

RULE 81

ENFORCING JUDGMENTS AGAINST INTERESTS IN LAND
SALE CONTRACTS

A. Scope. Rule 81 applies to all interests created by a contract for the sale of an interest in real property including an earnest money receipt.

B. Purchaser's interest.

B.(1) A creditor who has docketed a judgment in the county in which the land that is the subject of an executory land sale contract is situated may apply to the circuit court of such county for an order applying the purchaser's interest under the contract to satisfaction of the judgment. The application must:

B.(1)(a) Identify the judgment and state the amount presently due thereon;

B.(1)(b) Identify the contract by parties, date, and land description;

B.(1)(c) State the contract price, terms of payment, and unpaid balance.

B.(1)(d) Propose the relief that the court should grant.

B.(2) A copy of the contract shall be attached to the application, or, if the creditor has not been able to obtain a copy, the reason therefor stated.

B.(3) A copy of the application may be filed with the county clerk and, if so filed, shall be recorded in the same manner as other

instruments affecting title to the land described and indexed under the names of both the purchaser and the contract vendor. Upon such filing the creditor acquires a lien on the land described in the application in the nature of the lis pendens lien provided for in ORS 93.740.

B.(4) A copy of the application and a notice stating the date set for hearing thereon shall be served on the purchaser and the vendor. The notice served on the purchaser must contain a statement respecting homestead exemption similar to that required by Rule 76 E.

B.(5) The purchaser or vendor may file an answer to the application controverting facts stated therein, alleging additional relevant facts, or proposing some other form of relief.

B.(6) At any time before the date set for hearing on the application, other judgment creditors of the purchaser may intervene in the proceedings. The priority of such intervenors shall be determined by time of intervention.

B.(7) After hearing, the court may dismiss the application or grant such relief as appears fair under the circumstances, for example:

B.(7)(a) An immediate transfer of the purchaser's interest to the creditor;

B.(7)(b) Transfer of the purchaser's interest to the creditor if the purchaser fails to sell it himself within a stated period;

B.(7)(c) Public sale of the purchaser's interest;

B.(7)(d) Assignment of all or part of the rents and profits produced by the contract property to the creditor for a stated period.

The court is not limited to giving the relief suggested by the parties, except that if the purchaser fails to appear in the proceedings, only the relief proposed in the creditor's application may be given.

C. Vendor's interest.

C.(1)(a) Except as provided in this subsection a judgment against a vendor is not a lien on real property that is the subject of an executory contract of sale entered into before the judgment was docketed. In the event that such a contract is terminated without conveyance to the purchaser and the vendor reassumes general ownership of the property the lien of a judgment against the vendor shall attach as in the case of after acquired property.

C.(1)(b) If a contract for the sale of real property has not been recorded and the purchaser is not in possession thereunder, a judgment against the vendor, docketed in the county where the real property is located, is a lien on the vendor's right to receive payments under the contract and on the vendor's title reserved as security for such payments. Such a lien may be perfected by serving on the purchaser a copy of the judgment and a notice that future contract payments must be made to the judgment creditor. The purchaser's contract obligation is satisfied, and the lien is extinguished, to the extent that payment

is made to the vendor prior to such service or to the creditor after such service. In case of dispute the burden is on the creditor to prove that service was made.

C.(1)(c) If a contract for the sale of real property has been recorded, or if the purchaser is in possession thereunder, a judgment against the vendor is not a lien on the real property and does not affect the purchaser's rights under the contract or his obligation to pay the price in accordance with its terms.

C.(2) A judgment creditor of a vendor may compel sale of the vendor's contract interest, including conveyance of the vendor's reserved title to the real property, or obtain other suitable relief in satisfaction of his judgment, by proceeding under Rule 83 C.

C.(3) With the exception of liens for taxes levied on the real property that is the subject of the contract and liens for services or materials supplied in improving the property, statutory liens securing obligations of the vendor do not attach to real property that is the subject of a land sale contract. A holder of an obligation that would be a lien on the vendor's property but for this subsection is a judgment creditor for purposes of subsection (2) of this section.

COMMENT

Rule 81

The procedure outlined in section B. is essentially a streamlined creditor's suit. See comment to Rule 83 C. The contract copy required by subsection B.(2) may be obtained from the debtor under Rule 43 or the vendor under Rule 55 B.

