COUNCIL ON COURT PROCEDURES

June 25, 1988 Meeting
9:30 a.m.

Woodstone Inn
721 NE Third
Bend, Oregon 97701

A G E N D A

1. Public comment
2. ORCP 71 - proposed statute (Merrill memo of 5/11/88 and Thorp memo of 5/17/88) (deferred from last meeting)
3. ORCP 24 (Harrison Latto letter) (deferred from last meeting)
4. Supplementary judgment - report (Larry Thorp)
5. Satisfaction of judgment - report (Judge Liepe)
6. ORCP 70(2) (Merrill memo)
7. ORCP 18 B(1) - noneconomic damages (Merrill memo)
8. ORCP 80 F(3) - comment; technical amendment (Merrill memo)
9. ORCP 68 C(2) - comment (Merrill memo)
10. ORCP 4 E (Merrill memo)
11. ORCP 4 K (Merrill memo)
12. ORCP 7 D(4) and E(1) (Merrill memo)
13. ORCP 10 A - OSB Procedure & Practice Committee (Merrill memo)
14. Review of ORCP 12 - 15
15. Publication of proposed and promulgated amendments to ORCP
16. **NEW BUSINESS**

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COUNCIL ON COURT PROCEDURES

Minutes of Meeting of June 25, 1988

Woodstone Inn
721 Northeast Third
Bend, Oregon

Present:	Richard L. Barron	Jack L. Mattison
	Raymond J. Conboy	Martha Rodman
	Lafayette G. Harter	William F. Schroeder
	John V. Kelly	J. Michael Starr
	Winfrid K.F. Liepe	Larry Thorp
	Paul J. Lipscomb	Elizabeth H. Yeats
	Ronald Marceau	
Absent:	John H. Buttler	Richard P. Noble
	Lee Johnson	Steven H. Pratt
	Robert E. Jones	James E. Redman
	Henry Kantor	R. William Riggs
	Robert B. McConville	

(Also present were Fredric R. Merrill, Executive Director, and Gilma J. Henthorne, Management Assistant)

The meeting was called to Order by Chairer Raymond J. Conboy at 9:30 a.m.

The chairer asked members of the public in attendance to present any statements they wished to make. None was received.

The minutes of the May 21, 1988 meeting were unanimously approved.

Agenda Item No. 1: ORCP 71 - proposed statute (Merrill memo of 5/11/88 and Thorp memo of 5/17/88) (deferred from last meeting). After discussion, it was decided to defer consideration of this matter until the September meeting of the Council.

Agenda Item No. 3: ORCP 24 (Harrison Latto letter) (deferred from last meeting). Mr. Latto had suggested in his letter that ORCP 24 is ambiguous as it is not clear if it applies only to the original complaint or whether it also applies to crossclaims, counterclaims, and impleaders which join new parties. After discussion, it was the consensus of the Council that no action should be taken with regard to ORCP 24.

Agenda Item No. 4: Supplementary judgment - report (Larry

Thorp). Larry Thorpe stated that, after having further considered supplementary judgment procedures, he recommended that no action be taken at this point.

Agenda Item No. 5: Satisfaction of judgment - report (Judge Liepe). Judge Liepe stated that he had been working on some proposals for statutory revision and proposals for satisfaction of judgment simply by court rule but that a number of problems had not yet been resolved. He hoped to have something definite to report at the next Council meeting.

Agenda Item No. 6: ORCP 70(2) (Merrill memo). The Executive Director had been asked to draft an amendment of ORCP 70 A(2) which would exclude costs and attorney fees from the summary of judgment requirement. The Council considered the following proposed amendment and comment:

> **A(2) Summary.** When required under Section 70 A(1)(c) of this rule a judgment shall comply with the requirements of this part. These requirements relating to a summary are not jurisdictional for purposes of appellate review and are subject to the requirements under section 70 A(3) of this rule. A summary shall include all of the following:
>
> A(2)(a) The names of the judgment creditor and the creditor's attorney.
>
> A(2)(b) The name of the judgment debtor.
>
> A(2)(c) The amount of the judgment[.]<u>, except any amount awarded as costs and disbursements and attorney fees under Rule 68.</u>
>
> (2)(d) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded at what intervals.
>
> [A(2)(e) Any specific amounts awarded in the judgment that are taxable as costs and attorney fees.]
>
> A(2)[(f)]<u>(e)</u> Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded, at what intervals.
>
> A(2)[(g)]<u>(f)</u> For judgments that accrue on a periodic

basis, any accrued arrearages, required further payments per period and accrual dates.

STAFF COMMENT - 1988

The Council was concerned that the summary of judgment requirement added by the 1986 Legislative Assembly was creating problems when applied to items awarded under ORCP 68. Since ORCP 68 contemplates, and it is common practice, that the amount of attorney fees and costs and disbursements will be determined and entered after entry of the principal judgement, it frequently was impossible to include these amounts in the summary contained in the principal judgment. When the ORCP 68 amounts were determined, it was then unclear whether a separate judgment with a separate summary was necessary or whether the summary in the principal judgment could be amended. It was also felt that including costs and disbursements and attorney fees in the summary was of relatively little benefit. This portion of the judgment would usually be a simple monetary amount clearly listed in the cost bill or directed by the court and the "summary" would simply repeat the amount.

It was pointed out that present tense verbs be used in the comment and that technical references to "part", "rule", "subsection", and "section" be changed appropriately.

It was suggested that the last sentence of the comment be changed to read: "This portion of the judgment is usually a simple monetary amount clearly listed in the cost bill or directed by the court, and it is unnecessary to repeat this."

It was suggested the new UTCR would take effect on August 1 and it included among its forms a provision relating to attorney fees to be awarded. Larry Thorp suggested that the Executive Director review the provision.

The Executive Director was asked to prepare revisions for consideration at the next meeting.

Agenda Item No. 7: ORCP 18 B(1) - noneconomic damages (Merrill memo of 6/8/88). The Executive Director had been asked to check whether the problem of ascertaining jurisdiction when noneconomic damages are involved has been addressed by the Uniform Trial Court Rules. Bradd Swank of the State Court Administrator's Office had been asked to consider the relationship between the pleading change and the jurisdictional and arbitration statutes. He suggested a UTCR amendment only to deal with the arbitration problem. The Executive Director proposed the following new language in 18 B(1):

18 B(1) The amount sought in a civil action for

noneconomic damages, as defined in ORS 18.560, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim[.], but the person claiming such damages shall allege that fact and that the amount claimed for such damages, when combined with other amounts in controversy in the case, is or is not within the jurisdictional limitations of the court in which the action is pending.

After discussion, the Council decided that it would take no action regarding the proposed change.

ORCP 80 F(3) - comment; technical amendment (Merrill memo of 6/8/88). The Executive Director had prepared an amendment to 80 F(3), with comment, as follows:

F.(3) **Form and service of notices.** Any notice required by this [rule] section [(except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss)] shall be [addressed to] served upon the person to be notified or such person's attorney [, at their post office address, and deposited in the United States Post Office, with postage thereon prepaid] as provided by Rule 9, at least five days [(10 days for notices under section G of this rule)] before the hearing on any of the matters above described [; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section G of this rule) before such hearing], unless a different period is fixed by order of the court. [Proof of mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.]

STAFF COMMENT-1988

ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The detailed language directing form of service in subsection 80 F(3) was apparently included in the subsection because notices covered in section F of Rule 80 are those directed to persons who are not parties to the proceedings. ORCP 9 only refers to service of papers upon parties. The subsection, however, referred to notices under the "rule", not the "section", and created an ambiguity as to the required manner of service for notices under other sections of Rule 80, such as sections C, D and G. The Council changed this. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council also added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions for the

sale of perishable property. It was unclear in such situations whether notice was not required or the judge could vary the notice requirement. The Council assumed that, with explicit authority to vary the notice requirement, the Court could take care of any emergency situation involving sale of perishable property. Finally, the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

Larry Thorp suggested a change so that the first eight lines of the proposed amendment would read as follows:

> F.(3) **Form and service of notices.** Any notice required by this [rule] <u>section</u> [(except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss)] shall be [addressed to] <u>served in the manner provided in Rule 9,</u> at least five days [(10 days for ...

The Executive Director was asked to prepare another amendment for consideration at the next meeting.

Agenda Item No. 9: 68 C(2) - comment (Merrill memo of 6/8/88). The Executive Director had been asked to prepare the following amendment to ORCP 68 C(2):

> (C)(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as [substantially] denied and no responsive pleading shall be necessary. <u>The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain as provided in Rule 21. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of</u>

fees shall be waived if not asserted prior to trial. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fees is asserted as provided in this subsection.

The comment would contain the following additional two sentences:

> The waiver is only of objections to the form of allegation of the right to attorney fees. Any objection as to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill.

After considerable discussion, a motion was made by Judge Lipscomb, seconded by Judge Liepe, that the words "as provided in Rule 21" be deleted from the first sentence of the new language. The motion passed, with Bill Schroeder opposing.

Agenda Item No. 10: ORCP 4 E (Merrill memo of 6/8/88). The Executive Director stated that the following changes to ORCP 4 E would make the language of the rule closer to the current Supreme Court interpretation of constitutional limits. It corrects the apparent drafting error in the Wisconsin rule, picks up situations that are not covered by the current rule, eliminates jurisdiction based solely upon the fact that the plaintiff received goods shipped from the state, and eliminates the language referring to guarantees.

E. Local services, goods, or contracts. In any action or proceeding which:

> E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] or to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or
>
> E(2) arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, is such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or
>
> E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such

goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] defendant to the [defendant] plaintiff or to a third person on the [defendant's] plaintiff's order or direction [or sent to a third person when payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred[.]; or

E(6) Relates to goods, documents of title, or to other things of value actually received by the defendant in this state from the plaintiff without regard to where delivery to carrier occurred.

After discussion, the Executive Director was asked to redraft subsections (5) and (6) and to try to combine them in one subsection.

Agenda Item No. 11: ORCP 4 K (Merrill memo of 6/8/88). The Executive Director had been asked to redraft the comment to ORCP 4 K to reflect the problem presented by the subject matter jurisdiction limitation contained in ORS 107.075. He suggested that the rule itself be amended with an appropriate comment as follows:

K(1) Subject to ORS 107.075, [I]in any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

STAFF COMMENT - 1988

The Council added the reference to ORS 107.075 to provide warning that in some cases, under that statute, the court may lack subject matter jurisdiction to consider a dissolution proceeding, when the plaintiff has resided in Oregon for less than six months. See Pirouskar and Pirouskar 51 Or App 519, 521, 626 P2d 380 (1981).

The Council decided that the reference to ORS 107.075 should be in a staff comment. The Executive Director was asked to prepare a draft for consideration at the next meeting.

Agenda Item No. 12: ORCP 7 D(4) (Merrill Memo of 6/8/88). The Executive Director had been asked to draft a cross-reference for insertion in ORCP 7 D(4)(a) which would make it clear that the insurance company should be served in compliance with ORCP 7

D(2)(d). The Council considered the following proposal:

> D(4)(a)i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and [mailing] <u>service by mail in accordance with paragraph 7 D(2)(d) of this rule of</u> a copy of the summons and complaint to the defendant's insurance carrier if known.

The Council deferred action on the proposal until the next meeting. The Executive Director was asked to review ORCP 7 D(4)(a)(ii) and submit a proposal to make the supplementary mailing to defendant by certified or registered mail.

Agenda Item No. 13: ORCP 10A - OSB Procedure & Practice Committee (Merrill memo of 6/8/88). The Oregon State Bar Procedure & Practice Committee had submitted a proposed amendment to ORCP 10 A which would preface the rule with the phrase "Subject to ORS 174.125 ..." The following is an amendment of the rule which incorporates the language of ORS 174.124:

> **A. Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. <u>If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business.</u> When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

The Council considered and discussed both proposals. Mike Starr made a motion, seconded by Lafayette Harter, that the

latter version incorporating the language of ORS 174.125 be adopted. The motion passed unanimously.

Agenda Item No. 14 (review of ORCP 12-21). The Executive Director distributed research materials concerning ORCP 12-21 and stated that there appeared to be no problems requiring consideration by the Council. He stated that further material relating to ORCP 21-64 would be submitted prior to the next meeting.

Agenda Item No. 15 (publication of proposed and promulgated amendments to ORCP). The Executive Director stated that he would investigate possible forms of dissemination of proposed and promulgated rules and report at the September meeting.

Agenda Item No. 16 (NEW BUSINESS). A letter had been received from Chief Judge George M. Joseph of the Oregon Court of Appeals in which he objected to the reference to "a minor or an incapacitated person" in the singular when, in the same sentence, the pronoun "they" was used in referring to the minor or incapacitated person.

The Executive Director was asked to make the appropriate changes.

The Executive Director reported that a letter had been received from Diana Godwin suggesting a proposed amendment to ORCP 44 (PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS) which would include examinations by psychologists (in addition to examinations by physicians). It was suggested that it should be left to the court to determine the qualifications and area of expertise of the examiner. It was also pointed out that specifying a "mental examination by a psychologist" might indicate the necessity of then adding all other types of practitioners. The Executive Director was asked to research what other states have done along these lines and to report back at the next meeting.

The next meeting of the Council will be held on Saturday, September 17, 1988, at 9:30 a.m., at the University of Oregon School of Law (Room 121), Eugene, Oregon.

The meeting adjourned at 12:15 p.m.

Respectfully submitted,

Fredric R. Merrill
Executive Director

FRM:gh

M E M O R A N D U M

June 8, 1988

TO: **MEMBERS, COUNCIL ON COURT PROCEDURES**

FROM: Fred Merrill, Executive Director

RE: Miscellaneous matters from meeting of May 21, 1988

Attached are minutes of the last meeting of the counsel. Copies of material distributed at the meeting have been enclosed for those members who were not at the meeting.

The following are matters which the Counsel asked to be researched or drafted for the next meeting.

1) ORCP 70 A(2)

I was asked to furnish a draft which reflected the suggestions of Judge McConville for consideration at the next meeting:

> **A(2) Summary.** When required under Section 70 A(1)(c) of this rule a judgment shall comply with the requirements of this part. These requirements relating to a summary are not jurisdiction for purposes of appellate review and are subject to the requirements under section 70 A(3) of this rule. A summary shall include all of the following:
>
> A(2)(a) The names of the judgment creditor and the creditor's attorney.
>
> A(2)(b) The name of the judgment debtor.
>
> A(2)(c) The amount of the judgment[.]**, except any amount awarded as costs and disbursements and attorney fees under Rule 68.**
>
> (2)(d) The interest owed to the date of the judgment, either as a specific amount or as accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded and, if compounded at what intervals.

[A(2)(e) Any specific amounts awarded in the judgment that are taxable as costs and attorney fees.]

A(2)[(f)](e) Post-judgment interest accrual information, including the rate or rates of interest, the balance or balances upon which interest accrues, the date or dates from which interest at each rate on each balance runs, and whether interest is simple or compounded, at what intervals.

A(2)[(g)](f) For judgments that accrue on a periodic basis, any accrued arrearages, required further payments per period and accrual dates.

STAFF COMMENT - 1988

The Council was concerned that the summary of judgment requirement added by the 1986 Legislative Assembly was creating problems when applied to items awarded under ORCP 68. Since the ORCP 68 contemplates, and it is common practice, that the amount of attorney fees and costs and disbursements will be determined and entered after entry of the principal judgement, it frequently was impossible to include these amounts in the summary contained in the principal judgment. When the ORCP 68 amounts were determined, it was then unclear whether a separate judgment with a separate summary was necessary or whether the summary in the principal judgment could be amended. It was also felt that including costs and disbursements and attorney fees in the summary was of relatively little benefit. This portion of the judgment would usually be a simple monetary amount clearly listed in the cost bill or directed by the court and the "summary" would simply repeat the amount.

2) ORCP 18 B(1) and noneconomic damages

I was asked to check whether the problem of ascertaining jurisdiction when noneconomic damages are involved has been addressed by the Uniform Trial Court Rules. I found the attached memorandum from Brad Swank of the Court Administrator's Office in the Council files. As you can see, he was asked to consider the relationship between the pleading change and the jurisdictional and arbitration statutes. He ended up suggesting a UTCR amendment only to deal with the arbitration problem.

I am not sure whether further action is needed on the jurisdictional problem. ORS 46.064, which is cited as curing the problem in the memo, was adopted to deal with the serious procedural trap of filing in the wrong court. A mistake or change of subject matter jurisdiction is cured by a transfer procedure and allowing for waiver of the procedural defect. The problem presented by not pleading noneconomic damages is that the

opposing party and the court may have no way of determining what is actually in controversy, and whether the case is in fact in the wrong court, until the claimant presents evidence at the trial. It is a question of fair warning and access to information relating to the correct jurisdiction. The possibility of waiver under ORS 46.064 may make the problem of unplead noneconomic damages worse, rather than solving it.

The following language could be added to ORCP 18 B(1) to deal with the ambiguity relating to jurisdiction caused by the prohibition against pleading noneconomic damages. It at least forces the party claiming such damages to assert their good faith belief as to the existence of jurisdiction of the court. It would apply to noneconomic damages claims by either a plaintiff or a defendant.

The amendment would only affect cases where noneconomic damages were involved. There would be no general requirement to allege that the court had jurisdiction in all cases, as there is in the federal courts. Presumably the original plaintiff could only allege that the total amount he or she sought was <u>within</u> the jurisdiction of the court where the case was filed. The reference to pleading that a noneconomic claim "is not within" the court jurisdiction is for counterclaims and cross claims. Under ORS 46.064(2) a cross- claim or counterclaim in excess of the jurisdictional limit in a case in district court makes the case transferrable to circuit court. In district courts a defendant counterclaiming or crossclaiming for noneconomic damages would have to allege that he or she is asking for noneconomic damages and that the damages sought are beyond the jurisdiction of the district court.

> 18 B(1) The amount sought in a civil action for noneconomic damages as defined in ORS 18.560, shall not be pleaded in a complaint, counterclaim, cross-claim or third-party claim[.]<u>**, but the person claiming such damages shall allege that fact and that the amount claimed for such damages, when combined with other amounts in controversy in the case, is or is not within the jurisdictional limitations of the court in which the action is pending.**</u>
>
> B(2) The prayer in such actions shall contain only a demand for the payment of damages without specifying the amount.
>
> B(3) The party making the claim may supply to any adverse party a statement of the amount claimed for such damages, and shall do so within 10 days of a request for such statement. The request and the statement shall not be made a part of the trial court file.

3) ORCP 80 F(3)

The amendment directed by the Council to ORCP 80 F(3), with a technical change would appear as follows:

> F.(3) **Form and service of notices.** Any notice required by this [rule] **section** [(except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss)] shall be [addressed to] **served upon** the person to be notified or such person's attorney [, at their post office address, and deposited in the United States Post Office, with postage thereon prepaid] **as provided by Rule 9,** at least five days [(10 days for notices under section G of this rule)] before the hearing on any of the matters above described [; or personal service of such notice may be made on the person to be notified or such person's attorney not less than five days (10 days for notices under section G of this rule) before such hearing], **unless a different period is fixed by order of the court.** [Proof of mailing or personal service must be filed with the clerk before the hearing. If upon hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order.]

