N O T I C E

TO: NEWS MEDIA
OREGON STATE BAR BULLETIN

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

The next meeting of the COUNCIL ON COURT PROCEDURES will be held Saturday, December 13, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

At that time, the Council will discuss and hear suggestions regarding proposed Oregon rules of civil procedure.

# # # #

11-28-80

A G E N D A

COUNCIL ON COURT PROCEDURES

9:30 a.m., Saturday, Dec. 13, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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1. Proposed changes in draft of September 6, 1980

2. Promulgation of amendments and rules

3. Recommendation of effective date

4. Errors and omissions committee

5. Future meeting schedule - coverage of legislative review

6. Approval of minutes of meeting held 11-22-80

7. NEW BUSINESS

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 13, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

The meeting was called to order by Chairman Don McEwen at 9:35 a.m. The Council proceeded to discuss and act upon proposed revisions of the September 6, 1980, tentative draft of rules and amendments.

1. Amendment to Rule 54 E. Darst Atherly moved, seconded by Austin Crowe, that ORCP 54 E. be amended to read as follows:

> "E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. Unless agreed upon by the parties, costs, disbursements, and attorney fees shall be entered as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the

> offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer."

The motion passed unanimously.

2. Proposed Rule 65 E.(3)(a). The Council again discussed the weight of findings of fact by referees in 65 E.(3)(a). No change was suggested in the proposed draft.

3. Proposed Rule 67. Frank Pozzi moved, seconded by James Tait, to delete the second sentence of proposed Rule 67 B. and to add the following section to proposed Rule 67:

> "G. Judgment on portion of claim exceeding counterclaim. The court may direct entry of a final judgment as to that portion of any claim, which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if such party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim."

The motion passed unanimously.

4. Proposed Rule 67 E.(1). The Council discussed the second sentence of 67 E.(1) which could be interpreted to mean that if a partner or member of an association is served as the person receiving summons for the partnership or association, that partner or member also is personally liable. It was pointed out that the sentence was unnecessary because ORCP 28 would allow joinder of an individual partner or association member if such party were also liable under the substantive law; in such case, the individual would have to be named as such and served with a separate summons directed to him, even if he also was served with the entity summons. Laird Kirkpatrick moved, seconded by Judge Dale, to delete the sentence. The motion passed unanimously.

5. Proposed Rule 67 F.(1). Austin Crowe moved, seconded by Laird Kirkpatrick, to adopt the following suggested change in the last sentence of subsection 67 F.(1):

> "If the stipulation provides for attorney fees, costs, and disbursements, they may be entered [pursuant to Rule 68] as part of the judgment according to the stipulation."

The motion passed unanimously.

6. Proposed Rule 67 F.(2). Judge Sloper moved, seconded by Don McEwen, to adopt the following proposed revision of 67 F.(2) to make

it clear that attorneys may sign a stipulation:

> "F.(2) Filing; assent in open court. The stipulation for judgment may be in a writing signed by the parties, their attorneys or authorized representatives, which writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court."

The motion passed unanimously.

7. Proposed Rule 68 B. James Tait moved, seconded by Laird Kirkpatrick, to adopt the following proposed revision in the first sentence of 68 B.:

> "B. Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, unless these rules or other rule or statute direct that in the particular case costs shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs."

The motion passed unanimously.

8. Proposed Rule 68 C.(2). Charles Paulson moved, seconded by Frank Pozzi, to adopt the proposed change in 68 C.(2) by deleting the second to the last sentence which reads as follows:

> "The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45 or may affirmatively admit liability."

The motion passed unanimously.

9. Proposed Rule 70 B.(1) and Rule 63 E. The Council discussed the proposal that would require clerks to send a notice of the date of entry of judgment only, and not a copy of the judgment, to the attorneys of record. Darst Atherly moved, seconded by Judge Wells, to eliminate the obligation of the clerk to send a notice and a copy of the judgment and to eliminate Rule 63 E. entirely. The motion failed with the following voting for the motion: Darst Atherly, Judge Copenhaver, Austin Crowe, Don McEwen, Judge Redding, Judge Tompkins, David Vandenberg, Lyle Velure, and Judge Wells.

Judge Dale moved, seconded by Judge Lent, to adopt the proposed change in 70 B.(1) changing the obligation of the clerk to include only mailing notice of the date of entry of the judgment and not mailing a copy of the judgment. The motion passed unanimously.

10. Since there were members of the bar present who wished to be heard, and there being no objection, the Council received comments from Clarence R. Wicks, Manley Strayer, and Richard A. Franzke, all of Portland. Messrs. Wicks, Strayer, and Franzke all favored retention of third party practice.

Garr King moved, seconded by Laird Kirkpatrick, to reconsider the motion passed at the November 22, 1980, meeting which eliminated third party practice. The Council discussed the matter at length. The motion to reconsider passed with Judge Copenhaver, Charles Paulson, Frank Pozzi, Judge Sloper, Judge Tompkins, David Vandenberg, and Lyle Velure voting against the motion. Judge Wells abstained from voting.

11. Proposed Rule 71 B.(1). Austin Crowe moved, seconded by Charles Paulson, to add the following sentence to proposed Rule 71 B.(1):

> "A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense."

12. Proposed Rule 73. Darst Atherly moved, seconded by Judge Jackson, to adopt proposed Rule 73, JUDGMENTS BY CONFESSION. The motion passed unanimously.

13. Proposed Rule 84 D.(3)(b). James Tait moved, seconded by Austin Crowe, to adopt the proposed change in 84 D.(3)(b) making a uniform time of five days for garnishees to respond. The motion passed unanimously.

14. Rule 39 F. Austin Crowe moved, seconded by Frank Pozzi, to adopt the proposed amendment in ORCP 39 F. which would require submission of a deposition to the witnesss for examination and change only upon request of a party or witness. The motion passed unanimously.

15. Rule 7 D.(2)(c). Judge Jackson moved, seconded by Judge Wells, to adopt the suggested amendment to Rule 7 D.(2)(c) "to require a subsequent mailing to either defendant's place of abode, his place of business, or such other place under circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action." The motion passed unanimously.

16. Proposed Rule 68 C.(6). Judge Jackson moved, seconded by James Tait, to adopt the following change in proposed Rule 68 C.(6):

> "C.(6) Avoidance of multiple collection of costs, disbursements, and attorney fees.
>
> C.(6)(a) Separate judgments for separate claims. Where separate, final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments."

The motion passed unanimously.

17. Proposed Rule 71 B.(2). Judge Dale moved, seconded by James Tait, to adopt the following proposed change in proposed Rule 71 B.(2):

"B.(2) When appeal pending. With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court 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."

The motion passed unanimously.

18. Proposed Rule 80 D.(3) and E. James Tait moved, seconded by Frank Pozzi, to adopt the following changes in 80 D.(3) and E.:

"D.(3) Shall set a time within which creditors and claimants shall file their claims or be barred when a general receiver is appointed to liquidate and wind up afffairs; and"

"E. Notice to persons interested in receivership. A general receiver appointed to liquidate and wind up affairs shall under the direction of the court, give notice to the creditors of the corporation, of the partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the receiver's attorney, or the clerk of the court, within such time as the court directs."

19. Rule 7 D.(3)(g). Frank Pozzi moved, seconded by Charles Paulson, to change the proposed amendment to ORCP 7 by the addition of language which had been submitted by the OSB Admiralty Law Committee. The revision would be as follows:

> "D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer, by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon."

The motion passed unanimously.

The Council discussed a letter received from Martha L. Walters regarding a procedure for resolving conflicts in trial settings recommended by the Judicial Administration Committee of the OSB but decided this should be a matter for consideration during the 1981-83 biennium.

The Council discussed whether or not to include mailing summons to the liability insurance carrier as well as to the defendant in cases under Rule 7 D.(4)(a)(i) but decided to take no further action.

The minutes of the meeting held November 22, 1980, were unanimously approved. It was noted that a typographical error in the vote relating to third party practice would be changed from 18 for and 6 against to 12 for and 6 against.

Justice Lent moved, seconded by Laird Kirkpatrick, that the rules of civil procedure, together with amendments to the ORCP, rules in ORS sections, and proposed ORS sections superseded, set forth in the tentative draft dated September 6, 1980, as modified by action of the Council at the meetings held November 22, 1980, and December 13, 1980, be promulgated by the Council and submitted to the legislature before the commencement of the legislative session. The motion passed unanimously.

Justice Lent moved, seconded by Laird Kirkpatrick, that the Council recommend to the legislature that January 1, 1982, be set as the effective date for the new rules and amendments.

The Chairman appointed himself and Judge Dale as an errors and omissions committee to review any last-minute problems arising with the submission.

The Chairman stressed the importance of Council members being available to testify before the Judiciary Committee during the legislative session.

The meeting was adjourned at 11:55 a.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

MEMORANDUM

December 18, 1980

TO: DARST ATHERLY
AUSTIN CROWE
JAMES TAIT
LYLE VELURE

RE: ORCP 54

Here is the way revised ORCP 54 E. will look in the draft being submitted. If this does not reflect your understanding of the action taken by the Council on December 13, call me at once.

RULE 54

DISMISSAL OF ACTIONS[:]; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. Unless agreed upon by the parties, costs, disbursements, and attorney fees shall be entered as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

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H. V. JOHNSON (1895-1975)
HAROLD V. JOHNSON (1920-1975)

ORVAL ETTER
OF COUNSEL

November 25, 1980

Mr. Fred Merrill
Council on Court Procedures
251 Law Center
University of Oregon
Eugene, OR 97403

Dear Fred:

As you may know, at the 1980 Annual Meeting the Judicial Administration Committee recommended, and the Annual Meeting approved, a procedure for resolving convlicts in trial settings. This procedure is attached as Exhibit A. It was recommended that this procedure be adhered to by all Oregon state and federal courts and, if necessary or appropriate, court rules be amended to incorporate the procedure.

Although I do not believe that your group had anticipated adopting a rule such as this, I thought I would submit it to you for future consideration. We do not know, at this time, how many of the circuits will adopt this rule as part of their local rules and whether, without adoption by all circuits, we will succeed in resolving these conflicts. I would be glad to keep you, or any other person on the council who is interested, advised of our progress. Please also let me know if you believe the Judicial Administration Committee may be of benefit to you or the council in any other manner.

Sincerely,

Martha L. Walters

MLW:og
Enclosure

EXHIBIT A

When an attorney responds to a trial notice with a claim of a conflict with a case set in another county or court, the setting court will defer to the case first given a trial date, unless the second case set should be tried first because of age or other special circumstances and this preference is resolved with the other court involved.

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

November 26, 1980

CHARLES S. CROOKHAM
PRESIDING JUDGE

COURTROOM 208
(503) 248-5198

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

Dear Fred:

Thank you for the materials you forwarded to me relative to purported changes and amendments to the Rules of Civil Procedure. I am attempting to digest them and if I have any comments I will communicate them to you.

In the meantime there are a couple of matters that you may wish to consider.

1. Rule 21A: It says in the latter part if, on a motion to dismiss asserting defenses 1 through 7, etc. and then allows the record to be supplemented by affidavits or other evidence.

The two grounds not included are failure to state ultimate facts sufficient to constitute a claim (8) and (9) that the pleading shows the action is not commenced within the time limited by statute. I have no particular quarrel with leaving 8 out of those where the record can be supplemented, but I clearly think 9 should be included. If it is possible to terminate a case early because of failure to satisfy the Statute of Limitations, it is in the best interest of everyone to do so. The losing party has the chance of the cheapest possible appeal and the defendants obviously saves money if the case is terminated early. Is there any reason why the record should not be supplemented in the cases statute of limitation? I am not aware of why the Council did this but I suggest to you that it may wish to re-examine the matter.

2. Rule 52 - "Postponement of Cases." You may wish to look at Spaulding vs. McCaige, 47 Or App 129(1980), where

Judge Schwabe notes a potential conflict between ORS 17.040 as replaced by ORCP Rule 52, and ORS 20.110. In view of the broad language of ORCP Rule 52 I suggest that ORS 20.110 be repealed.

3. As I go over the Rules another matter comes to my attention that is relative to Rule 53 - "Consolidation." The rule suggests that consolidation can only be done on motion of either party. Why should not the court be given an option to order consolidation on its own motion. The time has past when we can afford the luxury of a proliferation of trials where the same basic question of liability exists. I say this especially in regard to multiple injuries out of the same accident. It has been my practice for some time to order consolidation as an inherent power and no one has challenged me or one of the parties has made the motion following my suggestion and the record is clear.

I would appreciate your thoughts on these suggestions. If I have any more I will forward them to you.

Kindest personal regards.

Very truly yours,

Charles S. Crookham
Presiding Judge

CSC/rmc

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503/686-3845

December 1, 1980

Honorable Charles S. Crookham
Presiding Judge
Circuit Court of Oregon
Courtroom 208
Multnomah County Courthouse
1021 S.W. 4th Avenue
Portland, OR 97204

Dear Judge Crookham:

Thank you for your letter of November 26, 1980.

In response to your comment on Rule 21 A., my memory of the limitation on supplementation of the record for defenses 21 A.(8) and (9) is that the subcommittee on pleading felt that these defenses properly only went to the face of the pleading and that if additional matter were submitted, the motion should be handled under the summary judgment rule. Thus, for example, if the statute of limitations defense does not appear on the face of the opponent's pleading but can easily be established by uncontroverted facts, the correct procedure is to make a motion for summary judgment and submit affidavits or other material establishing the defense. Federal Rule 12(b), which provided the pattern for Rule 21 A., provides that the supplementary material can be submitted with a motion to dismiss for failure to state a claim, but in such case the motion shall be treated as a motion for summary judgment.

The pleading subcommittee did not include this language because it was felt that this properly is a summary judgment motion and should be clearly identified as such rather than labelled as a motion to dismiss. If there is any confusion on this matter, however, it might be better to use the conversion language from the federal rule.

Thank you for the reference to Spaulding vs. McCaige. We have picked this up and you will notice that there is an amendment on page 127 of the September 6, 1980, draft designed to specifically cover the situation, and ORS 20.110 is included in the list of statutes superseded by the new rules and amendments.

I personally agree with your comments relating to consolidation on the judge's own motion. I am afraid this has been rather thoroughly "chewed" over by the Council. The original draft of Rule 53 which I submitted would have allowed both consolidation and separate trials upon the judge's own motion. This received substantial critical commentary from the Bar and finally a Council compromise by allowing separate trials but not consolidation upon the court's own motion. I believe that they felt the results of consolidation upon the parties were sufficiently serious that they did not wish to have this happen if no party requested it.

If you wish to have me submit the amendment to Rule 21 A. to allow supplementary material or the amendment to Rule 53 to allow consolidation upon the court's own motion to the Council at the next meeting on December 13, please let me know and I will do so.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

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November 26, 1980

Fredric R. Merrill
Executive Director
University of Oregon
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Dear Mr. Merrill:

Jackie in the library told me you might be able to furnish whatever was said by the ORCP Committee when they tried to abolish General Denials.

Judge Casciato told me that there was some comment by the Committee.

I am willing to pay. You probably know that our judges have various views on the subject.

I learned years ago that some states never permitted general denials. I also learned what law I know in Eugene. Took pleadings from Sam Bass Warner who wrote our text.

Sincerely,

Alton John Bassett

AJB:bg

pleading and joinder area and the balance of these rules use the word, claim, rather than cause of action: retaining cause of action here would be confusing and is unnecessary. It is the reference to pleading ultimate facts that will retain the present level of specificity in pleading.

Of the jurisdictions with modern pleading rules, only three do not utilize to the federal description of pleading (Texas, Michigan and Florida). Texas and Michigan retain the use of cause of action. The language of this rule is adapted from Florida Rule 1.110 (b) (2), "A short and plain statement of the ultimate facts showing that the pleader is entitled to relief". The Oregon courts have developed the required level of pleading specificity through a series of cases distinguishing ultimate facts from evidentiary facts and conclusions of law, and this rule would retain the existing court-defined level of specifity.

Sebsection (2) is based on existing ORS 16.210 (c). The last sentence was added. The word, plaintiff, will be changed to party to conform to the broader scope of the rule.

RULE H

This rule governs all responsive pleadings. The language is that of Federal Rule 8 (b) through (d), slightly modified to fit Oregon practice. Except as pointed out below, it is consistent with existing Oregon practice.

(1) The only substantial change here would be the last clause of the last sentence which authorizes a general denial only when a pleader truly intends to controvert all allegations in an opponent's pleading. Since few cases would arise when a pleader would truly be able to deny absolutely all

allegations in a pleading, the general denial would be rarely used. (Note there is a typographical error in the draft -- it should read obligations in Rule F instead of Rule J). Existing Oregon practice sanctions use of the general denial, but this is inconsistent with the fact pleading objective of sharpening issues through pleading.

(2) This does not change any existing burden of pleading in Oregon but spells out some common situations of affirmative defenses. ORS 16.290 simply requires affirmative statement of new matter without any specific illustrations. The list of items is not exclusive; for any potential defense not listed, the pleader must decide if this is "any other matter constituting an avoidance or affirmative defense". The defenses listed under the federal rule were modified by addition of "comparative negligence" and "unconstitutionality" which are the subject of existing Oregon cases. There also are Oregon cases on estoppel, failure of consideration, release, res judicata and statute of limitations. Assumption of risk, contributory negligence and fellow servant have generally been replaced in Oregon, but could arise in an occasional case and were not deleted.

(3) Except for the situation where no reply is required, this is the existing rule.

RULE I

Most of these special pleading rules are taken directly from the Oregon statutes; with the exceptions of Sections (6) and (9), similar provisions exist in most other states.

(1) This is Utah Rule 9(c). It is identical to ORS 16.480 except that

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December 12, 1980

Mr. Alton John Bassett
Attorney at Law
218 Mohawk Building
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Dear Mr. Bassett:

The Oregon Council on Court Procedures did not try to abolish general denials as such. They merely required that a party filing a general denial controvert in good faith all of the allegations in the plaintiff's complaint. Enclosed is a copy of a portion of the report of the pleading subcommittee relating to ORCP 19 A., which is the rule limiting the general denial (it is referred to as Rule H.(1) in the report because the final numbering system had not been developed for the ORCP at the time the report was written). I would also point out that the exact language used is taken from Federal Rule 8.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

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December 8, 1980

Council on Court Procedures
University of Oregon
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TO WHOM IT MAY CONCERN:

I urge the Council not to eliminate the procedure for the entry of confessions of judgment without action. Confessions of judgment presently are used to liquidate the amount of a claim when a debtor has no defense but needs additional time to pay his debt. The procedure enables a creditor to have some assurance that he will not be forced to suffer the delay of litigating the amount of the claim after granting the debtor additional time within which to pay.

To abolish the confession of judgment without action will be to force creditors to incur the expense of filing suit in virtually every case. Debtors, who might need 90 days to raise the money, will be forced to appear and "defend" simply to obtain additional time. Even promissory notes may be denied, requiring summary judgment motions. The result, I submit, is much worse for the debtor and the creditor.

If confessions of judgment are being abused, the Council should focus any changes on those abuses. Perhaps confessions of judgment should not be allowed in consumer transactions? In a commercial collection, the confession of judgment without action is an important tool.

I sincerely believe that abolishing the confession of judgment without action will increase needless litigation and consequent expense to both plaintiffs and defendants.

Very truly yours,

S. Ward Greene

SWG:cl
cc: Members of the Council

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WENDELL GRAY
OF COUNSEL

December 10, 1980

Frederic R. Merrill, Esq.
School of Law
University of Oregon
Eugene, Oregon 97403

Re: Serving Copy of Default Judgment on Defendant

Dear Fred:

Please thank the Council for considering my comments on ORCP 7D.(3). I met with Paul Daigle, John Brooke, and Carl Neil and we hashed out a consensus proposal.

I note in the minutes of the meeting of November 22 that default is presently before the Council.

I think that a copy of the default judgment should be served on the defendant in default the same as a defendant who has appeared. Thus, ORS 18.030 or its ORCP equivalent should be amended to delete "xxx who is not in default xxx".

My suggestion is based on a situation involving a client of ours. The client was served with the summons and complaint and instructed house counsel to negotiate a settlement. The house counsel and plaintiff's counsel entered into negotiations and the matter was resolved and memorialized in a letter. Shortly after the agreement, plaintiff's counsel had a default judgment entered without advising the defendant or house counsel of his intention to do so.

Plaintiff did not attempt to execute and the defendant found out about the judgment more than one (1) year after the entry of the judgment when he wanted to borrow some money using his home as collateral. The default judgment turned up on the preliminary title report. Plaintiff's counsel claimed that the provisions of ORS 18.160 precluded defendant from seeking relief from the overreaching; fortunately, Judge Bradshaw saw things differently.

If the clerk had been required to mail a copy of the default judgment to the defendant the defendant could have promptly objected to the judgment.

There does not appear to be any reason why a copy of a default judgment cannot be mailed by the clerk to the defendant at the address shown on the return of summons or the rules could provide that the plaintiff must file proof of service by mail of a copy of the judgment within a short period, say 10 days, of its entry.

