FINAL TENTATIVE DRAFTS

of

RULES OF PROCEDURE

submitted by

THE ADVISORY COMMITTEE ON RULES OF PROCEDURE

of the

SUPREME COURT OF IOWA

PART TWO

PLEADINGS
PROCEEDINGS AFTER JUDGMENT
DECLARATORY JUDGMENTS
PARTITION OF REAL PROPERTY
PARTITION OF PERSONAL PROPERTY

CONTENTS

Supreme Court

STATE OF IOWA

TO THE MEMBERS OF THE IOWA BAR:

On November 20 of this year the Advisory Committee, with the permission of the Supreme Court, sent to every lawyer in Iowa tentative drafts of rules dealing with commencement of actions, appellate procedure, and pre-trial procedure. The conditions under which the Court gave its permission for the first submission govern this submission, and are stated in a letter attached to Part One of these drafts.

The drafts of rules in the present submission cover the important subjects of pleadings, proceedings after judgment, declaratory judgments, partition of real property and partition of personal property. The Committee earnestly hopes that these drafts will be carefully studied and that it will receive detailed and constructive suggestions for their improvement. Nothing has been more helpful to the work of the Committee than the large number of carefully considered letters received as a result of the submission of Part One. If the bar continues to display this intelligent interest in the Committee's work, there is no reason why we should not be able to prepare rules which will make more efficient the administration of justice in our courts.

The Committee once again desires to express its grateful appreciation of the work of the various sub-committees that have assisted in the drafting of the rules thus far released, and I am taking this opportunity to list the personnel of the sub-committees that have participated in our drafts now published.

Sub-Committee on Pre-Trial Procedure

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Sincerely yours,

Wayne L. Cook

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved March 7, 1942)

I.

PLEADINGS AND MOTIONS

INTRODUCTORY

The following rules are designed to replace the code provisions relating to pleadings and motions now contained in Chapters 491 and 492 of the Code of Iowa, 1939. Some of the sections will be found here in the same language as in the present code. Others, not materially changed, are included here in shortened, condensed and simplified form, so worded as to adapt them to a system of rules. Where the rule is a substantial adoption of the present statute, that statute is cited without comment.

The principal changes in the present practice which are embodied in these proposed rules include the following:

Abolition of demurrers in cases at law as well as in equity.

Abolition of general denials and requiring specific denials to be made in lieu thereof.

Abolition of verifications, except as herein noted.

An attempt to minimize the use of motions by permitting all points of law to be raised by answer, (as may now be done only in equity), so as to make motions unnecessary and by strictly limiting the time within which motions may be interposed.

Fixing the times to plead so they are short, but long enough to make the time limits enforceable, and limiting the extension of times to plead.

Fixing a more workable plan for speedy disposition of motions and other matters before trial, in an effort to bring cases to issue and trial as speedily as practicable.

Requiring a reply to new matter, as well as to counterclaim, to minimize the uncertainty as to the actual dispute which now inheres in the general implied denial of every answer.

Permitting motions for judgment on the pleadings.

Permitting separate disposition of points of law before trial in all cases, (now permitted in equity only), and making such determination final for the trial court.

Making orders effective when filed, and allowing them to be signed anywhere in the district.

Providing that the courts shall always be open for business.

Requiring the court, in sustaining motions, to state specifically the ground upon which the ruling was based.

These rules assume that exceptions to adverse rulings will automatically be preserved in all cases.

PLEADINGS

RULE 1. TECHNICAL FORMS ABOLISHED

All technical forms of action and pleading, common counts, general issues, fictions and demurrers are abolished. The forms and sufficiency of pleadings in civil actions shall be determined by these rules, which shall be construed and enforced to secure the just, speedy and inexpensive determination of every suit upon its merits.

Comment: This is based on Section 11108 and, in addition, abolishes demurrers. It also expresses the legislative intent set forth in Sec. 1 of S. F. 25 of the Laws of the 49th General Assembly.

RULE 2. PLEADINGS DEFINED

"Pleadings" are the parties' written statement of their respective

claims. They shall be clear and concise, avoiding prolixity and repetition. "Pleadings" as used in these rules shall not include motions.

Comment: The first sentence is practically the same as the first part of Section 11109. The rest is new. The last sentence is added to make it plain that in construing these rules, pleadings and motions are not to be confused or the rules as to one made applicable to the other.

Although heretofore a motion has been loosely called a form of pleading, it seems proper and desirable not to so regard it under these rules. If the two are kept distinct, the word "pleadings" can be applied generically to all papers other than motions, without enumerating them, (or excluding motions), in each rule that applies to them but does not apply to motions. These rules deal with the presentation and disposition of motions in a radically different manner than that of pleadings, which seems necessary if any speeding up of the practice is to be attained. Therefore, rules applicable to "motions" will not apply to other pleadings, and vice versa.

Great liberality is allowed in presenting points of law in answer or reply, and of disposing thereof, but motions are rather strictly limited, especially as to time of filing and speedy disposition. If this definition as to motions not being embraced in the word "pleadings" is observed, the different rules applicable to each class can be readily kept in mind.

RULE 3. PLEADINGS ALLOWED

The pleadings allowed shall be: petition, answer, reply, where permitted by these rules, cross-petition, petition of intervention, and amendments allowed by the court or these rules.

Comment: Based on Section 11109, modified to exclude motions from the category of "pleadings".

To this list may be added the name of any other pleadings involved in such Third Party Practice as may be adopted.

RULE 4. PETITION

The petition must contain

(a) the title of the case, designating the court and naming the parties,

(b) a statement as to whether "at law" or "in equity",

(c) the facts constituting the cause or causes of action, and

(d) a demand for the relief claimed, and if for money, the amount thereof.

Comment: This is a condensation of Section 11111.

RULE 5. ANSWER

The answer shall show on whose behalf it is filed, and shall specifically admit or deny each allegation or paragraph of the petition, which denial may be for lack of information. It must state any claimed additional facts deemed to constitute a defense. It may contain a counterclaim, which shall be in a separate division. It may raise points of law appearing on the face of the petition to which it responds. It may contain as many defenses, legal or equitable, as defendant may claim, and may contain inconsistent defenses.

Comment: This supplants Sections 11114, 11115, 11130, 11193 and 11199 of the Code. It abolishes general denials and requires specific denials or admissions of each allegation of a petition. It permits the answer to raise points of law appearing on the petition in every case, and not merely in equity as in Code Section 11130. The Committee believes this rule sufficiently covers Section 11193, concerning certain

denials, and Section 11115, as to multiple defenses, and 11199 as to inconsistent defenses, to make further reference to these subjects needless.

It is not entirely new to allow points of law to be raised in answer, rather than by motion or demurrer. These rules hope to encourage this, and thus to eliminate many dilatory motions. With this being allowed, limitation on the time for filing and presenting motions does no harm to any meritorious defense, since it can be as fully raised by answer as by motion. The separate defenses of law thus raised may be heard by the court separately, under Rule 45. In short, the answer may, and it is hoped most often will, present every point of law or fact which is claimed as a defense, rather than doing it by a series of time-wasting motions and hearings.

RULE 6. ANSWER OF GUARDIAN AD LITEM

Every guardian, guardian ad litem, or attorney for a person in prison, must report whether his ward has been properly served with notice, and his answer must deny all material allegations of the petition prejudicial to his ward.

Comment: This is based upon Section 11116, with the addition of the provision requiring an investigation to ascertain if proper service has been had. This practice is followed in some courts, but not in others, and is here inserted in the interest of uniformity and for proper protection of the ward.

RULE 7. REPLY

There shall be a reply to a counterclaim, and to new matter set forth in the answer, responding in the same manner that an answer responds to a petition; but it shall not be inconsistent with the petition. Points of law arising on the face of the answer may be raised by a reply.

each must be stated in a separate numbered division. Every pleading shall be separated into numbered paragraphs, each of which shall contain, as nearly as may be, a distinct statement.

Comment: Based on Sections 11112, 11113, 11117 and 11119. Requiring all paragraphs to be numbered facilitates the specific denials or admissions required later, and makes them easy to state concisely. It is as convenient to number paragraphs in law as in equity.

RULE 14. VERIFICATIONS ABOLISHED—AFFIDAVITS IN CERTAIN CASES

A. Pleadings need not be verified. Counsel's signature to every motion or pleading shall be deemed his certificate that there are good grounds for making the claims therein, and that it is not interposed for delay.

B. Any motion asserting facts as the basis for the order it seeks, and any pleading seeking interlocutory relief, shall be supported by affidavit of the person or persons knowing the facts requisite to such relief. A similar affidavit shall be appended to all petitions which special statutes require to be verified.

Comment: This supersedes Sections 11160, 11161, 11162, 11164, 11165, 11166, 11167, 11168, 11169, 11170, 11171, concerning verifications.

It is felt that verifications have become pure formalities, and are either meaningless or uniformly abused. They add nothing of substance to pleadings in actual practice. Where verifications are mandatory, rather than optional, under the present practice, there has been substituted the requirement of an affidavit by some one knowing the facts. Except in such cases, the verification serves no useful purpose and is abandoned in the interests of simplicity and candor.

RULE 15. CORRECTING DEFECTS AND RECASTING PLEADINGS

The court, on its own motion or that of any adverse party, may order any prolix, confused or multiple pleading to be recast in a concise single document within such time as the order may fix. It may, in like manner, order any pleading not complying with these rules to be corrected on such terms as it may impose.

Comment: Last sentence is Section 11120 condensed. First sentence is new.

RULE 16. FILING—COPIES AND DELIVERY THEREOF—COPY FEES

All motions and pleadings, with a copy, shall be filed with the clerk, who shall deliver or mail the copy to the attorney of record for the adverse party immediately on his appearance, or forthwith if he has already appeared.[1] If such copy is not filed, the original may be stricken from the file.[2] Additional copies may be required in like manner as provided in Rule 9-B of Commencement of Actions. A fee of ten cents per hundred words for each copy shall be taxed with the costs, to be the property of the attorney filing the copy.[3]

Comment: [1]This is in lieu of Section 11124, making all filings sufficient if made with the clerk, without the present requirement of a memorandum in the appearance docket during term time. It also requires the clerk promptly to get the copy to the adverse attorney, which is often not done at present.