Section C. recognizes that the principal thing that is of interest to a vendor's creditors is the right to receive the payments to be made by the purchaser under the contract. Paragraph C.(1)(b) reinstates the procedure of May v. Emerson, 52 Or. 262, 96 P. 454 (1908), and Heider v. Dietz, 234 Or. 105, 380 P.2d 619 (1963), for short term contracts. Paragraph C.(1)(c) deals with long-term instalment contracts. Subsection C.(2) is applicable in either case but would ordinarily be used only in the long-term situation. Section C. is adapted from a proposed statute appearing, and explained in detail, in an article in 55 Or. L. Rev. 227.

ORS sections superseded: 93.645.

PROCEDURE AND PRACTICE COMMITTEE

COMMENT

RULE 81:

Rule 81 applies to all interests created by contracts for the sale of interest in real property. It is specifically made applicable to earnest money receipts.

The rule is divided into two parts, the first concerning the purchaser's or vendee's interest: (§B), the second applying to the seller's or vendor's interest. (Subsection C)

Section B.(1) proceeds upon the premise of "equitable conversion", providing the creditor with a method to obtain a lien against the vendee's contractual interest. Subsection B.(4) provides that a copy of the application and notice must be served upon the purchaser and the vendor. Again, the author has failed to indicate the nature of the required service.

Section B provides for a hearing on the creditor's application at which other creditors and the judgment debtor may appear. The court is given the power to dismiss the application or grant relief according to the circumstances shown at the hearing. A number of proposed methods of relief are set forth in the rule.

Subsection (c) clearly states that a judgment against a contract vendor is not a lien upon the real property if the

property was sold before the judgment was docketed. The rule states that should the property be repossessed or otherwise re-acquired by the vendor, the judgment shall become a lien as in the case of after-acquired property.

Section C provides that the creditor has a lien against the vendor's right to receive payments under the contract and on the vendor's title reserved as security for such payments. This lien may be perfected by serving a copy of the judgment and a notice that future contract payments must be made to the judgment creditor upon the purchaser of the property. Again, no mention is made of the method of service.

The purchaser is protected by language in the rule providing that the creditor's lien is extinguished to the extent that payment had been made to the vendor prior to service of the judgment and notice.

C.(1)(c) This section provides, again, that even if the contract has been recorded, the judgment against the vendor is not a lien on the real property. The creditor is given the power to compel sale of the vendor's contractual interest under section C(2). Section C.(3) further clarifies the fact that statutory liens securing obligations of the vendor do not attach to real property that is the subject of a land sale contract.

The author, for some reason, has limited the scope of section C.(1)(b) to situations where the contract has not been recorded. Although section C.(2) would provide a remedy

to creditors holding judgments against vendors who own long-term contractual rights, no specific arrangements are made for those creditors who might wish to proceed under C.(1)(b) if the contract has been recorded.

RULE 81

DEFINITIONS; NOTICE OF LEVY; SERVICE

A. Definitions. As used in Rules 81-85, unless the context otherwise requires:

A.(1) Attachment. "Attachment" is the procedure by which an unsecured plaintiff obtains a judicial lien on defendant's property prior to judgment.

A.(2) Bank. "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions.

A.(3) Clerk. "Clerk" means clerk of the court or any person performing the duties of that office.

A.(4) Consumer goods. "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(5) Consumer transaction. "Consumer transaction" means a transaction in which the defendant becomes obligated to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(6) Issuing officer. "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim, or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(9) Provisional process. "Provisional process" means attachment under ORS chapter 29 or Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes constable where Rules 81-85 apply to district court proceedings in counties having such an officer.

A.(12) Writ. A "writ" is an order by a court to a sheriff or other official to aid a creditor in attachment.

B. Notice to defendant following levy.

B.(1) Form of notice. Whenever a plaintiff levies on

property of a defendant, other than wages held by an employer, the plaintiff must promptly serve on the defendant, in the manner provided in Rule 9 B., a notice in substantially the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

Plaintiff)
v.) No. _____

Defendant)
NOTICE OF LEVY

TO: (Defendant) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. Action was commenced against you on _____ for \$_____.
2. To secure payment the following has been levied on:
(E.g.: 1979 Chevrolet, License #ABC 123
Savings account in Fiduciary Trust &
Savings Co.
Etc.)
3. This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you.
4. You may release the property from the levy by delivering a bond to the clerk of the court.

