RULES of CIVIL PROCEDURE

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Prescribed

by

THE IOWA SUPREME COURT

and

Reported to

THE FIFTIETH GENERAL ASSEMBLY
of Iowa

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MEMBERS

of the

SPECIAL COMMITTEE of the SENATE

of

THE FIFTIETH GENERAL ASSEMBLY

to

CONSIDER THIS REPORT

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(Home Address, Pocahontas)

Emerson, S. Ray, Ranking Member, Fifth District
(Home Address, Creston)

Bekman, E. K., Thirteenth District
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Evans, K. A., Eighth District
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(Home Address, Dubuque)

MEMBERS

of the

SPECIAL COMMITTEE of the HOUSE

of

THE FIFTIETH GENERAL ASSEMBLY

to

CONSIDER THIS REPORT

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(Home Address, Bloomfield)

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Walter, W. Eldon, Marshall County
(Home Address, Beaman)

To the General Assembly of Iowa:

In accordance with Chapter 311, Acts of the Forty-ninth General Assembly, the Supreme Court of Iowa has prescribed and herewith reports to the General Assembly rules of pleading, practice and procedure and forms of process, writs and notices, for proceedings of a civil nature in courts of this state, for the purpose of simplifying the same, and of promoting the speedy determination of litigation upon its merits.

These rules are the result of efforts over a period of about twenty-two months during which a study has been made of the rules of procedure in this state and in other jurisdictions, including the new rules promulgated by the Supreme Court of the United States. During this period the court has had the valuable assistance of an advisory committee, appointed by the court, consisting of fifteen representative and able lawyers, and some twenty sub-committees of equally capable attorneys and judges. Much credit is due the members of the committee and subcommittees, whose names are listed in this report. All served without compensation.

Tentative drafts of these rules were furnished to every lawyer and judge in Iowa, from whom several hundred communications were received. These communications were carefully considered. The tentative drafts were also discussed in meetings of lawyers held in every judicial district in this state.

The final report of the advisory committee was submitted to the court about December 10, 1942. Since that time each member of the court has carefully studied the report and numerous changes have been made therein.

This report includes:

1. Names of members of the advisory committee.
2. Names of members of the sub-committees.
3. Some information regarding the work of the committees.
4. Table of contents.
5. The rules.
6. Appendix I, showing statutes affected by these rules. (The inclusion of a statute in this table by no means indicates that the existing procedure has been changed by these rules. The greater portion of the statutes listed as of no further force and effect

have been incorporated in the rules either verbatim, in substance, or with slight modifications.)

Ten additional copies of this report are being furnished to the General Assembly (twelve in all). While these are about all the copies now available, arrangements can probably be made to furnish the General Assembly with many additional copies, perhaps one for each member, if so desired.

Respectfully submitted,

.....

Chief Justice,
Supreme Court of Iowa.

Des Moines,
January 28, 1943.

I. Members of the Advisory Committee to assist the Court in preparation of Rules:

Wayne G. Cook, Chairman
Scott County (Davenport).
Harley H. Stipp, Vice-chairman
Polk County (Des Moines).
Harold G. Cartwright
Marshall County (Marshalltown).
Kenneth R. Cook
Mills County (Glenwood).
E. P. Donohue
Chickasaw County (New Hampton).
Dan C. Dutcher
Johnson County (Iowa City)
Judge Henry N. Graven
Cerro Gordo County (Clear Lake).
Curtis W. Gregory
Dallas County (Adel).
T. M. Ingersoll
Linn County (Cedar Rapids).
Denis M. Kelleher
Webster County (Fort Dodge).
George C. Murray
O'Brien County (Sheldon).
Floyd E. Page
Crawford County (Denison).
C. F. Stilwill
Woodbury County (Sioux City).
Roscoe P. Thoma
Jefferson County (Fairfield).
John K. Valentine
Appanoose County (Centerville).

