RULE 67

JUDGMENTS

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

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

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

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

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

(Alternative 1)

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

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

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

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

(Alternative 2)

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

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

F. Judgment by stipulation.

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

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

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

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

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

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

COMMENT

Rule 67

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

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

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

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

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

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

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

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

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

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

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

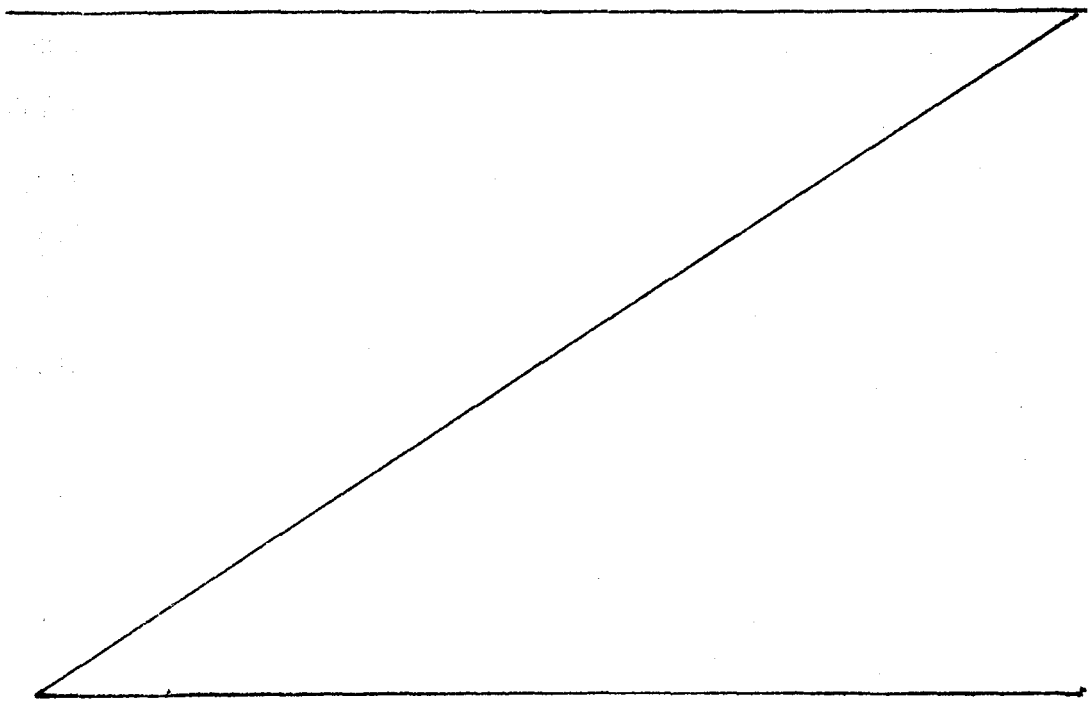
In any case, the Oregon rule on default would appear to be that recovery is limited to the prayer. ORS 18.080(a) and (b) refer to the plaintiff applying for the relief prayed for in the complaint. Cf. Coleman v. Meyer, supra. Apparently, however, in an equity default case the general prayer still allowed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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alternative 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Alternative 2

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

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

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

allowing discovery of the names, qualifications, and summary of the area in which expert witnesses will testify at trial. Laird Kirkpatrick moved, seconded by Austin Crowe, to amend the main motion so that it would not apply to claims to recover for professional negligence of any person licensed to practice healing arts. The motion failed with Laird Kirkpatrick, Justice Lent, Austin Crowe, and Judge Redding voting in favor of the motion.

Carl Burnham moved, seconded by Justice Lent, to amend the main motion by adding a condition that the depositions of the experts disclosed pursuant to a request for discovery could not be taken. The motion passed, with Judge Tompkins, Harriet Krauss, Judge Buttler, and Judge Casciato opposing it. Garr M. King abstained.

The Council voted in favor of the main motion. The following opposed the motion: Frank Pozzi, Wendell Gronso, Judge Redding, Judge Tompkins, Judge Copenhaver, Judge Casciato, and Charles Paulson.

Austin W. Crowe, Jr., chairman, stated that his subcommittee had reviewed the background information concerning the original Class Action Statute and legislative activity during the last several sessions and that Frank Pozzi had produced a list of six proposed changes in the Class Action Statute. The Executive Director was asked to furnish Council members with copies of the proposed changes, and it was decided to defer further consideration at this time.

Frank Pozzi stated that the subcommittee appointed to study and report on third party practice and summary judgments had not had an opportunity to meet. He said that he was attempting to obtain written comments and suggestions from judges as to their feelings on third party practice.