If my suggestion is already incorporated in the proposals, please note my support.

Very truly yours,

Lloyd W. Weisensee

LWW/bsw

cc: Honorable William Dale

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December 22, 1980

Mr. Lloyd W. Weisensee
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720 S.W. Washington Street
Portland, OR 97205

Dear Lloyd:

I am sorry that your letter of December 10, 1980, did not reach us until after December 13, 1980, which was the date of the Council meeting at which action was taken to promulgate the rules for this biennium.

The change to 7 D.(3)(g) recommended by you, Neil, Brooke, and Daigle was accepted. I am enclosing a copy of the provision as it is being submitted to the legislature.

I am also enclosing a copy of new Rule 70 B.(1) which will be replacing ORS 18.030. You will note the notice requirement is changed from mailing a copy of the judgment to a notice of entry of judgment, but the exception for parties in default is retained. There is an errors and omissions committee which can make last minute changes. I am sending a copy of your letter to them. I doubt if they would still be able to do this without Council approval. The legislature will be receiving the proposed rules, and you could raise the point with them. We could also put this on the agenda for the next biennium.

Very truly yours,

Fredric R. Merrill
Executive Director, COUNCIL ON
COURT PROCEDURES

FRM:gh

cc: Mr. Donald W. McEwen
Hon. William M. Dale

LANE COUNTY LEGAL AID SERVICE, INC.

RICHARD H. HART
EXECUTIVE DIRECTOR

1309 WILLAMETTE STREET
EUGENE, OREGON 97401

AREA CODE 503
342-6056

December 15, 1980

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

Dear Fred:

On November 13, 1980, I wrote you concerning seven thoughts I had about the proposed ORCP 65-85. I received your letter of November 18, 1980, saying that the Council would be considering my points.

I would like to follow up on one of those points - #5, regarding elimination of ORS 29.178 for post-judgment executions (I don't care as strongly what the Council does with pre-judgment executions, since Legal Aid programs rarely, if ever, see them) by proposed Rule 81B. Michael Taylor tells me that the minutes of the last Council meeting are inconclusive on this point. Can you tell me whether the Council will preserve ORS 29.178 for post-judgment exeuctions?

Thanks.

Sincerely,

John H. Van Landingham
Attorney at Law

JHV: kjz

SUMMARY OF CHANGES APPROVED AT MEETINGS PRIOR TO 12-13-80

RULE 68. Page 17.

C.(1)(b) Deleted "from events" between "arising" and "prior."

RULE 68. Page 19.

C.(4)(a) Deleted first sentence: "Costs shall be entered as part of a judgment by the clerk of court or person exercising the duties of that office."

Inserted "costs" between "fees" and "and" in the first line.

C.(4)(a)(i) Added "costs" after "fees" at the end of the second line.

C.(4)(a)(ii) Inserted "if any" between "service" and "in" in the second line.

C.(4)(a)(iii) THIS IS A NEW SUBPARAGRAPH.

court otherwise directs. If, under a special provision of 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 authorized by ORS 20.070.

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 C. 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; or

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

C.(1)(c) Such items are granted by order, rather than entered as part of 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

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C.(4)(a) Entry by clerk. Attorney fees, costs, 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, costs, 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, if any, in accordance with Rule 9 C., with the court.

C.(4)(a)(iii) For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.

C.(4)(b) 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 the 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.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall

RULE 69. Pages 24 and 25.

B.(3) OLD LANGUAGE:

No judgment by default shall be entered until the filing of an affidavit 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.

NEW LANGUAGE:

As shown on Pages 24 and 25 attached.

of Oregon upon the party, or an agent, officer, director, or partner of a 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 hearing 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

on behalf of the plaintiff, showing that affiant reasonably believes 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 69 B. regulates entry of judgment after default. Subsection 69 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

A. Deleted from the first sentence: ", except judgments need not be set forth in a separate document if the local rules of a court so provide."

Inserted the following sentence after "document":

"A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof."

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. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. 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.(1) by the clerk.

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 the attorneys of record, if any, or to each party who is not in default for failure to appear, or if a party who is not in default for failure to appear and does not have an attorney of record, to such party. 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.(1), 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 68.

B.(2) Judgment effective upon entry. Notwithstanding

C. OLD LANGUAGE:

Stay of 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 in any action to which it is a party or is responsible for payment or performance of the judgment.

NEW LANGUAGE:

As shown on Page 35.

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 through 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. Stay or injunction in favor of public body. The federal government, any of its public corporations or commissions, the state, any of its public corporations or commissions, a county, a municipal corporation, or other similar public body shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment.

D. 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

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A.(6) OLD LANGUAGE IN LAST TWO LINES:

"a showing of good cause and on such terms as may be just and equitable."

NEW LANGUAGE:

"an ex parte showing of good cause and on such terms as may be just and equitable."

A.(6) 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 an ex parte showing of good cause 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 the surety's 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.(3)(b)(ii) Inserted: "office of the registered agent or to the" in sixth line.

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 office of the registered agent or 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 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.

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Change in ORCP 7 D.(4)(a)(i) revised to statutory format for action by legislature.

A BILL FOR AN ACT

Relating to administrative procedures of state agencies; amending ORS 311.705.

Be It Enacted by the People of the State of Oregon:

Section 1. ORCP 7 D.(4)(a)(i) is amended to read as follows:

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

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, [may be served with summons by mail, except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and (iii) any other address of the defendant known to the plaintiff, which might result in actual notice] except a defendant which is a foreign corporation maintaining a registered agent 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.

Section 2. This amendment shall be effective January 1, 1982.

ORCP 10 - TIME.

Added "Except for service of summons" at the beginning of the subsection.

RULE 10

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

B. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending before it.

C. Additional time after service by mail. Except for service of summons, [w]henever a party has the right or is required to do some act or take some proceedings within a

prescribed period after the service of a notice or other paper upon such party and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

COMMENT

The Council added the provision to Rule 10 C. to avoid application of the additional time to service of summons. The service of summons by mail under Rule 7 D.(2)(d) (as amended) has a built-in extension of time of at least 3 days.

ORCP 32. Page 114.

Section I. Changed reference to section J. to section H.

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section H. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

D.(1) Added following sentence at the end of section:

"A subpoena for taking of a deposition, served upon an organization as provided in subsection (6) of section C. of Rule 39, shall be served in the same manner as provided for service of summons in subparagraph (i) of paragraph (b) of subsection (3) of section D., and paragraph (e) of subsection (3) of section D., of Rule 7."

COMMENT

The language change in 55 D.(1) was made to conform to ORCP 7 E. and 7 F.(2).

The reference to place of examination in 55 F.(2) 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.

RULE 55

SUBPOENA

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in subsection (6) of section C. of Rule 39, shall be served in the same manner as provided for service of summons in subparagraph (i) of paragraph (b) of subsection (3) of section D., and paragraph (e) of subsection (3) of section D., of Rule 7.

F.(2) Place of examination. 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. 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.

RULE 84. Page 87.

Changed ORS 29.185 to 23.185.

Section D. is taken from ORS 29.160-29.200, 29.270-29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 29.170 and 23.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

Section E. is ORS 29.380 and 29.390. Section F. is new and replaces ORS 29.220-29.250. It clarifies the procedure for redelivery bond.

ORS 29.178 and 29.210 would be eliminated as unnecessary because of 81 B. and D. ORS 29.120 and 29.260 are eliminated as inconsistent with Rule 83. ORS 29.175 would remain as a statute.

ORS 29.178

Deleted language in section (1) and paragraphs (b) and (c) which made reference to ORS 29.170 or 29.175, and added underlined language as shown.

Deleted section (3) and renumbered section (4). Added <u>of such person</u> in two places in new section (3).

29.178 Post-execution procedure; notice: contents; bank, trust company or savings and loan association as garnishee. (1) Following execution by the sheriff of [any writ pursuant to ORS 29.170 or 29.175] a writ of execution or execution of a writ of garnishment by any person, other than a wage or salary garnishment, the sheriff or such person shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:

(a) A copy of the writ;

(b) A copy of the certificate delivered to the county clerk [pursuant to subsection (1) of ORS 29.170] to levy upon real property, if any;

(c) A copy of a notice of garnishment or the notice delivered pursuant to [subsection (3) of ORS 29.170 or] subsection (1) of ORS 29.175, if any; and

(d) The notice described in subsection (2) of this section.

(2) The notice to the judgment debtor shall contain:

(a) A statement that certain property of the judgment debtor has been or may have been levied upon;

(b) If the sheriff has executed the writ by taking property into his custody, a list of the property so taken;

(c) A list of all property and funds declared exempt under state or federal law;

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

(e) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the judgment debtor; and

(f) A statement that if the judgment debtor has any questions, he should consult an attorney.

[(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]

[(4)] (3) The sheriff or such person may meet the requirements of subsection (1) of this section by mailing the documents to the last-known address of the judgment debtor as provided by the judgment creditor. The sheriff or such person may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

REMAINING SUGGESTIONS AND REVISIONS

(For consideration at meeting of December 13, 1980)

REMAINING SUGGESTIONS AND REVISIONS

(For consideration at meeting of December 13, 1980)

CONTENTS

ORCP 54 E.

PROBLEM

The Council requested a draft of 54 E. which would include attorney fees and set a three-day limit before trial.

RESPONSE

The draft is attached. I also changed the reference to "confession of judgment" to "judgment by stipulation." This is technically a stipulated judgment under proposed Rule 67 F.

RULE 54

DISMISSAL OF ACTIONS[:]; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees, but the party against whom the claim was asserted shall recover of the party asserting the claim costs [and], disbursements, and attorney fees from the time of the service of the offer.

Proposed Rule 65

PROBLEM

It has been suggested that the first sentence of 65 E.(3)(a) gives more weight to the referee's findings than existing law.

RESPONSE

ORS 17.765 contained the following provision: "Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of a jury."

I think our language would do the same thing but if there is any doubt, perhaps we should use the ORS language.

Proposed Rule 67 B.

PROBLEM

It has been suggested that the second sentence of 67 B. relating to portion of a claim exceeding a counterclaim suggests that in a situation where there is a claim and counterclaim present, the only time judgment could be entered on the claim is when it is admitted and only on the portion exceeding the claim. It was also pointed out that any finding of no just reason for delay is unnecessary.

RESPONSE

ORS 18.125, and the federal rule from which it was taken, do not include any language similar to the second sentence. This was added from 18.080(2) which was part of the default statute. It was added here because no default is involved but it is actually an admitted liability. If it is causing any confusion, it could be added as a separate section here or perhaps put in section F. relating to stipulated judgments as follows:

> "Judgment on portion of claim exceeding counterclaim. The court may direct entry of a final judgment as to that portion of any claim which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered if such party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim."

Proposed Rule 67 E.(1)

PROBLEM

Laird Kirkpatrick suggests that the last sentence of 67 E.(1) seems to say that if a partner or member of an association is served as the person receiving summons for the partnership or association, they also are personally liable. This could be somewhat hard on an association member.

RESPONSE

The last sentence of 67 E.(1) was taken from Cal. Civ. Pro. Code 388(b) and is designed, particularly in a partnership situation, to cover the case where the plaintiff sues partners or individuals as well as the partnership, i.e., Plaintiff vs. ABC Partnership, A, B, and C individual defendants. This would require naming of them as individuals in the caption and service of another summons and complaint (in addition to that directed to the partnership). There also could be situations where claims are asserted against members of an association and the association.

Actually, Cal. Civ. Pro. Code 388(b) finds as follows:

> "(b) Any member of the partnership or other unincorporated association may be joined as a party in an action against the unincorporated association. If service of process is made on such member as an individual, whether or not he is also served as a person upon whom service is made on behalf of the unincorporated association, a judgment against him based on his personal liability may be obtained in the action, whether such liability be joint, joint and several, or several."

Our rules does not include the first sentence because under ORCP 28, joinder would be possible. If there is any danger of confusion, we could modify the California language and add it to 67 E.(1) as follows:

> "Any member of the partnership or other unincorporated association may be joined as a party in an action against the partnership or unincorporated association by naming such member as an individual defendant and service of summons upon such person as an individual."

These, of course, are only procedural rules relating to joinder or form of judgment. The existence of individual liability is a matter of substantive law.

Proposed Rule 67 F.(1)

PROBLEM

Laird Kirkpatrick suggested that the last sentence of subsection 67 F. is misleading. If there is a stipulation for attorney fees, costs, or disbursements, there is no need to file a statement and have objections on any other procedure in Rule 68.

RESPONSE

He is right. The sentence should read:

> "If the stipulation provides for attorney fees, costs, and disbursements, they may be entered [pursuant to Rule 68] as part of the judgment according to the stipulation."

Proposed Rule 67 F.(2)

PROBLEM

Action was deferred on the change to proposed Rule 67 F.(2) pending determination of the change to Rule 70 A. allowing some material to be included with the judgment. Laird Kirkpatrick has suggested that the last sentence of the existing proposal does not make it clear that attorneys may sign a stipulation. Stamm Johnson has suggested language which appeared on page 9 of the COMMENTS AND SUGGESTIONS dated 11-20-80.

RESPONSE

The change probably should be made since the Council accepted the change to 70 A. Stamm's suggested language takes care of the problem raised by Laird Kirkpatrick. If accepted, the change would appear as shown on the proposed revision of page 12 attached.

F. Judgment by stipulation.

F.(1) Availability of judgment by stipulation. 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) Filing; assent in open court. The stipulation for judgment may be in a writing signed by the parties, their attorneys or authorized representatives, which writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

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(2). See ORCP 14 A. for a definition of "motion."

Section 67 B. is a combination of ORS 18.125(1) and ORS 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 fit the definition of judgment in Rule 67 A.

The procedural merger of law and equity creates the problem of whether the unified procedure follows the former equity

8

Proposed Rule 68 B.

PROBLEM

It has been suggested that the word "therefor" in the third line of 68 B. is not clear.

RESPONSE

The first sentence of 68 B. could be more clearly drafted as follows:

> "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], unless these rules or other rule or statute direct that in the particular case costs shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs."

Proposed Rule 68 C.(2)

PROBLEM

Laird Kirkpatrick suggests that the following sentence in 68 C.(2) adds nothing but length and confusion:

> "The party against whom the award of attorney fees is sought may admit liability for attorney fees under Rule 45 or may affirmatively admit liability."

RESPONSE

This language has been redrafted several times including one suggestion by the State Procedure and Practice Committee. Looking at it one more time, I do not believe it adds anything. Since the pleading of the right to attorney fees does not require a response, it could not be admitted in the answer. The sentence was added to suggest how admission was possible but really adds nothing. Rule 45 already exists and the parties can always stipulate.

Proposed Rule 70 B.(1) and ORCP 63 E.

PROBLEM

John H. Donnelly of the Oregon Association for Court Administration, also suggests amendments to the duty of the clerks to send copies of judgments.

RESPONSE

Mr. Donnelly's suggestion of a simple notice of judgment, as opposed to a copy of the judgment, makes sense.

I suggest we amend Rule 70 B.(1) as shown on the proposed revision of page 27 attached.

Note, we should also change Rule 63 E. to conform as shown on the attached sheet.

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. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. 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.(1) by the clerk.

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 the attorneys of record, if any, of each party who is not in default for failure to appear, or if a party who is not in default for failure to appear and does not have an attorney of record, to such party. 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.(1), 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 68.

B.(2) Judgment effective upon entry. Notwithstanding

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D. of this rule, whichever is earlier, mail a [copy of the order and] notice of the date of entry of the order or denial of the motion to the attorney of record, if any, of each party who is not in default for failure to appear or, if a party not in default for failure to appear does not have an attorney of record, to such party. The clerk also shall make a note in the docket of the mailing.

Proposed Rule 71 B.(1)

PROBLEM

The Council asked for a draft of Rule 71 B.(1) that would include a requirement of showing a meretorious claim or defense. The Council also asked for a clarification of the relationship between Rule 70 and waiver of defects in process and personal jurisdiction.

RESPONSE

Prior to the Oregon Rules of Civil Procedure, it was quite clear that a motion to vacate a default judgment under ORS 18.160, with the requirement that an answer showing a meretorious defense be tendered, resulted in a general appearance. See Coleman v. Meyer, 291 Or. 129 (1972). In other words, making the motion was a waiver of the defense of lack of jurisdiction over the person and defective summons.

ORCP 21 F. and G., however, eliminate the strict waiver rule of general appearance and substitute a rule that allows the defense to be asserted by motion or answer, if there is no motion made, but not amended answer. ORCP 21 G.(1).

Apparently, under the prior procedure the general appearance did not occur if a party attacked a judgment on the grounds of defective summons or lack of jurisdiction. See Dial Press, Inc. v. Sisemore, 263 Or. 460 (1972). The motion so attacking a judgment for voidness was independent of ORS 18.160 and based upon inherent power of the court and not limited as to time. See State ex rel Karr v. Shorey, 281 Or. 453 (1978). Logically, a meretorious answer was not required. At most, a motion to quash would be tendered with the answer as was done in Sisemore. We have now changed this by adding an explicit reference in the motion to vacate to void judgment, 71 D.(1)(d), and that the judgment is satisfied, 71 D.(1)(e).

The net result of all this seems to be that even though a defendant may continue to be required to file an answer, this would not be a waiver of personal jurisdiction. A party could assert in the answer both the defense of personal jurisdiction and other defenses. This seems reasonable because why should the defaulted party who has a right to vacation choose between a jurisdictional defense and some other defense? He should be able to raise any defense which he has. Further, why should he be forced to use an answer when he could raise jurisdiction and some other matters by motion? It also seems clear that requiring the existence of a meretorious defense for 71 B.(1)(e) would not make sense.

Therefore, I suggest we add the following sentence to Rule 71 B.(1):

> "A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense."

Note, the reference to motions under Rule 21 A. would prevent the moving party from attacking the form of the opponent's complaint by motion to strike or make more definite and certain.

Proposed Rule 73

PROBLEM

The Council's decision regarding CONFESSIONS OF JUDGMENT WITHOUT ACTION, proposed Rule 73, was postponed until the next meeting.

RESPONSE

A copy of the proposed rule is attached.

RULE 73

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

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

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

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered, or a person authorized to bind such party, and verified by oath, as follows:

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

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

B.(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment.

B.(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

Proposed Rule 84 D.(3)(b)

PROBLEM

Jerry Johnston of the Sheriffs' Association suggested that the attachment by garnishment provision allowing a garnishee who is served outside the county 10 days to respond, as opposed to 5 days for garnishees inside the county, be changed to a uniform 5-day period.

RESPONSE

I agree that the two separate periods seem needlessly confusing. I suppose an argument could be made that 10 days would be better, but ORS 23.660 provides only 5 days for any "writ" of garnishment served by a private party, and it may as well be uniform.

If the Council accepts the change, paragraph D.(3)(b) would appear as shown on the proposed revision of page 79 attached.

corporation mentioned in paragraph (b) of subsection (2) of this section, 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 plaintiff 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.

D.(3)(b) 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 paragraph (b) of subsection (2) of this section, for the purpose of attaching any property mentioned therein, such person or officer shall furnish the sheriff with a certificate, designating the amount and description of any property in the possession of the garnishee 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. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, such person or officer may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning

ORCP 39 F.

PROBLEM

I was asked to draft an amendment to Rule 39 F. that would only require submission to the witness for examination and change upon request of a party or witness.

RESPONSE

Proposed revision of ORCP 39 F. is attached.

It might be noted that the requirement in the existing rule does not differ from the prior law. ORS 45.171 always had a mandatory requirement of submission and signing, which was routinely waived in the record. The only change the Council made was to require that the witness waive examination as well as the parties. Would a witness who is not represented by an attorney be aware of their rights and be likely to request at the time the deposition is taken? I added a possible late request subject to court control, but I wonder if this is sufficient protection. Should we include a requirement that a non-party witness shall be advised at the deposition of their right to examine and change the deposition?

RULE 39

DEPOSITIONS UPON ORAL EXAMINATION

F. Submission to witness; changes; statement.

F.(1) Necessity of submission to witness for examination. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if [the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties.] any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F.(2) Procedure after examination. Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the

statement or the witness is physically unable to make such statment or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F.(3) No request for examination. If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

REMAINING COMMENTS AND SUGGESTIONS

(For consideration at meeting of December 13, 1980)

CONTENTS

(Letter, with Exhibit A, from Martha L. Walters is also included.)

Proposed Rule 68 C.(6)

PROBLEM

Laird Kirkpatrick has pointed out that proposed Rule 68 C.(6) would not work well when separate judgments against separate parties, but for the same claim, are entered under 67 B. This would be a situation where parties who are jointly or jointly and severall liable for the same amount were joined together and the trial judge directed entry of a final judgment as to less than all parties. Assuming a final judgment is later entered against the remaining parties, you would then have two separate final judgments covering the same obligation arising from the one case. Under 68 C.(6), the court would be required to apportion costs, attorney fees, and disbursements among such judgments. If satisfaction of one judgment would bar enforcement of the other, the winning party(ies) would never collect their full costs, disbursements, and attorney fees.

