

RULE 72

STAY OF PROCEEDINGS TO ENFORCE JUDGMENT

A. Immediate execution; discretionary stay. Execution or other proceeding to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of the judgment in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. No stay of proceedings to enforce judgment may be entered by the court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 19.029 and during the pendency of such appeal.

B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

C. Stay or injunction in favor of state or municipality thereof. The state, or any county or incorporated city, shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule in any action to which it is a party or is responsible for payment or performance of the judgment.

D. Stay of judgment as to multiple claims or multiple parties. When a court has ordered a final judgment under the conditions stated in Rule 67 B., the court may stay enforcement of that judgment or judgments and may prescribe such conditions

as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

#### COMMENT

Existing ORS sections do not clearly cover stay of enforcement of judgment, other than providing for an automatic stay by the supersedeas bond. ORS 19.040, et seq. This rule does not change the supersedeas bond provisions or affect the power of the appellate court to grant a stay pending appeal, but deals with the power of the trial court to stay enforcement of judgment.

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

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

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

RULE 72

HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

COMMENT

Rule 72

This is Federal Rule 61. There is no specific equivalent provision in the Oregon statutes. The rule is included to carry the general philosophy of liberal construction into the area of new trials under ORCP 64 and vacation of judgments under the preceding rule. It is a reinforcement of similar language in ORCP 1 B. and 12. Rules of procedure are a means to an end, and application should be no more strict than necessary.

The rule deals only with harmless error at the trial level, i.e., motions to vacate judgments and for new trials; it is not a rule of appellate procedure. Although it refers to rulings on the admission or exclusion of evidence, it is not itself a rule of evidence.

RULE 72  
ATTACHMENT

A. Actions in which attachment allowed; procedural pre-requisite.

A.(1) The plaintiff, at the time of issuing the summons or any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, in the following cases:

A.(1)(a) An action upon a contract, expressed or implied, for the direct payment of money, when the contract is not secured by mortgage, lien or pledge, or when it is so secured but such security has been rendered nugatory by act of the defendants, or when the defendant is a nonresident of this state.

A.(1)(b) An action against a defendant not residing in this state to recover a sum of money as damages for breach of any contract, expressed or implied, other than a contract of marriage.

A.(1)(c) An action against a defendant not residing in this state to recover a sum of money as damages for injury to property in this state.

~~A.(1)(d) The defendant may have the property of the plaintiff attached upon filing a counterclaim within paragraphs (a), (b), or (c). References to plaintiff in Rule 78 include a counterclaiming defendant.~~

A.(2) Notwithstanding subsection (1), no attachment, injunction, or execution shall be issued against any bank or its property before final judgment.

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

D.(2) Debts. Debts may be attached in accordance with the provisions of Rule 73.

D.(3)(a) Chattels in which security interests may be recorded. If a consensual security interest within ORS Chapter 79.1020 on a chattel would be required by ORS Chapter 79.3020 to be perfected by filing a financing statement, the plaintiff may obtain an attachment lien on such chattel at any time after an order that provisional process may issue has been made by filing a Claim of Lien with the clerk of the court that issued the writ and in the same office or offices that a financing statement would be required to be filed. Such claim shall identify the action by names of parties, court and docket number, and judgment demand, describe the property sufficiently to identify it, state that a provisional process order has been made with the date thereof, and state that an attachment lien is claimed on the property.

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

D.(5) When the writ of attachment has been fully executed or discharged, the sheriff shall return the same, with his proceedings indorsed thereon, to the clerk of the court where the action was commenced, and the sheriff shall make a full inventory of the property attached, and return the same with the writ.

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

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

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

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

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

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

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

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

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

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

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

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

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

RULE 73

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B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

C. Injunction pending appeal. When a judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of any appeal from such judgment, upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the trial court to suspend, modify, restore, or grant an injunction during the pendency of appeal is terminated by the taking of the appeal.

D. Stay or injunction in favor of state or municipality thereof. The state, or any county or incorporated city, shall not be required to furnish any bond or other security when a stay is granted by authority of section A. of this rule or an injunction is suspended, modified, restored, or granted pending appeal by authority

of section B. of this rule, in any action or proceeding in which it is a party or interested.

E. Stay of judgment as to multiple claims or multiple parties. When a court has ordered a final judgment under the conditions stated in Rule 67 B., the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 73

Except for the supersedeas bond stay in ORS 19.056, et seq., the Oregon statutes do not clearly deal with stays of execution or judgments in civil cases. This Rule attempts to restate and clarify Oregon practice as it seems to be specified in applicable Oregon cases. The Rule is necessary as stays of judgment by the trial court, apart from supersedeas bond stays, may be required:

- (1) During the pendency of motions under ORCP 63 and 64;
- (2) Upon appeal in cases not covered by the supersedeas bond statute;
- (3) Upon motion to vacate under Rule 71; and
- (4) In other special emergency situations.

