

CONFESSIONS OF JUDGMENT

ALTERNATIVE I:

Repeal ORS 26.110-26.130 and enact no rule.

ALTERNATIVE II:

RULE 74

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

A.(1) Subject to the provisions of ORS 83.670(1), 91.745(1)(b), 697.733(3), and 725.050(2), judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A.(2) No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or loan or extension of credit.

B. Statement by defendant. A statement in writing must be made, signed by the defendant or person acting for defendant in the same manner as provided by Rule 67 F.(2), and verified by oath, to the following effect:

B.(1) It must authorize the entry of judgment for a specified sum; and

B.(2) If it be for money due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due.

C. Application by plaintiff. Judgment by confession may be entered by the clerk upon the filing of:

C.(1) The statement required by section B. of this rule, and

C.(2) A certificate of service of summons in the manner required by section D. of this rule.

D. Summons. The plaintiff shall issue a summons to the defendant notifying him of the intended entry of the judgment and requiring him to appear within 30 days after service of summons and show cause, if any, why the judgment should be vacated, opened, or modified. The summons shall be served with a copy of the statement required by section B. of this rule. Except as otherwise provided in this rule, the form of summons, the manner of service, and return of summons shall be as provided in Rule 7. In lieu of the notice required by Rule 7 C.(3)(a), the summons shall contain a notice printed in a type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEBTOR
READ THESE PAPERS
CAREFULLY!

Your creditor has applied for a judgment against you in the amount stated in the attached paper. He claims that you have waived any right to a court trial on the claim by signing that paper.

If you wish to contest the claim, you must file with the court a legal paper called a motion, or the creditor will win automatically. The motion must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the creditor's attorney or, if the creditor does not have an attorney, proof of service on the creditor.

If you have any questions, you should see an attorney immediately.

E. Motion by defendant. Application to vacate, open, or modify the judgment must be made by motion within 30 days after service of the summons. The motion shall be made on the ground that the defendant did not knowingly and intelligently waive such defendant's constitutional rights concerning the entry of judgment or that the defendant has a meritorious defense to the cause of action. It shall set forth fully the facts relied on for such defense. A copy of the motion shall be served on the plaintiff or his attorney. If no application is made within the time allowed, and the judgment was

entered prior to the expiration of the 30 days, the judgment shall stand to the same extent as a judgment after trial.

F. Disposition of defendant's motion. If the evidence presented at a hearing establishes that the defendant could have resisted a motion for a directed verdict if the case were tried on the merits, the court shall order the judgment by confession vacated, opened, or modified with leave to file a pleading and the case shall stand for trial. If the evidence does not establish that the defendant could have resisted a motion for directed verdict if the case was tried on the merits, the motion shall be denied and the judgment shall stand to the same extent as a final judgment after trial.

G. Use of discovery. The court may, for good cause shown, permit the use of any discovery device prior to the hearing on defendant's motion.

H. Other cases. Except as authorized by this rule, judgment by confession shall be entered only upon order of court, after such notice and upon such terms as the court may direct.

I. Enforcement of judgment. Unless otherwise ordered by the court, a judgment by confession may not be enforced until either the expiration of 30 days after service of summons on the defendant or disposition of any motion filed under section E. of this rule, whichever occurs later.

J. Extensions of time. The court may, for good cause shown, extend the time for responding to any summons or notice pursuant to this Rule.

K. Judgments by confession entered prior to the effective date of this rule.

K.(1) Application for enforcement by judgment creditor. A judgment entered prior to the effective date of this rule by a court of this state by authority of ORS 26.110 to 26.130 or any prior statute and which has not been enforced by execution or otherwise may not be so enforced until the judgment creditor shall notify the judgment debtor. The judgment creditor shall issue a summons to the defendant notifying him of the intended enforcement of the judgment and requiring him to appear within 30 days after service of summons and show cause, if any, why the judgment should not be enforced. The summons shall be served with a copy of the judgment. Except as otherwise provided in this rule, the form of summons, the manner of service, and return of summons shall be as provided in Rule 7. In lieu of the notice required by Rule 7 C.(3)(a), the summons shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEBTOR

READ THESE PAPERS

CAREFULLY!