RESPONSE

The situation presented is of recent origin. Until the legislature adopted ORS 18.125(1) in 1977, there could be only one judgment in a case. If A, B, and C were jointly or jointly and severally liable for the same claim, one judgment for the claim plus costs, disbursements, and attorney fees could be entered and, once paid by A, barred any further collection from B and C.

The only analogous prior situation was a party who separately sued parties who were jointly and severally liable. (Parties jointly liable would have to be sued together.) In such case, three judgments in three separate cases could be entered against A, B, and C for the same claim. Each judgment would also include an amount for costs, attorney fees, and disbursements incurred in that case. The common law rule was that payment of A's judgment prior to entry of judgment against B and C barred entry of any judgment against B and C. If, however, A's judgment was satisfied after entry of judgment (including costs, etc.) against B and C, the satisfaction barred any recovery of the main judgment against B and C, but not the costs, attorney fees, and disbursements portions of B's and C's judgments. See Annotations, 27 A.L.R. 819, 65 A.L.R. 1091, and 166 A.L.R. 1109.

Because this was regarded as somewhat unfair, the New York Field Code included a provision which was picked up by Oregon and still exists as ORS 20.050:

> **20.050 Costs and disbursements when several actions are brought on same cause of action.** When several actions are prosecuted for the same cause of action, against several parties who might have been joined as defendants in the same action, disbursements shall be allowed the plaintiff in each action if he prevails therein, but costs shall not be allowed the plaintiff in more than one of such actions, which shall be at his election, unless the party or parties prosecuted in the other action or actions were, at the time of the commencement of the previous action, without this state or secreted therein.

As explained by the New York courts, "the object of this section is to prevent plaintiffs from bringing a multitude of actions for the purposes of recovering costs, In cases when all of their legal rights might be adjudicated in a single legal or equitable action." Mooshbrugger v. Kaufman, 7 App. Div. 380, 40 N.Y. Supp. 213 (1896). See Annotations, 6 A.L.R. 623.

Our draft supersedes ORS 18.050 and has no comparable provision. It was felt that costs had become so minimal that no one actually would elect not to join defendants merely to secure multiple costs.

This suggested ORCP 68 C.(6), however, because assuming joinder and separate judgments, it did seem rational that costs, attorney fees, and disbursements only be collected once. This still could work where judgment is entered upon separate claims; the court could allocate costs, attorney fees, and disbursements between the two judgments and collection of one would have no effect upon the other whether or not the case involved a single or multiple defendant. Laird Kirkpatrick is correct, however, that this does not work when separate judgments are involved in the same claim.

Also, upon reconsideration, although possible of multiple collection of costs would not induce anyone to proceed separately against multiple defendants liable on the same claim, multiple attorney fees awards might influence the attorneys to suggest severance.

There basically are two problems: (a) avoiding multiple collection of the same costs, attorney fees, and disbursements when separate judgments are entered under 67 B., and (b) avoiding a party's bringing separate cases to secure collection of multiple costs, attorney fees, and disbursements which actually are separate but were unnecessary because only one case was necessary.

The only existing provision I could find is in New York C.P.L.R. § 8104 which provides when an action is severed (in New York a formal severance order is necessary before multiple judgments can be entered in a case), costs shall be awarded in each action as if it were a separate action unless the court orders otherwise in the severance order.

I would suggest we try the following revision in 68 C.(6):

(ALTERNATIVES 1 AND 2 ATTACHED)

ALTERNATIVE 1

C.(6) Separate judgments for one claim or for separate claims in one action.

C.(6)(a) Separate actions. Where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, disbursements shall be allowed to a prevailing party in each action as provided by this rule, but costs and attorney fees shall not be allowed to the party bringing such action in more than one of such actions, which shall be at such party's election.

C.(6)(b) One action. Where separate final judgments are entered in one action for separate claims pursuant to Rule 67 B., the court shall avoid multiple taxation of the same costs, attorney fees, or disbursements in such separate judgments. Where separate final judgments are entered against several parties for the same claim, disbursements attributable to each separate judgment shall be allowed to the prevailing party as provided by this rule, but costs and attorney fees shall not be allowed to the party receiving such judgments in more than one such judgment, which shall be at the party's election.

ALTERNATIVE 2

C.(6) Avoidance of multiple collection of costs, disbursements, and attorney fees.

C.(6)(a) Separate judgments for separate claims. Where separate, final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as

necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments.

NOTE: The first alternative is based upon the approach of ORS 20.050. I prefer the second alternative which focuses upon the problem in terms of enforcement, rather than entry of overlapping costs, attorney fees, and disbursements.

Proposed Rule 71 B.(2)

PROBLEM

Tim Bowles suggests that the language in 71 B.(2) suggests that we are authorizing the filing of a motion to vacate in the appellate court more than one year after entry, as long as an appeal is pending.

RESPONSE

The intent was to allow the filing of the motion in the trial court during the one-year period which would then have to await disposition of the appeal. The reason for requiring leave of the appellate court was that the motion to vacate might have significant impact on whether the appeal should even be considered, and this would allow the appellate court to require that the motion be made and disposed of by it, before wasting further time on the appeal. We have no authority to make any rules for the appellate court, but I assume they have power to do this while an appeal is pending. We could change ORCP 71 B.(2) as shown on the proposed revision of Page 32 which is attached.

party of the judgment. A copy of a motion filed within one year after the entry of the judgment 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, and subject to the time limitations of subsection (1) of this section, a motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court 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, 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, 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.

Proposed Rule 80

PROBLEM

Vic Van Koten has asked whether subsection 80 D.(3) and section 80 E. make any sense when applied to a provisional receivership. In a foreclosure receivership, for example, notice to persons claiming an interest in the property is provided by section 80 F.(1). The general creditors of the defendant have no interest in the property, and there is no need for notice. The only time notice to general creditors would make sense is for a liquidation receivership.

RESPONSE

He is probably correct. Section 80 E. was adapted from Washington Superior Court Rule 66 C. The Washington rule actually says:

> "A general receiver appointed to liquidate and wind up affairs shall, under the direction of the court, give notice. . . ."

I suggest we amend proposed Rule 80 D.(3) and E. as shown on revised page 47 of the September 6th draft attached. A copy of the revised COMMENT is also attached.

C. Appointment of receivers; notice. 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. Form of order appointing receivers. Every order or judgment appointing a receiver:

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

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

D.(3) Shall set a time within which creditors and claimants shall file their claims or be barred when a general receiver is appointed to liquidate and wind up affairs; and

D.(4) May require period reports from the receiver.

E. Notice to persons interested in receivership. A general receiver appointed to liquidate and wind up affairs shall under the direction of the court, give notice to the creditors of the corporation, of the partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the

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 identical to ORS 31.010.

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 provisional process in Rule 83. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separarate. The bond requirements for a receivership appear in ORCP 82.

Notice to the defendant and hearing prior to a receivership are required by case law and are included in section C. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNicholas, 76 Or. 167, 183, 144 P. 96, 148 P. 67 (1915). There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established.

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

Subsection F.(2) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections F.(2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section G. 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 652.550.

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

ORCP 7 D.(2)(c)

PROBLEM

We received the attached letter from Ronald Allen Johnston which has not been previously submitted to the Council. He requests a change in the adddress for mailing after office service.

RESPONSE

His request seems reasonable and could be accomplished by adding to ORCP D.(2)(c) the language contained in the last sentence of his letter.

LAW OFFICES

SHANNON AND JOHNSON

DAVID S. SHANNON
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DATA SYSTEMS PLAZA
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(503) 232-3171

November 4, 1980

Counsel and Court Procedures
University of Oregon School of Law
Eugene, Oregon 97401

Re: Amendments to the Oregon Rules of Civil Procedure

Ladies and Gentlemen:

I request that you consider amending ORCP 7D(2)(c) relating to office service. The current rule requires that service shall be perfected by a subsequent mailing of the summons and complaint to the defendant at his dwelling house or usual place of abode. This poses practical service problems in that a person's place of business is often well known but his place of abode is not. This applies particularly to commercial defendants who have unlisted telephone numbers and generally undisclosed residences. I request that this rule be amended to require a subsequent mailing to either defendant's place of abode, his place of business, or such other place under circumstances that is most recently calculated to apprise the defendant of the existence and pendency of the action.

Sincerely,

Ronald Allen Johnston

Ronald Allen Johnston

RAJ/ml

11

ORCP 7 D.(3)(g)

PROBLEM

Paul Daigle suggested that the OSB Advisory Committee would submit some suggested reword language for ORCP 7 D.(3)(g). Carl Neil of that committee submitted the following revision, stating that this reflected the view of the Executive Committee of the group:

> "D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer, by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon."

RESPONSE

Ths language (1) adds the master as an agent for service, and (2) clarifies what type of agent may be served.

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JOEL S. KAPLAN
A. KEITH MARTIN

H. V. JOHNSON (1895-1975)
HAROLD V. JOHNSON (1920-1975)

ORVAL ETTER
OF COUNSEL

November 25, 1980

Mr. Fred Merrill
Council on Court Procedures
251 Law Center
University of Oregon
Eugene, OR 97403

Dear Fred:

As you may know, at the 1980 Annual Meeting the Judicial Administration Committee recommended, and the Annual Meeting approved, a procedure for resolving convlicts in trial settings. This procedure is attached as Exhibit A. It was recommended that this procedure be adhered to by all Oregon state and federal courts and, if necessary or appropriate, court rules be amended to incorporate the procedure.

Although I do not believe that your group had anticipated adopting a rule such as this, I thought I would submit it to you for future consideration. We do not know, at this time, how many of the circuits will adopt this rule as part of their local rules and whether, without adoption by all circuits, we will succeed in resolving these conflicts. I would be glad to keep you, or any other person on the council who is interested, advised of our progress. Please also let me know if you believe the Judicial Administration Committee may be of benefit to you or the council in any other manner.

Sincerely,

Martha L. Walters

MLW:og
Enclosure

EXHIBIT A

When an attorney responds to a trial notice with a claim of a conflict with a case set in another county or court, the setting court will defer to the case first given a trial date, unless the second case set should be tried first because of age or other special circumstances and this preference is resolved with the other court involved.

OREGON RULES OF CIVIL PROCEDURE

and

AMENDMENTS

promulgated by

COUNCIL ON COURT PROCEDURES

(SEMI-FINAL DRAFT BEFORE FINAL PROOFREADING)

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INTRODUCTION

The following rules, amendments, and ORS sections superseded have been promulgated by the Council on Court Procedures and submitted to the 1981 Legislative Assembly. Pursuant to ORS 1.735, they will become effective after the legislative session to the extent that the Legislative Assembly does not, by statute, modify the action of the Council.

This submission completes the main body of the Oregon Rules of Civil Procedure, which are the general rules of pleading and practice in civil actions in state courts. During this biennium, the Council has concentrated upon the areas of referees, submitted controversies, confession of judgments, judgments, defaults, taxation of attorney fees, costs and disbursements, vacation of judgments, and provisional remedies. The Council has also taken action to correct problems relating to ORCP 1-64 promulgated during the last biennium. The new rules (Rules 65-85) will replace most of ORS Chapters 26, 27, 29, 31, and 32 and portions of ORS Chapters 17, 18, 20, and 23.

The comment which follows most rules was prepared by Council staff. It represents staff interpretation of the rules and the intent of the Council, and is not officially adopted by the Council.

Subdivisions of rules are called sections and indicated by capital letters, e.g., A.; subdivisions of sections are called subsections and indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and indicated by lower case letters in parentheses, e.g., (a); and subdivisions

of paragraphs are called subparagraphs and indicated by lower case Roman numerals in parentheses, e.g., (iv).

SUMMARY OF CONTENTS

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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 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. If a 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, 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.

D.(1)(a) 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 the 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 by the court and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) 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.

E.(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury

verdict. 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. The court after hearing may affirm or set aside the report, in whole or in part.

E.(3)(b) 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 65 A. was taken from Wisconsin statutes 805.06(1). It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as a juror.

Subsection 65 B.(1) does not appear in the federal rule and was taken from ORS 17.720. Any right to jury trial is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. Subsection 65 B.(2) allows the court to appoint a referee upon motion in any type of case.

However, there are limitations:

(1) Reference upon motion is only available where there is no right to jury trial. The procedure is available in any non-jury case, whether formerly equitable or legal. Note, long account cases would still be referable upon motion; there is no right to jury trial in such cases. Tribou and McPhee v. Strowbridge, 7 Or. 157 (1879).

(2) Reference cannot be used by the court as a routine matter. A showing of some exceptional condition is required. 65 B.(2). See LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (65 C. through 65 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 ask the court for an order requiring the referee to act with more diligence. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection 65 E.(3) is new but gives the same weight to the referee's findings of fact as did ORS 17.763.

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 agreed facts. 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 case 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 66 A.(3) was added. This is a clarification taken from N.Y. C.P.L.R. § 3222 (b)(4).

Subsection 66 B. was taken from Iowa Code Ann. § 678. The submission after suit differs from a stipulated judgment or 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. or G. 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 claims or parties in action; judgment on portion of claim exceeding counterclaim. 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. 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) Default. 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) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

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

E. Judgment in action against partnership or unincorporated association; judgments in action against parties jointly indebted.

E.(1) Partnership and unincorporated association. 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.

E.(2) Joint obligations; effect of judgment. 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.

F. Judgment by stipulation.

F.(1) Availability of judgment by stipulation. 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 as part of the judgment according to the stipulation.

F.(2) Filing; assent in open court. The stipulation for judgment may be in a writing signed by the parties, their attorneys or authorized representatives, which writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G. Judgment on portion of claim exceeding counterclaim. The court may direct entry of a final judgment as to that portion of any claim, which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if such party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

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(2). See ORCP 14 A. for a definition of "motion."

Section 67 B. is identical to ORS 18.125(1). ORS 18.125(2) becomes ORCP 72 D.

The procedural merger of law and equity creates 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 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, 103 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 D. is ORS 18.110. See ORCP 61 D.

Section 67 E. 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. At common law, for partnership or association assets to be subject to a judgment, the judgment had to be against all partners or association members. ORS 18.135 allows an action to recover for a joint debt even though not all joint debtors are served. 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. 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. Section 67 B.(1) authorizes entry of a judgment against the entity which would bind the assets of the partnership or association. If a partner or member of an association is individually liable under the substantive law, an action against such individual could be joined with the action against the entity by naming the individual, as well as the entity, as a party and serving a separate summons and complaint directed to the individual. See ORCP 28. A judgment could then be entered against the individual parties so joined and served, as well as a judgment against the entity. Individual partners or members not so joined and served would not be subject to any individual judgment.

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

(a) avoids the necessity of difficult distinctions between joint and several obligations. The joint debtor statute did not apply to some joint partnership obligations because it was limited to actions based on contract. See 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.

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 judgment because another joint obligor was served. From a due process standpoint, this is defensible for partnerships and associations because partners and association members can be viewed as agents for the partnership or association. That theory would usually 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, including those of partnerships and associations, there was a requirement that any judgment 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, 213 Or. 228, 323 P.2d 49 (1958). 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, 67 E.(2) is not limited to partnerships or joint ventures, but covers any joint obligation.

ORS 18.135 also covered whether joint debtors could be or should be joined. 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 18.135 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. The attorney for a party may sign the stipulation. Confessions of judgment without action are covered by Rule 73.

Section 67 G. was previously included with default judgment provisions as ORS 18.080(2). The judgment involved is a form of special final judgment, not a default judgment. Note, under 67 A. this is defined as a final judgment.

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. "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, unless these rules or other rule or statute direct that in the particular case costs shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs.

If, under a special provision of 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 costs authorized by ORS 20.070.

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 C. 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; or

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

C.(1)(c) Such items are granted by order, rather than entered as part of 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 a pleading filed 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. Attorney fees may be sought before the substantive right to recover such fees accrues. 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) Entry by clerk. Attorney fees, costs, 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, costs,

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, if any, in accordance with Rule 9 C., with the court.

C.(4)(a)(iii) For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.

C.(4)(b) 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 the 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.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, 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) Avoidance of multiple collection of costs, disbursements, and attorney fees.

C.(6)(a) Separate judgments for separate claims. Where separate, final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and

disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments.

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 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain nonrecoverable because the rule refers to "necessary" deposition costs.

Section 68 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 District Court Rule 526.1. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Section 68 C.(1) makes almost all claims for attorney fees subject to this rule. There are a large number of 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, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, 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. 68 C.(1)(c).

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.

Subsections 68 C.(4) and (5) are based upon the existing costs and disbursements procedure in ORS 20.210 through 20.230. Paragraph 68 C.(4)(a) changes the procedure and requires service of a statement claiming costs, as well as disbursements and attorney fees, prior to entry of such costs as part of a judgment. The specific claim for attorney fees is included in the bill of disbursements. Note that in cases including a judgment against parties, who are in default for failure to appear, service of the statement of costs, disbursements, and attorney fees is not required. A statement must be prepared and filed to provide a basis for assessment of these items. Also, no judgment for attorney fees can be entered in such default cases unless the court approves the amount of the fees. Such approval could be in the form of an approved fee schedule for default cases adopted by the court or approval for individual cases.

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 service of the statement of costs, disbursements, and attorney fees. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence on affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) replaces ORS 20.050 and also covers the entry of multiple final judgments in one case. Paragraph 68 C.(6)(a) covers the situation where multiple judgments are entered on separate claims pursuant to ORCP 67 B. In such case, the court is required to avoid multiple taxation of the same costs, disbursements, or attorney fees. Paragraph 68 C.(6)(b) allows entry of the same costs, disbursements, and attorney fees when there are multiple judgments against different parties on the same claim (in the same case or in separate cases), but makes clear that satisfaction of the costs, attorney fees, and disbursements portion of one such judgment satisfies all of the judgments.

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, or an agent, officer, director, or partner of a 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 hearing 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

on behalf of the plaintiff, showing that affiant reasonably believes 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 69 B. regulates entry of judgment after default. Subsection 69 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).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 C.

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. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. 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.(1), by the clerk.

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 notice of the date of entry of the judgment to the attorneys of record, if any, of each party who is not in default for failure to appear, or if a party who is not in default for failure to appear who does not have an attorney of record, to such party. 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.(1), 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 68.

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 prescribed 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, five days prior to the submission of judgment, in accordance with Rule 9 B. The proposed form of judgment shall be filed 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. This rule differs from the federal rule for default or stipulated judgments because supporting motions, affidavits, or stipulations may be combined with the 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, 286 P.2d 665, 288 P.2d 214, 288 P.2d 215 (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. Most provisions in ORS refer to entry, e.g., ORS 23.030, 18.080, 18.510, and 20.210. 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 acting 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 begins to run at entry. ORS 19.026. 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 mailing of a copy of the judgment by the clerk to all parties not in default. This requirement has presented substantial practical difficulty for clerks. This rule requires only notice of the date of entry to the attorney of record or party if there is no attorney.

Therefore, subsection 70 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. to change 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. ORS 18.040 referred to entry "within the day," which was interpreted to mean 24 hours. Casner v. Hoskins, 64 Or. 254, 281, 128 P. 841, 130 P. 55 (1913).

Section 70 C. is new but reflects existing practice. It was felt that submission of a form of judgment should be up to the court. However, if an attorney submits a form of judgment, it should be served on the 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, a judgment may be corrected under this section only with leave of the apellate 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.; (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. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and

for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment 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, and subject to the time limitations of subsection (1) of this section, a motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court 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, 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, 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 71 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 actually a correction of the record.

Subsection 71 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 71 B.(1)(b) explicitly authorizes a motion based upon newly discovered evidence. Wells, Fargo & Co. v. Wall, 1 Or. 295 (1860). Paragraph 71 B.(1)(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 71 B.(1)(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 71 B.(1)(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).

Subsection 71 B.(1) also explicitly requires that the party who makes the motion must demonstrate that a claim or defense is being asserted and that vacation of the judgment would not be a waste of time. That requirement existed for motions under ORS 18.160. Lowe v. Institutional Investors Trust, 270 Or. 814, 817 (1974), Washington County v. Clark, 276 Or. 33, 37 (1976). The requirement would not make sense for paragrapns (d) and (e) under the subsection. Dial Press v. Sisemore, 263 Or. 460 (1978).

The one-year time limit of ORS 18.160 is retained for paragraphs 71 B.(1)(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 71 B.(1)(d). The most important change in the time limits is the reference to "filing," instead of granting the motion. Compliance with the time limit should depend upon the diligence of the moving party and not upon the court.

The provisions relating to service of the motion are not in the federal rule and were drafted to conform to Herrick v. Wallace, supra, at 526.