[2]Changes the present result of not filing a copy, which merely allows a continuance or striking the original. The Committee feels it wise to eliminate the option of continuance.

[3]This preserves the present copy fee, but definitely provides it is the property of the attorney, thus avoiding dispute as to who is entitled thereto.

The above rule contains what is now found in Sections 11110, 11124, 11125; adding the requirement of copies of all motions. Present statutes do not require copies of motions for continuance or change of venue; but there is no reason why a copy of every motion should not be filed. This enables the rules to dispense with the provisions of Chapter 492 requiring notice of motions and the inconvenience and delay therefrom, since it insures a copy, and the delivery of such copy, to counsel interested.

RULE 17. TIME TO MOVE OR PLEAD

A. Motions. All motions attacking a petition, and other motions required to be filed before answer must be filed within five days from the time required for appearance. All motions attacking a subsequent pleading must be filed within seven days after the filing of such pleading.

B. Answer. Answers must be filed within five days after the time required for appearance, unless a motion is then on file, in which event answer must be filed within seven days after such motion is disposed of so as to require answer.

C. Reply. Reply must be filed, if at all, within seven days after the answer to which it responds, unless a motion attacking such answer is then on file, in which event reply must be filed within seven days after such motion is disposed of so as to permit a reply.

D. Amendments. Amendments permitted or required by any order must be filed within seven days after the order.

E. Answer or Reply to Amendments. Answer or reply to any amendment,

or any substituted or supplemental pleading, must be filed within seven days, unless a motion attacking it is then on file, and then within seven days from the time the motion is disposed of so as to require or permit answer or reply. But if the petition be amended before time for answering it, this rule shall not require answer to the amendment to be made prior to the time for answering the original petition.

F. Shortening Time. The court may order any motion or pleading to be filed within a shorter time than above prescribed, but cannot require a defendant to answer sooner than five days after the appearance day.

G. Extending Time. The court may, for good cause, but not ex parte, extend the time to amend, answer or reply for not more than thirty days beyond the time herein fixed. It shall have no power further to extend any such time, or to extend the time for filing motions.

Comment: This is a substitute for Sections 11121, 11122, 11123, 11134, 11135, 11136, 11137.

The time for pleading is longer than our present statutory "next day" rule; but that is so impractical it is never enforced, and it is thought better to provide a practical time, and not allow its extension without cause. This will, in fact, shorten the time over that now universally used in practice.

Here again it is emphasized that the short time to file motions, and the prohibition of its extension, is deemed absolutely necessary to any substantial speeding up of the practice. In view of the fact that every point of law now raised by motion can be raised also in the answer, there can be no deprivation of any rights by demanding a prompt motion, since the defendant can make the same point in answer, for which he can get an extension of time if need be. This does not apply

to motions for more specific statement and similar dilatory motions; but it is felt that the public interest and demand for promptness requires these to be filed promptly. If in rare cases this is impossible, the contemplated pre-trial practice and possibly other methods of discovery will enable the defendant to accomplish the same thing almost universally.

The prohibition against extending time for motions is felt necessary. Without it, the practice of such extensions unduly and without need will soon arise anew; and there seems no other way of certainly preventing it than by this definite prohibition.

RULE 18. APPEARANCES

An appearance without motion or pleading shall have the effect only of submitting to the jurisdiction of the court. No court shall have power to treat such appearance as sufficient to delay or prevent a default or any other order which would be made in the absence thereof, or in the absence of timely pleadings.

Comment: This is new, and attempts to eliminate dilatory appearances so prevalent now.

RULE 19. PLEADING OVER—FAILURE

If a party permitted or required to plead further by any order or ruling fails to do so, within the time fixed thereby or by these rules, he will be deemed to have elected to stand on the record theretofore made. An appropriate final judgment or order must follow such election, reserving only such issues, if any, which may remain undisposed of by the ruling and election.

Comment: Based on Sections 11147, 11148, but modified to make the election automatic and the result final as to the matter involved. Eliminates the red tape of formal elections to stand on pleading, etc.

RULE 20. AMENDMENTS

Any pleading may be amended before a pleading has been filed in response to it. The court may also, in furtherance of justice, allow any later amendments. Such amendments may include amendments to conform to the proof which do not substantially change the claim or defense. The court may impose terms, or grant a continuance with terms, as a condition of such allowance.

Comment: Based on Sections 11182, 11183.

RULE 21. MANNER OF MAKING AND CONSTRUING AMENDMENTS

All amendments must be made on a separate paper, duly filed, and not by interlining or expunging the prior pleadings, which must remain on file. All amendments will be construed as part of the original pleading which remains in effect, unless they are a complete substitute therefor.

Comment: Rewrites Section 11184, with nothing new added.

RULE 22. SUPPLEMENTAL PLEADINGS

Any party may file a supplemental pleading alleging facts material

to the case which have happened or come to his knowledge since his prior pleading. Such supplemental pleading shall not be considered a waiver of the former pleading.

Comment: Section 11221, rewritten.

RULE 23. SUBSEQUENT DEFENSES—PRESUMPTIONS

Any defense arising after action is commenced shall be stated according to the facts. Unless the answer states otherwise, it shall be held to state only matter arising before the action began.

Comment: Based on Sections 11124, 11125, omitting reference to "without formal commencement or conclusion".

RULE 24. PLEADING CONTRACT

No pleading which refers to a contract shall be sufficient unless it states whether it is in writing; and, if the contract alleged is the basis of the cause of action or defense asserted, it must be set forth in full.

Comment: Based on Section 11129.

RULE 25. ALLEGATION AS TO TIME

When time is not material, it need not be averred, or if averred need not be proved. When it is material, the date, or duration of a

continuous act, must be alleged.

Comment: Section 11194, shortened.

RULE 26. ALLEGATION AS TO PLACE

It shall be necessary to allege the place only where it forms a part of the substance of the issue.

Comment: Section 11195 verbatim.

RULE 27. PLEADING EXCEPTIONS

A claim in derogation of general law, or founded on any kind of exception, shall be so pleaded as to set forth particularly such claim or exception.

Comment: Section 11200, shortened.

RULE 28. PLEADING STATUTES

A pleading asserting a statute, or a right derived therefrom, need only refer to it by plain designation. The court shall judicially notice the statutes of any state, territory or other jurisdiction of the United States so pleaded.

Comment: Based on Section 11198. The provision regarding judicial notice of foreign law is new.

RULE 29. PLEADING UNLIQUIDATED DAMAGES

No order shall be made requiring any pleading to itemize or apportion unliquidated damages claimed therein, nor to attribute any part thereof to a portion of the claim asserted.

Comment: This sets out the present law concerning which there is lack of uniformity of application in some districts.

RULE 30. JUDICIAL NOTICE

Matters of which judicial notice is taken need not be stated in any pleading.

Comment: Section 11211, verbatim.

RULE 31. PLEADING CONVEYANCE

When a party claims by conveyance, he may state it according to its legal effect or name.

Comment: Section 11212, verbatim.

RULE 32. PLEADING ESTATE

It shall not be necessary to allege the commencement either of a particular estate or superior estate, unless it is essential to the merits of the case.

Comment: Section 11213, verbatim.

RULE 33. INJURIES TO REAL ESTATE

A pleading asserting an injury to real property shall describe the property; and when the injury is to an incorporeal hereditament it shall describe the property in respect of which the right is claimed, and the right itself, either by legal description, or by its abuttals, or by its courses and distances or by any name it has acquired by reputation definite enough to identify it.

Comment: Based on Section 11215.

RULE 34. MALICE

When a party intends to prove malice to affect damages, he must aver the same.

Comment: Section 11216, verbatim.

RULE 35. NEGLIGENCE—MITIGATION

In action to recover for negligence, by an employee against his employer or by a passenger against a common carrier, plaintiff need not negative his contributory negligence, and the burden of pleading and proving contributory negligence shall be upon the defendant; and in such cases contributory negligence may be pleaded in mitigation of damages.

Comment: Based on Section 11210, here reframed to include principles of pleading with which these rules are concerned.

knowledge or information sufficient to form a belief as to its genuineness.

Comment: Based on Section 11219.

RULE 41. MATTERS SPECIALLY PLEADED

Any defense that a contract or instrument sued on, is void or voidable, or that it was delivered in escrow, or showing matter of justification, excuse, discharge or release, and any defense which admits the facts of an adverse pleading, but by some other matter seeks to avoid their legal effect, must be specially pleaded.

Comment: This is a rewriting of Section 11209.

RULE 42. WHAT DEEMED ADMITTED

Every fact pleaded and not denied in a subsequent pleading shall be deemed admitted, except that allegations of value, or amount of damages, shall not be held true by failure to controvert them, but the allegations of a reply shall be denied by operation of law.

Comment: Based on Sections 11201, 11202.

RULE 43. COMBINING ALL DEFENSES

Every defense in bar or abatement, or to the jurisdiction after

general appearance, shall be made in the answer or reply, save as allowed by Rule 44; and no one of such defenses shall overrule the other; but a party who presents and tries a defense in abatement alone shall not thereafter be permitted to plead in bar.

Comment: Based on Sections 11115, 11132, 11199, 11222, 11223.

The last clause seems necessary to prevent a litigant from going through the trial with a plea in abatement only, and then after having delayed the trial, attempting to put in issue a plea in bar. The litigant should join both; then if the court feels they should be tried separately, that can be done under the rules.

RULE 44. HOW DEFENSES PRESENTED

Every defense in law or fact to any pleading must be asserted in the pleading responsive thereto, if one is required; and if none is required, then at the trial, except that:

(a) lack of jurisdiction over the subject matter or person, or insufficiency of the original notice or its service, must be raised by special appearance before any other motion or pleading is filed;

(b) failure to state a claim on which any relief can be granted may be raised by a motion to dismiss the claim, filed before answer;

(c) sufficiency of any defense may be raised by a motion to strike it, filed before pleading to such defense.

Such motions to dismiss or to strike must specify wherein the pleading attacked is claimed to be insufficient.

RULE 48. PROPER REMEDY AWARDED

Any case in the district court for mandamus, certiorari, appeal or equitable relief, in which the facts pleaded and proved do not entitle the petitioner to the specific remedy prayed for, but do show him entitled to another of such remedies, shall be deemed to have been brought for the remedy to which he is thus shown entitled.