Your creditor obtained the attached judgment against you without notice to you and without a court trial. He claims that you waived any right to a court trial on the claim by signing a paper.

If you wish to prevent your creditor from enforcing that judgment against your property, you must file with the court a legal paper called a motion, or the creditor will win automatically. The

motion must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the creditor's attorney or, if the creditor does not have an attorney, proof of service on the creditor.

If you have any questions, you should see an attorney immediately.

K.(2) Motion by judgment debtor. The judgment debtor may make a motion within the time and in the manner permitted by section E. of this rule. The provisions of sections F., G., and J. of this rule apply to such motions.

K.(3) Enforcement of judgment. Unless otherwise ordered by the court, a judgment by confession governed by this section may not be enforced until either the expiration of 30 days after service of summons on the defendant or the disposition of any motion filed under section E. of this rule, whichever shall occur later.

K.(4) When judgment creditor takes no action. Even though the judgment creditor takes no action to enforce the judgment by execution or otherwise, the judgment debtor may nonetheless move the court for an order in the manner permitted by section E. of this rule. This motion may be made at any time. The provisions of sections F. and G. of this rule apply to such motions.

L. Judgments entered by other jurisdictions. A judgment entered by another jurisdiction, whether prior to or after the effective date of this rule, by authority of any statute or procedure which permits judgments by confession, which does not provide due process safeguards shall not be enforced.

COMMENT

Rule 74

This proposed rule deals with confessions of judgment without action. Confessions of judgment after action have been covered by the stipulated judgment provision of Rule 67 F.

The use of the confession of judgment based upon authorization of power signed by a debtor (usually when the obligation is created) is a controversial issue in the area of consumer protection and creditors rights. The device is a procedure, however, that authorizes use of judgment collection power of the state as provided by the procedural rules.

Confessed judgments are not per se unconstitutional. Compare D.H. Overmyer Co., Inc. v. Frick Co., 92 S.Ct. 775, 405 U.S. 174 (1972), with Swarb v. Lennox, 92 S.Ct. 767, 405 U.S. 191 (1972). However, some states have gone further than the U.S. Supreme Court. New York's Court of Appeals criticized them as "the loosest way of binding a man's property that was ever devised in any civilized country," and refused to accord them full faith and credit. Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 250 N.E.2d 474, 478 (1969), quoting Alderman v. Diamant, 7 NJL 197, 198 (1828). A number of states have outlawed them entirely, or in certain transactions (see, e.g., ORS 83.670(1), ORS 91.745(1)(b), ORS 697.733(4), and ORS 725.050(2)).

ALTERNATIVE I

The complete repeal of ORS Chapter 26 could not be based on the unconstitutionality of consent judgments in all forms. If proper notice is given, the procedure is constitutional. But the Council may conclude that the inherent unfairness of depriving a debtor of a hearing so far

outweighs the commercial advantage of such judgments as to make the adoption of a rule on the subject imprudent. Granted, the repeal of Chapter 26 might be seen as substantive consumer protection, but there is clearly a legitimate interest in a rule which protects the dignity of the judicial system to the end that the word "judgment" truly does mean "a final determination of the rights of the parties." ORS 18.010 (1). This sort of action is not unprecedented. After the Overmyer decision, the Circuit Court of Cook County, Illinois stopped executing judgments by confession until they were confirmed after notice to the debtor. Supplement to Historical and Practice Notes, Ill. Ann. Stat. ch. 110 § 50(3)(1979 Pocket Part).

ALTERNATIVE II

This alternative retains confession of judgments but severely curtails their use: (1) confessions of judgment would no longer be available in consumer credit transactions, and (2) pre-judgment notice and pre-enforcement opportunity for hearing are required.