The technical change made in Larry Thorp's suggested language is the form of cross-reference to Rule 9. The comment I suggest is:

> **STAFF COMMENT-1988**
>
> ORCP 80 F(3) was amended by the Council to eliminate an apparent drafting error in the original rule and to simplify the rule. The detailed language directing form of service in subsection 80 F(3) was apparently included in the subsection because notices covered in section F of Rule 80 are those directed to persons who are not parties to the proceedings. ORCP 9 only refers to service of papers upon parties. The subsection, however, referred to notices under the "rule", not the "section", and created an ambiguity as to the required manner of service for notices under other sections of Rule 80, such as sections C, D and G. The Council changed this. It also opted to provide for service in the same manner as service on parties under ORCP 9. The Council also added explicit authority for the Court to vary the notice period and eliminated the parenthetical exception to the notice requirement for petitions for the sale of perishable property. It was unclear in such situations whether notice was not required or the judge could vary the notice requirement. The Council assumed that, with explicit authority to vary the notice requirement, the Court could take care of any emergency situation involving sale of perishable property. Finally,

the Council eliminated the last two sentences of the original rule, which required filing of proof of service before the hearing and finding by the court of the adequacy of notice. Filing and proof of service are explicitly required by ORCP 9 C which would apply to notices served under ORCP 80 F because service of such notices must be in the manner provided for by ORCP 9. There seemed to be no stronger reason to direct the Court to make reference to the adequacy of service in an order entered under ORCP 80 F than any other type of order.

4) ORCP 68 C(2)

The following is the form which results for section 8 of ORCP 68 C(2) after the Council action:

(C)(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as [substantially] denied and no responsive pleading shall be necessary. **The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain as provided in Rule 21. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial.** Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fees is asserted as provided in this subsection.

I suggest we add the following to the comment.

"The waiver is only of objections to the form of allegation of the right to attorney fees. Any objection as to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill."

5) ORCP 4 E

The following changes to ORCP 4 E would make the language of the rule closer to the current Supreme Court interpretation of

constitutional limits. It corrects the apparent drafting error in the Wisconsin rule, picks up the situations that are not covered by the present rule, eliminates jurisdiction based solely upon the fact that the plaintiff received goods shipped from the state, and eliminates the language referring to guarantees. It should be noted that, in some guarantee situations and cases involving goods shipped from the state, there will be jurisdiction because more is involved than a simple guarantee of performance by a person subject to jurisdiction or shipment of goods from the state. In that case, to the extent the situation is not covered by one of the other specific provisions, jurisdiction would be covered by ORCP 4 L.

E. Local services, goods, or contracts. In any action or proceeding which:

E(1) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state[,] **or** to pay for services to be performed in this state by the plaintiff [, or to guarantee payment for such services]; or

E(2) arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, is such performance within this state was authorized or ratified by the defendant [or payment for such services was guaranteed by the defendant]; or

E(3) Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value [or to guarantee payment for such goods, documents, or things]; or

E(4) Relates to goods, documents of title, or other things of value sent from this state by the [plaintiff] **defendant** to the [defendant] **plaintiff or to a third person** on the [defendant's] **plaintiff's** order or direction [or sent to a third person when payment for such goods, documents, or things was guaranteed by defendant]; or

E(5) Relates to goods, documents of title, or other things of value actually received by the plaintiff in this state from the defendant without regard to where delivery to carrier occurred[.]**; or**

E(6) Relates to goods, documents of title, or to other things of value actually received by the defendant in this state from the plaintiff without regard to where delivery to

carrier occurred.

6) **ORCP 4 K**

The Council asked that the comment be redrafted to reflect the problem presented by the subject matter jurisdiction limitation contained on ORS 107.075. After some reflection, I believe that is not possible. The comment was prepared by staff at the time the rule was originally submitted to the legislature and is legislative history for the rule. It cannot be altered. The only thing the Council can really do to raise the problem is place some warning in the rule. I suggest the following:

> K(1) **Subject to ORS 107.075,** [I]in any action to determine a question of status instituted under ORS Chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.
>
> **STAFF COMMENT - 1988**
>
> The Council added the reference to ORS 107.075 to provide warning that in some cases, under that statute, the court may lack subject matter jurisdiction to consider a dissolution proceeding, when the plaintiff has resided in Oregon for less than six months. **See** Pirouskar and Pirouskar 51 Or App 519, 521, 626 P2d 380 (1981).

7) **ORCP 7 D(4)(a)(i)**

The following language would solve the problem suggested by Judge Liepe relating to service upon insurance companies in motor vehicle cases. In fact, it appears that the problem with form of service has always existed because it was not clear if ordinary mail could be used for the defendant.

> D(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and [mailing] **service by mail in accordance with paragraph 7 D(2)(d) of this rule of** a copy of the summons and complaint to the defendant's insurance carrier if known.

8) **ORCP 10 A**

The following is how the amendment suggested by the OSB Procedure and Practice Committee for ORCP 10 A would appear:

A. Computation. Subject to ORS 174.125 [I]in computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

The following is an amendment of the rule which incorporates the language of ORS 174.125:

A. Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or a legal holiday. **If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business.** When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020.

UNIVERSITY OF OREGON

MEMORANDUM

June 8, 1988

TO: Chief Justice Edwin Peterson
Oregon Supreme Court

R. William Linden, Jr.
State Court Administrator

FROM: Fredric Merrill
Executive Director, Council on Court Procedures

RE: Relationship between appeal and ORCP 71

The Council on Court Procedures is considering possible legislation and amendment of Rule 71 that would create some method of handling Rule 71 motions to vacate judgment during an appeal. The purpose is to avoid wasting time on appeal of judgments which are later vacated by the trial court under Rule 71. The Council originally addressed this problem under Rule 71 by requiring leave of the appellate court when filing a Rule 71 motion to vacate or correct a judgment which is on appeal. This does not really solve the problem, because the appellate courts probably lack the power to do anything relating to the motion, and the trial court probably has no power to rule on the motion until the appeal is completed.

I am enclosing a copy of suggested statutory and ORCP amendments directed to the problem prepared by Council staff, together with comments, and further suggested amendments from Larry Thorp, who is a member of the Council. If you have any reactions or suggestions, please send them to me and I will submit them to the Council.

FRM:gh

Enclosures

cc: Larry Thorp (w/enc.)

SCHOOL OF LAW • EUGENE, OREGON 97403-1221 • TELEPHONE (503) 686-3837

FROM FRED MERRILL:

We could amend ORS 19.033 (copy attached) by adding the following new sections:

(6) If the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, and a motion to vacate judgment is filed in the trial court under ORCP 71 B (1), the Supreme Court or the Court of Appeals may stay the appeal and enter an order directing the trial court to rule upon the motion to vacate and the trial court shall have jurisdiction to rule upon the motion to vacate the judgment. The trial court file shall be transmitted to the trial court with the order directing the trial court to rule. The trial court shall notify the appellate court of its ruling on the motion. If the trial court vacates the judgment, the appeal shall be dismissed. If the trial court refuses to vacate a judgment, the trial court shall transmit the trial court file back to the appellate court, and the appellate court shall terminate the stay and proceed with the appeal from the judgment. The order of the trial court refusing to vacate the judgment may be appealed to the appellate court which has jurisdiction over the appeal from that judgment and which directed the trial court to rule on the motion to vacate.

(7) If the Supreme Court or the Court of Appeals has acquired jurisdiction of the cause, and a motion to correct judgment is filed in the trial court under ORCP 71 A, the Supreme Court or the Court of Appeals may stay the appeal and enter an order directing the trial court to rule upon the motion to correct and the trial court shall have jurisdiction to rule upon the motion to correct the judgment. The trial court file shall be transmitted to the trial court with the order directing the trial court to rule. The trial court shall notify the appellate court of its ruling upon the motion. After the trial court rules on the motion to correct judgment, the trial court shall transmit the trial court file back to the appellate court, and the appellate court shall terminate the stay and proceed with the appeal from the judgment. If the trial court corrects the judgment, the appeal shall proceed as from the corrected judgment, unless the order correcting judgment is reversed or modified on appeal. The trial court ruling on the motion to correct judgment may be appealed to the appellate court which has jurisdiction over the appeal from that judgment and which directed the trial court to rule on the motion to correct.

The necessary statute turns out to be a bit complicated but it should allow the appellate court discretion to either proceed with the appeal, irrespective of the filing of the motion, or to

direct the trial court to rule. Presumably this would turn on the relationship between the subject of the appeal and the motion, and the appellate court assessment of the most time saving way to dispose of the matter. It also would avoid the necessity of further appellate consideration of a judgment that has been vacated and presumably would allow the appellate court to dismiss an appeal when the correction of the judgment obviates the need for appeal. The appeal on the trial court ruling on the motion to correct or vacate, back to the appellate court where the matter originated, would allow the appellate court to consider both the vacation and original appeal together and proceed from there according to what it decides is appropriate.

For this scheme to work, leave of appellate court is not needed, but notice of the filing of the motion to correct or vacate should be given to the appellate court. I suggest we amend Rule 71 A and B(1) as follows:

> A. **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own motion or on the motion of any party and after such notice to all parties who have appeared. [During the pendency of an appeal, a judgment may be corrected under this section only with leave of the appellate court.] **A motion for correction of judgment may be filed during the pendency of an appeal therefrom, but no relief may be granted by the trial court during the pendency of the appeal, unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion for correction of judgment, filed during the pendency of an appeal, shall be filed in the appellate court having jurisdiction over the appeal.**
>
> B.(2) **When appeal pending.** [With leave of the appellate court, and subject to the time limitations of subsection (1) of this section, a] A motion under this section may be filed with the trial court during the time an appeal from a judgment is pending before an appellate court, but no relief may be granted by the trial court during the pendency of an appeal[.], **unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion to vacate under this section, filed during the pendency of an appeal, shall be filed with the appellate court having jurisdiction over the appeal.** [Leave to file the motion need not be obtained from any appellate court, except during such time as an appeal from the judgment is actually pending before such court.]

If the statute did not pass, the rule as amended still makes

sense. It lets the appellate court know what is happening and makes it clear that the trial court has no jurisdiction to act during the pendency of the appeal. Without the statute, however, there probably would be no authority for the appellate court to direct the trial court to rule before the appeal is over. I took a quick look at the Appellate Rules of Procedure and saw nothing that would have to be changed. I will look more carefully before the meeting. If the Council does decide that it wants to proceed with this, we should send a copy to the State Court administrator, the Court of Appeals and the Supreme Court for comment.

FROM LAURENCE THORP:

Changes to ORCP 71 and ORS 19.033. I generally agree with what Professor Merrill is attempting to accomplish in the changes which he suggests to both ORCP 71 and ORS 19.033. I believe, however, that the purpose can be accomplished and at the same time clear up some ambiguities which exist both in the rule and statute.

I would change the rule in the following particulars:

A. I would delete the last sentence of section A.

B. I would change sub-section B(1) to be simply section B, and I would delete sub-section B(2) completely.

C. I would insert a new section C to cover appeals and renumber sections C and D to be sections D and E. The new section C would read very similarly to the language which Professor Merrill proposes to add to section A. It would simply read:

> "A motion under this rule may be filed during the pendency of an appeal but no relief may be granted by the trial court during the pendency of the appeal unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion filed during the pendency of an appeal shall be filed in the appellate court in which the appeal is pending."

I believe that the language proposed to be added to ORS 19.033 is more complicated than is necessary. It appears to me that existing sub-section (4) of the statute is aimed at covering many of the issues which would be addressed under ORCP 71A. Rather than adding whole new sections, I believe that sub-section (4) should simply be amended to make it clear that it covers all those cases under 71A and B. In addition, I believe it is unnecessary to spell out in the statute what will happen to the trial court file or that a stay will be granted if the trial court is directed to rule upon the motion, since I believe that the appellate court would deal with those issues irrespective of the statute. I do believe, however, that Professor Merrill's language which makes it clear that the appellate court could also consider the ruling on the ORCP 71 motion as a part of the appeal should be added. With all of that in mind, I would suggest that sub-section (4) could be rewritten to read as follows:

"Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction, with leave of the appellate court to:

"(a) Enter an appealable judgment if the appellate court determines that;

> "(A) at the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment; and
>
> "(B) the judgment from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under sub-section (1) of this section, or the trial court had not yet entered an appealable judgment.

"(b) Enter an order under ORCP 71A correcting the judgment or ORCP 71B granting relief from the judgment.

"Any order entered under this sub-section shall be reviewable by the appellate court in conjunction with the appeal."

MEMORANDUM

June 16, 1988

TO: The Hon. Winfrid K.F. Liepe

FROM: Fred Merrill

RE: Compelling satisfaction of judgment

I checked all 50 states and found six more that have some statutory reference to a procedure for compelling entry of a satisfaction of judgment. I am not sure I picked everything up just by checking the indices under satisfaction of judgments. Freeman refers to statutory procedure in Illinois, Minnesota and Montana, but I could not find any statute in those states. I did not check further because we have enough samples for drafting purposes.

Copies of the statutes (in one case rule) are attached. Many of the rest of the states have the federal rules, and I assume the matter is handled under their vacation of judgment rule equivalent to FRCP 60 or our ORCP 71. (That may be what happened to the statutes in Illinois, Minnesota, and Montana) The remainder must still handle the matter through **audita querela** or perhaps through some common laws motion procedure based upon the power of a court to control its own records.

In considering our objectives in drafting something to deal with the problem, the following occurred to me as possibilities:

1. Put in an explicit procedure where one would expect to find it, i.e. the judgment satisfaction provisions in ORS Chapter 18, rather than expect people to find Herrick v Wallace or an obscure subsection in Rule 71.

2. Provide a formal notice to the judgment creditor demanding satisfaction.

3. Provide explicit authority for the court to order the judgment creditor to execute a satisfaction or to direct the clerk to enter a satisfaction.

4. Create a statutory penalty for judgment creditors who wrongfully refuse to satisfy a judgment.

5. Provide for costs and/or attorney fees against a judgment creditor who wrongfully refuses to satisfy a judgment.

6. Describe how the motion to compel satisfaction should be served on the judgment creditor.

7. Describe the form of the contested fact hearing, particulary use of jury.

ORS Chapter 18 has a number of provisions relating to satisfaction. Under ORS 18.400, it appears that judgments can be satisfied in either of two ways: (1) by an entry in the docket signed by the clerk, judgment creditor, or judgment creditor's attorney, or (2) by filing a separate acknowledgement of satisfaction. I believe the latter is the exclusive method used by judgment creditors, and if you can convince a clerk to satisfy a judgment, the clerk would use the first method. ORS 18.410 contains the procedure of paying into court and getting the clerk to satisfy, which apparently does not work. ORS 18. 350(3) has an explicit statement that it is the judgment creditor's responsibility to file a satisfaction.

In looking over the statutes in other states, California seems the most comprehensive. Also, since their code is still heavily based upon the same Field Code as ORS Chapter 18, the language used in California seems to fit Oregon practice well. I would suggest we use Sec. 724.050 of the California Code, with two changes:

1. Change subsection (d) to read:

> "If the judgment creditor does not comply with the demand within the time allowed, the person making the demand may apply to the court on motion for an order requiring the judgment creditor to comply with the demand. Notice of the motion shall be served upon the judgment creditor pursuant to ORCP 7. If the court determines that the judgment creditor has not complied with the demand, the court shall either (1) order the judgment creditor to comply with the demand or (2) order the officer having the official custody of the judgment docket of original entry to enter satisfaction of judgment pursuant to ORS 18.400(1)."

2. Add the following as a new subsection:

> "(f) If the motion is granted, the court may, after opportunity for hearing, require the judgment creditor to pay the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. If the motion is denied, the court may, after opportunity for

hearing, require the moving party to pay to the judgment debtor the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust."

This would leave us with three problems:

1. The provision says nothing about the procedure to be followed in trying the motion. I see no problem in that. It should be up to the trial judge and maximum flexibility should be available. It appears there may be right to jury trial, but why say anything about it. The procedure seems singularly inappropriate for using a jury, and mentioning it would encourage the practice. If an attorney is astute enough, he or she can find Herrick v Wallace and demand jury trial. If they are not, which would be the usual case, the right to jury trial would be waived and no problem. The only state I saw with an explicit statutory reference to jury trial on a proceeding to compel entry of satisfaction was Alabama (6-9-180). The real question may be whether we want to point out the problem in the comment.

2. Where should we put the provision? The most logical place would be in ORS as an additional section in ORS 18.350 or as a separate section immediately after it. That raises the problem whether the Council can add or amend an ORS section. The answer to that technical problem is probably yes. ORS 1.745 makes all provisions of law in ORS relating to practice and procedure for civil proceedings rules of court, and they are subject to modification by the Council. Many procedural provisions remain in the ORS, and satisfaction of judgments looks like one of them. As a practical matter, however, the Council has stayed away from changing ORS sections and instead has promulgated rules to replace ORS sections, and then amended the rules. In this case putting the provision in a rule would place it very inconveniently. We could consider moving the subject of satisfaction of judgments over into the rules. That would only make sense if we moved most of Chapter 18 over into the rules, which is more of a job than we want to get into.

3. Does the Council have the power to provide for costs, attorney fees and penalties? Probably yes. I copied the provision for costs and attorneys fees right out of ORCP 46. If the Council can provide for cost assessments for wrongful conduct in discovery, it surely can do so for failure to follow a duty to satisfy a judgment which is already statutorily established. The penalty provision may be more troublesome, but again if a court can assess contempt for failure to comply with a procedural penalty, why not a money penalty? On the other hand, the only state I could find which provided this procedure by court rule was Missouri, and the provision there was originally enacted as a

statute and later converted into a rule. It also does not contain a penalty. Perhaps the best approach might be to at least drop the penalty provision and avoid trouble. The $100 penalty is really not very significant.

Note the last two difficulties could be avoided by doing this in the form of a suggested statute, rather than a promulgated rule by the Council. This, of course, presents substantial danger that it will never be adopted and substantial additional labor dealing with the legislature.

Enclosures

ARKANSAS

16-65-602. Entry of satisfaction.

(a) Whenever the whole judgment shall appear to be satisfied by the return of an execution, it shall be the duty of the clerk to enter in the judgment book, in the space left for that purpose, "satisfied by execution."

(b)(1) Whenever a judgment is satisfied otherwise than upon an execution, it shall be the duty of the party or his attorney within sixty (60) days thereafter, to enter satisfaction in the judgment book, which shall be sufficiently done by writing the words "satisfied in full," with the date of the entry, and the signature of the party making it.