If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of plaintiff of
plaintiff's attorney

B.(2) Notice of exemption. If the defendant is a natural person, the notice served shall also contain the following:

B.(2)(a) A statement that a defendant may be entitled to claim that the property levied on is exempt from the claims of the plaintiff;

B.(2)(b) A list of all property and funds declared exempt under state or federal law;

B.(2)(c) An explanation of the procedure by which the defendant may claim an exemption; and

B.(2)(d) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the defendant.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant and knows of no address or office of defendant and with reasonable diligence cannot discover any address or office of defendant, plaintiff shall file an affidavit to that effect.

C. Service of notices; proof of service.

C.(1) Service. Save where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles applicable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.025(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified.

Sections C. and D. are new. Examples of notices which do not need service which complies with Rule 7 are 81 B.(1) and 84 E. Section D. is designed to provide summary procedure for release of attachment which does not infringe upon jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is clearly entitled to relief. See ORCP 47. This is a more reasonable approach than the seldom used sheriff's jury provided in ORS 23.320 and 23.330.

RULE 81

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A. Definitions. As used in Rules 81-85, unless the context otherwise requires:

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A.(2) Bank. "Bank" includes commercial and savings banks, trust companies, savings and loan associations, and credit unions.

A.(3) Clerk. "Clerk" means clerk of the court or any person performing the duties of that office.

A.(4) Consumer goods. "Consumer goods" means consumer goods as defined in ORS 79.1090.

A.(5) Consumer transaction. "Consumer transaction" means a transaction in which the defendant becomes obligated to pay for goods sold or leased, services rendered or monies loaned, primarily for purposes of the defendant's personal, family, or household use.

A.(6) Issuing officer. "Issuing officer" means any person who on behalf of the court is authorized to issue provisional process.

A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim, or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(9) Provisional process. "Provisional process" means attachment under ORS chapter 29 or Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes a constable of a district or justice court.

A.(12) Writ. A "writ" is an order by a court to a sheriff or other official to aid a creditor in attachment.

B. Notice to defendant following levy.

B.(1) Form of notice. Whenever a plaintiff levies on

property of a defendant, other than wages held by an employer, the plaintiff must cause to be promptly served on the defendant, in the manner provided in Rule 9 B., a notice in substantially the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____)	
)	No. _____
Plaintiff)	
)	NOTICE OF LEVY
v.)	
)	
_____)	
)	
Defendant)	

TO: (Defendant) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. Action was commenced against you on _____ for \$ _____.
2. To secure payment the following has been levied on:
(E.g.: 1979 Chevrolet, License #ABC 123
Savings account in Fiduciary Trust &
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3. This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you.
4. You may release the property from the levy by delivering a bond to the clerk of the court.

If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of plaintiff of
plaintiff's attorney

B.(2) Notice of exemption. If the defendant is a natural person, the notice served shall also contain the following:

B.(2)(a) A statement that a defendant may be entitled to claim that the property levied on is exempt from the claims of the plaintiff;

B.(2)(b) A list of all property and funds declared exempt under state or federal law;

B.(2)(c) An explanation of the procedure by which the defendant may claim an exemption; and

B.(2)(d) A statement that the forms necessary to claim an exemption are available at the county courthouse at no cost to the defendant.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service upon defendant shall not be required.

C. Service of notices; proof of service.

C.(1) Service. Save where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles applicable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.025(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified.

Sections C. and D. are new. Examples of notices which do not need service which complies with Rule 7 are 81 B.(1) and 84 E. Section D. is designed to provide summary procedure for release of attachment which does not infringe upon jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is clearly entitled to relief. See ORCP 47. This is a more reasonable approach than the seldom used sheriff's jury provided in ORS 23.320 and 23.330.

