

RULE 84

CREDITORS OF DECEDENTS AND DISTRIBUTEES  
OF DECEDENTS' ESTATES

A. Creditors of Decedents. The procedure for establishing and paying claims against a decedent's estate is provided in ORS ch. 115.

B. Survival of liens. A judicial lien that has attached to an asset of a debtor is not affected by the debtor's subsequent death; the debtor's personal representative and distributees and transferees of such asset acquire it encumbered by the lien. Proceedings to enforce such liens may not be instituted without leave of the probate court within six months after the grant of letters testamentary or of administration.

C. Levy on interest of distributee.

C.(1) Specific items of personal property in the possession of a personal representative but bequeathed or ordered to be distributed to a debtor may be levied upon by a creditor of such debtor under a writ of attachment or execution by proceeding in a manner analogous to that described in Rule 82 G.(1). Such levy shall not impair the powers of the personal representative over the property for purposes of administration. The personal representative shall deliver it to the sheriff at such time as an order of the probate court distributing it to the debtor becomes final and such delivery shall be deemed compliance with the order of distribution.

C.(2) The interest of a debtor who is a distributee of the general assets of a decedent's estate may be levied upon by serving notice of garnishment on the personal representative under Rule 83 A. If the personal representative's answer shows that the debtor is a potential distributee, but that the form and amount of such distribution have not yet been determined by the probate court, the creditor shall nevertheless have a lien from the time of service of the notice of garnishment on the debtor's contingent right to distribution, and the clerk, at the request of the creditor, shall order the personal representative to pay or deliver to the clerk any money or property that the probate court may order distributed to the debtor. Such payment or delivery shall be deemed compliance with the order of distribution.

COMMENT

Rule 84

Section B. restates ORS 23.100 as construed in Barrett v. Furnish, 21 Or. 17 (1891), and Petke v. Pratt, 168 Or. 425, 123 P.2d 797 (1942). Cf. also ORS 114.345, 115.065, .255, and .275.

Section C. is ORS 29.175 revised to make clear that it applies to the interest of a distributee from the general assets of the estate. The priority of creditors of distributees of real property is governed by Rule 80 B.(1)(b).

ORS sections superseded: 23.100, 29.175.

PROCEDURE AND PRACTICE COMMITTEE

COMMENTS

RULE 78 - ATTACHMENT

A. (1) This section is almost identical to ORS 29.110. Its language has been slightly clarified but attachment will be available under the new rule in the same situations it is allowed under the present statute.

A. (2) This section is the same as ORS 29.410. It continues present policy in that no attachment, injunction or execution may be issued against any bank or its property before issuance of a final judgment.

A. (3) This is a new section. It provides that a prerequisite to issuance of a writ of attachment is the issuance of an order under Rule 79 that provisional process may issue.

B. (1) This section is derived from ORS 29.130 and, in fact, utilizes the exact language of the first portion of the present statute. However, the author has clarified the language of the new rule, substituting the word "bond" for the word "undertaking" and has also rephrased a portion of the present statute's language.

The author has deleted entirely all requirements of an affidavit concerning the type and nature of the surety involved. Instead, the new rule simply requires that the plaintiff file a "corporate surety bond." This is actually not a change from the old statute, since under ORS 743.732 no affidavit is

necessary so long as the surety company providing the bond was authorized to do business in Oregon.

The one major change made is contained in Section B.(2). This section provides that, upon a motion by the defendnat, the court may require the plaintiff to provide additional security if the defendant's potential costs for damages exceed the amount of the attachment bond. X

C. Subsection C replaces ORS 29.140. ORS 29.140 defines attachable property as "any property not exempt from execution." Subsection (1) of the new rule lacks clarity. C (1) refers to "real property within Rule 80 (A)." Rule 80 (A) provides a definition of the term "real property." Unfortunately, land sale contract interests, contingent and equitable interests and short-term leaseholds are discussed in Rule 81 and Rule 83 (C). It is not clear whether the type of real property interests discussed in Rules 81 and 83 (C) are included in the definition found in Rule 78(C)(1).

The "largely illusory constriction" is probably justified given the policy reason set forth in the author's comment to Rule 78 wherein he states that " a plaintiff should not be allowed to invoke the more complex procedures for levying on non-garden variety assets when it is not certain that he will win the case."

METHOD OF ATTACHMENT:

D.(1) Real property - This section replaces ORS 29.170(1) Under the current statute, real property is attached by having the clerk issue a writ to the sheriff directing the sheriff to

the location of the property. The sheriff prepares a certificate containing the title of the cause, the names of the parties to the action, the description of such real property as is to be attached, and a statement that the real property has been attached at the instance of the plaintiff. This certificate is then delivered to the County Clerk. The Clerk then files it and records it in a book kept for that purpose. ORS 29.190. The filing of a certificate with the Clerk causes the attachment to be perfected.