(2) The court may, on motion and notice, compel an entry of satisfaction to be made.

(3)(A) Satisfaction of a judgment or decree may be entered by the plaintiff in person, by his attorney of record, or by an agent duly authorized in writing for that purpose, under the hand of the plaintiff.

(B) When the entry of satisfaction is made by an agent, his authority shall be filed in the office of the clerk of the court in which the judgment or decree may be.

(4) If the person receiving satisfaction for any judgment or decree neglects or fails to enter satisfaction within the time prescribed in subsection (b)(1) of this section, the person shall forfeit and pay to the person against whom the judgment or decree may have been entered any sum not exceeding one hundred and fifty dollars ($150) nor less than five dollars ($5.00), to be recovered in an action founded on this act.

(c)(1) If the person receiving satisfaction of any judgment or decree neglects or refuses to acknowledge the satisfaction of the judgment or decree within the time prescribed by subdivision (b)(1) of this section, the party interested may, on notice given to the adverse party or his attorney, apply to the court to have satisfaction entered.

(2) If the court is satisfied that the plaintiff, his agent, or attorney has received full satisfaction of the judgment or decree, an order shall be made directing the clerk to enter satisfaction on the judgment or decree, which shall have the same effect as if it had been acknowledged by the party.

(3) The costs attending the application shall be recovered of the party so refusing, by execution, as in other cases.

(d) Satisfaction entered in accordance with the provisions of this section shall forever discharge and release the judgment or decree.

History. Rev. Stat., ch. 84, §§ 19-21, 23-26; C. & M. Dig., §§ 6325-6332; Pope's Dig., §§ 8280-8287; A.S.A. 1947, §§ 29-702 — 29-708.

Meaning of "this act". Rev. Stat., ch. 84 codified as §§ 16-65-113, 16-65-116, 16-65-501 — 16-65-505, 16-65-601, 16-65-602, 16-66-411.

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624.36 Approval in vacation

Whenever by law it is permitted or required that judicial or other sales and conveyances of land may or shall be confirmed and approved by a court, the judge of the court may, in vacation, approve the same, and cause the proper entry or entries to be made.

History and Source of Law

Derivation:
Codes 1939, 1935, 1931, 1927, 1924, § 11620.
Code 1897, § 3812.
McClain's Code 1888, § 4103.
Code 1873, § 2893.

Law Review Commentaries

Powers of court and judge, distinction between court and judge. Wayne G. Cook, Feb. 1930, 15 Iowa Law Review 141, 152.

Notes of Decisions

1. Construction and application

Where a judicial sale of farm lands was to be made, and the season was too far advanced to give sufficient time to advertise and sell them to advantage in the present spring, the court might order them to be leased for the cropping season of the current year, and the rent to be applied to payment of the debts. Roe v. Wilmot, 1879, 51 Iowa 689, 2 N.W. 530.

A foreclosure by notice and sale under the provisions of the code of 1851 was a "judicial sale," within the meaning of said act of 1862. Sturdevant v. Norris, 1870, 30 Iowa 65.

624.37 Satisfaction of judgment—penalty

When the amount due upon judgment is paid off, or satisfied in full, the party entitled to the proceeds thereof, or those acting for him, must acknowledge satisfaction thereof upon the record of such judgment, or by the execution of an instrument referring to it, duly acknowledged and filed in the office of the clerk in every county wherein the judgment is a lien. A failure to do so for thirty days after having been requested in writing shall subject the delinquent party to a penalty of fifty dollars, to be recovered in an action therefor by the party aggrieved.

History and Source of Law

Derivation:
Codes 1939, 1935, 1931, 1927, 1924, § 11621.
Code 1897, § 3804.
McClain's Code 1888, § 4095.
Acts 1878 (17 G.A.) ch. 129, § 4.

See History and Source of Law under § 624.23.

Cross References

Docket entry of satisfaction, see, also, §§ 601.54, 624.20, 655.5.
Foreign fiduciaries, satisfaction of judgment, see §§ 633.53–633.56.
Mortgage foreclosure judgment, entry of satisfaction, see § 655.5.

Delaware

to be recovered by a civil action. The damages shall not be less than $10 nor more than $500, except when special damage to a larger amount is alleged in the complaint and proved. (Code 1852, § 1637; Code 1915, § 3230; Code 1935, § 3693; 25 Del. C. 1953, § 2114; 55 Del. Laws, c. 341, § 5.)

§ 2115. Procedure to compel entry of satisfaction of mortgage or judgment.

(a) In all cases where mortgages or judgments are liens on real estate in this State and the same have been paid and the mortgagee or obligee or their executors, administrators or assigns refuses or neglects to enter satisfaction of such mortgage or judgment on the record thereof in the office where the same is recorded or entered, forthwith after the payment thereof, the mortgagor or obligor or their heirs or assigns may, upon sworn petition to the Superior Court of the county in which such mortgage or judgment is recorded or entered, setting forth the facts, obtain from such Court a rule on the mortgagee or obligee or their executors, administrators or assigns, returnable at such time as the Court may direct, requiring such mortgagee or obligee or their executors, administrators or assigns to appear on the day fixed by the Court and show cause, if they have any, why such mortgage or judgment shall not be marked satisfied on the record thereof. Such rule shall be served as provided by law for service of writs of scire facias. In case the mortgagee or obligee or their executors, administrators or assigns reside out of the State and cannot be served, or in case the mortgagee or obligee is a corporation which has been dissolved for more than 3 years prior to the filing of the petition, and for whom no trustee or receiver has been appointed, the rule shall be continued and a copy thereof shall be published by the sheriff in a newspaper of the county once each week for 4 successive weeks, and upon proof of such advertisement by affidavit of the sheriff made at the time to which such rule was continued, shall be deemed and considered sufficient service of such rule.

(b) Upon the return of the rule, if the Court is satisfied from the evidence produced that such mortgage or judgment, together with all interest and costs due thereon, has been satisfied and paid, the rule shall be made absolute, and the Court shall order and decree that the mortgage or judgment is paid and satisfied, and shall order and direct the recorder or the Prothonotary, in whose office such mortgage or judgment is entered, to enter on the record thereof full and complete satisfaction thereof. (22 Del. Laws, c. 211, §§ 1, 2; Code 1915, § 3231; 29 Del. Laws, c. 237; Code 1935, § 3694; 25 Del. C. 1953, § 2115; 55 Del. Laws, c. 341, § 5.)

Purpose. — Section is solely for the purpose of removing the record evidence of a defunct but recorded lien, after the debt secured by the mortgage lien had been actually paid. In re Mortgage of Agostini, 42 Del. 347, 33 A.2d 306 (Super. Ct. 1943).

Section is not intended as method of separating debt from lien securing such debt. In re Mortgage of Agostini, 42 Del. 347, 33 A.2d 306 (Super. Ct. 1943).

Missouri

or their heirs or devisees; and sued out in the name of the r plaintiffs, or legal representa- ed plaintiff, for the benefit of es, and the legal representatives rty; or the judgment or decree he name of such legal represent- rviving plaintiffs, and execution jointly.

When Defendant Dies, Judgment Survives

several defendants in a judgment ne of them die before the same is ed into effect, the judgment or rning real estate, shall survive ir heirs or devisees, and execution st any surviving defendant or de- h judgment or decree may be re- heirs or devisees of any or all such nts, by *scire facias*, and execution ar st the surviving defendant or eirs or devisees of such de- r such of them as are made but if such judgment or decree lty, execution shall be sued out only riving defendant or defendants; and he judgment or decree has not ex- e exhibited in the probate court for ther demands against the deceased efendant's estate; but if the lien has dgment or decree shall be revived ecutors or administrators of the de- nt or defendants, and then shall be as hereinbefore directed.

Death of Defendant After Levy—Proceedings

dant shall die after his real estate en seized on execution, the service ot be completed, but the sheriff shall cution, together with the fact of the th, which shall be a sufficient indem- his failure to proceed.

Revivor of Judgment by or Against Administrator De Bonis Non

or or administrator be plaintiff or judgment or decree, and shall die, smissed before the same is satisfied fect, the judgment or decree may against the administrator *de bonis* nner aforesaid.

Rule 74.50. Execution Sued Out by Administrator De Bonis Non

Where a judgment shall have been or may hereafter be had in the name of an executor or administrator, execution thereafter may be sued out or an action thereon maintained by the administrator *de bonis non*, upon his filing in the clerk's office of the court in which such judgment was rendered a certified copy of his letters of administration *de bonis non*.

Rule 74.51. Satisfaction of Judgment—Acknowledgment of

When any judgment or decree is satisfied otherwise than by execution, the party in whose favor the same was rendered shall, immediately thereafter, enter an acknowledgment of satisfaction thereof either in open court or on the margin of the record of the judgment or decree in vacation.

Rule 74.52. Who May Enter Satisfaction

Satisfaction may be entered by the plaintiff in person, by his attorney of record, or by his agent duly authorized, in writing, under the hand of the plaintiff.

Rule 74.53. Satisfaction, Where Entered

If the acknowledgment is made in open court, it shall be entered of record; but if made on the margin of the record of such judgment or decree, it shall be signed by the party making it and attested by the clerk.

Rule 74.54. Satisfaction by Agent—How Made

When made by an agent, his authority shall be filed in the office of the clerk of the court where the acknowledgment is made.

Rule 74.55. Effect of Acknowledgment of Satisfaction

The acknowledgment so made shall forever discharge and release the judgment or decree.

Rule 74.56. Refusal of Party to Satisfy—Proceedings

If a person receiving satisfaction of a judgment or decree shall refuse within a reasonable time after request of the party interested therein to acknowledge satisfaction on the record, or cause the same to be done in the manner herein provided, the person so interested may, on notice given, apply to the court to have the same done, and the court may thereupon order satisfaction to be entered by the clerk, with like effect as if acknowledged as afore-

said; and the cost attending such acknowledgment shall be recovered of the party refusing by fee-bill, as in other cases.

Rule 74.57. Recording Judgments—Duty of Clerks

The clerks of courts of record, in recording a judgment or decree, shall leave a space or margin on the record for entering a memorandum of the satisfaction or vacation of such judgment or decree.

Rule 74.58. Satisfaction of Judgment—Entry of

When satisfaction of a judgment or decree shall be acknowledged or entered by order of the court, or satisfaction shall be made by execution, or such judgment or decree shall be vacated, the clerk shall enter upon the margin of the judgment or decree a memorandum of the disposition thereof, the date, and the book and page in which the evidence is entered or recorded.

Rule 74.59. Judgments—Docketing of

The clerks of courts of record shall keep in their respective offices a well-bound book for entering therein an alphabetical docket of all judgments and decrees.

Rule 74.60. Judgment Docket—Contents of

During every term, or within thirty days thereafter, there shall be entered in such docket all final judgments and decrees rendered at such term in alphabetical order, by the name of the person against whom the judgment or decree was entered; and if the judgment or decree be against several persons, it shall be docketed in the name of each person against whom it was recovered, in the alphabetical order of their names, respectively.

Rule 74.61. Further Entries to be Made in Docket

Such docket shall contain, in columns ruled for that purpose: (1) the names of the parties; (2) the date; (3) the nature of the judgment or decree; (4) the amount of debt, damages and costs; (5) the book and page in which it is entered; (6) a column for entering a note of the satisfaction or other disposition thereof.

Rule 74.62. Failure of Clerk to Perform Duty

Any clerk failing to comply with the provisions of any of the five preceding subdivisions of Rule 74, or who shall fail to enter in said docket, within the time required, the judgments of magistrate courts, transcripts of which have been filed in shall be guilty of breach of official duty.

Rule 74.63. Recording of Copies ments

In all cases where any court of record der final judgment, adjudging or decree veyance of real estate, or that any real e or shall render any final judgment quietin mining the title to any real estate, the whose favor the judgment or decree is shall cause a copy thereof to be record office of the recorder of the county wh lands passed or to be conveyed or the titl is quieted or determined lie, within eigh after such judgment or decree is entered judgment or decree be not so recorded, i be valid, except between the parties th such as have actual notice thereof, and i in which any defendant in any such juc decree shall have the right, by petition f to show good cause for setting aside such or decree, within three years after such ju decree is rendered, and a copy of such ju decree is not filed for record within eight herein provided, such defendant shall b two years and four months from the da filing of a copy of such judgment or d record in which to file such petition fo provided, that nothing in this Rule sha strued to affect the provisions of Rule 74

Rule 74.64. Recording Judgment tions

Nothing contained in the preceding R shall be so construed as to require a party a judgment or decree when a conveyance executed in pursuance thereof, and ackr or proved and deposited for record in t office within the time therein limited.

Rule 74.65. Assignment of Judgmer

Judgments of courts of record (includi trate courts) for the recovery of money assigned in writing by the plaintiff an assignees thereof, successively, which ass shall be on, or attached to the judgm attested by the judge or clerk of the magistrate, and, when so made and attes vest the title of such judgments in each thereof, successively.

Rule 74.66. Payment to Assignor ment—When Valid

Payments or satisfaction on such judgm assignor shall be valid, if made before

ceived by the parties. In re Bundy's Estate, 121 Utah 299, 241 P.2d 462 (1952).

—"Filed."

——Service on opposing counsel.

Compliance with Rule 2.9(b), Rules of Practice — Dist. and Cir. Ct., is necessary in order that a judgment be properly "filed" as that term is used in Subdivision (c) of this rule. Bigelow v. Ingersoll, 618 P.2d 50 (Utah 1980).

Compliance with Rule 2.9(b), Rules of Practice — Dist. and Cir. Ct., which requires that a copy of proposed findings or judgments be served on opposing counsel before being presented to the court, is necessary before a judgment is considered "filed" under this rule and, therefore, appealable. Wayne Garff Constr. Co. v. Richards, 706 P.2d 1065 (Utah 1985) (decided prior to 1986 amendment).

Unless Rule 2.9(b), Rules of Practice — Dist. and Cir. Ct., has been complied with, the judgment is not deemed "filed" within the meaning of Subdivision (c) of this rule and the time for taking an appeal from that judgment under Rule 4(a), R. Utah S. Ct., does not begin to run because the judgment has not been properly "entered." Calfo v. D.C. Stewart Co., 717 P.2d 697 (Utah 1986) (decided prior to 1986 amendment).

—Unsigned minute entry.

An unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment. Wilson v. Manning, 645 P.2d 655 (Utah 1982); Wisden v. City of Salina, 696 P.2d 1205 (Utah 1985).

Cited in Orton v. Adams, 21 Utah 2d 245, 444 P.2d 62 (1968); Larsen v. Larsen, 674 P.2d 116 (Utah 1983); Sather v. Gross, 727 P.2d 212 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — Sniadach, Fuentes and Mitchell: A Confusing Trilogy and Utah Prejudgment Remedies, 1974 Utah L. Rev. 536.

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments §§ 91 to 105, 152 to 166; 47 Am. Jur. 2d Judgments §§ 1098 to 1151.

C.J.S. — 49 C.J.S. Judgments §§ 29, 106 to 116, 134 et seq.

A.L.R. — Requirements as to signing, sealing, and attestation in warrants of attorney to confess judgment, 3 A.L.R.3d 1147.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor, or other party obligating himself for performance of primary contract, 5 A.L.R.3d 426.

Constitutionality, construction, application, and effect of statute invalidating powers of attorneys to confess judgment or contracts giving such power, 40 A.L.R.3d 1158.

What constitutes "entry of judgment" within meaning of Rule 58 of Federal Rules of Civil Procedure as amended in 1963, 10 A.L.R. Fed. 709.

Key Numbers. — Judgment ⇐ 12, 29 et seq., 270 to 272, 276.

Rule 58B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

VIRGINIA

REVISERS' NOTE

The 90-day period of former § 8-382 has been reduced to 30 days. The fine has been increased from $20 to a maximum of $50. Other minor changes have been made.

Cross reference. — As to entering of satisfaction of other liens, see §§ 43-67 through 43-71.

DECISIONS UNDER PRIOR LAW.

Ratification of act of attorney in indorsing judgment as satisfied. — The holder of a note sent it to attorneys, with instructions to renew if possible, but otherwise to sue. After judgment was obtained, the holder received from the attorneys a new note and money, with the intimation that if a small balance was paid they would receive it in satisfaction of the judgment. The holder accepted the new note and money, and announced the balance due, and the attorneys indorsed the judgment on the lien docket as "satisfied." The holder did nothing further for five years, when an attempt was made to cancel the indorsement on the ground of fraud or mistake. It was held that the holder had ratified the indorsement by the attorneys. Higginbotham v. May, 90 Va. 233, 17 S.E. 941 (1893).

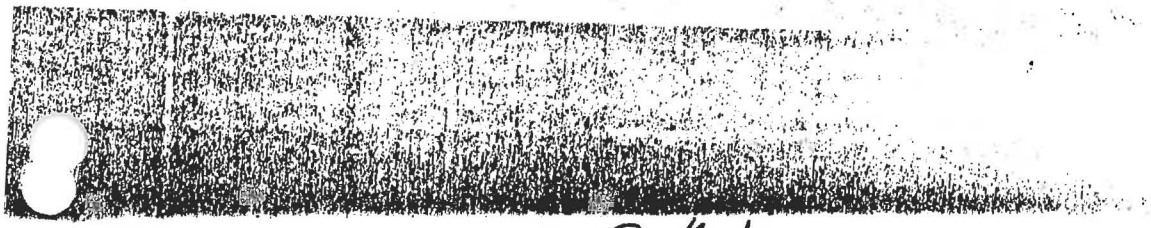
Applied in In re Casper, 338 F. Supp. 327 (E.D. Va. 1972).

§ 8.01-455. Court, on motion of defendant, etc., may have payment of judgment entered. — A. A defendant in any judgment, his heirs or personal representatives, may, on motion, after ten days' notice thereof to the plaintiff in such judgment, or his assignee, or if he be dead, to his personal representative, or if he be a nonresident, to his attorney, if he have one, apply to the court in which the judgment was rendered, to have the same marked satisfied, and upon proof that the judgment has been paid off or discharged, such court shall order such satisfaction to be entered on the margin of the page in the book wherein such judgment was entered, and a certificate of such order to be made to the clerk of the court in which such judgment is required by § 8.01-446 to be docketed, and the clerk of such court shall immediately, upon the receipt of such certificate, enter the same in the proper column of the judgment docket opposite the place where such judgment is docketed. If the plaintiff be a nonresident and have no attorney of record residing in this Commonwealth, the notice may be published and posted as an order of publication is required to be published and posted under §§ 8.01-316 and 8.01-317. Upon a like motion and similar proceeding, the court may order to be marked "discharged in bankruptcy," any judgment which may be shown to have been so discharged.

B. The cost of such proceedings, including reasonable attorney's fees, may be ordered to be paid by the plaintiff. (Code 1950, § 8-383; 1977, c. 617.)