II. Members of the various sub-committees:

Don Barnes
Linn County (Cedar Rapids).
L. L. Brierly
Jasper County (Newton).
Robert Buckmaster
Black Hawk County (Waterloo).
R. F. Clough
Cerro Gordo County (Mason City).
Fred Cromwell
Des Moines County (Burlington).
W. S. Cooper
Madison County (Winterset).
John P. Dorgan
Scott County (Davenport).
Lee Elwood
Howard County (Cresco).
L. B. Forsling
Woodbury County (Sioux City).
Karl Geiser
Pottawattamie County (Council Bluffs).
Fred Gilchrist, Jr.
Pocahontas County (Laurens).
Stanley Haynes
Cerro Gordo County (Mason City).
Norman R. Hays
Marion County (Knoxville).
Allen A. Herrick
Polk County (Des Moines).
R. E. Hines
Shelby County (Harlan).
Harry S. Johnson
Linn County (Cedar Rapids).
Craig R. Kennedy
Black Hawk County (Waterloo).
E. O. Korf

Jasper County (Newton).
L. E. Linnan
Kossuth County (Algona).
Alan Loth
Webster County (Fort Dodge).
H. J. Mantz
Audubon County (Audubon).
Jesse E. Marshall
Woodbury County (Sioux City).
Paul H. McCoid
Henry County (Mount Pleasant).
J. W. McGeeney
Floyd County (Charles City).
E. W. McManus
Lee County (Keokuk).
Walter McNett
Wapello County (Ottumwa).
Francis J. Mullen
Webster County (Fort Dodge).
Robert Munger
Woodbury County (Sioux City).
C. Edwin Moore
Polk County (Des Moines).
Ben P. Poor
Des Moines County (Burlington).
Clifford Powell
Montgomery County (Red Oak).
G. Belvel Richter
Allamakee County (Waukon).
Thomas B. Roberts
Polk County (Des Moines).
R. G. Rodman
Cherokee County (Cherokee).
George J. Sager
Black Hawk County (Waterloo).
Frank W. Senneff
Hancock County (Britt).
John A. Senneff
Cerro Gordo County (Mason City).
Edward L. Simmons
Appanoose County (Centerville).
P. J. Siegers
Jasper County (Newton).
H. Y. Simmons
Linn County (Cedar Rapids).
Berry J. Sisk
Woodbury County (Sioux City).
Heinrich C. Taylor
Davis County (Bloomfield).
Henry TePaske
Sioux County (Orange City).
Bailey Webber
Wapello County (Ottumwa).
W. A. Westfall
Cerro Gordo County (Mason City).
Allen Whitfield
Polk County (Des Moines).

The members of the Advisory Committee were also members of the various sub-committees. Each member of the committee was a chairman of a particular sub-committee and was active in the sub-committee's work, attending its meetings and doing some of the research related to the subject matter with which that particular sub-committee dealt.

III. Number of Committee Meetings—Twenty-six.

IV. Number of Days Spent by the Committee in Committee Sessions—Fifty. (This figure does not include the number of days spent by the committee members in sub-committee sessions.)

V. Approximate Number of Man-hours Spent in Committee Sessions by Committee Members—2,799. (This figure does not include time spent by committee members in sub-committee sessions; nor does it include time spent by sub-committee members at committee sessions.)

VI. Approximate Number of Man-hours Spent by Sub-committee Members in Committee Sessions—246. (Frequently a member of a sub-committee who had done a great deal of research on a particular problem was asked to attend a committee meeting when that problem was under discussion by the committee.)

VII. Approximate Total Number of Man-hours Spent in Committee Sessions—3,043.

VIII. Approximate Number of Man-hours Spent on Rules Committee Work by Its Chairman, Wayne G. Cook—878. (This figure covers the time spent up to November 20, 1942.)

IX. Approximate Number of Man-hours Spent on Rules Committee Work by Its Reporter, Paul B. DeWitt—1,320. (This time was spent during the period beginning on about May 1, 1941, and ending July 1, 1942.)

X. Approximate Number of Man-hours Spent on Rules Committee Work by the Administrative Assistant—892. (This time was spent during the period beginning on July 13, 1942, and continuing up to date.)

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DIVISION I

OPERATION OF RULES

1. **Applicability; Effective Date; Statutes Affected.**

(a) **Applicability.** These Rules shall govern the practice and procedure in all courts of the State, except where they expressly provide otherwise, or statutes not affected hereby provide different procedure in particular courts or cases.

(b) **Effective Date.** These Rules will take effect on July 4, 1943. They govern all proceedings in actions brought after they take effect, and also further proceedings in actions then pending, except to the extent that in the opinion of the court in which the action is pending their application in a particular action pending when the Rules take effect would not be feasible, or would work injustice, in which event the former procedure applies.

