FINAL TENTATIVE DRAFTS

of

RULES OF PROCEDURE

submitted by

THE ADVISORY COMMITTEE ON RULES OF PROCEDURE

of the

SUPREME COURT OF IOWA

PART FOUR

CERTIORARI
QUO WARRANTO
JUSTICE OF PEACE COURTS
INFERIOR COURTS OF RECORD
DEFAULTS
CHANGE OF VENUE AND PLACE OF TRIAL

CONTENTS

Supreme Court

STATE OF IOWA

TO THE MEMBERS OF THE IOWA BAR:

Part Four of the Final Tentative Draft of Rules is submitted to you herewith. Part Four covers the remaining subjects on the agenda of the Advisory Committee, which will be presented to the members of the Bar. Certain additional rules will be presented to the Supreme Court for its recommendation which have not been included in any of the rules submitted to the Bar. This additional material will be primarily correlative in character and will serve to harmonize and unify the operation of the already existing rules.

As was pointed out in Part Three, the intention of the Committee is to submit the definitive draft, with the Committee's report, to the Supreme Court about the 10th of November. This will require that reports of Legal Institutes and individual criticisms and suggestions with respect to the rules in Part Four, reach the Committee NOT LATER THAN OCTOBER 15TH.

ALL CORRESPONDENCE WITH THE ADVISORY COMMITTEE SHOULD BE ADDRESSED TO THE OFFICE OF THE CHAIRMAN IN DAVENPORT. Suggestions respecting the rules contained in Part Four may be sent there or to the Sub-committees involved in the publication of Part Four, a list of which is appended hereto.

While final revision of Part Four will be withheld until October 15th, it is hoped that any suggestions occurring to the members of the Bench and Bar will be sent in at an earlier date to facilitate their classification for, and study by the Sub-committees.

Yours very truly,

Wayne G. Cook
Chairman

WGC:H

SUB-COMMITTEES PARTICIPATING IN PART FOUR

Sub-Committee on Certiorari

Roscoe P. Thoma, Fairfield, Chairman
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Sub-Committee on Quo Warranto

Roscoe P. Thoma, Fairfield, Chairman
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Sub-Committee on Change of Venue and Place of Trial

C. F. Stilwill, Sioux City, Chairman
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ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved June 9, 1942)

CERTIORARI

FOREWORD

The following rules deal, in general, with the subject matter covered in Chapter 533 of the Code.

This chapter, in the opinion of the Advisory Committee, deals entirely with the rules governing court procedure in certiorari and the following rules are tendered to take the place of the procedure in that chapter. In the past many questions have arisen and been discussed by the Courts concerning the intent of these statutes, especially on matters which have not been clearly set forth therein.

It has been the object of the Committee, in so far as possible, to eliminate these troublesome questions; to more particularly define the rules of procedure in certiorari and to assist the Bar in preparing and presenting cases where the remedy is pertinent by eliminating these questions which have been the subject of litigation to the detriment of the merits of the case.

It has also been the thought of the Committee in preparing these rules and in placing certain limitations therein, which were not in the original statutes, that certiorari, being an extraordinary legal remedy, should be confined strictly to its common law function as broadened by statutory provision; that it should not be an action wherein the Court would try the matter in the broad sense of an appeal or an action de novo. The committee has therefore limited the scope of the remedy to the limits of its original function. In doing so the remedy of certiorari should again take its place as a simple and speedy method of questioning the jurisdiction of a Court, officer, board, or tribunal and eliminating extra jurisdictional acts or acts which are deemed to be illegal by reason of the Court or other agency assuming powers not inherent in it and which, therefore, are excessive.

RULES.

RULE 1. WHEN WRIT MAY ISSUE.

A writ of certiorari shall only be granted when specially authorized by statute or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his, proper jurisdiction or otherwise acted illegally.

RULE 2. OTHER REMEDIES.

The writ shall not be denied or annulled on the ground that there is another plain, speedy and adequate remedy open to the petitioner, but relief thereunder, if certiorari is determined to be the proper remedy, shall be strictly limited to the questions of jurisdiction and the legality of the acts complained of.

Comment: The above rules are based on Section 12456.

Rule 1 above is a slight deviation from the text of the above section. The revision of 1860 and the Code of 1873 both contained in lieu of the present expression "when authorized by law", the expression "especially authorized by law". In a number of cases, such for instance as contempt proceedings, the Code strictly limits the remedy of review to certiorari. The word "specially" points to these matters and the word "statute" substituted for the word "law" more particularizes them. The word "law" includes the substantive matters established by the Court decisions as well as by statute. These matters are embraced in the second portion of Rule 1.

Rule 2 is placed in this report for the purpose of limiting the use of certiorari procedure. In the past the courts have dismissed certain applications because an appeal will lie, (see Witmer v. Polk

County, 155 Iowa, 249), but in many instances the only question the party wishes to raise is the legality of the procedure and when so confined, this action should be much more speedy than a general appeal, (see Assoc. v. Dist. Ct., 121, Iowa, 1).

RULE 3. BY WHOM GRANTED.

The writ may be granted by the District Court, but if directed to said Court, or to a superior or municipal Court, then by the Supreme Court, or one of its Justices; it shall command the defendant therein to certify to the Court from which it issues, at a specified time and place, a transcript of such records and proceedings complained of in the petition, and such other records made in the original cause as may be pertinent thereto, as well as the facts in the case, describing them or referring to them, or any of them, with convenient certainty and also to have then and there the writ, which writ shall be issued by the Clerk of the Court wherein the application is made, under seal of said Court.

Comment: Rule 3 is based on Section 12457, only slightly changed. It is the thought of the Committee that in many instances a full transcript of "the records and proceedings" will not be necessary and the Court granting the writ should specify those deemed to be necessary for the proper understanding of the appellate tribunal. In every instance a Court granting a writ has an official Clerk and the fact that a Justice grants the writ should not make it incumbent upon him to issue it, but such procedure should be left to the Clerk, which in fact is the present practice.

RULE 4. STAY OF PROCEEDINGS ON APPLICATION -- BOND.

If a stay of proceedings is sought, such stay can be granted only

upon the petitioner giving bond, the penalty and conditions thereof, including security for costs, to be fixed by the Court or Justice granting such stay, with sureties approved by the Court or Justice or the Clerk of said Court, which bond shall be filed with the Clerk.

Comment: This is substantially Section 12458.

RULE 5. STAY ON COURTS OWN MOTION.

Where no stay of proceedings is sought, the Court, or Justice, issuing the writ, in its, or his, discretion, may stay further proceedings in the main case until the proceedings under the writ are determined.