Under Oregon case law, during the pendency of an appeal the trial judge could not vacate a judgment for the reasons covered in section 71 B. Caveny v. Asheim, supra. Since there may be a one-year time limitation for filing the motion, it should be possible to file such a motion in the trial court during the one-year period to await disposition of the appeal; this is provided by subsection 71 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 71 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. Any grounds for vacation which could be raised by such devices 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 trial court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 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. Stay or injunction in favor of public body. The federal government, any of its public corporations or commissions, the state, any of its public corporations or commissions, a county, a municipal corporation, or other similar public body shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment.

D. 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 19.040, 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 72 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). 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 72 C. 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 22.010 and 20.140.

Section 72 D. is taken from ORS 18.125(2).

RULE 73

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

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

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

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered, or a person authorized to bind such party, and verified by oath, as follows:

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

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

B.(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment.

B.(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

COMMENT

This rule retains confessions of judgment without action in a more limited form than ORS 26.100-26.130 but is consistent with existing Oregon practice and constitutional limitations.

Under subsection 73 A.(1), the use of the device is limited to amounts actually due. The confession of judgment should not be used generally as a security device. The limiting of the place of entry is adapted from Ill. Stat. Ann. Ch. 110, § 50(3) (1968).

Subsection 73 A.(2) prohibits use of the procedure in actions arising from consumer transactions. This is simply carrying forward prior legislative action which prohibited the procedure in

many consumer transactions. See ORS 83.670(1), 91.745(1)(b), 697.733(3), and 725.050(2). The language used was adapted from Cal. Code of Civ. Proc. § 1132.

Section 73 B. is new and is intended to allow confessions of judgments based upon agreement by the debtor after the amounts claimed were due and not allow confessions of judgment based upon a cognovit agreement in the original agreement or instrument creating the debt. The cognovit situation is the one most open to abuse and where due process may require some hearing or notice before entry of the judgment. Testimony received by the Council indicated that confessions of judgments based upon cognovit agreements were not used in Oregon practice, but the confession of judgment was needed to encourage some settlements when a debtor acknowledges that a debt is due but cannot pay immediately.

Sections 73 C. and D. were adapted from N.Y. C.P.L.R. § 3218.

RULE 74 (RESERVED)

RULE 75 (RESERVED)

RULE 76 (RESERVED)

RULE 77 (RESERVED)

RULE 78

ORDER OR JUDGMENT FOR SPECIFIC ACTS

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.

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 33.150.

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 108.120.

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 personally upon the party required to show cause.

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

This rule was generally taken from existing ORS sections. Section A. is ORS 23.020(1). Section B. is ORS 23.020(2) with the specific reference to ORS chapter 33 added.

Section C. was taken from ORS 23.020(3). 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. See ORCP 67 A. and 68 C.(1)(c).

Section D. is new and authorizes a motion procedure for contempt, 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) Circumstances. Subject to the requirements of Rule 82 A.(1), a temporary restraining order or preliminary injunction may be allowed under this rule:

A.(1)(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.(1)(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 the provisions of Rule 83 F., G.(4), and I.(2) are applicable, whether or not provisional relief is ordered under those provisions.

A.(2) Time. A temporary restraining order or preliminary injunction under this rule may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be

granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B.(1)(b) The applicant or applicant's attorney submits an affidavit setting forth the efforts, if any, which have been made to notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit required in this paragraph shall not be required for orders granted by authority of paragraphs (c), (d), (e), (f), or (g) of subsection (1) of ORS 107.095.

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; and 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 paragraph B.(2)(a) does not apply to orders granted by authority of paragraphs (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 for dissolution or modification of such restraining order. 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 subsection 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, the parties may stipulate that the trial of the action on the merits shall be advanced and consolidated with the hearing of the application. The parties may also stipulate that 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.

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 any of 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. Writ abolished. 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 process procedure of ORS chapter 29 (now ORCP 83).

The grounds spelled out in subsection A.(1) 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. 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 either to the situation where the ultimate remedy sought in the case is a permanent injunction and the plaintiff needs immediate relief, or where the injunction sought to effectuate the eventual judgment does not consist of restraining the defendant from disposing of property because such property could be applied to satisfy any judgment.

Subsection A.(2) was taken from ORS 32.020(1).

Sections B. and C. are adapted from Federal Rule 65(a) and (b). Paragraph B.(1)(b) was redrafted to make clear that a party seeking a temporary restraining order must try to inform the opposing party or such party's attorney of the application by telephone or any other possible means. 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).

Subsection C.(2) differs from the federal rule; consolidation with trial on the merits requires agreement of the parties.

Section D. is taken from Federal Rule 65 (d). Note, the bond requirements for preliminary injunctions and temporary restraining orders are found in ORCP 82.

Under section E. certain preliminary injunctions are not covered. 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 from 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.

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. Subject to the requirements of Rule 82 A.(2), a receiver may be appointed by a circuit court in the following cases:

B.(1) Provisionally to protect property. Provisionally, before judgment, on the application of any party, when such party'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) To effectuate judgment. After judgment to carry the same into effect.

B.(3) To dispose of property, to preserve during appeal, or when execution unsatisfied. 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) Creditor's action. 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) Attaching creditor. 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) Protect, preserve, or restrain property subject to execution. 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) Corporations and associations; when provided by statute. 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) Corporations and associations; to protect property or interest of stockholders or creditors. 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. Appointment of receivers; notice. 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. Form of order appointing receivers. Every order or judgment appointing a receiver:

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

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

D.(3) Shall set a time within which creditors and claimants shall file their claims or be barred when a general receiver is appointed to liquidate and wind up affairs; and

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

E. Notice to persons interested in receivership. A general receiver appointed to liquidate and wind up affairs shall under the direction of the court, give notice to the creditors of the corporation, of the partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the

receiver's attorney, or the clerk of the court, within such time as the court directs.

F. Special notices.

F.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with the receiver, all persons having claims against the receiver, all persons having 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.

F.(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 such person desires special notice of any and all of the following named steps in the administration of said receivership:

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

F.(2)(b) Filing of accounts;

F.(2)(c) Filing of motions for removal or discharge of the receiver; and

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

A request shall state the post office address of the person, or such person's attorney.

F.(3) Form and service of notices. Any notice required by this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to the person to be notified, or such person's attorney, at their post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least five days (10 days for notices under section C.) before the hearing on any of the matters above described; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section C.) before such hearing. 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.

G. Termination of receiverships. A receivership may be terminated only upon motion served with at least 10 days' notice upon all parties who have appeared in the proceeding. The court may require that a final account and report be filed and served, and may provide for the filing of written objections to such account within a specified time. At the hearing on the motion to terminate, the court shall hear all objections to the final account and shall take such evidence as is appropriate, and shall make such orders as are just concerning the termination of the receivership, 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 identical to ORS 31.010.

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 provisional process in Rule 83. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separate. The bond requirements for a receivership appear in ORCP 82.

Notice to the defendant and hearing prior to a receivership are required by case law and are included in section C. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNicholas, 76 Or. 167, 183, 144 P. 96, 148 P. 67 (1915). There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established.

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

Subsection F.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections F.(2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section G. 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 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; ADVERSE CLAIMANTS

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 becomes obligated 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 prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

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 under Rule 83, preliminary injunctions under Rule 83, 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 under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

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 a constable of a district or justice court.

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 cause to be promptly served 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 Chevrolet, 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.

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 statement:

> SOME KINDS OF PROPERTY CANNOT BE TAKEN FROM YOU IN A LEGAL PROCEEDING. THE PROPERTY DESCRIBED IN THIS NOTICE MAY OR MAY NOT BE THE KIND OF PROPERTY THAT CANNOT BE TAKEN. IF YOUR PROPERTY IS PROTECTED, YOU MUST TAKE ACTION IMMEDIATELY TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN. IF YOU DO NOT ACT, YOU WILL LOSE THE PROPERTY, WHETHER OR NOT IT IS PROTECTED. YOU SHOULD GET LEGAL ADVICE TO DETERMINE IF THE PROPERTY DESCRIBED IN THIS NOTICE CAN BE TAKEN IN THIS PROCEEDING AND HOW TO TAKE THE REQUIRED ACTION TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service of notice upon defendant shall not be required.

C. Service of notices; proof of service.

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

C.(2) Proof of service. Copies of all notices or orders to show cause 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 subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

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 relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process 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 29.020(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified. The most important change is in B.(2) where the requirement that notice to individuals contain a list of exemptions, an explanation of the exemption procedure, and a reference to the availability of forms is eliminated. The Council does not wish to discourage exemption claims, but felt the notice presently required for attachment was incomprehensible and constituted a procedural trap.

Sections C. and D. are new. Section D. is designed to provide summary procedure for release of attachment which does not infringe 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 action 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 entitled to relief. See ORCP 47.

ORS 29.210 presently makes reference to a summary procedure. The seldom used sheriff's jury in ORS 29.210 is eliminated.

RULE 82

SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF SURETIES

A.(1) Restraining orders; preliminary injunctions.

A.(1)(a) 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.(1)(b) No security will be required under this section where:

A.(1)(b)(i) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A.(1)(b)(ii) 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.

A.(2) 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.(3) Attachment or claim and delivery.

A.(3)(a) Before any property is attached under Rule 84 or taken by the sheriff under Rule 85, the plaintiff must file with

the clerk a surety bond, in an amount fixed by the court, 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.(3)(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.(3)(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 the claim for which probable cause exists is that defendant acquired the property contrary to law.

A.(4) 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 damaged by such provisional process.

A.(5) 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.(6) 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 an ex parte showing of good cause 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 the surety's 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 stating 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 given 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 party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is given objects to the sufficiency of such sureties. If the party for whose benefit the bond is given 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 amended, substitute, or additional bond as the circumstances will 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

The bond requirement for release of party from attachment lien is found in Rule 84 F. This rule has most of the bond requirements for provisional remedies in ORCP 79-85. See ORS 22.010, which provides that bonds are not required for certain parties. This rule also contains some general rules on the form of security when required and general rules for justification of sureties.

Subsections A.(1) through A.(4) provide when bonds will be required for various provisional remedies. Paragraph A.(1)(a) was taken from Federal Rule 65 (c). The exceptions in A.(1)(b) are those contained in ORS 32.020(3). Note, this bond requirement would apply to injunctions and restraining orders both under ORCP 79 and 83. Subsection A.(2) is adapted from ORS 31.030. Paragraph A.(3)(a) is taken from ORS 29.130, but the court sets the amount of the bond. Paragraph A.(3)(b) is new. The bond requirement also applies to claim and delivery as well as attachment. The existing provisions for claim and delivery do not require a bond. Paragraph A.(3)(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 subparagraph A.(1)(b)(ii). 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.(4) is new and makes clear that a bond is required for all provisional process. The definition of provisional process is found in ORCP 81 A.(9).

Subsections A.(5) and A.(6) apply to all bonds required by the ORCP, not simply to those required by subsections A.(1) through A.(4) of this rule. Subsection A.(5) is new. Subsection A.(6) was adapted from ORS 32.020(2). Note, ORS chapter 22 allows deposit in lieu of bond without court order in some circumstances and provides that the state, cities, or counties are not required to furnish bonds.

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 cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiants 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) If the provisional process sought 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;

A.(3)(b) If the provisional process sought 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, if plaintiff relies upon 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 the 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. Provisional process authorized by Rule 85 may issue in consumer transactions.

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 D. or 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 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 property 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, and 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. A restraining order under this section does not create a lien.

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. Upon request of the plaintiff the hearing date may be set later than the seventh day.

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.

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, and if Rule 82 A. has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

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 defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon 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 8.,

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 G. finds that there is probable cause for sustaining the validity 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 is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

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.

The first paragraph of section A. was rewritten slightly to make clear that the showing of the necessary information for section A. can either be in plaintiff's sworn petition or in separate affidavits submitted to support the petition. For clarity, paragraph A.(3)(a) was added. 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 last sentence was added to B. for clarity. The existing language "to effect attachment" creates the exception for claim and delivery. The language of C.(2) was also 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. See A.(8).

The cross reference to the security requirements of Rule 82 and form of order in Rule 79 D. were added to sections F., G., and I.

The most important change in the provisions relating to restraining orders was to specify that no lien attaches to property subject to a restraining order. A party who wishes to secure a lien, as opposed to merely restraining disposition of the property, should use other provisional process. The last sentence of I.(1) is also new.

Note, pursuant to Rule 81 C.(1), personal service of the show cause order is not absolutely required. The order may be served in any manner in which a summons may be served.

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 circuit 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. Attachment by claim of lien.

C.(1) Property subject to claim of lien. When attachment is authorized, the plaintiff may attach the following property by filing a claim of lien:

C.(1)(a) Defendant's real property; or

C.(1)(b) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C.(2) Form of claim; filing.

C.(2)(a) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) identify the action by names of parties, court, docket number, and judgment demanded;

C.(2)(a)(ii) describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) state that an attachment lien is claimed on the property.

C.(2)(b) Filing.

C.(2)(b)(i) A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose. When the claim of lien is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

C.(2)(b)(ii) A claim of attachment lien in personal property shall be filed with the clerk of the court that authorized the claim of lien and in the same office or offices in which a financing statement would be required to be filed. A lien arises in the property described in the claim upon a filing of the claim of lien.

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall 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 all the property of the defendant within the county not exempt from execution, 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. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) 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:

D.(2)(a) 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 the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's

lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) 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. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(c) 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.

D.(2)(d) The notice referred to in paragraph (b) of this subsection 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. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

D.(2)(f) The interest of a distributee in an estate may be attached as provided in ORS 29.175. A plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in that section.

D.(3) Procedure after garnishment.

D.(3)(a) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or

corporation mentioned in paragraph (b) of subsection (2) of this section, 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 plaintiff 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.

D.(3)(b) 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 paragraph (b) of subsection (2) of this section, for the purpose of attaching any property mentioned therein, such person or officer shall furnish the sheriff with a certificate, designating the amount and description of any property in the possession of the garnishee 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. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, such person or officer 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.

D.(3)(c) Contents of order; designation of parties. The order provided for in paragraph (b) of this subsection shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

D.(3)(d) Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in paragraph (b) of this subsection, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by the garnishee to the defendant, and disobedience to such order may be punished as a contempt.

D.(3)(e) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in paragraph (b) of this subsection, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in paragraph (b) of this subsection.

D.(3)(f) Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, the garnishee or officer shall return the allegations and interrogatories of the plaintiff to the court or judge, with the written answer of the garnishee or officer, unless for good cause shown a further time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

D.(3)(g) Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel the garnishee or officer to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

D.(3)(h) Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend the answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a

part of the answer within such time as may be prescribed or allowed. If the answer is not excepted or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

D.(3)(i) Trial. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

D.(3)(j) Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in paragraph (b) of this subsection, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

D.(3)(k) Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from the garnishee to the defendant is not yet due, execution shall not issue until the debt is due.

D.(3)(1) Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the face thereof by attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or property subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of garnishee's return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received

without any obligation on the part of the garnishee to inquire into the authority therefor. The authority vested by this section in the clerk of the court to issue releases is not exclusive but is in addition to the authority of the court having jurisdiction of the cause to release, discharge, or dissolve attachments and garnishments.

D.(4) Return of writ; inventory. When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with the sheriff's 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.

D.(5) 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 double the amount of the estimated value of the property to be seized.

E. Disposition of attached property after judgment.

E.(1) If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by the sheriff or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, the sheriff shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section F. of this rule, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

E.(2) If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon service upon the sheriff of a certified copy of the order discharging the attachment.

F. Redelivery of attached property.

F.(1) If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof upon a court order authorizing such

redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least five days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond.

F.(2) 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.

COMMENT

This rule is primarily based upon the existing statutory provisions of ORS 29.110-29.410.

Subsection A.(1) indicates that attachment is provisional process subject to Rule 83. Subsection A.(2) is identical to ORS 29.110. Subsection A.(3) is taken from ORS 29.410.

Section B. is a clarification of ORS 29.140. It does not change the property that may be subject to attachment.

The claim of lien in section C. is a new procedure. It recognizes that no writ should be required to establish an attachment lien on real property. It also provides a simple way to establish a lien on personal property subject to recording of a security interest. In either case, plaintiff cannot abuse the procedure because it is only available after the order for provisional process authorizes a claim of lien for specific property.

Section D. is taken from ORS 29.160-29.200, 29.270-29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 29.170 and 23.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

Section E. is ORS 29.380 and 29.390. Section F. is new and replaces ORS 29.220-29.250. It clarifies the procedure for redelivery bond.

ORS 29.178 and 29.210 would be eliminated as unnecessary because of 81 B. and D. ORS 29.120 and 29.260 are eliminated as inconsistent with Rule 83. ORS 29.175 would remain as a statute.

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 deliver 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. 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

Sections A. through D. are almost identical to existing ORS 29.080-.095.

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

Section E. is 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 and appear in the action.

M. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections [B.] A. through L. would have furnished a basis for jurisdiction over the deceased had the deceased been living. It is immaterial whether the action is commenced during the lifetime of the deceased.

COMMENT

The situation covered by section M. could arise where jurisdiction is based upon section A. of this rule.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete [when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused] three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

D.(3)(b) [Corporations; limited partnerships; unincorporated associations subject to suit under common name] Corporations and limited partnerships. 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 office of the registered agent or 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 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.

D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer, by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

[D.(6)(g) Completion of service. For the purpose of computing any period of time prescribed or allowed by these rules service by publication shall be complete at the date of the last publication.]

COMMENT

The amendment to ORCP 7 D.(2)(c) provides more flexibility for mailing of summons after office service. Office service may be used when defendant's home address cannot be determined.

The amendment to ORCP 7 D.(2)(d) clarifies when the period for default begins to run after service of summons by mail.

ORCP 7 D.(3)(b)(ii) is amended to provide more flexibility for mail service.

The new provisions of ORCP 7 D.(3)(e) and (f) are designed to specify a method of serving summons on a partnership or association consistent with ORCP 26 B. and 67 E. The new ORCP 7 D.(3)(g) provides a special agency service for defendants engaged in maritime commerce.

The Council has also recommended that the legislature act to amend ORCP 7 D.(4)(a). See recommended Bill in Section IV of this report. The amendment to ORCP 7 D.(4)(a) reinstates service on the Department of Motor Vehicles. The amendment would provide a record of service and clarify when the time for default begins to run. The Council did not itself promulgate the amendment because of uncertainty whether Council rulemaking power was sufficient to require that the Department of Motor Vehicles accept service of summonses and keep the necessary records. The amendment 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 amendment 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.

Paragraph ORCP 7 D.(6)(g) was removed because of inconsistency with subsection C.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing. Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

COMMENT

The added language of section B. formerly appeared in ORS 16.810 and was inadvertently omitted from this rule in 1979.

RULE 10

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

B. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending before it.

C. Additional time after service by mail. Except for service of summons, [w]henever a party has the right or is required to do some act or take some proceedings within a

prescribed period after the service of a notice or other paper upon such party and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

COMMENT

The Council added the provision to Rule 10 C. to avoid application of the additional time to service of summons. The service of summons by mail under ORCP 7 D.(2)(d) (as amended) has a built-in extension of time of at least 3 days.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.[2] (3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

COMMENT

When Rule 21 G. was revised by the 1979 Legislature, the cross reference in Rule 21 F. was not changed.

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.

B. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended [and shall do so freely] when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If an amended

pleading is filed, the party filing the motion 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. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is required. 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. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.]

COMMENT

The wording of section 23 B. relating to amendments after the commencement of trial was changed slightly to give the trial judge more discretion in determining whether an amendment should be allowed under all of the circumstances. Some trial judges asserted that with the language that was removed, they would always have to allow amendment, no matter what circumstances were involved.

Sections D. and E. are replaced by ORCP 25.

RULE 25

EFFECT OF PROCEEDING AFTER MOTION OR AMENDMENT

A. 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 amend the pleading. In all cases where part of a pleading is ordered stricken, the pleading shall be amended in accordance with Rule 23 F. By amending a pleading pursuant to this section, the party amending such pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

B. Amendment of pleading; objections to amended pleading not waived. If a pleading is amended, whether pursuant to sections A. or B. of Rule 23 or section A. of this rule or pursuant to other rule or statute, a party who has filed and received a court's ruling on any motion directed to the preceding pleading does not waive any defenses or objections asserted in such motion by failing to reassert them against the amended pleading.

C. Denial of motion; non-waiver by filing responsive pleading. If an objection or defense is raised by motion, and the motion is denied, the party filing the motion does not waive the objection or defense by filing a responsive pleading or by

failing to re-assert the objection or defense in the responsive pleading or by otherwise proceeding with the prosecution or defense of the action.

COMMENT

Sections 25 A. and B. of this new rule include the provisions formerly found in ORCP 23 D. and E. The language used in sections D. and E. was not clear. Section 25 C. is new and was not clearly covered by the ORCP. Although sections 25 A. and B. do relate to some extent to amended pleading, section 25 C. does not. All three subsections basically deal with the effect of proceeding after motion or amendment, and it was therefore deemed advisable to put them together in a totally separate rule. See Moore v. West Lawn Memorial Park, Inc., 266 Or. 244, 512 P.2d 1344 (1973).