D. (1) Dispenses with the need to utilize the sheriff. After the plaintiff has obtained an order that provisional process may issue under Rule 79, the plaintiff may obtain a lien on the defendant's real property by simply filing with the County Clerk a "claim of lien." The new rule provides that the lien arises at the time that the claim is delivered to the Clerk. I should point out that this is going to cause some problems since the actual time of delivery may be earlier than the time of filing. I would suggest that the lien arise at the time that the claim is filed by the Clerk rather than delivered to the Clerk.

D.(2) Has also been streamlined to avoid the necessity of having the sheriff issue a writ. Note that the rule requires the notice of garnishment to reflect the fact that it is issued by way of attachment and not by way of execution.

D.(3) (a) Is a new addition and follows the guiding principal set forth in Rule 75(B)(3). This principal is that the defendant be left with possession of the property whenever possible. Section D (3) (a) therefore provides that the plain-

tiff may obtain an attachment lien by filing a claim of lien with the Clerk of the court that issued the writ and also by filing the claim of lien in the same office or offices that a financing statement would be required to be filed. It is not clear whether the attachment lien would be perfected at the time of filing with the Clerk or at the time of filing with both and Clerk and the office that a financing statement would be required to be filed. Consideration might be given to a clear statement of the actual time of perfection of such a lien.

D.(3)(b) Provides some additional security to the plaintiff by allowing him to obtain actual possession of the chattels if filing of the lien is not sufficient security.

D.(4) Is derived from ORS 29.160 and ORS 29.170(2). It simply allows a plaintiff to cause the sheriff to attach and safely keep certain described real property of the defendant. The procedure for such attachment is almost identical to the current procedure.

E. Disposition of attached property after judgment, is taken from ORS 29.380 and 29.390. The author has dispensed completely with any language referring to sale of the property. The author has also deleted any reference to the sheriff applying the property toward satisfaction of the judgment. This section might be clarified somewhat if a reference to Rule 80 and its treatment of real property was included.

RULE 78  
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.



A.(3) Before a writ of attachment may be issued or any property attached, the plaintiff must obtain an order under Rule 79 that provisional process may issue.

B. Attachment bond.

B.(1) Before any property is attached, the plaintiff must file with the clerk a corporate surety bond in a sum not less than \$100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

B.(2) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

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

C.(1) In actions in circuit court, real property within Rule 80 A.;

C.(2) Tangible personal property;

C.(3) Liquidated, non-contingent, uncontested debts.

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

D. How property is attached.

D.(1) Real property. Any time after an order that provisional process may issue has been made under Rule 79 in a circuit

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

D.(2) Debts. Any time after an order that provisional process may issue has been made, the plaintiff may serve a notice of garnishment under Rule 83 A. The notice shall state that it is issued by way of attachment and not execution and the date on which the order allowing provisional process was made.

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

D.(4) Other chattels. A plaintiff desiring to attach an item of tangible personal property not covered by paragraph (3)(a), or having obtained authorization under paragraph (3)(b), may require the clerk to issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep certain described property of the defendant, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. The writ may issue to the sheriff of any county in the state and several writs may be issued at the same time to the sheriffs of different counties. Levy and return shall be made as provided in Rule 82 D. and C.(5).

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.

COMMENT

Rule 78

Subsection A.(1) is ORS 29.110; subsection A.(2) is 29.410; subsection A.(3) replaces ORS 29.120 in view of ORS 29.020(5) and ORS 29.025.

Subsection B.(1) is derived from ORS 29.130. The requirement of a corporate surety is explained in the Comment to Rule 77 F.(1). Subsection B.(2) recognizes that the potential damage to the defendant from an attachment is not necessarily related to the size of the plaintiff's claim.

Section C. replaces ORS 29.140, which authorized attachment of all non-exempt property. The apparent constriction is largely illusory: subsection C.(1) forbidding attachment of real property in district court actions continues the rule of ORS 46.082; most assets not falling within subsections C.(2), (3) or (4) would be reachable only by a creditor's suit which does not ordinarily lie before judgment. The policy argument is that a plaintiff should not be allowed to invoke the more complex procedures for levying on non-garden variety assets when it is not certain that he will win the case. Note that the availability of summary judgment enables a creditor to get judgment without great delay when the debtor is merely stalling. Cf. Cal. C.C.P. 487.010 and .020 which also put restrictions on what may be attached, as opposed to taken, on execution.

Subsection D.(1) replaces ORS 29.170(1). It eliminates the necessity of issuing a writ to the sheriff and the sheriff delivering a certificate (presumably prepared by the creditor) to the clerk. Subsection D.(2) also eliminates the necessity of a writ. As under ORS 23.670 (2)

notice of garnishment need not be served by the sheriff. Subsection D.(3) is new and reflects the principle stated in Rule 75 B.(3). Comparable provisions are: Cal. C.C.P. 488.340-.360; Me. R.S. 14-4154; Minn. Stats. Ann. 550.13. Note that this subsection merely puts a burden on the attaching plaintiff to show that immediate dispossession of the defendant is justified. Cf. Rule 79 H. Subsection D.(4) is derived from ORS 29.160 and .170(2).

Section E. is derived from 29.380 and .390.