Comment: New; the petitioner may not desire a stay or fail to request it. The Court, upon examination, could determine the advisability of further proceedings in the main cause and thus avoid useless litigation, especially in cases where it is rather apparent that the inferior tribunal was without jurisdiction or acting in excess of its jurisdiction.

RULE 6. PETITION — HOW ENTITLED.

The petition shall be entitled in the name of the petitioner as plaintiff against the inferior tribunal, board or officer as defendant.

Comment: The above rule is Section 12459 rewritten. There has been a great deal of confusion in the past concerning the method of entitling a petiton in certiorari; a few of the earlier cases have borne the title of the original case, later the title of the "District Court" as defendant, or the name of the Judge. In order to make this procedure uniform, the designation set forth in the above rule would not only be convenient and assist the young practitioner, but would clearly differentiate certiorari proceedings from the original case.

RULE 7. DISCRETION AS TO NOTICE.

The Court, or Justice, to whom the petition is presented may, before issuing a writ, fix a time and place for hearing of the petition and prescribe notice thereof to be given the adverse party, or may grant such writ without notice.

Comment: The above rule is substantially Section 12460 of the Code of 1939.

RULE 8. NOTICE AND HEARING - WHEN NECESSARY.

If a stay of proceedings is sought or where a petition is filed before the entry of a final order or decree, the Court, or Justice, to whom said petition is presented shall fix a time and place of hearing and prescribe a reasonable notice to be given the adverse party. Such hearing shall be confined to the sufficiency of the petition and the conditions of the bond to be required and the records and proceedings to be certified.

Comment: The foregoing rule is Section 12461 rewritten with additions thereto. It is the thought of the Committee that where a petition is filed prior to a final order, a stay may be desirable although the petitioner may not ask for such stay, in order to avoid giving bond. The hearing contemplated being in the nature of a preliminary examination and not going to the merits of a petition, it should be limited to the sufficiency of the petition, the necessity and requirements of the bond, or stay, and contents of the proposed writ.

RULE 9. SERVICE AND RETURN.

The writ must be served and proof of such service made by a sheriff of any county or his deputy. If directed to a Court it shall be served on a Judge or Clerk thereof, but if directed to a Board or other Tribunal, then on any member of such Board or Tribunal, or its secretary or clerk. The service shall be by delivering the original writ to the person to be served and the return of service shall be endorsed upon the copy thereof which shall be returned to the office of its issuance. Any official or person upon whom service is authorized may, as an alternative, accept service by endorsement on the returnable copy.

Comment: The above rule is a rewriting of Section 12462. In view of the fact that the original section prescribes service in the same manner as for original notices and the new rules contemplate a somewhat different service of original notices than that which is now in effect, it is deemed desirable that the serving officer shall be designated, the parties on whom served more particularly designated, and the manner of service more particularly prescribed, and that such service shall be personal only.

RULE 10. RETURN TO WRIT; BY WHOM MADE.

The return to writ directed to an inferior court shall, where practicable, be made and signed by the Judge who made the order, ruling or decision complained of, otherwise by any Judge of said court; where the writ is directed to an officer, the return shall be made and signed by him; where directed to a board or tribunal, the return shall be made and signed either by its presiding officer or by the clerk or secretary thereof.

Comment: New; the chapter on certiorari does not designate the particular person who shall make return of the writ. In this rule such person has been particularly designated, although in case of a Court, the writ being directed to the Court, any Judge of the Court having the records before him should be in position to make return.

RULE 11. DEFECTIVE RETURN.

If the return to the writ be defective, the Court, or Justice, issuing said writ may, on its or his own motion or at the written request of either the petitioner or adverse party, order a further return made, and compel obedience to the writ and to such further order, by attachment or citation for contempt if necessary.

Comment: The above rule is substantially Section 12463 of the Code with certain additions. It is the thought of the Committee that the Court issuing the writ, not being familiar with the proceedings, might fail to specify the necessary matters to be returned. Ordinarily the petitioner and the adverse party are more interested in the contents of the writ and the record to be certified than is the issuing authority and it is presumed that the Court, upon having a defect called to its attention, would naturally be interested in having all pertinent records certified.

RULE 12. TRIAL AND JUDGMENT.

When the full return has been made, the Court shall fix a time and place of hearing and hear the parties upon the record, proceedings and facts certified, and give judgment sustaining or annulling the proceedings in whole or in part or, in its discretion, correcting the same and prescribing the manner in which the parties, or either of them shall proceed further.

RULE 13. ADDITIONAL EVIDENCE AND HEARING.

The Court, in its discretion, may receive such other testimony, oral or written, including a transcript of the evidence, if any, had in the original proceedings, as may be offered by the parties. Such oral or written testimony shall be confined to that explanatory of the records, proceedings and facts as certified and shall, together with the transcript of the evidence, if any, be considered for the sole purpose of determining the legality of the proceedings and the sufficiency of the evidence to sustain the orders of the inferior tribunal, board or officer.

RULE 14. JUDGMENT LIMITED.

The judgment or order of the Court shall be limited to sustaining the proceedings or annulling the same in whole or in part to the extent that the inferior tribunal, board or officer has been found to be without jurisdiction or to have exceeded its, or his, jurisdiction and in no event shall the court substitute a different or amended decree or order.

Comment: The three preceding rules are Section 12464 rewritten. Certiorari being an inquiry into the jurisdiction of the Court and the legality of the proceedings only, the court in such proceedings should be confined thereto. Certiorari has never been considered a place for correction of errors or trial de novo, or a proceeding which would permit the Court, examining into the jurisdiction or legality of the inferior tribunal, to substitute its judgment for that of the inferior tribunal; it is in no way a proceedings to examine into the evidence except to determine the sufficiency thereof to sustain the order or decree. Under the above rules it could reduce an excessive order of sentence as in Eicher v. Dist Court, 221 Iowa, 293; but not substitute its own as in Carey v. Dist. Court, 226 Iowa, 717. The true rule is stated

in Bird v. Sears, 187 Iowa, 75, and cases there collected.

RULE 15. NATURE OF THE ACTION.

The action shall be prosecuted by ordinary proceedings so far as applicable.

Comment: This is identical to Section 12465.

RULE 16. APPEAL.

From the judgment of the District Court sustaining or annulling the proceedings, an appeal lies to the Supreme Court as in ordinary actions and the record shall be prepared in the same manner.

Comment: The above is substantially Section 12466.

RULE 17. LIMITATION.