The consumer credit situation is the area of most serious abuse on the confession of judgment procedure. The rule would merely complete the legislative piecemeal action of abolishing confessions of judgment by debt consolidation agencies, ORS 697.733(4), by licensed consumer finance entities, ORS 725.050(2), for rental agreements, ORS 91.745, and in retail installment sale contracts, ORS 83.670(1).

There is a great deal of dispute as to whether due process requires a pre-judgment notice to the debtor of a confession of judgment, or whether an ability to reopen or vacate the judgment on the part of the debtor is sufficient. The cases holding the former include: Isbell v. County of Sonoma, 21 Cal.2d 61, 145 Cal. Rptr. 368, 577 P.2d 188 (1978),

cert. den. 99 S.Ct. 597 (1978); Virgin Islands Nat. Bank v. Tropical Ventures, Inc., 358 F. Supp. 1203 (D. St. Croix (1973)); Osmond v. Spence, 359 F. Supp. 124 (D. Del. 1972). The cases holding contra include: Star Finance Corp. v. McGee, 27 Ill. App.3d 421, 326 N.E.2d 518 (1975); Irmco Hotels Corp. v. Solomon, 27 Ill. App. 3d 225, 326 N.E.2d 542 (1975); Tunheim v. Bowman, 366 F. Supp. 1392 (D. Nev. 1973). The U.S. Supreme Court has not decided the issue, but there are several policies to consider:

(1) The mere existence of a judgment even unexecuted may cast a cloud over the debtor's financial dealings, whether he is aware of it or not;

(2) If no pre-judgment notice is given, the debtor may not challenge the judgment until some later time when execution is sought. That puts the burden on the debtor to hurry into court to stop a sale. Creditors apparently don't always execute until months or even years after getting their judgment. By then, evidence may be stale or the debtor may be faced in court with an assignee of the judgment, rather than the original creditor;

(3) The standards for upsetting a judgment by other means may be stricter than that provided by this rule (see Rule 71).

Once the pre-judgment notice is given, the judgment may not be enforced (section J.) until the debtor has had a 30-day opportunity to challenge the entry of judgment. The grounds for the challenge are ineffective waiver or the existence of a meritorious defense. Probably the only constitutionally required ground is the effectiveness of the waiver,

but the modern rule allows any defense to be raised. If the challenge fails, or if no motion is filed within 30 days, the judgment is final, constitutionally enforceable, and non-appealable.

Section A.

The reference to the statutory prohibitions is desirable. They are broader than the consumer credit limit in subsection (2).

While debts "to become due", Green v. Green, 34 Md. App. 350, 367 A.2d 102 (1976), and contingent liabilities, Allen v. Norton, 6 Or. 345 (1866), have traditionally been eligible for confession (see ORS 26.110 superseded by this rule), the rule makes only debts actually due eligible for judgment by confession. Creditors seeking security should look to UCC Art. 9, indemnity agreements, or other arrangements.

The last three sentences of section A. are designed to prohibit the sort of forum shopping encountered when the plaintiff is authorized to confess judgment anywhere in the world. The provision is patterned on Ill. Ann. Stat. ch. 110, § 50(3)(1968), and uses the venue rules of ORS 14.080.

Note, these provisions are in the nature of venue rules but are not ordinary venue provisions controlling case flow but more in the nature of a due process protection granting the defendant a local court for this unusual procedure. The effect of failure to comply is an invalid judgment where a venue defect does not invalidate judgment.

ORS 26.120 (superseded by this rule) permitted confessions by warrant. The substituted language from Cal. CCP § 1132 requires the confession to be signed "by the defendant." Because the confession must be made by the defendant and not by power of attorney or warrant, Barnes v. Hilton, 118 Cal. App. 2d 108, 257 P.2d 98 (1953), and

because of the detail required in the statement, it would ordinarily have to be prepared after default on the obligation. In any event, no judgment may be entered until the debt is due. Note, the rule continues the ORS scheme of specifying who actually may sign by reference to judgments confessed after action (now stipulated judgments).