ORS sections superseded: 29.110-.140, 29.160, 29.170, 29.380, 29.390, 29.410, 46.082.

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.

A.(3) Before a writ of attachment may be issued or any property attached, the plaintiff must obtain an order under Rule 71 that provisional process may issue.

B. Attachment bond.

B.(1) Before any property is attached, the plaintiff must file with the clerk a ~~corporate~~ surety bond in a sum not less than \$100, and equal to the amount for which the plaintiff demands judgment, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

B.(2) Upon motion by the defendant and a showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

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

C.(1) In actions in circuit court, real property ~~within~~  
~~Rule 80 A.~~;

C.(2) Tangible personal property;

C.(3) Liquidated, non-contingent, uncontested debts.

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

D. How property is attached.

D.(1) Real property. Any time after an order that provisional process may issue has been made under Rule 71 in a circuit

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

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

D.(4) Other chattels.

D.(4)(a)(i) A plaintiff desiring to attach an item of tangible personal property not covered by paragraph D.(3)(a), or having obtained authorization under paragraph D.(3)(b), may require the clerk to issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require him to attach and safely keep certain described property of the defendant, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. The writ may issue to the sheriff of any county in the state and several writs may be issued at the same time to the sheriffs of different counties.

D.(4)(a)(ii) A plaintiff may also attach according to the procedure provided in Rule 73.

D.(4)(a)(iii) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be levied on by taking it into his custody.

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. Redelivery of attached property; release of liens.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

G. Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

## RULE 71 - PROVISIONAL PROCESS

Sections A. through J. are taken directly from Lacy's Rule 79 B. through K. Lacy had taken this directly out of ORS Chapter 29. This is the 1977 provision to conform to constitutional requirements. The language is not as clear as it might be, but it is apparently constitutional and accepted. See Huntington v. Coffee Associates, 43 Or. App. 395 (1979). Section K. of this rule is new. Since by the definition of Rule 70 A.(10) a receivership prior to judgment is provisional process, all of the provisions and limitations of this rule would apply to such receiverships. Note, in compliance with Chapter 31, receiverships are limited to circuit court.

Procedural matters in the provisional receivership are provided in subsection K.(2) by cross reference to the general receivership rule. Note, by virtue of the incorporation of 91 F., the provisional receivership would require a bond; this was not clearly provided by ORS.

## RULE 72 - ATTACHMENT

Sections A. through E. are taken from Lacy's Rule 78 A. through E. The only changes were to eliminate Lacy's Rule 78 A.(1)(d), which is unnecessary because of the definition in 70 A.(8), and to remove the limit to corporate security bonds. Although non-corporate security bonds present problems of justification of sureties, some people cannot secure or afford a corporate bond. D.(4)(a)(iii) and (iv) were taken from 82 D. D.(5) is ORS 29.180.

Section F. is taken from Lacy's Rule 77 F. and section G. from 77 G. Again, the limit to the corporate surety bond is removed. Lacy's Rule 77 F.(2)(e) was not included as it refers to the special procedures of Lacy's Rule 80 which have not yet been adopted.

#### RULE 73 - GARNISHMENT

This rule has been primarily adapted from Lacy's Rule 83 A. It uses the notice of garnishment procedure rather than a writ of attachment. This rule allows the plaintiff to issue the notice rather than a clerk issuing a writ, and any person can serve instead of only a sheriff.

Rule 73 A. makes clear that garnishment is simply a method of attachment. Rule 72 D.(2) and D.(4)(a)(ii) indicate the same. The garnishment creates a lien on the debt or property in the hands of the third person, and the lien attaches upon service. The references in Lacy's Rule 83 to judgment creditors and executions have been removed. In paragraph A.(4)(a), the substance of Lacy's Rule 82 G. was incorporated, rather than have a cross reference. Note, the rule does not provide any procedure for contesting a response by the garnishee that no money is owed nor any property held. Under A.(1)(a) the lien attaches upon notice, and after judgment the matter would be decided upon a proceeding to foreclose the lien against the garnishee if the

RULE 84

ATTACHMENT BY CLAIM OF LIEN

A. Order for provisional process. Before a writ of attachment may be issued on any property attached by claim of lien, the plaintiff must obtain an order under Rule 83 that provisional process may issue.

B. Property subject to claim of lien. When attachment is authorized, by ORS 29.110 or by other rule or statute, the plaintiff may attach the following property by filing a claim of lien:

B.(1) Defendant's real property; or

B.(2) Personal property of the defendant in which a consensual security interest within ORS chapter 79.1020 would be required to be perfected by filing a financing statement under ORS 79.3020.

C. Form of claim; filing; attachment of lien.

C.(1) Form. The claim of lien must be signed by the plaintiff or plaintiff's attorney and must:

C.(1)(a) identify the action by names of parties and court, docket number, and judgment demanded;

C.(1)(b) describe the property sufficiently to identify it;

C.(1)(c) state that a provisional process order has been issued authorizing the claim of lien with the date of such order; and



C.(1)(d) state that an attachment lien is claimed on the property.

C.(2)(a) Filing. A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located.