No writ shall be granted on any petition filed after six months from the time it is alleged the inferior tribunal, board or officer exceeded its, or his, jurisdiction or otherwise acted illegally.

Comment: The above rule is substantially Section 12467 with the additional insertion of the date of filing the petition as the determining date rather than the date of granting the writ as in the present section. The time limit has been reduced from twelve to six months in accord with the policy of the Rules Committee to expedite legal proceedings where possible.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved June 7, 1942)

QUO WARRANTO

FOREWORD

The following rules are designated to replace the code provisions relating to actions of quo warranto now contained in Chapter 531 of the Code of Iowa, 1939. In a very few instances 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:

The action is made one in equity.

Corporations are included as possible defendants in actions provided for in present Section 12417, subdivision 5.

Provision is made for the bringing of the action in cases where the county attorney is a possible defendant.

The rules are broadened to authorize the court to determine all matters in controversy in the action.

In the opinion of the committee the provisions of the present Code Sections 12432 to 12438, inclusive, deal with substantive law and consequently, are not changed and are not superseded by these rules, but it is the intention that they remain as now enacted unless and until changed by the Legislature.

Section 12439 providing for a penalty for refusing to obey orders is entirely omitted and superseded with the thought that the court has authority to punish disobedience of its orders under the general chapter relating to contempt.

RULES

RULE 1. FOR WHAT CAUSES.

An action in the nature of quo warranto, triable by equitable proceedings, may be brought in the name of the state against any person or corporation in any of the following cases:

1. Persons unlawfully holding or exercising any public office or franchise within this state, or any office in any corporation chartered under the laws of this state.

2. Any public officer who has done, or suffered to be done an act which works a forfeiture of his office.

3. Any person or persons acting as a corporation within the state without being authorized by law so to act.

4. Any corporation doing, or omitting acts which amount to a forfeiture of its rights and privileges as a corporation, or exercising powers not conferred by law.

5. Any person, or corporation, claiming under a patent, permit, certificate of convenience and necessity, or license, of any nature or kind, granted by the proper authorities of this state, but which grant was obtained by fraud, or through mistake or ignorance of a material fact, or if such person, or corporation has done, or omitted an act in violation of the terms or conditions upon which any such patent, permit, certificate, or license was granted, or by any other means, acts, or

omissions has forfeited his, or its rights acquired therein or thereunder. Any action brought under this subdivision of this rule shall be for the purpose of annulling or vacating the patent, permit, certificate, or license in question.

Comment: The foregoing is almost identical with present Code Section 12417 with three exceptions: First, the action is made an equitable action instead of an ordinary proceeding. Trial by jury in this kind of proceeding is not guaranteed by the constitution, and therefore the Legislature has the power to provide that trial shall be in equity and it appears that the nature of the remedy is such that equitable procedure would be more feasible. Second, in subdivision 5 corporations are included as possible defendants. No logical reason appears why corporations should be excluded from such a proceeding as therein provided for. Third, Subdivision 5 is broadened to include not only patents but permits, certificates of convenience and necessity, and licenses of all kinds granted by the authorities of the state.

RULE 2. BY WHOM BOUGHT.

A. Such action may be brought in the discretion of, and by the county attorney of the county in which the action may be brought, but such county attorney must bring the action when directed by the Governor, General Assembly, or the Supreme or District Court, unless such county attorney may be a defendant in the action, in which case the same shall be brought by the Attorney General when directed by the Governor, General Assembly, or the Supreme or District Court.

B. If the county attorney of the county in which the action may be brought, on demand of any citizen of the state, refuses, or fails to bring the same, such citizen may apply to the court in which the action

may be brought for leave to do so, and, if the court grants leave, and, if such citizen shall file with the clerk of such court a bond, in an amount fixed by the court, with sureties approved by the clerk conditioned upon payment of all costs which may be adjudged against him in such action, then he may thereupon commence the action and prosecute the same to final judgment.

Comment: This rule covers the present Sections 12419 and 12420 of the Code with the addition of the provisions for the bringing of the action by the Attorney General when the county attorney is a possible defendant. Advisability of this provision is rather obvious. The provision for bond for costs is also added in cases commenced by private citizens, which provision seems advisable with the thought that it will tend to prevent the unreasonable use of the action.

RULE 3. NO JOINDER OR COUNTERCLAIM.

In such action there shall be no joinder of any other cause of action and no counterclaim.

Comment: Same as present Section 12418.

RULE 4. PETITION.

The petition shall set forth the grounds upon which the action is brought, and where the defendant is holding an office, or franchise, the right to which is claimed by one or more other persons, the petition shall set forth the name of such claimant or claimants, and any or all of such claimants may be made parties.

Comment: This rule covers and supersedes all of the present Code Sections 12421, 12423, 12424. That part of 12421 dealing with notice and procedure is omitted with the thought that the general rules governing notice and procedure will apply in these cases.

RULE 5. JUDGMENT.

A. Upon the trial of such action the trial court shall determine all the rights and claims of all the parties thereto respecting the matters involved therein. If the right to hold an office is in controversy in such action, the trial court shall determine which of the parties, if any, is entitled to hold such office.

B. The court shall enter any order, judgment and decree necessary to enforce the rights of all parties as determined, and to accomplish the objects of its decision.

C. If a party is found to be unlawfully holding or exercising any office, franchise or privilege, or if a corporation is found to have violated the law by which it holds its existence, or in any manner to have been guilty of acts or ommissions which amount to a surrender or forfeiture of its privileges, the judgment or decree shall provide for the ouster of such party from such office or franchise, and for the forfeiture of any such privilege and forbid the exercise or use by such party of any such office, franchise or privilege.

D. If a party is found to have exercised merely certain powers and privileges to which he was not entitled, but the exercise of which

does not warrant a forfeiture under the law, the judgment or decree shall provide that such party shall be prohibited and precluded from further exercise of powers and privileges which he was found to be unlawfully exercising.

Comment: This rule covers and supersedes the provisions of present Code Sections 12424, 12426, 12428, and 12429 with certain additions contemplated to give the court ample power to enforce its decisions and judgment. The phrase now found in the present Code section 12428 "or is acting contrary to law" is eliminated in the thought that this clause renders the section ambiguous in that it might be construed to mean that the charter of a corporation could be forfeited upon a finding that it had violated some provision of law, not affecting its right to existence as a corporation.

RULE 6. COSTS.

A. If judgment be rendered against one or more of the defendants, or interveners, in such action, such parties shall pay the costs and judgment shall be rendered against them accordingly.

B. If judgment in such action be rendered against a pretended but not real corporation, the costs shall be taxed against the person or persons acting as such pretended corporation and judgment shall be rendered accordingly.