Judge Jackson reported that the subcommittee had carefully reviewed proposed Rules 67-74 and suggested the following changes:

Rule 67 B.

Wendell Gronso said that the subcommitee felt there was a problem under section B., stating that if a judgment is entered for a plaintiff before the rest of the case is decided, the time for appeal will be running. A suggestion was made that a decision as to any change in the section be deferred until the Council voted on third party practice.

Rule 67 C.

This section should be amended to allow a judgment that exceeds the prayer when the court has equitable jurisdiction and to limit damages to the amount of the prayer when an action is brought for money damages.

Rule 67 E.

Alternative II on page 3 of the draft, which allows a partnership to be sued as an entity, should be used. The Executive Director suggested that this would also involve amending ORCP 26 to add a new subsection B. as shown on page 20 of the comment to Rule 67 and a possible new section for service on partnerships in Rule 7. He was asked to submit a draft of a suggested rule covering service on partnerships.

Rule 67 F.

The complicated categories of who may stipulate to judgment in 67 F.(2) should be eliminated and replaced by a requirement that the stipulation be signed by the defendant or a person with authority to bind the defendant.

Rule 68 A.(3)

The comment to this subsection should reflect that the language relating to deposition expense was taken from ORS 20.020 and there was no intent to change existing law.

Rule 68 C.(2)

This subsection should be changed to require allegation of facts, statute, or rule providing a basis for such fees in the body of the pleading. The section should also cover the situation where a party seeking fees files no pleading but moves to dismiss or for summary judgment and also to allow assertion of a right to attorney fees at a point later than an initial pleading if the right to such fees later appears.

Rule 68 C.(4)(b)

The time for objection to cost bill should be increased from 15 days after the entry of judgment to "15 days after the filing of the cost bill or 30 days after the entry of judgment, whichever occurs first." Since there are 10 days in which to file the cost bill, 15 days to object is too short.

Rule 68 C.(4)(d)

The words "and the same shall be conclusive as to all questions of fact" should be removed from the last sentence.

Rule 68 C.(4)(e)

This section should be eliminated. Any additional costs incurred in the objection to the cost bill should be recoverable.

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

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

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

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

RULE 67

JUDGMENTS

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

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

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

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

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

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

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

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

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

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

F. Judgment by stipulation.

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

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

RULE 67

JUDGMENTS

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

B. Judgment for less than all 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. The court may also 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, only upon an express determination that the party or parties against whom such judgment is entered have admitted the claim and asserted a counterclaim amounting to less than the claim and there is no just reason for delay. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all

the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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

C.(1) 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. When a claim is asserted against parties jointly indebted upon a joint obligation, contract, or liability:

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. If service of process is made upon any member of the partnership or other unincorporated association as an individual, whether or not such partner or associate is also served as a person upon whom service is made on behalf of the partnership or association, a judgment against such partner or associate based upon personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

E.(2) 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 pursuant to Rule 68.

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

COMMENT

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

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. The rule allows individual partners to be named in addition to the partnership and for the entry of a judgment enforceable against the personal assets of any partner actually served with summons.

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

(a) avoids the necessity of difficult distinctions between joint and several obligations. 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.

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

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

ORS 18.135 referred to action against any joint obligors, not just partnerships or associations. This rule covers only the ability to create judgments enforceable against partnerships or associations. ORS 18.135 subjected a person, who was never actually served and perhaps not aware of a suit, to 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. Note, this is not a confession of judgment based upon prior contractual agreement, which is eliminated, but an actual stipulation to judgment after action. Dismissals by stipulation are covered by Rule 54.

RULE 67

JUDGMENTS

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

B. Judgment for less than all 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. The court may also 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, only upon an express determination that the party or parties against whom such judgment is entered have admitted the claim and asserted a counterclaim amounting to less than the claim and there is no just reason for delay. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all

the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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

C.(1) 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. If service of process is made upon any member of the partnership or other unincorporated association as an individual, whether or not such partner or associate is also served as a person upon whom service is made on behalf of the partnership or association, a judgment against such partner or associate based upon personal liability may be obtained in the action, whether such liability be joint, joint and several, or several.

E.(2) 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 pursuant to Rule 68.

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

COMMENT

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

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. The rule allows individual partners to be named in addition to the partnership and for the entry of a judgment enforceable against the personal assets of any partner actually served with summons.

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

(a) avoids the necessity of difficult distinctions between joint and several obligations. 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. Note, this is not a confession of judgment based upon prior contractual agreement, which is eliminated, but an actual stipulation to judgment after action. Dismissals by stipulation are covered by Rule 54.

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.