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

C.(3) Attachment of lien. A lien arises in the property described in the claim upon a filing of a claim of lien as provided in this section.

D. Disposition after judgment. The property subject to lien under this rule may be applied to the satisfaction of any judgment for the plaintiff, by execution upon the judgment. If judgment is entered for defendant, any lien provided by this rule shall be discharged.

E. Release of lien; bond. A defendant desiring to sell property that is subject to a lien under this rule may move for an order releasing the lien. Before ordering a release of lien, the court shall require the posting of bond or other security, as provided in Rule 82, in an amount set by the court. The bond shall guarantee payment of any judgment for plaintiff in the action up to the amount of the bond. A defendant moving to have a lien released under this subsection shall serve a statement of

the proposed amount for the bond 10 days prior to hearing upon the motion. The statement shall be served and returned in the manner provided in Rule 9.

F. Exception for bank. No claim of lien of attachment shall be authorized under this rule when the attachment is sought as security for the satisfaction of any judgment that may be recovered against a bank.

#### COMMENT

The ORCP do not include the procedure for attachment. This remains in ORS chapter 29 without change. This rule simply establishes one additional procedure for attachment of real property and personal property using the system for recording security interests.

The rule does not authorize attachment; this is covered by ORS 29.110. In a case when attachment is available, the plaintiff may file a claim of lien in addition to or instead of using a writ of attachment. Note, attachment of real property remains unavailable in district court. ORS 46.082.

The rule is designed to avoid the expense and extra work of a writ of attachment when all that plaintiff seeks is a pre-judgment lien. The procedure will not be abused because it cannot be used without court approval. The claim establishes the lien and nothing further need be done before judgment. For comparable provisions in other states, see Cal. Code of Procedure 48:340-360; Maine R.S. 14.4154; and Minn. Stats. Ann. 550.13.

Section F. provides a procedure for pendente lite release of lien if defendant wishes to sell the property subject to the lien. It is roughly equivalent to the redelivery procedure in ORS 29.220-.230 but requires court authorization, and the bond is set by the court. Section F. is the same as ORS 29.410 with the language revised for clarity.

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held September 6, 1980

Judge Dale's Courtroom

Multnomah County Courthouse

Portland, Oregon

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

Chairman Don McEwen called the meeting to order at 9:35 a.m.

Judge Buttler reviewed proposed Rules 78 through 85 submitted by the enforcement of judgments subcommittee in the draft dated August 29, 1980.

Charles K. Markley, Attorney, Portland, Oregon, spoke on behalf of the debtor-creditor section of the bar concerning the provisional remedies rules. He stated he was concerned about the following: the implication in the first paragraph of Rule 83 A. that all the information required be personally sworn to by plaintiff as opposed to affidavits of persons with knowledge; the seven-day limit for hearing in Rule 83 G.(1); the problem of application of Rule 84 A.(2)(a) to a partially secured creditor. He stated he felt there should be a description of the property for any type of provisional process in Rule 83 A.(3). He also questioned the necessity of the inclusion of all 13 items in Rule 83 A. for any kind of provisional process, and suggested the words "where applicable" could be appropriately inserted.

The Council considered and discussed Mr. Markley's suggestions and other aspects of the rules. The following actions were taken:

Rule 84 D.(3)(d). The reference to "subparagraph (ii) of this paragraph" was changed to read "paragraph B. of this subsection."

Rule 84 F. The Council unanimously decided to delete the provisions relating to release of liens, F.(2)(a) through F.(2)(e), in their entirety. The Council also unanimously agreed to delete the last sentence of F.(1)(a): "Delivery of property under this section does not affect the attaching plaintiff's lien."

Rule 81 B. Judge Sloper moved, seconded by Darst Atherly, that paragraphs B.(2)(b) through B.(2)(d) be deleted from the notice of exemption section. The motion carried unanimously. It was suggested by Frank Pozzi that some simple and clear language relating to possible exemptions be added to the notice. The Executive Director was asked to draft language and submit it for approval to the subcommittee.

Rule 83 G.(1). The Council decided that the following sentence should be added at the end of G.(1): "If the plaintiff so requests, the hearing date may be set at some date later than the seventh day."

Rule 83 A. Upon motion by Laird Kirkpatrick, seconded by Don McEwen, the Executive Director was asked to redraft the first paragraph of this rule to allow the required showing to be made by affidavits submitted in support of plaintiff's petition. Judge Dale opposed the motion.

Upon motion by Carl Burnham, seconded by Judge Sloper, the Council unanimously approved release of the tentative draft of Rules 78-85, dated August 29, 1980, as modified by the actions taken by the Council.

Class Actions. Austin Crowe moved, seconded by Charles Paulson, that Rule 32 be amended to incorporate the revisions submitted on July 21, 1980, by the class action subcommittee. The motion carried, with Carl Burnham, Darst Atherly, Garr King, Judge Buttler, and Don McEwen opposing it.

The Council had no further objections to or suggestions regarding the draft of Rules 65-72 and amendments to ORCP 1-64 dated August 27, 1980, which had been approved for release at the last meeting.