Comment: This is new. It is analogous to Rule 10-G of Appellate Procedure tentatively approved by the Committee. The reason is obvious. At least in most cases it will eliminate any question as to the differences in these forms of relief, which all shade in together; and will get rid of difficult questions which really benefit no one.

RULE 49. LOST PLEADING--SUBSTITUTION

If an original pleading is lost or withheld by anyone, the court may order a copy thereof to be substituted or a substituted pleading filed.

Comment: This is Section 11227 as it now stands.

MOTIONS

RULE 50. MOTIONS--DEFINED

A motion is a written application for an order made by any party or interested person. It may contain several objects, if all grow out

of, or are connected with, the action in which it is filed, and it is not a pleading.

Comment: Based on Sections 11229, 11230.

RULE 51. FAILURE TO MOVE—EFFECT OF RULING

No pleading shall be held sufficient for failure to move to strike or dismiss it. When a motion to strike or dismiss is overruled, and the moving party pleads over, such ruling shall not adjudicate the sufficiency of the pleading thus attacked.

Comment: Based on Sections 11144, 11145.

RULE 52. SINGLE MOTION ALLOWED

Only one motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter.

Comment: The present Code requires all motions "of the same kind" to be filed at once. The Supreme Court has held that this requires both motion to strike and for a more specific statement to be made together, etc. The present rules permit many points now included in motions to be raised also in the answer or reply. The Committee feels that, if a pleader desires to raise such points by motion and not by answer, he should present them with his other motions, and not be permitted to have a series of motions attacking the same pleading, and consuming time and involving successive hearings. So if a defendant wishes to move to strike, and to make more specific, and also wants to raise the statute of limitations or want of capacity to sue by motion rather than by answer, he ought to make all those points in the same motion and argue the whole thing once. If he does not care to raise the statute of limitations by motion to dismiss, he can reserve it for his answer; but if he is going to file it in a motion, he should include it

promptly. Of course, if his motion results in his adversary amending the pleading, he can then file another motion to the amended pleading, and this rule does not prevent that. Inasmuch as failure to raise any defense of law or fact does not waive it, and it can still be raised by answer, no prejudice can result from acquiring the first motion to include it if it is going to be the subject of a motion at all, since it can always be raised in the answer or reply anyway.

RULE 53. MOTION FOR SPECIFIC STATEMENT

Before otherwise responding to a pleading, a party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him adequately to plead or prepare for trial, pointing out the defects complained of, and the particulars desired. The court shall not order a more specific statement unless it finds such statement is necessary to enable the movant adequately to plead or prepare for trial.

Comment: Based on Sections 11127, 11128. By rephrasing it is hoped to avoid the indiscriminate practice of moving for, and ordering, amendments not actually needed but which cause delay and expense. Rule 29 above was also adopted to correct a peculiarly needless abuse of the present practice.

RULE 54. MOTION TO STRIKE

In addition to motions to strike allowed by Rule 44-c, sham and irrelevant matter may be stricken on motion of the adverse party, on such terms as the court in its discretion may prescribe.

Comment: Section 11197, abbreviated.

RULE 55. MOTION FOR JUDGMENT ON THE PLEADINGS

At any time before the case is assigned or reached for trial, either party may move for such judgment on the pleadings as he may be entitled to under the undenied allegations of the pleadings; or on any portion of his claim or defense which is uncontroverted, or as to which his adversary is in default.

Comment: While our court has said judgment on pleadings is not allowed, it is provided for to a degree in Section 11574; and such motions have been occasionally used and sustained in such cases as are here contemplated. There are times when such motion expedites the case, and a failure to permit it would work much hardship as to a claim not actually controverted but joined with one that is, or where the facts on the whole pleaded record show no actual controversy of fact, when the case may be determined at law in this way.

RULE 56. NOTICE OF MOTION UNNECESSARY

A party who has appeared or has been served with original notice in an action shall take notice of all motions filed therein which are adverse to him, and of the regular motion day on which they will be heard under these rules.

Comment: This modifies Section 11232, now requiring notice to be served, which is practically never complied with and is not necessary, now that copies must reach counsel under Rule 16 above.

RULE 57. DISCRETIONARY NOTICE OF MOTIONS

The court may require counsel to be apprised of the time and

place at which it will hear or act on any motion, application or other matter, other than the regular motion day or pursuant to a general assignment. Such information shall be conveyed to counsel in any manner deemed suitable by the court. This rule shall be applied so as to expedite and not delay hearings and submissions.

Comment: This is new and is a substitute for Sections 11233, 11234, 11235, 11236, 11237, 11238, 11239.

RULE 58. PROOF OF FACTS ALLEGED IN MOTIONS

Testimony to sustain or resist a motion may be by affidavit or in such other form as the parties agree or the court directs. Any affiant may be required by the court to appear for cross-examination.

Comment: Based on Section 11231.

RULE 59. MOTION DAYS--DISPOSITION OF MOTIONS

At least once each month, beginning on a day specified in advance by the judges of the district, a motion day shall be held in each county, at which all motions on file for twenty days or more must be submitted. All such motions not orally argued, for whatever reason, shall then be deemed submitted without oral argument, unless they are then, or have previously been, set down for oral argument at some time, any place in the district, not more than ten days thereafter, at which time they

must be submitted without further postponement.

All motions not ruled on within thirty days after submission shall be deemed to have been overruled by the trial court on the thirtieth day.

The court may order any motion submitted sooner than herein required, so as not to delay completion of the issues or trial of the case.

For the purposes of this rule, a "motion" is any paper denominated as such, and any matter requiring attention or order of the court other than the actual trial of issues on their merits, except motions made after verdict or judgment.

Comment: This is a substitute for Sections 11133 and 11138. It excepts motions in arrest or for new trial, etc., which should be heard by the same judge who tried the case. Otherwise, it is thought that any substantial saving of time and delay requires a mandatory rule of this kind, which neither the courts nor counsel can materially avoid. Such prompt submission and decision of the preliminaries is essential to any improved practice. Since the matters raised in motions can always be raised again in answer or reply or at the trial, there should be no excuse for holding up a case very long on any preliminary motion, and no one can lose any substantial rights by this rule.

RULE 60. SPECIFIC RULINGS REQUIRED

A motion or other matter involving separate grounds or parts shall be disposed of by separate ruling on each, and shall not be sustained generally.

Comment: This is new. There is much confusion as to the right of a party to specific rulings. Under the doctrine that a general

ruling sustaining a motion is deemed to sustain every ground, no matter how absurd, it is necessary in review of such rulings to argue every ground, even those the judge never actually thought were good. Both the appellate court and the parties should be entitled to know what grounds are upheld, thus shortening the later phases of the matter. No one is harmed by this.

ORDERS

RULE 61. ORDER DEFINED

Every direction of a court or judge, made in writing and not included in the judgment, is an order.

Comment: This is present Section 11240.

RULE 62. ENTRY OF ORDERS

Any judge may enter orders, judgments and decrees at any time after the matter has been submitted to him, effective when filed with the clerk, regardless of where signed.

Comment: Supersedes Sections 11241, 11242, 11242.1, 11243, 11244 and others as to the formalism and technicality required of entry of orders and judgments. It will do away with questions which, though not often raised, may almost always be raised against nearly every order under the present technical system.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved March 7, 1942)

II.

PROCEEDINGS AFTER JUDGMENT

RULE 1. BILL OF EXCEPTIONS

A. When Necessary - Time for Filing. A bill of exceptions shall be necessary only to effect a showing of material portions of the record of the cause not shown by the court files or entries, or the court reporter's legally certified shorthand notes of the trial, if any.

Such a bill of exceptions shall be filed within ten days after judgment is entered in the case, unless additional time not to exceed thirty days be granted by the court for good cause.

Comment: Substitute for matter in Sections 11538, 11539, and 11540. Considered adequate to meet needs of present day practice.

B. Affidavits to Sustain or Controvert Exceptions. Affidavits in support of any such exceptions, and not exceeding five in number, may be filed with the bill. Affidavits controverting the exceptions, and not

exceeding five in number, may be filed within seven days thereafter. For good cause shown, the court may extend time for filing of affidavits here permitted.

Comment: Revision of provisions now set out in Sections 11546 and 11547.

C. Certification of Bill of Exceptions - By Judge - or Bystanders. Any bill of exceptions shall then promptly be presented to the trial judge for his signature, which, if it fairly presents the facts, he shall sign.

If the judge refuses, the party may procure the signature of not less than two bystanders attesting in writing that the exceptions presented are correctly stated and that the trial judge has refused to sign the same, which bill of exceptions, together with such attestation, shall then be filed with the clerk and become a part of the record.

Comment: Substance of provisions of present Section 11545.

D. Certification by Successor - Or Any Judge of the Court. Whenever the judge or referee trying a cause is unable for any reason to sign a bill of exceptions or certify the shorthand reporter's record, the same may be done by his successor or by any judge of the court in which the proceeding has been pending.

Comment: This added provision is one usually found in the recently enacted codes of procedure and meets emergencies that do arise.

RULE 2. GENERAL PROVISIONS RE MOTIONS - FOR JUDGMENT NOTWITHSTANDING VERDICT OR FAILURE OF VERDICT AFTER SUBMISSION TO JURY - FOR NEW TRIAL

A. Time for Filing. Motions for judgment notwithstanding verdict or failure of verdict after submission to jury, or for new trial, shall be filed within ten days after the verdict, failure of verdict after submission to jury, order or decision is made, unless additional time not to exceed thirty days be granted by the court for good cause shown.

Comment: Appropriate provisions of present Sections 11551 and 11556 made applicable to the recited three situations.

B. "New Trial" defined. A new trial is a re-examination in the same court of any issue of fact, or some part or portions thereof, after verdict by a jury, report of a referee, or a decision by the court.

Comment: Same as present Section 11549.

C. Issues Tried by Consent - Amendments to Conform to Evidence. When issues not raised by the pleadings have been tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise such issues may be made upon motion of any party after judgment; but failure so to amend shall not affect the result of the trial of such issues.

Comment: The rule of present code sections 11557, 11558 and 11559 has been eliminated. There is now presented the above provisions which follow the established federal rule and accord with weight of opinion as to proper modern practice.