REVISERS' NOTE

Subsection B, providing that the cost of such a proceeding be borne by the plaintiff, is new in Title 8.01.



CAL

§ 724.030. Acknowledgment by judgment creditor

When a money judgment is satisfied, the judgment creditor immediately shall file with the court an acknowledgment of satisfaction of judgment. This section does not apply where the judgment is satisfied in full pursuant to a writ. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.040. Procedure after satisfaction where abstract of judgment recorded

If an abstract of a money judgment has been recorded with the recorder of any county and the judgment is satisfied, the judgment creditor shall immediately do both of the following:

(a) File an acknowledgment of satisfaction of judgment with the court.

(b) Serve an acknowledgment of satisfaction of judgment on the judgment debtor. Service shall be made personally or by mail. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.050. Demand upon judgment creditor

(a) If a money judgment has been satisfied, the judgment debtor, the owner of real or personal property subject to a judgment lien created under the judgment, or a person having a security interest in or a lien on personal property subject to a judgment lien created under the judgment may serve personally or by mail on the judgment creditor a demand in writing that the judgment creditor do one or both of the following:

(1) File an acknowledgment of satisfaction of judgment with the court.

(2) Execute, acknowledge, and deliver an acknowledgment of satisfaction of judgment to the person who made the demand.

(b) The demand shall include the following statement: "Important warning. If this judgment has been satisfied, the law requires that you comply with this demand not later than 15 days after you receive it. If a court proceeding is necessary to compel you to comply with this demand, you will be required to pay my reasonable attorney's fees in the proceeding if the court determines that the judgment has been satisfied and that you failed to comply with the demand. In addition, if the court determines that you failed without just cause to comply with this demand within the 15 days allowed, you will be liable for all damages I sustain by reason of such failure and will also forfeit one hundred dollars to me."

(c) If the judgment has been satisfied, the judgment creditor shall comply with the demand not later than 15 days after actual receipt of the demand.

(d) If the judgment creditor does not comply with the demand within the time allowed, the person making the demand may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand. The notice of motion shall be served on the judgment creditor. Service shall be made personally or by mail. If the court determines that the judgment has been satisfied and that the judgment creditor has not complied with the demand, the court shall either (1) order the judgment creditor to comply with the demand or (2) order the court clerk to enter satisfaction of the judgment.

(e) If the judgment has been satisfied and the judgment creditor fails without just cause to comply with the demand within the time allowed, the judgment creditor is liable to the person who made the demand for all damages sustained by reason of such failure and shall also forfeit one hundred dollars ($100) to such person. Liability under this subdivision may be determined in the proceedings on the motion pursuant to subdivision (d) or in an action. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.060. Form and contents of acknowledgment of satisfaction

(a) An acknowledgment of satisfaction of judgment shall contain the following information:

(1) The title of the court.

(2) The cause and number of the action.

(3) The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any. If an abstract of the judgment has been recorded in any county, the judgment debtor's name shall appear on the acknowledgment of satisfaction of judgment as it appears on the abstract of judgment.

(4) The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.

(5) A statement either that the judgment is satisfied in full or that the judgment creditor has accepted payment or performance other than that specified in the judgment in full satisfaction of the judgment.

(6) A statement whether an abstract of the judgment has been recorded in any county and, if so, a statement of each county where the abstract has been recorded and the book and page of the county records where the abstract has been recorded, and a notice that the acknowledgment of satisfaction of judgment (or a court clerk's certificate of satisfaction of judgment) will have to be recorded with the county recorder of each county where the abstract of judgment has been recorded in order to release the judgment lien on real property in that county.

(7) A statement whether a notice of judgment lien has been filed in the office of the Secretary of State and, if such a notice has been filed, a statement of the file number of such notice, and a notice that the acknowledgment of satisfaction of judgment (or a court clerk's certificate of satisfaction of judgment) will have to be filed in that office in order to terminate the judgment lien on personal property.

(b) The acknowledgment of satisfaction of judgment shall be made in the manner of an acknowledgment of a conveyance of real property.

(c) The acknowledgment of satisfaction of judgment shall be executed and acknowledged by one of the following:

§ 720.770. Hearing on objection; decrease in amount of undertaking

Unless the parties otherwise agree, the hearing on an objection to an undertaking shall be held not less than 10 nor more than 15 days after service of the notice of motion. The court may order the amount of the undertaking decreased below the amount prescribed by Section 720.160 or 720.260 if the court determines the amount prescribed exceeds the probable recovery of the beneficiary if the beneficiary ultimately prevails in proceedings to enforce the liability on the undertaking. *(Added by Stats.1982, c. 1364, § 2. Amended by Stats. 1983, c. 18, § 15.)*

§§ 720.780, 720.790. Repealed by Stats.1983, c. 18, §§ 16, 17, operative July 1, 1983

§ 720.800. Undertaking filed with levying officer

If an undertaking has been filed with a levying officer pursuant to this division, and the undertaking remains in the levying officer's possession when the writ is to be returned, the levying officer shall file the undertaking with the court at the time the writ is returned. *(Added by Stats.1982, c. 1364, § 2.)*

§§ 721 to 724e. Repealed by Stats.1982, c. 1364, § 1, operative Jan. 1, 1983

OFFICIAL FORMS

Mandatory and optional Forms adopted and approved by the Judicial Council are set out in Volume 23, Forms Pamphlet.

TABLE

The subject matter of the sections of former Title 9 shown in this Table has been incorporated into new Title 9 as indicated.

Former Sections	New Sections
721	708.140
722	708.160
722.5	688.010, 688.020
723	708.140
723.010 to 723.154	706.010 et seq.
724a to 724e	699.720, 708.910 et seq.

Division 5

SATISFACTION OF JUDGMENT

CHAPTER 1. SATISFACTION OF JUDGMENT

§ 724.010. Satisfaction by payment in full or acceptance of lesser sum; obligation to give or file acknowledgment

(a) A money judgment may be satisfied by payment of the full amount required to satisfy the judgment or by acceptance by the judgment creditor of a lesser sum in full satisfaction of the judgment.

(b) Where a money judgment is satisfied by levy, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction arises only when the judgment creditor has received the full amount required to satisfy the judgment from the levying officer.

(c) Where a money judgment is satisfied by payment to the judgment creditor by check or other form of noncash payment that is to be honored upon presentation by the judgment creditor for payment, the obligation of the judgment creditor to give or file an acknowledgment of satisfaction of judgment arises only when the check or other form of noncash payment has actually been honored upon presentation for payment. *(Added by Stats.1982, c. 1364, § 2.)*

Cross References

Attorney, authority to satisfy judgment, see § 283.
Insurance tax, see Revenue and Taxation Code § 12494.
Joint debtors, release of one or more, see Civil Code § 1543.
Multiple parties, see § 578.
Officer, satisfaction by payment to levying officer, see § 699.020
Power to take and certify acknowledgments, see § 179.
Sureties, see § 917.1.
Surety's action to compel satisfaction of debt, see § 1050.

§ 724.020. Time for entry of satisfaction of judgment

The court clerk shall enter satisfaction of a money judgment in the register of actions when the following occur:

(a) A writ is returned satisfied for the full amount of a lump-sum judgment.

(b) An acknowledgment of satisfaction of judgment is filed with the court.

(c) The court orders entry of satisfaction of judgment. *(Added by Stats.1982, c. 1364, § 2.)*

(1) The judgment creditor.

(2) The assignee of record.

(3) The attorney for the judgment creditor or assignee of record unless a revocation of the attorney's authority is filed. *(Added by Stats.1982, c. 1364, § 2. Amended by Stats.1983, c. 155, § 21.)*

OFFICIAL FORMS

Mandatory and optional Forms adopted and approved by the Judicial Council are set out in Volume 23, Forms Pamphlet.

§ 724.070. Conditional delivery of acknowledgment

(a) If a judgment creditor intentionally conditions delivery of an acknowledgment of satisfaction of judgment upon the performance of any act or the payment of an amount in excess of that to which the judgment creditor is entitled under the judgment, the judgment creditor is liable to the judgment debtor for all damages sustained by reason of such action or two hundred fifty dollars ($250), whichever is the greater amount.

(b) Subdivision (a) does not apply if the judgment creditor has agreed to deliver an acknowledgment of satisfaction of judgment to the judgment debtor prior to full satisfaction of the judgment in consideration for the judgment debtor's agreement either to furnish security or to execute a promissory note, or both, the principal amount of which does not exceed the amount to which the judgment creditor is entitled under the judgment. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.080. Attorney's fees

In an action or proceeding maintained pursuant to this chapter, the court shall award reasonable attorney's fees to the prevailing party. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.090. Damages

The damages recoverable pursuant to this chapter are not in derogation of any other damages or penalties to which an aggrieved person may be entitled by law. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.100. Certificate of satisfaction of judgment; fee; contents

(a) If satisfaction of a judgment has been entered in the register of actions, the court clerk shall issue a certificate of satisfaction of judgment upon application therefor and payment of a fee of three dollars ($3).

(b) The certificate of satisfaction of judgment shall contain the following information:

(1) The title of the court.

(2) The cause and number of the action.

(3) The names of the judgment creditor and the judgment debtor.

(4) The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.

(5) The date of entry of satisfaction of judgment and where it was entered in the register of actions. *(Added by Stats.1982, c. 1364, § 2.)*

CHAPTER 2. ACKNOWLEDGMENT OF PARTIAL SATISFACTION OF JUDGMENT

Section
724.110. Demand upon judgment creditor for acknowledgment of partial satisfaction of judgment.
724.120. Form and contents of acknowledgment.

§ 724.110. Demand upon judgment creditor for acknowledgment of partial satisfaction of judgment

(a) The judgment debtor or the owner of real or personal property subject to a judgment lien created under a money judgment may serve on the judgment creditor a demand in writing that the judgment creditor execute, acknowledge, and deliver an acknowledgment of partial satisfaction of judgment to the person who made the demand. Service shall be made personally or by mail. If the judgment has been partially satisfied, the judgment creditor shall comply with the demand not later than 15 days after actual receipt of the demand.

(b) If the judgment creditor does not comply with the demand within the time allowed, the judgment debtor or the owner of the real or personal property subject to a judgment lien created under the judgment may apply to the court on noticed motion for an order requiring the judgment creditor to comply with the demand. The notice of motion shall be served on the judgment creditor. Service shall be made personally or by mail. If the court determines that the judgment has been partially satisfied and that the judgment creditor has not complied with the demand, the court shall make an order determining the amount of the partial satisfaction and may make an order requiring the judgment creditor to comply with the demand. *(Added by Stats.1982, c. 1364, § 2.)*

§ 724.120. Form and contents of acknowledgment

An acknowledgment of partial satisfaction of judgment shall be made in the same manner and by the same person as an acknowledgment of satisfaction of judgment and shall contain the following information:

(a) The title of the court.

(b) The cause and number of the action.

(c) The names and addresses of the judgment creditor, the judgment debtor, and the assignee of record if any. If an abstract of the judgment has been recorded in any county, the judgment debtor's name shall appear on the acknowledgment of partial satisfaction of judgment as it appears on the abstract of judgment.

(d) The date of entry of judgment and of any renewals of the judgment and where entered in the records of the court.

(e) A statement of the amount received by the judgment creditor in partial satisfaction of the judgment

The debtor could not waive the benefits of Deficiency Judgment Act [12 P.S. §§ 2621.1 to 2621.11 (repealed)] nor release obligee from complying therewith and any attempted waiver or release was void. In re McGrath's Estate, 46 A.2d 735, 159 Pa.Super. 78, 1946.

Review

Order holding that appellee's petition to fix fair market value of premises was merely was clearly interlocutory because it did not terminate valuation proceedings, and thus appeal therefrom was not authorized by law. Philadelphia Nat. Bank v. Lutherland, Inc., 428 A.2d 232, 286 Pa.Super. 48, 1981.

Superior Court's review of trial court's decision in proceeding on petition to fix fair market value of judgment debtor's real property which has been purchased by judgment creditor at an execution sale is limited to deciding whether there is sufficient evidence to sustain the lower court's holding and whether there is a reversible error of law. (Per Cercone, J., with two Judges concurring and two Judges concurring in the result.) Shrawder v. Quiggle, 389 A.2d 1135, 256 Pa.Super. 303, 1978.

On appeal from order fixing fair market value of realty purchased by judgment creditor at execution sale at a price which is insufficient to satisfy his judgment, review by Supreme Court is limited to deciding whether or not there is sufficient evidence or a reversible error of law. Walnut St. Federal Sav. and Loan Ass'n v. Bernstein, 147 A.2d 359, 394 Pa. 353, 1959.

In proceeding to collect balance due on judgment after judgment creditor purchased realty at execution sale at a price which was insufficient to satisfy judgment, the amount in controversy, for purpose of appellate jurisdiction of Supreme Court, was amount of judgment and not difference between amount at which judgment creditor bid in the property and the amount which he presently averred was fair market value. Id.

In proceeding to fix fair market value of property on foreclosure of mortgage thereon, that trial judge took it upon himself to inspect the premises, and as a result thereof considered matters outside the record, did not require a reversal of the order fixing the fair market value of the property where no objection was made at the hearing and no complaint was made on appeal. Union Nat. Bank of Pittsburgh v. Crump, 37 A.2d 733, 349 Pa. 339, 1944.

On appeal from order fixing fair market value of mortgaged property sold on foreclosure, review by Supreme Court is limited to determination of whether evidence is sufficient to sustain findings of court below, and whether there is reversible error of law, and since proceedings are purely statutory and legislature has not provided for appellate review, appeal is in nature of certiorari in its broadest sense. Id.

§ 8104. Duty of judgment creditor to enter satisfaction

(a) General rule.—A judgment creditor who has received satisfaction of any judgment in any tribunal of this Commonwealth shall, at the written request of the judgment debtor, or of anyone interested therein, and tender of the fee for entry of satisfaction, enter satisfaction in the office of the clerk of the court where such judgment is outstanding, which satisfaction shall forever discharge the judgment.

(b) Liquidated damages.—A judgment creditor who shall fail or refuse for more than 30 days after written notice in the manner prescribed by general rules to comply with a request pursuant to subsection (a) shall pay to the judgment debtor as liquidated damages 1% of the original amount of the judgment for each day of

delinquency beyond such 30 days, but not less than $250 nor more than 50% of the original amount of the judgment. Such liquidated damages shall be recoverable pursuant to general rules, by supplementary proceedings in the matter in which the judgment was entered.

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978.

Historical Note

Official Source Note:

Derived from act of April 13, 1791 (3 Sm.L. 28), § 14 (12 P.S. § 971).

Prior Laws:

1967, Sept. 1, P.L. 305, No. 133, § 4 (12 P.S. § 1589.24).
1876, March 14, P.L. 7, § 1 (12 P.S. § 978).
1865, March 27, P.L. 52, § 1 (12 P.S. § 977).
1851, April 14, P.L. 612, §§ 2 to 4 (12 P.S. §§ 973 to 975).
1810, March 20, P.L. 208, 5 Sm.L. 161, § 15 (42 P.S. § 811).
1791, April 13, 3 Sm.L. 28, § 14 (12 P.S. § 971).

Library References

Judgment ⇐890.

C.J.S. Judgments § 573.

Notes of Decisions

1. Construction and application

As used in this section, requiring a judgment creditor who has received satisfaction of a judgment to enter a satisfaction of the judgment in the office of the clerk of court where the judgment is outstanding upon the judgment debtor's request and tender of the fee for entry, the term "satisfaction" means that the creditor has received full payment of the underlying debt instrument. Busy Beaver Bldg. Centers, Inc. v. Tueche, 442 A.2d 252, 295 Pa.Super. 504, 1981.

This section prescribes exclusive remedy for failure of judgment holder to enter satisfaction, and no common-law action would lie. Hooper v. Commonwealth Land Title Ins. Co., 427 A.2d 215, 285 Pa.Super. 265, 1981.

2. Discretion of court

Rejecting as incredible and false claims of judgment debtor, suing for statutory penalty for refusal to satisfy judgment, that employer had agreed to pay one-half of judgment note payable to him, executed by judgment debtor for funds of employer allegedly misappropriated with his knowledge and consent for payment of blackmail demanded by third person, and that judgment debtor was entitled to credit for additional payment on judgment note evidenced by altered receipt was not abuse of discretion. Warren v. Prager, 176 A.2d 432, 405 Pa. 555, 1962.

The court has no power to mark a judgment satisfied where the consideration therefor had failed; its duty in such case was to open the judgment. Martin v. Pulte, 2 W.N.C. 184, 1875.

3. Request to enter satisfaction

Judgment debtors were not entitled to liquidated damages for judgment creditor's failure to comply with their request for entry of satisfaction of judgment, where judgment creditor had not received full payment of the underlying debt instrument. Busy Beaver Bldg.

and enable him to carry out mandate of § 344.20 of financial responsibility act under which judgment debtor is not to be relieved of revocation of driving privileges by discharge in bankruptcy. Zywicke v. Brogil (1964) 130 N.W.2d 180, 24 Wis.2d 685.

Section 344.20 under which judgment debtor is not to be relieved of revocation of driving privileges by discharge in bankruptcy is to be enforced even though satisfaction of judgment is granted to bankrupt. Id.

Section 344.26 under which discharge in bankruptcy does not relieve judgment debtor from revocation of his driving privileges and this section providing for satisfaction of judgment after discharge in bankruptcy are independent and not in pari materia and there is no conflict between them. Id.

Bankrupt against whom judgment had been entered in automobile accident case was entitled to have such judgment satisfied of record subsequent to discharge in bankruptcy but commissioner of motor vehicles would be free to look behind satisfaction and would be entitled to heed § 344.20 of financial responsibility act to effect that judgment debtor is not to be relieved by discharge in bankruptcy and deny any request for reinstatement of driving license. Id.

10. Vacating of satisfaction

A proceeding to vacate a satisfaction, sheriff's certificate, and deed upon execution sale is governed by equitable rules; the ultimate question being whether it is inequitable for debtor to avail himself of the satisfaction. Hermance v. Braun (1939) 285 N.W. 733, 231 Wis. 357.

Where judgment creditor purchased judgment debtor's interest in realty and received sheriff's certificate and deed and executed partial satisfaction of judgment without knowledge of liens against debtor's interest, and subsequently filed partition suit, wherein debtor's mother asserted existence of liens on debtor's interest, validity of which was debatable but which was subsequently established so that sale of partition would leave nothing for creditor, the creditor, under the circumstances, could have certificate and deed and partial satisfaction vacated. Id.

In proceeding on motion to vacate satisfaction of judgment, wherein evidence indicated that the satisfaction was entirely without consideration and fraudulently procured, circuit judge's statement at conclusion of testimony that he thought plaintiff's attorneys had an attorneys' lien upon the judgment, did not make order vacating the satisfaction entirely erroneous as entered solely for the protection of attorneys without evidence of lien and to a greater extent than necessary to protect attorneys' rights. Simon v. Lecker (1939) 285 N.W. 406, 231 Wis. 106.

