FINAL TENTATIVE DRAFTS

of

RULES OF PROCEDURE

submitted by

THE ADVISORY COMMITTEE ON RULES OF PROCEDURE

of the

SUPREME COURT OF IOWA

PART THREE

INTERROGATORIES AND PRODUCTION OF EVIDENCE BEFORE TRIAL
SUMMARY JUDGMENT
TRIAL AND JUDGMENT
JOINDER OF ACTIONS, PARTIES TO ACTIONS, AND JOINDER THEREOF
DEPOSITIONS AND PERPETUATING TESTIMONY
INJUNCTIONS

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Supreme Court

STATE OF IOWA

TO THE MEMBERS OF THE IOWA BAR:

Part Three of the Final Tentative Draft of Rules is submitted to you herewith. These drafts were intended to cover the remaining subjects on the Advisory Committee's agenda, with respect to which the Committee expects to formulate rules for recommendation to the Supreme Court, but due to delays in printing, the material has been divided and Part Four will follow in about two weeks.

The Committee has now started the revision of Parts One and Two of the drafts in the light of the suggestions and criticisms received from the Bar. It has found these suggestions of inestimable value and hopes that Part Three will receive the same careful scrutiny on the part of the Bench and Bar as those previously submitted.

It is contemplated that the definitive draft with the Committee's report, will be submitted 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 Three, now being submitted, and Part Four, reach the Committee NOT LATER THAN OCTOBER 15TH.

As Mr. Paul B. DeWitt is now in the U. S. Navy, all correspondence with the Advisory Committee should be addressed to the office of the Chairman in Davenport. Suggestions respecting the rules on particular subjects may be sent there or to the Subcommittees, a complete list of which is appended hereto.

While final revision of Parts Three and Four will be withheld until October 15th, it is hoped that any suggestions occuring to members of the Bench and Bar will be sent in at an earlier date to facilitiate their classification for, and study by the Subcommittees.

Yours very truly,

Wayne G. Cook

Chairman

WGC:H

SUB-COMMITTEES PARTICIPATING IN PART THREE

Sub-Committee on Interrogatories and Discovery of Evidence Before Trial

The Advisory Committee acting as a Committee of the Whole constituted the sub-committee on this subject. The draft was written by Henry N. Graven, Clear Lake

Sub-Committee on Trial and Judgment

H. G. Cartwright, Marshalltown, Chairman
L. L. Brierly, Newton
P. J. Siegers, Newton

Sub-Committee on Summary Judgment

H. G. Cartwright, Marshalltown, Chairman
L. L. Brierly, Newton
P. J. Siegers, Newton

Sub-Committee on Joinder of Actions, Parties to Actions, and Joinder Thereof

Dan C. Dutcher, Iowa City, Chairman
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Walter McNett, Ottumwa
Edward L. Simmons, Centerville
Bailey Webber, Ottumwa
Allen Whitefield, Des Moines

Sub-Committee on Depositions and Perpetuatung Testimony

K. R. Cook, Glenwood, Chairman
Karl Geiser, Council Bluffs
R. E. Hines, Harlan
Clifford Powell, Red Oak

Sub-Committee on Injunctions

D. M. Kelleher, Fort Dodge, Chairman
Fred Gilchrist, Jr., Laurens
L. E. Linnan, Algona

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved July 20, 1942)

INTERROGATORIES AND PRODUCTION OF EVIDENCE BEFORE TRIAL

FOREWORD

Interrogatories and Production of Evidence Before Trial are phases of pre-trial procedure. Pre-trial procedure covers a number of related topics and subjects. The related subjects of pleading, pre-trial conference, depositions and summary judgments are covered elsewhere. The pre-trial procedure covered herein relates to the matter of pre-trial disclosure of evidentiary matters by the parties.

The matter of pre-trial disclosure of evidentiary matters between the parties is one not free from difficulty. It involves the desirability of having such pre-trial disclosure of evidentiary matters as will avoid needless and useless expense in the trial of cases on the one hand, and it involves the matter of avoiding unwarranted intrusion and "fishing expeditions" on the other hand.

Under the New Federal Rules one of the principal methods provided for pre-trial disclosure of evidentiary matters, is by allowing any party to take the deposition of any other party. Under our existing Iowa procedure the principal method provided for such pre-trial disclosure has been by interrogatories attached to the pleadings. It has been the expressed view of a considerable number of the bar that the use of interrogatories under the present statutory provision is very difficult and unsatisfactory and fraught with potentialities of "legal suicide". Quite a few of the members of the bar have strongly recommended to the committee that portion of the New Federal Rules which permits one party to take the deposition of an adverse party. Because of these recommendations and because of expressed dissatisfaction with the present revelant Iowa statutory provisions, the Committee made an extensive study of the entire subject. That study covered the operation of the New Federal Rules party deposition practice, and the cases decided thereunder, and the statutory provisions of every state in the Union relating to the matter and a large number of cases decided thereunder.

It is the view of the Committee after such study and investigation that while there are some desirable aspects to the party deposition provisions found in the New Federal Rules and in the statutory provisions of a number of states, that there are also some undesirable aspects. It is the view of the Committee that the problem of pre-trial disclosure of evidentiary matters by the parties can best be worked out in the framework of the existing Iowa statutory provisions by improvements in those provisions.

The pertinent Iowa statutory provisions as to interrogatories are found in Sections 11185 and 11186 of the 1939 Code of Iowa, which read as follows:

> "11185 INTERROGATORIES ANNEXED TO PLEADING. Either party may annex to his petition, answer or reply written interrogatories to any one or more of the adverse parties, concerning any of the material facts in issue in the action, the answer to which, on oath, may be read by either party as a deposition between the party interrogating and the party answering."
>
> "11186 ANSWERS. The party answering shall not be confined to responding merely to the interrogatories, but may state any new matter concerning the same cause of action, which shall likewise be read as a deposition."

The matter of the production of books and papers is also a part of the problem. The pertinent Iowa statutory provisions as to production of books and papers are found in Sections 11316 and 11317 of the 1939 Code of Iowa, which read as follows:

> "11316 PRODUCTION OF BOOKS AND PAPERS. The district or superior court may in its discretion, by rule, require the production of any papers or books which are material to the just determination of any cause pending before it, for the purpose of being inspected and copied by or for the party thus calling for them."
>
> "11317 PETITION - GRANTING OR REFUSING. The petition for that purpose shall be verified, and must state the facts expected to be proved by such books or papers, and that, as the petitioner

> believes, such books and papers are under the control of the party against whom the rule is sought, and must show wherein they are material. The rule shall thereupon be granted to produce the books and papers, or show cause to the contrary, if the court deems such rule expedient and proper."

The principal difficulties in connection with the present statutory provisions relating to interrogatories are:

(1) The provisions found in Section 11186 which expressly permits and authorizes new matter and unresponsive matter in the answers to the interrogatories, and allowing such new and unresponsive matter to be read as a deposition of the interrogated party.

(2) The problem of dealing with evasive or incomplete answers.

The principal objection to the present statutory provisions for the production of books and papers is that the request for such production is frequently of a general and drag net variety. Iowa, different from most other states, has no present statutory method to have determined as a preliminary matter what relevant books and papers are in existence. This gap and omission in the Iowa statutory provisions renders it in many cases impossible to describe the books or papers to be produced with any reasonable certainty, and necessitates the request for production being general and all-inclusive in character.

In these rules it is proposed to make our statutory provisions more workable -

(1) by eliminating the present provisions which permit new and unresponsive matters in the answers, and the reading of such answers as a deposition by the interrogated party.

(2) By providing for the striking out of answers or parts of answers which are unresponsive or otherwise objectionable.

(3) By providing that if the interrogated party answers the interrogatories in an incomplete or evasive way, that the court may upon application and hearing order the interrogated party to appear before the court to be orally examined as to information requested in the interrogatories which have been answered in an incomplete or evasive manner.

(4) By expressly providing that interrogatories may be asked as to the existence or control of books and papers. This is expressly authorizing what is now permitted in practice in some parts of the state.

(5) By providing that in a request for the production of books and papers, that such books or papers be described with reasonable certainty, and making such description possible by making express provision for the determination of the existence of revelant books or papers through interrogatories.

In addition to the changes just indicated, the matters of viewing real and personal property and of physical and mental examination of parties where relevant, are covered herein, with explanation in the comment under each.

RULE 1. INTERROGATORIES - WHEN PERMITTED - KIND PERMITTED

Any party to an action may after the filing of his petition or after answer, file in the office of the clerk, interrogatories directed to any adverse party which are necessary to enable the interrogating party adequately to prepare for trial, and which do not require the party interrogated to disclose the names of the witnesses by whom or the manner in which he will prove his own case. A copy of the interrogatories for the use of the adverse party shall be filed therewith. Interrogatories shall not be annexed to a pleading or motion. The interrogatories may include interrogatories as to the existence, description, nature, custody, control, condition or location of papers or books. The interrogatories shall be numbered. The clerk shall upon the filing of the interrogatories and copy, forthwith mail the copy of the interrogatories to the party to whom they are directed or his

attorney of record. These provisions as to interrogatories shall not be applicable to actions in justice court or class B actions in municipal court.

Comment: The present statutory provision as to the nature of the interrogatories which may be asked (Code Sec. 11185) provides that the interrogatories may be made "concerning any of the material facts in issue in the action." Somewhat related to this phase is Section 11127 of the 1939 Code, which provides as follows:

"Motion for More Specific Statement. When the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defense is not apparent, the court may, on motion, require it to be made more definite and certain."

While the section just set out apparently relates only to matters of pleading, yet by the Supreme Court's interpretation and construction it has been broadened so as to include the disclosure of evidentiary matters necessary to permit the other party to make adequate preparation for trial. Rule 53 of the proposed rules on pleadings which provides for a motion for more specific statement, incorporates the Supreme Court interpretation of Section 11127 by providing as follows:

"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 that such statement is necessary to enable the movant adequately to plead or prepare for trial." It has occurred to the committee that it would be highly desirable to have evidentiary matters necessary to enable the party to prepare for trial, as distinguished from those necessary to enable him to plead, brought in in response to interrogatories separate and apart from the pleadings. The committee is considering revision of suggested rule 53 of "Pleading" to limit the scope of motions for more specific statement to matters necessary for adequate pleading. Whether such revision is ultimately made or not the use of interrogatories to compel disclosure of evidentiary matter seems desirable.

Because of the situation just discussed and because the term "adequately prepare for trial" best states the purpose of interrogatories that terminology was used. In order to avoid any attempted use of

interrogatories merely to hunt out a party's witnesses, and what preparations such party had made for trial, such use is expressly provided against. This limitation is taken from a Massachusetts statute.

The interrogatories are required to be filed separately because they are intended to be independent of the pleadings and should neither delay the making up of issues or encumber the pleadings from which the issues are to be ascertained.

Express provision is made for interrogatories as to the existence or control of books and papers so that when an application is made for the production of books and papers they can be described with reasonable certainty, and thus tend to avoid the general or drag net applications now frequently made. It has been the practice in some parts of this state, under the present statutes relating to interrogatories to make inquiry as to the existence or control of books and papers.

RULE 2. NUMBER OF INTERROGATORIES - ENLARGEMENT OF - HEARING ON APPLICATION.

Except as herein provided, the number of interrogatories directed to any party shall not exceed thirty. If a party desires to ask a greater number of interrogatories, he shall file an application therefor, setting up the reasons for such request. A copy of the application shall be filed at the same time for the use of the interrogated party. The court shall fix a time and place of hearing upon the application and prescribe the manner and form of giving notice to the interrogated party or his attorney of record. At the hearing the court for good cause shown may enlarge and shall specify the number of interrogatories to be permitted, and shall fix the time within which they shall be filed.

Comment: The limit of thirty interrogatories is taken from the

Massachusetts practice. Before Massachusetts provided for the limitation to thirty, some litigants attempted to ask over two thousand interrogatories. Since there might be involved or complex cases where thirty interrogatories would not be adequate, provision is made in this rule for enlargement.

RULE 3. TIME FOR ANSWERING - OBJECTIONS.

The party to whom the interrogatories are directed shall file either answers thereto or objections to their propriety within seven days after they are filed, unless the court for good cause, but not ex parte, shall enlarge the time. If objections are filed to any of the interrogatories, the time for answering all the interrogatories shall be suspended until the objections are ruled on. At the hearing upon the objections, if it is determined that any of the interrogatories shall be answered, the court shall fix the time within which the answers shall be made. This rule shall not limit the right to object to the answers if offered in evidence.

Comment: This provides a method for determining the propriety of the interrogatories.

