

RULE 69

DEFAULT

A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) A plaintiff's claim against a defendant is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The defendant has been defaulted for failure to appear; and

B.(1)(d) The defendant is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted.

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party entitled to a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian or other representative as provided in Rule 27 who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court shall direct entry of judgment in accordance with its own findings or the verdict of the jury; provided, however, that in all cases where the claim is for unliquidated damages, if a jury is demanded by either party to assess the damage, the court must grant such jury trial. If neither party demands a jury the damage may be assessed by the court.

B.(3) Non-military affidavit required. Notwithstanding subsections B.(1) and B.(2) of this rule, no judgment by default shall be entered until the filing of an affidavit made by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in

Article 1 of the "Soldiers' and Sailors' Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with that Act.

C. Setting aside default. For good cause shown the court may set aside an entry of default. If a judgment by default is entered, such judgment may only be set aside in accordance with the procedure and rules governing vacation of judgments not by default.

D. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 67 B.

E. Default judgment after publication. When in any action the service of the summons appears to have been made by publication or other method under Rule 7 D.(6)(a), the court may order the entry of judgment to be delayed until the party seeking the judgment files with the clerk an undertaking, with one or more sureties, to be approved by the clerk, in an amount equal to the sum for which judgment may be given, upon the condition that the party seeking the judgment will abide by and perform any order of the court requiring restitution to be made to the party against whom the judgment is sought or such party's representative in case either of them shall afterwards be admitted to defend against the claim.

COMMENT

Rule 69

The Oregon default statute, ORS 18.080, is almost identical to the 1853 default statute and manifestly unsuited to complex cases with modern joinder of claims and parties. ORS 18.080 refers to failure to answer and to defendants only, but appears to be used for a number of different types of default and against different parties.

The rule drafted uses the basic structure of Federal Rule 55 with a number of modifications. The rule contains a basic distinction between the default and the judgment or default.

Under 69 A. the entry of default is a ministerial act to be performed by the clerk. Anyone who has failed to comply with a time limit for pleading or appearance is technically in default, but until a formal entry of default is made, this can be cured by the necessary pleading or appearance. Reeder v. Marshall, 214 Or. 134, 328 P.2d 773 (1958). After entry, the default can only be cured by the judge vacating the default under section 68 C. Under a similar federal rule it has been held that a default may also be entered by a judge. The rule would clearly apply to the counterclaim, cross-claim, and third party claim situation. ORS 18.080 only referred to default for failure to answer. This rule would apply to anyone required to file a responsive pleading to a claim and to any person who failed to appear and defend at trial. It would also apply when other ORCP provide for default, such as, under ORCP 46, a sanction for failure to comply with discovery rules. The rule would apply when a party against whom a

judgment is sought and who is subject to a motion to dismiss, strike, or change a pleading declines to plead over, as such party would be failing to plead as required by ORCP 15 and 23. The rule would not apply where a motion to dismiss for failure to state a claim or to strike an insufficient defense or for a judgment on the pleadings is granted, and leave to amend is denied under 23 D. These are covered under Rule 70. This rule also does not apply to failure to prosecute or other dismissals of claims against a party seeking judgment. These are covered by ORCP 54.

Rule 69 A. is taken from the federal rule and requires that service must be shown by affidavit or "otherwise" before default can be entered. This would allow use of the record of the case when jurisdiction is by consent and presumably would cover the use of the certificate of service that is in the file with the returned summons to establish service. It would also cover the partnership judgment under ORS 15.100 (see Rule 67 E.).

Rule 69 B. covers the judgment entry after the separate entry of the default. The provision in 69 B.(1) differs from the federal rule in that the authority of the clerk to enter judgment is limited to contract actions. ORS 18.080(a) authorized the clerk to enter judgment in any contract action where money or damages was sought. This would literally include any case where money damages are sought based on contract, including possibly some situations involving unliquidated damages. The "sum certain" language was taken from the federal rule as being more consistent with the role of the clerk,. Note, the rule also is more limited than ORS 18.080 in that the clerk cannot enter judgment when the default is not for failure to appear or when defendant is an infant

or incompetent. The lack of infancy or incompetency should be shown by affidavit before the clerk enters the judgment.

The rule preserves the ORS 18.080(1)(a) requirement of a written application as opposed to the "request" referred to in the federal rules. The language limiting recovery to prayer of ORS 18.080(1)(a) is covered by ORCP 67 D.