D. No Waiver. The filing of a motion for judgment notwithstanding the verdict, or for judgment notwithstanding failure of verdict after submission to jury, or for a new trial, shall not be a waiver of the right to file any other of such motions.

Comment: Substance of provisions of present Section 11555.

E. Stay of Proceedings or Process. In its discretion and on such conditions as the court may deem proper, the court or a judge thereof may stay execution or any other proceedings or process to enforce a judgment pending the disposition of any motion for judgment notwithstanding verdict or failure of verdict, or motion for new trial.

Comment: The courts may now possess such power, but recently adopted new rules of procedure in state and federal jurisdictions have usually so expressly provided in order to avoid question thereof and furnish a protective procedure.

RULE 3. MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT OR FAILURE OF VERDICT AFTER SUBMISSION TO JURY

Either party may file a motion for judgment in his favor notwithstanding the fact that a verdict has been returned against him or that there has been a failure of verdict after submission to a jury:

(a) If the pleadings of the opposing party omit to aver some material fact or facts necessary to constitute a complete cause of action or defense, the motion to clearly point out the omission.

(b) In accordance with his previous motion for directed verdict, if any.

If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Comment: Here a substantial change is effected. Under present Section 11553 such a motion could only be made when the pleadings of the party in whose favor the verdict had been returned "omit to aver some material fact or facts necessary to constitute a complete cause of action or defense". Recently enacted new rules in many of the states and the federal rules provide in substance as above submitted. It is believed sound that the trial court should have opportunity under the rules to effect correction of error in failing to sustain a motion for directed verdict; and then to effect the same result that would have obtained had such motion for directed verdict been sustained.

Provisions of this rule as stated include the substance of present Section 11554, "Motion in Arrest of Judgment".

RULE 4. MOTION FOR NEW TRIAL

A. Grounds. The verdict, or decision, or report, or some part or portion thereof, shall be vacated and a new trial granted, on the application of the party aggrieved, for the following causes materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury, referee, or prevailing party; or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

2. Misconduct of the jury or prevailing party.

3. Accident or surprise which ordinary prudence could not have guarded against.

4. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.

5. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract or for the injury to or detention of property.

6. That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law.

7. Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial.

8. Errors of law occurring in the proceedings.

9. That the pleadings of the prevailing party do not state facts sufficient to constitute a cause of action or defense, as the case may be, specifying wherein they are defective.

The motion shall be in writing and if for the causes enumerated in sub-sections 2, 3 and 7, may be sustained and controverted by affidavits.

Comment: The substance of present Section 11550 with appropriate provisions of Section 11552. In sub-paragraph 4, the words "or inadequate" have been added in the belief that experience has indicated the need and desirability of such addition.

B. Conditions on New Trial. The court may grant a new trial unless the terms and conditions, which it may impose, be agreed to by the adverse party. In the event of such an agreement by the adverse party, the terms and conditions imposed shall be entered on the record and judgment entered accordingly.

Comment: This is a restatement in affirmative form of the substance of provisions of Section 11561.

RULE 5. RETRIAL AFTER JUDGMENT ON NOTICE BY PUBLICATION

A. Retrial. Except in divorce actions, when a judgment or decree has been rendered against a defendant or defendants, served by publication only, and who do not appear, such defendants, or any one or more of them, or any person legally representing him or them, may at any time within three months after the rendition of the judgment, appear in court and move to have the action retried, and, security for the costs being given, they shall be permitted to make defense; and thereupon the action shall be tried as to such defendants as if there had been no judgment.

Comment: Same as Section 11595 but for the following: (a) "Except in divorce actions" is inserted because the Supreme Court has expressly excepted such cases from operation of this statute, and it is deemed necessary they should be excepted. (b) A change of time from "two years" in the present statute to "three months" in the form submitted above.

Courts, legal writers and lawyers in recent years have generally recommended the reduction in the time during which such judgments could be disturbed and rights and titles insecure.

B. Judgment on Retrial. Where retrial is granted under this rule, the court may confirm the former judgment or decree, or may modify or set it aside, and may order restoration of any money or property taken, paid to, delivered to or acquired by a party and remaining in his possession; and may order payment to a party of the value of any property which may have been taken in attachment in the action or under the judgment or decree, and not restored.

Comment: Restatement for clarification of substance of Section 11596.

C. Title to Property Not Affected. The title of a purchaser in good faith to any property sold under attachment or judgment shall not be affected by the retrial permitted, except the title of property obtained by the party and not bought of him in good faith by others.

Comment: Substantially the provisions of present Section 11597.

RULE 6. PROCEDURE TO VACATE OR MODIFY JUDGMENTS

A. Correction, Vacation or Modification of Final Judgment, Decree or Order – Time – Grounds. Where a final judgment, decree or order has been rendered or made, the district court, in addition to causes for a

new trial enumerated in Rule 4, may within one year thereafter, correct, vacate or modify the same or grant a new trial for:

1. Mistake, neglect, or omission of the clerk.

2. Irregularity or fraud practiced in obtaining the same.

3. Erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record.

4. The death of one of the parties before the rendition of the judgment, decree or making of the order, if no substitute has been made of the proper representative before the rendition of the judgment, decree or order.

5. Unavoidable casualty or misfortune preventing the party from prosecuting or defending.

6. Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and which was not discovered before the expiration of the period provided for filing motion for new trial under Rule 2A.

Comment: Same provisions as in present Sections 11787 except: (2) for the underlined portions which have been added, and (b) elimination of former ground "6" pertaining to minors and persons of unsound mind. The latter is not a true "ground" and other provisions of law care for extension of time for action by minors and persons of unsound mind.

B. Petition - Notice - Pleading - Trial.

1. The party interested shall file a petition in the origi-

nal cause, supported by affidavit, and upon any of the grounds provided in "A" of this Rule 6.

2. If a new trial is asked, the petition shall allege and show that the grounds relied upon could not with reasonable diligence have been discovered before but were discovered after the time for filing motion for new trial under Rule 2A.

3. Such proceeding shall be initiated by service of a written notice upon each adverse party, informing that such a petition is on file, and the grounds thereof. Such notice shall be served in the same manner as is provided for original notices in ordinary actions.

4. The court shall assign the petition for hearing at a date not less than twenty days after the service of notice.

5. No new cause of action or defense shall be introduced. Matter stated in the petition shall be taken as denied without answer.

6. Pleadings, issues, form and manner of trial shall be governed by the same rules and conducted in the same manner as nearly as may be and with the same right of appeal as in ordinary actions.

7. The court may first try and decide upon the alleged grounds before trying or deciding upon the validity of the cause of action or defense claimed.

Comment: Substance of provisions of present code sections are included in this section.

C. Liens Preserved - Good Faith Purchasers Protected. If a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment. Title of a good faith purchaser to any property sold under the original judgment shall not be affected by the court's decision on petition to vacate or modify judgment under this Rule.

Comment: First sentence is the same as present Section 12797. Last sentence is an added provision deemed proper to protect good faith purchasers under any execution process.

D. Stay of Proceedings or Process. In its discretion and on such conditions as the court may deem proper, the court may stay execution or any other proceedings or process to enforce a judgment, decree or order pending the disposition of any petition filed under this Rule 6.

Comment: This is the usual type of rule providing for proper protection in such a situation upon proper conditions imposed by the court.

E. Provisions upon Affirmance of Judgment. If the judgment or order is affirmed and the proceedings have been stayed, an additional judgment shall be rendered against the petitioner for the amount of the costs, together with damages at the discretion of the court, not exceeding ten per cent on the amount of the judgment affirmed.

Comment: Same as present Section 12800.

F. Writ of Coram Nobis Not to Be Invoked. The ancient writ of error coram nobis shall not be invoked.

Comment: This is a new provision. Probably the decisions of our Supreme Court have barred invocation of this ancient writ. It has seemed desirable to have the rules so affirm.

RECOMMENDATIONS FOR REPEAL OF PRESENT CODE SECTIONS

12,255 - 12,256 - 12,257 — Chapter 517.

The sections above referred to authorize new trial in actions for the recovery of real property on grounds other than those now specified in Chapter 522 of the present Code. Under Section 12,255 there is no limit to the ground upon which a new trial in such actions may be granted. Section 12,256 authorizes a new trial without notice to the adverse party on any grounds which appeal to the discretion of the court.

The Iowa decisions reveal very few instances where new trials have been granted under these sections.

The Committee believes that the restatement above set out in Rule 6, "Procedure to Vacate or Modify Judgments", provides adequately for any situation which may arise. It is deemed important to remove the uncertainty attending titles to real estate and to make the procedure for new trials in such actions conform to the requirements for new trials in any other actions.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved March 7, 1942)

III.

DECLARATORY JUDGMENTS

FOREWORD

In submitting a tentative draft of rules for declaratory judgments, the Advisory Committee has adopted substantially the provisions of the Uniform Declaratory Judgments Act. Certain changes have been made and will be noted in the comments.

The Uniform Act has been adopted in twenty-six states and Puerto Rico. Eleven states have other adequate statutory provisions for declaratory judgments, and only eleven states, including Iowa, have no general provisions therefor. Title 28, Section 400 of the United States Code and Rule 57 of the Federal Rules make the procedure available in the Federal Courts.

The following states, whose decisions appear in the Northwestern Reporter, have adopted the Uniform Act: Minnesota, 1933; Nebraska, 1929; North Dakota, 1923; South Dakota, 1925; Wisconsin, 1927. The state of Michigan in 1929 adopted provisions similar to the Uniform Act. The procedure has been used frequently in the Federal and State Courts. After 12 years experience with the Uniform Act, the Supreme Court Advisory Committee on Rules of Civil Procedure in the state of Nebraska is recommending the inclusion of the provisions of the Uniform Act as a part of the new rules of civil procedure to be promulgated by the Supreme Court of Nebraska.

In the early development of a procedure for declaratory judgments constitutional questions were raised. The constitutional validity of declaratory judgments is now uniformly established by decisions of the Supreme Court of the United States and of courts in the states adopting the procedure.

In Aetna Life Insurance Company v. Haworth, 300 U. S. 227, 81 L. Ed. 617, 57 S. Ct. 461, the Federal Declaratory Judgments Act was held to relate only to practice and procedure and was held not to violate any constitutional rights or provisions.

