

RULE 66

SUBMITTED CONTROVERSY

A. Submission without action. Parties to a question in controversy, which might have been the subject of an action with such parties plaintiff and defendant, may submit the question to the determination of a court having subject matter jurisdiction.

A.(1) Contents of submission. The written submission shall consist of an agreed statement of facts upon which the controversy depends, a certificate that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties, and a request for relief.

A.(2) Who must sign the submission. The submission must be signed by all parties or their attorneys as provided in Rule 17.

A.(3) Effect of the submission. From the moment the submission is filed with the clerk, the court shall treat the controversy as if it is an action pending after a special verdict found. The controversy shall be determined on the agreed case alone, but the court may find facts by inference from the facts agreed to. If the statement of facts in the case is not sufficient to enable the court to enter judgment, the submission shall be dismissed or the court shall allow the filing of an additional statement.

B. Submission of pending case. An action may be submitted at any time before trial, subject to the same requirements and attended by the same results as in a submission without action, and in addition:

B.(1) Pleadings deemed abandoned. Submission shall be an abandonment by all parties of all prior pleadings, and the cause shall stand on the agreed case alone; and

B.(2) Provisional remedies. The submission must provide for any provisional remedy which is to be continued or such remedy shall be deemed waived.

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COMMENT

The only serious question presented by this rule is whether any rule is required at all. The question is whether the procedure accomplishes anything that could not be done by some combination of stipulation of facts, admissions, declaratory judgment, confession of judgment or summary judgment.

Although aspects of the submission procedure overlap the functions of all the procedures described above, the use of submission has two major elements:

(a) No pleadings or summons are involved; any other procedure requires the commencement of an action.

(b) No discovery, trial, or evidence is involved. The submitted facts are presented to the court as the equivalent of a special verdict. See Alsos v. Kendall, 111 Or. 359, 364 (1924); Clason v. Matko, 223 U.S. 646 (1911). This differs from the summary judgment where the court is presented with factual matter and asked to determine if a factual dispute exists. This also differs from "stipulated facts" which are presented in lieu of evidence and the court then finds the ultimate facts. 83 C.J.S. Submission of Controversy § 1. The change in the second sentence of A.(3) reduces the importance of the distinction, but the procedure remains unique as a way of securing a judicial determination of issues of law.

The procedure is not heavily used but an examination of the annotations to Chapter 27 shows 14 appeals from 1869 to 1968 which arose from submitted controversies. Since the submission cannot be used unless

there is sufficient harmony between the parties, the procedure is particularly useful for obtaining declaratory relief, or in resolving legal disputes between a public agency and a citizen at minimum cost. Practice Commentary to N.Y. C.P.L.R. § 3222 at p. 1083. A submission, however, may be used to obtain any type of relief. Apparently, the procedure of submission without any action did not exist at common law, and a rule is necessary. No rule would be required for section B. on submission of pending matters (once a case was filed the parties could stipulate any submission), but reference to such procedure and particular problems involved is useful. 3 Am. Jur.2d Agreed Case § (2).

Section A. is identical to the procedure provided in ORS Chapter 27 (superseded) with a few exceptions. ORS 27.020 (superseded) required verification of the submission. That requirement has been deleted for the same reason it was deleted with respect to pleadings in ORCP 17. The second sentence of Section A.(3) was not in ORS and is taken from N.Y. C.P.L.R. § 3222(b)(4). Its purpose is best described by this quote from the Practice Commentary to § 3222.

"The major barrier to the use of the submission device under prior law was that the statement of facts had to be so replete that a determination did not even require the drawing of an inference. Many a submission was dismissed because of the need to draw inferences, 'even if the submitted facts logically and reasonably admit of further important inferences.' Cohen v. Mfrs. Safe Dep. Co., 297 N.Y. 266, 78 N.E.2d 604 (1948).

This prior-law limitation is removed by CPLR 3222(b)(4) in direct reaction to such as the Cohen case. \* \* \* The drawing of inferences naturally emanating from the stated facts appears to have been the only thing needed to make the Cohen case ripe for a determination."

In all other respects, the special verdict standard controls. The court may not hear evidence. It can dismiss or allow a new filing. As to

the amendment or withdrawal of submissions, see Am. Jr.2d Agreed Case §§ 26-28.

Section B. did not exist in ORS and is based on Iowa Code Ann. § 678, 3 Am. Jur.2d Agreed Case § 2. Sections B.(1) and (2) are modifications of Iowa Code Ann. § 678.7. New York allows no provisional remedies, even if agreed to by the parties. N.Y. C.P.L.R. § 3222(b)(1). Here the agreement must be express.

ORS SECTIONS SUPERSEDED: 27.010 through 27.030.

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#### COMMENT

This rule covers the submitted controversies in ORS chapter 27. Although the procedure overlaps stipulation, admissions, declaratory judgment, and summary judgment in some respects, it provides for entry of judgment (a) without pleading or summons, and (b) with no trial or submission of evidence. The procedure did not exist at common law and a rule is required.

The procedure is the same as ORS chapter 27. The only changes are: (a) the submission is not verified (this conforms to ORCP 17), and (b) the second sentence of 66 A.(3) was added. This is a clarification taken from N.Y. C.P.L.R. § 3222 (b)(4).

Subsection 66 B. was taken from Iowa Code Ann. § 678. The submission after suit differs from a stipulated judgment or dismissal, because the parties agree to the facts but leave the decision to the court. For stipulated judgments and dismissals, see ORCP 54 and 67 F.

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