A subsequent judgment creditor or mortgagee is not prejudiced by having discharge set aside, where a judgment is discharged wrongfully. Downer v. Miller (1862) 15 Wis. 612.

The court will not, upon motion, set aside a satisfaction of a judgment by an accord and satisfaction in the nature of a compromise, where the plaintiff, with full knowledge, has enjoyed the avails. Reid v. Hibbard (1857) 6 Wis. 175.

WISC

806.20 Court may direct satisfaction; refusal to satisfy

(1) When a judgment has been fully paid but not satisfied or the satisfaction has been lost, the trial court may authorize the attorney of the judgment creditor to satisfy the same or may by order declare the same satisfied and direct satisfaction to be entered upon the docket.

(2) If any owner of any judgment, after full payment thereof, fails for 7 days after request and tender of reasonable charges therefor, to satisfy the judgment, the owner shall be liable to the party

paying the same, the party's heirs or representatives in the sum of $50 damages and also for actual damages occasioned by such failure.

Judicial Council Committee's Note—1974

Sub. (1) is s. 270.90 renumbered.

Sub. (2) is s. 270.94 renumbered.

Historical Note

Source:

S.Ct.Order, 67 Wis. (2d) 737, eff. Jan. 1, 1976.

L.1975, c. 218, § 188, eff. April 23, 1976.

Laws 1975, chapters 198 to 200 and 218 as they relate to sections of the statutes created or affected by the Supreme Court order adopted February 17, 1975, are substantially all amendments for the purpose of eliminating distinctions based upon sex under the authority granted to the Revisor of Statutes by § 13.93(1)(m) created by L.1975, c. 94, § 3.

Prior Laws:

R.S.1849, c. 102, § 23.
R.S.1858, c. 132, § 44.
L.1869, c. 63, § 1.
R.S.1878, §§ 2911, 2915.
St.1898, §§ 2911, 2915.
L.1925, c. 4.
St.1925, §§ 270.90, 270.94.
L.1935, c. 541, §§ 183, 187.
St.1973, §§ 270.90, 270.94.

Notes of Decisions

1. In general

Where it was provided that, if any owner of a judgment, after full payment, shall refuse or neglect, after the space of seven days after request, and after tender of his reasonable charges therefor, to satisfy the same, he shall be liable to the party paying the same in the sum of $50 damages and for actual damages sustained by such refusal, such provision justified a recovery only where the refusal was willful, and a judgment debtor could not recover thereunder for defendant's refusal to satisfy a judgment pending an appeal of an action to determine whether the same had been paid by an accord and satisfaction. Johnson v. Huber (1903) 93 N.W. 826, 117 Wis. 58.

Where defendant had secured a judgment against plaintiff, and agreed to settle it before appeal for a certain sum, which was paid to him, and he afterwards refused to satisfy the judgment, and had execution issued, plaintiff was entitled to a judgment restraining the enforcement of the execution, and commanding defendant to satisfy the judgment on the record. Johnson v. Huber (1900) 82 N.W. 137, 106 Wis. 282.

One circuit court has no jurisdiction to restrain the enforcement of a judgment rendered in another. Cardinal v. Eau Claire L. Co. (1890) 44 N.W. 761, 75 Wis. 404.

An order of court discharging a judgment will not be set aside on the application of the judgment plaintiff, unless his application is made within one year after he has actual notice of the order, although it may appear that the judgment had never in fact been satisfied, and that the plaintiff had been prevented from resisting effectually the motion for its discharge through the neglect of his attorney, on whom notice of the motion was served, to inform him of it. Flanders v. Sherman (1864) 18 Wis. 575.

806.21 Judgment satisfied not a lien; partial satisfaction

If a judgment is satisfied in whole or in part or as to any judgment debtor and such satisfaction docketed, such judgment shall, to

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This situation is covered by statutes in some states, providing a penalty.[18]

§ 1163. Compelling Satisfaction.—Whenever the defendant is entitled to have a judgment discharged or satisfied of record because of its payment or performance or by reason of other facts entitling him to that relief, he may compel this to be done by an appropriate proceeding,[19] the nature of which depending to some extent upon the facts and the statutes, if any, covering the matter. The fact that the defendant has taken an appeal from the judgment against him, which is still pending, does not deprive him of the right to have it satisfied of record upon payment, regardless of the effect this may have in the appeal.[20] Obviously the clerk may be compelled to enter satisfaction if he improperly refuses to do so upon the request or direction of one authorized to satisfy the judgment.[1] A party claiming the right to have a judgment satisfied of record may have this alleged right determined upon motion to the court in which the judgment is entered, the authorities quite generally, either by virtue of statute or independent thereof, recognizing the power of a court to control its records in this way or by an equivalent rule or order to show cause.[2]

18. Travis v. Rhodes, 142 Ala. 189, 37 So. 804; Marston v. Tryon, 108 Pa. St. 270; Johnson v. Huber, 117 Wis. 58, 93 N. W. 826.

19. Wood v. Currey, 1 Cal. App. 583; Beard v. Millikan, 68 Ind. 231; Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Hare v. De Young, 39 Misc. Rep. (N. Y.) 366, 79 N. Y. Supp. 868.

20. Buckeye Ref. Co. v. Kelly, 163 Cal. 8, Ann. Cas. 1913E, 840, 124 Pac. 536.

1. People ex rel. Immerman v. Devlin, 63 Misc. Rep. 363, 118 N. Y. Supp. 478 (by mandamus).

2. Macrum v. United States, 154 Fed. 653, 83 C. C. A. 427; Pilcher v. Hickman, 148 Ala. 517, 41 So. 741; Harding v. Hawkins, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; Wilson v. Brookshire, 126 Ind. 497, 9 L. R. A. 792, 25 N. E. 131; Dunton v. McCook, 120 Iowa, 444, 94 N. W. 942; Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Planters' Bank v. Spencer, 3 Smedes & M. (Miss.) 305; Manker v. Sine, 47 Neb. 736, 66 N. W. 840; First National Bank v. Hoffman, 68 N. J. L. 245, 52 Atl. 280; Coulter v. Kaighn, 30 N. J. L. 98; Waddle v. Dayton, 8 N. J. L. 174; Gross v. Pennsylvania P. & B. R. Co., 65 Hun (N. Y.), 191, 20 N. Y. Supp. 28; Pabst Brew. Co. v. Rapid Safety Filter Co., 54 Misc. Rep. 305, 105 N. Y. Supp. 962; Foreman v. Bibb,

Where a judgment is alleged to have been satisfied in fact, the court may doubtless entertain a motion to have the satisfaction entered of record, and may grant such motion, and quash any outstanding execution if the facts as alleged are clearly established.[3] While such a motion is the ordinary procedure, resort to an independent action has been sanctioned in some cases and may perhaps be desirable or necessary under some circumstances, as a means of bringing in all persons who may be interested or affected though not parties to judgment, or of trying the issues involved.[4] In fact, a suit in equity may be resorted to where the facts justify or require equitable relief which could not be obtained in proceedings by motion,[5] or where an application by motion has been made and denied.[6] Statutory provision is made in a number of states for compelling an entry or acknowledgment of satisfaction as to judgments which have been paid or discharged.[7] It has been held that such statutes must be

65 N. C. 128; Harper v. Graham, 20 Ohio, 105; Vaughn v. Canby Canal Co., 68 Or. 566, 137 Pac. 784; Hottenstein v. Haverly, 185 Pa. St. 305, 39 Atl. 946; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Hanna v. Savage, 21 Wash. 555, 58 Pac. 1069.

But where one indorser has paid and taken an assignment of a judgment upon a note, an application by another indorser for a rule to show cause why the judgment should not be satisfied will be denied if the evidence indicates an agreement between such indorsers for contribution, since their rights in this respect must be litigated in another proceeding provided by the statute for that purpose. National Newark Banking Co. v. Sweeney, 88 N. J. L. 140, 99 Atl. 86.

3. Russell v. Hugunin, 1 Scam. (Ill.) 562, 33 Am. Dec. 423; Adams v. Smallwood, 8 Jones (N. C.), 258; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

4. Mayer v. Sparks, 3 Kan. App. 602, 45 Pac. 249; Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757.

5. Scogin v. Beall, 50 Ga. 88; McQuat v. Cathcart, 84 Ind. 567; Ahl v. Ahl, 71 Md. 555, 18 Atl. 959; Mallory v. Norton, 21 Barb. (N. Y.) 424; Provost v. Millard, 3 Or. 370. But see Macrum v. United States, 154 Fed. 653, 83 C. C. A. 427 (holding a resort to equity unnecessary).

6. Eppinger v. Scott, 130 Cal. 275, 62 Pac. 460.

7. Union Lithograph Co. v. Bacon, 179 Cal. 53, 175 Pac. 464; State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Nickerson v. Supplee, 174 Ill. App. 136; Warren v. Ward, 91 Minn. 254, 97 N. W. 886; Work v. Northern Pac. R. Co., 11 Mont. 513, 29 Pac. 280; Homan v. Taylor, 79 N. J. Eq. 221, 80 Atl.

limited in their operation to their express language[8] and must be strictly complied with,[9] though in some courts they have been applied to situations not strictly within their terms.[10]

The manner in which issues made upon such a motion should be tried and disposed of depends somewhat upon statutory and other general rules of practice. A jury trial seems to be a matter of right in some states unless waived.[11] "Under the established modern practice allowing a motion to enter satisfaction of a judgment at law, by reason of its payment or discharge, as a substitute for the ancient writ of audita querela, the trial of controverted issues of fact arising under such motion is ordinarily to be had in the same manner as under such writ, that is, by jury trial."[12] But under a statute authorizing the court to act upon motion, it is held in some cases that the controverted matters may be determined on affidavits, at least in the absence of any demand for a different method of trial.[13]

326; Brown v. Hobbs, 154 N. C. 544, 70 S. E. 906.

The Washington statute covers payment and satisfaction in whole or in part and provides for a corresponding entry. Blake v. Farrell, 31 Utah, 110, 86 Pac. 805.

8. O'Connor v. Flick, 265 Pa. St. 49, 107 Atl. 159 (proof that the judgment was "fully paid" must be made "to the satisfaction" of the court).

The only proper issue that may be raised upon such a motion is whether the judgment has been paid and satisfied. Proof of a mere covenant not to sue is not material on this issue. Nickerson v. Supplee, 174 Ill. App. 136.

9. Wood v. New York, 44 App. Div. 299, 60 N. Y. Supp. 759; Felt v. Cook, 95 Pa. St. 247; Blake v. Farrell, 31 Utah, 110, 86 Pac. 805.

10. Warren v. Ward, 91 Minn. 254, 97 N. W. 886 ("While the strict terms of the statute apply to a judgment which has been paid in fact, perhaps by cash, we are clear that, where such facts and conditions exist as are tantamount to such payment, this relief should be granted").

11. Bruce v. Barnes, 20 Ala. 219; Harding v. Hawkins, 141 Ill. 572, 33 Am. St. Rep. 347, 31 N. E. 307; Hottenstein v. Haverly, 185 Pa. St. 305, 39 Atl. 946; McCutcheon v. Allen, 96 Pa. St. 319; Cooley v. Gregory, 16 Wis. 303. See State Bank of Lansing v. McLaury, 175 Cal. 31, 165 Pac. 7; Dunton v. McCook, 120 Iowa, 444, 94 N. W. 942; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780.

12. Lillie v. Dennert, 232 Fed. 104, 146 C. C. A. 296.

13. State Bank v. McLaury, 175 Cal. 31, 165 Pac. 7; Warren v. Ward, 91 Minn. 254, 97 N. W. 886. See, also, Faulkner v. Chandler, 11

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by the use of drugs and a false medical history of the case he had fooled one of his own doctors and other doctors, including those of the railroad who had examined him before trial. The Eighth Circuit held that because of the facts, additional to perjury, extrinsic fraud was involved.[118] Few will question the justice of granting relief to the railroad from Callicotte's de luxe reinforced perjury, but the judgment was no more fraudulent than any that results from successful perjury. Accordingly, it seems that little is to be gained by classifying successful fraud into intrinsic and extrinsic categories; and that "the more reasonable course to pursue would be to weigh the degree of fraud and the diligence with which such was unearthed and proceeded on." [119] This rationale, also, applies to relief by an independent action on other grounds such as accident and mistake.

Audita Querela. The writ of audita querela was a common law writ that originated in the fourteenth century, about the tenth year of the reign of Edward III.[120] Sir William Blackstone speaks of it in this fashion:

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118. It was necessary to classify the case as one of extrinsic fraud, since the Eighth Circuit did not regard the *Marshall* case as being in conflict with the *Throckmorton* case. In the Annotation to the *Callicotte* case, 16 A. L. R. 386, 397, on the subject of fraud or perjury as to physical condition resulting from injury as ground for relief from or injunction against a judgment for personal injuries, the commentator, however, states: "With the exception of the reported case the authorities upon the question under annotation, applying the general rule that a judgment will not be set aside for fraud or perjury unless it be extrinsic or collateral to the matter originally tried, have denied relief against the judgment."

119. 3 MOORE 3269; (1927) 21 ILL. L. REV. 833; (1927) 12 CORN. L. Q. 385; and see (1934) 23 CALIF. L. REV. 79, 84 commenting on the Wisconsin experience in granting independent relief from both intrinsic and extrinsic fraud.

An independent action in the federal court, based on diversity, to enjoin the enforcement of a state judgment would be subject to a state statute of limitations or a state doctrine of laches, as the case may be, which would bar a like independent action in the state court. Guaranty Trust Co. v. York, 326 U. S. 99 (1945); see Comment (1946) 55 YALE L. J. 401. An original action in the federal court to enjoin the enforcement of a federal judgment rendered in an action where jurisdiction was based on diversity presents a slightly different problem. There is authority, however, for applying the state statute of limitations, if any. Boone County v. Burlington & Missouri River R. R., 139 U. S. 684 (1891) (suit held barred by laches also). If the federal judgment sought to be enjoined was rendered in an action involving a federal matter, it might be contended that this presents a matter upon which the federal courts, in the absence of an applicable federal statute of limitations, should be free to apply their own doctrine of laches in the action for injunction. See Holmberg v. Armbrecht, 66 Sup. Ct. 582 (U. S. 1946). But in actions formerly legal, although involving a federal matter, federal courts have applied state statutes of limitations as a rule of substantive law in the absence of an applicable federal statute, and even prior to the *York* case, *supra*, tended to do likewise in equity suits. 1 MOORE 240, 245–6. The *York* case and the union of law and equity under Rule 2 should reinforce that tendency, but the *Holmberg* case thwarts it. As to what will constitute laches if that doctrine still has any validity, see Hendryx v. Perkins, 114 Fed. 801, 811–2 (C. C. A. 1st, 1902) (9 years constitutes laches), *cert. denied* 187 U. S. 643 (1902).

120. 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 257.

> "An *audita querela* is where a defendant, against whom judgment is recovered, and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge, which has happened since the judgment: As if the plaintiff hath given him a general release; or if the defendant hath paid the debt to the plaintiff, without procuring satisfaction to be entered on the record. In these and the like cases, wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it, (either at the beginning of the suit, or *puis darrein continuance*, which . . . must always be before judgment) an *audita querela* lies, in the nature of a bill in equity, to be relieved against oppression of the plaintiff. . . . [Audita querela] is a writ of a most remedial nature, and seems to have been invented, lest in any case there should be an oppressive defect of justice, where a party, who hath a good defence, is too late to make it in the ordinary forms of law. But the indulgence now shewn by the courts in granting a summary relief upon motion, in cases of such evident oppression, has almost rendered useless the writ of audita querela, and driven it quite out of practice." [121]

While the substance of this exposition is often quoted with general approval,[122] Blackstone's reference to audita querela as an equitable action is taken to refer to the character of the proceeding as "equitable" in nature, although in fact it is an independent common-law action, the complaint sounds in tort, the proper plea is not guilty, and damages are recovered if a tort has actually been committed.[123]

While it has sometimes been said that "the writ of audita querela was limited to a ground of discharge occurring subsequent to the entry of the judgment, and did not extend to matters arising before its rendition and the proper subject of a defense to the action," [124] a well established rule, and certainly the rule followed by the federal cases hereinafter set forth, is that it includes certain matters arising before as well as after judgment.[125] To the extent, however, that relief is accorded for matters prior to judgment there is little, if any, distinction between

121. 3 Bl. Comm. *405–6.

122. Humphreys v. Leggett, 9 How. 297, 313 (U. S. 1850); New River Mineral Co. v. Seeley, 120 Fed. 193, 196 (C. C. A. 4th, 1903); Baker v. Penecost, 171 Tenn. 529, 106 S. W. (2d) 220 (1937); Longworth v. Screven, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834).

123. Avery v. United States, 12 Wall. 304 (U. S. 1870); Little v. Cook, 1 Aikens 353 (Vt. 1826); Longworth v. Screven, 2 Hill 298, 300 (S. C. 1834) ("that writ, as a common law mode of proceeding . . . is a regular suit, where the parties may take issue in law or in fact, and a regular judgment must be pronounced"); 5 Am. Jur. 491–2; 7 C. J. S. 1281. For a form of petition for writ of audita querela, see Newhart v. Wolfe, 102 Pa. 561 (1883).

124. Luparelli v. United States Fire Ins. Co., 117 N. J. L. 342, 188 Atl. 451 (1936), *aff'd* 118 N. J. L. 565, 194 Atl. 185 (1937) (although the court made the statement set forth in the text it gave relief on matter arising before judgment, see *infra*, n. 153, and text accompanying); Baker v. Penecost, 171 Tenn. 529, 106 S. W. (2d) 220 (1937) (dictum).

125. 5 Am. Jur. 492; 7 C. J. S. 1279.

coram nobis and audita querela and oftentimes no attempt is made to keep the remedies separate.[126]

While audita querela is an independent proceeding, it must be brought in the trial court which rendered the judgment; [127] and may be brought after the mandate from an appellate court has gone down in the original proceeding, unless, of course, the matter sought to be raised is foreclosed by the original proceedings.[128]

Preliminary to a more detailed discussion of the scope of audita querela it should be noted that although the independent common-law proceeding of audita querela has given way in the federal courts and in most state courts to some proceeding thought to be more convenient or summary, the substance of the remedy is retained in many states, and, what is more important, in the federal courts. In other words the formal procedure has generally disappeared, but the substance remains, since the courts look to the scope of audita querela in determining whether relief from the judgment in question is proper. Some of the

126. In Robertson v. Commonwealth, 279 Ky. 726, 132 S. W. (2d) 69, 71 (1939) (overruled as to certain propositions not here pertinent by *Smith v. Buchanan*, cited *infra*, note 177), a person convicted of crime unsuccessfully petitioned the trial court to grant him the writ of coram nobis "and or" the writ of audita querela because of perjured and newly discovered evidence. The court stated: "We see but little distinction between the writ of coram nobis and that of audita querela. Judge Elliott, the distinguished jurist who wrote the leading case of Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29, had before him the writ of coram nobis, but a careful reading of that opinion will show that he in effect granted the writ of audita querela. Sanders was indicted for the murder of his wife and when the case was called for trial an ominous mob surrounded the court house intent upon lynching the defendant. Under the duress of his counsel and the attachés of the court, if not the trial judge himself, Sanders entered a plea of guilty without presenting his defense. The writ of coram nobis was granted not because of any mistake of fact but rather to relieve Sanders from duress and oppression, and to allow him to present a defense which was not available to him at the time of trial. As Judge Elliott made no distinction between the writs of coram nobis and audita querela, we will not attempt to do so here." And Freeman states of audita querela: "It is . . . sometimes sanctioned in cases where the writ of coram nobis seems peculiarly appropriate." 1 FREEMAN, JUDGMENTS (5th ed. 1925) § 257, pp. 517–8.