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A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim, or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(9) Provisional process. "Provisional process" means attachment under Rule 84, claim and delivery under Rule 85, temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

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IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____)	No. _____
Plaintiff)	NOTICE OF LEVY
v.)	
_____)	
Defendant)	

TO: (Defendant) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. Action was commenced against you on _____ for \$ _____.
2. To secure payment the following has been levied on:

(E.g.: 1979 Chevrolet, License #ABC 123
Savings account in Fiduciary Trust &
Savings Co.
Etc.)

3. This property will (be held by the court) (remain subject to a lien) while the action is pending and may be taken from you permanently if judgment is entered against you.
4. You may release the property from the levy by delivering a bond to the clerk of the court.

If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of plaintiff or
plaintiff's attorney

B.(2) Notice of exemption. If the defendant is a natural person, the notice served shall also contain the following statement:

SOME KINDS OF PROPERTY CANNOT BE TAKEN FROM YOU IN A LEGAL PROCEEDING. THE PROPERTY DESCRIBED IN THIS NOTICE MAY OR MAY NOT BE THE KIND OF PROPERTY THAT CANNOT BE TAKEN. IF YOUR PROPERTY IS PROTECTED, YOU MUST TAKE ACTION IMMEDIATELY TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN. IF YOU DO NOT ACT, YOU WILL LOSE THE PROPERTY, WHETHER OR NOT IT IS PROTECTED. YOU SHOULD GET LEGAL ADVICE TO DETERMINE IF THE PROPERTY DESCRIBED IN THIS NOTICE CAN BE TAKEN IN THIS PROCEEDING AND HOW TO TAKE THE REQUIRED ACTION TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service of notice upon defendant shall not be required.

C. Service of notices; proof of service.

C.(1) Service. Except where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles applicable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(7) is based on ORS 24.010(3), and subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.020(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section B. basically requires the same notices as did ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified. The most important change is in B.(2) where the requirement that notice to individuals contain a list of exemptions, an explanation of the exemption procedure, and a reference to the availability of forms is eliminated. The Council does not wish to discourage exemption claims, but felt the notice presently required for attachment was incomprehensible and constituted a procedural trap.

Sections C. and D. are new. Section D. is designed to provide summary procedure for release of attachment which does not infringe jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is entitled to relief. See ORCP 47.

ORS 29.210 presently makes reference to a summary procedure. The seldom used sheriff's jury in ORS 29.210 is eliminated.

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.

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A.(7) Levy. "Levy" means to create a lien upon property prior to judgment by any of the procedures provided by Rules 81-85 that create a lien.

A.(8) Plaintiff and defendant. "Plaintiff" includes any party asserting a claim for relief whether by way of claim, third party claim, cross-claim, or counterclaim, and "defendant" includes any person against whom such claim is asserted.

A.(9) Provisional process. "Provisional process" means attachment under Rule 84, claim and delivery under Rule 85; temporary restraining orders under Rule 83, preliminary injunctions under Rule 83, or any other legal or equitable judicial process or remedy which before final judgment enables a plaintiff, or the court on behalf of the plaintiff, to take possession or control of, or to restrain use or disposition of, or fix a lien on property in which the defendant claims an interest, except an order appointing a provisional receiver under Rule 80 or granting a temporary restraining order or preliminary injunction under Rule 79.

A.(10) Security interest. "Security interest" means a lien created by agreement, as opposed to a judicial or statutory lien.

A.(11) Sheriff. "Sheriff" includes a constable of a district or justice court.

A.(12) Writ. A "writ" is an order by a court to a sheriff or other official to aid a creditor in attachment.

8. Notice to defendant following levy.

B.(1) Form of notice. Whenever a plaintiff levies on

property of a defendant, other than wages held by an employer, the plaintiff must cause to be promptly served on the defendant, in the manner provided in Rule 9 B., a notice substantially in the following form:

IN THE _____ COURT OF THE STATE OF OREGON FOR _____ COUNTY

_____)	No. _____
Plaintiff)	NOTICE OF LEVY
v.)	
_____)	
Defendant)	

TO: (Defendant) IMPORTANT NOTICE. READ CAREFULLY. IT CONCERNS YOUR PROPERTY.