In State of Iowa v. Executive Council, 207 Iowa 923, there appears the following dictum:

> "Nor has the judiciary of this State any power to render a merely declaratory judgment."

By reason of the reference to power in the dictum, it is the opinion of the Committee that the court was referring to advisory opinions. If the statement refers to declaratory judgments as contemplated by the tentative draft of the rules, it is contrary to the decisions of the Supreme Court of the United States and many state courts which have squarely considered the question.

Provisions for declaratory judgments must not be confused with statutory provisions authorizing merely advisory opinions. Many state and federal decisions clearly establish that the procedure for declaratory judgments does not authorize advisory opinions or decisions on moot questions.

The desirability of a speedy determination or settling of rights, status and other legal relations without awaiting irreparable loss, injury or breach, is apparent. The procedure for declaratory judgments is almost uniformly recommended as one of the most desirable procedural reforms which has been introduced in the Federal Courts and the courts of more than three-fourths of the states of the United States. The actual operation of the procedure has been so far developed that the Bar of the state of Iowa will encounter little or no difficulty in the application thereof.

For the convenience of the Bar, a number of references are appended hereto.

RULES

RULE 1. DECLARATORY JUDGMENTS PERMITTED

Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further

relief is or could be claimed. No action or proceedings shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.

Comment: The foregoing rule is the same as Section I of the Uniform Act, except that the word "shall" in the first line thereof has been substituted for the words "shall have power to". The last sentence of the rule has been added, and is similar to the language of Rule 57 of the Federal Rules. The purpose is to indicate clearly that the procedure may be used wherever appropriate and to prevent a judicial construction that the rule provides only an extraordinary remedy.

The Uniform Act and the Federal Act have been uniformly construed not to authorize advisory opinions or adjudications where no substantial adverse interests are involved, and have been held not available where an exclusive administrative remedy has been provided, such as the provisions for the determination of claims for Workmen's Compensation, or to determine issues already in litigation between the parties.

RULE 2. CONSTRUCTION OF CONTRACTS, WRITINGS, STATUTES, ETC.

Any person interested under a contract, either oral or written, deed, will, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, rule, regulation, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, regulation, rule, contract or franchise, and obtain a declaration of rights, status, or

legal relations thereunder.

Comment: The rule is substantially the same as Section 2 of the Uniform Act except that oral contracts and rules and regulations have been included. The words "rule, regulation" are inserted for clarity and to permit a judicial determination of right, status or other legal relations thereunder where no other adequate and complete method of review has been provided by law. Under the New York Act, rules and regulations relating to the New York sales tax were reviewed in the case of Dunn & Bradstreet v. City of New York, 276 N. Y. 198, 11 N. E. 2d, 728, and the case illustrates an application of the procedure for declaratory judgments.

RULE 3. BEFORE OR AFTER BREACH

A contract may be construed either before or after there has been a breach thereof.

Comment: Same as Section 3 of the Uniform Act.

RULE 4. FIDUCIARIES AND BENEFICIARIES

Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, insolvent, an infant, or other person for whom a guardian has been appointed, may have a declaration of rights or legal relations in respect thereto:

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct executors, administrators, guardians, trustees,

or other fiduciaries, to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate, guardianship, or trust, including questions of construction of wills and other writings.

Comment: This rule is substantially the same as Section 4 of the Uniform Act, except that it has been extended to include all fiduciaries and all types of guardianships provided for by the Iowa Code.

RULE 5. ENUMERATION NOT EXCLUSIVE

The enumeration in Rules 2, 3, and 4, does not limit or restrict the exercise of the general powers referred to in Rule 1.

Comment: Same as Section 5 of the Uniform Act, except that the words "in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty" have been omitted. The rule is intended to indicate that the procedure is applicable in appropriate situations in addition to those enumerated in Rules 2, 3, and 4 and is not limited thereby.

RULE 6. DISCRETIONARY

The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Comment: Same as Section 6 of the Uniform Act.

RULE 7. REVIEW

All orders, judgments and decrees under these rules may be reviewed as other orders, judgments and decrees.

Comment: Same as Section 7 of the Uniform Act.

RULE 8. SUPPLEMENTAL RELIEF

Supplemental relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to the court which entered such judgment or decree. If the application be deemed sufficient, the court, after such reasonable notice as it may prescribe, shall require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why such relief should not be granted forthwith. Posted notice alone shall not be sufficient under this rule.

Comment: This rule is substantially the same as Section 8 of the Uniform Act except that the rule has been limited to such supplemental relief as can be granted by the court entering such declaratory judgment or decree and posted notice has not been deemed sufficient. This rule does not apply to or limit relief in any other court based upon a declaratory judgment or any rights established thereby.

RULE 9. JURY TRIAL

The right of jury trial shall not be abridged or extended by these rules.

Comment: Section 9 of the Uniform Act has been omitted and the right of jury trial in all appropriate cases has been recognized and affirmed by Rule 9. The procedure for declaratory judgments has not been construed by the courts to deprive the litigant of the right to jury trial, and that right has been universally recognized. No rule could cover all situations which might arise. The nature of the controversy in which declaratory relief is sought will indicate whether an issue of fact should be submitted to a jury. The trial courts and the Supreme Court of Iowa will experience no difficulty in protecting the right of jury trial.

RULE 10. WORDS CONSTRUED

The word "person", wherever used in these rules relating to declaratory judgments, shall be construed to include any individual or entity capable of suing or being sued under the laws of the state of Iowa.

Comment: Section 13 of the Uniform Act defines the word "person" so as to include associations or organizations which may not have the right to sue or be sued under existing laws and statutes of the state of Iowa. The proposed rule has been simplified so as to include within its application any person or entity now capable of suing or being sued under the laws and statutes of the State of Iowa.

NOTE: Section 10 of the Uniform Act relating to costs, has been omitted. General rules applicable to costs in civil actions will apply. Section 11 of the Uniform Act relating to parties has been omitted. The general rules relating to parties in civil actions will apply.

Sections 12 and 15 of the Uniform Act relating to construction and uniformity of interpretation, as well as Sections 14, 16 and 17, declaring the provisions of the Uniform Act severable and providing for the citation thereof and the effective date thereof are inappropriate and have been omitted.

REFERENCES

Text Books:

Borchard, Declaratory Judgments (1941)

Anderson, Declaratory Judgments (1940)

Law Review Articles:

8 Iowa L. B. 81 (1923)

9 Texas L. Rev. 172 (1931)

31 Col. L. Rev. 561 (1931)

45 Harv. L. Rev. 717, 793, 822, 1089 (1932)

41 Yale L. J. 1195 (1932)

Annotations:

Justiciable Controversy:

108 A.L.R. 1005

Jury Trial:

131 A. L. R. 218

Hargrove v. American Central Insurance Co., —F (2) —, (C.C.A. 10) decided January 16, 1942

Pending Actions:

135 A.L.R. 934

General:

12 A.L.R. 52

19 A.L.R. 1124

50 A.L.R. 42

68 A.L.R. 110

87 A.L.R. 1205

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

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IV.

PARTITION OF REAL PROPERTY

RULE 1. NATURE OF ACTION

The action for partition shall be by equitable proceedings.

Comment: This is identical with Section 12310.

RULE 2. DEFINITION OF TERMS

The term "partition in kind" as used herein shall mean the division of the property into shares without sale, and the term "partition by sale" shall mean the sale of the property and the division of the proceeds to the parties according to their respective interests.

Comment: This is new.

RULE 3. PETITION

The petition shall contain the following:

(a) The description of the property sought to be partitioned.

(b) The interest of the plaintiff therein.

(c) The name of each of the owners and the extent of their respective interests, so far as known.

(d) The names of all lienholders having a lien against less than the entire property, and the nature and extent and amount of their liens so far as known.

Comment: Parts (a), (b) and (c) are in substance Section 12312 of the Code. Part (d) is new. In the latter part of the rules provision is made for the court to determine the amount of the liens, and for making such lienholders parties. It is thought that it would make for convenience to have the plaintiff set forth the matters required by (d).

In this rule and throughout these rules the distinction is kept between liens which are liens against only a portion of the property and liens against the entire premises. Thus if there is a first mortgage against the entire premises, it is not believed that any owner could convey a portion of the land to another person, and then have that person or the owner then bring partition proceedings, and have the land sold free and clear of liens, and compel the mortgagee to take whatever the premises might bring. If the premises would not bring the amount of the liens which are against the entire premises, it would not seem that any purpose would be served by ordering it sold. If the premises are partitioned in kind, the mortgage indebtedness could not be allocated to the respective shares. The present statutory provisions in regard to partition make distinction between the two types of liens. In a later rule, provision is made for lienholders against the entire premises as permissive defendants, in case, for instance, the validity or amount of their liens was in question.

No specific provision is made in present statutes as to who may maintain a partition action, and none is made in these rules, for who can maintain the action of partition has been definitely decided by our Supreme Court, and it was felt that it was best to let it stand that way.

RULE 4. ABSTRACT OF TITLE

The court may upon application of any interested party:

(a) Order any party to the action having possession or control of the abstract of title to the property to produce the same.

(b) Require the plaintiff to have completed any abstract of title which is available but which is not complete.

(c) Require the plaintiff to cause to be prepared an abstract of title, if none is available.

Any abstracts so produced, prepared or completed, shall be filed in the office of the clerk for the use, during the proceedings, of the court or any interested party.

The cost of preparing and completing any abstract ordered under this rule shall, in the first instance, be paid by the plaintiff, but such cost shall be taxed as a part of the costs in the action.

Comment: The present statutory requirement of attaching a copy of the abstract of title to every petition in partition, found in Section 12313, occasions a large amount of unnecessary expense. This rule dispenses with such a requirement. This rule does provide for obtaining an abstract in a case where it might be needed, as in a case of a contest over title.

RULE 5. INDISPENSABLE PARTIES

The following shall be indispensable parties:

(a) The owners of the respective undivided interests.

(b) Lienholders having a lien against less than the entire property.

Comment: The only present statutory statement as to indispensable

parties is found in Section 12323 which provides that holders of a lien against one or more portions must be made parties. By Supreme Court decision, the owners of the respective shares are indispensable parties. The Supreme Court has also held that the spouses of the owners need not be made parties, and that is left as it is.