127. Manning v. Phillips, 65 Ga. 548 (1880); Eureka Casualty Co. v. Municipal Court of City of Los Angeles, 136 Cal. App. 195, 28 P. (2d) 708 (1934); Eureka Casualty Co. v. Municipal Court, 136 Cal. App. 261, 28 P. (2d) 709 (1934). In the *Eureka Casualty* cases a surety's bail was forfeited in the municipal court. Thereafter the surety moved this court to vacate the forfeiture alleging that it had discovered the defendant had died. The municipal court denied the motion. The surety then filed in the superior court his petition for a writ of audita querela. Held, denied. While a proceeding equivalent to petition for writ of audita querela is authorized when duly taken by motion for new trial or for relief from judgment granted through mistake, inadvertence, surprise, or excusable neglect, the motion must be made in the court of original jurisdiction, and hence is not available in the superior court to have the municipal court judgment vacated.

128. Humphreys v. Leggett, 9 How. 297 (U. S. 1850). If this principle is not implicit in Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939), it has been definitely established in Smith v. Buchanan, *infra*, note 177.

procedural substitutes for the writ of audita querela are: motion;[129] rule to show cause;[130] statutory certiorari;[131] statutory affidavit of illegality;[132] suit in equity.[133]

129. Harris v. Hardeman, 14 How. 334 (U. S. 1852); Landes v. Brant, 10 How. 348 (U. S. 1850); Jones v. Watts, 142 F. (2d) 575, 577 (C. C. A. 5th, 1944) ("In present day practice the validity of money judgments which are in execution may be tested in three ways: (1) By motion to quash . . . (2) Affidavit of Illegality, under Statutes . . . (3) Injunction, by a suit in equity."); Longworth v. Screven, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834); Barnett v. Gitlitz, 290 Ill. App. 212, 8 N. E. (2d) 517 (1937) (defendant's motion to vacate plaintiff's judgment or in the alternative that the court satisfy or record the judgment was in the nature of a writ of audita querela and should be granted in this case); Eureka Casualty Co. v. Municipal Court of City of Los Angeles (2 cases), *supra* n. 127; Hill v. Delaunay, 34 Ga. 427 (1866) (see n. 132 *infra*); Electric Plaster Co. v. Blue Rapids City Township, 81 Kan. 730, 732–3, 106 Pac. 1079, 1080 (1910) ("As a substitute for *audita querela* our practice affords the same remedy either by motion or petition. . . . While the writ itself has become obsolete the remedy still exists in a proper case. The prayer of the petition in this case is that the judgment be vacated and a new trial granted, and the action is brought under §§ 568 and 570 of the Code of Civil Procedure (Gen. Stat. 1901, §§ 5054, 5056), upon the grounds set forth in the fourth subdivision of § 568, which authorizes the district court to vacate or modify a judgment at or after the term, 'for fraud practised by the successful party in obtaining it.' " Held, relief denied because the fraud involved, perjury, was intrinsic.); 15 Am. Dec. 695 (Annotation: "The proceeding by writ of audita querela is superseded in a majority of the states by the more summary method of application for relief by motion upon notice to the adverse party: (citing cases). And, as a general rule, wherever audita querela would lie at common law, relief may now be obtained on motion."); 20 L. Ed. 405 (Annotation: "Remedy by motion may now be obtained in most States where formerly the party would have been entitled to audita querela." [citing cases]).

130. Luparelli v. United States Fire Ins. Co., 117 N. J. L. 342, 188 Atl. 451 (1936), *aff'd*, 118 N. J. L. 565, 194 Atl. 185 (1937).

131. Baker v. Penecost, 171 Tenn. 529, 531, 106 S. W. (2d) 220, 221 (1937) ("Section 8990 of the Code provides: 'Certiorari lies: (1) On suggestion of diminution; (2) where no appeal is given; (3) as a substitute for appeal; (4) instead of audita querela; (5) instead of writ of error.' ").

132. Hill v. DeLaunay, 34 Ga. 427, 428–9 (1866) ("The proceeding by illegality, given by our statute, has been substituted for the writ of Audita Querela in England. Formerly, the writ was resorted to to correct all errors which are redressed here by illegality. The remedy by illegality is cumulative, not exclusive. In modern practice, the writ of Audita Querela has been superseded almost entirely by motion . . . and the same relief is now afforded by motion which was formerly granted by said writ. Much more, in this State, should the proceeding by illegality be superseded by motion, which is more cheap and expeditious, especially where the facts are all before the Court and none of them disputed."); Manning v. Phillips, 65 Ga. 548 (1880); Fidelity & Casualty Co. of N. Y. v. Whitaker, 172 Ga. 663, 666, 158 S. E. 416, 418 (1931) ("The remedy by affidavit of illegality is statutory, and applies generally only to the arrest of executions based upon judgments of courts, and not to the arrest of executions issued ex parte by a ministerial officer."). An affidavit of illegality may be authorized by statute where the judgment has been satisfied, settled, or become dormant for failure to enforce it for a specified period of time, or where the judgment is void. See, *e.g.*, GA. CODE ANN. § 39, 1001–9; 33 C. J. S. §§ 147–50.

133. Humphreys v. Leggett, 9 How. 297 (U. S. 1850); New River Mineral Co. v. Seeley, 120 Fed. 193, 196 (C. C. A. 4th, 1903); Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939); and see *In re* Drainage Dist. No. 7, 25 F. Supp. 372, 383 (E. D. Ark. 1938), *aff'd*, 104 F. (2d) 696 (C. C. A. 8th, 1939), *cert. denied* 308 U. S. 604 (1939).

As early as 1834 the South Carolina court stated that the indulgence of the courts, in granting summary relief upon motion, had rendered useless the writ and driven it out of practice both in England and this country.[134] In 1850 the United States Supreme Court stated that a motion was familiar practice in cases where audita querela was proper,[135] and two years, later in holding that a motion was a proper substitute, made this clear pronouncement:

> ". . . it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error *coram vobis* or *audita querela*, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense." [136]

But while evolving this simple and forthright practice, the Court did not insist upon use of the motion. Thus, a suit in equity to enjoin enforcement of a federal judgment at law was sustained in a case where the principles of audita querela warranted relief.[137] The flexibility of this approach which does not require resort to *a* particular procedural remedy is commendable.[138] Thus, the ancient common law and equitable remedies for relief from judgments are helpful both when

134. Longworth v. Screven, 2 Hill 298, 299–300, 27 Am. Dec. 381, 382–3 (S. C. 1834). The court continued: "Where the facts are doubtful, and the Court should be unwilling or unable to decide them, an issue might be ordered, which I think has been the practice in this State; and then such an issue would become the substitute for the formal and technical writ of *audita querela*, and answer the same end. Or the party complaining might be put to that writ, as a common law mode of proceeding, which is a regular suit, where the parties may take issue in law or in fact, and a regular judgment must be pronounced. 1 Mass. 101; 17 Johns. Rep. 484. I should be unwilling to say that it is so far obsolete that our Courts would not allow it, if preferred. The present motion is therefore considered as a substitute for the writ of *audita querela*, . . ."

135. Landes v. Brant, 10 How. 348, 371 (U. S. 1850); Humphreys v. Leggett, 9 How. 297, 313 (U. S. 1850) (". . . although it [audita querela] is said to be in its nature a bill in equity, yet, in modern practice, courts of law usually afford the same remedy on motion in a summary way."—per Grier, J.).

136. Harris v. Hardeman, 14 How. 334, 345 (U. S. 1852).

137. Humphreys v. Leggett, 9 How. 297, 313, 314 (U. S. 1850) (". . . courts of equity usually grant a remedy by injunction against a judgment at law, upon the same principles. . . . He [the judgment debtor] is . . . in the same condition as if the defence had arisen after judgment, which would entitle him to relief by audita querela, or a bill in equity for an injunction.")

138. For an excellent example, see *In re* Rothrock, 14 Cal. (2d) 34, 92 P. (2d) 634 (1939). The California Supreme Court describes the proceedings in this manner: "By this consolidated proceeding, the applicant . . . has moved and petitioned this court for writ of *coram nobis*, writ of *audita querela*, writ of *habeas corpus*, writ of *certiorari*, recall of *remittitur*, revocation and annulment of judgment, *subpoena duces tecum*, production of documents, permission to appear and testify, and other and further relief. Uncertain of his remedy, petitioner has couched his plea in these various forms, but the allegations in each instance are identical, and the prayer in substance is that, regardless of form, he be given the relief to which the facts entitle him." *Id.* at 635.

the simple motion is a satisfactory substitute on the formal level and when they are used merely as guideposts in determining whether the case is proper for disturbing the finality of a judgment.

Now to proceed with audita querela as a guidepost to substance. It did not lie to correct mere judicial error, the remedy here being a motion for a new trial or a writ of error.[139] This seems proper since in the interest of the finality of judgments the definite time limits for a new trial or appeal should not be circumvented by a motion of audita querela, where the only time limit is laches. Nor could it be used to obtain relief from intrinsic fraud, such as perjury, in a jurisdiction where a bill to enjoin would lie only for extrinsic fraud.[140] While it had characteristics of a bill in equity, it could not be utilized to set aside an execution sale of particular lands where the judgment creditor had a legal right to levy thereon;[141] nor to quash an execution levy upon property subject to a mortgage executed by the judgment debtor where the judgment creditor proceeded on the theory that the mortgage was a fraudulent transfer and hence had the legal right to disregard the mortgage.[142] On the other hand on principles somewhat analogous to relief from an injunction that has been rendered inequitable because of a change of circumstances,[143] a bankruptcy court has refused to give effect to a finding, underlying a state court judgment, that was rendered baseless by subsequent facts.[144] Audita querela was proper to

139. Little v. Cook, 1 Aikens 363, 15 Am. Dec. 698 (Vt. 1826); Shear v. Flint, 17 Vt. 497 (1845) (not permissible where a writ of error is proper by the common law, as where right to jury trial was denied, though the right of appeal is taken away by statute).

140. Electric Plaster Co. v. Blue Rapids City Township, 91 Kan. 730, 106 Pac. 1079 (1910) (see note 129, *supra*); Robertson v. Commonwealth, 279 Ky. 762, 132 S. W. (2d) 69 (1939) (see note 126 *supra*).

141. Longworth v. Screven, 2 Hill 298, 27 Am. Dec. 381 (S. C. 1834) (A purchaser of land which was subject to the lien of a judgment, and which was afterwards sold under it, cannot set aside the levy and sale on the ground that the defendant in the execution had at the time other lands and personalty sufficient to satisfy the execution.).

142. Baker v. Penecost, 171 Tenn. 529, 106 S. W. (2d) 220 (1937).

143. See note 64, *supra*.

144. *In re* Drainage Dist. No. 7, 25 F. Supp. 372, 383 (1938) (In the reorganization of a drainage district, Haverstick claimed priority for his state court judgment amounting to $20,000 because the Arkansas Supreme Court had found that his land was "totally and permanently destroyed for agricultural purposes" by certain acts of the drainage district. Yet within a year after that pronouncement the Haverstick land was completely reclaimed. In denying priority to the Haverstick judgment, the court said: "Throughout our jurisprudence there has always been some method of correcting a judgment which becomes unjust by subsequent developments. The original common law method was by a writ of audita querela but the modern remedy is by proceeding in equity. . . . It would not be just to give Haverstick a preference based on an announcement of the Supreme Court [of Arkansas] which is rendered baseless by subsequent facts."), *aff'd* 104 F. (2d) 696 (C. C. A. 8th, 1939), *cert. denied* 308 U. S. 604 (1939).

See also Wetmore v. Law, 34 Barb. 515 (N. Y. 1860) (where an injunction has been granted because of the absence of any legal right and this objection has since been removed by valid statute, the injunction may be vacated on motion as a substitute for audita querela.

challenge the validity of a judgment for lack of jurisdiction over the defendant's person, whether the record failed to or did show jurisdiction.[145] It has also been utilized to vacate judgments taken under the following circumstances: against a lunatic whose guardian was not notified;[146] against an infant who defended without appointment of a guardian;[147] where, during the pendency of the suit, the defendant paid

145. Harris v. Hardeman, 14 How. 334, 345 (U. S. 1852) (A default judgment was entered May, 1839 on substituted service; the marshal's return failed, however, to show proper substituted service. A writ of fieri facias was sued out in March, 1840, levied, and defendant executed a forthcoming bond on April 20, 1840. In pursuance of this forthcoming bond another fieri facias was sued out June 11, 1840. Upon defendant's motion at the May term, 1850, until which time the proceeding had been stayed, the court set aside the judgment, and quashed the forthcoming bond and fieri facias. Mr. Justice Daniel stated: "At the time of the motion . . . judgment was still unsatisfied, and was in the progress of execution, and the forthcoming bond, filed in the clerk's office, according to the laws of the State, was properly a part of the process of execution, the fieri facias being sued out therein from the office without any order of the court. The proceedings then, still being as it were in fieri, and not terminated, it was competent for the court to rectify any irregularity which might have occurred in the progress of the cause, and to do this either by writ of error coram vobis, or by audita querela if the party choose to resort to the latter mode. If this position be maintainable, then, there would seem to be an entire removal of all exception to the judgment of the Circuit Court as it is believed to be the settled modern practice, that in all instances in which irregularities could formerly be corrected upon a writ of error coram vobis or audita querela, the same objects may be effected by motion to the court, as a mode more simple, more expeditious, and less fruitful of difficulty and expense."); New River Mineral Co. v. Seeley, 120 Fed. 193, 196 (C. C. A. 4th, 1903). (The general manager in Virginia of a New York corporation sued it in the federal court in Virginia and caused the bookkeeper, who was under his control, to accept service for the corporation, and subsequently took a default judgment. The corporation had no other notice of the suit until months after the judgment was rendered. Held, bill to vacate judgment sustained as a substitute for the writ of audita querela.); see Landes v. Brant, 10 How. 348, 371 (U. S. 1850) (If the judgment was voidable for want of notice although the judgment recited " 'that the parties appeared by their attorneys and dispensed with a jury, and submitted the facts to the court,' then it should have been set aside by an audita querela, or on petition and motion; such being the familiar practice in similar cases"); Jones v. Watts, 142 F. (2d) 575, 576 (C. C. A. 5th, 1944) ("If these appellants can by proper and sufficient evidence show that they were never served they are entitled to a remedy. An ancient remedy in courts of law was by *audita querela* in the court which rendered the judgment, and without limit of time. In modern practice this procedure has been substituted by motion in the cause, with notice, or by statutory remedies."); compare United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 Fed. 651 (E. D. N. Y. 1907) (court lacked power and could not in its discretion relieve a person, at a subsequent term, from a default judgment of forfeiture entered after due service of process).

In Georgia where the statutory affidavit of illegality has been substituted for the writ of audita querela it is provided: "If the defendant shall not have been served and does not appear, he may take advantage of the defect by affidavit of illegality; but if he shall have had his day in court, he may not go behind the judgment by an affidavit of illegality." GA. CODE ANN. § 39-1009.

For the California practice, see notes 66, 69 *supra*.

146. Lincoln v. Flint, 18 Vt. 247 (1846). *Cf.* Olivera v. Grace, 19 Cal. (2d) 570, 122 P. (2d) 564 (1924), set out in note 78 *supra*.

147. Starbird v. Moore, 21 Vt. 529 (1848).

the debt but the plaintiff nevertheless took judgment;[148] and where judgment was taken after the action was discontinued by agreement,[149] or by failure of the parties to appear for trial.[150] Subject to the qualification that audita querela may not be used where the party complaining has had a legal opportunity of defense and has neglected it,[151] it is proper to present defenses in existence prior to, but not as a practical matter available before, judgment. Examples are: death of the principal, unknown to the surety, prior to forfeiture of the surety's bail;[152] that the insurer has paid a certain amount under the policy to the mortgagee who has credited the insured accordingly, but the insured recovers judgment for the full amount of the policy;[153] where between the time of a judgment in the surety's favor in the federal circuit court and its reversal by the United States Supreme Court, judgment against the surety is recovered by a different party, and satisfaction is had in the state court for the full amount of the bond.[154] Audita querela has

148. Lovejoy v. Webber, 10 Mass. 101 (1813).

149. See Jenney v. Glynn, 12 Vt. 480 (1839) (but audita querela denied because the parties had not consented to a discontinuance).

150. Pike v. Hill, 15 Vt. 183 (1843).

151. Avery v. United States, 12 Wall. 304 (U. S. 1870) (During the Civil War the United States took possession of A's warehouse as "captured and abandoned property," and received rents approximating $7,000. After the war the government sued A as surety on a postmaster's bond and recovered judgment approximating $5,000. Subsequently A applied to the court to satisfy the judgment and also for a writ of audita querela, assigning as a reason for not having pleaded a set-off that he did not know until just before he filed his petition and made his motion that the rent money was in the federal treasury. Held, petition and motion were rightly denied, for if A had a claim of set-off he was at fault in not having discovered and pleaded it.); United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 Fed. 651 (E. D. N. Y. 1907) (although, said the court, from the standpoint of discretion the application to open default judgment of forfeiture would be appealing).

152. See *Eureka Casualty* cases, *supra*, n. 127.

153. Luparelli v. United States Fire Ins. Co., 117 N. J. L. 342, 188 Atl. 451 (1936) (Defendant insurer admitted liability and paid to the mortgagee $350, but denied liability to insured on the policy of $2,000. The insured, nevertheless, recovered judgment for that amount. Although the insured judgment-creditor has received a credit from the mortgagee of $350 he seeks to execute his judgment in full against the insurer. The insurer tendered the amount of the judgment less $350 and sought satisfaction of the judgment. Held, granted.), *aff'd* 118 N. J. L. 565, 194 Atl. 185 (1937).