This rule does not govern the effect of a confession by one defendant or a co-defendant. See Richardson v. Fuller, 2 Or. 179 (1866); ORS 68.210(3)(d); ORS 69.350(i)(c).

Subsection A.(2) prohibits use of the confession of judgment in consumer transactions. The language defining the prohibited transaction was adapted from California Code of Civil Procedure § 1132.

Section B.

For the amount of detail needed in the statement of the debtor required by section B., see Richardson v. Fuller, *supra*; Princeton Bank and Trust Co. v. Barley, 57 A.D.2d 348, 394 N.Y.S.2d 714, 717-18 (1977). "It is sufficient that there appears to be an honest recital of enough detail to permit a check of its genuineness and to simplify an investigation of the underlying facts [by other creditors of the debtor]." *Id.* at 718.

The burden of serving summons is on the creditor. No judgment can be entered until the certificate of service is filed with the clerk. The creditor waits to file the certificate at his peril, since the debtor might file a motion to vacate on the 31st day and the creditor would then have to prove service of process. Also, the creditor would be gambling with his priority over other creditors.

Section D.

The notice required by section D. is designed to satisfy due

process requirements. D.H. Overmyer Co. v. Frick Co., 92 S.Ct. 775, 405 U.S. 174 (1972); Isbell v. County of Sonoma, 121 Cal.3d 61, 145 Cal. Rptr. 368, 577 P.2d 188 (1978). Basically, it is the same as commencing an action.

Section E.

Due process requires an opportunity to vacate the judgment on some grounds. The modern practice is to permit a reopening on a showing of any meritorious defense. Maryland Rules of Procedure 645 c. Some states limit the grounds to a showing of ineffective waiver. Del. Code Ann., tit. 10, § 2306(h)(1974). Compare State ex rel. Karr v. Shorey, 281 Or. 453, 466-67 (1978). Section E. permits a challenge on either ground.

Section F.

Section F. is derived from Maryland Rules of Procedure 645 d. The original version, as in several states, referred to "substantial and sufficient grounds for an actual controversy on the merits." Such language has been interpreted as posing the directed verdict test stated in section F. See D.H. Overmyer Co. v. Frick Co., supra, at 188-90 (1972) (Douglas, J concurring).

The resulting judgment, if the debtor makes no motion, or does not prevail on it, is final and non-appealable. ORS 19.020.

Section G.

Section G. is an attempt to balance the need for discovery against the cumbersome process which would result if all discovery procedures applied automatically. See Goldstein v. Peninsula Bank, 41 Md. App. 224, 396 A.2d 542 (1979).

Sections H., I., and J.

Section H. is derived from Maryland Rules of Procedure 645 i. Sections I. and J. are derived from Maryland Rules 645 j and h, respectively. Section J. is simply a repetition of ORCP Rule 15 D.

Section K.

This section and section L. were the trickiest sections to draft. Only one state has a procedure like section K., and none has a provision like section L. Section K. is designed to give debtors who already have a judgment against them a chance to challenge its enforcement if it wasn't entered in a manner in accordance with due process. The standards are the same as the pre-judgment challenge. This section is based on the procedure of Del. Superior Ct. Rule 58c. Note that sections K. and L. apply only where no attempt has previously been made to execute. Presumably, an attempt to execute would provide the judgment debtor with sufficient notice to satisfy due process.

Section K.(4) is a codification of First Mercantile Bank Co. v. Bittner, 337 A.2d 321 (Del. Super. 1975), which expanded the rights of a debtor on the theory that a judgment, even unexecuted, casts a cloud on the debtor's financial dealings.

Section L.

Section A. should stand up to a constitutional challenge based on full faith and credit. Atlas Credit Corp. v. Ezrine, supra, even though not overruled, is wrong in holding that confessed judgments are not judicial proceedings within the full faith and credit clause. Id. at 476. But a judgment entered in a manner which violates due process is void and thus not entitled to full faith and credit.