RULE 4. ANSWERS - MODE AND MANNER OF ANSWERING.

The interrogatories shall be answered under oath, separately and as responsively and fully as may be. If the party to whom the interrogatories are directed is a corporation, partnership or association, the answers shall be made by an officer or representative competent to testify in its behalf.

Comment: This rule eliminates the present statutory provision which allows the interrogated party to include new and unresponsive matter in his answers and then read it as his deposition. The provision as to who should answer the interrogatories where the interrogated party is a corporation, partnership or association is a frequent and common provision in other jurisdictions.

RULE 5. ANSWERS - MOTION TO STRIKE.

Upon the filing of the answers, the interrogating party may within seven days file a motion to strike the same or any portion thereof for the reason that the same are unresponsive or for any other proper reason.

Comment: This rule enables the interrogating party to eliminate any unresponsive material.

RULE 6. ANSWERS - APPLICATION FOR EXAMINATION.

If certain interrogatories are unanswered, or are answered in an incomplete or evasive manner, the interrogating party may within seven days after they are filed, make application to the court for an order requiring the answering party to be orally examined in court as to the information requested in the unanswered interrogatories, or the interrogatories answered in an incomplete or evasive manner.

Comment: The great difficulty in connection with the procedure relating to interrogatories in most jurisdictions has been the matter of securing non-evasive answers. It has frequently been found necessary for the court to make repeated orders, generally without success, in relation to evasive answers. Generally the only means of dealing with

evasive answers has been to strike the pleadings of the offending party. This remedy is so drastic that it is seldom that the courts will use it. While the provision for striking pleadings, etc. for disobedience to court orders in relation to interrogatories is found in a later rule, yet it is believed that a more adequate way to deal with the matter of evasive answers is to provide that if upon hearing it is determined that a party is answering interrogatories in an evasive manner, then in the discretion of the court such party may be summoned into court to be orally examined as to the matters included in the interrogatories the answers to which are being evaded. It is believed that the fact that a party knows that if he evades the answer to an interrogatory which the court holds he should answer, that he will be orally examined in court as to it, should in a great many cases result in non-evasive answers without the use of oral examination.

RULE 7. HEARING ON APPLICATION - MOTIONS TO STRIKE ALSO HEARD.

The court shall fix a time and place of hearing upon the application and shall prescribe the manner and form of notice to be given to the interrogated party. If a motion to strike any of the answers has been filed, that motion may be heard at the same time.

RULE 8. ORDER.

Upon the hearing, if the court finds that such party has without just cause refused to answer certain interrogatories, or has answered certain of them in an incomplete or evasive manner, it may in its discretion order such party to appear in court to be orally examined as to the information requested by the unanswered interrogatories or by the interrogatories answered in an incomplete or evasive manner. The court shall fix the time and place for such examination. If the party

answering is a nonresident of the state, or is a resident more than one hundred miles from the court where the action is pending, the court may in its discretion direct that such party shall not be required to appear in court for oral examination, but that in lieu thereof, the deposition of such party may be taken in the manner provided for the taking of depositions of witnesses, as to the information requested in the unanswered interrogatories or by the interrogatories answered in an incomplete or evasive manner.

RULE 9. RULES APPLICABLE TO EXAMINATION.

Upon oral examination in court or upon examination by deposition, the party examined shall be subject to the rules and provisions for witnesses in general, except that the party examined shall not be entitled to witness fees or mileage.

RULE 10. USE OF ANSWERS TO INTERROGATORIES.

The answers to interrogatories, whether contained in the written answers or as secured by oral examination or by deposition, may be used by the party interrogating as follows:

(1) To contradict or impeach the testimony of the party as a witness.

(2) As admissions of the party.

If only part of the interrogations are offered in evidence by the

interrogating party, the party interrogated may require him to introduce all of the answer or answers which are relevant to the part introduced. The interrogating party does not by introducing such answers make the interrogated party his own witness.

Comment: This rule makes definite and specific the use which may be made of the answers to interrogatories, and the limitations on such use.

RULE 11. APPLICATION FOR PRODUCTION OF BOOKS OR PAPERS.

After issue is joined in any action, any party may file an application for the production of any books or papers, not privileged, which are in control of any other party, which are material to a just determination of the cause, for the purpose of having them inspected or copied or photostated. The application shall state with reasonable particularity the papers or books which are called for, and state wherein they are material to a just determination of the cause, and state that they are under the control of the party from whom production is requested.

Comment: The present statutory language found in Section 11316 providing for the production of books or papers which "are material to a just determination of the cause" is retained in this rule. It requires the request to be made by application instead of a petition for rule. It does not contain the provision found in Section 11317 that the "petition must state the facts expected to be proved" as it is believed that the term "material to a just determination" covers the ground satisfactorily. This rule adds the provision that the application must describe the papers or books to be produced with "reasonable particularity". This is the requirement in practice under the New Federal Rules. Since interrogatories relating to the existence of papers or books are

now expressly permitted, this would make it possible for a party to describe with more particularity the papers or books to be produced. This rule further provides that the application for the production of books or papers shall not be made until issue is joined. When issue is joined the court can on the hearing on the application for production of books and papers more readily determine what papers or books are "material to a just determination of an action."

RULE 12. HEARING.

The court shall fix a time and place of hearing on the application and prescribe the manner and form of giving notice to the party from whom production is asked, or to his attorney of record.

RULE 13. ORDER.

Upon such hearing the court, in its discretion may order the production of such books or papers as the court deems material to a just determination of the action. There may also be included in such order such terms and conditions as the court may deem proper and necessary in regard to the inspection, copying or photostating of such papers or books.

Comment: This rule makes provision for protective orders in connection with applications for production of books and papers.

RULE 14. PARTY NOT OBLIGED TO INTRODUCE.

A party calling for the production of any papers or books is not obliged to use them as evidence in the case.

Comment: This is the same in substance as Section 11319.

RULE 15. INSPECTION OF REAL AND PERSONAL PROPERTY.

The Court by procedure similar to that for production of books and papers may in its discretion, when material to a just determination of an action, order any party to permit the inspecting, measuring, viewing, surveying or photographing of any real property or relevant object or operation thereon, and the inspecting, measuring, viewing, or photographing of any personal property. The order granting such permission shall specify the time, place and manner for the exercise thereof.

Comment: This is in substance the pertinent portions of Federal Rule 34. While probably all that is provided herein could be done by the court in the exercise of its inherent power, yet it was thought desirable to provide a definite procedure in connection therewith.

RULE 16. PHYSICAL AND MENTAL EXAMINATION OF PARTIES.

In any action in which the mental or physical condition of a party is in controversy, the court may in its discretion order such party to submit to a physical or mental examination by a physician. The order may be made only on application for good cause shown, and upon notice to the party to be examined or his attorney of record, and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made. A representative of the party to be examined shall be permitted to be present at such examina-

tion, if the party examined or his attorney of record so requests.

Comment: This is in substance Section (c) of Rule 35 of the New Federal Rules with the words "in its discretion" inserted to make for uniformity with the rules relating to interrogatories and production of books and papers. There is no present Iowa statutory provision for the physical examination of a party, but the Iowa Supreme Court early established the rule in the case of Schroeder v. Railroad Co., 47 Iowa 375, that a physical examination of a litigant could be ordered under the inherent power of the court. Presumably a mental examination of a party could be ordered under the same inherent power. While Section 11228.1 of the 1939 Code makes provision for the mental examination of a party where a party affirmatively pleads mental incompetency yet that section is not broad enough to cover all the cases where the determination of a person's mental incompetency is in controversy, as for example in actions to appoint a guardian for a person as a mental incompetent.

RULE 17. REPORT OF FINDINGS OF PHYSICAL OR MENTAL EXAMINATION - PRIVILEGE.

(1) If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report, the court on application and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same mental or physical condition.

Comment: This is Section (b) of Rule 35 of the New Federal Rules. Our Iowa practice makes no provision for so-called "court witnesses" and no such provision is made in these rules, so that the physician making the examination when he testifies would be regarded as a witness for the party requesting the examination. While provision is made for a representative of the party examined to be present at the examination, yet in a good many cases, such representative, even if a physician, could not learn by merely being present what the report and findings of the examining physician will be. Under this rule the party examined has the option to waive his privilege as to other examinations by his own physicians by requesting and securing a copy of the report and findings of the examining physician. If the party examined does not want to waive his privilege, he does not have to do so, but in such case he cannot secure a copy of the report and findings of the examining physician. If the party examined does request and secure a copy of such findings and report, he has to give the other party a copy of any examination for a like purpose made by any of his physicians.

RULE 18. NOTICE BY POSTING NOT PERMITTED.

Wherever in these rules provision is made for giving notice, it shall not be permitted to give notice by posting.

RULE 19. REMEDIES IN CASE OF NON-COMPLIANCE.

If any party or an officer or managing agent of a party refuses

to comply with the provisions of the rules hereinbefore set forth, the court may make such orders in regard to the refusal as are just, and among others the following:

(1) An order refusing to allow the disobedient party to support or oppose designated claims or defenses or prohibiting him from introducing into evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition.

(2) An order striking out pleadings or parts thereof, or staying further proceedings until compliance, or dismissing the action or proceeding or any part thereof, or rendering judgment by default against the disobedient party.

The remedies set forth in this rule shall be in addition to other remedies provided in these rules. If the non-compliance complained of is the failure to answer interrogatories, or the answering of them in an incomplete or evasive manner, the remedies herein provided for shall be available to the interrogating party with or without a request for oral examination of the interrogated party.

Comment: This is in part Rule 37 of the New Federal Rules.

FINAL TENTATIVE DRAFT

RULES ON

SUMMARY JUDGMENT

(Approved July 15, 1942)

RULE 1. ACTIONS IN WHICH SUMMARY JUDGMENT MAY BE OBTAINED.

A summary judgment may be entered in any action to recover a debt or liquidated demand in money, with or without interest, arising (First) (a) on a negotiable instrument or a recognizance; (b) on any other contract, express or implied, excepting quasi contracts; (c) on a judgment for a stated sum; (d) on a statute where the sum sought to be recovered is a fixed sum or in the nature of a debt; (e) on a guaranty, when the claim against the principal is in respect of a debt or liquidated demand only; and (Second) in any other action (f) for the recovery of specific chattels, with or without a claim for withholding the same, provided that if such claim be for other than nominal damages and be unliquidated it may be severed and proceeded with as provided in these rules; (g) to quiet and settle the title to real estate or any interest therein; (h) to discharge any claimed invalid mortgage or lien.

RULE 2. PROCEDURE.

In any such action final judgment shall be entered by the court at any time after the defendant has appeared, either before or after

the answer has been filed, upon written motion and affidavit of the plaintiff or of any person having personal knowledge of the facts, verifying the cause of action, and the amount he believes to be due, and his belief that there is no defense to the action, unless a defendant, within ten days after the filing of such motion and affidavit or within such further time as the court for good cause shown may prescribe, shall show by affidavit such facts as may be deemed by the court sufficient to entitle him to defend. The clerk shall forthwith mail the copy of the motion to the defendant. The court may, on motion of the plaintiff, order striken from the files any affidavit of a defendant found by it to be insufficient, frivolous, false, or made only for the purpose of delay.

RULE 3. SUMMARY JUDGMENTS OR FINAL ORDERS IN PARTICULAR CASES.

Judgments or final orders may be obtained on motion by sureties againt principals or by sureties against co-sureties for the recovery of money due them on account of payments made by them as such; by clients against attorneys; by plaintiffs in execution against sheriffs, constables and other officers, for the recovery of money or property collected for them, and damages; and in all other cases specially authorized by statute. Such judgments or final orders may be obtained upon motion in any action commenced under these rules, in accordance with the procedure provided in Rule 2 hereof. Such judgments or final orders may also be obtained upon motion where no action has been so commenced by serving notice

thereof on the party against whom the judgment or order is sought at least ten days before the motion is made, said notice stating in plain and ordinary language the nature and grounds thereof, and the time and place of hearing thereon. Such motions shall be heard and determined by the Court without written pleadings and judgment given according to the very right of the matter. If the motion is not on file on or before the day named in the notice it shall be considered as abandoned.

Comment: Rules (1) and (2) are adopted from the Connecticut procedure. Rule 3 is the same in substance as Sec. 11608.

The purpose of the summary judgment is to enable a party who has an undeniable cause of action or defense to be freed from the delays involved in sham claims or defenses presented by his adversary and from the expense and inconvenience of a trial. The effect of the rule is to enable the court to find in advance that there is no issue of fact which necessitates a trial.

