RULE 71

RELIEF FROM JUDGMENT OR ORDER

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

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

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

COMMENT

Rule 71

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subsection (3) now 71 B(1)(c) may change the law in two respects. First, although fraud has been recognized as a ground for attacking a judgment within a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 71 A.

Add the words "to all parties who have appeared" after "notice" in line 5.

Rule 71 B.

Subsection B.(3) relating to fraud should be eliminated as it does not appear in ORS 18.160. It was suggested case law interpretation of ORS 18.160 provides adequate grounds for relief. The Executive Director was asked to summarize the cases.

Rule 73 A. and C.

The Executive Director was asked to clarify whether "pendency of an appeal" meant after filing notice of appeal or after other steps for appeal.

Rule 73 D.

The Executive Director was asked to investigate what the words "or interested" mean.

Rule 74

The subcommittee recommended Alternative 1 which is the complete elimination of the confession of judgment without action. Confessions in a pending action are covered under stipulated judgments in Rule 67 F.

The Chairman asked Judge Jackson's subcommittee to review Rules 65-66 and Rules 90-93 when they are drafted.

Discussion regarding Judge Musick's letter was deferred until the next meeting.

The next meeting of the Council is scheduled to be held Saturday, February 16, 1980, at 9:30 a.m., in Judge Dale's Courtroom, Multnomah County Courthouse, Portland, Oregon.

The meeting adjourned at 12:06 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

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

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

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

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

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

The Council received reports of subcommittees as follows:

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

RULE 71

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B. Mistakes; inadvertence; excusable neglect; newly discovered evidence, etc. On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 64 F.; (3) the judgment is void; or (4) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after receipt of notice by the moving party of the judgment. A copy of a motion filed within

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

COMMENT

Rule 71

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

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

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

Whether the language relating to both extrinsic or intrinsic

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

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

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

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

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

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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.; (d) fraud, misrepresentation, or other misconduct of an adverse party; (d) the judgment is void; or (e) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. The motion shall be made within a reasonable time, and for reasons (a), (b), and, (c) not more than 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, a motion under this section may be filed during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted during the pendency of an appeal. Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court.

C. Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, 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.

Section 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).

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 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 is a one-year time limit upon filing the motion, it should be possible to file such a motion to await disposition of the appeal; this is provided by subsection 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 auerela 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.

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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. 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, a motion under this section may be filed during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted during the pendency of an appeal. Leave to make the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.

C. Relief from judgment by other means. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time, or the power of a court to entertain an independent action to relieve a party from a judgment, 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.

Section 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).

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 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 is a one-year time limit upon filing the motion, it should be possible to file such a motion to await disposition of the appeal; this is provided by subsection 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 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 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 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, 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 B.(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.