See "Confession of Judgment in California," 8 Pac. L.J. 99, 110-114 (1977). Basically, the section only restates an existing constitutional limitation but is useful to warn persons faced with enforcement of a foreign confessed judgment of the due process defense.

Miscellaneous Sections

This rule does not deal with the burden of proof in the hearing. That is a rule of evidence outside the Council's authority. On the burden of proof, compare Virgin Islands Nat. Bank v. Tropical Ventures, Inc., 358 F. Supp. 1203, 1207 (D. St. Croix 1973), with Swarb v. Lennox, 314 F. Supp. 1091, 1103 (E.D. Pa. 1970).

ORS 26.110, 26.120, and 26.130 would be superseded by this rule. The first two are incorporated in this rule. ORS 26.130 is not needed if the Council agrees that confessed judgments should not be permitted in cases of contingent and unmatured liability. If the Council does not agree, the last sentence of ORS 26.130 should be added at the end of section J. The first sentence should be incorporated by adding a section B. (3) which reads:

If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and show that the sum confessed does not exceed the same.

Rule 71 A.

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

Rule 71 B.

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

Rule 73 A. and C.

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

Rule 73 D.

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

Rule 74

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

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

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

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

The meeting adjourned at 12:06 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

RULE 73

JUDGMENTS BY CONFESSION

A. Judgments which may be confessed.

A.(1) For money due; where allowed. Judgment by confession may be entered without action for money due in the manner prescribed by this rule. Such judgment may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A.(2) Consumer transactions. No judgment by confession may be entered without action upon a contract, obligation, or liability which arises out of the sale of goods or furnishing of services for personal, family, or household use, or out of a loan or other extension of credit for personal, family, or household purposes, or upon a promissory note which is based upon such sale or extension of credit.

B. Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered or a person authorized to bind such party, and verified by oath, as follows:

B.(1) It must authorize the entry of judgment for a specified sum;

B.(2) It must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly and presently due;

B.(3) It must contain a statement that the person or persons signing the judgment understands that it authorizes entry of judgment without further proceeding which would authorize execution to enforce payment of the judgment; and

B.(4) It must have been executed after the date or dates when the sums described in the statement were due.

C. Application by plaintiff. Judgment by confession may be ordered by the court upon the filing of the statement required by section B. of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D. Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those who confessed it and it is not a bar to an action against the other joint debtors upon the same demand.

COMMENT

This rule retains confessions of judgment without action in a more limited form than ORS 26.110-26.130 but is consistent with existing Oregon practice and constitutional limitations.

Under subsection 73 A.(1), the use of the device is limited to amounts actually due. The confession of judgment should not be used generally as a security device. The limiting of the place of entry is adapted from Ill. Stat. Ann. Ch. 110, § 50(3) (1968).

Subsection 73 A.(2) prohibits use of the procedure in actions arising from consumer transactions. This is simply carrying forward prior legislative action which prohibited the procedure in

RULE 73

GARNISHMENT

A. Debts; choses in action; claims and causes of action against third parties.

A.(1)(a) At any time after an order that provisional process may issue has been made the plaintiff may attach defendant's property by service of notice of garnishment on any person believed to be obligated or liable to the defendant or to have possession of property belonging to the defendant. Plaintiff's lien shall attach to any obligation or liability to or property of defendant at the time the notice of garnishment is served.

A.(1)(b) If the garnishee is a bank maintaining branch offices, the notice must be served on the manager or assistant manager of the branch at which the defendant has an account, and is effective only with respect to such account, except that service on the president, vice-president, treasurer, secretary, cashier, or assistant cashier at the head office of the bank is effective with respect to accounts in any branch located in the same city as the head office.