Statements made by various appellate courts serve to illustrate the history of such procedure and the use thereof, viz.:

In the case of People's Wayne County Bank v. Wolverine Box Co. 250 Mich. 273, 230 N.W. 170, the court said:

"The summary judgment rule is not an innovation. It was adopted in this country in South Carolina as early as 1768. It was used extensively in New York, New Jersey, Connecticut, Pennsylvania, Indiana, Virginia, West Virginia, Delaware, District of Columbia, Kentucky, Arkansas, Missouri and other states. Summary judgment was employed in England as early as 1855 but its scope was rather narrowly limited until 1874, since which time it has played an important part in English practice".

In Norwood Morris Plan Co. v. McCarthy, 4 N.E. (2d) 450, the Court said:

"The purpose of the affidavits and hearing is to determine whether such facts are disclosed as the court finds entitle the defendant to defend. A substitution of trial by affidavits for trial on evidence clearly is not intended. The duty of the trial judge is to determine whether there is a substantial issue of fact and not to try such issue if found to exist. Questions of credibility of affidavits or evidence do not concern the trial court. If the affidavit of defense shows a substantial issue of fact, summary judgment should not be ordered even though the affidavit be disbelieved. If the affidavits on the one side and on the other are directly opposed as to the facts shown, the case must go to trial".

In Atlas Investment Co. v. Christ et al; 240 Wis. 114, the court said:

"The purpose to be served by the summary judgment statute, so far as it relates to motions by plaintiff, is to prevent interposition of false or frivolous answers for the purposes of accomplishing a delay in the securing of a just judgment. The statute is, however, drastic and is to be availed of only when it is apparent that there is no substantial issue to be tried. It is not a substitute for a regular trial nor does it authorize trial of controlling issues on affidavits".

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved June 8, 1942)

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TRIAL AND JUDGMENT

RULE 1. DEFINITION OF TRIAL.

A trial is a judicial examination of the issues in an action, whether they be issues of law or of fact. Issues arise in the pleadings where a fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds: (1) of law, (2) of fact. An issue of fact arises upon: (1) A material allegation of fact in the petition denied by the answer. (2) Material allegations of new matter in the answer, either denied by a reply or by operation of law. (3) Allegations of new matter in the reply, which shall be considered as controverted by the opposite party without further pleading. Any other issue is one of law. Issues of law must be tried first.

Cmment: This rule embodies Sections 11426, 11427 and 11428 of the Code.

RULE 2. JURY TRIAL.

(a) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by filing a demand therefor in writing, which

demand shall be filed not later than 10 days after the filing of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(b) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within ten days after filing of the demand or such lesser time as the court may order, may file a demand for trial by jury of any other or all of the issues of fact in the action.

(c) Waiver. The failure of a party to file a demand as required by this rule constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

Comment: This rule replaces Section 11429. It is an adoption of all of Federal Rule 38 except the first section thereof, which is not thought necessary since the right of jury trial is a matter of substantive law.

RULE 3. TRIAL BY JURY OR BY THE COURT.

(a) By Jury. When trial by jury has been demanded as provided by these rules the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the party or parties appearing at the trial, or their attorneys of record,

by written waiver or stipulation filed with the court or made orally in open court and entered in the record, consent to trial by the court sitting without a jury, or (2) the Court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist.

Comment: This Rule supplants Section 11429 of the Code. It is an adoption of subdivision (a) of Federal Rule 39.

(b) By the Court. Issues not demanded for trial by jury as provided in these rules shall be tried by the court.

Comment: This is an adoption of a part of Federal Rule 39.

RULE 4. FINDINGS BY THE COURT.

(1) Effect. In all actions triable either by equitable or ordinary proceedings, without a jury, the court shall find in writing the facts and separately state its conclusions of law thereon and direct the entry of the appropriate judgment. Requests for findings are not necessary for purposes of review. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

Comment: This subsection supplants Section 11435 of the Code. It is an adoption of a part of Federal Rule 52.

(2) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make

additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial. The question of the sufficiency of the evidence to support the findings may thereafter be raised on appeal whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

RULE 5. ASSIGNMENT OF CASES FOR TRIAL.

(a) Generally. Trial courts shall provide by rule for the placing of actions upon the trial calendar in such manner as they deem expedient. Precedence shall be given to actions entitled thereto.

Comment: This rule contemplates that the various courts of the State of Iowa shall make their own rules for the placing of actions upon the trial calendar.

RULE 6. CONTINUANCES.

(1) Application For. When time is asked for making application for continuance, the cause shall not lose its place on the calendar, unless it be continued at the option of the other party, and at the cost of the party applying therefor, for which cost judgment may at once be entered by the clerk, unless the contrary be agreed between the parties or ordered by the court.

(2) Causes For. A continuance shall not be granted for any cause

growing out of the fault or negligence of the party applying therefor; subject to this rule, it may be allowed for any cause which satisfies the court that substantial justice will thereby be more nearly obtained.

(3) Absence of Evidence. Motions for continuance on account of the absence of evidence must be founded on the affidavit of the party, his agent or attorney, and must state:

1. The name and residence of such witness, or, if not known, that the affiant has used reasonable diligence to ascertain them, and in either case facts showing reasonable grounds of belief that his attendance or testimony will be procured at the next term.

2. Efforts constituting due diligence which have been used to obtain such witness, or his testimony.

3. What particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proven.

(4) Admission by Opposite Party. If the application is insufficient, it shall be overruled; if sufficient, the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the court to be properly stated.

(5) Filing Motion - Diligence. There shall be no delay

in filing such motion, and no motion for a continuance shall be granted after a cause is assigned for trial, except for matters which could not by reasonable diligence have been discovered before that time.

(6) Amendment. The application may be amended but once, unless by permission to supply a clerical error.

(7) Written Objections. To such motion the adverse party may at once, or within such reasonable time as the court shall allow, file written objections, stating wherein he claims that the same is insufficient, and on such motion and objections no argument shall be heard unless the court desires it.

(8) Part of Record. Such motion and objections shall be a part of the record.

(9) Entry on Appearance Docket. No copy of a motion for continuance or of objections thereto need be served, but a minute of the filing thereof shall be entered on the appearance docket.

(10) Costs. Every continuance granted shall be at the cost of the party applying therefor, unless otherwise ordered by the court.

(11) By Agreement. The court shall grant continuances whenever the parties agree thereto, and provide as to costs as may be stipulated.

(12) Several Defendants. When the defenses are distinct the cause may be continued as to any one or more defendants.

Comment: These are Sections 11442 to 11455 of the Code except that Sections 11450 and 11454 are omitted and with the further exception that Section 11455 has been restated.

RULE 7. CONSOLIDATION.

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

RULE 8. SEPARATE TRIALS

The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Comment: The above two rules are in lieu of Section 11437 of the Code.

RULE 9. JURORS.

(a) Selection. When an action is to be tried by a jury, the clerk shall select sixteen jurors by lot from the regular panel or additions thereto, which shall be supplied as provided in the statutes relating to jurors.

Comment: Section 11459 of the Code.

(b) Examination. The parties, or their attorneys, shall have the right to conduct the examination of prospective jurors and the court may also conduct such examination as it deems proper.

Comment: Adopted from the first sentence of Federal Rule 47.

(c) Challenges. A challenge is an objection made to the trial jurors, and is of two kinds.

(1) To the panel.

(2) To an individual juror.

(d) Joint Challenges. Where there are several parties, plaintiffs or defendants, and no separate trial is allowed, they shall not sever their challenges, but must join in them.

(e) To the Panel. A challenge to the panel can be founded only on a material departure from the forms prescribed by statute in respect to the drawing and return of the jury.

(f) When and How Made. A challenge to the panel must be taken before a juror is sworn, and must be in writing, specifying distinctly the facts constituting the ground of challenge.

(g) How Tried. A challenge to the panel may be taken by either party, and upon the trial thereof the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

(h) Allowance. If the challenge is sustained by the court, the jury must be discharged, and its members will be disqualified from sitting in the trial in question; if it is overruled, the court shall direct the jury to be impaneled.

(i) To Jurors. A challenge to an individual juror is either peremptory or for cause.

(j) When Made - Determination. It must be taken when the juror appears and before the jury is sworn. Upon the trial of a challenge, the juror challenged shall be sworn, if demanded by either party, and examined as a witness, and must answer every question pertinent to the inquiry thereof.

(k) Peremptory. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude him.

(l) Number; Striking. Each party shall have the right to peremptorily challenge three jurors and shall strike two jurors. The clerk shall prepare a list of jurors called and after all challenges for cause are exhausted or waived, the parties, commencing with the plaintiff, shall alternately challenge peremptorily or waive by indicating any such challenge upon the list opposite the name of the juror challenged or by indicating the number of waiver elsewhere on the list.

After all challenges or waivers have been indicated the parties shall alternately in the same manner each strike two jurors from the list.

(m) Vacancies. After each challenge, either for cause or peremptory, as indicated on the list, another juror shall be called and examined for challenge for cause before further challenge is made and any new juror thus called may be challenged for cause and shall be subject to peremptory challenge or to being struck from the list as other jurors.

(n) Reading of Names. After all challenges have thus been exercised or waived and four jurors have been struck from the list the clerk shall read the names of the twelve jurors remaining who shall constitute the jury selected.

(o) Oath of Jurors. The jury shall be sworn in substantially the following form: You and each of you do solemnly swear (or affirm) that you will well and truly try the issues wherein ..... is plaintiff and ..... is defendant, and a true verdict render, and that you will do so solely on the evidence introduced and in accordance with the instructions of the court, so help you God.

(p) Challenges for Cause. A challenge for cause is an objection to a juror, and may be for any of the following causes:

1. A conviction of felony.

2. A want of any of the qualifications prescribed by statute to render a person a competent juror.

3. Such defects in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror.

4. Consanguinity or affinity within the ninth degree to the adverse party.

5. Standing in the relation of guardian and ward, or the client of any attorney engaged in the cause, master and servant, landlord and tenant, or being a member of the family or in the employment of the adverse party.

6. Being a party adverse to the challenging party in a civil action, or having complained against or been accused by him in a criminal prosecution.

7. Having already sat upon the trial of the same issues.

8. Having served as a grand or trial juror in a criminal case based on the same transaction.

9. When it appears the juror has formed or expressed an unqualified opinion on the merits of the controversy, or shows such a state of mind as will preclude him from rendering a just verdict.

10. Being interested in a like question with the issue to be tried.

11. Having requested, directly or indirectly, that his name be returned as a juryman for the regular biennial period.

12. Having served in the district court as a grand or petit juror during the last preceding calendar year.

(q) How Tried. Upon the trial of a challenge to an individual juror, he may be examined as a witness to prove or disprove the challenge,

and must answer every question pertinent to the inquiry thereon, and other evidence may be heard.

(r) Determination. In all challenges, the court shall determine the law and the fact, and must either allow or disallow the challenge.

(s) Saturday as Religious Day. Prior to the final submission of a case to the jury, a person whose religious faith requires him to keep the seventh day of the week cannot be compelled to attend as a juror on that day.

Comment: This alters Section 11475 of the Code.

(t) Exemption as Personal Privilege. An exemption from service as a juror is not a cause of challenge, but the privilege of the person exempt.

(u) Attachment for Absent Jurors. When a cause is called for trial, and before drawing the jury, either party may require the names of all the jurors in the panel to be called, and an attachment to be issued against those who are absent, but the court may, in its discretion, wait or not for the return of the attachment.

(v) Ballots Prepared. The clerk shall prepare separate ballots containing the names of the persons returned as jurors and must deposit them in a box for that purpose.

(w) Drawing. Before the name of any juror is drawn, the box must be closed and shaken, so as to intermingle the ballots therein, and the clerk shall draw such ballots from the box, without seeing the names written thereon.

(x) Jurors Absent or Excused. If a juror is absent when his name is drawn, or be set aside or excused from serving on that trial, the ballot containing his name must be returned to the box as soon as the jury is sworn.

(y) Ballots Returned to Box. When a jury is completed, the ballots containing the names of the jurors sworn must be laid aside and kept apart from the ballots containing the names of the other jurors until it is discharged, and must then be returned to the box, and so on, as often as a trial is had.

Comment: Subdivisions (v), (x) and (y) eliminate the necessity of the clerk folding the ballots as now required by Code Sections 11478, 11480 and 11481. Subdivision (w) alters Section 11479 by omitting the words "through the top of the lid thereof."

The foregoing rule is substantially in accord with present statutory provisions.

(a-1) Majority Verdict. The parties may stipulate at any time before the verdict is returned that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Comment: In lieu of Section 11483. This is an adoption of a part of Federal Rule 48.