RULE 6. PERMISSIVE PARTIES

The following may be made parties:

(a) Lienholders having a lien against the entire property.

(b) All other persons having any actual, apparent, claimed interest in and to the property including those having a contingent interest therein.

Comment: Part (a) is in substance the same as Section 12314. That section uses the term "having a specific or general lien against the entire property". It is believed the term "lien against the entire property" involves no change. Part (b) so far as it relates to those having contingent interests is in substance the same as Section 12315. Part (b) is broad enough so as to allow all parties being brought in whom the plaintiff might want to include to perfect or quiet title.

RULE 7. JOINDER AND COUNTERCLAIM

Any person may in the same proceeding:

(a) Perfect or quiet title to the property.

(b) Have adjudicated the rights of the parties as to all matters growing out of or connected with the property.

(c) Have declared and enforced liens between the parties.

(d) To partition personal property used in connection with the real property to be partitioned where the ownership of such personal

property and such real property is in the same persons.

That save as permitted in this rule, no other joinder or counter-claim shall be permitted.

Comment: Paragraphs (b) and (d) are new. What is specifically permitted by (b) has to a large extent already been permitted by court decisions. In regard to paragraph (d) it occasionally happens that the owners in common of a piece of real property also own in common certain personal property used in connection with it, as for instance, hotel property with equipment. In such cases, it would save expense to have the entire matter all handled in the one action.

RULE 8. JURISDICTION OVER PROPERTY

The proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested.

Comment: This is identical with Section 12316.

RULE 9. PARTITION IN KIND

Partition shall be by sale unless the plaintiff in his petition or any defendant by answer shall ask for partition in kind. In any of the parties thus request the partition in kind they shall make showing to the court that it would be practical and equitable to make partition in kind. If no showing is made or the court deems the showing insufficient, the partition shall be by sale. If the court deems the showing sufficient, it may appoint referees as hereinafter provided to make

partition in kind.

Comment: Under Section 12326, it is provided that the property shall be partitioned in kind unless it appears that the property cannot be equitably divided. Under Section 12327, it is provided that three referees shall be appointed to make partition unless it is shown that the property cannot be divided. In practical operation a partition in kind is a rarity. Rule 9 does not change the substance of the present statutory provisions, but it does change the emphasis. Under it, if neither the plaintiff or any defendant wants partition in kind, the court need not concern itself with that phase. If any party wants partition in kind, it is up to such party to make a prima facie showing as to its practicability.

RULE 10. DECREE

The court shall by decree establish the shares and interests of the owners of the land. If partition in kind is ordered, the court shall appoint three referees to make partition in kind, unless a smaller number is agreed upon by the parties. If partition by sale is ordered, the court shall appoint one or more referees for such purpose and the court shall also appoint three disinterested freeholders to appraise the property. The court may direct the property to be sold at either public or private sale, but if at private sale, it shall be sold for not less that its appraised value unless the court expressly approves a sale at less than such value. The court may in the same decree determine all other issues involved in the proceedings, or such other issues may be adjudicated in a supplemental decree or decrees.

Comment: All except the last sentence and the underlined portion of the sentence preceding it is a grouping together of certain related

portions of Sections 12325, 12326, 12327 and 12393. The last sentence is new, but it is not believed it introduces any change. It merely recognizes what is commonly done in practice, and that is to confirm the shares and order the sale so that sale proceedings can get under way, and then go ahead with the accounting between the owners. The underlined portion of the next to the last sentence providing for sales at less than the appraised value applies the same rule to sales in partition as is provided in the case of sales of real property by executors and administrators under Section 11939.

RULE 11. DETERMINATION OF LIENS

The nature, extent, amount, priority and validity of the liens of the parties, against the property not theretofore determined, shall be determined by the court upon ten days' notice to the interested parties. The court shall prescribe the manner of giving notice. The notice shall be given by the referee or referees. In cases of partition by sale, such determination may be either before or after the sale. In cases of partition in kind, such determination shall be made before partition in kind is made. The court shall direct the making up of any issues arising in connection therewith, and by decree or supplemental decree adjudicate and determine the nature, extent, amount, priority and validity of such liens. Any controversy as to a lien or liens shall not delay the distribution of the proceeds of sale to any party whose rights are not affected thereby.

Comment: This rule takes the place of Sections 12320, 12321, 12322 and 12324. It contains all of Section 12324 but very little of the others. The present statutory provisions for the ascertainment of liens have been very unsatisfactory. The method provided for reference

to a clerk or referee has been unwieldy. While the court now doubtless has power to conduct such hearing, yet no method is pointed out or provided for the court so doing.

The problem of lienholders in a partition action is decidedly different than in most other actions. In foreclosure actions where the subsequent lienholders are made parties, generally, the extent and amount of their liens is of little concern unless priority is involved. In such cases, the property is sold on execution and the lienholders either redeem or they do not. In partition actions where the lien is against less than the entire property, the sale transfers the lien from the land to the proceeds, and it is necessary to have some method to have the amount, extent and nature of the lien established. The plaintiff in a great many cases outside of making such a lienholder a party, has no interest as to liens against interests other than his own, and so will not concern himself with the determination or adjudication of such liens.

It is believed that it would be best for the court itself to determine the matter of liens upon notice to all interested parties, and that is what is provided in this rule. In case of partition by sale, there might be no reason in certain cases why such determination could not be made after sale. In cases of partition in kind, it would seem desirable to have the matter of liens determined before partition in kind is made. This rule makes it the specific duty of the referee or referees to attend to the matter of giving notice of the hearing for the determination of liens.

RULE 12. SALE FREE FROM LIENS

The court either in the original decree or by supplemental decree shall order the property sold free and clear of those liens which are not liens against the entire property, and in such cases the lienholder shall have the same right in the proceeds as he had in the property, subject to a prior charge for costs.

Comment: This is the substance of Section 12323.

RULE 13. INTEREST OF PARTIES IN PROCEEDS OF SALE

In case of sale all parties shall have the same right or interest in the proceeds of sale that they had in the property, subject to a prior charge for costs.

Comment: This rule gives the same rights to all parties that might have an interest in the property that is given to lienholders in Rule 11. It would apply in cases where a portion of the premises was subject to a life estate or estate for years, etc.

RULE 14. POSSESSION OR LEASING PENDING SALE

Where the owners of the property are not able to agree as to the possession or leasing of it, the court may provide for the possession or leasing of the same by the referee or referees.

Comment: This is in substance Section 12328.

RULE 15. REFEREES TO MAKE PARTITION IN KIND

Referees appointed to make partition in kind need not give bond, but shall qualify by filing oath of office.

Comment: This is new, but it is not believed that it makes any change in the practice. It merely makes definite provision as to the qualifying of such referees.

RULE 16. INABILITY TO MAKE PARTITION IN KIND

If such referees are unable to make partition in kind, they shall

so report to the court, and such report shall be set down for hearing in the same manner as hereinafter provided for hearings on a report making partition in kind.

Comment: There is now no provision in the statutes to govern a case where the referees after appointment are unable to make partition in kind. This rule covers that situation.

RULE 17. SHARES MARKED OUT

If such referees make partition in kind, they must mark out the shares by visible monuments, and may employ a surveyor and assistants to aid them therein if necessary. The cost and expense of such survey, when approved and allowed by the court, shall be included as a part of the costs.

Comment: This is the same as Section 12329, except that there has been added to it the provision that expense of the survey must be approved by the court, and then specifically making such expense a part of the costs.

RULE 18. REPORT OF REFEREES

The report of the referees must be in writing, signed by them, and filed in the office of the clerk, and must describe the respective shares with reasonable particularity, and be accompanied by a plat of the premises, and must allot their shares to the several owners. For good and sufficient reasons appearing to the court, the referees may be directed to allot particular portions of the premises to particular

individuals.

Comment: This is the substance of Sections 12330 and 12331.

RULE 19. NATURE OF HEARING ON REPORT

After the filing of the report of the said referees, the court shall fix a time and place of hearing on it, and shall give ten days' notice to the parties whose rights are involved. The court shall prescribe the manner of giving notice.

Comment: While the present statutes, Sections 12332, 12333 and 12334 provide for the filing of a report of the referees, no provision is made or method pointed out for a hearing thereon. This rule provides a method of hearing on such reports.

RULE 20. HEARING ON REPORT

At the hearing on the report of such referees to make partition in kind, the court may approve or disapprove the same, or may modify the same, or may refer the same to the same or other referees, or may order partition by sale.

Comment: This takes the place of Section 12333. It adds to the provisions of that section a provision for modification of the report, and also a provision for the court ordering partition by sale if it appears that the partition in kind was not practicable or equitable.

RULE 21. DECREE

If the court at the hearing of the report of the referees makes

the partition in kind, it shall enter a decree allotting to each of the owners their respective shares or portions of the property, and apportioning the costs and entering judgment therefor.

Comment: This is the substance of Section 12334.

RULE 22. TRANSCRIPT OF DECREE

Upon the rendition of such decree the clerk shall file with the county recorder of the county a duly certified transcript of such part of the entire decree, in the case in which partition has been ordered, as may be necessary to show the volume and page where such decree is recorded, and the confirmation of the shares and interests of the parties in the property of which partition is made, and the names of the parties who are found entitled to such shares, and an accurate description of each of the shares allotted to the several owners.

Comment: This is identical with Section 12335.

RULE 23. TRANSCRIPT RECORDED. FOREIGN COUNTIES

Such transcript shall be presented to the county auditor for transfer and recorded in the deed records of the county where the action was brought and also in the other counties in the state, if any, where any of the property so partitioned is situated; and in such case the clerk shall transmit to the county recorder of each of such

other counties a duplicate of such transcript, and the same shall be there so recorded and transfer so made.

Comment: This is identical with Section 12336.

RULE 24. TRANSCRIPT TO BE INDEXED

Such transcript shall be indexed in the recorder's office the same as conveyances of real estate with the names of the parties so entitled to such shares as grantors, and the name of the party to whom each share is allotted as grantee.

Comment: This is identical with Section 12337.