The Council discussed the suggested changes in ORCP 7 set out in Frank Pozzi's letter dated August 4, 1980, and in the staff memorandum dated June 16, 1980.

A motion was made by Austin Crowe, seconded by Don McEwen, to adopt the change in 7 D.(4)(a) set out in the June 16, 1980, memorandum reinstating service on the Department of Motor Vehicles, with the substitution of "registered agent" for "attorney in fact" in paragraph (i). The motion passed unanimously.

A motion was made by Frank Pozzi, seconded by Charles Paulson, to adopt the change in D.(4)(c) on Page 2 of the August 4th letter.

Revised

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

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

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

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

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

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

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

any judgment that may be recovered against such bank.

B. Property attachable. All property of a defendant in this state, not exempt from execution, including the rights or shares which a defendant may have in the stock of any association or corporation, together with the interest and profits thereon, shall be liable to be attached.

C. Attachment by claim of lien.

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

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

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

C.(2) Form of claim; filing.

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

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

C.(2)(a)(ii) describe the property sufficiently to identify it;

C.(2)(a)(iii) state that a provisional process order has been issued authorizing the claim of lien with the date of such order; and

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

C.(2)(b) Filing.

C.(2)(b)(i) A claim of attachment lien in real property shall be filed with the clerk of the court that authorized the claim and with the county clerk of the county in which the property is located.

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

C.(3) Attachment of lien. A lien arises in the property described in the claim upon a filing of a claim of lien as provided in this section.

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) To attach real property, the sheriff shall make a certificate containing the title of the cause, the names of the parties to the action, a description of such real property, and a statement that the same has been attached at the suit of the plaintiff, and deliver the certificate to the county clerk of the county in which the attached real estate is situated. The county clerk shall certify upon every certificate so delivered the time when it was received, and the certificate shall be effective from the time of its receipt by the county clerk. Upon receiving the sheriff's certificate as provided in ORS 29.170, the county clerk shall immediately file such certificate in the county clerk's office, and record it in a book to be kept for that purpose. When the certificate is so filed for record, the lien in favor of the plaintiff attaches to the real property described in the certificate. Whenever such lien is discharged, the county clerk shall enter upon the margin of the page on which the certificate is recorded a minute of the discharge.

D.(2)(b) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody. If any property attached is perishable, or livestock, where the cost of



keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's lien shall attach when the property is taken into the sheriff's custody.

D.(2)(c). Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession

of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(d) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of

the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(e) The notice referred to in subsection (3) of this section shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished. be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

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

D.(2)(g) Procedure after garnishment

D.(2)(g)(i) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph D.(2)(c) of this subsection, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(2)(g)(ii) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph D.(2)(c) of this subsection, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time

stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(2)(g)(iii) Contents of order; designation of parties.

The order shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

D.(2)(g)(iv) Restraining order against garnishee. The court or judge thereof may, at the time of the application of the plaintiff for the order provided for in subparagraph (ii) of this paragraph, and at any time thereafter before judgment against the garnishee, by order restrain the garnishee from in any manner disposing of or injuring any of the property of the defendant, alleged by the plaintiff to be in the garnishee's possession, control, or owing by him to the defendant, and disobedience to such order may be punished as a contempt.

D.(2)(g)(v) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in subparagraph (ii) of this paragraph, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the

garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in ORS 29.280.

D.(2)(g)(vi) Answer of garnishee. On the day when the garnishee or officer thereof is required to appear, he shall return the allegations and interrogatories of the plaintiff to the court or judge, with his written answer thereto, unless for good cause shown a further time is allowed. The answer shall be on oath, and shall contain a full and direct response to all the allegations and interrogatories.

D.(2)(g)(vii) Compelling garnishee to answer; judgment for want of answer. If the garnishee or officer thereof fails to answer, the court or judge thereof, on motion of the plaintiff, may compel him to do so, or the plaintiff may, at any time after the entry of judgment against the defendant, have judgment against the garnishee for want of answer. In no case shall judgment be given against the garnishee for a greater amount than the judgment against the defendant.

D.(2)(g)(viii) Exception or reply to answer. Plaintiff may except to the answer of the garnishee or officer thereof for insufficiency, within such time as may be prescribed or allowed, and if the answer is adjudged insufficient, the garnishee or officer may be allowed to amend his answer, on such terms as may be proper, or judgment may be given for the plaintiff as for want of answer, or such garnishee or officer may be compelled to make a sufficient answer. The plaintiff may reply to the whole or a

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

D.(2)(g)(ix) Trial. Witnesses, including the defendant and garnishee or officer thereof, may be required to appear and testify, and the issues shall be tried, upon proceedings against a garnishee, as upon the trial of an issue of fact between a plaintiff and defendant.

D.(2)(g)(x) Judgment against garnishee. If by the answer it shall appear, or if upon trial it shall be found, that the garnishee, at the time of the service of the copy of the writ of attachment and notice, had any property as to which such garnishee or officer thereof is required to give a certificate, as provided in ORS 29.280, beyond the amount admitted in the certificate, or in any amount if the certificate was refused, judgment may be given against the garnishee for the value thereof in money.