(b-1) Alternate Jurors. The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called

shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by these rules. The additonal peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by these rules shall not be used against the alternate.

RULE 10. PROCEDURE AFTER JURY IS SWORN - ORDER OF EVIDENCE.

When the jury has been sworn, the court shall proceed in the following order:

1. The party on whom rests the burden of proof may briefly state his claim and the evidence by which he expects to sustain it.

2. The other party may then briefly state his defense and the evidence by which he expects to sustain it.

3. The party on whom rests the burden of proof in the whole action must first produce his evidence, to be followed by that of the adverse party.

4. The parties then will be confined to rebutting evidence, unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case.

5. But one counsel on each side shall examine the same witness.

Comment: The above rule is the same as Section 11485 of the 1939 Code.

RULE 11. ARGUMENT - OPENING AND CLOSING.

The parties may then either submit or argue the case to the jury. In the argument, the party then having the burden of the issue shall have the opening and closing, but shall disclose in the opening all the points relied on in the cause; and if in the close he should refer to any new material point or fact not relied upon in the opening, the adverse party shall have the right of reply thereto, which reply shall close the argument in the case.

Comment: The above rule is the same as Section 11487 of the 1939 Code.

RULE 12. WAIVER OF OPENING.

If the party holding the affirmative waives the opening, he shall be limited in the close simply to a reply to his adversary's argument, otherwise the other party shall have the concluding argument.

Comment: The above rule is the same as Section 11488 of the 1939 Code.

RULE 13. ARGUMENT RESTRICTED.

The court may restrict the time of argument of any attorney to itself, but shall not limit the argument in cases tried to a jury.

Comment: The above rule is the same as Section 11490 of the 1939 Code.

Rule 14. INSTRUCTIONS TO JURY - OBJECTION.

The instructions of the court to the jury shall be in writing. At the close of the evidence, or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in such requests.

The court shall, prior to the argument of counsel to the jury, furnish counsel with copy of the instructions which it proposes to give to the jury.

After the completion of the arguments of counsel, the court shall submit to counsel its instructions in final form, which action shall be noted in the record and when so noted said instructions shall constitute a part of the record in the cause on trial. The court shall, on the submission of such instructions to counsel, grant each party a reasonable time to object to the giving of, or the failure to give an instruc-

tion, and no party may assign any error on said account, unless objection is made at such time. Such objections shall be made in writing or dictated into the record, out of the hearing of the jury and shall state specifically the matter to which objection is made and the grounds thereof, and no other grounds shall be considered on appeal.

If thereafter the court, by reason of such objections, or otherwise, revises its instructions or further instructs the jury, any party shall have the right to object to such revised or additional instructions, which objections shall be made a part of a motion for a new trial.

Comment: This rule has the advantage of permitting the trial court to correct any error in its instructions prior to the reading thereof to the jury. It is the tendency of all lawyers at the present time to refrain from calling the attention of the court to any errors in the instructions until such questions are raised on a motion for a new trial. As a result of this many cases are reversed in the Supreme Court due to errors in instructions, which errors would have been cured in the lower court had the same been called to the attention of the lower court. An examination of the Northwestern Reporter discloses that more cases are reversed by the Iowa Supreme Court on account of errors in the instructions than in any other state serviced by this publication. Also counsel would be informed of the court's instructions prior to the argument of the case to the jury, and would thus be in a position to discuss the law of the case.

RULE 15. VIEW OF PREMISES.

When in the opinion of the court it is proper for the jury to have a view of any property real or personal or the place where any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person ap-

pointed by the court for that purpose; while the jury are thus absent, no one, save such person so selected, shall speak to them on any subject connected with the trial.

Comment: The above rule is the same as Section 11496 of the 1939 Code, with the exception that the words "in which" appearing in Section 11496 have been deleted and the word "where" has been inserted in the place of such words.

RULE 16. RULES AS TO JURY.

When the case is finally submitted to the jury, they shall retire for deliberation. They shall be kept together, under charge of an officer, until they agree upon a verdict or are discharged by the court. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court, and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

After the jury is sworn they shall not be permitted to separate during the trial, unless so ordered by the court, and, when so ordered, they must be advised by the court that it is the duty of each one of them not to converse with any other of them, or with any person, nor to suffer himself to be addressed by any person, on any subject of the trial, and that, during the same, it is the duty of each one of them to avoid, as

far as possible, forming any opinion thereon until the cause is finally submitted to them.

Comment: The above rule is a combination of Sections 11497 and 11498 of the 1939 Code.

RULE 17. DISCHARGE OF JURY - RETRIAL.

The jury may be discharged by the court on account of any accident or calamity requiring it, or by the consent of all parties, or when on an amendment a continuance is ordered, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may then direct.

Comment: The above rule is a combination of Sections 11500 and 11501 of the 1939 Code.

RULE 18. ADJOURNMENT.

The court may, at any time after having entered upon the trial of any cause, and in furtherance of justice, order an adjournment for such time within the term, and subject to such terms and conditions as to costs and otherwise, as it may think just.

Comment: Same as Code Section 11502.

RULE 19. WHAT JURY MAY TAKE WITH THEM.

The trial court shall determine what exhibits the jury shall take with them when it retires for deliberation. Depositions shall not be taken unless all the testimony is in writing and none of the same has been ordered stricken.

Comment: Redraft of Code Section 11503.

RULE 20. COURT OPEN FOR VERDICT.

While the jury is absent, the court may adjourn from time to time in respect to other business, but shall be regarded as open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged.

Comment: The above is the same as Section 11504 of the 1939 Code.

RULE 21. FURTHER TESTIMONY TO CORRECT MISTAKE.

At any time before the cause is finally submitted to the court or jury, either party may be permitted by the court to give further testimony to correct an evident oversight or mistake, but terms may be imposed upon the party obtaining the privilege.

Comment: The above is the same as Section 11505 of the 1939 Code.

RULE 22. ADDITIONAL INSTRUCTIONS.

After the jury has retired for deliberations, if they desire to be instructed as to any point of law arising in the case, they may request the officer to conduct them into court, which he shall do, when the court may further instruct, which instruction shall be given in the presence of, or after notice to, the parties or their counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record, and may be objected to in a motion for a new trial as provided for by these rules.

Comment: Redraft of Code Section 11506 to comply with these rules.

RULE 23. FOOD AND LODGING.

If, while the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court orders them to be provided with suitable food and lodging, it must be provided by the sheriff at the expense of the county.

Comment: The above is the same as Section 11507 of the 1939 Code.

RULE 24. VERDICT - HOW SIGNED AND RENDERED.

The verdict must be in writing, signed by a foreman chosen by the jury. When agreed to, the jury must be conducted into court, their verdict read to them and the inquiry made whether it is their verdict. If any juror

disagrees, the jury must be sent out again, but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete, and the jury shall be discharged from the case.

Comment: The above is the same as Section 11508 of the 1939 Code.

RULE 25. JURY POLLED.

When the verdict is announced, any party may require the jury to be polled, which shall be done by the court or clerk, asking each juror if it is his verdict. If any one answers in the negative, the jury must be sent out for further deliberation.

Comment: The above is the same as Section 11509 of the 1939 Code.

RULE 26. SEALED VERDICT.

When by consent of the parties and the court, the jury has been permitted to seal its verdict and separates before it is rendered, such sealing is equivalent to a rendition and a recording thereof in open court, and such jury shall not be polled or permitted to disagree with respect thereto.

Comment: The above is substantially the same as Section 11510 of the 1939 Code.

RULE 27. SPECIAL VERDICTS AND INTERROGATORIES.

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. The court shall direct the entry of the appropriate judgment upon such special verdict and answers of the jury.

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such

explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

Comment: The above rule is similar in substance to Rule 49 of the Federal Rules.

RULE 28. FORM OF VERDICT AND RECORD THEREOF.

The verdict shall be sufficient in form if it expresses the intention of the jury.

The verdict shall in all cases be filed with the clerk and entered upon the record, after having been put into form by the court, if necessary, and be a part of the record. The clerk shall forthwith enter

judgment on the verdict.

Comment: The above is a combination of Sections 11517 and 11518 of the Code of 1939.

RULE 29. MASTERS.

(a) Appointment and Compensation. The Court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) Reference. A reference to a master shall be the exception and not the rule. A reference shall not be made in actions to be tried by a jury, and in any case shall be made only upon a showing that some exceptional condition requires it.

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report

evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in these rules for a court sitting without a jury. The master may appoint a shorthand reporter at the expense of the party making such request.

(d) Proceedings.

(1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of

the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided by these rules. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided by statute.

(3) Statement of Accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) Report.

(1) Contents and Filing. The master shall prepare a

report upon the matters submitted to him by the order or reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the trial court unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) Findings. The court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may file written objections thereto. Application to the court for action upon the report and upon objections thereto shall be by motion and upon such notice as the court prescribes. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) Stipulation as to Findings. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings in fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(4) Draft Report. Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Comment: The above rule is similar to Rule 53 of the Federal Rules and supplants Sections 11520 to 11535 inclusive of the Code of 1939.

RULE 30. EXCEPTIONS UNNECESSARY.

Exceptions to rulings or orders of the court are unnecessary.

RULE 31. DISMISSAL OF ACTIONS.

(a) Voluntary Dismissal: Effect Thereof.

(1) By Plaintiff; By Stipulation. An action may be dismissed by a party without order of court (1) by filing a dismissal at any time before filing of the answer or (2) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in such dismissal or stipulation, the dismissal is without prejudice, except that a dismissal operates as an adjudication upon the merits when filed by a party who has previously dismissed in any court of the United States or of any state an action based on or including the same cause of action.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the filing upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection

unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(c) Dismissal of Counterclaim, Cross-Claim or Third-Party Claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of sub-division (a) of this rule shall be made before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing.

(d) Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court

may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

Comment: The foregoing rule is the same as Rule 41 of the Federal Rules and supplants Sections 11562 to 11566, inclusive, of the 1939 Code.

The rule is designed to prevent indiscriminate dismissals of actions by the parties litigant.

RULE 32. JUDGMENT DEFINED.

Every final adjudication of the rights of the parties in an action is a judgment.

Comment: This rule adopts the definition set forth in Code Section 11567 omitting a part thereof. The part omitted is in the opinion of the Committee cumulative.

RULE 33. JUDGMENT FOR PART.

Any party who succeeds in part of his cause or causes, and fails as to part, may have the entry in such case express judgment for him for such part as he succeeds upon, and against him on the other part.

Comment: Same as Code Section 11568.

RULE 34. JUDGMENT BASED ON PLEADING IN ABATEMENT AND BAR.

Where matter in abatement is pleaded in connection with other matter not such, the finding of the jury or court must distinguish between matter in abatement and matter in bar, and the judgment must, if it is rendered on the matter in abatement, and not on the merits, so declare.

Comment: Same as Code Section 11569.

RULE 35. SEVERAL JUDGMENT.

In an action by several parties, or aganst several parties, the court may, in its discretion, render judgment for or against one or more of them when a several judgment is proper, leaving the action to proceed as to the others.

Comment: Same as Code Section 11571 with the exception that plaintiff and defendants are designated as parties.

RULE 36. JUDGMENT AGAINST ONE OF JOINT ADVERSE PARTIES.

Though jurisdiction is had of all adverse parties judgment may be rendered against any of them severally where the prevailing party would be entitled to judgments against such adverse parties if the action had been against such alone.

Comment: Same as Code Section 11572 with the exception that "parties" are substituted for "plaintiff" and "defendants."

RULE 37. JUDGMENT ON VERDICT.

When a trial by jury has been had, judgment must be entered by the clerk forthwith in conformity with the verdict, unless it is special, or the court orders the case to be recserved for future argument or consideration.

Comment: Same as Code Section 11575.

RULE 38. PRINCIPAL AND SURETY
ORDER OF LIABILITY.

When a judgment is rendered against a principal and his surety, it shall recite the order of their liability therefor, and the term "surety" includes all persons whose liability on the claim is posterior to that of another.

Comment: Same as Code Section 11577.

RULE 39. JUDGMENT FOR EXCESS
AFFIRMATIVE RELIEF.

If any party to an action recovers a judgment against an adverse party in excess of any judgment recovered against him, judgment shall be

rendered for the excess or, if it appears that any party is entitled to affirmative relief, judgment shall be given therefor.

Comment: In substance Code Section 11578 with exception that the Code Section is revised to fit in with the practice prescribed by these rules.

RULE 40. JUDGMENT BY AGREEMENT.

Any judgment in a case pending, other than for divorce, which may be agreed upon between the parties interested therein, may at any time be entered, and if not done in open court, the judgment agreed to shall be in writing signed, and filed with the clerk, who shall thereupon enter the same accordingly, and execution thereon may issue forthwith unless therein otherwise agreed upon.