C. If judgment in such action is found against the plaintiff, and such plaintiff be the state upon the relation of a private individual, the court may tax the costs of the action to such private individual and enter judgment accordingly. If, in such event, the court does not

find that the costs should be taxed to the individual upon whose relation the action is brought, the payment of costs shall be regulated by the statutes governing the payment of costs in criminal cases.

Comment: This rule covers and supersedes the provisions relative to costs appearing in the present Sections 12422, 12428, and 12430 of the Code. There is no change in the provisions, but the same are merely grouped together.

RULE 7. CORPORATIONS DISSOLVED.

If, by judgment or decree, in any such proceeding, a corporation is ordered dissolved, the court shall make appropriate orders for its dissolution as provided by the statutes then in force.

Comment: The committee is of the opinion that present Sections 12432 to 12438, both inclusive, now appearing in the Code contain provisions of substantive law and for that reason should not be in any way changed in these rules. It is a matter for the Legislature to change provisions of substantive law. Consequently, while the provisions of these sections are omitted in these rules, these sections are not superseded but will remain in force unless amended or repealed by the Legislature.

Comment: Section 12439 is omitted and is superseded and eliminated with the thought that the general chapter relative to contempt proceedings authorizes the court to punish any disobedience of its orders.

ADVISORY COMMITTEE ON RULES OF PROCEDURE

Subcommittee No. 17 Justice of Peace Courts

Final Tentative Draft

(Approved June 8, 1942)

FOREWORD

It was not within the province of this committee to deal with the plan of organization, terms of office, selection of personnel, jurisdiction of justice courts, or criminal procedure, but the sole province of this committee is civil practice and procedure in such courts.

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The main provisions proposed by these rules are as follows:

(1) To maintain the co-relation between the proposed rules for commencement of actions in district court actions and justice court actions that exists under the present statutory provisions.

(2) To require motions for security for costs to be made two days before the time fixed for appearance, instead of two days before the commencement of the trial, and to omit the requirement that security for costs be required of domestic companies in justice court actions, and requiring such security for costs only from non-residents and foreign corporations.

(3) To avoid needless difficulties where a plaintiff who has a small claim for damages sues a defendant in justice court, where the defendant has a counterclaim growing out of the same occurrence, or transaction which is in excess of the jurisdiction of such justice court, by making provision for transfer to the district court in such cases.

(4) To avoid needless expense and delay in justice court actions where the defendant is going to take an appeal anyway, to have the case transferred to district court prior to justice court trial by filing bond.

(5) Making definite and specific the manner of perfecting an appeal from justice court on the day the judgment is entered.

(6) Providing that appeals from justice court or reviews by writ of error shall be dismissed for lack of prosecution the same as actions originally commenced in district court, and that upon such dismissal that judgment be entered against the appellant for the judgment appealed from.

(7) Providing that in addition to other remedies provided by law, that the debtor have the right to have the question of his exemptions under attachemnt or execution issued by a justice court, determined in a speedy, summary manner by motion for release.

(8) Providing that cash may be deposited in lieu of bond where any bond is required in justice court.

The statutory provisions relating to practice and procedure in justice court are very numerous. None of the statutory provisions relating to justice court procedure are affected except as modified or supplemented herein.

Original Notice in Justice Court.

RULE 1. SERVICE AND RETURN.

The service and return must be made in the same manner as in the district court except that no service shall be made by publication other than as herein provided.

Comment: This takes the place of Section 10524 of the 1939 Code. Rule One and Section 10524 are the same except that Rule One omits the following words found in Section 10524:

"nor shall any return be made other than the sheriff or constable or be valid unless sworn to."

The words indicated were omitted so that the provisions as to return of service in district court and justice court shall be in uniformity.

RULE 2. SECURITY FOR COSTS.

If a defendant in any cause of action in the justice court at any time within two days prior to the time fixed in the notice shall make and file an affidavit stating that he has a good defense in whole or in part, the plaintiff if he is a non-resident of the state or a foriegn corporation, before any other proceedings in the action, must file with the justice before whom such action is pending, a bond with sureties to be approved by such justice, in an amount to be fixed by such justice for the payment of all costs which may accrue in the action in the court in which it is brought, or in any other justice court to which it may be carried, either to the defendant or to the officers of the court. The filing of an application for security for costs shall not waive the right of a party to challenge the jurisdiction of the justice court, at the time fixed in the notice.

Comment: This is Section 10527 of the 1939 Code changed so as to provide that the application for security for costs be filed two days prior to the time fixed in the notice, in place of "within two days prior to the commencement of the trial" which words gave rise to some confusion, and also changed so as to require security for costs only from non-residents and foreign corporations and not to require such security from domestic corporations.

COUNTERCLAIMS AND TRANSFER TO DISTRICT COURT.

RULE 3. TRANSFER TO DISTRICT COURT.

In an action commended in justice court for the recovery of

money only, where the sum claimed is in excess of $25.00, the defendant or defendants may have the same transferred to the district court by filing with the justice at least twenty-four hours prior to the time fixed in the notice, a bond with sureties approved by the justice, in double the amount claimed by the plaintiff, but in no case less than $100.00, and conditioned that the defendant shall pay any judgment with costs recovered by the plaintiff against the defendant in the district court. Upon the filing of such bond and the approval of the sureties by the justice, the justice shall forthwith transcript the action to the district court. A defendant of defendants may in like manner have justice court action where the amount claimed by plaintiff is $25.00 or less, transferred to the district court upon the filing of an affidavit stating that such defendant or defendants have a counter-claim against the plaintiff in an amount in excess of the jurisdiction of the court, arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim, and which upon transfer will be filed as a counterclaim, and by filing a bond as provided where the amount claimed is in excess of $25.00. Such affidavit and bond shall be filed at least twenty-four hours prior to the time fixed in the notice.

RULE 4. PROCEEDINGS UPON TRANSFER.

Upon transfer of an action from the justice court to the district

court, the plaintiff shall, within 5 days after the filing of the transcript in the district court, file a written petition. If such petition has been so filed, the defendant shall plead or move thereto within 10 days after the filing of the transcript. Thereafter, the rules of pleading and practice shall be the same as though the action had originally been commenced in the district court. If the petition is not filed as provided herein the action shall be dismissed at plaintiff's costs.

Comment: Section 10535 of the 1939 Code provides as follows:

"Counterclaim. A counterclaim must be made, if at all, at the time the answer is put in."