RULE 25. COSTS GENERALLY

All the cost of the proceedings in partition shall be paid, in the first instance by the plaintiffs, but eventually by all parties in proportion to their interests, except costs which are created by contests. Costs created by contest shall be taxed against the losing party, unless the courts by order shall otherwise tax such costs. A contest shall not deprive the plaintiff's attorney of the fees provided in Rule 26. In cases of partition in kind, the share of costs apportioned to any owner shall be a lien upon the share of such owner. Costs created by contests shall in cases of partition in kind be a lien against the share of the owner to whom they are taxed, and in cases

of partition by sale such costs shall be deducted from the share of the proceeds of the party against whom they are taxed. In cases of partition in kind, any interested person may, upon request, have a special execution issue for the sale of so much of the share of any owner as may be necessary to pay the costs assessed as provided herein. The remedies herein provided for enforcing payment of costs shall be cumulative and not exclusive.

Comment: The first sentence of this rule is identical with Section 12339. The rest of the rule is new. Under Section 12339, as it now stands, if any defendant in any way questions the plaintiff's title, the plaintiff's attorney loses the fees provided for him under Section 12340. The allowance of fees to the plaintiff's attorney is based upon the theory, that all the owners receive the benefit of his work in preparing the original notices, petition and decree. The owners do not lose the benefit of these services because a contest occurs. It is not believed that plaintiff's attorney should lose such fees because a contest does occur, because the fees provided in Section 12340 are not fees for services rendered in connection with contests. It is reported that in some cases of partition in kind, great difficulty is encountered in getting the costs paid. This rule makes specific provision for enforcing the payment of costs in such cases. This rule also provides a specific method for collecting costs out of the proceeds of sale in cases of contests.

RULE 26. ATTORNEY'S FEES

In actions for partition of real estate, when a decree ordering partition or sale is rendered, there shall be taxed in favor of plaintiff's attorney, as costs in the case, an attorney's fee; but in no case shall the amount so taxed exceed the following, to wit:

(a) For the first two hundred dollars or fraction thereof, ten

percent;

(b) For the next three hundred dollars, five percent;

(c) For the next five hundred dollars, three percent;

(d) For all excess over above amounts, one percent of the value of the property partitioned.

Such value shall be determined by the court or the appraisement, or by the sale when sale is ordered.

Comment: This is identical with Section 12340.

RULE 27. COMPENSATION OF APPRAISERS AND REFEREES, AND ATTORNEYS FOR REFEREES

Appraisers and referees appointed under the provisions of this chapter and the attorney employed by the referee or referees shall receive such reasonable compensation as the court allows, which shall be taxed as a part of the costs.

Comment: This rule is identical with Section 12351 as amended by Chapter 304 of the Acts of the 49th G. A. The latter amendment is indicated by underlining. It was thought best to have it follow the rule relating to attorney's fees for plaintiff's attorney, instead of being separated as it now is.

RULE 28. REFEREE—BOND. SALE

A referee in case of partition by sale shall qualify by filing

his oath of office. No bond shall be required to be filed before sale except in cases where the referee is to have possession of or lease the property. No sale shall be executed until the referee has filed a bond in an amount of one and one-quarter times the sale price, payable to the parties entitled to the proceeds, and conditioned for the faithful discharge of his duties in connection with said sale and the proceeds thereof.

Comment: There has been much variation in the practice in regard to giving of bonds by referees. This rule is for the purpose of having uniformity of practice. Section 12341 of the Code relating to sale bonds by referees provides that it shall be in the amount fixed by the court. In the case of sale of executors, administrators or guardians, such fiduciaries must give bond in the amount of one and one-fourth times the sale price. It would seem that the same rule should apply to referees.

RULE 29. PUBLIC SALE

Where the property is to be sold at public sale, notice of the time and place of sale shall be given by two publications in some newspaper of general circulation published in the county, which publications shall be at least six days apart, and the last publication shall be not less than seven days prior to the sale.

Comment: This rule takes the place of Section 12342 which provides that where a referee sells land at public sale he shall give the same notice as is given by the sheriff in case land is sold on execution. Sections 11722 and 11723 relating to sales of real estate on execution provide for two publications in a newspaper and the posting of notices in three public places in the county. It is not believed that the posting helps to attract buyers to the sale so it has been omitted.

RULE 30. NOTICE BY POSTING NOT PERMITTED

Whenever in this chapter provision is made for the court prescribing the manner and form of giving notice to the interested parties, notice by posting shall not be permitted.

Comment: Because the hearings provided for in this chapter are of great importance to the interested parties, it would seem that notice by posting should not be permitted.

RULE 31. REPORT AND APPROVAL OF SALE

All proposed sales shall be reported to the court for approval. When such a report is filed the court shall fix a time and place of hearing on said report. The referee or referees shall give notice to all interested parties of such time and place of hearing in the manner prescribed by the court. No conveyance shall be made until all of the purchase price is paid.

Comment: The portion requiring notice to the interested parties is new. There are frequent complaints that the property is sold by the referees and approved by the court without the interested parties knowing about it, and getting a chance to raise the bid. The rule provides for notice to those interested before a sale is approved.

This rule is a substitute for Sections 11344 and 11345. It leaves out the provision found in Section 12345 providing for the referee to take back a mortgage on the property or "other equivalent security". Such provision has not proved workable in practice, except where the situation of the owners is such that they are in a position to take back a mortgage and are willing to do so. Since such arrangements depend upon the individual willingness of the owners, it is believed that it

should be left to be a matter of individual arrangements between such owners and the purchaser.

RULE 32. VALIDITY

A conveyance by a referee upon being recorded in the county where the property is situated, shall be valid against all subsequent purchasers, and also against all persons interested at the time, who were parties to the proceedings.

Comment: This is Section 12346 with a slight change of phraseology.

RULE 33. FINAL REPORT OF REFEREE

The court shall, unless all interested parties have waived notice in writing of hearing on the final report of the referee, fix a time and place of hearing upon such report, and prescribe the manner of giving notice to all interested persons.

Comment: There is now no statutory provision in regard to how a referee shall have a hearing fixed upon his final report, and how notice shall be given. This rule provides for that.

RULE 34. PROTECTION OF INTERESTS IN PROCEEDS OF SALE

In case of the sale of the property the court shall make suitable provision for the protection of life estates or estates for years, or

for remainder interests, out of the proceeds of said sale. Provision for such protection may be made by appointment of a trustee for the portion of the proceeds involved.

Comment: This rule is a substitute for Section 12350 relating to life estates and estates for years. That section provides for investment but no method is indicated or provided for such handling, and in practice it has been largely unworkable. The above rule makes specific provision for a trustee for that purpose.

RULE 35. UNBORN PARTIES

When it appears in the petition for partition that a person not in being has an interest, vested or contingent, as a co-tenant of the land sought to be partitioned, the court shall have jurisdiction over the interest of such person not in being and shall appoint a suitable person to act for him in such proceeding and the provisions of Section 10996 so far as applicable, shall apply to persons so appointed. The decree of partition and the division or sale thereunder shall be of the same force and effect as to all such persons, or persons claiming by, through or under them, as though they were in being at the time of entry of the decree, and the property or proceeds of the interest of such person shall be subject to the order of the court until the right thereto becomes fully vested.

Comment: This is identical with Section 12351.1.

RULE 36. MINORS. SMALL AMOUNTS. PAYMENT

Whenever any minor shall be entitled to a portion of the proceeds of the sale and said sum does not exceed two hundred dollars, and such minor has no legal guardian of his property, the court may upon application of the referee, order the payment of such sum to the parents or surviving parent or natural guardian of such minor, or the person with whom such minor resides, for the use of such minor, and the receipt of such person or persons shall have the same force and effect as though payment had been made to a duly appointed and qualified guardian of the property of such minor.

Comment: This is similar to Section 12077.01 which relates to the payment of small sums due minors by executors and administrators. It has worked so well in those situations that it is believed that like provision should be made for payments by referees. It would save guardianship proceedings where only a small sum was involved.

COMMENTS WHICH FOLLOW ARE ON OMITTED SECTIONS

Dower:

Comment: Section 12347 provides as follows: "12347. WHEN PARTIES ARE MARRIED. If the owner of any share thus sold has a husband or wife living and if such husband and wife do not agree as to the disposition that shall be made of the proceeds of such sale, the court must direct it to be invested in real estate under the supervision of such person as it may direct, taking the title in the name of the owner of the share sold as aforesaid. Provided that in case the amount of any share shall not exceed the sum of one thousand dollars, the court may in its discretion direct the same to be paid to the owner, or two-thirds to the owner and one-third to the spouse; and provided further, that in all cases when it is shown to the satisfaction of the court that the owner

has been abandoned by the husband or wife, the whole amount shall be paid to the owner and no agreement therefor shall be required." A sale in partition is a judicial sale which divests dower. The Iowa Supreme Court has held that spouses of owners are not necessary parties to partition proceedings. Quite a number of states whose statutes have been examined contain no provision in regard to dower rights in the proceeds.

Section 12347 above set forth is in the main unworkable in practice. The provision for purchase of land by the court cannot in general be made to work. The court would have to find a piece of property the purchase price of which would fit the amount on hand, with no provision for the handling of the amount left over. If the proceeds are from the sale of a farm, the share of the owner of an undivided interest would rarely be enough to purchase another farm, and then a small town or city property would be all that would be available, and the purchase price for such property would have to be approximately the amount on hand to invest. Quite a wide inquiry among lawyers and judges brought out that none of them had ever been able to make use of this provision.

In cases of other judicial sales no similar provision is found and it was thought that an exception should not be made in case of partition, and so Section 12347 above set forth was omitted.

Share of Absent Owner.

Section 12317 provides as follows: "The ascertained share of any absent owner shall be retained, or the proceeds invested for his benefit, under like order."

Comment: Under Section 12778 provision is made for referees, executors, administrators, etc. to deposit the money with the Clerk where they are unable to pay it to the party. Since it is not clear why an absent owner in partition should be treated differently than an absent owner of property in probate, and since Section 12317 sets up no machinery for its operation, it was believed that it might just as well be omitted.

Pleadings by Defendants and Trial of Issues.

Section 12318 provides as follows: "The answers of the defendants must state, among other things, the amount and nature of their respective interests. They may deny the interest of any of the plaintiffs, and by supplemental pleading, if necessary, may deny the interest of any of the other defendants."