(c) **Commencement of Action Pending Effective Date of Rules.** Where a defendant has been served with original notice prior to July 4, 1943, for a term of court to be convened after said date, the validity and effect of such notice and of the service thereof shall be determined by the statutes in force at the time of service. Service of original notice on all other defendants in the same or other actions, and the validity and effect thereof shall be governed by these Rules.

(d) **Statutes Affected.** After these Rules take effect courts and litigation shall no longer be governed by the statutes listed in column 1 of the Table appended to these Rules as Appendix I, and the practice and procedure shall no longer be in accordance therewith.

DIVISION II

ACTIONS, JOINDER OF ACTIONS AND PARTIES*

A. Parties Generally, Capacity

2. **Real Party in Interest.** Every action must be prosecuted in the name of the real party in interest. But an executor, administrator, guardian, trustee of an express trust; or a party with whom or in whose name a contract is made for another's benefit, or a party specially authorized by statute, may sue in his own name without joining the party for whose benefit the action is prosecuted.

(Code Secs. 10967, 10968.)

3. **Public Bond.** When a bond or other instrument given to the state, county, school or other municipal 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.

(Code Sec. 10982.)

4. **Partnerships.** Actions may be brought by or against partnerships as such; or against any or all partners with or without joining the firm. Judgment against a partnership may be enforced against partnership property and that of any partner served or appearing in the suit. A new action will lie on the original cause against any partner not so served or appearing. The Court may order absent partners brought in.

(Code Sec. 10983 with last sentence added.)

5. **Foreign Corporations.** Foreign corporations may sue and be sued in their corporate name, except as prohibited by statute.

(Code Sec. 10984 modified in view of Sec. 8427 denying right of unqualified foreign corporation to sue in certain cases.)

6. **Seduction.** An unmarried female may sue for her own seduction.

(Code Sec. 10985.)

*(This division replaces chapters 485 and 486 of the Code and supersedes all sections therein which are not expressly retained.)

7. **Assignees; Exception.** The assignment of a thing in action, except transfer of a negotiable instrument for value in good faith before maturity, shall be without prejudice to any defense, counterclaim or cause of action matured or not, if matured when pleaded, existing against the assignor in favor of the party pleading it.

(Code Sec. 10971.)

8. **Injury or Death of Minor.** A father, or if he be dead, imprisoned or has deserted the family, then the mother, may sue for the expense and actual loss of services resulting from injury to or death of a minor child.

(Code Sec. 10986.)

9. **Actions By and Against State.** The state may sue in the same way as an individual. No security shall be required of it. It may be sued as provided by any statutes in force at the time.

(Code Secs. 10990, 10990.1, 10990.2 and 10990.3.)

10. **Married Women; Husband and Wife.** A married woman may sue or be sued without joining her husband. If both are sued, she may defend in her own right; and if either fails to defend, the other may defend for both.

(Code Secs. 10992, 10993.)

11. **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; under like circumstances the husband shall have the same right.

(Code Sec. 10994.)

12. **Minors; Incompetents.** An action of a minor or any person judicially adjudged incompetent shall be brought by his guardian if he have one; otherwise the minor may sue by a next friend, and the incompetent by a guardian appointed by the Court for that purpose. The Court may dismiss such action or substitute another guardian or friend for the ward's benefit.

(Code Secs. 10995, 10996.)

13. **Defense by Incompetent, Prisoner, etc.** No judgment without a defense shall be entered against a party then a minor, or confined in a penitentiary, reformatory or any state hospital for the insane, or one judicially adjudged incompetent, or whose physician certifies to the Court that he appears to be mentally incapable of conducting his defense. Such defense shall be by guardian ad litem; but the regular guardian or the attorney

appearing for a competent party may defend unless the Court supersedes him by a guardian ad litem appointed in the ward's interest.

(Parts of Code Secs. 10989, 10997, 11000 modified and combined. Provision for cases certified by physician is new.)

14. **Guardian Ad Litem.** If a party, served with original notice, appears to be subject to Rule 13, the Court may appoint a guardian ad litem for him, or substitute another, in the ward's interest. Application for such appointment or substitution may be by the ward, if competent, or a minor over 14 years old; otherwise by his regular guardian or if there be none by any friend, or any party to the action.