A.(2) The notice of garnishment shall be prepared and signed by the plaintiff or plaintiff's attorney and must:

A.(2)(a) Identify the action in connection with which it is served by names of parties, court, and docket number;

A.(2)(b) 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;

A.(2)(c) Require the garnishee 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 debtor, and the identify of any property of the defendant in the garnishee'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;

A.(2)(d) Order the garnishee not to pay or deliver to the defendant, or any other person, any money owed to or property owned by the defendant (saive 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 garnishee;

A.(2)(e) Warn that payment, delivery, or settlement in violation of the order may make the garnishee 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.

A.(2)(f) Have attached thereto a copy of the provisions of ORS 23.170 and 23.185.

A.(3) Notice of garnishment shall be served in the manner of a summons and may be served by anyone eligible to make service of summons. Proof of service shall be returned to the plaintiff and a copy of the notice and proof of service shall be filed with the clerk when the garnishee's answer is filed.

of such payment the clerk shall hold it pending judgment in the action in which provisional process was authorized. If the garnishee under a provisional process is a bank, the clerk, instead of ordering immediate payment, may direct that the money be held by the bank in a restricted, interest bearing, account pending judgment in the action.

A.(5)(a) If the garnishee's answer states that money is presently owed to the defendant but is not payable until some future time, the plaintiff may apply to the court for an order directing the garnishee to pay the money to the clerk when it becomes payable. If money owed by the garnishee is payable in instalments, the order may be to pay all, or a part of, future instalments to the clerk for a specified time.

A.(5)(b) The plaintiff and the garnishee shall be served notice of an application under paragraph A.(5)(a) and given an opportunity to make alternative proposals and to be heard thereon.

A.(6) Any amounts paid by or collected from garnishee, exclusive of amounts applied to costs assessed against the garnishee in connection with the garnishment, correspondingly extinguish the debtor's claim against the garnishee. The clerk shall give the garnishee a receipt identifying a payment as money paid under a designated garnishment.

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

B.(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.

B.(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.

B.(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.

B.(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.

B.(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.

B.(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.

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

plaintiff believes money was held or property owned. Note, notice to the defendant and a bond is required by Rule 72 since this is a form of attachment.

Lacy's sections 83 B., C., and D. were excluded because they applied only to garnishment as an execution method.

Section B. is taken from Lacy's Rule 83 E. Again, the corporate bond requirement is eliminated.

RULE 74 - CLAIM AND DELIVERY

This was adapted from Lacy's Rule 87 A. Lacy's Rule 87 A.(3) was not included. This appears substantive and should be left in the statutes. Section C. of this rule was not in Lacy's rule and requires a bond prior to claim and delivery. Section F. is also new and requires indemnity to the sheriff. These two requirements exist for the similar procedure of attachment. The rule does not make the redelivery by bond procedure available. Since plaintiff sued to replevin this specific property, he should be enabled to insist the sheriff hold it until judgment.

RULE 75 - TEMPORARY RESTRAINING ORDER

This was formerly denominated Rule 90. The only changes are those suggested by the Jackson subcommittee. Note, the provisional process rule (Rule 71) excludes restraining orders under this rule. Paragraph A.(2)(b) would only apply when the restraining order did not restrict or prevent alienation of defendant's property

many consumer transactions. See ORS 83.670(1), 91.745(1)(b), and 697.733(3). The language used was adapted from Cal. Code of Civ. Proc. § 1132.

Section 73 B. is new and is intended to allow confessions of judgments based upon agreement by the debtor after the amounts claimed were due and not allow confessions of judgment based upon a cognovit agreement in the original agreement or instrument creating the debt. The cognovit situation is the one most open to abuse and where due process may require some hearing or notice before entry of the judgment. Testimony received by the Council indicated that confessions of judgments based upon cognovit agreements were not used in Oregon practice, but the confession of judgment was needed to encourage some settlements when a debtor acknowledges that a debt is due but cannot pay immediately.

Sections 73 C. and D. were adapted from N.Y. C.P.L.R. § 3218.

RULE 74 (RESERVED)

RULE 75 (RESERVED)

RULE 76 (RESERVED)

RULE 77 (RESERVED)