Section 10599 of the 1939 Code relating to trials on appeal of cases started in justice court provides as follows:

"New Demand. No new demand or counterclaim can be made on appeal, unless by mutual consent."

There are two problems which are attempted to be dealt with in the rules proposed relating to transfer of causes from justice court to district courts. One problem is presented where the defendant intends to contest the plaintiff's claim, but intends to make his real contest in district court on appeal. The practice in such cases is for the attorney or the client to appear at the hearing in justice court, so as not to be in default, and then merely sit there without taking any part, while the plaintiff goes through the expense and trouble of putting on his evidence, and then immediately upon judgment being entered, appealing the case to the district court. The thought presents itself that if a party is going to do this, it would be best to allow him to transfer the case to the district court before trial, and thus avoid the incurring of needless expense and cost to the parties by going through a trial in justice court which in reality is nothing but a formality.

Another problem is given rise to by the practice in some parts of the state, of where one party to a motor vehicle collision has sustained but slight damage and the other party has sustained heavy damages, for

the one sustaining slight damage to hurriedly bring a suit in justice court (generally for less than $25.00 to cut off appeal.) This presents an awkward situation to the party with a substantial claim. If the party who has a substantial claim puts it in as a counterclaim up to the jurisdictional amount of $100.00, it is then asserted that he has waived the balance or split his cause of action. If such party does not put in any counterclaim and the party having the slight damage recovers a judgment, such party so recovering will when sued in district court on the larger claim, contend and assert that the judgment recovered in the justice court is res judicata on the issue of contributory negligence.

There is some troublesome authority indicating that when judgment has been recovered against a party as being negligent in a motor vehicle collision, that the judgment is res judicata on the issue of contributory negligence in a suit where the position of the plaintiff and the defendant is reversed. In some cases parties with damage claims running into thousands of dollars have to contend with the vexatious situation of the real party at fault suing them for small amounts in justice court.

RULE 5. NOTICE OF APPEAL.

In cases of appeal from the justice court to the district court or superior court, notice of appeal may be given in either of the following ways:

(a) By the appealing party filing in the justice court on the day on which the judgment is rendered, a written statement of such party or his attorney that such party is appealing from the judgment. The written statement may be made by writing the same in the justice's docket.

(b) By the appealing party serving notice of appeal upon the appellee, his agent, the attorney who appeared for him, within twenty days after the judgment appealed from is rendered. Such notice shall

be served in the same manner as is provided for service of original notices. If the appellee is a non-resident or foreign corporation and does not appear in justice court by an agent or attorney, or if for any reason it is not possible to make service of such notice upon the appellee, his agent or attorney in the State of Iowa, the notice of appeal may be served upon the justice who rendered the judgment appealled from.

Comment: This Rule 5 takes the place of Section 10596 of the 1939 Code, which reads as follows:

> "Notice of Appeal. If an appeal is not perfected on the day on which judgment is rendered, written notice must be served on the appellee or his agent at least ten days before the next term of court to which the appeal is taken, if ten days intervene, or the action, on motion of the appellee, shall be continued at the cost of appellant."

There is some doubt and uncertainty as to how an "appeal is perfected on the day judgment is rendered" as provided in the section just quoted. It was believed that it would make for expedition and certainty to provide that the notice of appeal must be served within twenty days rather than have the time of service dependant upon the next term of court. It was also thought best to make specific provision as to the service of notice of appeal where the appellee is a non-resident or a foreign corporation, or for other reasons service of the notice of appeal cannot be made in this state.

RULE 6. FILING OF BOND ON APPEAL.

The appeal bond must be filed in the office of the clerk of the court to which the appeal is taken within 20 days after the rendition of the judgment appealed from. It shall be in an amount determined by

the clerk to be sufficient to secure the judgment and costs of appeal and with sureties approved by said clerk.

Comment: There is some difference of opinion as to where the appeal bond shall finally be filed. This settles that question. It also provides that the amount of the appeal bond shall be fixed by the clerk of the court to which the appeal is taken and the sureties approved by such clerk.

RULE 7. DISMISSAL FOR LACK OF PROSECUTION.

Any justice court action which is appealed or transferred to the district or superior court, or taken up for review by writ of error, shall stand for trial or be dismissed for lack of prosecution the same as any case originally brought in the district or superior court.

Comment: When justice court judgments are appealed to the district court, or taken to the district court on writ of error, they frequently stay on the district court dockets a long time without being tried. There seems to become doubt in some districts whether such cases are subject to dismissal under the two year rule, and they tend to clutter up some court dockets. This rule deals with that situation.

RULE 8. JUDGMENT UPON APPEAL ON DISMISSAL FOR LACK OF PROSECUTION.

When any justice court judgment has been appealed to the district or superior court, or brought there for review by writ of error, and shall be dismissed in such district or superior court for lack of prosecution, then upon such dismissal the clerk shall enter judgment

against the party or parties appealing in accordance with the judgment of the justice court.

Comment: Upon appeal of a justice case to the district or superior court the case is tried anew. In the vast majority of cases where appeals from justice court judgments are taken, they are taken with the idea that they will never be tried in the district court because of the embarrassment on the part of the plaintiff to insist on the trial of a small case. Because of this the case is frequently finally dismissed and the appellee loses a case without a trial on the merits in the district court, which he won by trial on the merits in the justice court. It is not the intention and desire of your committee to change the rule that justice court cases on appeal shall be heard anew, but it is felt that the burden of seeing that the case is brought on for trial in the district or superior court should be upon the party who took the appeal, and if the case is not tried anew in the district or superior court, that the justice court judgment should be affirmed.

RULE 9. DEPOSIT OF MONEY IN LIEU OF BOND.

Where in connection with any matter of civil practice and procedure in justice court, a bond is required or provided for, any party in lieu of filing a bond, may deposit money with the justice or clerk in the sum fixed or specified as the amount of the bond. The rights of parties in and to the money so deposited shall be the same as their rights under the bond if one had been filed. Money deposited with a justice in lieu of a bond shall be transmitted by the justice to the clerk of the court to which the case is appealed, transferred or brought for review by writ of error.

Comment: The bonds required in connection with justice court practice are usually quite small, and it is frequently a matter of

considerable annoyance and inconvenience to either purchase a corporate surety bond or to secure personal sureties. It is believed that no one could possibly be prejudiced by permitting a deposit of money in lieu of bond.

RULE 10. ADDITIONAL REMEDY WHERE EXEMPTION CLAIMED.