RULE 26

REAL PARTY IN INTEREST;
CAPACITY OF PARTNERSHIPS AND
ASSOCIATIONS

A. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that party's own name without joining the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. 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.

COMMENT

The reference to conservator was added to section 26 A. for clarity.

Section 26 B. provides the basis for suit of a partnership in its own name. This provision was taken from Cal. Code of Civil Procedure § 388. See ORCP 67 E.

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action; [including the feasibility of giving adequate notice;] (e) [the likelihood that the damages to be recovered by individual

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or agrument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

F. Notice required; content; statements of class members may be required; form; content; effect of failure to file required statement.

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) a statement that the court will exclude any member of the class if such member so requests by a specified date.

F.(1)(b)(iii) a description of possible financial consequences on the class;

F.(1)(b)(iv) a general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) a statement that any member of the class may enter an appearance either personally or through counsel;

F.(1)(b)(vii) an address to which inquiries may be directed; and

F.(1)(b)(viii) other information the court deems appropriate.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if such class member's identity and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class

member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J.] H. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A. [, B., and C.] and B. of this rule upon a showing by a defendant that all of the following exist:

[J.] H.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section H. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[L.] J. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] K. Coordination of pending class actions sharing common question of law or fact.

[M.] K.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] K.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] K.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] K.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] K.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] L. Judgment; inclusion of class members; description [names]. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and

describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class [, and the judgment shall state the amount to be recovered by each member].

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

M. Attorney fees, costs, disbursements, and litigation expenses.

M.(1)(a) Attorney fees for representing a class are subject to control of the court.

M.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

M.(1)(e)(i) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

K.(1)(e)(ii) results achieved and benefits conferred upon the class;

M.(1)(e)(iii) the magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) the contingent nature of success; and

M.(1)(e)(v) appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M.(2)(b) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees and

M.(2)(c) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

N. Statute of Limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

N.(1) upon filing of an election of exclusion by such class member;

N.(2) upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

N.(3) except as to representative parties, upon entry of an order under section C. of this rule refusing to certify the class as a class action; and

N.(4) upon dismissal of the action without an adjudication on the merits.

COMMENT

Report of Class Action Subcommittee

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule. The Council conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. The proposed revisions are:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(g)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of subsection 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

subsection 32 G.(1) with the language of section 7 of the Uniform Class Actions Act (32 F.(1) of revision). The new language only requires individual notice for claims over $100 and has a number of provisions encouraging flexibility in the notice procedure. The subcommittee felt that an absolute requirement of individual notice was too rigid and imposed an unnecessary impediment to maintenance of class actions involving a large class and small individual claims. The subcommittee drafted revised paragraph F.(1)(f).

(6) Elimination of mandatory requirement of claim by class members prior to judgment. The committee changed the absolute requirement that class members submit claim forms in damage cases as a basis for judgment. The language of existing 32 G.(2) was changed from "the court shall" to "the court may" require such forms and by eliminating the last sentence (32 F.(2) in revision). Conforming changes were also made in 32 G.(3) and 32 N. (32 F.(3) and 32 L. in revision). The subcommittee felt that the requirement of a claim form in every damage case was too rigid and that a judgment listing all class members and individual damages in every case involves an extremely complex and expensive form of judgment for no good reason. The subcommittee took no position regarding award of aggregate damages not identifiable to individual class members (fluid class recovery). The subcommittee felt this was an area better determined by the courts or legislature in the context of remedies and proof of damages.

(7) Preliminary hearing and allocation of damage costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.L.R. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win.

(8) Regulation of attorney fees. The proposed revision would substitute far more detailed provisions, taken from sections 16 and 17 of the Uniform Class Actions Act, for section 32 O. of the existing rule (section M. of revision). These provisions do not provide for or authorize award of attorney fees, not otherwise provided by statute or law, but have much more detailed provisions for court control of attorney fees and litigation expenses. The new language also covers liability of class members for fees, costs, and disbursements awards.

(9) New provision relating to tolling of statute of limitations. The proposed revision adds a new section, N., which is taken from section 18 of the Uniform Class Actions Act. The section clarifies the effect of pendency and termination of class actions upon the running of the statute of limitations against the individual claims of class members. This is an area of considerable confusion and should be clarified. The subcommittee recognizes that this provision may have substantive elements, beyond the rulemaking powers of the Council, and suggests that it be submitted to the legislature with a note asking the legislature to review it in that light.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 B.(4) in subsection 36 B.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection B.(4).

F. Submission to witness; changes; statement.

F.(1) Necessity of submission to witness for examination. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if [the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties.] any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F.(2) Procedure after examination. Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the

statement or the witness is physically unable to make such statment or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F.(3) No request for examination. If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

COMMENT

This section was changed to require submission of the deposition to the witness for examination and statement of correctness only when such a procedure is requested by a party or the witness. The existing rule requires such examination and statement unless waived by the parties and the witness.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A.(2) Motion. If a party [fails to furnish a written statement under Rule 36 B.(4), or if a party] fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the

officer who is to take the deposition of that party or person, after being served with a proper notice, or (2) to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, [or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage,] the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

The cross reference in subsection 46 A.(2) to 36 B.(4) should have been removed when the 1979 Legislature deleted 36 B.(4).

The language removed from section 46 D. became superfluous when the 1979 Legislature revised 36 B.(2).

RULE 52

POSTPONEMENT OF CASES

A. Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. [The court may in a proper case, and upon terms, reset the same.] At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party.

COMMENT

The last sentence of section 52 A. as originally promulgated suggested there had to be terms. The last clause is suggested by Spalding v. McCaige, 47 Or. App. 129 (1980).

DISMISSAL OF ACTIONS[:]; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. Unless agreed upon by the parties, costs, disbursements, and attorney fees shall be entered as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i) and Rule 7 D.(3)(e).

F.(2) Place of examination. 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. 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

The language change in 55 D.(1) was made to conform to ORCP 7 E. and 7 F.(2).

The reference to place of examination in 55 F.(2) 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.

RULE 60

MOTION FOR A DIRECTED VERDICT

Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the [defendant] party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

COMMENT

The language in the last sentence was changed because the motion could be made by a plaintiff against a counterclaim and the court might wish to dismiss the counterclaim without prejudice. See 54 C.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

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

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D. of this rule, whichever is earlier, mail a [copy of the order and] notice of the date of entry of the order or denial of the motion to the attorney of record, if any, of each party who is not in default for failure to appear or, if a party not in default for failure to appear does not have an attorney of record, to such party. The clerk also shall make a note in the docket of the mailing.

COMMENT

Section 63 D. was changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 70.

Section 63 E. was changed to conform to the changed form of notice of entry of judgment in 70 B.(1).

NEW TRIALS

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

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

COMMENT

Sections 64 F. and G. were changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 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.] Appeal of judgment on the allowance of taxation of costs and disbursements.

[(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.

23.040 Kinds of execution. There are three kinds of executions:

(1) Against the property of the judgment debtor.

[(2) Against his person.]

[(3)] (2) For the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

23.050 Issuance of writ; contents. The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment, and if it is for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows:

(1) If it is against the property of the judgment debtor, and the judgment directs particular property to be sold, it shall require the sheriff to sell such particular property and apply the proceeds as directed by the judgment; otherwise, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

(2) If it is issued after the death of the judgment debtor, and is against real or personal property, it shall require the sheriff to satisfy the judgment, with interest, out of any property in the hands of the debtor's personal representatives, heirs, devisees, legatees, tenants of real property, or trustees as such.

[(3) If it is against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he pays the judgment, with interest, or is discharged according to law.]

[(4)] (3) If it is for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in subsection (1) of this section, and in that respect it is to be deemed an execution against 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.

29.178 **Post-execution procedure; notice; contents; bank, trust company or savings and loan association as garnishee.** (1) Following execution by the sheriff of [any writ pursuant to ORS 29.170 or 29.175] a writ of execution or execution of a writ of garnishment by any person, other than a wage or salary garnishment, the sheriff or such person shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:

(a) A copy of the writ;

(b) A copy of the certificate delivered to the county clerk [pursuant to subsection (1) of ORS 29.170] to levy upon real property, if any;

(c) A copy of a notice of garnishment or the notice delivered pursuant to [subsection (3) of ORS 29.170 or] subsection (1) of ORS 29.175, if any; and

(d) The notice described in subsection (2) of this section.

(2) The notice to the judgment debtor shall contain:

(a) A statement that certain property of the judgment debtor has been or may have been levied upon;

(b) If the sheriff has executed the writ by taking property into his custody, a list of the property so taken;

(c) A list of all property and funds declared exempt under state or federal law;

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

(e) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the judgment debtor; and

(f) A statement that if the judgment debtor has any questions, he should consult an attorney.

[(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]

[(4)] (3) The sheriff or such person may meet the requirements of subsection (1) of this section by mailing the documents to the last-known address of the judgment debtor as provided by the judgment creditor. The sheriff or such person may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

Section III. ORS SECTIONS SUPERSEDED

The following ORS sections are superseded by the Oregon Rules of Civil Procedure. The Oregon Rules of Civil Procedure replace the superseded ORS sections as the rules of pleading, practice, and procedure in those civil actions and courts where the Oregon Rules of Civil Procedure are made applicable by ORCP 1 A.

ORS

CHAPTER 17

17.003, 17.705, 17.710, 17.720, 17.725, 17.730, 17.735, 17.740, 17.745, 17.750, 17.755, 17.760, 17.765.

CHAPTER 18

18.010, 18.030, 18.040, 18.050, 18.060, 18.070, 18.080, 18.090, 18.100, 18.110, 18.115, 18.120, 18.125, 18.135, 18.160.

CHAPTER 20

20.010, 20.020, 20.040, 20.050, 20.055, 20.060, 20.110, 20.210, 20.230.

CHAPTER 23

23.020, 23.080, 23.090, 23.740, 23.810, 23.820, 23.830, 23.840, 23.850, 23.860, 23.870, 23.880, 23.890, 23.900, 23.910, 23.920, 23.930.

CHAPTER 26

26.010, 26.020, 26.030, 26.040, 26.110, 26.120, 26.130.

CHAPTER 27

27.010, 27.020, 27.030.

CHAPTER 29

29.010, 29.020, 29.025, 29.030, 29.035, 29.045, 29.050, 29.055, 29.060, 29.065, 29.070, 29.075, 29.080, 29.085, 29.090, 29.095, 29.110, 29.120, 29.130, 29.140, 29.150, 29.160, 29.170, 29.180, 29.190, 29.200, 29.210, 29.220, 29.230, 29.240, 29.250, 29.260, 29.270, 29.280, 29.290, 29.300, 29.310, 29.320, 29.330, 29.340, 29.350, 29.360, 29.370, 29.380, 29.390, 29.400, 29.410, 29.520, 29.530, 29.540, 29.550, 29.560, 29.570, 29.580, 29.590, 29.600, 29.610, 29.620, 29.630, 29.640, 29.650, 29.660, 29.670, 29.680, 29.690, 29.700, 29.710, 29.720, 29.730, 29.740.

CHAPTER 31

31.010, 31.020, 31.030, 31.040.

CHAPTER 32

32.010, 32.020, 32.030, 32.040, 32.050, 32.060.

CHAPTER 34

34.820.

CHAPTER 45

45.050.

Section IV. RECOMMENDED STATUTORY AMENDMENT TO ORCP

A BILL FOR AN ACT

Relating to administrative procedures of state agencies; amending ORS 311.705.

Be It Enacted by the People of the State of Oregon:

Section 1. ORCP 7 D.(4)(a)(i) is amended to read as follows: lows:

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, [may be served with summons by mail, except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and (iii) any other address of the defendant known to the plaintiff, which might result in actual notice] except a defendant which is a foreign corporation maintaining a registered agent 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.

Section 2. This amendment shall be effective January 1, 1982.

MEMORANDUM

TO: COUNCIL

FROM: Fred Merrill

RE: SUBMISSION OF RULES TO THE LEGISLATURE

DATE: January 14, 1981

Enclosed is a copy of the final draft of the rules and transmittal letter submitted to the legislature.

The Joint House and Senate Judiciary Committees have scheduled meetings according to the following schedule to review the rules:

Tuesday, January 20	8:30-10:00 a.m.	Amendments to ORCP 1-64 and Rules 65 and 66
Tuesday, January 27	8:30-10:00 a.m.	Judgments - Rules 67-73
Tuesday, February 3	8:30-10:00 a.m.	Provisional Remedies - Rules 78-85
Tuesday, February 10	8:30-10:00 a.m.	Class Actions - Rule 32

We will be calling some of you to attend. If anyone has a particular interest in attending, please let me know.

Our budget has not yet been set for hearings.

FRM:gh

Encl.

HARDY, MCEWEN, NEWMAN & HANNA
(FOUNDED AS CAKE & CAKE-1886)
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JEFFREY W. BOCK
DIANE M. HICKEY
RUSSELL R. KILKENNY
JOHN P. CONLEY
THOMAS J. KEMPER
DON G. CARTER
PAUL M. NELSON

RALPH H. CAKE
(1891-1973)
NICHOLAS JAUREGUY
(1896-1974)

December 29, 1980

Office of the President of the Senate
State Capitol
Salem, Oregon 97310

Office of the Speaker of the House
State Capitol
Salem, Oregon 97310

Gentlemen:

Enclosed herewith are new and amended Oregon Rules of Civil Procedure, amended ORS sections, and a list of ORS sections superseded which were promulgated by the Council on Court Procedures on December 13, 1980. This action was taken pursuant to ORS 1.735, and the material is submitted to the Legislative Assembly under that statute. The material includes the Council's response to the request of the Senate Judiciary Committee that the Council study and submit changes in rules relating to class actions and procedure for recovery of attorney fees. For your convenience, we are also submitting a distribution chart, prepared by our staff, which shows where rule provisions comparable to ORS sections superseded are located.

ORS 1.735 provides that these rules and amendments will go into effect ninety days after the close of the legislative session unless the Legislative Assembly, by statute, takes action to amend, repeal, or modify. On December 13, 1980, the Council adopted a resolution recommending that these rules and amendments, as modified or changed by the Legislative Assembly, take effect on January 1, 1982. This is a more definite date and would provide additional time for the bench and bar to become familiar with the rules.

The Council has met regularly since the last legislative session. A tentative draft of the proposed rules and amendments was released by the Council on September 6, 1980. Summaries of the proposed rules and amendments were published and furnished to all members of the bar. Approximately 300 copies

of the full text of the tentative draft were furnished to various bar and judicial groups and upon request to interested individuals. The Council conducted public hearings and heard testimony and comments relating to the proposed rules and amendments in Bend, on October 18, 1980; in Eugene, on November 1, 1980; and in Portland on September 27 and November 22, 1980. The enclosed submission reflects changes made in response to suggestions and comments received.

The submission includes a recommended statutory change to the ORCP (Section IV). The Council voted to accept a change to ORCP 7 which would reinstate service of summons upon the Department of Motor Vehicles in motor vehicle accident cases. The Council is requesting the legislature to make this change in the ORCP by statute since requiring the Department of Motor Vehicles to accept service of summonses and to keep the necessary records may not be within the Council's rulemaking power.

The Council also voted to recommend to the legislature that "the notice provisions in the Oregon Tort Claims Act be made similar to notice requirements in the Federal Tort Claims Act." Since this was a more general recommendation of a change in a substantive ORS section, no bill was prepared. The Council's recommendation is transmitted by this letter.

Yours very truly,

Donald W. McEwen
Chairman
Council on Court Procedures

DWM:lam

Enclosures

OREGON RULES OF CIVIL PROCEDURE

and

AMENDMENTS

promulgated by

COUNCIL ON COURT PROCEDURES

December 13, 1980

COUNCIL ON COURT PROCEDURES

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INTRODUCTION

The following rules, amendments, and ORS sections superseded have been promulgated by the Council on Court Procedures and submitted to the 1981 Legislative Assembly. Pursuant to ORS 1.735, they will become effective after the legislative session to the extent that the Legislative Assembly does not, by statute, modify the action of the Council.

This submission completes the main body of the Oregon Rules of Civil Procedure, which are the general rules of pleading and practice in civil actions in state courts. During this biennium, the Council has concentrated upon the areas of referees, submitted controversies, confession of judgments, judgments, defaults, taxation of attorney fees, costs and disbursements, vacation of judgments, and provisional remedies. The Council has also taken action to correct problems relating to ORCP 1-64 promulgated during the last biennium. The new rules (Rules 65-85) will replace most of ORS Chapters 26, 27, 29, 31, and 32 and portions of ORS Chapters 17, 18, 20, and 23.

The comment which follows most rules was prepared by Council staff. It represents staff interpretation of the rules and the intent of the Council, and is not officially adopted by the Council.

Subdivisions of rules are called sections and indicated by capital letters, e.g., A.; subdivisions of sections are called subsections and indicated by Arabic numerals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and indicated by lower case letters in parentheses, e.g., (a); and subdivisions

of paragraphs are called subparagraphs and indicated by lower case Roman numerals in parentheses, e.g., (iv).

SUMMARY OF CONTENTS

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Section 1.

PROMULGATED AND AMENDED OREGON RULES OF CIVIL PROCEDURE

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 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. If a 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, 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.

D.(1)(a) 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 the meeting date.

D.(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, after 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 by the court and be subjected to the consequences, penalties, and remedies provided in Rule 55 G.

D.(3) 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.

E.(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury

verdict. 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. The court after hearing may affirm or set aside the report, in whole or in part.

E.(3)(b) 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 65 A. was taken from Wisconsin Statutes 805.06(1). It contemplates a single referee and leaves the qualifications to the court, rather than requiring that the referee have the same qualifications as a juror.

Subsection 65 B.(1) does not appear in the federal rule and was taken from ORS 17.720. Any right to jury trial is waived by stipulating to a referee. ORS 17.725, covering the availability of a referee upon motion, was restricted to rather narrow categories. Subsection 65 B.(2) allows the court to appoint a referee upon motion in any type of case.

However, there are limitations:

(1) Reference upon motion is only available where there is no right to jury trial. The procedure is available in any non-jury case, whether formerly equitable or legal. Note, long account cases would still be referable upon motion; there is no right to jury trial in such cases. Tribou and McPhee v. Strowbridge, 7 Or. 156, 159 (1879).

(2) Reference cannot be used by the court as a routine matter. A showing of some exceptional condition is required. 65 B.(2). See LaBuy v. Howes Leather Co., 352 U.S. 249 (1957).

The provisions relating to order of reference, power of the referee, proceedings, and the form and filing of the report (65 C. through 65 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 ask the court for an order requiring the referee to act with more diligence. 65 D.(1)(b). Also, the referee cannot hold his or her report to force payment of fees. 65 A.(2).

Subsection 65 E.(3) is new but gives the same weight to the referee's findings of fact as did ORS 17.765.

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 agreed facts. 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 in a pending action 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 case 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 66 A.(3) was added. This is a clarification taken from N.Y. C.P.L.R. § 3222 (b)(4).

Subsection 66 B. was taken from Iowa Code Ann. § 678. The submission after suit differs from a stipulated judgment or 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. or G. 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 claims 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. 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) Default. 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) Demand for money damages. Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.

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

E. Judgment in action against partnership or unincorporated association; judgments in action against parties jointly indebted.

E.(1) Partnership and unincorporated association. 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.

E.(2) Joint obligations; effect of judgment. 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.

F. Judgment by stipulation.

F.(1) Availability of judgment by stipulation. 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 as part of the judgment according to the stipulation.

F.(2) Filing; assent in open court. The stipulation for judgment may be in a writing signed by the parties, their attorneys, or their authorized representatives, which writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G. Judgment on portion of claim exceeding counterclaim. The court may direct entry of a final judgment as to that portion of any claim which exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if such party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

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(2). See ORCP 14 A. for a definition of "motion."

Section 67 B. is identical to ORS 18.125(1). ORS 18.125(2) becomes ORCP 72 D.

The procedural merger of law and equity creates 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 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, 474, 236 P. 272, 256 P. 195 (1927)) if reasonable notice and opportunity to be heard are given (Leonard v. Bennett, 165 Or. 157, 174, 103 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 D. is ORS 18.110. See ORCP 61 D.

Section 67 E. 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. At common law, for partnership or association assets to be subject to a judgment, the judgment had to be against all partners or association members. ORS 18.135 allows an action to recover for a joint debt even though not all joint debtors are served. 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. 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. Section 67 E.(1) authorizes entry of a judgment against the entity which would bind the assets of the partnership or association. If a partner or member of an association is individually liable under the substantive law, an action against such individual could be joined with the action against the entity by naming the individual, as well as the entity, as a party and serving a separate summons and complaint directed to the individual. See ORCP 26 B. A judgment could then be entered against the individual parties so joined and served, as well as a judgment against the entity. Individual partners or members not so joined and served would not be subject to any individual judgment.