Section B.(2) combines ORS 18.080(1)(b) and Federal Rule 55(b)(2). The limit on judgments against infants and incompetents comes from the federal rule. The requirement of a three-day notice for judgments differing from the prayer when there is a default after appearance comes from the federal rule. It seems reasonable that where a party can easily be served under Rule 9, notice of the proposed judgment be given. It is easier to do this than handle problems under a motion to vacate. There also is an Oregon case that seems to say application for a judgment for an amount not specifically pled in the complaint must be upon notice. Leonard v. Bennett, 165 Or. 157, 174, 103 P.2d 732, 106 P.2d 542 (1940). The third sentence comes from Federal Rule 55(b) but is similar to ORS 18.080(1)(b). Under this approach it is sometimes difficult to tell exactly when a hearing is mandatory. The Oregon Supreme Court has said a hearing is mandatory only when evidence "would affect the outcome of the case." State ex rel. Nilson v. Cushing, 253 Or. 262, 266, 453 P.2d 945 (1969). Since all allegations in the complaint are admitted on default, the necessity of a hearing apparently is tied to the adequacy and specificity in pleading the claim. The court has

relatively free discretion to order the hearing, and in case of any default, it probably should. The only alternative would be to require a hearing and evidence in every case which would be unduly burdensome.

The last sentence giving a right to jury trial comes from ORS 18.080 and is different from the federal rule which says there is only a right to jury trial when statutorily granted.

Rule 69 B.(3) does not appear in the federal rule. The obligation to file the non-military affidavit arises from federal statute but it seems reasonable to note the obligation in our rule. The language comes from Rhode Island Rule 55(b)(3).

Rule 69 C. creates a new discretionary power on the part of the trial judge to set aside the default, as opposed to the judgment, without compliance with 18.160 or other requirements for vacating judgments. The judgment can be vacated only under the same conditions as other judgments. The federal rule makes direct reference to Federal Rule 60(b), governing vacation of federal judgments. The Oregon forms for vacation of judgment are more complex (see Rule 71) and in any case an independent suit in equity may be used.

Rule 69 D. makes clear the rule is not limited to plaintiff's claim. It also relates this rule to 67 B., covering judgments involving multiple claims and parties. If some parties default and others do not, in theory judgment can be entered against the defaulting defendants, but unless the defense of other defendants is individual, e.g., capacity, etc., a victory by the remaining defendants inures to the benefit of the defaulting defendants. This would involve vacating the

entered default judgment. See State ex rel. Everett v. Sanders, 274 Or. 75, 544 P.2d 1043. By reference to Rule 67 B., it is now clear that even in default a judgment against less than all defendants is possible only on court order and finding of no just reason for delay. Presumably, if it were possible that the defaulting defendants might be exonerated by a judgment for the appearing defendants, the court would leave the default, but delay entry of judgment until the entire case was finished.

Rule 69 E. does not appear in the federal rule but is ORS 18.030(3). Note the last sentence relating to qualifying and justifying sureties was eliminated, and that will be covered under the general rule for bonds and undertakings.

Federal Rule 55(e) limits default against the U.S. There is no comparable state rule, and none is created here. ORS 18.080(2) is covered in Rule 67 B.

The judgment recitals required by ORS 18.080(4) are unnecessary and incorrect and were eliminated.

Rule 68 C.(5)

This section should be changed to provide an automatic stay of the costs and attorney fees portion of the judgment upon filing of objections.

Rule 69 A.

The words "or court" should be added between "clerk" and "shall" in last line.

Rule 69 B.(1)

A further qualification upon the power of the clerk to enter judgment should be added as section B.(1)(g) as follows:

"Summons was personally served within the State of Oregon upon the party against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i)."

Rule 69 B.(2)

The necessity for appearance by a general guardian should be eliminated. The reference to three days in line 9 should be changed to "10 days, unless shortened by the court," and specific reference to authority of the court to use affidavits should be added. The requirement for mandatory jury trial in unliquidated damage cases should be omitted.

Rule 69 C.

The Executive Director was asked to redraft this section to avoid differing standards for vacating default judgments and other judgments.

Rule 69 E.

This section relating to publication default should be eliminated.

Rule 70 A.

Add the words "plainly labelled as a judgment" between the words "writing" and "and" in the first line. The words "or approved" should be eliminated from line 6.

Rule 70 B.

Eliminate words "in the journal" in lines 1 and 2 of this section.

Rule 70 C.

This section should be redrafted to provide for service a fixed number of days prior to submission.

RULE 69

DEFAULT

69 A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear; and

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State of Oregon upon the party against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

69 B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. The court shall direct entry of judgment in accordance with its own findings or the verdict of the jury.

B.(3) Non-military affidavit required. Notwithstanding subsections B.(1) and B.(2) of this rule, no judgment by default shall be entered until the filing of an affidavit made by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act" of 1940, as amended, except upon order of the court in accordance with that Act.

C. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 67 B.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

## COMMENT

### Rule 69

Rule 69 A. was changed to add "court", and the limitation to personal service cases was added to 69 B.(1). The requirement of appearance by a guardian before default was eliminated from 69 B.(2), and the three-day notice period was changed to 10 days. The reference to court decision on affidavits was added, and the mandatory jury trial was eliminated. There is no constitutional right to jury trial upon default, and the Council is free to change the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892), is directly in point and holds that the then existing statute, which did not give any right to jury trial, was constitutional.

After reviewing section 69 C. in the first draft relating to vacating defaults and judgments, it was felt that the best approach was to eliminate it. The present ORS sections have no equivalent section. Presently, a default, as any other order short of a final judgment, may always be revised by the court. The default judgment would be simply another judgment subject to vacation under the standards of Rule 71. Section E., relating to defaults after publication, was also eliminated as directed by the subcommittee.

New section D. relating to the definition of "clerk" was added for clarity. Some references to plaintiff or defendant or person entitled to judgment in sections B. and C. were also changed to "a person seeking judgment" and "person against whom judgment is sought."

RULE 69

DEFAULT

A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear; and

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State

of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit made

by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

#### COMMENT

This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69 A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule. Judgments of dismissal against a party seeking judgment are regulated by Rule 54.

Section 69 B. regulates entry of judgment after default. Subsection 69 B.(1) is more restrictive, in allowing entry by the clerk, than was ORS 18.080(a). The requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B.(2) is a modified form of

Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B.(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See State ex rel Nilsen v. Cushing, 253 Or. 262, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment, but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 C.

RULE 69

DEFAULT

A. Entry on default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract; and

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain; and

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear; and

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit; and

B.(1)(e) The party seeking judgment submits an affidavit of the amount due; and

B.(1)(f) An affidavit pursuant to subsection B.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State

of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing or make an order of reference or order that issues be tried by a jury as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit made

by some competent person on the affiant's own knowledge, setting forth facts showing that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

#### COMMENT

This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69 A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule. Judgments of dismissal against a party seeking judgment are regulated by Rule 54.

Section 69 B. regulates entry of judgment after default. Subsection 69 B.(1) is more restrictive, in allowing entry by the clerk, than was ORS 18.080(a). The requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B.(2) is a modified form of

Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B.(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See State ex rel Nilsen v. Cushing, 253 Or. 262, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment, but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. Deane v. Willamette Bridge Co., 22 Or. 167 (1892).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 C.

RULE 69

DEFAULT

A. Entry of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection 8.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State

of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i) or 7 D.(3)(b)(i).

The judgment entered by the clerk shall be for the amount due as shown by the affidavit, and may include costs, disbursements, and attorney fees entered pursuant to Rule 68.

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. If the party against whom judgment by default is sought has appeared in the action, such party (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits.

B.(3) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit

on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of Rule 67 B.

D. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

#### COMMENT

This rule is a combination of ORS 18.080 and Federal Rule 55. Under section 69 A. all defaults by a party against whom judgment is sought would be covered by this rule. ORS 18.080 referred only to failure to answer. A failure to file responsive pleading, or failure to appear and defend at trial, or an ordered default under Rule 46, would be regulated by this rule. Judgments of dismissal against a party seeking judgment are regulated by Rule 54.

Section 69 B. regulates entry of judgment after default. Subsection 69 B.(1) is more restrictive, in allowing entry by the clerk, than was ORS 18.080(a). The requirements of claim for a sum certain and jurisdiction based upon personal service within the state were added. The rule was drafted to avoid asking the clerk to make any decisions about the existence of jurisdiction or amount of the judgment.

In all other cases the court must order the entry of a default judgment. Subsection 69 B.(2) is a modified form of

Federal Rule 55 (b)(2). The limitation on judgments against infants and incompetents is new. The section requires 10 days' notice for any default other than failure to appear. The third sentence of subsection 69 B.(2) was intended to preserve the existing Oregon requirement for hearing before entry of a default judgment. See State ex rel Nilsen v. Cushing, 253 Or. 262, 266, 267, 453 P.2d 945 (1969). The fourth sentence specifically allows a court to use affidavits rather than require testimony. Finally, the rule allows the court to have a jury decide factual issues related to the default judgment. but does not require a jury in any case. ORS 18.080 did require a jury, upon demand, in some circumstances. There is no constitutional right to a jury trial after default, and the Council changed the rule. Deane v. Willamette Bridge Co., 22 Or. 167, 175, 29 P. 440 (1892).

Under section 69 C., the rule applies to default by any party against whom a claim is asserted. A separate default judgment against less than all the opposing parties would require a court direction for entry of judgment as provided in Rule 67 B.