In any action in justice court where funds are sought to be reached by garnishment process, or personal property has been levied upon under attachment or execution, the debtor in addition to other remedies now provided by law, may by motion filed in the justice court at any time before judgment is entered against the garnishee, or before sale of property taken under attachment or execution, move for a release of the funds, or certain or all of the personal property on the ground that the same are exempt from attachment or execution. Such motion shall be heard forthwith by the justice, and the showing or counter-showing may be by affidavit or oral testimony or both. The matter of entering judgment against the garnishee or the sale of the personal property shall be postponed until the motion is disposed of.

Comment: It is the report of a number of justices of the peace that in many cases in justice court that the question of exemption often arises in connection with garnishment, attachment or execution, probably most frequently in connection with garnishment of wages. While the sums involved are generally small, yet they are of importance to the debtor. It is the frequent complaint that there is no speedy or summary or convenient way in which the debtor can have the question of his exemptions determined. This rule allows the debtor, if he so desires, to have the question of his exemptions determined in a convenient and speedy way by a motion to release.

ADVISORY COMMITTEE ON RULES OF PROCEDURE

INFERIOR COURTS OF RECORD

Final Tentative Draft

(Approved July 11, 1942)

FOREWORD

The subcommittee which considered this subject reported to the Advisory Committee that it found no need for any extensive revision of the existing procedure in the Municipal and Superior courts. Section 10664 of the Code provides that all provisions of law relating to the District Court shall so far as applicable apply to the Municipal Court. It also gives the judges of the Municipal Court power to adopt rules of practice conforming as nearly as may be to those of the district court of the district. Section 10716 of the Code makes all statutes governing the District Court as to venue, commencement of actions, jurisdiction, process, pleadings, practice, modes of trial, judgment, execution and costs apply to Superior Courts, except when inconsistent with specific provisions.

Under these statutes the Municipal and Superior Courts have functioned quite efficiently in the past and the Rules of Civil Procedure, when adopted, will afford the same opportunity to improve their procedure where necessary as they will afford in the District Courts.

The Committee recommends no change in the practice in the Superior Court beyond those which will inhere in the rules applicable to the District Court. The only other changes recommended for Municipal Courts relate to (a) the necessity for and time of filing the petition or original notice; and, (b) transfer to the District Court in the event of counterclaims in the amounts in excess of the jurisdictional amount.

RULE 1. FILING AND DOCKETING.

The petition in class "A" cases and the original notice in class "B" cases must be filed with the clerk of the court not less than five

days before the date set in the original notice for the appearnace of the defendant, and unless so filed the defendant shall not be held to appear and answer. If the petition or original notice, as the case may be, is not filed within said time the defendant may have the case docketed by filing a copy of the original notice with the clerk and paying the filing fee, and may have the case dismissed without notice and at plaintiff's cost. In case of such dismissal no new action shall be commenced in any court of this state based upon the same claim or demand unless or until the costs in such dismissed action are fully paid by the claimant and satisfied of record.

Comment: This rule is intended to meet the problem raised by the rather prevalent practice of some collection agencies which serve original notices in Justice Court without intending to follow them up.

RULE 2. TRANSFER TO DISTRICT COURT.

In all cases brought in the municipal court, where the defendant or defendants file a counterclaim against the plaintiff in an amount in excess of the jurisdiction of the Court, arising out of the transaction or occurrence that is the subject matter of plaintiff's claim, the said defendant or defendants may by motion filed with such counterclaim, have the case transferred to the district court, upon the filing in the municipal court of a bond in an amount, and within the time fixed by such court, and with sureties approved by such court, conditioned that the

said defendant or defendants will pay all court costs assessed or adjudged against such defendant or defendants by the district court in connection with such case. Upon compliance with the foregoing provisions the municipal court shall thereupon transfer such case to the district court.

RULE 3. PROCEEDINGS UPON TRANSFER.

Upon transfer of an action from the municipal court to the district court, the rights of the parties and the practice and procedure shall be the same as in actions originally commenced in district court.

Comment: Rules 2 and 3 attempt to deal with a problem also encountered in justice of the peace court practice. The problem is where one party to a motor vehicle collision who sustains damages which are moderate, sues the other party to the collision in municipal court, while the other party has sustained damages in excess of the jurisdictional limit of the municipal court. If the party who has the larger claim puts it in as a counterclaim up to the jurisdictional limit, it is then asserted that he has waived the balance or split his cause of action. If such party does not put in the counterclaim, and the party having the smaller claim recovers in municipal court, such party so recovering will when sued in district court on the larger claim, claim and assert that the judgment recovered in the municipal court is res judicata on the question of contributory negligence. There is some troublesome authority indicating that when a judgment has been rendered against a party as being negligent in a motor vehicle collision, that the judgment is res judicata on the issue of contributory negligence where the position of the plaintiff and defendant are reversed. In the proposed rules dealing with the same problem in justice of the peace practice it is made one of the conditions of the transfer that the party asking for the transfer file a bond conditioned to pay the plaintiff in the district court. In justice court cases the total amount of the plaintiff's claim would be small, and probably could be furnished by practically all parties having a large counterclaim. In municipal court cases the amount claimed by the plaintiff could run into several hundred dollars. For the defendant to put up a bond to secure the payment of such an amount upon transfer, might prove insurmountable to

a defendant with a large counterclaim who was in poor or moderate circumstances, as for instance a widow with a death case counterclaim. For these reasons it is thought fairer to provide that in cases of transfer of cases from municipal court to district court the only bond that be required be one as security for the payment of costs.

Similar questions do not arise in connection with counterclaims in superior court for by Section 10704 their jurisdiction is concurrent with the district court in all civil matters, with certain exceptions not here material.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved April 18, 1942)

DEFAULT JUDGMENTS

FOREWORD

The present statutes providing for the taking of default judgments, and the conditions upon which they may be set aside, are found in Sections 11587–11593 inclusive. They are designed to fit in with our present system of court procedure, which requires appearance on or before noon of the second day of a term of court, and permitting default for failure so to do. Upon the adoption of the new rules, terms of court for the purpose of appearance will be abolished, and the District Court will be continuously in session for the transaction of business. This is a much needed improvement.

Under the new rules, a defendant will be notified to appear within a certain number of days after service of notice upon him. Our present procedure for defaults would be entirely inadequate to deal with this situation. It would be impossible to secure defaults promptly and this is necessary if the final determination of causes is to be speeded up in accordance with the Legislative intent as expressed in Senate File No. 25, Acts 49th General Assembly. It, therefore, becomes necessary to set up new machinery for this purpose.

The new Federal Rules dealing with defaults have been found quite satisfactory. They have been here adopted with certain changes to adapt them to the Iowa practice, together with other modifications.