154. Humphreys v. Leggett, 9 How. 297 (U. S. 1850) (The state court judgments were entered at the May term, 1840. In February, 1845, the Supreme Court reversed the federal circuit court's judgment entered against the surety. The surety then offered in the circuit court his plea of payment of the bond puis darrein continuance, but the plea was refused because of the Supreme Court's mandate. The surety then instituted his suit in equity to enjoin enforcement of the federal judgment. Held, judgment for the surety. "The mandate from this court was, probably, made without reference to the possible consequences that might flow from it. At all events, it operated unjustly, by precluding the complainant from an opportunity of making a just and legal defence to the action. The payment was made while the cause was pending here. The party was guilty of no laches, but lost the benefit of his defence, by an accident over which he had no control. He is, therefore, in the same con-

also been useful to show matter arising subsequent to entry of judgment, such as satisfaction or discharge, in whole or in part.[155] This general principle has been utilized where two suits on the same cause of action and between the same parties proceed in different forums to judgment at the same time so that satisfaction of either judgment may be shown in discharge of the other.[156] Admittedly this latter example is atypical. But there are recurring instances that present difficulty where a second judgment is based upon a prior judgment, or matter conclusively established by it, and the first judgment is subsequently reversed. First take the case where an appeal in the second action would go to the same court that reversed the first judgment. In this situation if an appeal is taken from the second judgment, the appellate court may take judicial notice of its action in the first case and make proper disposition of the second appeal.[157] But if no appeal is taken in the second action the Supreme Court ruled in *Reed v. Allen* [158] that the second judgment is res judicata of the matters therein adjudged; and the result of this case was that a party adjudged by the appellate court on the merits in the first action to be entitled to certain property was precluded by the second and unappealed judgment based solely on the first and subsequently reversed decision from obtaining the property in a third and subsequent action. Now take the case where the second judgment is rendered in a different forum so that the appeal goes to a different appellate court. This court will not take judicial notice of the reversal of the first judgment and, unless this matter can be brought into the record by amended or supplemental pleadings, it is not available on appeal. Moreover, the judgment in the second action is not subject to collateral attack.[159] Clearly there should be some flexible procedure that affords relief, and if that second judgment is a federal judgment there must be some procedure that affords relief after the running of the relatively short periods of time for a new trial, for appeal, and for relief from a judgment under Rule 60(b). The principles

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dition as if the defense had arisen after judgment, which would entitle him to relief by audita querela, or a bill in equity for an injunction." *Id.* at 314).

155. Doerr v. Schmitt, 375 Ill. 470, 31 N. E. (2d) 971 (1941); Barnett v. Gitlitz, 290 Ill. App. 212, 8 N. E. (2d) 517 (1st Dist. 2d Div. 1937). Insofar as Johnson v. Finn, 294 Ill. App. 616, 14 N. E. (2d) 240 (1938) holds *contra* it must be considered as overruled by the *Doerr* case; it is, however, correctly decided on the point that the corporate reorganization of the debtor does not discharge the debtor's guarantor.

156. See Bowne v. Joy, 9 Johns. 221 (N. Y. 1812).

157. Butler v. Eaton, 141 U. S. 240 (1891).

158. Reed v. Allen, 286 U. S. 191 (1932), 81 A. L. R. 703. This case and subsequent developments are set out in detail in 1 MOORE, at 165–8.

159. Deposit Bank v. Frankfort, 191 U. S. 499 (1903) (federal court judgment based on Kentucky judgment subsequently reversed, may not be disregarded by Kentucky courts): State v. Tillotson, 85 Kan. 577, 117 Pac. 1030 (1911).

underlying audita querela for judgments at law and bill of review for decrees in equity do afford relief.[160]

The unique advantages of employing the substantive principles of audita querela on a motion are three. First, because the motion represents a simple procedure, familiar to the federal courts as a substitute for the independent procedure of audita querela.[161] Second, the substance of audita querela, as outlined above, affords warranted relief in situations not covered by Rule 60(b), apart from the first saving clause.[162] Third, because if an independent action must be brought,

160. Ballard v. Searles, 130 U. S. 50 (1889) (bill of review proper where second decree was equitable); Merchants' Ins. Co. v. DeWolf, 33 Pa. 45, 46, 75 Am. Dec. 577 (1859) (". . . on a reversal of the first judgment, the defendant shall have a right to audita querela; or, perhaps, to a writ of error coram nobis, to have the court below reverse its own proceedings and award restitution. . . ."); see Deposit Bank v. Frankfort, 191 U. S. 499, 512 (1903) ("It is to be remembered that we are not dealing with the right of the parties to get relief from the original judgment by bill of review or other process in the federal court in which it was rendered. There the court may reconsider and set aside or modify its judgment upon seasonable application.").

161. See p. 663 *supra*.

162. The following is a summary where audita querela affords relief, subject only to the time limit of laches, but relief is either not afforded or its attainment is doubtful under Rule 60(b), apart from the saving clause, even within six months:

1) From a finding of a judgment rendered baseless by subsequent facts, see note 144, *supra;*

2) Where jurisdiction over the defendant was not obtained, see note 145, *supra;* (conceivably the elimination of the word "his" in the proposed amendment to Rule 60(b), see p. 688, *infra*, might warrant relief on the theory that the court had made a mistake or acted inadvertently in entering judgment without jurisdiction of the defendant);

3) Where judgment is irregularly entered against infants or incompetents, see notes 146–7, *supra*; (conceivably the elimination of the word "his" by the proposed amendment (see *infra*) might warrant relief under Rule 60(b));

4) Where between the time of a judgment in the surety's favor in the federal circuit court and its reversal by the United States Supreme Court, judgment against the surety is recovered by a different party and satisfaction is had in the state court for the full amount of the bond, see note 154, *supra;*

5) Where a judgment is subsequently discharged in whole or in part, see note 155, *supra;*

6) Where two judgments are entered at the same time, but in different forums, on the same cause of action and one judgment is subsequently discharged, see note 156, *supra;*

7) Where a second judgment is entered on the basis of an earlier judgment which is subsequently reversed, see notes 157–160, *supra.*

Rule 60(b) would afford relief, but only within the time limit of six months, in the following cases:

1) Where the plaintiff went ahead and took judgment despite the settlement of the claim by the defendant, or an agreement of the parties that the action be dismissed, see notes 148–50, *supra;* (certainly this would be true under the proposed amendment to Rule 60(b), see p. 691, *infra*, which authorizes relief from a judgment on the ground of "(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party.");

2) Where a defense was in existence prior to judgment but could not be availed of as a practical matter, see notes 152–4, *supra.*

relief cannot be obtained from judgments in favor of the United States.[163] According to *Jones v. Watts*,[164] while an independent action against the United States could not be maintained by the judgment debtor because of the sovereign's immunity from suit, and while audita querela was an independent action within the immunity rule,[165] nevertheless, the substance of audita querela was still available by motion made in the original proceeding, subject only to laches.

Writ of Error Coram Nobis (or Coram Vobis). The distinction between coram nobis and coram vobis is only nominal. Tidd explains it in this fashion. If the proceeding was brought in the King's Bench to set aside a judgment of that court it was called a "writ of error *coram nobis*, or *quae coram nobis resident*, so called from its being founded on the record and process, which are stated in the writ to remain in the court of the lord the king, before the king himself. . . . In the Common Pleas, the record and process being stated to remain before the king's justices, the writ of error is called a writ of error *coram vobis*, or *quae coram vobis resident*." [166] The term coram nobis will be used hereinafter since it is more commonly used in the cases.

A necessary distinction, however, is that the writ of error and the writ of error coram nobis served entirely different functions and were akin only in name and the fact that both were common law writs. The function of the writ of error was to bring a judgment of an inferior court before a higher court, having appellate jurisdiction, for purposes of review on questions of law. The writ of error coram nobis, on the other hand, was a writ to the *same* court which rendered the judgment to have that judgment set aside because of error in *fact*, which Tidd characterized as "not the error of the judges, and reversing it is not reversing their own judgment." [167]

While Blackstone noted the remedial possibilities of audita querela and his discussion has served as a starting point for many courts,[168] he made no mention of coram nobis. The writ, however, had long been in use before he wrote,[169] and Judge Cooley and other editors of the Com-

163. Avery v. United States, 12 Wall. 304 (U. S. 1870); Jones v. Watts, 142 F. (2d) 575 (C. C. A. 5th, 1944).

164. 142 F. (2d) 575 (C. C. A. 5th, 1944).

165. This had been established by Avery v. United States, *supra*, note 163.

166. 2 TIDD, PRACTICE IN PERSONAL ACTIONS (1807) 1056. *Cf.* Camp v. Bennett, 16 Wend. 48, 51 (N. Y. 1836) on this nominal matter to the effect that the name coram nobis is not appropriate in New York, since "the record represents the fact as it really takes place, before the justices of the supreme court."

167. 2 TIDD, *loc. cit. supra*, note 166.

And hence a statute governing the time for suing out a writ of error does not apply to a writ of error coram nobis. Strode v. The Stafford Justices, 23 Fed. Cas. 236, No. 13, 537 (C. C. D. Va. 1810) (opinion by Marshall, C. J.).

168. See pp. 659–60, *supra*.

169. See Jacques v. Cesar, 2 Saund. 100 (1682).

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a wrong name and was unable to find the declaration, and therefore did not appear, does not entitle him to this writ. It is his own fault that he did not plead the misnomer or take judgment of nolle prosequi.[11]

These writs have been generally, if not universally, superseded, and redress formerly obtained through their aid is now sought by motion.[12]

§ 257. **Audita Querela.** — The proceeding by writ of audita querela is said to have commenced about the tenth year of the reign of Edward III. It gradually gave way in England, in most cases, to the more simple and equally efficient remedy by motion. It is, nevertheless, still used in some of the United States, and is sometimes sanctioned in cases where the writ of coram nobis seems peculiarly

241, Ann. Cas. 1915A, 1282, 123 Pac. 63.

The error of fact which will justify the writ must be one not appearing on the face of the record and not contradicting the finding of the court. Chapman v. North Am. L. Ins. Co., 292 Ill. 179, 126 N. E. 732.

11. Brandon v. Diggs, 1 Heisk. (Tenn.) 472.

12. Pickett v. Legerwood, 7 Pet. (U. S.) 144, 8 L. Ed. 638; Billups v. Freeman, 5 Ariz. 268, 52 Pac. 267; Linton v. State, 72 Ark. 532, 81 S. W. 608; People v. Perez, 9 Cal. App. 265, 98 Pac. 870; Life Assn. v. Fassett, 102 Ill. 315; McKindley v. Buck, 43 Ill. 488; Fugate v. State, 85 Miss. 94, 107 Am. St. Rep. 268, 3 Ann. Cas. 326, 37 So. 712; State v. Hayslip, 90 Ohio St. 122, 107 N. E. 335; Smith v. Kingsley, 19 Wend. (N. Y.) 620. See United States v. Mayer, 235 U. S. 55, 59 L. Ed. 129, 35 Sup. Ct. Rep. 16; People v. Mooney, 178 Cal. 525, 174 Pac. 325 (the statutory remedies of motion for new trial and appeal supersede the common-law remedy. It is "only in cases where there is no remedy by statute" that we may "look to the common law"); Stevens v. Kansas City L. & P. Co. (Mo. App.), 231 S. W. 1006; Warren v. Order of Railway Conductors of Am., 199 Mo. App. 200, 201 S. W. 368; Cross v. Gould, 131 Mo. App. 585, 110 S. W. 672.

The remedy by motion is broader than the common-law writ of error coram nobis, including other grounds for relief, such as fraud. Cross v. Gould, 131 Mo. 585, 110 S. W. 672.

The Illinois statute (Rev. Stats. 1921, c. 110, § 89), expressly abolishes the common-law writ and substitutes a motion on the same grounds. But this statute did not abolish the essentials of the proceedings incident to that writ, which in nature remain the same. The motion is the commencement of a new suit and is the equivalent of a declaration. Rolenec v. Rolenec, 210 Ill. App. 329. See, also, Chapman v. North Am. L. Ins. Co., 292 Ill. 179, 126 N. E. 732.

appropriate. The original purpose of the writ, and the one to which it is generally confined, is that of relieving a party from the wrongful acts of his adversary,[13] and of permitting him to show any matter of discharge which may have occurred since the rendition of the judgment.[14] It is in the nature of a bill in equity; and was invented, says Blackstone, "lest in any case there should be an oppressive defect of justice, where a party who hath a good defense is too late to make it in the ordinary forms of law." It is a judicial writ founded upon the record and directed to the court where the record remains.[15] It has the usual incidents of a regular suit, with its issues of law and of fact, its trial and judgment;[16] and the persons whose judgment is sought to be vacated must be made parties and given notice.[17]

Besides being an appropriate remedy where some matter of discharge has arisen, the audita querela may be employed when a good defense to the action has accrued since the entry of the judgment, or where such defense, though existing prior to the judgment, was not brought to the attention of the court, on account of fraud or collusion of the prevailing party.[18] Where the defendant during the pendency of the suit paid the debt, and the plaintiff afterward took judgment, it was held that this writ would lie.[19] It has also been applied for the purpose of vacating a judgment against an infant who defended without appointment of a guardian;[20] and a judgment

13. Brackett v. Winslow, 17 Mass. 159; Lovejoy v. Webber, 10 Mass. 103; Kimball v. Randall, 56 Vt. 558; Hawley v. Mead, 52 Vt. 343; Little v. Cook, 1 Aik. (Vt.) 363, 15 Am. Dec. 698.

14. Barker v. Judges, 4 Johns. (N. Y.) 191; Powell's Appellate Proceedings, 377.

15. Harper v. Kean, 11 Serg. & R. (Pa.) 280; Poultney v. Treasurer, 25 Vt. 168; Warner v. Crane, 16 Vt. 79.

16. Brooks v. Hunt, 17 Johns. (N. Y.) 484.

17. Melton v. Howard, 7 How. (Miss.) 103; Gleason v. Peck, 12 Vt. 56, 36 Am. Dec. 329; Troop v. Ricardo, 9 Jur., N. S., 887, 11 Week. Rep. 1014, 8 L. T., N. S., 757, 33 Beav. 122.

18. Bryant v. Johnson, 24 Me. 304; Wetmore v. Law, 34 Barb. (N. Y.) 515; Staniford v. Barry, 1 Aik. (Vt.) 321, 15 Am. Dec. 692.

19. Lovejoy v. Webber, 10 Mass. 101.

20. Starbird v. Moore, 21 Vt. 529.

against a lunatic whose guardian was not notified.[1] In Vermont, it seems to be employed with more frequency than elsewhere, and to answer as a specific for all sorts of mischiefs not otherwise provided against. It there has power to vacate a judgment rendered after a suit is discontinued by agreement, or by failure of the parties to appear for trial or for irregularity,[2] or in cases where a justice of the peace should have allowed an appeal, but refused to do so.[3] It is the proper remedy when two judgments have been rendered on the same cause of action, and one of them is paid.[4] It is not sustained by error of the court in a matter of law or of fact;[5] and is never permissible in a case where a writ of error is proper by the common law, though the right to such writ has been taken away by statute.[6]

But a party having an opportunity of making his defense, or who is injured through his own neglect, cannot be relieved by audita querela.[7] Nor can a party, by audita querela, obtain relief from a judgment rendered against him on the unauthorized appearance of an attorney.[8] He may, however, resort to this writ for relief from a judgment obtained on a false return of service.[9] The fact that the judgment debtor had an equitable defense not cognizable at law does not entitle him to this writ;[10] nor can he by it obtain affirmative relief other than the setting aside of the judgment, and the relief incidentally following therefrom.[11]

Proceedings by audita querela are in the nature of a direct rather than of a collateral attack, and therefore the

1. Lincoln v. Flint, 18 Vt. 247.
2. Pike v. Hill, 15 Vt. 183; Jenney v. Glynn, 12 Vt. 480.
3. Edwards v. Osgood, 33 Vt. 224; Harriman v. Swift, 31 Vt. 385.
4. Bowne v. Joy, 9 Johns. (N. Y.) 221.
5. Lamson v. Bradley, 42 Vt. 165; School District v. Rood, 27 Vt. 214.
6. Spear v. Flint, 17 Vt. 497.
7. Avery v. United States, 12 Wall. (U. S.) 304, 20 L. Ed. 405; Thatcher v. Gammon, 12 Mass. 270; Barker v. Walsh, 14 Allen (Mass.), 175; Griswold v. Rutland, 23 Vt. 324.
8. Abbott v. Dutton, 44 Vt. 551; Spaulding v. Swift, 18 Vt. 214.
9. Ex parte Gunter, 17 Ala. App. 313, 86 So. 146.
10. Garfield v. University, 10 Vt. 536.
11. Foss v. Witham, 9 Allen (Mass.), 572.

party seeking relief may contradict the record.[12] A judgment debtor residing out of the state and who has not been served with process may, by aid of this writ, have an execution set aside which has been taken out by a creditor, without first filing a bond required by statute.[13] An audita querela, like a motion to set aside a judgment, is only available in behalf of one who was prejudiced by the judgment at its rendition. If the party does not seek to avoid the judgment, his subsequent alienee will not be allowed to interfere with it.[14] A party who has been discharged in insolvency, if he suffers default to be taken against him, is not entitled to have the judgment set aside for the purpose of pleading his discharge.[15]

As a general rule, whenever audita querela would lie at common law, relief may now be obtained on motion. But perhaps in some of the states and in England, if the right to relief is questionable, or if the facts of the case are disputed, the party moving may be compelled to have recourse to this writ.[16] In a majority of the states it is undoubtedly superseded by the more summary method of application by motion upon notice to the adverse party.[17]

12. Ex parte Gunter, 17 Ala. App. 313, 86 So. 146; Hill v. Warren, 54 Vt. 73; Folsom v. Connor, 49 Vt. 4; Paddleford v. Bancroft, 22 Vt. 529.

13. Folan v. Folan, 59 Me. 566; Dingman v. Meyers, 13 Gray (Mass.), 1; Harmon v. Martin, 52 Vt. 255.

14. Beard v. Ketchum, 8 U. C. Q. B. (Ont.) 523.

15. Faxon v. Baxter, 11 Cush. (Mass.) 35.

16. Wardell v. Eden, 2 Johns. Cas. (N. Y.) 258; Giles v. Nathan, 5 Taunt. (Eng.) 558; Lister v. Mundell, 1 Bos. & P. (Eng.) 427; Symonds v. Blake, 4 Dowl. P. C. (Eng.) 263; 2 Cromp. M. & R. (Eng.) 416; 1 Gale (Eng.), 182; Baker v. Ridgway, 2 Bing. (Eng.) 41, 9 Moore, 114.

17. Dunlap v. Clements, 18 Ala. 778; McMillan v. Baker, 20 Kan. 50; Chambers v. Neal, 13 B. Mon. (Ky.) 256; Huston v. Ditto, 20 Md. 305; Longworth v. Screven, 2 Hill (S. C.), 298, 27 Am. Dec. 381; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; McDonald v. Falvey, 18 Wis. 571.