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

(a) avoids the necessity of difficult distinctions between joint and several obligations. The joint debtor statute did not apply to some joint partnership obligations because it was limited to actions based on contract. See 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.

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.

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 judgment because another joint obligor was served. From a due process standpoint, this is defensible for partnerships and associations because partners and association members can be viewed as agents for the partnership or association. That theory would usually not apply to other joint obligation situations.

Subsection 67 E.(2) addresses a problem not specifically covered under ORS 18.135. Under the common law theories of joint obligations, including those of partnerships and associations, there was a requirement that any judgment 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, 361, 136 P. 826 (1913); Wheatley v. Halvorson, 213 Or. 228, 249, 323 P.2d 49 (1958). 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, 67 E.(2) is not limited to partnerships or joint ventures, but covers any joint obligation.

ORS 18.135 also covered whether joint debtors could be or should be joined. 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 18.135 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. The attorney for a party may sign the stipulation. Confessions of judgment without action are covered by Rule 73.

Section 67 G. was previously included with default judgment provisions as ORS 18.080(2). The judgment involved is a form of special final judgment, not a default judgment. Note, under 67 A. this is defined as a final judgment.

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. "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, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs.

If, under a special provision of 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 costs authorized by ORS 20.070.

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 A. 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; or

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

C.(1)(c) Such items are granted by order, rather than entered as part of 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 a pleading filed 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. Attorney fees may be sought before the substantive right to recover such fees accrues. 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 (4) of this section, without proof being offered during the trial.

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

C.(4)(a) Entry by clerk. Attorney fees, costs, 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, costs,

and 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, if any, in accordance with Rule 9 C., with the court.

For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.

C.(4)(b) 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 the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. 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 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 (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 (4)(d) of this section.

C.(6) Avoidance of multiple collection of costs, disbursements, and attorney fees.

C.(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and

disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments.

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 considered 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 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain nonrecoverable because the rule refers to "necessary" deposition costs.

Section 68 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. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Subsection 68 C.(1) makes almost all claims for attorney fees subject to this rule. There are a large number of 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, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, 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. 68 C.(1)(c).

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.

Subsections 68 C.(4) and (5) are based upon the existing costs and disbursements procedure in ORS 20.210 through 20.230. Paragraph 68 C.(4)(a) changes the procedure and requires service of a statement claiming costs, as well as disbursements and attorney fees, prior to entry of such costs as part of a judgment. The specific claim for attorney fees is included in the bill of disbursements. Note that in cases involving a judgment against parties who are in default for failure to appear, service of the statement of costs, disbursements, and attorney fees is not required. However, a statement must be prepared and filed to provide a basis for assessment of these items. Also, no judgment for attorney fees can be entered in such default cases unless the court approves the amount of the fees. Such approval could be in the form of an approved fee schedule for default cases adopted by the court or approval for individual cases.

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 service of the statement of costs, disbursements, and attorney fees. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence and affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) replaces ORS 20.050 and also covers the entry of multiple final judgments in one case. Paragraph 68 C.(6)(a) covers the situation where multiple judgments are entered on separate claims pursuant to ORCP 67 B. In such case, the court is required to avoid multiple taxation of the same costs, disbursements, or attorney fees. Paragraph 68 C.(6)(b) allows entry of the same costs, disbursements, and attorney fees when there are multiple judgments against different parties on the same claim (in the same case or in separate cases), but makes clear that satisfaction of the costs, attorney fees, and disbursements portion of one such judgment satisfies all of the judgments.

RULE 69

DEFAULT

A. Entry of 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;

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;

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

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit;

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

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, or an agent, officer, director, or partner of a 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 hearing, 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

on behalf of the plaintiff, showing that affiant reasonably believes 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 69 B. regulates entry of judgment after default. Subsection 69 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 sentance 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, 266, 267, 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, 175, 29 P. 440 (1892).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 B.

RULE 70

FORM AND ENTRY OF JUDGMENT

A. Form. Every judgment shall be in writing plainly labeled as a judgment and set forth in a separate document. A default or stipulated judgment may have appended or subjoined thereto such affidavits, certificates, motions, stipulations, and exhibits as may be necessary or proper in support of the entry thereof. 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 Rule 69 B.(1), by the clerk.

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 notice of the date of entry of the judgment to the attorneys of record, if any, of each party who is not in default for failure to appear. If a party who is not in default for failure to appear does not have an attorney of record, such notice shall be mailed to the party. 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.(1), 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 68.

8.(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.

8.(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 prescribed 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 five days prior to the submission of judgment in accordance with Rule 9 B. The proposed form of judgment shall be filed 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. Section 70 A. defines "judgment" as a written document signed by the judge, or in the limited default area under 69 8.(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. This rule differs from the federal rule for default or stipulated judgments because supporting motions, affidavits, or stipulations may be combined with the 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, 286 P.2d 665, 288 P.2d 214, 288 P.2d 215 (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. Most provisions in ORS refer to entry, e.g., ORS 23.030, 18.080, 18.510, and 20.210. On several occasions, however, the Oregon Supreme Court has interpreted "entry" to mean filing. Charco, Inc. v. Cohn, supra, at 570; Highway Commission v. Fisch-Or, Inc., 241 Or. 412, 415, 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 acting 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 begins to run at entry. ORS 19.026. 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 mailing of a copy of the judgment by the clerk to all parties not in default. This requirement has presented substantial practical difficulty for clerks. This rule requires only notice of the date of entry to the attorney of record, or if there is no attorney, to the party.

Therefore, subsection 70 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. to change filing to entry. The reference to ORS 3.070 is necessary because the opinion in Charco, Inc. v. Cohn, supra, at 569, refers to that statute as a basis for interpreting "entry" to mean "filing."

Subsection 70 8.(3) is based on ORS 18.040 and 18.050. ORS 18.040 referred to entry "within the day," which was interpreted to mean 24 hours. Casner v. Hoskins, 64 Or. 254, 281, 128 P. 841, 130 P. 55 (1913).

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

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 on its own motion 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, a judgment may be corrected under this section only with leave of the apellate 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.; (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. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A. which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and

for reasons (a), (b), and (c) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B., 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, and subject to the time limitations of subsection (1) of this section, a motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court during the pendency of an appeal. Leave to file 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, 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, 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 71 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, 208-212, 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 actually a correction of the record.

Subsection 71 B.(1) uses the same motion procedure as ORS 18.160. Paragraph 8.(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 71 8.(1)(b) explicitly authorizes a motion based upon newly discovered evidence. Wells, Fargo & Co. v. Wall, 1 Or. 295, 297 (1860). Paragraph 71 B.(1)(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 71 8.(1)(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 71 8.(1)(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, 525, 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, 65-69, 40 P. 1089 (1895).

Subsection 71 8.(1) also explicitly requires that the party who makes the motion must demonstrate that a claim or defense is being asserted and that vacation of the judgment would not be a waste of time. That requirement existed for motions under ORS 18.160. Lowe v. Institutional Investors Trust, 270 Or. 814, 817, 529 P.2d 920 (1974), Washington County v. Clark, 276 Or. 33, 37, 554 P.2d 163 (1976). The requirement would not make sense for paragraphs 71 8.(1)(d) and (e). State ex rel Dial Press v. Sisemore, 263 Or. 460, 463, 502 P.2d 1365 (1972).

The one-year time limit of ORS 18.160 is retained for paragraphs 71 B.(1)(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 71 B.(1)(d). The most important change in the time limits is the reference to "filing," instead of granting the motion. Compliance with the time limit should depend upon the diligence of the moving party and not upon the court.

The provisions relating to service of the motion are not in the federal rule and were drafted to conform to Herrick v. Wallace, supra, at 526.

Under Oregon case law, during the pendency of an appeal the trial judge could not vacate a judgment for the reasons specified in section 71 B. Caveny v. Asheim, supra. Since there may be a one-year time limitation for filing the motion, it should be possible to file such a motion in the trial court during the one-year period to await disposition of the appeal; this is provided by subsection 71 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, 566-567, 48 P. 420 (1897).

Subsection 71 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, 609, 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, 540, 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. Any grounds for vacation which could be raised by such devices 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 trial court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 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. Stay or injunction in favor of public body. The federal government, any of its public corporations or commissions, the state, any of its public corporations or commissions, a county, a municipal corporation, or other similar public body shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment.

D. 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 19.040, 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 72 A. is taken from Utah Rule of Civil Procedure 62(a) and restates existing Oregon law. Helms Groover & Dubber Co. v. Copenhagen, 93 Or. 410, 416, 177 P. 935 (1919). The last sentence is not in the Utah rule but states the existing Oregon rule. State ex rel Peterkort v. Bohannon, 210 Or. 215, 217, 309 P.2d 800 (1957).

A bond is only necessary where the party against whom judgment is entered might not perform. Therefore, section 72 C. provides that when a public body would be responsible, no bond is needed. See ORS 22.010 and 20.140.

Section 72 D. is taken from ORS 18.125(2).

RULE 73

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

A.(1) For money due; where allowed. Judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

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

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered or a person authorized to bind such party, and verified by oath, as follows:

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

B.(2) It must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly and presently due;

B.(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment; and

B.(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

COMMENT

This rule retains confessions of judgment without action in a more limited form than ORS 26.110-26.130 but is consistent with existing Oregon practice and constitutional limitations.

Under subsection 73 A.(1), the use of the device is limited to amounts actually due. The confession of judgment should not be used generally as a security device. The limiting of the place of entry is adapted from Ill. Stat. Ann. Ch. 110, § 50(3) (1968).

Subsection 73 A.(2) prohibits use of the procedure in actions arising from consumer transactions. This is simply carrying forward prior legislative action which prohibited the procedure in

many consumer transactions. See ORS 83.670(1), 91.745(1)(b), and 697.733(3). The language used was adapted from Cal. Code of Civ. Proc. § 1132.

Section 73 B. is new and is intended to allow confessions of judgments based upon agreement by the debtor after the amounts claimed were due and not allow confessions of judgment based upon a cognovit agreement in the original agreement or instrument creating the debt. The cognovit situation is the one most open to abuse and where due process may require some hearing or notice before entry of the judgment. Testimony received by the Council indicated that confessions of judgments based upon cognovit agreements were not used in Oregon practice, but the confession of judgment was needed to encourage some settlements when a debtor acknowledges that a debt is due but cannot pay immediately.

Sections 73 C. and D. were adapted from N.Y. C.P.L.R. § 3218.

RULE 74 (RESERVED)

RULE 75 (RESERVED)

RULE 76 (RESERVED)

RULE 77 (RESERVED)

RULE 78

ORDER OR JUDGMENT FOR SPECIFIC ACTS

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.

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 33.150.

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 108.120.

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 personally upon the party required to show cause.

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

This rule was generally taken from existing ORS sections. Section A. is ORS 23.020(1). Section B. is ORS 23.020(2) with the specific reference to ORS chapter 33 added.

Section C. was taken from ORS 23.020(3). 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. See ORCP 67 A. and 68 C.(1)(c).

Section D. is new and authorizes a motion procedure for contempt, 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) Circumstances. Subject to the requirements of Rule 82 A.(1), a temporary restraining order or preliminary injunction may be allowed under this rule:

A.(1)(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.(1)(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 the provisions of Rule 83 F., G.(4), and I.(2) are applicable, whether or not provisional relief is ordered under those provisions.

A.(2) Time. A temporary restraining order or preliminary injunction under this rule may be allowed by the court, or judge thereof, at any time after commencement of the action and before judgment.

B. Temporary restraining order.

B.(1) Notice. A temporary restraining order may be

granted without written or oral notice to the adverse party or to such party's attorney only if:

B.(1)(a) It clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or the adverse party's attorney can be heard in opposition, and

B.(1)(b) The applicant or applicant's attorney submits an affidavit setting forth the efforts, if any, which have been made to notify defendant or defendant's attorney of the application, including attempts to provide notice by telephone, and the reasons supporting the claim that notice should not be required. The affidavit required in this paragraph shall not be required for orders granted by authority of paragraphs (c), (d), (e), (f), or (g) of subsection (1) of ORS 107.095.

B.(2) Contents of order; duration. 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 shall state why the order was granted without notice.

B.(2)(a) 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) The 10-day limit of paragraph (a) of this subsection does not apply to orders granted by authority of paragraphs (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 for dissolution or modification of such restraining order. 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 subsection 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 subsection (4) of this section, 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, the parties may stipulate that the trial of the action on the merits shall be advanced and consolidated with the hearing of the application. The parties may also stipulate that 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.

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 any of 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. Writ abolished. 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 process procedure of ORS chapter 29 (now ORCP 83).

The grounds spelled out in subsection A.(1) are identical to ORS 32.040, except for elimination of a specific reference to a restraining order where a defendant threatens to remove or dispose of property. 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, 598, 603 P.2d 1183 (1979). The procedure in this rule applies either to the situation where the ultimate remedy sought in the case is a permanent injunction and the plaintiff needs immediate relief, or where the injunction sought to effectuate the eventual judgment does not consist of restraining the defendant from disposing of property because such property could be applied to satisfy any judgment.

Subsection A.(2) was taken from ORS 32.020(1).

Sections B. and C. are adapted from Federal Rule 65(a) and (b). Paragraph B.(1)(b) was redrafted to make clear that a party seeking a temporary restraining order must try to inform the opposing party or such party's attorney of the application by telephone or any other possible means. 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).

Subsection C.(2) differs from the federal rule; consolidation with trial on the merits requires agreement of the parties.

Section D. is taken from Federal Rule 65 (d). Note, the bond requirements for preliminary injunctions and temporary restraining orders are found in ORCP 82.

Under section E. certain preliminary injunctions are not covered. Subsection E.(1) refers to 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 from 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.

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. Subject to the requirements of Rule 82 A.(2), a receiver may be appointed by a circuit court in the following cases:

B.(1) Provisionally to protect property. Provisionally, before judgment, on the application of any party, when such party'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) To effectuate judgment. After judgment to carry the same into effect.

B.(3) To dispose of property, to preserve during appeal, or when execution unsatisfied. 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) Creditor's action. 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) Attaching creditor. 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) Protect, preserve, or restrain property subject to execution. 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) Corporations and associations; when provided by statute. 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) Corporations and associations; to protect property or interest of stockholders or creditors. 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. Appointment of receivers; notice. 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. Form of order appointing receivers. Every order or judgment appointing a receiver:

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

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

D.(3) Shall, when a general receiver is appointed to liquidate and wind up affairs, set a time within which creditors and claimants shall file their claims or be barred; and

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

E. Notice to persons interested in receivership. A general receiver appointed to liquidate and wind up affairs shall under the direction of the court, give notice to the creditors of the corporation, of the partnership or association, or of the individual, in such manner as the court may direct, requiring such creditors to file their claims, duly verified, with the receiver, the

receiver's attorney, or the clerk of the court, within such time as the court directs.

F. Special notices.

F.(1) Required notice. Creditors filing claims with the receiver, all persons making contracts with the receiver, all persons having claims against the receiver, all persons having 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.

F.(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 such person desires special notice of any and all of the following named steps in the administration of said receivership:

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

F.(2)(b) Filing of accounts;

F.(2)(c) Filing of motions for removal or discharge of the receiver; and

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

A request shall state the post office address of the person, or such person's attorney.

F.(3) Form and service of notices. Any notice required by this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to the person to be notified, or such person's attorney, at their post office address, and deposited in the United States Post Office, with the postage thereon prepaid, at least five days (10 days for notices under sections C. and G. of this rule) before the hearing on any of the matters above described; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under sections C. and G. of this rule) before such hearing. 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.

G. Termination of receiverships. A receivership may be terminated only upon motion served with at least 10 days' notice upon all parties who have appeared in the proceeding. The court may require that a final account and report be filed and served, and may provide for the filing of written objections to such account within a specified time. At the hearing on the motion to terminate, the court shall hear all objections to the final account and shall take such evidence as is appropriate, and shall make such orders as are just concerning the termination of the receivership, 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 identical to ORS 31.010.

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 provisional process in Rule 83. See ORCP 81 A.(9). It was felt that a receivership was such a specialized provisional remedy that it should be kept separate. The bond requirements for a receivership appear in ORCP 82.

Notice to the defendant and hearing prior to a receivership are required by case law and are included in section C. Anderson v. Robinson, 63 Or. 228, 233, 126 P. 988, 127 P. 546 (1912); Stacy v. McNicholas, 76 Or. 167, 183, 144 P. 96, 148 P. 67 (1915). There is no provision for an ex parte receivership order. In an emergency situation, a temporary restraining order would be available under Rule 79 to protect a party until a receivership could be established.

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

Subsection F.(1) is required by Pacific Lumber Co. v. Prescott, 40 Or. 374, 384, 67 P.2d 207 (1902). Subsections F.(2) and (3) were taken from Washington Superior Court Rules 66 D. and E. Section G. 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 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; ADVERSE CLAIMANTS

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 becomes obligated 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 prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

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 under Rule 83, preliminary injunctions under Rule 83, 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 under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

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 a constable of a district or justice court.

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 cause to be promptly served on the defendant, in the manner provided in Rule 9 B., a notice substantially in 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 Chevrolet, 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.

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 statement:

> SOME KINDS OF PROPERTY CANNOT BE TAKEN FROM YOU IN A LEGAL PROCEEDING. THE PROPERTY DESCRIBED IN THIS NOTICE MAY OR MAY NOT BE THE KIND OF PROPERTY THAT CANNOT BE TAKEN. IF YOUR PROPERTY IS PROTECTED, YOU MUST TAKE ACTION IMMEDIATELY TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN. IF YOU DO NOT ACT, YOU WILL LOSE THE PROPERTY, WHETHER OR NOT IT IS PROTECTED. YOU SHOULD GET LEGAL ADVICE TO DETERMINE IF THE PROPERTY DESCRIBED IN THIS NOTICE CAN BE TAKEN IN THIS PROCEEDING AND HOW TO TAKE THE REQUIRED ACTION TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service of notice upon defendant shall not be required.

C. Service of notices; proof of service.

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

C.(2) Proof of service. Copies of all notices or orders to show cause 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 subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

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 relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process 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), (7), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.020(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as does ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified. The most important change is in B.(2) where the requirement that notice to individuals contain a list of exemptions, an explanation of the exemption procedure, and a reference to the availability of forms is eliminated. The Council does not wish to discourage exemption claims, but felt the notice presently required for attachment was incomprehensible and constituted a procedural trap.

Sections C. and D. are new. Section D. is designed to provide summary procedure for release of attachment which does not infringe 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 action 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 entitled to relief. See ORCP 47. The seldom used sheriff's jury in ORS 29.210 is eliminated.

SECURITY; BONDS AND UNDERTAKINGS;
JUSTIFICATION OF SURETIES

A. Security required.

A.(1) Restraining orders; preliminary injunctions.

A.(1)(a) 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.(1)(b) No security will be required under this subsection where:

A.(1)(b)(i) A restraining order or preliminary injunction is sought to protect a person from violent or threatening behavior; or

A.(1)(b)(ii) 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.

A.(2) 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.(3) Attachment or claim and delivery.

A.(3)(a) Before any property is attached under Rule 84 or taken by the sheriff under Rule 85, the plaintiff must file with

the clerk a surety bond, in an amount fixed by the court, 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.(3)(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.(3)(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 the claim for which probable cause exists is that defendant acquired the property contrary to law.

A.(4) 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 damaged by such provisional process.

A.(5) 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.(6) 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 an ex parte showing of good cause 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 the surety's 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 subsection 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 stating 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 A. 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 given 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 party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is given objects to the sufficiency of such sureties. If the party for whose benefit the bond is given 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. of this rule 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 amended, substitute, or additional bond as the circumstances will 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

The provision allowing release of property from attachment by posting a bond is found in Rule 84 F. This rule has most of the bond requirements for provisional remedies in ORCP 79-85. See ORS 22.010, which provides that bonds are not required for certain parties. This rule also contains some general rules on the form of security when required and general rules for justification of sureties.

Subsections A.(1) through A.(4) provide when bonds will be required for various provisional remedies. Paragraph A.(1)(a) was taken from Federal Rule 65 (c). The exceptions in A.(1)(b) are those contained in ORS 32.020(3). Note, this bond requirement would apply to injunctions and restraining orders both under ORCP 79 and 83. Subsection A.(2) is adapted from ORS 31.030. Paragraph A.(3)(a) is taken from ORS 29.130, but the court sets the amount of the bond. Paragraph A.(3)(b) is new. The bond requirement also applies to claim and delivery as well as attachment. The existing provisions for claim and delivery do not require a bond. Paragraph A.(3)(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 subparagraph A.(1)(b)(ii). 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.(4) is new and makes clear that a bond is required for all provisional process. The definition of provisional process is found in ORCP 81 A.(9).

Subsections A.(5) and A.(6) apply to all bonds required by the ORCP, not simply to those required by subsections A.(1) through A.(4) of this rule. Subsection A.(5) is new. Subsection A.(6) was adapted from ORS 32.020(2). Note, ORS chapter 22 allows deposit in lieu of bond without court order in some circumstances and provides that the state, cities, or counties are not required to furnish bonds.