Comment: Same as Code Section 11579.

RULE 41. JUDGMENTS AND ORDERS ENTERED.

All judgments and orders must be entered on the record of the court, and must specify clearly the relief granted or order made in the action.

Comment: Same as Code Section 11582.

RULE 42. SURRENDER OF WRITTEN OBLIGATIONS.

Unless otherwise ordered by the court or judge, the clerk of the

district court shall not enter or spread upon the records of his office any judgment based upon any promissory note or unless the note or notes or other written evidence of indebtedness are first delivered to the clerk.

Comment: Same as Code Section 11582.1.

RULE 43. AFFIDAVIT AS TO IDENTITY OF JUDGMENT DEBTOR.

No personal judgment shall be docketed until the judgment creditor, or his agent or attorney, shall have filed with the clerk an affidavit, stating the full name, occupation, place of residence, and postoffice address of the judgment debtor, to the best of affiant's information and belief; and, if such residence be within an incorporated place having more than five thousand inhabitants, the street number of both his place of residence and place of business, if he have one, shall be stated. If the clerk shall violate this provision, neither the judgment nor the docketing thereof shall be invalid.

Comment: The purpose of this rule is to eliminate much of the confusion of identity of judgment debtors who have the same name. This rule is taken from the Minnesota Statutes.

RULE 44. JUDGMENT ON PUBLICATION SERVICE.

No personal judgment shall be rendered against a party served by

publication only who has not made an appearnace.

Comment: Same as Code Section 11600.

Additional Comment: Code Section 11601 is not included herein in the form of a rule, since such section was declared unconstitutional in the case of Raher v. Raher, 150 Iowa 511. However, the legislature has not repealed the section. In the light of decisions elsewhere the Supreme Court might well re-examine the Raher case, but unless and until it does so it does not seem proper for the Advisory Committee to recommend a rule based on this statute.

Code Section 11580 is omitted for the reason that it appears to serve no good purpose.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved June 8, 1942)

JOINDER OF ACTIONS, PARTIES TO ACTIONS, AND JOINDER THEREOF

FOREWORD

The following body of rules deals, in general, with the subject matter covered by Chapters 485 and 486 of the Code and related matters.

There have been many cases in Iowa which reached the Supreme Court in which frequently the only questions litigated were questions of joinder of actions or of parties, and not a few, were disposed of upon these issues without the parties ever having had the merits of their cases tried out. Much of this represents wasted time, effort, and money on the part of courts, lawyers, and litigants, and with the result that the parties, seeing their cases disposed of on "technicalities", or seeing months pass without reaching the real point of their dispute, become impatient and disgusted with the administration of justice.

It has been the object of the Committee to draft a body of rules which will (1) eliminate insofar as possible troublesome questions of joinder, and (2) provide a procedure whereby, when convenient and when it will not result in prejudice, issues and questions arising out of related transactions or occurrences, and all disputes between the parties, may be litigated in a single action.

These objects and purposes have been carried out by adopting a policy of free or liberal joinder, with discretionary power in the court to protect the parties from inconvenience and prejudice by separation of issues for trial.

The present draft of new rules on Appellate Procedure tending to eliminate appeals from rulings on motions will also help to carry these objects into effect.

In drafting the rules it has been the policy to use present Iowa rules and statutes as much as possible, and where the present

language did not carry out the objects above referred to, to take from the Federal rules such language as seemed useful, keeping in mind that where this language is the same as the Federal Rules many precedents by way of court decision will be available to Iowa lawyers which would not otherwise be available.

An effort has also been made by Rule 16 to make more useful the procedure of interpleader, which procedure is present today in the Iowa law, but which due to lack of specific rules and statutes has not been widely used.

A third party procedure, (impleader) and cross petiton procedure (found in Rules 9, 10, and 11) has been drafted to enlarge the application of present Iowa law in cases where questions of liability over, or secondary liability are present, with the purpose of settling these questions insofar as practicable, without resorting to more than one action.

Very few changes have been made in the rules relating to parties which define the capacity of various parties to sue and be sued and the status of the several special groups such as infants, insane, etc.

Details of the changes, reasons for changes, source of the drafted language or principle, and similarity to or adoption of presently existing code sections are noted in the comments following each rule.

RULES

RULE 1. JOINDER OF ACTIONS.

The plaintiff may in the same petition join as many causes of action, either legal or equitable, independent or alternative, as he may have against an opposing party.

Comment: This rule and the following rules on joinder follow a policy of free or liberal joinder, and are patterned not only after the Federal rules, but also rules in many other states and England, which now follow this policy. The rules on joinder have as their corollary Rules (7 and 8) found in the Division on "Trial and Judgment" which give the court broad powers as to separation of issues for trial, based upon convenience and avoidance of prejudice to the parties.

Rule 1 contemplates one plaintiff versus one defendant.

RULE 2. PERMISSIVE JOINDER OF PARTIES--JOINDER OF ACTIONS WHERE MULTIPLE PLAINTIFFS.

Any number of persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action; and all plaintiffs thus entitled to join in the action may join therein as many causes of action, either legal or equitable, independent or alternative, as they may have against an opposing party, providing the actions arise out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law or fact common to all of said causes of action will arise in the trial thereof.

Comment: This rule first contemplates joinder of plaintiffs as parties, and second, limits the types of action they may join in the same way that Federal Rules 18 (a) and 20 (a) provide.

RULE 3. JOINDER OF DEFENDANTS.

(a) Permissive Joinder. Any number of persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or

arising out of the same transaction, occurrence, or series of transactions or occurrences, and if any question of law of fact common to all of them will arise in the action.

Comment. Substance of last part of Federal Rule 20 (a).

(b) Special Provisions – Joint Common Carriers. Common carriers subject to the provisions of Code Sections 10977, 10978, 10979, and 10980 may be joined as therein provided.

Comment. The reference to the code provisions referred to is for the convenience of attorneys.

RULE 4. NECESSARY JOINDER OF PARTIES PLAINTIFF AND DEFENDANT.

(a) Who must Be Joined. Subject to subdivision (b) of this rule, all persons having a joint interest in any action shall be joined on the same side either as plaintiffs or defendants, but when same who should be made plaintiffs refuse to join, they may be made defendants, the reason therefor being stated in the petition. This rule is not applicable to class actions which may be brought under the provisions of Rule 17, and shall not affect the options provided for in sections 10975 and 10976 of the Code nor the provisions of Rule 14 (b) that partners may be sued separately.

Comment: This rule is not greatly different from present Code Section 10973, and is substantially the same as Federal Rule 19 (a).

The last sentence of the rule preserves present exceptions to necessary joinder of jointly interested parties, viz. contracts and partnerships, and also states an exception where class actions are involved.

(b) Procedure on Nonjoinder.

(1). Persons who ought to be joined. When persons who are not indispensable (as hereinafter defined), but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties, and when necessary jurisdiction can be obtained by service of original notice in any manner provided by these rules or by statute, the court shall order their names added as parties and original notice served upon them in the appropriate manner.

If such jurisdiction cannot be had except by their consent or voluntary appearance, the court may proceed with the hearing and determination of the cause, but the judgment rendered therein shall not affect their rights and liabilities.

(2). Indispensable parties. An indispensable party is one whose interest cannot be severed and whose absence prevents the court from rendering judgment between parties before it, or one whose interest would be injuriously affected by a judgment rendered in his absence to an extent that would be inconsistent with equity. When such persons can be made parties, they shall be brought in as provided in (b) (1) above.

Comment: Subdivision (a) incorporates the substance of Code Section 10973 and Federal Rule 19 (a).

Subdivision (b) (1) incorporates the provisions of Code Section 10981 and Federal Rule 19 (b) adapted to the conditions of the state courts.

Subdivision (b) (2) attempts to make more clear what is meant by an indispensable party and to indicate the distinction between persons who ought to be joined and indispensable parties. For Iowa cases on indispensable parties, see Gunnar v. Town, 293 N.W. 1, 228 Iowa 581, and Todd v. Crisman, 123 Iowa 699, 99 N.W. 686.

RULE 5. EXTENT OF RELIEF.

A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for or against one or more parties according to their respective rights or liabilities.

Comment: This rule contains the substance of Federal Rule 20 (a) and is the rule which eliminates the necessity for complete mutuality of relief on both sides, one of the features which has heretofore been a bar to many kinds of joinder.

RULE 6. MISJOINDER

(a) Misjoinder of Parties. Misjoinder of parties, plaintiff or defendant, is not ground for dismissal of an action. Parties may be dropped by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Comment: This is the substance of Federal Rule 21.

(b) Misjoinder of Actions. When two or more actions are joined contrary to these rules, the court shall, upon motion, strike those causes which it is moved to strike, leaving however at least one action pleaded, or the court may in its discretion order the causes separated and docketed separately. The party whose pleading is attacked by motion on the ground of misjoinder of causes of action may, prior to ruling on the motion, withdraw any of said causes.

All objections to the misjoinder of causes of action shall be waived unless made as provided in this rule.

Comment: Heretofore it has been the rule that a misjoinder of causes of action and a misjoinder of parties was ground for a demurrer or dismissal.

See McPherson v. Commercial Building Co. 206 Iowa 562, 218 N.W. 306.

It was also true that the misjoinder of causes of action could be cured by the court dismissing one of the actions, thus avoiding the dismissal of the entire case.

See Minnesota Loan & Trust Co. v. Hannan, 215 Iowa 1060, 247 N.W. 536.

It is hoped by Rule 6 (b) to retain the advantages of the procedure in the Minnesota Loan & Trust Co. case, plus giving to the plaintiff an option as to which cause he wishes to remain, and plus the opportunity for the court to separate the causes and have them tried separately.

Misjoinder of parties is not ground for demurrer either under this rule or under the present law, Gibson v. Union County, 208 Iowa 314, 223 N.W. 111; Brown v. Correll, 227 Iowa 659, 288 N.W. 907.

Thus when a motion to strike causes of action is made, (and

unless made it is waived), three things may happen:

1. The court may strike one or more causes.
2. The plaintiff may withdraw one or more causes.
3. The court may order the causes separated and docketed separately, particularly in cases where jurisdiction of a party would be difficult to obtain, or if the Statute of Limitations might have run if the action had to be commenced over again.

These rules, of course, do away with misjoinder of any kind as ground for demurrer or dismissal.

The last paragraph is the substance of Code Section 10964.

RULE 7. DEPENDENT REMEDIES.

Whenever a cause of action is one heretofore cognizable only if another action has been prosecuted to a conclusion, the causes of action may be joined in a single action, but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties.

This rule shall not permit an action against an indemnitor or insurer to be joined with an action against the parties indemnified or insured where such cannot otherwise be done.

Comment: This rule is taken from Federal Rule (18) (b) which also contains the following language:

> "In particular, a plaintiff may state a cause of action for money and in the same petition a claim to have set aside a conveyance fraudulent as to him, without having first obtained a judgment establishing the claim for money."

In drafting this rule it was felt that to use the language of the Federal Rule last above referred to, might tend to limit its application.

It is the intent of the rule to include the illustrative situation referred to in the Federal Rule.

This rule would modify a portion of Section 11815, Code of 1939.

RULE 8. COUNTERCLAIM.

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any cause of action not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. Failure to plead such counterclaim shall be a bar to any subsequent action thereon.

Comment: This is the same as Federal Rule 13 (a) designated "Compulsory Counterclaim" plus the last sentence which is not in the Federal rules. However, we understand that by making certain counterclaims compulsory, the effect is that if they are not pleaded they shall be barred.

(b) Permissive Counterclaims. A pleading may state as a counterclaim, any cause of action against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim, which the pleader might have brought when suit was commenced, or which was then held by him, either matured or not, if matured when so pleaded. This rule shall not permit counterclaims to be made where specifically prohibited by other rule or by statute.

Comment: This is the substance of Federal rule 13 (b), plus the restriction laid down in Code Section 11151, subsection 3, to prevent purchase of claims after an action is commenced, purely for the purpose of counterclaim.

Illustrations of specific prohibitions of certain counterclaims: Partition of Personal Property, Rule 6; Partition of Real Property, Rule 7; and Code Section 12178 relating to replevin.

(c) Joinder of Counterclaims.

(1). By one party. A party may join in the same counterclaim as many claims as he may have against an opposing party or parties.

(2). By more than one party. Parties joined either as plaintiffs or defendants, may join in the same counterclaim as many claims as they may have against an opposing party or parties, providing all of said claims arise out of the same transaction, occurrence or series of transactions or occurrences.