D.(2)(g)(xi) Execution against garnishee. Executions may issue upon judgments against a garnishee as upon ordinary judgments between plaintiff and defendant, and costs and disbursements shall be allowed and recovered in like manner; provided, however, when judgment is rendered against any garnishee, and the debt from the garnishee to the defendant is not yet due, execution shall not issue until the debt is due.

D.(2)(g)(xii) Release of garnishment. The clerk of any court in whom is vested authority to issue writs of attachment may issue releases of garnishments based upon writs of attachment issued by such clerk, whenever the plaintiff by his attorney of record, or the plaintiff in person if there is no attorney, shall file with the clerk a written request therefor. Such release shall be executed in duplicate, under the seal of the court or the stamp of the clerk, and may cover all or any portion of the funds or property held under garnishment. One duplicate original of the release shall be delivered to the garnishee and the other duplicate original, together with the written request therefor, indorsed on the fact thereof by the attorney of record, if there be an attorney, shall be attached to the original writ of attachment in the same manner as the return of the sheriff or constable; and any pending proceedings in such case for the sale upon execution of any property so garnished shall, as to all property covered by the release, thereupon be terminated and be considered of no effect; all costs to be paid by the plaintiff. Upon receipt by the garnishee of the duplicate original release, the garnishee, and all funds or property subject to such garnishment, shall, to the extent stated in the release, be released from all liability arising by reason of the issuance and service of the writ of attachment and notice of garnishment, or by reason of his return thereon, as though the writ of attachment and notice of garnishment had not been served. The garnishee may rely upon any such release so received by him



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

D.(2)(h) Return of writ; inventory. 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.

D.(2)(i) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

D.(2)(j) Form of notice or levy or attachment. Any notice of levy or attachment authorized by this section must:

D.(2)(j)(i) State that an order for provisional process

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

D.(2)(j)(ii) Require the debtor or third party to return a written answer to the plaintiff within a stated time (not less than five days) stating the amount and nature of any obligation or liability to the defendant, and the identity of any property of the defendant in the third party's possession, or that no such obligation or liability or property exists. The notice may describe the specific obligation or property that the plaintiff believes to exist;

D.(2)(j)(iii) Order the debtor or third party not to pay or deliver to the defendant, or any other person, any money owed to or property owned by the defendant (save payments of any excess above the sum claimed by the plaintiff in the notice) or to settle any claim or cause of action asserted by the defendant against the debtor or third party.

D.(2)(j)(iv) Warn that payment, delivery, or settlement in violation of the order may make the debtor or third party personally liable to the plaintiff and that failure to answer, or answer accurately, may result in personal liability for any amount that the plaintiff can prove was owed when the notice was served.

D.(2)(j)(v) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

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

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

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

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

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

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

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

G. Redelivery of attached property; release of liens.

G.(1)(a) If an attachment deprives the defendant or any other person claiming the property of the possession or use of the property, the defendant or such person may obtain redelivery or possession thereof, upon a court order authorizing such redelivery or possession, by filing with the court a surety bond undertaking to pay the value of the property, in an amount fixed by the court, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim or the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least 5 days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond. Delivery of property under this section does not affect the attaching plaintiff's lien.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ATTACHMENT

A. Actions in which attachment allowed.

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

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

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

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

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

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

any judgment that may be recovered against such bank.

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

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

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

B.(3) Debts.

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

C. Attachment by claim of lien.

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

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

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

C.(2) Form of claim; filing.

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

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



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

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

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

C.(2)(b) Filing.

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

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

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into his custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plain-

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

D.(2)(b) Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the

bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(c) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred

and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(d) The notice referred to in paragraph D.(2)(b) of this subsection shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of OR 23.185. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

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

D.(3) Procedure after garnishment

D.(3)(a) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph D.(2)(b) of this subsection, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by him is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(3)(b) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph D.(2)(b) of this subsection, for the purpose of attaching any property mentioned therein, such person or officer shall furnish him with a certificate, designating the amount and description of any property in his possession belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time

stated, or if the certificate, when given, is unsatisfactory to the plaintiff, he may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(3)(c) Contents of order; designation of parties.

The order shall require such person or officer to appear before the court or judge at a time and place therein stated. In the proceedings thereafter upon the order, such person or the association or corporation represented by such officer shall be known as the garnishee.

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

D.(3)(e) Allegations and interrogatories to the garnishee. After the allowance of the order provided for in paragraph (b) of this subsection, and before the garnishee or officer thereof shall be required to appear, or within a time to be specified in the order, the plaintiff shall serve upon the

garnishee or officer thereof written allegations, and may serve written interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in paragraph (b) of this subsection.