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 725 (1961). Sections C. through G. were adapted from Alaska Rules of Civil Procedure 80 and Michigan General Court Rule 763.

RULE 83

PROVISIONAL PROCESS

A. Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, 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) If the provisional process sought 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;

A.(3)(b) If the provisional process sought 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, if plaintiff relies upon 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 the 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. Provisional process authorized by Rule 85 may issue in consumer transactions.

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

C.(1) The court shall consider the affidavit or petition filed under section A. of this rule 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 D. or 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. of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. Issuance of provisional process where damage to property threatened. Subject to section B. of this rule, 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. of this rule, 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, and 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. A restraining order under this section does not create a lien.

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

G.(1) Subject to section B. of this rule, 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 place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

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.

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, and if Rule 82 A. has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F. of this rule. Such order shall conform to the requirements of Rule 79 D. Any restraining order issued under this subsection does not create a lien.

H. Waiver; order without hearing. If after service of the order issued under subsection G.(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon 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 8.

of this rule 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. of this rule, if the court on hearing on a show cause order issued under section G. of this rule 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. of this rule, if the court on hearing on a show cause order issued under section G. of this rule finds that there is probable cause for sustaining the validity 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 is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.

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.

The first paragraph of section A. was rewritten slightly to make clear that the showing of the necessary information for section A. can either be in plaintiff's sworn petition or in separate affidavits submitted to support the petition. For clarity, paragraph A.(3)(a) was added. 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 last sentence was added to B. for clarity. The existing language "to effect attachment" creates the exception for claim and delivery. The language of C.(2) was also 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. See A.(8).

The cross reference to the security requirements of Rule 82 and form of order in Rule 79 D. were added to sections F., G., and I.

The most important change in the provisions relating to restraining orders was to specify that no lien attaches to property subject to a restraining order. A party who wishes to secure a lien, as opposed to merely restraining disposition of the property, should use other provisional process. The last sentence of I.(1) is also new.

Note, pursuant to Rule 81 C.(1), personal service of the show cause order is not absolutely required. The order may be served in any manner in which a summons may be served.

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 defendant.

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) of this section, 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 circuit 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; and

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

C. Attachment by claim of lien.

C.(1) Property subject to claim of lien. When attachment is authorized, the plaintiff may attach the following property by filing a claim of lien:

C.(1)(a) Defendant's real property; or

C.(1)(b) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C.(2) Form of claim; filing.

C.(2)(a) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(2)(a)(i) Identify the action by names of parties, court, docket number, and judgment demanded;

C.(2)(a)(ii) Describe the particular property attached in a manner sufficient to identify it;

C.(2)(a)(iii) Have a certified copy of the order authorizing the claim of lien attached to the claim of lien.

C.(2)(a)(iv) State that an attachment lien is claimed on the property.

C.(2)(b) Filing.

C.(2)(b)(i) A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located. The county clerk shall certify upon every claim of lien so filed the time when it was received. Upon receiving the claim of lien, the county clerk shall immediately file such claim of lien in the county clerk's office, and record it in a book to be kept for that purpose. When the claim of lien is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the claim of lien. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the claim of lien is recorded a minute of the discharge.

C.(2)(b)(ii) A claim of attachment lien in personal property shall be filed with the clerk of the court that authorized the claim of lien and in the same office or offices in which a financing statement would be required to be filed. A lien arises in the property described in the claim upon a filing of the claim of lien.

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall 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 all the property of the defendant within the county not exempt from execution, 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. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) 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:

D.(2)(a) Personal property not in possession of third person. 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 the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's

lien shall attach when the property is taken into the sheriff's custody.

D.(2)(b) Other personal property. 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. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this paragraph.

D.(2)(c) Savings and loan association. For purposes of this paragraph, 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.

D.(2)(d) Form of notice. The notice referred to in paragraph (b) of this subsection 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. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

D.(2)(f) Interest in estate. The interest of a distributee in an estate may be attached as provided in ORS 29.175. A plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in that section.

D.(3) Procedure after garnishment.

D.(3)(a) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph (b) of subsection (2) of this section, 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 plaintiff 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.

D.(3)(b) 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 paragraph (b) of subsection (2) of this section, for the purpose of attaching any property mentioned therein, such person or officer shall furnish the sheriff with a certificate, designating the amount and description of any property in the possession of the garnishee 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. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, such person or officer 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.

D.(3)(c) Contents of order; designation of parties. The order provided for in paragraph (b) of this subsection shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

D.(3)(d) Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in paragraph (b) of this subsection, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by the garnishee to the defendant, and disobedience to such order may be punished as a contempt.

D.(3)(e) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in paragraph (b) of this subsection, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in paragraph (b) of this subsection.

D.(3)(f) Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, the garnishee or officer shall return the allegations and interrogatories of the plaintiff to the court or judge, with the written answer of the garnishee or officer, unless for good cause shown a further time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

D.(3)(g) Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel the garnishee or officer to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

D.(3)(h) Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend the answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a

part of the answer within such time as may be prescribed or allowed. If the answer is not excepted or replied to within the time prescribed or allowed, it shall be taken to be true and sufficient.

D.(3)(i) Trial. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

D.(3)(j) Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in paragraph (b) of this subsection, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

D.(3)(k) Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from the garnishee to the defendant is not yet due, execution shall not issue until the debt is due.

D.(3)(1) Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the face thereof by attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or property subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of garnishee's return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received

without any obligation on the part of the garnishee to inquire into the authority therefor. The authority vested by this section in the clerk of the court to issue releases is not exclusive but is in addition to the authority of the court having jurisdiction of the cause to release, discharge, or dissolve attachments and garnishments.

D.(4) Return of writ; inventory. When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with the sheriff's 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.

D.(5) 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 double the amount of the estimated value of the property to be seized.

E. Disposition of attached property after judgment.

E.(1) Judgment for plaintiff. If judgment is recovered by the plaintiff against the defendant, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment, the court shall order the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by the sheriff or the proceeds thereof, upon the execution, and if any such property or proceeds remain after satisfying such execution, the sheriff shall, upon demand, deliver the same to the defendant; or if the property attached has been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section F. of this rule, the court shall upon giving judgment against the defendant also give judgment in like manner and with like effect against the surety in such undertaking.

E.(2) Judgment not for plaintiff. If judgment is not recovered by the plaintiff, all the property attached, or the proceeds thereof, or the undertaking therefor, shall be returned to the defendant upon service upon the sheriff of a certified copy of the order discharging the attachment.

F. Redelivery of attached property.

F.(1) Order and bond. If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof upon a court order authorizing such

redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least five days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond.

F.(2) Defense of surety. 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.

COMMENT

This rule is primarily based upon the existing statutory provisions of ORS 29.110-29.410.

Subsection A.(1) indicates that attachment is provisional process subject to Rule 83. Subsection A.(2) is identical to ORS 29.110. Subsection A.(3) is taken from ORS 29.410.

Section B. is a clarification of ORS 29.140. It does not change the property that may be subject to attachment.

The claim of lien in section C. is a new procedure. It recognizes that no writ should be required to establish an attachment lien on real property. It also provides a simple way to establish a lien on personal property subject to recording of a security interest. In either case, plaintiff cannot abuse the procedure because it is only available after the order for provisional process authorizes a claim of lien for specific property.

Section D. is taken from ORS 29.160-29.200, 29.270-29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 23.170 and 23.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

Section E. is ORS 29.380 and 29.390. Section F. is new and replaces ORS 29.220-29.250. It clarifies the procedure for redelivery bond.

ORS 29.120 and 29.260 are eliminated as inconsistent with Rule 83. ORS 29.175 would remain as a statute. ORS 29.178 is amended and remains as a statute.

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 deliver 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. 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

Sections A. through D. are almost identical to existing ORS 29.080-29.095.

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

Section E. is 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 and appear in the action.

PERSONAL JURISDICTION

M. Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in sections [B.] A. through L. would have furnished a basis for jurisdiction over the deceased had the deceased been living. It is immaterial whether the action is commenced during the lifetime of the deceased.

COMMENT

The situation covered by section M. could arise where jurisdiction is based upon section A. of this rule.

D.(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving a true copy of the summons and complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules, office service shall be complete upon such mailing.

D.(2)(d) Service by mail. Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete [when the registered or certified mail is delivered and the return receipt signed or when acceptance is refused] three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.

D.(3)(b) [Corporations; limited partnerships; unincorporated associations subject to suit under common name] Corporations and limited partnerships. 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 office of the registered agent or 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 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.

D.(3)(g) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

[D.(6)(g) Completion of service. For the purpose of computing any period of time prescribed or allowed by these rules service by publication shall be complete at the date of the last publication.]

COMMENT

The amendment to ORCP 7 D.(2)(c) provides more flexibility for mailing of summons after office service. Office service may be used when defendant's home address cannot be determined.

The amendment to ORCP 7 D.(2)(d) clarifies when the period for default begins to run after service of summons by mail.

ORCP 7 D.(3)(b)(ii) is amended to provide more flexibility for mail service.

The new provisions of ORCP 7 D.(3)(e) and (f) are designed to specify a method of serving summons on a partnership or association consistent with ORCP 26 B. and 67 E. The new ORCP 7 D.(3)(g) provides a special agency service for defendants engaged in maritime commerce.

The Council has also recommended that the legislature act to amend ORCP 7 D.(4)(a). See recommended Bill in Section IV of this report. The amendment to ORCP 7 D.(4)(a) reinstates service on the Department of Motor Vehicles. The amendment would provide a record of service and clarify when the time for default begins to run. The Council did not itself promulgate the amendment because of uncertainty whether Council rulemaking power was sufficient to require that the Department of Motor Vehicles accept service of summonses and keep the necessary records. The amendment 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 amendment 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.

Paragraph ORCP 7 D.(6)(g) was removed because of inconsistency with subsection C.(2).

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing. Service of any notice or other paper to bring a party into contemot may only be upon such party personally.

COMMENT

The added language of section 8. formerly appeared in ORS 16.810 and was inadvertently omitted from this rule in 1979.

RULE 10

TIME

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

B. Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending before it.

C. Additional time after service by mail. Except for service of summons, [w]henever a party has the right or is required to do some act or take some proceedings within a

prescribed period after the service of a notice or other paper upon such party and the notice or paper is served by mail, 3 days shall be added to the prescribed period.

COMMENT

The Council added the provision to Rule 10 C. to avoid application of the additional time to service of summons. The service of summons by mail under ORCP 7 D.(2)(d) (as amended) has a built-in extension of time of at least 3 days.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

F. Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G.[(2)] (3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

COMMENT

When Rule 21 G. was revised by the 1979 Legislature, the cross reference in Rule 21 F. was not changed.

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.

8. Amendments to conform to the evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended [and shall do so freely] when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

[D. Amendment or pleading over after motion. When a motion to dismiss or a motion to strike an entire pleading or a motion for a judgment on the pleadings under Rule 21 is allowed, the court may, upon such terms as may be proper, allow the party to file an amended pleading. If an amended

pleading is filed, the party filing the motion 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. If any motion is disallowed, the party filing the motion shall file a responsive pleading if any is required. 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. Amended pleading where part of pleading stricken. In all cases where part of a pleading is ordered stricken, the court, in its discretion, may require that an amended pleading be filed omitting the matter ordered stricken. If an amended pleading is filed, the party filing the motion to strike does not waive any defense or objection asserted against the original pleading by filing a responsive pleading or failing to reassert the defense or objection. By complying with the court's order, the party filing such amended pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling upon the motion to strike.]

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

[G.] E. Supplemental pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading it shall so order, specifying the time therefor.

COMMENT

The wording of section 23 B. relating to amendments after the commencement of trial was changed slightly to give the trial judge more discretion in determining whether an amendment should be allowed under all of the circumstances. Some trial judges asserted that with the language that was removed, they would always have to allow amendment, no matter what circumstances were involved.

Sections D. and E. are replaced by ORCP 25.

RULE 25

EFFECT OF PROCEEDING AFTER MOTION OR AMENDMENT

A. 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 amend the pleading. In all cases where part of a pleading is ordered stricken, the pleading shall be amended in accordance with Rule 23 D. By amending a pleading pursuant to this section, the party amending such pleading shall not be deemed thereby to have waived the right to challenge the correctness of the court's ruling.

B. Amendment of pleading; objections to amended pleading not waived. If a pleading is amended, whether pursuant to sections A. or B. of Rule 23 or section A. of this rule or pursuant to other rule or statute, a party who has filed and received a court's ruling on any motion directed to the preceding pleading does not waive any defenses or objections asserted in such motion by failing to reassert them against the amended pleading.

C. Denial of motion; non-waiver by filing responsive pleading. If an objection or defense is raised by motion, and the motion is denied, the party filing the motion does not waive the objection or defense by filing a responsive pleading or by failing to re-assert the objection or defense in the responsive pleading or by otherwise proceeding with the prosecution or defense of the action.

COMMENT

Sections 25 A. and B. of this new rule include the provisions formerly found in ORCP 23 D. and E. The language used in sections D. and E. was not clear. Section 25 C. is new and was not clearly covered by the ORCP. Although sections 25 A. and B. do relate to some extent to amended pleading, section 25 C. does not. All three subsections basically deal with the effect of proceeding after motion or amendment, and it was therefore deemed advisable to put them together in a totally separate rule. See Moore v. West Lawn Memorial Park, Inc., 266 Or. 244, 246-248, 512 P. 2d 1344 (1973).

RULE 26

REAL PARTY IN INTEREST; CAPACITY OF PARTNERSHIPS AND ASSOCIATIONS

A. Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, conservator, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that party's own name without joining the party for whose benefit the action is brought; and when a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of the state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. 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.

COMMENT

The reference to conservator was added to section 26 A. for clarity.

Section 26 B. provides the basis for suit of a partnership in its own name. This provision was taken from Cal. Code of Civil Procedure § 388. See ORCP 67 E.

[A.(5) In an action for damages under subsection (3) of section B. of this rule, the representative parties have complied with the prelitigation notice provisions of section I. of this rule.]

B.(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Common questions of law or fact shall not be deemed to predominate over questions affecting only individual members if the court finds it likely that final determination of the action will require separate adjudications of the claims of numerous members of the class, unless the separate adjudications relate primarily to the calculation of damages. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action[, including the feasibility of giving adequate notice]; (e) [the likelihood that the damages to be recovered by individual

class members, if judgment for the class is entered, are so minimal as not to warrant the intervention of the court;] whether or not the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class; and (f) after a preliminary hearing or otherwise, the determination by the court that the probability of sustaining the claim or defense is minimal.

[C. Court discretion. In an action commenced pursuant to subsection (3) of section B. of this rule, the court shall consider whether justice in the action would be more efficiently served by maintenance of the action in lieu thereof as a class action pursuant to subsection (2) of section B. of this rule.]

[D. Court order to determine maintenance of class actions.]

C. Determination by order whether class action to be maintained.

C.(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained and, in action pursuant to subsection (3) of section B. of this rule, the court shall find the facts specially and state separately its conclusions thereon. An order under this section may be conditional, and may be altered or amended before the decision on the merits.

C.(2) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or

administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the court may postpone a determination under subsection (1) of this section until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.

[E.] D. Dismissal or compromise of class actions; court approval required; when notice required. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs, except that if the dismissal is to be without prejudice or with prejudice against the class representative only, then such dismissal may be ordered without notice if there is a showing that no compensation in any form has passed directly or indirectly from the party opposing the class to the class representative or to the class representative's attorney and that no promise to give any such compensation has been made. If the statute of limitations has run or may run against the claim of any class member, the court may require appropriate notice.

[F.] E. Court authority over conduct of class actions. In the conduct of actions to which this rule applies, the court may make appropriate orders which may be altered or amended as may be desirable:

[F.] E.(1) Determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or agrument;

[F.] E.(2) Requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

[F.] E.(3) Imposing conditions on the representative parties or on intervenors;

[F.] E.(4) Requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

[F.] E.(5) Dealing with similar procedural matters.

[G. Notice required; content; statements of class members required; form; content; amount of damages; effect of failure to file required statement; stay of action in certain cases. In any class action maintained under subsection (3) of section B. of this rule:

G.(1) The court shall direct to the members of the class the best notice practicable under the circumstances. Individual notice shall be given to all members who can be identified through reasonable effort. The notice shall advise each member that:

G.(1)(a) The court will exclude such member from the class if such member so requests by a specified date;

G.(1)(b) The judgment, whether favorable or not, will include all members who do not request exclusion; and

G.(1)(c) Any member who does not request exclusion may, if such member desires, enter an appearance through such member's counsel.]

F. Notice required; content; statements of class members may be required; form; content; effect of failure to file required statement.

F.(1)(a) Following certification, in any class action maintained under subsection (3) of section B. of this rule, the court by order, after hearing, shall direct the giving of notice to the class.

F.(1)(b) The notice, based on the certification order and any amendment of the order, shall include:

F.(1)(b)(i) A general description of the action, including the relief sought, and the names and addresses of the representative parties;

F.(1)(b)(ii) A statement that the court will exclude any member of the class if such member so requests by a specified date;

F.(1)(b)(iii) A description of possible financial consequences on the class;

F.(1)(b)(iv) A general description of any counterclaim being asserted by or against the class, including the relief sought;

F.(1)(b)(v) A statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

F.(1)(b)(vi) A statement that any member of the class may enter an appearance either personally or through counsel;

F.(1)(b)(vii) An address to which inquiries may be directed; and

F.(1)(b)(viii) Other information the court deems appropriate.

F.(1)(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

F.(1)(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed $100 shall be given personal or mailed notice if such class member's identity and whereabouts can be ascertained by the exercise of reasonable diligence.

F.(1)(e) For members of the class not given personal or mailed notice, the court shall provide a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. The means of notice may include notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups, or any other means reasonably calculated to provide notice to class members of the pendency of the action.

F.(1)(f) The court may order a defendant who has a mailing list of class members to cooperate with the representative parties in notifying the class members and may also direct that notice be included with a regular mailing by defendant to the class members.

[G.] F.(2) Prior to the final entry of a judgment against a defendant the court [shall] may request members of the class to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, require information regarding the nature of the loss, injury, claim, transactional relationship, or damage. The statement shall be designed to meet the ends of justice. In determining the form of the statement, the court shall consider the nature of the acts of the defendant, the amount of knowledge a class member would have about the extent of such member's damages, the nature of the class including the probable degree of sophistication of its members, and the availability of relevant information from sources other than the individual class members. [The amount of damages assessed against the defendant shall not exceed the total amount of damages determined to be allowable by the court for each individual class member, assessable court costs, and an award of attorney fees, if any, as determined by the court.]

[G.] F.(3) If the court requires class members to file a statement requesting affirmative relief, [F]failure of a class

member to file a statement required by the court [will] may be grounds for the entry of judgment dismissing such class member's claim without prejudice to the right to maintain an individual, but not a class, action for such claim.

[G.(4) Where a party has relied upon a statute or law which another party seeks to have declared invalid, or where a party has in good faith relied upon any legislative, judicial, or administrative interpretation or regulation which would necessarily have to be voided or held inapplicable if another party is to prevail in the class action, the action shall be stayed until the court has made a determination as to the validity or applicability of the statute, law, interpretation, or regulation.]

F.(4) Unless the court orders otherwise, the plaintiffs shall bear the expense of notification. The court may, if justice requires, require that the defendant bear the expense of notification or may allocate the costs of notice among the parties if the court determines there is a reasonable likelihood that the plaintiffs may prevail. The court may hold a preliminary hearing to determine how the costs of notice should be apportioned.

[H.] G. Commencement or maintenance of class actions regarding particular issues; division of class; subclasses. When appropriate:

[H.] G.(1) An action may be brought or maintained as a class action with respect to particular issues; or

[H.] G.(2) A class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

[I. Notice and demand required prior to commencement of action for damages.

I.(1) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of subsection (3) of section B. of this rule, the potential plaintiffs' class representative shall:

I.(1)(a) Notify the potential defendant of the particular alleged cause of action; and

I.(1)(b) Demand that such person correct or rectify the alleged wrong.

I.(2) Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within this state, or, if neither will effect actual notice, the office of the Secretary of State.]

[J.] H. Limitation on maintenance of class actions for damages. No action for damages may be maintained under the provisions of sections A. [, B., and C.] and B. of this rule upon a showing by a defendant that all of the following exist:

[J.] H.(1) All potential class members similarly situated have been identified, or a reasonable effort to identify such

other people has been made;

[J.] H.(2) All potential class members so identified have been notified that upon their request the defendant will make the appropriate compensation, correction, or remedy of the alleged wrong;

[J.] H.(3) Such compensation, correction, or remedy has been, or, in a reasonable time, will be, given; and

[J.] H.(4) Such person has ceased from engaging in, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage in such methods, acts, or practices alleged to be violative of the rights of potential class members.

[K. Application of sections I. and J. of this rule to actions for equitable relief; amendment of complaints for equitable relief to request damages permitted.]