RULE 1. DEFAULT JUDGMENTS.

A. Entry of Default. When a party has failed to appear, or having appeared, has failed to plead or otherwise defend as required by Rule 17 of the rules on Pleadings and Motions, the clerk, upon written demand of

the adverse party, shall immediately enter his default, provided the party has not been adjudged to be under legal disability, or a prisoner in the penitentiary. All defaults subsequent thereto shall be entered only by the court.

Comment: Only a few counties in the state have a judge of the District Court continuously present so that defaults can be promptly entered at all times. Therefore, it is necessary to provide some other method for entering defaults, in order that all counties might be adequately served. It was felt that the Clerk of Court was the logical and proper person to do this.

This is substantially Federal Rule 55 (a).

B. Judgment. Judgment by default may be entered as follows:

1. By the Clerk. When the claim is for a sum certain, or for a sum which can, by computation, be made certain, the clerk upon request, shall make such computation as may be necessary, and upon affidavit that the amount is due, shall enter judgment for the amount so computed, and costs against the party in default.

Comment: When judgment is asked for a sum certain, or where it is merely a matter of computing the amount due, there is no sound reason why the clerk could not perform this task as well as a judge. Therefore, the clerk is given such power. This speeds up the final determination of causes and avoids delay.

In order that the rights of litigants may be properly safeguarded and no prejudice or loss suffered by reason of these changes, the grounds for setting aside defaults and default judgments have been broadened and liberalized. The court is given wider powers in such matters. See Rule D post.

This is substantially Federal Rule 55 (b).

2. By the Court. In all other cases, the party seeking judgment by default shall apply to the court therefor. If the party is entitled to it, the court shall enter such judgment. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or determine the amount of damages, or to establish the truth of any averment by evidence, or to make an investigation of any matter, the court may conduct such hearings or order such reference as it deems necessary and proper, and in cases triable to a jury, shall accord such right upon demand of any party not in default.[1]

If court is not being held in the county wherein the action is pending, any party, after having taken default, or being entitled thereto, may appear before a judge in the same judicial district, and offer such proof as may be necessary to entitle him to a judgment by default. Whereupon such judge shall render judgment, and when the same is entered by the clerk of court of the county wherein said cause is pending, it shall be a valid judgment.

Comment: In all other cases, it is felt that the court should have exclusive power to enter default judgments.

If court is not in session where the default is taken, it is felt that a party should not have to wait until a judge returns to the county, but should be able to go to any judge in the district and obtain judgment.

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1. The matter of taking judgment against those under legal disability or prisoners in the penitentiary is dealt with under rules relating to parties.

If any proof is necessary, this can be offered and the judge sign the judgment entry. When this is entered by the clerk of the county wherein the action is pending, it becomes a valid judgment.

This is substantially Federal Rule 55(b), except the second paragraph is new.

C. Notice. Notice of Default in Certain Cases. When personal judgment has been taken by default against a party served with original notice by substituted service, as provided in Rule 3(a) of Commencement of Actions in the District Court, the clerk of court in the county wherein such judgment is entered, shall immediately give written notice thereof, by regular United States mail to such party at his last known address, or the address where such substituted service was had. A record shall be made of the mailing of such notice. Failure to give such notice shall not invalidate the judgment.

Comment: Since service of the original notice by substituted service has been broadened in Rule 3(a) of Commencement of Actions in the District Court, it is felt desirable to provide additional safeguards. Therefore, in such instances, when default judgment has been taken, the clerk is required to immediately notify the party by ordinary mail. This gives some additional assurance that the defendant will have actual notice of the proceedings, and gives him an opportunity promptly to take action to have it set aside if he did not actually receive notice of the action.

This is new.

D. Setting Aside Default. On motion, for good cause shown but not ex parte, the court may set aside the default and, if a judgment has been entered, may likewise set it aside for mistake, inadvertence, surprise, excusable neglect, or unavoidable casualty. The motion shall

be made promptly after discovery of the existence of the grounds, but in no case exceeding two months after such judgment, order or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, as otherwise provided for by these rules, (2) to set aside as provided by these rules, a judgment obtained against a defendant served by publication only.

Comment: The setting aside of defaults and judgments entered thereon has been liberalized. They may be set aside on motion which must be promptly made after the discovery of the grounds. The time in which this can be done was made short, as it was not felt advisable to leave judgments open to uncertainty for any long period of time.

Subdivisions (1) and (2) refer to Chapter 552, Code 1939, which are now embraced in the rules relating to Proceedings After Judgment.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved March 21, 1942)

CHANGE OF VENUE AND PLACE OF TRIAL

RULE 1. GROUNDS FOR CHANGE OF VENUE.

A change of the place of trial in any civil action may be had in any of the following cases:

(a) County a party. Where the county in which the action is pending is a party thereto, if the application is made by the party adversely interested, and issue be triable by a jury, and jury demand has been filed.

(b) Judge a party or interested. Where the trial judge is a party, or is directly interested in the action, or is connected by blood or affinity with any person so interested nearer than the fourth degree.

(c) Prejudice or local influence. Where either party files an affidavit, verified by himself and three disinterested persons not related to the party making the application nearer than the fourth degree, nor standing in the relation of servant, agent, employee or attorney of such party, stating that the inhabitants of the county or the trial judge are so prejudiced against him, or that the adverse party has such an undue influence over the inhabitants of the county, that he cannot

obtain a fair trial. When either party files such an affidavit the other party shall have a reasonable time in which to prepare and file counter-affidavits, and the court, in its discretion, may cause the affiants upon either side to be brought into court for examination upon matters contained in their affidavits, and when fully advised, shall allow or refuse the change.

(d) Agreement. By the written agreement of the parties.

(e) Fraud in written contract. In an action brought on a written contract in the county where the contract by its express terms is to be performed, a defendant residing in a different county, having filed a sworn answer alleging fraud in the inception of the contract constituting a complete defense thereto, may have such action transferred to the district court of the county of his residence upon application and filing of a bond for cost in an amount to be fixed by the court.

(1) Such bond shall be with sureties to be approved by the clerk, in an amount to be fixed by the court, for the payment of all costs, and shall be filed within ten days from the granting of the application.

(2) If, upon trial of the action, judgment is rendered against the defendant so demanding a change, the court shall include as part of the costs the reasonable expenses incurred by the plaintiff and his attorney by reason of changing the place of trial.