1. Action was commenced against you on _____ for \$_____.
2. To secure payment the following has been levied on:
(E.g.: 1979 Chevrolet, License #ABC-123
Savings account in Fiduciary Trust &
Savings Co.
Etc.)
3. This property will (be held by the court) (remain subject to a lien] while the action is pending and may be taken from you permanently if judgment is entered against you.
4. You may release the property from the levy by delivering a bond to the clerk of the court.

If you have any questions about this matter, you should consult an attorney.

IF YOU DO NOTHING ABOUT THIS, YOU MAY LOSE THIS PROPERTY PERMANENTLY.

Name and address of plaintiff or
plaintiff's attorney

B.(2) Notice of exemption. If the defendant is a natural person, the notice served shall also contain the following statement:

SOME KINDS OF PROPERTY CANNOT BE TAKEN FROM YOU IN A LEGAL PROCEEDING. THE PROPERTY DESCRIBED IN THIS NOTICE MAY OR MAY NOT BE THE KIND OF PROPERTY THAT CANNOT BE TAKEN. IF YOUR PROPERTY IS PROTECTED, YOU MUST TAKE ACTION IMMEDIATELY TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN. IF YOU DO NOT ACT, YOU WILL LOSE THE PROPERTY, WHETHER OR NOT IT IS PROTECTED. YOU SHOULD GET LEGAL ADVICE TO DETERMINE IF THE PROPERTY DESCRIBED IN THIS NOTICE CAN BE TAKEN IN THIS PROCEEDING AND HOW TO TAKE THE REQUIRED ACTION TO CLAIM THAT YOUR PROPERTY CANNOT BE TAKEN.

B.(3) Address of defendant unknown. Where a plaintiff cannot find defendant or defendant's attorney and knows of no address or office of defendant or defendant's attorney and with reasonable diligence cannot discover any address or office of defendant or defendant's attorney and cannot serve notice upon defendant in any manner, plaintiff shall file an affidavit to that effect, and service of notice upon defendant shall not be required.

C. Service of notices; proof of service.

C.(1) Service. Except where some other method is expressly permitted, any notice or order to show cause required or permitted to be served by Rules 81-85 shall be served in the manner in which a summons may be served.

C.(2) Proof of service. Copies of all notices or orders to show cause shall be filed together with proof of service as provided in Rule 9 C.

D. Adverse claimants. A person other than the defendant claiming to be the actual owner of property subject to provisional process, or any interest in such property, may move the court for an order establishing the claimant's title or interest, extinguishing the plaintiff's lien, or other appropriate relief. After hearing:

D.(1) Summary release of attachment. In a case where there is no genuine issue as to any material fact and the claimant is entitled to relief as a matter of law, the court may make an order establishing claimant's title or interest, extinguishing or limiting the plaintiff's lien, or granting other appropriate relief.

D.(2) Continuation of attachment. In all other cases, the court shall order the provisional process continued pending judgment. Such order protects the sheriff but is not an adjudication between the claimant and the plaintiff.

COMMENT

This rule provides the general principles applicable to all provisional process covered in Rules 81 through 85.

Subsections A.(1), (2), (3), (7), (8), (11), and (12) are new. Subsections A.(4), (5), and (6) were taken from ORS 29.020. Subsection A.(10) is based on 11 U.S.C. § 101 (37). The most important definition is A.(9), which was adapted from ORS 29.020(5) and clarifies the relationship between provisional process and other temporary restraining orders or provisional receiverships.

Section 8. basically requires the same notices as does ORS 29.178, but the language of the statute was modified slightly and the form of notice was specified. The most important change is in 8.(2) where the requirement that notice to individuals contain a list of exemptions, an explanation of the exemption procedure, and a reference to the availability of forms is eliminated. The Council does not wish to discourage exemption claims, but felt the notice presently required for attachment was incomprehensible and constituted a procedural trap.

Sections C. and D. are new. Section D. is designed to provide summary procedure for release of attachment which does not infringe jury trial rights in the dispute between the attaching plaintiff and a claimant. Although the claimant of the property would have a right to a separate action to determine title and right to possession, that might not be sufficient when immediate action is needed. Section D. allows the court, which authorized the provisional process, to act after summary hearing if there are no facts in dispute and claimant is entitled to relief. See ORCP 47. The seldom used sheriff's jury in ORS 29.210 is eliminated.