I. Amendment of complaints for equitable relief to request damages permitted. [An action for equitable relief brought under sections A., B., and C. of this rule may be commenced without compliance with the provisions of section I. of this rule.] Not less than 30 days after the commencement of an action for equitable relief[, and after compliance with the provisions of section I. of this rule,] the class representative's complaint may be amended without leave of court to include a request for damages. The provisions of section [J.] H. of this rule shall be applicable if the complaint for injunctive relief is amended to request damages.

[L.] J. Limitation on maintenance of class actions for recovery of certain statutory penalties. A class action may not be maintained for the recovery of statutory minimum penalties for any class member as provided in ORS 646.638 or 15 U.S.C. 1640(a) or any other similar statute.

[M.] K. Coordination of pending class actions sharing common question of law or fact.

[M.] K.(1)(a) When class actions sharing a common question of fact or law are pending in different courts, the presiding judge of any such court, upon motion of any party or on the court's own initiative, may request the Supreme Court to assign a Circuit Court, Court of Appeals, or Supreme Court judge to determine whether coordination of the actions is appropriate, and a judge shall be so assigned to make that determination.

[M.] K.(1)(b) Coordination of class actions sharing a common question of fact or law is appropriate if one judge hearing all of the actions for all purposes in a selected site or sites will promote the ends of justice taking into account whether the common question of fact or law is predominating and significant to the litigation; the convenience of parties, witnesses, and counsel; the relative development of the actions and the work product of counsel; the efficient utilization of judicial facilities and personnel; the calendar of the courts; the disadvantages of duplicative and inconsistent rulings, orders, or judgments; and the likelihood of settlement of the actions without further litigation should coordination be denied.

[M.] K.(2) If the assigned judge determines that coordination is appropriate, such judge shall order the actions coordinated, report that fact to the Chief Justice of the Supreme Court, and the Chief Justice shall assign a judge to hear and determine the actions in the site or sites the Chief Justice deems appropriate.

[M.] K.(3) The judge of any court in which there is pending an action sharing a common question of fact or law with coordinated actions, upon motion of any party or on the court's own initiative, may request the judge assigned to hear the coordinated action for an order coordinating such actions. Coordination of the action pending before the judge so requesting shall be determined under the standards specified in subsection (1) of this section.

[M.] K.(4) Pending any determination of whether coordination is appropriate, the judge assigned to make the determination may stay any action being considered for, or affecting any action being considered for, coordination.

[M.] K.(5) Notwithstanding any other provision of law, the Supreme Court shall provide by rule the practice and procedure for coordination of class actions in convenient courts, including provision for giving notice and presenting evidence.

[N.] L. Judgment; inclusion of class members; description[; names]. The judgment in an action maintained as a class action under subsections (1) or (2) of section B. of this rule, whether or not favorable to the class, shall include and

describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (3) of section B. of this rule, whether or not favorable to the class, shall include and specify [by name] those to whom the notice provided in section [G.] F. of this rule was directed, and who have not requested exclusion and whom the court finds to be members of the class [, and the judgment shall state the amount to be recovered by each member].

[O. Attorney fees. Any award of attorney fees against the party opposing the class and any fee charged class members shall be reasonable and shall be set by the court.]

M. Attorney fees, costs, disbursements, and litigation expenses.

M.(1)(a) Attorney fees for representing a class are subject to control of the court.

M.(1)(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney fees, costs, or disbursements from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those amounts. If a plaintiff is entitled to attorney fees, costs, or disbursements from a defendant class, the court may apportion the fees, costs, or disbursements among the members of the class.

M.(1)(c) If the prevailing class recovers a judgment that can be divided for the purpose, the court may order reasonable attorney fees and litigation expenses of the class to be paid from the recovery.

M.(1)(d) The court may order the adverse party to pay to the prevailing class its reasonable attorney fees and litigation expenses if permitted by law in similar cases not involving a class.

M.(1)(e) In determining the amount of attorney fees for a prevailing class the court shall consider the following factors:

M.(1)(e)(i) The time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

K.(1)(e)(ii) Results achieved and benefits conferred upon the class;

M.(1)(e)(iii) The magnitude, complexity, and uniqueness of the litigation;

M.(1)(e)(iv) The contingent nature of success; and

M.(1)(e)(v) Appropriate criteria in DR 2-106 of the Oregon Code of Professional Responsibility.

M.(2) Before a hearing under section C. of this rule or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately:

M.(2)(a) A statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts;

M.(2)(b) A copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangement or fees and

M.(2)(c) A copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with the law firm of the representative parties' attorney. This statement shall be supplemented promptly if additional arrangements are made.

N. Statute of Limitations. The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

N.(1) Upon filing of an election of exclusion by such class member;

N.(2) Upon entry of an order of certification, or of an amendment thereof, eliminating the class member from the class;

N.(3) Except as to representative parties, upon entry of an order under section C. of this rule refusing to certify the class as a class action; and

N.(4) Upon dismissal of the action without an adjudication on the merits.

COMMENT

Report of Class Action Subcommittee

At the request of the Council on Court Procedures and pursuant to a direction by the Senate Judiciary Committee of the 1979 Legislative Assembly, this subcommittee has conducted a detailed review of ORCP 32 relating to class actions. The subcommittee has compared the Oregon rule to Federal Rule 23, reviewed current legislative trends in other states and proposals for federal statutes relating to class action, and reviewed the extensive national literature on class actions. The subcommittee has also considered Oregon cases interpreting ORCP 32 and the legislative history of that rule. The Council conducted a public hearing relating to class actions at which the testimony of 10 persons was received.

The subcommittee now recommends that Rule 32 be amended to incorporate the proposed revisions which are attached. The proposed revisions are:

(1) Elimination of prelitigation notice requirements. The subcommittee recommends that section 32 I. be eliminated, with conforming elimination of subsection 32 A.(5) and modifications to 32 J. and K. This eliminates the requirement of notice 30 days prior to the commencement of class actions for damages. The subcommittee felt the requirement served no useful purpose and contained potential for abuse.

(2) Revision of factors to be considered in deciding predominance of common questions of law or fact. The subcommittee recommends that paragraphs (d) and (e) of subsection 32 B.(3) be changed to eliminate the reference to notice in paragraph (d) (because of the proposed change in 32 G.) and by substitution of paragraph 3(a)(13) of the Uniform Class Actions Act for paragraph B.(3)(e) of existing Oregon Rule 32. (The Uniform Act language more clearly expresses the idea incorporated in paragraph B.(3)(e).)

(3) Elimination of subsection 32 C. The subcommittee felt this provision was of very limited utility and confusing. Anything covered by this subsection could already be considered under B.(3).

(4) Clarification of provision relating to postponement of certification decision to determine legal question. Subsection G.(4) of the existing rule refers to a "stay" of the class action if the outcome turns upon a point of law and the court wishes to consider the legal question first. Technically, what is involved is not a "stay" but a postponement of the certification hearing or decision. The substance of subsection 32 G.(4) was moved up to subsection C.(2).

(5) Elimination of requirement of individual notice in all cases. The revision would replace the existing requirement of

subsection 32 G.(1) with the language of section 7 of the Uniform Class Actions Act (32 F.(1) of revision). The new language only requires individual notice for claims over $100 and has a number of provisions encouraging flexibility in the notice procedure. The subcommittee felt that an absolute requirement of individual notice was too rigid and imposed an unnecessary impediment to maintenance of class actions involving a large class and small individual claims. The subcommittee drafted revised paragraph F.(1)(f).

(6) Elimination of mandatory requirement of claim by class members prior to judgment. The committee changed the absolute requirement that class members submit claim forms in damage cases as a basis for judgment. The language of existing 32 G.(2) was changed from "the court shall" to "the court may" require such forms and by eliminating the last sentence (32 F.(2) in revision). Conforming changes were also made in 32 G.(3) and 32 N. (32 F.(3) and 32 L. in revision). The subcommittee felt that the requirement of a claim form in every damage case was too rigid and that a judgment listing all class members and individual damages in every case involves an extremely complex and expensive form of judgment for no good reason. The subcommittee took no position regarding award of aggregate damages not identifiable to individual class members (fluid class recovery). The subcommittee felt this was an area better determined by the courts or legislature in the context of remedies and proof of damages.

(7) Preliminary hearing and allocation of damage costs. The proposed revision adds a new subsection, F.(4), adapted from N.Y. C.P.L.R. section 904, which authorizes the court, after a preliminary hearing, to require the defendant to pay all or part of the costs of initial notice to class members. Although the normal rule is that plaintiffs pay the costs of notice, the subcommittee felt the New York approach provided desirable flexibility by allowing the trial judge to require payment by defendant, based upon a likelihood that the plaintiff class will win.

(8) Regulation of attorney fees. The proposed revision would substitute far more detailed provisions, taken from sections 16 and 17 of the Uniform Class Actions Act, for section 32 O. of the existing rule (section M. of revision). These provisions do not provide for or authorize award of attorney fees, not otherwise provided by statute or law, but have much more detailed provisions for court control of attorney fees and litigation expenses. The new language also covers liability of class members for fees, costs, and disbursements awards.

(9) New provision relating to tolling of statute of limitations. The proposed revision adds a new section, N., which is taken from section 18 of the Uniform Class Actions Act. The section clarifies the effect of pendency and termination of class actions upon the running of the statute of limitations against the individual claims of class members. This is an area of considerable confusion and should be clarified. The subcommittee recognizes that this provision may have substantive elements, beyond the rulemaking powers of the Council, and suggests that it be submitted to the legislature with a note asking the legislature to review it in that light.

B.(3) Trial preparation materials. Subject to the provisions of Rule 44 [and subsection B.(4) of this rule], a party may obtain discovery of documents and tangible things otherwise discoverable under subsection B.(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of such party's case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that party. Upon request, a party who is not a party may obtain, without the required showing, a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person or party requesting the statement may move for a court order. The provisions of Rule 46 A.(4) apply to the award of expenses incurred in relation to the motion.

For purposes of this subsection, a statement previously made is (a) a written statement signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

COMMENT

The cross reference to subsection 36 8.(4) in subsection 36 8.(3) was inadvertently not eliminated when the 1979 Legislature deleted subsection 8.(4).

F. Submission to witness; changes; statement.

F.(1) Necessity of submission to witness for examination. When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C.(4) of this rule, and if [the transcription or recording is to be used at any proceeding in the action or if any party requests that the transcription or recording thereof be filed with the court, such transcription or recording shall be submitted to the witness for examination, unless such examination is waived by the witness and by the parties] any party or the witness so requests at the time the deposition is taken, the recording or transcription shall be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F.(2) Procedure after examination. Any changes which the witness desires to make shall be entered upon the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons shall promptly be served upon all parties by the party taking the deposition. The witness shall then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the

statement or the witness is physically unable to make such statment or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time upon court order, after the deposition is submitted to the witness, the party taking the deposition shall state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 O., the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F.(3) No request for examination. If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

COMMENT

This section was changed to require submission of the deposition to the witness for examination and statement of correctness only when such a procedure is requested by a party or the witness. The existing rule requires such examination and statement unless waived by the parties and the witness.

RULE 46

FAILURE TO MAKE DISCOVERY; SANCTIONS

A.(2) Motion. If a party [fails to furnish a written statement under Rule 36 B.(4), or if a party] fails to furnish a report under Rule 44 B. or C., or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C.(6) or Rule 40 A., or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B.(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

D. Failure of party to attend at own deposition or respond to request for inspection or to inform of question regarding the existence of coverage of liability insurance policy. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C.(6) or 40 A. to testify on behalf of a party fails (1) to appear before the

officer who is to take the deposition of that party or person, after being served with a proper notice, or (2] to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, [or (3) to inform a party seeking discovery of the existence and limits of any liability insurance policy under Rule 36 B. that there is a question regarding the existence of coverage,] the court in which the action is pending on motion may make such orders in regard to the failure as are just, including among others it may take any action authorized under paragraphs (a), (b), and (c) of subsection B.(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

COMMENT

The cross reference in subsection 46 A.(2) to 36 B.(4) should have been removed when the 1979 Legislature deleted 36 B.(4).

The language removed from section 46 D. became superfluous when the 1979 Legislature revised 36 B.(2).

RULE 52

POSTPONEMENT OF CASES

A. Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. [The court may in a proper case, and upon terms, reset the same.] At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party.

COMMENT

The last sentence of section 52 A. as originally promulgated suggested there had to be terms. The last clause is suggested by Spalding v. McCaige, 47 Or. App. 129 (1980).

DISMISSAL OF ACTIONS[:]; COMPROMISE

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time [before] up to three days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as [in case of a confession] a stipulated judgment. Unless agreed upon by the parties, costs, disbursements, and attorney fees shall be entered as part of such judgment as provided in Rule 68. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, disbursements, and attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

COMMENT

The amendment to 54 E. requires that the offer of compromise be made at least three days prior to trial. It also makes clear that a more favorable judgment bars not only all costs and disbursements, but attorney fees "incurred after the date of the offer." The addition of the second sentence allows a settlement of the principal claim even though there is no agreement as to attorney fees, disbursements, or costs. Note, ORS 20.180 is not superseded.

D.(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person [over 18 years of age] 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and for one day's attendance. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C.(6), shall be served in the same manner as provided for service of summons in Rule 7 D.(3)(b)(i), D.(3)(d), D.(3)(e), or D.(3)(f).

F.(2) Place of examination. 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. 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

The language changes in 55 D.(1) were made to conform to ORCP 7 E. and 7 F.(2) and to clarify how subpoenas for ORCP 39 C.(6) depositions should be served.

The reference to place of examination in 55 F.(2) 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.

RULE 60

MOTION FOR DIRECTED VERDICT

Motion for a directed verdict. Any party may move for a directed verdict at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury. If a motion for directed verdict is made by the [defendant] party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict.

COMMENT

The language in the last sentence was changed because the motion could be made by a plaintiff against a counterclaim, and the court might wish to dismiss the counterclaim without prejudice. See 54 C.

RULE 63

JUDGMENT NOTWITHSTANDING THE VERDICT

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

E. Duties of the clerk. The clerk shall, on the date an order made pursuant to this rule is entered or on the date a motion is deemed denied pursuant to section D. of this rule, whichever is earlier, mail a [copy of the order and] notice of the date of entry of the order or denial of the motion to the attorney of record, if any, of each party who is not in default for failure to appear. If a party who is not in default for failure to appear does not have an attorney of record, such notice shall be mailed to the party. The clerk also shall make a note in the docket of the mailing.

COMMENT

Section 63 D. was changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 70.

Section 63 E. was changed to conform to the changed form of notice of entry of judgment in 70 B.(1).

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

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

COMMENT

Sections 64 F. and G. were changed to make "entry" the effective date for all purposes related to judgments. See Comment to ORCP 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.] Appeal of judgment on the allowance of taxation of costs and disbursements.

[(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.

23.040 Kinds of execution. There are three kinds of executions:

(1) Against the property of the judgment debtor.

[(2) Against his person.]

[(3)] (2) For the delivery of the possession of real or personal property, or such delivery with damages for withholding the same.

23.050 Issuance of writ; contents. The writ of execution shall be issued by the clerk and directed to the sheriff. It shall contain the name of the court, the names of the parties to the action, and the title thereof; it shall substantially describe the judgment, and if it is for money, shall state the amount actually due thereon, and shall require the sheriff substantially as follows:

(1) If it is against the property of the judgment debtor, and the judgment directs particular property to be sold, it shall require the sheriff to sell such particular property and apply the proceeds as directed by the judgment; otherwise, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter.

(2) If it is issued after the death of the judgment debtor, and is against real or personal property, it shall require the sheriff to satisfy the judgment, with interest, out of any property in the hands of the debtor's personal representatives, heirs, devisees, legatees, tenants of real property, or trustees as such.

[(3) If it is against the person of the judgment debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he pays the judgment, with interest, or is discharged according to law.]

[(4)] (3) If it is for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the sheriff to satisfy any costs, charges, damages, or rents and profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in subsection (1) of this section, and in that respect it is to be deemed an execution against 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.

29.178 Post-execution procedure; notice: contents; bank, trust company or savings and loan association as garnishee. (1) Following execution by the sheriff of [any writ pursuant to ORS 29.170 or 29.175] a writ of execution or execution of a writ of garnishment by any person, other than a wage or salary garnishment, the sheriff or such person shall promptly mail or deliver the following to the noncorporate judgment debtor at his last-known address:

(a) A copy of the writ;

(b) A copy of the certificate delivered to the county clerk [pursuant to subsection (1) of ORS 29.170] to levy upon real property, if any;

(c) A copy of a notice of garnishment or the notice delivered pursuant to [subsection (3) of ORS 29.170 or] subsection (1) of ORS 29.175, if any; and

(d) The notice described in subsection (2) of this section.

(2) The notice to the judgment debtor shall contain:

(a) A statement that certain property of the judgment debtor has been or may have been levied upon;

(b) If the sheriff has executed the writ by taking property into his custody, a list of the property so taken;

(c) A list of all property and funds declared exempt under state or federal law;

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

(e) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the judgment debtor; and

(f) A statement that if the judgment debtor has any questions, he should consult an attorney.

[(3) Notwithstanding subsection (1) of this section, if a writ is served on a bank, trust company or savings and loan association, as garnishee, the sheriff shall deliver the copies and notice required by subsection (1) of this section to such garnishee. If the garnishee has property belonging to the judgment debtor, the garnishee shall promptly mail or deliver the copies and notice to the judgment debtor.]

[(4)] (3) The sheriff or such person may meet the requirements of subsection (1) of this section by mailing the documents to the la known address of the judgment de or as provided by the judgment creditor. The sheriff or such person may withhold execution of the writ until such address or a statement that the judgment creditor has no knowledge of the judgment debtor's last-known address is furnished by the judgment creditor.

Section III. ORS SECTIONS SUPERSEDED

The following ORS sections are superseded by the Oregon Rules of Civil Procedure. The Oregon Rules of Civil Procedure replace the superseded ORS sections as the rules of pleading, practice, and procedure in those civil actions and courts where the Oregon Rules of Civil Procedure are made applicable by ORCP 1 A.

ORS

CHAPTER 17

17.003, 17.705, 17.710, 17.720, 17.725, 17.730, 17.735, 17.740, 17.745, 17.750, 17.755, 17.760, 17.765.

CHAPTER 18

18.010, 18.030, 18.040, 18.050, 18.060, 18.070, 18.080, 18.090, 18.100, 18.110, 18.115, 18.120, 18.125, 18.135, 18.160.

CHAPTER 20

20.010, 20.020, 20.040, 20.050, 20.055, 20.060, 20.110, 20.210, 20.230.

CHAPTER 23

23.020, 23.080, 23.090, 23.740, 23.810, 23.820, 23.830, 23.840, 23.850, 23.860, 23.870, 23.880, 23.890, 23.900, 23.910, 23.920, 23.930.

CHAPTER 26

26.010, 26.020, 26.030, 26.040, 26.110, 26.120, 26.130.

CHAPTER 27

27.010, 27.020, 27.030.

CHAPTER 29

29.010, 29.020, 29.025, 29.030, 29.035, 29.045, 29.050, 29.055, 29.060, 29.065, 29.070, 29.075, 29.080, 29.085, 29.090, 29.095, 29.110, 29.120, 29.130, 29.140, 29.150, 29.160, 29.170, 29.180, 29.190, 29.200, 29.210, 29.220, 29.230, 29.240, 29.250, 29.260, 29.270, 29.280, 29.290, 29.300, 29.310, 29.320, 29.330, 29.340, 29.350, 29.360, 29.370, 29.380, 29.390, 29.400, 29.410, 29.520, 29.530, 29.540, 29.550, 29.560, 29.570, 29.580, 29.590, 29.600, 29.610, 29.620, 29.630, 29.640, 29.650, 29.660, 29.670, 29.680, 29.690, 29.700, 29.710, 29.720, 29.730, 29.740.

CHAPTER 31

31.010, 31.020, 31.030, 31.040.

CHAPTER 32

32.010, 32.020, 32.030, 32.040, 32.050, 32.060.

CHAPTER 34

34.820.

CHAPTER 45

45.050.

Section IV. RECOMMENDED STATUTORY AMENDMENT TO ORCP

A BILL FOR AN ACT

Relating to administrative procedures of state agencies; amending ORS 311.705.

Be It Enacted by the People of the State of Oregon:

Section 1. ORCP 7 D.(4)(a)(i) is amended to read as follows:

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, [may be served with summons by mail, except a defendant which is a foreign corporation maintaining an attorney in fact within this state. Service by mail shall be made by mailing to: (i) the address given by the defendant at the time of the accident or collision that is the subject of the action, and (ii) the most recent address furnished by the defendant to the Administrator of the Motor Vehicles Division, and (iii) any other address of the defendant known to the plaintiff, which might result in actual notice] except a defendant which is a foreign corporation maintaining a registered agent 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.

Section 2. This amendment shall be effective January 1, 1982.