Comment: This rule is intended to give the same right to join counterclaims as is given by these rules to join original actions.

(d) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleadings of the opposing party.

Comment: This is the same as Federal rule 13 (c) and is intended to definitely eliminate the concept of offset which has to some extent heretofore hampered counterclaim procedure.

(e) Assignments - Exception.

The assignment of a thing in action shall be without prejudice

to any counterclaim, defense, or cause of action, whether matured or not, if matured when pleaded existing in favor of the party pleading it, and against the assignor before notice of the assignment, but this rule shall not apply to negotiable instruments transferred in good faith and upon a valuable consideration before due.

Comment: This is Code Section 10971.

RULE 9. CROSS CLAIMS BETWEEN ORIGINAL PARTIES.

(a) A pleading may state in a cross petition any cause of action by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-petition may include a claim that the party against whom it is asserted is, or may be, liable to the cross-petitioner for all or part of a claim asserted in the action against the cross-petitioner.

Comment: This is the substance of Federal Rule 13 (g).

(b) When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in those rules, if jurisdiction of them can be obtained.

Comment: This is Federal rule 13 (h). (Rule 8 of "Pleadings" also

bears upon the subject of cross-claims, and upon final draft one or the other will be eliminated).

RULE 10. CROSS-CLAIMS AGAINST THIRD PARTIES--IMPLEADER.

(a) When defendant may bring in third party. A defendant who shows by affidavit that, if he be held liable in the action, he will have a right of action against a third person not a party to the action for the amount of the recovery against him, or a part thereof, may, upon due notice to such third person, and to the opposing party, apply to the court for an order making such third person a third party defendant in order that the rights of all parties may be finally settled in one action, and the court in its discretion may make such order.

Comment: Code Section 11155 provides for bringing in of third parties by a defendant who has a cause of action against the third party "affecting the cause of action". It is somewhat doubtful whether the present procedure would allow the enforcement of defendant's claim if it depended upon the outcome of the plaintiff's main action. The above rule covers this situation to the end that the final liability may be settled in one action.

Federal rule 14, which covers the same subject matter, has a somewhat broader application and in litigated cases has been found to fall short of its purposes in important respects. The Committee, therefore, in drafting, has followed the language of the Wisconsin rule which has been found in some years of use to provide an effective procedure, and has received favorable comment from writers on the subject.

(b) When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which, under this rule, would entitle the defendant to do so.

Comment: Gives the plaintiff similar rights to a defendant which he apparently does not now have under Iowa law.

(c) Construction. Rules 9 and 10 shall be liberally construed so that so far as practicable all closely related contentions may be disposed of in one action, even though in a strict sense there be two controversies, provided the contentions relate to the same general subject, and separate actions would subject either of the parties to the danger of double liability or serious hardship.

Comment: Substance of the Wisconsin rule, which emphasizes discretion of the court to carry into effect the general objects of the rule.

RULE 11. PROCEDURE BRINGING IN NEW PARTIES.

Whenever under these rules a person is ordered to be added as a party to the action, he shall be brought in by service of original notice upon him in any manner which would be appropriate under Rules 3 and 4 of "Commencement of Actions", or applicable statutes relating to service of original notice, and the time of appearance and the filing of petition against such third party, shall be as provided in the rules on commencement of actions.

RULE 12. VENUE NOT AFFECTED

No rule permitting or requiring joinder of parties shall be construed so as to compel a party to appear in any county in which

he has not appeared, and could not be compelled to appear, under the rules and statutes relating to places of bringing actions.

RULE 13. PARTIES GENERALLY.

(a) Every action must be prosecuted in the name of the real party in interest.

Comment: Same as Code Section 10967 and first part of Federal rule 17 (a).

(b) An executor or administrator, a guardian, a trustee of an express trust, a party with whom, or in whose name, a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name, without joining with him the party for whose benefit the action is prosecuted.

Comment: Same as Code Section 10968, and also substantially the same as the last portion of Federal rule 17 (a).

RULE 14. CAPACITY OF PARTIES TO SUE OR BE SUED.

(a) Public Bond. When a bond or other instrument given to the state or county or other municipal or school corporation, or to any officer or person, is intended for the security of the public generally, or of particular individuals, action may be brought thereon, in the name of any person intended to be thus secured, who has sustained an injury in consequence of a breach thereof, except when otherwise provided.

Comment: Same as Code Section 10982.

(b) Partnership. Actions may be brought by, or against, a partnership as such, or against all or any of the individual members thereof, or against it and all or any of the members thereof; and a judgment against the firm as such, may be enforced against the partnership property, or that of such members as have appeared or been served with notice. The court may order other partners brought in as provided in Rule 4 (b); if not so brought in, a new action may be brought against the members not made parties, on the original cause of action.

Comment: Substance of Code Section 10983, with the addition of the provision that the court may order other parties brought in.

(c) Foreign corporations. Foreign corporations may sue in the courts of this state in their corporate name.

Comment: Same as Code Section 10984.

(d) Seduction. An unmarried female may maintain, as plaintiff, an action for her own seduction.

Comment: Same as Code Section 10985.

(e) Injury or death of minor child. A father, or, in case of his death, or imprisonment, or desertion of his family, the mother, may as plaintiff, maintain an action for the expenses and actual loss of service resulting from the injury or death of a minor child.

Comment: Same as Code Section 10986.

(f) Prisoner in penitentiary. No judgment can be rendered against a prisoner in the penitentiary until after a defense made for him by his attorney, or, if there is none, by a person appointed by the court.

Comment: Same as Code Section 10989.

(g) Actions by state. The state may maintain actions in the same manner as natural persons, but no security shall be required in such cases.

Comment: Same as Code Section 10990.

(h) Certain actions against state. The state may be sued as provided in Code Sections 10990.1, 10990.2, and 10990.3.

Comment: Reference to these sections is made for convenience of attorneys.

(i) Married women. A married woman may in all cases, sue and be sued, without joining her husband with her, and an attachment or judgment in such action shall be enforced, by or against her, as if she were single.

Comment: Same as Code Section 10992.

(j) Defense by husband or wife. If husband and wife are sued together, the wife may defend for her own right, and if either neglects

to defend, the other may defend for both.

Comment: Same as Code Section 10993.

(k) Desertion of family. When a husband has deserted his family, the wife may prosecute or defend in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had; and, under like circumstances, the husband shall have the same right.

Comment: Same as Code Section 10994.

(l) Minors. The action of a minor must be brought by his guardian, if he has one; if not, by his next friend. The court may dismiss it if it is not for his benefit, or may substitute a guardian or another person as next friend.

Comment: Same as Code Section 10995.

(m) Defense by minor. The defense of a minor must be by his regular guardian, or by one appointed to defend for him where no regular guardian appears, or, where the court directs a defense, by one appointed for that purpose. No judgment can be rendered against a minor until after a defense by a guardian.

Comment: Same as Code Section 10997.

(n) Appointment of guardian ad litem. After the service of the original notice in the action or proceeding, the court shall have power

to appoint a guardian ad litem, and to remove such guardian when the interests of the minor require it. The appointment may also be made on the application of the minor, if he is of the age of fourteen years, and applies at, or before the time he is required to appear and defend. If he does not, or is under that age, the appointment may be made on the application of any friend of his, or on that of the plaintiff in the action.

Comment: Substance of Code Sections 10998 and 10999, but eliminating appointment by the clerk.

(o) Insane person. The action of a person judicially found to be of unsound mind, must be brought by his guardian, but if he have none, the court may appoint one for the purposes of the action.

Comment: Same as Code Section 10996, but eliminating appointment by the clerk.

(p) Defense of incompetent person. The defense of an action against a person judicially found to be of unsound mind, or of one confined in any state hospital for the insane, or of one who by the certificate of a physician in charge of him, appears to be mentally incapable of his own defense, must be by his regular guardian, or by a guardian appointed by the court to defend for him, and no judgment can be rendered against such person until after a defense by such guardian.

Comment: Substance of Code Section 11000, plus the provision as to persons without guardian, that if as phyician in charge certifies that

the party is mentally incapable of his own defense, that defense must be made by a guardian ad litem.

(q) Appointment of guardian ad litem. After service of original notice in the action or proceedings, and when the necessity for a guardian ad litem shall appear, the court shall have the power to appoint a guardian ad litem for the persons named in (p) above and to remove such guardian when the interests of such persons require it. Such appointment may be made upon the application of any friend of the defendant, or on that of the plaintiff.

Comment: Includes the substance of Code Section 11000, but rearranged.

RULE 15. SUBSTITUTION OF PARTIES.

(a) Death. Actions contemplated by Sections 10957 and 10958 of the Code of Iowa, may be brought by or against the legal representatives or successors in interest of the deceased, or the court, on motion made within two years after the death of a party to an action, may order substitution of the proper parties, and upon such order, the action shall be deemed a continuing one, and to have accrued to such representative or successor at the time it would have accrued to the deceased if he had survived. If such action is continued against the legal representative of the defendant, a notice shall be served on him as in the case of original notices. If such substitution is not made within two years after the death of a party, the action shall be dismissed

as to the deceased party.

In the event of the death of one or more of the plaintiffs, or of one or more of the defendants, in an action in which the right sought to be enforced survives, only to the surviving plaintiffs, or only against the surviving defendants, the action shall not abate. The death shall be suggested upon the record, and the action shall proceed in favor of, or against the surviving parties.

Comment: This rule contains the substance of Code Section 10959, and also certain features of Rule 25 (2) of the Federal rules, providing for a two year limitation.

(b) Transfer of interest. No action shall abate by the transfer of any interest therein during its pendency, and new parties may be brought in, as may be necessary.

Comment: Same as Code Section 10991.

(c) Incompetency pending action. Where, during the pendency of an action, a party is judicially found to be of unsound mind, or is confined in any state hospital for the insane, or, by the certificate of the physician in charge, appears to be mentally incapable of acting in his own behalf, the fact being stated on the record, if he is plaintiff his guardian shall be joined with him in the action as such, or a guardian appointed for the purpose of continuing the action; if defendant, a guardian ad litem shall be appointed, or the plaintiff may, on ten days notice thereof to his guardian, have an order making the

guardian a defendant also.

Comment: Substance of Code Section 11001, changed to fit preceding provisions of these rules.

(d) Nonabatement in case of guardianship. When a guardianship shall cease by the death of the guardian, his removal, or otherwise, or by the decease of his ward, any action or proceeding then pending shall not abate, but his successor or the person for whom he was guardian, or the executor or administrator of such person, as the case may require, shall be substituted or joined as a party thereto; or, if no application is made for substitution, the court may on its own motion, appoint a special guardian or administrator to represent the deceased party in the action.

Comment: Substance of Code Section 12583, plus the provision for appointment of special guardian or administrator.

(e) Majority of minor pending action. If during the pendency of an action, a minor shall have reached his legal majority, then such action shall not abate, but he shall continue as a party to the action in his own right.

Comment: This is new, and has been inserted to create uniformity of practice.

(f) Public officers. When any officer of the State of Iowa, agency thereof, or of any county or municipality, or an executor, administrator, trustee, of an express trust or other party legally

authorized to sue or defend in a representative or official capacity, is a party to an action in such representative capacity, and during its pendency, dies, resigns, or otherwise ceases to hold office, the action shall not abate, and may be continued and maintained by or against his successor, and the court may order the name of such successor substituted as a party upon hearing, notice, and application therefor.

Comment: This is new so far as the Iowa Code is concerned and is similar to Federal rule 25 (d).

RULE 16. INTERPLEADER.

(a) Right of interpleader. Whenever a person is or may be exposed to double or multiple liability, or vexatious litigation, by reason of claims of two or more claimants, he may file, as plaintiff, a bill of interpleader in equity, joining such claimants as defendants.

It is not ground for objection to the interpleader that the claims of the several claimants, or the titles on which their claims depend, do not have a common origin, or are not identical, but are adverse, to and independent of one another, or that plaintiff avers that he is not liable in whole, or in part to any or all of the claimants.

Comment: The common law equity interpleader does exist in Iowa, although we believe not widely used. There is also a very limited interpleader procedure provided by Section 11002 of the Code et sequitur. These rules on interpleader, we believe, will result in its wider use and also liberalize the common law procedure in keeping with modern tendencies.

(b) Interpleader by defendant. A defendant in any action in which he is exposed to similar liability, may obtain such interpleader by way of cross-claim or counterclaim; or upon application to the court, may obtain an order requiring any third person to appear, in a reasonable time to be fixed by the court, and to maintain or relinquish his claim against the defendant or against any property which may be the subject of the action. If such third person being served with a copy of the order fails to appear, the court may declare him barred of all claims against the defendant, or in the property which is the subject of the action.