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

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

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



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

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

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

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

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

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

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

D.(5) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

E. Disposition of attached property after judgment.

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

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

F. Redelivery of attached property; release of liens.

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

redelivery or possession. The moving party shall file a surety bond undertaking, in an amount fixed by the court, to pay the value of the property or the amount of plaintiff's claim, whichever is less, if the same is not returned to the sheriff upon entry of judgment against the defendant. A motion seeking an order authorizing such redelivery or possession must state the moving party's claim of the value of the attached property and must be served upon plaintiff as provided in Rule 9 at least 5 days prior to any hearing on such motion, unless the court orders otherwise. The property shall be released to the defendant upon the filing of the bond. Delivery of property under this section does not affect the attaching plaintiff's lien.

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

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

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

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

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

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

F.(2)(b)(iv) List the liens against the properties 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)(iii) 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.

F.(2)(e) After judgment the proceeds shall be disposed of as provided in section E. of this rule. However, the proceeds shall not be distributed to defendant until distribution to all other lienors according to priority.

#### COMMENT

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

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

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

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

Section D. is taken from ORS 29.160 - 29.200, 29.270 - 29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 29.170 and 29.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

Section E. is ORS 29.380 and 29.390. Section F. is new and replaces ORS 29.220 - 29.260. It clarifies the procedure for redelivery bond and authorizes a new procedure allowing sale of attached property and deposit of proceeds pending judgment.

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

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

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

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

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

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

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

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



any judgment that may be recovered against such bank.

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

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

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

B.(3) Debts.

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

C. Attachment by claim of lien.

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

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

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

C.(2) Form of claim; filing.

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

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

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

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

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

C.(2)(b) Filing.

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

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

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plain-

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

D.(2)(b) Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the

bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this subsection.

D.(2)(c) For purposes of this section, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred

and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(d) The notice referred to in paragraph (b) of this subsection shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

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

D.(3) Procedure after garnishment.

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

corporation mentioned in paragraph (b) of subsection (2) of this section, from the time of the service of a copy of the writ and notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by plaintiff is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(3)(b) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph (b) of subsection (2) of this section, for the purpose of attaching any property mentioned therein, such person or officer shall furnish the sheriff with a certificate, designating the amount and description of any property in the possession of the garnishee belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ, when service is made within the county in which the action is pending, and within 10 days when service is made in any other county. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, such person or

officer may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(3)(c) Contents of order; designation of parties.

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

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

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



interrogatories, touching any of the property as to which the garnishee or officer thereof is required to give a certificate as provided in paragraph (b) of this subsection.

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

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

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

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

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

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

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

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

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

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

D.(5) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

E. Disposition of attached property after judgment.

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

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

F. Redelivery of attached property.

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

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

F.(2) In an action brought upon such undertaking against the principal or the sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

#### COMMENT

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

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

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

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

Section D. is taken from ORS 29.160-29.200, 29.270-29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 29.170 and 29.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

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

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

RULE 84

ATTACHMENT

A. Actions in which attachment allowed.

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

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

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

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

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

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



of any judgment that may be recovered against such bank.

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

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

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

B.(3) Debts; and

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

C. Attachment by claim of lien.

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

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

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

C.(2) Form of claim; filing.

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

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

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

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

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

C.(2)(b) Filing.

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

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

D. Writ of attachment.

D.(1) Issuance; contents; to whom directed; issuance of several writs. If directed by an order authorizing provisional process under Rule 83, the clerk shall issue a writ of attachment. The writ shall be directed to the sheriff of any county in which property of the defendant may be, and shall require the sheriff to attach and safely keep all the property of the defendant within the county not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, together with costs and expenses. Several writs may be issued at the same time to the sheriffs of different counties.

D.(2) Manner of executing writ. The sheriff to whom the writ is directed and delivered shall note upon the writ the date of such delivery, and shall execute the writ without delay, as follows:

D.(2)(a) Personal property not in possession of third person. Personal property capable of manual delivery to the sheriff, and not in the possession of a third person, shall be attached by taking it into the sheriff's custody. If any property attached is perishable, or livestock, where the cost of keeping is great, the sheriff shall sell the same in the manner in which property is sold on execution. The proceeds thereof and other property attached shall be retained by the sheriff to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment. Plaintiff's

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

D.(2)(b) Other personal property. Other personal property shall be attached by leaving a certified copy of the writ and a notice with the person having possession of the same, or if it be a debt, then with the individual debtor, and if such debt arises out of a wage or salary claim against a corporate debtor then with the registered agent of the corporation, the president or other head of the corporation, vice president, secretary, cashier, assistant cashier or managing agent or such other person designated by the corporation to accept the writ and notice, or if it be rights or shares in the stock of an association or corporation, or interests or profits thereon, then with such person or officer of the association or corporation as a summons is authorized to be served upon; provided that if it be a security, as defined in ORS 78.1020 or a share or any other interest for which a certificate is outstanding the requirements of ORS 78.3170 must be satisfied. However, debts owing to the defendant by a bank or trust company or savings and loan association maintaining branch offices, or credits or other personal property whether or not capable of manual delivery, belonging to the defendant and in the possession of or under the control of such a bank or trust company or savings and loan association, shall be attached by leaving a certified copy of the writ and the notice with the president, vice president, treasurer, secretary, cashier, or assistant cashier of the