It only governs stays by the trial court and does not govern stays of any proceeding except a judgment. These are left to appellate procedure and the inherent power of the courts.

Section A. is taken from Utah Rule of Civil Procedure 62a. and restates existing Oregon practice. There is no automatic stay such as the 10-day stay under Federal Rule 62(a) or the rules in some states which stay judgment until the time to file a notice of appeal has run. The express provision eliminates any doubt about the inherent power of a trial court to stay its own judgment. See Helms Groover & Dubber Co. v. Copenhagen, 93 Or. 410, 177 P. 935 (1919), and discussion in Note, 38 Or. L. Rev. 335, 345-350. The Utah language was changed to make clear this section only refers to the court granting judgment. A separate equitable proceeding to vacate a judgment may involve some stay or temporary

injunction of the judgment, but that is a matter of definition of appropriate equitable remedies. See Butler v. Ungerleider, 199 F.2d 709 (2d Cir. 1952). The last sentence is not in the Utah Rule and was added to conform to State ex rel. Peterkort v. Bohannon, 210 Or. 215, 309 P.2d 800 (1957), which holds that after a notice of appeal is filed, the trial court lacks jurisdiction to stay the judgment. This power would exist before or after the pendency of the appeal. Note, many states allow either the trial court or appellate court to stay while the appeal is pending. Arguably, this is desirable as the trial court may be better able to decide, but under the analysis in Bohannon, the question is one of subject matter jurisdiction and beyond the Council's rulemaking authority.

Section B. makes clear the rules do not affect the right to an automatic stay under ORS 19.040 upon filing of a supersedeas bond.

Section C. explicitly gives the trial court some authority to deal with the problem that a supersedeas bond on appeal does not stay a negative injunction, i.e., a judgment prohibiting action is not affected by the stay of ORS 19.040. If the trial court has enjoined an appropriation of water, the defendant cannot file the supersedeas bond and take the water. See Helms Groover & Dubber Co. v. Copenhagen, *supra*; Threadgold v. Willard, 81 Or. 658, 160 P. 803 (1916); Note, 38 Or. L. Rev. 335, 345-50 (1959). The statutory stay only suspends a positive injunction; see State ex rel. Small v. Small, 49 Or. 595, 90 P. 1110 (1907). Also, where the trial court denies injunctive relief, a temporary injunction may be necessary during the pendency of appeal to avoid irreparable harm.

Lais v. Silverton, 77 Or. 434, 147 P. 398, 150 P. 269, 151 P. 712 (1915). The appellate court may exercise inherent power to issue an injunction pending appeal. Lais v. Silverton, *supra*; Livesley v. Krebs Hop Company, 57 Or. 352, 97 P. 718, 107 P. 460, 112 P. 1 (1910). This rule allows the trial judge to stay the negative injunction as well as allow or continue a temporary injunction until or through the appeal. Once jurisdiction is transferred to the appellate court by appeal, the trial court's action would be subject to modification by the appellate court. The provision covers the emergency situation where some protection must exist before the appeal is filed (this can be done before entry or as part of the judgment), and before the appellate court can act. The provision also allows the trial court, which may be in the best position to evaluate the situation, to express its opinion as to the best course of action.

Note, the wording is taken from the Alabama Rules of Procedure, except that the last sentence expressly terminates the trial court power when the appeal is filed, whereas Alabama expressly maintains it. This seems unavoidable under State ex rel. Peterkort v. Bohannon, *supra*, and Caveny v. Asheim, 202 Or. 195, 274 P.2d 281 (1954). In Oregon, the trial court has no power once the appeal is perfected.

Section D. is in keeping with the principle of ORS 23.010 and 20.140.

Section E. is taken directly from 18.125(2). The provision for a stay in a multiple party judgment logically fits here.

The federal rules have a safety provision to avoid conflict with appellate court stays as follows:

Power of Appellate Court Not Limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or

to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

Given the fact that this rule does not authorize trial court stays during appeal and the clear fact that the Council could not make binding rules of appellate procedure, it seems unnecessary.

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

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B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

C. Injunction pending appeal. When a judgment has been rendered granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of any appeal from such judgment, upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. The power of the trial court to suspend, modify, restore, or grant an injunction during the pendency of appeal is terminated by the taking of the appeal.

D. Stay or injunction in favor of state or municipality thereof. The state, or any county or incorporated city, shall not be required to furnish any bond or other security when a stay is

granted by authority of section A. of this rule or an injunction is suspended, modified, restored, or granted pending appeal by authority of section B. of this rule, in any action in which it is a party or is interested.

E. Stay of judgment as to multiple claims or multiple parties. When a court has ordered a final judgment under the conditions stated in Rule 67 B., the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

COMMENT

Rule 73

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

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

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

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

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B. Other stays. This rule does not limit the right of a party to a stay otherwise provided for by these rules or other statute or rule.

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

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

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