Comment: Rules (a) and (b) incorporate the substance of Federal rule 22 (1), and also provisions of Code Sections 11002 and 11003.

(c) Deposit by party filing bill. If either a plaintiff of defendant filing an interpleader, acknowledges therein that he is liable for a certain amount of money, or is not the owner or entitled to the property in question, then the court may make such order for deposit in court, or for bond, or for otherwise preserving or safekeeping the property, as may be proper.

Comment: This provision is common to all interpleader proceedings.

(d) Discharge of plaintiff. Where a bill of interpleader is filed as an original action by plaintiff, if upon appearance by the defendants, it shall appear to the court that the party filing the inter-

pleader has by compliance with the order for deposit, bond, or safe-keeping, discharged his obligation in full, then the court may upon hearing, discharge the party filing the bill.

Comment: This provision is common to all interpleader proceedings, and is the real purpose of allowing interpleader.

(e) Discharge of defendant. Where defendant has made application interpleading another party, and such party appears, he shall be allowed to make himself a party in the action in lieu of the original defendant, who shall be discharged from all liability to either of the parties in respect to the subject of the action, upon his compliance with the order of the court for bond, payment, deposit, or safekeeping thereof.

Comment: Substance of Code Section 11004.

(f) Injunction. Upon filing of the petition and presenting proof of service of original notice upon the defendants, the court shall have power to enjoin all defendants and all other persons interested in the subject matter of the action, from instituting or prosecuting any suit or proceeding on account of such money or property as may be the subject of the action, until further order of court.

Comment: This type of relief is essential to the proper working of the interpleader procedure, so that the defendants or claimants cannot defeat the purpose of the interpleader, which is to avoid exposing a party to possible double liability or vexatious litigation. The language is taken in substance from the Federal Interpleader Act, U.S.C.A., Title 28 Section 41 (26).

(g) Costs. The court, upon application, may make an order taxing costs against the unsuccessful party, and in favor of the successful party, and the party filing the bill of interpleader.

(h) Sheriff or officer may interplead. The provisions of this rule shall be so far applicable to an action brought against a sheriff or other officer for the recovery of personal property taken by him under an attachment or execution, or for the value of such property so taken and sold by him, that, upon exhibiting to the court the process under which he acted, with his affidavit that the property for the recovery of which, or its proceeds, the action was brought, was taken under such process, he may have the attaching or execution creditors made a joint defendant with him, and if judgment go against them, it shall provide that the property of such creditor shall be first exhausted in satisfaction thereof.

Comment: Same as Code Section 11005.

(i) Substitution. In an action against a sheriff or other officer for the recovery of property taken under an attachment or execution, the court may, upon application of the defendant, and of the party in whose favor the process issued, permit the latter to be joined with such officer as defendant.

Comment: Same as Code Section 11006.

RULE 17. CLASS ACTIONS.

(a) If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all, may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is:

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right, and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do, or may, affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Comment: This is the same as Federal rule 23, and while not differing greatly in principle from the present Iowa Code Section 10974, its adoption is recommended for purposes of making available the Federal precedents.

(b) Where it appears that a class is composed of persons in being, and others who may be later born and the object of the action is the adjudication of claims which do, or may, affect specific property involved in the action, they may be made parties by naming them as a class, provided all living members of the class are made parties by name, and jurisdiction of the interests of the living members of the class is

obtained in the appropriate manner.

Comment: The doctrine of virtual representation has been applied in Iowa in the following cases among others:

John Hancock Life Ins. Co. v. Dower, 271 N.W.193; 222 Ia. 1377; Buchan v. German American Land Co., 164 N.W.119; 180 Ia. 911; Harris v. Randolph, 236 N.W. 51, 213 Ia. 772.

The language of this rule would tend to furnish greater protection to persons unborn having an interest, than heretofore, since it requires that all living members of a class are to be made parties.

(c) In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may be properly asserted by it, the petition shall be supported by affidavit, and shall also set forth the ultimate facts regarding the efforts of the plaintiff to secure from the managing directors or trustees, and if necessary from the shareholders, such action as he desires, or the ultimate facts which are his reason for not making such effort.

(d) A class action shall not be compromised, or voluntarily dismissed, without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of Subdivision (a) of this rule, notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of Subdivision (a), notice shall be given only if the court requires it. Notice under this sub-

division by posting shall not be directed by the court.

(e) Before entry of final judgment in a class action, the court shall make inquiry, and determine that the representation of the parties to the action adequately represent the class, and if it shall determine that the class is not adequately represented, it may order new parties added to the case, who shall be served by original notice in the appropriate manner.

(f) An action against a class shall not go to decree or judgment by default for want of appearance. If none of the class shall appear, the court shall appoint an attorney to appear for, and defend for the class, taxing a reasonable fee for said appointed attorney as a part of the costs of the case.

ADVISORY COMMITTEE ON RULES OF PROCEDURE

Final Tentative Draft

(Approved July 27, 1942)

DEPOSITIONS AND PERPETUATING TESTIMONY

FOREWORD

The provisions of the present code governing the taking of depositions and perpetuating of testimony, are contained within Sections 11358 to 11407, both inclusive, Code of Iowa, 1939.

The committee believes that the present statutory procedure is much too cumbersome and has no flexibility, and except as indicated in the comments, no attempt has been made to utilize any of the present statute law relating to the subject.

RULE 1. DEPOSITIONS PENDING ACTION.

A. When Depositions May Be Taken. By leave of Court after jurisdiction has been obtained over any defendant or over property which is the subject of the action, or without such leave after an answer has been filed, the testimony of any person, except an adverse party and except any person whose testimony is sought as the representative, past or present, of an adverse party, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for use as evidence in the action. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of Court on such terms as the Court prescribes.

B. Default Cases. Depositions may be taken in default cases where proof of the facts relied upon by the plaintiff must be established. In such cases when there is no appearance by the defendant and where the defendant has no attorney of record, notice as hereafter required of the taking of such deposition shall be served upon or accepted by the Clerk of the District Court of the County where such action is pending.

C. Not Taken on Certain Days. Except by consent of the parties and the witnesses, no deposition shall be taken on any general or primary election day or any day now or hereafter made a legal holiday.

Comment:

Rule 1A is an adaptation of Federal Rule 26 (a), except that it completely eliminates discovery and does not permit the taking of depositions of the adverse party or those in privity with him.

Rule 1B provides for depositions in all default cases, including divorce actions, and provides for notice in such cases. This is a simplification of Code Section 11378.

Rule 1C is not contained in the Federal Rules, but is suggested by Code Section 11362. Said section also provides that depositions may not be taken on notice during term time without a court order. No sound reason appears for the retention of this restriction, so that it has been eliminated.

D. Scope of Examination. Unless otherwise ordered by the Court, the deponent may be examined regarding any matter not privileged or self incriminating, which is revelant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party. A deponent may also be examined as to the existence, description, nature, custody,

condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

E. Use of Deposition. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who appeared or was represented at the taking of the deposition or who had due notice thereof, or who had stipulated therefor, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association, which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness may be used by any party for any purpose if the Court finds: (a) that the witness is dead; or (b) that the witness is a greater distance than 100 miles from the place of trial or hearing, or is outside the State of Iowa, unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the witness by subpoena; or (e) upon

application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other relevant parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court in the State of Iowa has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

F. Objections to Admissibility. Subject to the provisions of Rule 7, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

G. Effect of Taking or Using Depositions. A party shall not be deemed to make a person his own witnesss for any purpose by taking his deposition. The introduction in evidence of the deposition or any part

thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) division E of this rule. At the trial or hearing any party may introduce evidence to contradict any relevant evidence contained in a deposition whether introduced by him or by any other party.

Comment: Rules E, F, and G are an adaptation of Federal Rule 26 with some slight changes.

RULE 2. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.

A. Before Action.

(1) Petition. A person who desires to perpetuate his own testimony or the testimony of another person, not expected to be an adverse party, or not the representative of an expected adverse party, regarding any matter that may be cognizable in any court of record of the State of Iowa may file a petition supported by affidavit in such court in the County where the contemplated action could then be maintained. The petition shall be entitled in the name of the petitioner and shall show: (a) that the petitioner expects to be a party to an action cognizable in any court of record of the State of Iowa, but is presently unable to bring it or cause it to be brought; (b) the subject matter of the expected action and his interest therein; (c) the facts which he desires to

establish by the proposed testimony and his reasons for desiring to perpetuate it; (d) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and (e) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the sole purpose of perpetuating their testimony.

(2) Notice, Service and Representation. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served as provided for the service of original notices other than by publication; but if such service cannot with due diligence be so made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, or the Court upon a showing of extraordinary circumstances may prescribe a hearing on less than twenty days notice.

The Court shall appoint an attorney to represent and cross examine for any expected adverse party not personally served with notice, or who may be a minor or a person insane or otherwise under legal disability.

If a party is a minor, insane or under legal disability or has not been personally served with notice, the deposition shall not be admissible against him in any subsequent action.

(3) Order and Examination. If the Court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, and is not for the purpose of discovery, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the Court in which the action is pending shall be deemed to refer to the Court in which the petition for such deposition was filed.

(b) Use of Deposition. In any action later commenced against any expected adverse party named in the petition, their privies or successors in interest, such depositions, or certified copies thereof, may be given in evidence by either party where the witnesses are dead or insane, or where their attendance for oral examination cannot be obtained as required.

C. Pending Appeal. If an appeal has been taken from a judgment of a court of record, or before the taking of an appeal, if the time therefor has not expired, the Court in which the judgment was rendered

may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in such court. In such case the party who desires to perpetuate the testimony may make a motion in such court for leave to take depositions, upon the same notice and service thereof as if the action were pending for trial in such court. The motion shall show (a) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (b) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice and not for the purpose of discovery, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in courts of record.

D. Perpetuation by Action. This rule shall not limit the power of a court to entertain an action to perpetuate testimony.

E. Filing. All depositions taken pursuant to this rule shall be promptly filed in the office of the clerk of the court. If not filed within 30 days, unless the time is enlarged by the court, they shall not be received in evidence.

Comment:

This rule is the substance of Federal Rule 27, except that precautions have been taken to eliminate discovery. Division D is a part of the Federal rules, and is recommended for the reason that

there is a common law remedy, somewhat restricted, for the perpetuation of testimony by action.

Division E is new, its purpose being to compel the prompt filing of depositions when taken.

RULE 3. DEPOSITIONS UPON ORAL EXAMINATION.

A. Notice of Examination - Time and Place. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action who is not in default for want of appearance. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom notice is served, the Court may for cause shown enlarge or shorten the time.

Except as hereinafter permitted, or by agreement of all the parties not in default for want of appearance, the right to take depositions upon oral examination shall be limited to depositions taken at points within this State, or points in any foreign state not more than one hundred miles distant from the nearest point within this State.

Upon satisfactory showing that it is not practicable to take the deposition upon written interrogatories and that the issue is of sufficient importance to justify it, the Court may order it taken on oral interrogatories at a greater distance and at any point outside this state.

B. Record of Examination - Oath - Objections. The officer before whom the deposition is to be taken shall put the witness on oath, and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objection. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

C. Submission to Witness - Changes - Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. When the testimony

is taken and transcribed by an official Court Reporter of the State of Iowa, the deposition need not be read to or be signed by the witness. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor, or the fact that the testimony was taken and transcribed by an official Court Reporter of the State of Iowa; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 7D the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

D. Certification and Filing by Officer - Copies - Notices of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)", and shall promptly file it with the Court in which the action is pending or send it by registered mail to the Clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The Clerk of the Court with whom filed shall promptly

give notice by mail of its filing to all parties not in default for want of appearance.

E. Failure to Attend or to Serve Subpoena – Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend in person or by attorney and proceed therewith, and another party attends in person or by attorney pursuant to the notice, the Court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him, and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the Court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Comment: Rule 3 is substantially the same as Federal Rule 30, except with respect to the limitation as to distance.

RULE 4. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.

A. Serving Interrogatories – Notice. A party desiring to take the deposition of any person upon written interrogatories shall serve

them upon every other party who is not in default for want of appearance, with notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within ten days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within five days thereafter the latter may serve re-direct interrogatories upon a party who has served cross interrogatories. Within three days after being served with re-direct interrogatories, a party may serve re-cross interrogatories upon the party proposing to take deposition. The Court may, however, upon application of any party and for good cause shown, enlarge or shorten the time for serving cross interrogatories, re-direct interrogatories or re-cross interrogatories.