bank or trust company or savings and loan association at the office or branch thereof at which the account evidencing such indebtedness is carried or at which the bank or trust company or savings and loan association has credits or other personal property belonging to the defendant in its possession or under its control, or, if no such officers be found at such office or branch, by leaving a certified copy of the writ and the notice with the manager or assistant manager of such office or branch; and no attachment shall be effective as to any debt owing by such bank or trust company or savings and loan association if the account evidencing such indebtedness is carried at an office or branch thereof not so served, or as to any credits or other personal property in its possession or under its control at any office or branch thereof not so served, except that such service on the head office of any such institution shall be effective service upon all offices or branches thereof located in the same city as the head office. Plaintiff's lien shall attach upon service of the copy of the writ and notice as provided in this paragraph.

D.(2)(c) Savings and loan association. For purposes of this paragraph, a savings and loan association, including such an association doing business in this state and organized under the laws of another state or of the United States, shall be deemed the debtor of a defendant to whom a certificate, account, or obligation, or an interest therein, of the association has been issued, established, or transferred and in such case the provisions of ORS 78.3170 shall not apply; provided, however, ownership

by a defendant of reserve fund capital stock, or comparable equity stock, or of an interest therein, of any such association shall not be deemed to create such a relationship.

D.(2)(d) Form of notice. The notice referred to in paragraph (b) of this subsection shall contain the name of the court, the names of the parties to the action, clearly specify name of the party or parties whose property is being garnished, provide the last address, if known, of each party whose property is being garnished, be directed to the garnishee, specify the property attached, whenever possible, and comply with the requirements of ORS 23.185. A certified copy of the order authorizing provisional process shall be attached to the notice. If wages held by an employer are attached, a copy of the provisions of ORS 23.170 and 23.185 shall be included in the notice. The notice may contain additional information to assist the garnishee in identifying the party whose property is being garnished.

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

D.(3) Procedure after garnishment.

D.(3)(a) Liability of garnishee; delivery of attached property to sheriff by garnishee. Any person, association, or corporation mentioned in paragraph (b) of subsection (2) of this section, from the time of the service of a copy of the writ and

notice as therein provided, shall, unless the attached property is delivered or attached debt is paid to the sheriff, be liable to the plaintiff for the amount thereof until the attachment is discharged or any judgment recovered by plaintiff is satisfied. Such property may be delivered or debt paid to the sheriff without suit, or at any time before a judgment against the garnishee, and the sheriff's receipt shall be a sufficient discharge.

D.(3)(b) Certificate of garnishee; order for examination of garnishee. Whenever the sheriff, with a writ of attachment against the defendant, shall apply to any person or officer mentioned in paragraph (b) of subsection (2) of this section, for the purpose of attaching any property mentioned therein, such person or officer shall furnish the sheriff with a certificate, designating the amount and description of any property in the possession of the garnishee belonging to the defendant, or any debt owing to the defendant, or the number of rights or shares of the defendant in the stock of the association or corporation, with any interest or profits or encumbrance thereon. The certificate shall be furnished to the sheriff within five days from the date of service of the writ. If such person or officer fails to do so within the time stated, or if the certificate, when given, is unsatisfactory to the plaintiff, such person or officer may be required by the court, or judge thereof, where the action is pending, to appear and be examined on oath concerning the same, and disobedience to such order may be punished as a contempt.

D.(3)(c) Contents of order; designation of parties.

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

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

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



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

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

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

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

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

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

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

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

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

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

D.(5) Indemnity to sheriff. Whenever a writ of attachment is delivered to the sheriff, if the sheriff has actual notice of any third party claim to the personal property to be levied on or is in doubt as to ownership of the property, or of encumbrances thereon, or damage to the property held that may result by reason of its perishable character, such sheriff may require the plaintiff to file with the sheriff a surety bond, indemnifying the sheriff and the sheriff's bondsmen against any loss or damage by reason of the illegality of any holding or sale on execution, or by reason of damage to any personal property held under attachment. Unless a lesser amount is acceptable to the sheriff, the bond shall be in double the amount of the estimated value of the property to be seized.

E. Disposition of attached property after judgment.

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

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

F. Redelivery of attached property.

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

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

F.(2) Defense of surety. In an action brought upon such undertaking against the principal or the sureties, it shall be a defense that the property for which the undertaking was given did not, at the execution of the writ of attachment, belong to the defendant against whom the writ was issued.

#### COMMENT

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

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

Section 8. is a clarification of ORS 29.140. It does not change the property that may be subject to attachment.

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

Section D. is taken from ORS 29.160-29.200, 29.270-29.370, and 29.400. The only changes are: specific references to attachment of lien in D.(2)(a) and (b) which replace ORS 29.150; the requirement of attaching a copy of the provisional process order and ORS 23.170 and 23.185 were added to D.(2)(d); and, D.(5) is new and modelled upon ORS 23.310.

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

ORS 29.120 and 29.260 are eliminated as inconsistent with Rule 83. ORS 29.175 would remain as a statute. ORS 29.178 is amended and remains as a statute.