"The common-law writ of audita querela, if it was ever in use in this state, was long since abandoned, and the writ of supersedeas is now used in its stead." Ex parte Brickell, 204 Ala. 441, 86 So. 1. Compare Henderson v. Planters & M. Bank, 178 Ala. 420, 59 So. 493; Ex parte Gunter, 17 Ala. App. 313, 86 So. 146.

MEMORANDUM

June 18, 1988

TO: Larry Thorp

FROM: Fred Merrill

RE: ORCP 67 and supplemental judgments

I have been working on the suggestions relating to supplemental judgment contained in your letter of May 23, 1988 without a great deal of success. I have gone through all of the standard texts and looked at the Oregon judgment cases without finding any discussion of "supplemental judgments." I have also checked the statutes in my usual 10 drafting source states (well done procedural codes that differ from the federal rules) and never found any explicit rule dealing with-post judgment orders.

As I see it, the problem is not one of jurisdiction but one of relationship to the final judgment rule in ORCP 67 A. I think the jurisdiction problem is covered by the concept of continuing jurisdiction. Continuing jurisdiction allows a court which has proper jurisdiction over a defendant for a case to maintain that jurisdiction for all subsequent proceedings in that case, including post-judgment proceedings, even though the basis for jurisdiction over the defendant does not continue to exist. That concept is what allows a court to modify custody and support decrees years after all of the parties involved have left the state; it provides jurisdiction to modify injunctive decrees based upon changed conditions; it provides jurisdiction over the parties to vacate a judgment.

I am enclosing a copy of section 26 of the Restatement (Second) of Conflict of Laws and comments, which discuss continuing jurisdiction. As you can see under comment d, the only limitation would be that the court does not have jurisdiction to enter a supplemental judgment as to some claim or relief not covered by the original complaint, but that is not the type of order which you are contemplating. Continuing jurisdiction is recognized in Oregon. I am enclosing the section of my jurisdiction book that discusses the Oregon cases.

The problem that I see with your suggested 69 H is that I am not sure what is covered by the reference to a "supplemental judgment." The term is not defined but apparently contemplates that there has been a "final judgment" already in the case. Under ORCP 67 A, that is only possible if the first judgment

disposed of all the claims and parties involved in the case. If it did not, it cannot be final. Under the Zidell case you would only have a final judgment when the last order was entered disposing of all the claims. You could, of course, have a final judgment that disposes of less than all of the claims or parties under ORCP 67 B, with an express finding and direction for entry by the court. ORCP 67 H would not be needed for that situation because it is already completely covered.

The only type of "supplemental judgment" that would therefore be covered is one which relates to carrying into effect a final judgment which has already disposed of all the substantive issues in the case. I think those were the types of cases which you described to me in discussing the problem. The Oregon cases recognize this possibility in defining a final judgment and state that a judgment is final if no further action of the court is required to dispose of the case or if it determines the rights of the parties so no further questions can arise except such as are necessary to be determined in carrying it into effect. Klamath Co. v Laborers Int. Union, 21 Or App 281, 287, 534 P2d 1180 (1975); Durkhiemer v Zell, 161 Or 434, 437-438, 90 P2d 213 (1939); Winters v Grimes, 124 Or 214, 216-217, 264 P 359 (1928).

The courts have always recognized the possibility of the need for such supplemental order. This is most usual in equitable judgments, such as injunctive or domestic relations orders, because of the nature of the relief. It also comes up frequently in some types of equitable proceedings such as suits for an accounting, partition, foreclosure, etc., where the court decides the case and directs the remedy and then has to make further orders to carry out or ratify the remedy. There is no reason why the court's authority is any different with subsequent steps necessary to carry into effect a legal remedy, and in fact all orders entered on executions and supplemental proceedings in aid of execution probably fit into this category.

From what I can tell, there is no question of the authority of the courts do this. ORS 19.010(2)(c) explicitly provides that "A final order affecting a substantial right, and made in a proceeding after judgment or decree" is a judgment for purposes of appeal. All courts recognize the authority to enter orders subsequent to the judgment relating to costs and disbursements, enforcement of judgments, and vacation of judgments. There have been a number of cases under ORS 19.010(2) involving the court giving further directions, or ratifying, or clarifying the relief granted in a final judgment. (See the ORS annotations.)

The question then is what do we gain by an explicit statement in the rules. We cannot change the appellate definition of a final judgment. In any case, no change is needed because the kinds of orders you are worried about are in fact

final judgments for appeal. We could change the enforceability or res judicata status of the orders supplemental to the final judgment, but I would assume that they are final judgments for all purposes anyway. I suppose the most important thing would be to educate trial judges as to this authority which might not be absolutely clear in some situations.

The problem is that I do not think the present draft does this because again it does not tell the trial judge what a permissible supplemental order is. We could use the language in the Durkheimer line of cases and state that supplemental final judgments can be entered to do anything necessary to carry the judgment into effect. The problem is that we may be creating a bigger problem than we are solving. The Durkheimer definition of final judgment is not a model of clarity. Under it, the courts had an awful time figuring out whether a decree directing an accounting or partition was final followed by supplemental or the last decree was the final one. The Oregon cases conflict on the accounting questions, and the partition order is specifically covered in ORS 19.010(2)(b) because its status was not clear in the cases. My fears of creating more problems than we solve are fueled by my inability to find any statutory coverage in other states. Finally, we may create confusion by requiring a reference to future orders in the original final judgment.

I will call you next Tuesday or Wednesday. We can discuss the matter and if you want something drafted or checked further, I can get it done before the next meeting.

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May 17, 1988

Professor Frederic R. Merrill
Executive Director
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Eugene, Oregon 97403

Dear Fred:

I have reviewed the Agenda material for Saturday's meeting. I have several suggestions concerning language which you have drafted to change several of the rules. I thought it would be helpful if you could review my thoughts prior to the meeting. Therefore, I have prepared a Memorandum outlining my ideas.

I will be out of town Thursday and Friday, but may be back late Friday afternoon. If you want to discuss my thoughts, feel free to give me a call.

Very truly yours,

THORP, DENNETT, PURDY,
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET:edk

Enclosure

MEMORANDUM

RE: COUNCIL ON COURT PROCEDURES

Meeting May 21, 1988

1. Staff Comment to ORCP 59C(6). I suggest that the last two sentences of the language proposed by Professor Merrill be revised so that the whole comment reads as follows:

> "When the ORCP was originally promulgated, trial judges had no authority to allow a jury to separate after they had retired to begin their deliberation. The 1981 legislature added 59C(6) which allowed the trial judge to permit the jury to separate for the evening after deliberation had begun. The Council has now added authority for the trial judge to permit separation for the noon recess. The authority to permit separation is still limited to noon and evening recesses only and then only if the trial court can affirmatively find that separation will not adversely affect the deliberation process. The Council was concerned that the discretion to allow separation for the noon recess be exercised cautiously since separation for the noon recess presents the risk of unavoidable and undesirable contact between jurors and other trial participants."

2. ORCP 80F(3). I believe that this section as proposed should be further modified. It seems to me that since ORCP 80F was put together out of pieces from various cases and rules from other states, it was not well tied together. I believe that sub-section F(3) was designed specifically to deal with notice under section F. The notices under sections C and G involve parties and are clearly covered by ORCP 9B. Therefore, sub-section F(3) more properly should read as follows:

> "**FORM AND SERVICES OF NOTICES.** Any notice required by this section shall be served upon the person to be notified or such person's attorney in the manner provided by Section 9B at least five days before the hearing unless a different period is fixed by order of the court."

This version differs from Professor Merrill's suggestion in the following particulars:

A. It changes the reference in the second line from "this rule" to "this section."

B. It deletes the parenthetical phrase in the first sentence. The phrase is unnecessary since the court is given discretion. In addition, the parenthetical phrase is ambiguous in the sense that virtually every case of retaining personal property "involves expense" and therefore the 5 day limit in sub-section F(3) does not apply.

C. The form of notice required has been changed from notice "as provided" in Rule 9B to "in the manner" provided in Rule 9B. Since 9B only applies to parties, it seems to me that what we are talking about is methodology and not requirements.

D. Finally, I eliminated the last two sentences of the existing sub-section since I do not really understand the necessity of filing the proof of service or a specific finding that the notice has been given as required. If there is no such filing or finding, is any order void for lack of jurisdiction? Regardless, it seems to me that it is incumbent upon the moving party to establish that the requirements have been met.

3. ORCP 68C(2). Both Professor Merrill and Judge McConville have suggested alternative language to deal with the harshness of the result in a couple of cases where a party failed to specifically allege the "facts, statute or rule" upon which the party sought to recover attorney fees. It seems to me that the simple solution to the problem is to strike the language which requires specificity in the pleading of attorney fees. As a result, the first sentence would be rewritten to simply read as follows:

> "A party seeking attorneys fees shall assert the right to recover such fees in a pleading filed by that party."

The balance of the section would read exactly as it currently reads. In addition to that change, a comment could be added reading as follows:

> "The Council feels that in several cases the requirements in ORCP 68C(2) that a party plead the specific basis for attorneys fees have been too strictly interpreted by the appellate courts. See, e.g., Dept. of Human Resources v. Strasser, 83 Or. App. 363, 732 P.2d 38 (1987) and AFSD v. Fulop, 72 Or. App. 424, 695 P.2d 979, rev'd on other grounds, 300 Or. 39, 706 P.2d 921 (1985). The purpose of the change to the first sentence of sub-section C(2) is to make it clear that the pleading of attorneys fees is required, but any such pleading is subject to the usual rules under which a pleading may be challenged. For example, if a plea for attorneys fees is not specific but the adverse party fails to file a motion to make more definite and certain, that failure precludes a subsequent attack upon the right to recover attorneys fees due to failure to more specifically plead."

4. Changes to ORCP 71 and ORS 19.033. I generally agree with what Professor Merrill is attempting to accomplish in the changes which he suggests to both ORCP 71 and ORS 19.033. I believe, however, that the purpose can be accomplished and at the same time clear up some ambiguities which exist both in the rule and statute.

I would change the rule in the following particulars:

A. I would delete the last sentence of section A.

B. I would change sub-section B(1) to be simply section B, and I would delete sub-section B(2) completely.

C. I would insert a new section C to cover appeals and renumber sections C and D to be sections D and E. The new section C would read very similarly to the language which

Professor Merrill proposes to add to section A. It would simply read:

> "A motion under this rule may be filed during the pendency of an appeal but no relief may be granted by the trial court during the pendency of the appeal unless the trial court is directed to rule upon such motion by the appellate court. A copy of a motion filed during the pendency of an appeal shall be filed in the appellate court in which the appeal is pending."

I believe that the language proposed to be added to ORS 19.033 is more complicated than is necessary. It appears to me that existing sub-section (4) of the statute is aimed at covering many of the issues which would be addressed under ORCP 71A. Rather than adding whole new sections, I believe that sub-section (4) should simply be amended to make it clear that it covers all those cases under 71A and B. In addition, I believe it is unnecessary to spell out in the statute what will happen to the trial court file or that a stay will be granted if the trial court is directed to rule upon the motion, since I believe that the appellate court would deal with those issues irrespective of the statute. I do believe, however, that Professor Merrill's language which makes it clear that the appellate court could also consider the ruling on the ORCP 71 motion as a part of the appeal should be added. With all of that in mind, I would suggest that sub-section (4) could be rewritten to read as follows:

> "Notwithstanding the filing of a notice of appeal, the trial court shall have jurisdiction, with leave of the appellate court to:
>
> "(a) Enter an appealable judgment if the appellate court determines that;
>
> > "(A) at the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment; and

"(B) the judgment from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under sub-section (1) of this section, or the trial court had not yet entered an appealable judgment.

"(b) Enter an order under ORCP 71A correcting the judgment or ORCP 71B granting relief from the judgment.

"Any order entered under this sub-section shall be reviewable by the appellate court in conjunction with the appeal."

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May 23, 1988

Professor Frederic R. Merrill
Executive Director
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Dear Fred:

I have been doing some more thinking about the subject of supplemental judgments. The prospect of using supplemental judgments raises a whole spectrum of issues, not the least of which are jurisdictional. It appears to me that there are two ways to approach the question. The first is to assume that the court can maintain post-judgment jurisdiction of a case by specifically providing in the judgment that the court reserves the right to enter one or more supplemental judgment. The second is to provide for supplemental judgments in only those cases in which under existing law the court has post-judgment jurisdiction, i.e., equity cases.

Proceeding on the assumption that the court can maintain post-jurisdiction by so providing in a judgment, Rule 67 could be amended by adding a new section H, which would read as follows:

> "H. **Supplemental Judgments.** One or more judgments may be entered supplemental to a final judgment provided (1) the original judgment provides for the entry of the supplemental judgment, and (2) a hearing is conducted prior to the entry of each supplemental plemental judgment. The original and each supplemental judgment shall be deemed a final judgment with respect to the matters determined therein."

The criteria for granting a supplemental judgment could also be expanded by requiring that the supplemental judgment relate to the subject matter of the original judgment. I believe such a provision would raise as many issues as it would resolve. As a result, I left it out.

If a person were to approach this subject from the standpoint that jurisdiction terminates upon entry of a final judgment in all nonequity cases, then the language which I have proposed

above probably should be amended by adding an introductory phrase reading:

> "In cases in which the court has post-judgment jurisdiction, . . ."

As I noted at the outset, the whole subject of supplemental judgment raises many issues. As a result, probably a fair amount of research ought to be done to find out what, if anything, has been done concerning this issue in other jurisdictions. If you want to discuss the matter further, please give me a call.

Very truly yours,

THORP, DENNETT, PURDY,
GOLDEN & JEWETT, P.C.

Laurence E. Thorp

LET:edk

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GEORGE M. JOSEPH
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June 16, 1988

Professor Fred Merrill
University of Oregon
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Subj: ORCP 69 (and perhaps others)

Dear Fred:

A valiant few of us are trying, against desperate odds, to preserve the English language. This may not be a fight in which victory will go to the valiant or the noble. To be sure, it rather looks like victory will go to the craven. Nonetheless, I like to pretend that there is still hope. That hope is sharply diminished when I read abominations such as the first sentence of ORCP 69B(2):

> "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 a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27." (Emphasis supplied with tears in my eyes and an ache in my heart.)

I suppose, someday, I shall have to read the rest of ORCP. With that example in mind, I anticipate a horrible time.

Sincerely,

George

George M. Joseph

GMJ/jk

c: Kathleen Beaufait

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DONNA R. MEYER

June 21, 1988

Fred Merrill
Executive Director
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University of Oregon School of Law
Eugene, Or 97403

Re: Proposed Amendment to ORCP 44

Dear Fred:

As I mentioned in our telephone conversation of Thursday, June 16th, it has come to my attention that the language of ORCP 44, which allows a court to order a party "to submit to a physical or mental examination by a physician", has been interpreted and applied literally by some court in Oregon to preclude licensed psychologists from conducting mental examinations. Unfortunately, 15 out of 36 counties in this state have no resident psychiatrist, which raises the question of whether a "mental examination by a physician" can be conducted in those counties.

In order to correct this problem, my client, the Oregon Psychological Association, respectfully requests that the Council on Court Procedures amend ORCP 44 to allow either a physician or a psychologist to conduct a mental examination of a party. I have attached an amended version of ORCP 44 for consideration by the Council at its meeting in Bend on June 25th. The suggested new language is underlined and deletions are shown in brackets.

Thank you for your help and please call me if the Council needs additional information or assistance from me.

Very truly yours,

Diana E. Godwin

DEG/smc
#6Merrill.617

Enclosure
cc: Elliott Weiner, Ph.D.
Robert Henry, Ph.D.
Lorah Sebastian, Ph.D.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS;

REPORTS OF EXAMINATIONS

RULE 44

A. **Order for examination.** When the mental or physical condition or the blood relationship of a party, or of an agent, employee or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B. **Report of examining physician.** If requested by the party against whom an order is made under section A. of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C. **Reports of examinations; claims for damages for injuries.** In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of al written reports or existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comp

D. **Report; effect of failure to comply.**

D.(1) **Preparation of written report.** If an obligation to furnish a report arises under sections B. or C. of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physic or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses including the [examining physician's] examiner's fee, necessary to prepare such a report.

D.(2) Failure to comply or make report or request report. If a party fails to comply with sections B. and C. of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E. Access to hospital records. Any party against whom a civil action is filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

#6Rule44

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June 24, 1988

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Dear Dave:

I am pleased to see that the Oregon State Bar Pleading and Practice Committee is considering the question of pretrial disclosure of experts in tort cases. My view on this subject follows, and I want to make it clear that I write to express my personal view, and not that of the Oregon Trial Lawyers Association, of which I am President. Indeed, I would guess that most plaintiffs' lawyers in the state do not concur with my view on this subject, but I believe that if substantial changes were made in existing practice in this area, it would be in the interest of both the plaintiffs bar and the defense bar.

I do a good deal of practice in Federal Court where disclosure of expert witnesses is governed by Federal Rule of Civil Procedure 26(b)(4). In my experience, it works exceptionally well. The reasons that it works well are as follows:

1. It is bilateral. While I am required to divulge to defense counsel my experts and their respective opinions, I am able to discover the same from the defense. I would much rather get bad news two months into a case than to get the same bad news on the third day of trial.

2. As a corollary to the above, if the other side is producing a witness who is incompetent or biased, I ought to be able to show a jury such weaknesses when I have several months to have such a witness' opinion scrutinized by competent experts.

3. Expert disclosure promotes settlement. No competent trial lawyer can buy a pig in a poke. By that I mean that if a defense lawyer tells me they have a dynamite expert who is going to torpedo my case, I simply cannot attach any significance to such a statement until and unless I receive the expert's credentials and his/her opinions. I recently finished a major wrongful death case in Federal Court where it was very ably defended. For months as we traveled to Colorado and Idaho doing depositions, we discussed settlement. We had agreed upon a specific time frame for reciprocal disclosure under FRCivP 26(b)(4), and two working days after I disclosed my highway safety expert and accident reconstruction expert, the case settled. This never would have occurred in State Court where there is no reciprocal disclosure for the reasons already noted above.

I know that some of my brethren in the plaintiffs' bar feel strongly about non-disclosure and point to the problem caused in medical negligence cases by disclosure of experts. They believe, and I am absolutely convinced that they are right, that certain insurers and defense counsel apply unfair pressure upon medical experts who are willing to call a spade a spade. I do not do medical negligence cases, so I do not know first hand about how frequent this occurs and therefore the magnitude of this problem. I am told that I do do more dental negligence litigation than anyone else in the state, and am seeing recently the same tactic used in dental cases. I think that if medical and dental cases pose that problem, that the bar ought not to let the tail wag the dog. By that I mean that a new rule should be adopted that provides for reciprocal discovery as under FRCivP 26(b)(4), and simply except from that medical and dental cases.

Very truly yours,

JENSEN & OWENS

David Jensen

DJ:ljw