Comment: This rule contains, substantially, the same provisions as Sections 11408, 11411, 11412 and 11413, Code of Iowa, 1939. Under

Rule 1 (c), however, attorneys, as well as servants, agents and employees are excluded from verifying the affidavit for change of venue upon the ground of prejudice or local influence. On the other hand, change of place of trial because of the undue influence of an attorney over the inhabitants of the county has been eliminated. The provision for change of place of trial where a jury is not obtainable in the county has also been eliminated. The last changes mentioned simply eliminate provisions which are no longer useful in this state.

RULE 2. LIMITATIONS

A change of venue shall not be allowed:

(a) In case of appeal from a justice of the peace.

(b) When the issue can only be tried to the court, for any objection to the inhabitants of the county, or for the objection that the adverse party has such undue influence over the inhabitants thereof that he cannot obtain a fair trial.

(c) Until the issues are made up, unless the objection is to the judge.

(d) After continuance, except for a cause not known to the party asking the same before or arising since such continuance.

(e) After one change for any cause in existence and known or ascertainable with the exercise of diligence when the first was obtained, and in no event shall more than two such changes be allowed to any party for any cause.

Comment: This rule comprises substantially the provisions found in Sections 11409 and 11414, Code of Iowa, 1939.

RULE 3. SUBSEQUENT CHANGES.

After change of place of trial has been taken, and trial had, and the jury discharged, or a new trial granted, a subsequent change may, in the discretion of the court, subject to Rule 2, be allowed.

Comment: This rule embodies the provisions of Section 11410, Code of Iowa, 1939, with the exception that subsequent changes under the conditions specified are within the discretion of the court.

RULE 4. NON-APPLICATION FOR CHANGE.

The right of any party to change the place of trial shall not be affected or denied by failure of any other party to the action to make similar application, and upon the granting of any such application the change shall be as to all parties in conformity with these rules, unless pursuant to Rule _____ the court shall order separate trials.

Comment: This rule is substituted for Section 11421, Code of Iowa, 1939. Section 11421 provides that if like parties do not apply for a change the case shall remain in the county where brought and be tried there as to those not seeking a change. This leads to piecemeal trial, and at least in some instances it is impractical, if not impossible, to litigate the matters at separate times between the various parties. The proposed rule, therefore, provides that if a case is properly changed as to one party the whole action is transferred to another county where trial is had as to all parties, unless the court should order separate trials. Elsewhere in these rules the court is given broad powers to grant such separation. It is felt that this proposed rule, in conjunction with the provisions for separation, will better assure a fair trial to all litigants, with due regard to considerations of convenience and expediency. The reference to "Rule _____" is to that dealing with separation, covered by another section of the rules.

RULE 5. TRANSFER OF CASE.

If the application for a change is granted for any cause except the prejudice of disability of the judge, or under Rule 1 (e), the cause shall be sent to another convenient county in the district unless objections upon any ground permitted by there rules, supported by affidavit, are made to each county in the district, in which case, to another convenient county in another district.

If the application is sustained upon objections made to the judge, the cause shall not be tried by him, and such judge shall, if there be a judge of the same district against whom there is no objection, assign the cause to him for trial. If there be no other judge of his district against whom there is no objection, then he may, in his discretion, send the cause for trial to another convenient county of another district or to the county of another district agreed upon by the parties for trial before a judge in such district; or he may procure another judge of another district to try such cause.

Comment: This rule contains substantially the provisions of Sections 11416 and 11417, Code of Iowa, 1939, with the exception that upon granting of change the case may be sent to any other convenient county in the district, rather than the next or most convenient county. It is felt that this greater flexibility as to where the case may be sent is desirable.

RULE 6. COST OF CHANGE.

Except where the change of place of trial is by agreement of the

parties, or is granted under Rule 1 (e), all costs occasioned thereby, shall be paid by the applicant therefor, and the court, at the time of making the order, shall designate in general terms such costs, and no change shall be held to be perfected until the same are paid. Such costs shall be paid within ten days from the granting of the application or the right to such change shall be deemed to have been waived.

Comment: This rule modifies Section 11423, Code of Iowa, 1939, by applying alike to all parties seeking a change, except in the case indicated. There is no apparent reason why any distinction as to costs should be made between the various classes of applicants under Rule 1.

RULE 7. TRANSCRIPT AND PAPERS.

When the change has been perfected or agreed to by the parties, the clerk must forthwith transmit to the clerk of the proper court the transcript of the records and proceedings, with all the original papers, having first made out and filed in his office authenticated copies thereof. Upon filing such transcript and papers in the office of the clerk of court to which the same are certified, the action shall be docketed without fee and proceeded with as though it originated therein.

Comment: This rule contains the same provisions as Sections 11420 and 11422, Code of Iowa, 1939.

The provisions of Section 11419, dealing with perfection of change, have been eliminated, for the reason that they have no application under these rules. Where application is granted the change is automatically made by filing of the transcript and papers by the clerk under Rule 7, unless waived by failure to pay costs, under Rule 6, or to post bond, under Rule 1 (e).

RULE 8. JURY FEES.

Where the place of trial in any civil action is changed to any county other than that in which the same was properly commenced, where the trial thereof occupies more than one calendar day, the judge trying it shall certify the number of days so occupied, and the county in which the action was originally commenced shall be liable to the county where the same is tried for the sum of $3.00 per day for each juryman engaged in the trial thereof.

Comment: This rule contains the same provisions as Section 11424, Code of Iowa, 1939, except that the provisions for taxing costs in criminal cases has been eliminated, for the reason that the subject is already covered by Section 13824, Code of Iowa, 1939.

RULE 9. CHANGE OF PLACE OF TRIAL WHEN BROUGHT IN WRONG COUNTY.

A. If an action is brought in a wrong county, it may there be prosecuted to a termination, unless the defendant, before answer, demands a change of place of trial to the proper county, in which case the court shall order the same at the cost of the plaintiff, and may award the defendant a reasonable compensation for his trouble and expense in attending at the wrong county.

B. If the sum so awarded and costs are not paid to the clerk by a time to be fixed by the court, or if the papers in such case are not filed in the court to which the change is ordered within twenty days

from such order, the action shall be dismissed in accordance with these rules.

Comment: This rule contains the same provisions as Sections 11053 and 11054, Code of Iowa, 1939, altered only to correspond with the recommended provisions dealing with commencement of actions and required appearances regardless of terms. The provisions of these two sections have been removed from Chapter 488, "Place of Bringing Actions", because they deal with matters of procedure, and it was felt that it was advisable to have all such provisions in one place.

Note: Section 11051 dealing with the right of a non-resident defendant to dismissal, under certain circumstances, has been left in Chapter 488, for the reason that it does not deal with procedure relative to changing the place of trial.