Section 12319 provides as follows: "Issues—trial—costs. Issues may thereupon be joined and tried between any of the contesting parties, the question of costs on such issues being regulated between the contestants agreeably to the principles applicable to other cases."

Comment: Those two sections were omitted since it seemed that they did not provide for anything that was not already adequately covered by the general rules relating to pleadings and trial.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved March 1, 1942)

V.

PARTITION OF PERSONAL PROPERTY

RULE 1. WHO MAY MAINTAIN ACTION

Parties owning personal property in common may bring an action for partition, which action shall be an equitable action.

Comment: Partition of personal property in Iowa is permitted by court decision. Some states have definite statutory machinery for the partition of personal property. It was thought that as long as partition of personal property is permitted, that it would be desirable to have definite machinery set up for it.

RULE 2. DEFINITION OF TERMS

The term "partition in kind" as used herein shall mean division of the property into shares without sale, and the term "partition by sale" shall mean the sale of the property and the division of the proceeds to the parties according to their respective interests.

Comment: This is the same definition as used in the real property partition rules.

RULE 3. PETITION

The petition shall contain the following:

(a) The description of the property sought to be partitioned.

(b) The interest of the plaintiff therein.

(c) The names of each of the owners and the extent of their respective interests so far as known.

(d) The names of all lienholders having a lien against all or any portion of the property, so far as known.

Comment: This is the same as a similar rule relating to real property, except that in (d) it is required to set forth the names of all lienholders having a lien against all of the property or any portion thereof, whereas under the rules relating to real property only those lienholders need be named who had liens against less than the entire property. The reason for the difference is that it would be impossible to partition personal property without making all lienholders parties.

RULE 4. SHORTER TIME FOR APPEARANCE AND PLEADING - ALTERNATIVE

In actions for the partition of personal property only upon presentation of the petition to the court or judge after the same has been filed, the court or judge may make an order fixing the time and place of hearing upon said petition and shall prescribe that notice of the hearing be personally served upon the defendant or defendants, which service shall be at least five days prior to the date set for hearing.

This shall be an alternative to the method provided for the commencement of actions in general.

Comment: In quite a number of cases, the property involved might be livestock or perishable property or property likely to depreciate, in which a delayed hearing would be very detrimental. As an alternative to the regular method of commencing actions, the above method is provided. It provides the same method as is now provided in cases of forcible entry and detainer by Chapter 303 of the Laws of the 49th G. A. (1941)

RULE 5. INDISPENSABLE PARTIES

The following shall be indispensable parties:

(a) The owners of the respective undivided interests.

(b) All parties having a lien on or interest in the property or any portion thereof.

Comment: While in partition of real property, there are certain indispensable parties, and certain permissive parties, it would seem that it would be impracticable to attempt to partition personal property unless every person who has a lien on or interest is made a party.

RULE 6. JOINDER AND COUNTERCLAIM

Any party may in the same proceeding:

(a) Have adjudicated the rights of the parties as to all matters growing out of or connected with the property.

(b) Have declared and enforced liens between the parties.

(c) That save as permitted in this rule, and except as joining an action for partition of personal property with an action for partition of real property is permitted by the rules relating to real property, no other joinder or counterclaim will be permitted.

Comment: This is the same as the rule relating to real property

partition, except that the provision for correcting and perfecting title has been omitted.

RULE 7. PROCEDURE WHERE PARTITION OF REAL AND PERSONAL PROPERTY JOINED

Where under these rules partition of real and personal property is permitted in the same action, the referee or referees shall act in connection with the partition of both the real and personal property.

Comment: Under the rules relating to personal property, in certain cases real and personal property may be partitioned in the same action. This rule obviates the necessity for two sets of referees in such cases.

RULE 8. PARTITION IN KIND OR SALE

Partition shall be by sale unless the plaintiff in his petition or any defendant by answer shall ask for partition in kind. If any of the parties thus request partition in kind, they shall make showing to the court that it would be practical and equitable to make partition in kind. If no showing is made or the court deems the showing insufficient, the partition shall be by sale. If the court deems the showing sufficient, it may appoint referees as hereinafter provided to make partition in kind. If there are any liens against the property or any portion thereof, partition shall be by sale.

Comment: This is the same as the real property except the last sentence is new. It would seem that it would be difficult to make partition in kind where common or joint liens against all of the property.

RULE 9. DECREE

The court shall by decree establish the shares and interests of the owners of the property. If partition in kind is ordered, the court shall appoint three referees to make partition in kind, unless a smaller number is agreed upon by the parties. If partition by sale is ordered, the court shall appoint one or more referees for such purposes and the court shall also appoint three disinterested freeholders to appraise the property. The court may direct the property to be sold at either public or private sale, but if at private sale it shall be sold for not less than its appraised value, unless the court expressly approves a sale at less than such appraised value. The court may in the same decree determine all other issues involved in the proceedings, or such other issues may be adjudicated in a supplemental decree or decrees.

Comment: This is the same as the real property rule.

RULE 10. DETERMINATION OF LIENS

The nature, extent, amount, priority and validity of the liens of the parties, not theretofore determined, shall be determined by the court upon five days' notice to the interested parties given by the referee or referees. This determination shall be made prior to sale. The court shall direct the making up of any issues arising in connection therewith and by decree, or supplemental decree, adjudicate the nature, extent, amount, priority and validity of such liens.

Comment: This is similar to the real property rule.

RULE 11. SALE FREE FROM LIENS

All sales shall be made free and clear of liens, and the owners, lienholders and all other parties shall have the same right or interest in the proceeds as they had in the property.

Comment: In case of personal property any sale would have to necessarily be made free from liens.

RULE 12. JURISDICTION OF PROPERTY - POSSESSION - CUSTODY

The proceeds of the property so situated, or the property itself in case of partition, shall be subject to the order of the court until the right becomes fully vested. The court may preserve and protect the property and the interests of the parties therein by injunction or the appointment of a receiver. The court may make such provisions as it deems necessary for the possession, care and custody of the property. All the costs and expenses incurred in connection with the protection, preservation, possession, custody and care of the property when approved and allowed by the court shall be included as a part of the costs of the proceedings.

Comment: This rule provides for protection and preservation of the property.

RULE 13. QUALIFICATION OF REFEREES TO MAKE PARTITION IN KIND

Referees appointed to make partition in kind need not give bond but shall qualify by filing oath of office.

Comment: This is the same as the real property rule.

RULE 14. INABILITY TO MAKE PARTITION IN KIND

If such referees are unable to make partition in kind, they shall so report to the court, and the court shall thereupon order partition by sale.

Comment: This rule differs from the real property rule, in that it does not require notice and hearing on report of inability to make partition in kind. It was felt that it was not necessary in the case of personal property.

RULE 15. DIVISION IN KIND

If such referees make partition in kind, they shall make a report in writing, signed by them, and filed in the office of the clerk. The report shall describe the property set off to each owner with reasonable particularity. After the filing of the report, the court shall fix a time and place of hearing on it. The referee or referees shall give five days' notice to the parties of the time and place of hearing on the report. The court shall prescribe the manner of giving notice.

Comment: This is similar to the real property rule except that the length of time of notice has been shortened to five days.

RULE 16. HEARING ON REPORT

At the hearing on the report of such referees, the court may approve or disapprove the same, or may modify the same, or may refer the same to the same or other referees, or may order partition by sale.

Comment: This is the same as the real property rule.

RULE 17. DECREE

If the court at the hearing on the report of the referees makes partition in kind, it shall enter a decree allotting to each of the owners their share or portion of the property, apportioning the costs and entering judgment therefor. The costs so apportioned shall be a specific lien upon the property allotted to each party, and any interested person may upon request have special execution issue for the sale of so much of the property as may be necessary to pay the same.

Comment: This is similar to the real property rule.

RULE 18. COMPENSATION OF APPRAISERS AND REFEREES AND ATTORNEYS FOR REFEREES

Appraisers and referees appointed under the provisions of this

chapter and the attorney employed by the referee or referees shall receive such reasonable compensation as the court allows.

Comment: This is the same as the real property rule, except that no provision is made for fees for plaintiff's attorney. It would seem that the court would have inherent power to provide compensation for its own appointees, so it is doubtful if this rule adds anything. However, provision for attorney's fees for plaintiff's attorney would seem to be a matter that should be handled by the legislature.

RULE 19. REFEREE - BOND - SALE

A referee in case of partition by sale shall qualify by filing his oath of office and a bond in such amount as shall be fixed by the court.

Comment: This differs from the real property rule in that in the real property rule, the referee need not give bond until just before sale. In the case of real estate there is frequently quite a long wait between the appointment of a referee and the sale of the property. Personal property is usually sold rather promptly, and the referee to make sale might just as well file his bond at the start.

RULE 20. PUBLIC SALE

Where the property is to be sold at public sale, notice of the time and place of sale shall be given by two publications in some newspaper of general circulation published in the county, which publications shall be at least six days apart, and the last publication shall be not less than four days prior to the sale. The court may authorize the referee to employ an auctioneer and clerk in connection with the

sale and to make expenditures for publicity in regard to the sale in addition to those herein provided for. All expenses in connection with the sale upon approval and allowance by the court become part of the costs of the proceedings.

Comment: This is similar to the real property rule, except the length of time between publications and between the last publication and the sale has been shortened. Specific provision is also made for an auctioneer and clerk.

RULE 21. APPROVAL OF SALE

All sales shall be subject to the approval of court, except where the court in the order for sale expressly dispenses with such requirement.

Comment: In a great many cases the property to be sold might be such as to require a public auction of a large number of items of personal property which would be sold to a large number of different persons. It would hardly be feasible to require approvals of all such sales to complete them.

RULE 22. FINAL REPORT OF REFEREE

The court shall, unless all interested parties have in writing waived notice of hearing on the final report of the referee, fix the time and place of hearing upon such report, and prescribe the manner of giving notice to all interested parties.

Comment: This is similar to the real property rule.

RULE 23. NOTICE BY POSTING NOT PERMITTED

Whenever in these rules relating to the partition of personal property, provision is made for the court prescribing the manner and form of giving notice to the interested parties, notice by posting shall not be permitted.

Comment: This is similar to the real property rule.