B. Oral Cross Examination. When notice is served of taking a deposition on written interrogatories, the adverse party may elect to appear and orally cross-examine the witness, and if he so elects, he shall serve written notice of such election on the party seeking to take the deposition on or before the date when he would be required to serve cross-interrogatories. If such notice is given, the party seeking to take the deposition shall within 5 days notify the party electing to cross-examine orally, by writing served upon or mailed to him, of the date, hour and place where the deposition will be taken.

C. Right to Waive Interrogatories. If the adverse party elects

to cross-examine orally the party seeking to take the deposition may waive his written interrogatories and appear and orally examine the witness.

D. Officer to take Responses and Prepare Record.

A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly in the manner provided by Rules 3 B, C and D to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him. It shall not be necessary, however, that the testimony be taken stenographically.

E. Notice of Filing. When the deposition is filed, the Clerk of the Court in which it is filed shall promptly give notice thereof by mail to all parties not in default for want of appearance.

RULE 5. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

A. Within the United States. Within the United States or within territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

B. In Foreign Countries. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation,

consul general, counsel, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the Country).

C. Disqualification for Interest. No deposition shall be taken before a person who is a relative within the fourth degree or is an employee or attorney or counsel of any of the parties, or is a relative within the fourth degree or employee of such attorney or counsel, or is financially interested in the action.

Comment: Same as Federal Rule 28.

RULE 6. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS.

If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Comment: Same as Federal Rule 29.

RULE 7. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.

A. As to Notice. All errors and irregularities in the notice

for taking a deposition are waived unless written objection is promptly served upon the party or his attorney of record giving the notice.

B. As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

C. As to Taking of Deposition. (1) Objections to the competency of a witness or to the testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time. (2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objections thereto are made at the taking of the deposition. (3) Objections to the form of written interrogatories submitted under Rule 6 are waived unless served in writing upon the party or attorney of record propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

D. Completion and Return of Deposition. Motion to Suppress.

Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 3 and 4 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. No motion to suppress shall be sustained unless the error or illegality complained of is substantial, and materially affects the rights of one or more of the parties.

Comment: Rule 7 is substantially the same as Federal Rule 32.

RULE 8. SUBPOENA FOR TAKING DEPOSITIONS - PLACE OF EXAMINATION.

A. Application by any party to the clerk of a court of record of the county where the action is pending, or proof of service of a notice to take a deposition as provided in Rules 3A and 4A, constitute a sufficient authorization for the issuance by the clerk of such court for the county in which the action is pending, of subpoena for the persons named or described therein. The Clerk shall not issue a subpoena commanding the production of documentary evidence on the taking of a deposition without an order of court upon application therefor.

B. A resident of the State of Iowa may be required to attend only in the county wherein he resides or is employed or transacts his business in person.

Comment: Rule 8 is substantially the same as Federal Rule 45, with changes to conform to State practice.

RULE 9. SERVICE AND NOTICE.

A. Manner of Service. Whenever, in these rules, provision is made for serving notices or interrogatories upon a party, service may be made by mailing the notice or interrogatories by ordinary United States mail. If the party has an attorney of record the service, whether by mail or personal service, may be made upon such attorney.

B. Notice By Posting not Permitted. Whenever, in these rules, provision is made for the prescribing by the court of the manner and form of giving notice to the interested parties, notice by posting shall not be permitted.

RULE 10. COSTS.

The costs of taking depositions, including those incurred in any proceeding for securing them, shall be paid in the first instance by the party causing them to be taken, they shall be noted upon the return or certificate and taxed by the clerk and no deposition shall be read in evidence by the party who caused it to be taken until the costs incurred in the taking have been paid. Upon the entry of judgment in the action the court shall tax against the losing party only such portion of the cost of taking depositions as in its judgment were necessarily incurred in the production of testimony offered and admitted in evidence at the trial.

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Final Tentative Draft

(Approved April 25, 1942)

INJUNCTIONS

FOREWORD

The following rules are designed to replace the statutory provisions relating to injunctions now contained in Chapter 535 of the 1939 Code of Iowa. None of the Code sections are found here in exactly the same form and language as in the present Code, but several provisions of the present statutes are not materially or substantially changed. Others not materially changed are included in a shortened, condensed and simplified form.

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

The prohibition against presenting an application for temporary injunction to more than one court or judge is abolished, and the requirement that a statement as to prior presentation, if any, in the petition or by counsel substituted therefor.

The statutory limitation on the power of the Supreme Court or a Justice thereof to grant temporary injunctions is omitted.

The requirement of filing petition prior to presentation thereof for temporary injunction to the court during term time is omitted.

The penalty of temporary injunction bond is reduced to one and one-fourth probable liability thereon.

Bond in actions for divorce, separate maintenance and for annulment of marriage is made discretionary with trial court.

The distinction between motion and application to dissolve temporary injunctions is abolished, and provision is made for opportunity to the moving party to promptly submit motion to dissolve, vacate or modify temporary injunctions.

Requirement of notice of application for dissolution of temporary injunction is abolished, and requirement of opportunity to resist motion to dissolve substituted therefor.

Statutory prohibition against more than one motion to dissolve or modify injunction is omitted.

The present procedure on violation of injunction is abolished, and in lieu thereof such violation is defined as a contempt to be punished accordingly.

The proposed rules represent a reduction and consolidation of 28 existing Code sections into 11 proposed rules.

RULES

RULE 1. INDEPENDENT OR AUXILIARY REMEDY.

An injunction may be obtained as an independent remedy in any action cognizable by equitable proceedings, or as an auxiliary remedy in all actions, and the party applying therefor either as an independent or auxiliary remedy, may also in the same action include a claim for damages or other relief. An injunction may be granted either as a part of the judgment rendered in the action, or it may, if proper grounds therefor are shown, be granted by order at any stage of the action before judgment, and shall then be known as a temporary injunction.

Comment: This rule supplants and condenses Sections 12512, 12513 and 12514, but does not substantially change the provisions thereof.

RULE 2. TEMPORARY--WHEN ALLOWED.

Where it appears by the petition therefor, which must be supported by affidavit, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some action which would produce great or irreparable injury to the plaintiff; or where, during litigation, it appears that a party is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of another party's right respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

Comment: Same as Section 12515 except that "party" and "another party" are substituted for the terms "plaintiff" and "defendant" to permit the granting of a temporary injunction to defendant or any party other than the plaintiff during litigation.

RULE 3. STATEMENT AS TO PRIOR PRESENTATION.

Every petition for temporary injunction must state therein, or be accompanied by a certificate in writing of the attorney presenting the same stating, whether a petition for the same relief, or a part thereof, previously has been presented to and refused by any other court or Justice of the Supreme Court, and, if so, the name of the court or Justice refusing the same, and the date of such refusal. A

court or Justice of the Supreme Court refusing a temporary injunction shall endorse such refusal upon the petition therefor.

Comment: This rule abolishes the prohibition contained in Section 12523 against presenting an application for temporary injunction to more than one court, but does require a statement in the petition or in writing by counsel as to whether the same had been previously presented as a prerequisite to granting thereof.

RULE 4. LIMITATION ON COURTS OUTSIDE THE DISTRICT.

A temporary injunction shall not be granted by a district court outside the district where the action is pending or is to be brought, unless it be made to appear by affidavit that the application therefor cannot be made promptly to the court within such district.

Comment: The provisions of Sections 12517, 12518 and 12520 containing limitations on the granting of injunctions are omitted, and the provisions of this rule substituted therefor.

RULE 5. BY WHOM GRANTED.

A temporary injunction may be granted by:

(a) The court in which the action is pending or is to be brought.

(b) The Supreme Court of any Justice thereof.

(c) Any other district court, subject to the limitation in Rule 4 hereof.

Comment: This rule supplants Section 12516, and there is no substantial change thereof except to harmonize with other proposed rule

drafts so as to limit the distinction between the court and a judge, and in the interests of clarity reference is made in Sub-section 3 of this rule to the limitations in Rule 4 hereof.

RULE 6. NOTICE DISCRETIONARY.

The court, before granting a temporary writ, may require reasonable notice of the time and place of hearing on the petition therefor to be given to the party to be enjoined.

Comment: This language contains a requirement similar to that contained in Section 12530 except that reasonable notice, etc., are used instead of opportunity to show cause in order to use the same terminology found in Section 12521, applying to situations where notice is required rather than discretionary. Furthermore, the requirement is notice of hearing rather than notice of application as the present statute now reads.

RULE 7. WHEN NOTICE NECESSARY.

A temporary injunction to stop the general and ordinary business of a corporation, or the operations of a railway, or of a municipal corporation, or the erection of any building or other work, or the board of supervisors of any county, or to restrain a nuisance, can only be granted upon notice.

Comment: This rule contains substantially the same provisions as our present Section 12521. Sections 12522, 12524 and 12525 dealing with granting of a writ during term time, motion to dissolve injuntion, and entry of order, are omitted.

RULE 8. BOND.

The order of allowance shall direct the temporary injunction to issue only after the filing of a bond in the office of the clerk of the proper court, with sureties to be approved by the clerk, in a penalty of one and one-fourth the probable amount of liability to be thereby incurred, which penalty shall be fixed in the order. The bond shall be conditioned for the payment of all damages which may be adjudged against petitioner by reason of such injunction. In actions for divorce, separate maintenance, and for annulment of marriage, the court may, in its discretion, grant an injunction without bond, or fix the penalty thereof in such amount as the court may deem just and reasonable.

Comment: An effort has been made to combine the existing provisions of Sections 12526 and 12529 by this rule. The penalty of the bond has been made one and one-fourth times the probable amount of liability, in harmony with the general effort to standardize the penalty of bonds. Likewise the provisions hereof seek to make the requirement of bond discretionary with the trial court where an injunction is asked in any action for anulment of marriage, divorces, etc.

RULE 9. VENUE AND BOND ON ENJOINING PROCEEDINGS OR JUDGMENT.

When proceedings in a civil action, or on a judgment or final order are sought to be enjoined, the action must be brought in the county and court in which such action is pending or the judgment or order was obtained, unless such judgment or final order is obtained

in the Supreme Court, in which case the acton must be brought in the county and court from which the appeal was taken to the Supreme Court. In such action the bond must be further conditioned to pay such judgment, or comply with such final order, if the injunction is not made permanent, or to pay any judgment that may be ultimately recovered against the party obtaining the injunction on the cause of action enjoined.

Comment: The provisions of this rule contain substantially the same provisions as Section 12527 and Section 12528, with no change in the substance thereof.

RULE 10. DISSOLUTION.

If the order granting temporary injunction is made and entered without notice, any party enjoined thereby may at any time move the court in which the action is pending, to dissolve, vacate or modify such temporary injunction, and such motion shall be submitted to the court or Justice granting the temporary injunction if it be made to appear by affidavit on behalf of the party filing the motion, that such motion cannot be promptly submitted to the court in which the action is pending.

Comment: This rule supplants the provisions of Sections 12524, 12531, 12532 and 12533, and provides for dissolution of a temporary injunction on motion, thus eliminating the duplicating provisions of the present statutes, which provide for both motions and applications of dissolution. The provisions of Section 12534 prohibiting more than one motion to dissolve or modify an injunction are omitted.

This rule further permits the party, who files motion to dissolve a temporary injunction, to go outside the district in which the action is pending to obtain prompt hearing on such motion under the same conditions in which the party making application for a temporary injunction is entitled to present such application to a judge outside of the district in which the action is pending or is to be brought as provided by Rule 4 hereof. In view of the abolition of the distinction between the "court" and a "judge", to harmonize with the provisions of the other proposed rule drafts, it is, of course, obvious that this rule permits a motion to dissolve, vacate or modify temporary injunction to actually come before and be submitted to a judge other than the judge granting the temporary injunction, where the injunction is granted by a judge of the court in which the action is pending or is to be brought. Similarly if the injunction has been granted under the provisions of Rule 4 by a court outside of the district in which the action is pending or is to be brought, and prompt disposition of the motion cannot be obtained in the district where the action is pending, then upon showing the party filing the motion is permitted to have the same submitted to the court in the district where the injunction was granted, and in such event it may be submitted either to the judge who granted the injunction, or to any other judge in that same district.

RULE 11. VIOLATION AS CONTEMPT.

The violation of the provisions of any temporary or permanent injunction shall constitute a contempt and be punished accordingly.

Comment: This language supplants the procedure contained in Sections 12535, 12536, 12537, 12538 and 12539 of the Code dealing with violations of injunctions, which procedure is in conflict with the procedure and punishment for contempt set out in Chapter 536 of the Code, commencing in Section 12545, et seq., which conflict arose before the Supreme Court in the case of Carey v. District Court, 226 Iowa 717, 285 N. W. 236.