As to insanity, etc., occurring pending suit, see Rule 17.
For class actions, see Rule 42.
For answer of guardian ad litem, see Rule 71.

(Other parts of Code Secs. 10998, 10999, 11000 combined. Eliminates appointment by the Clerk. Permits a co-defendant, as well as plaintiff, to apply for appointment.)

(B) Substitution of Parties

15. **Substitution at Death; Limitation.** Any substitution of legal representatives or successors in interest of a deceased party, permitted by statute, must be ordered within two years after the death of the original party. If his right survives entirely to those already parties, the action shall continue among the surviving parties without substitution.

(Substitution is now permitted by Code Sec. 10959 which is not affected by the Rules. This Rule is a limitation on the time for substitution. It is similar to Federal Rules 25-a-1, 25-a-2.)

16. **Transfer of Interest.** Transfer of an interest in a pending action shall not abate it, but may be the occasion for bringing in new parties.

(Code Sec. 10991.)

17. **Incapacity Pending Action.** If, during pendency of an action, a party is judicially adjudged incompetent, or confined in any state hospital for the insane, or if his physician certifies to the Court that he appears to be mentally incapable of acting in his own behalf, his guardian shall be joined with him, or, if there be none the Court shall appoint a guardian ad litem for any party thus adjudged, confined or certified.

(Sec. 11001 modified to adapt it to these Rules.)

18. **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.

(Code Sec. 12583 with additional provision permitting appointment of a special guardian or administrator.)

19. **Majority of Minor.** If a minor party attains legal majority, he shall continue as a party in his own right.

(New.)

20. **Officers; Representatives.** When any public official, or any administrator, express trustee or other person in a representative capacity, ceases to be such while a party to a suit, the court may order his successor brought in and substituted for him.

(New. Analogous to Federal Rule 25-d.)

21. **Notice to Substituted Party.** The order for substitution shall fix the time when the substituted party shall appear, and the notice to be given him. In case of substitution of a legal representative of a deceased party the notice shall be served as in case of original notices. In all other cases a shorter time may be prescribed.

(New. Code Sec. 10959 which is not affected by these Rules requires notice the same as original notice where a personal representative is substituted for a party who dies. This Rule is consistent with that statute and covers notice in other cases of substitution.)

(C) Joinder; Misjoinder and Nonjoinder

22. **Actions Joined.** A single plaintiff may join in the same petition as many causes of action, legal or equitable, independent or alternative, as he may have against a single defendant.

(Supersedes Code Sec. 10960. This and the following Rules adopt a policy of liberal joinder of both actions and parties. Rule 186 of Trial and Judgment permits separation for trial where possible prejudice or greater convenience warrants.)

23. **Same; Multiple Plaintiffs.** Any number of persons who claim any relief, jointly, severally or alternatively, arising out of or respecting the same transaction, occurrence or series of transactions or occurrences, may join as plaintiffs in a single action, when it presents or involves any question of law or fact common to all of them. They may join any causes of action, legal or equitable, independent or alternative, held by any one or more

of them which arise out of such transaction, occurrence or series, and which present or involve any common question of law or fact.

(Supersedes Code Secs. 10960 and 10969, Analogous to Federal Rules 18-a, 20-a. See comment under Rule 22.)

24. **Permissive Joinder of Defendants.**

(a) **Generally.** Any number of defendants may be joined in one action which asserts 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, when any question of law or fact common to all of them is presented or involved.

(b) **Special Provisions—Joint Common Carriers.** Sections 10977 to 10980 inclusive of the 1939 Code, relating to joint common carriers shall remain in force.

(Paragraph (a) is new. It is the substance of Federal Rule 20-a and supersedes all Iowa statutes as to optional joinder of defendants save those retained in the second paragraph.)

25. **Necessary Parties; Nonjoinder.**

(a) Except as provided in this Rule, all persons having a joint interest in any action shall be joined on the same side, but such persons failing to join as plaintiffs may be made defendants. This Rule does not apply to class actions under Rules 42-47, nor affect the options permitted by Sections 10975 and 10976 of the Code.

(b) A party is indispensable if his interest is not severable, and his absence will prevent the Court from rendering any judgment between the parties before it; or if notwithstanding his absence his interest would necessarily be inequitably affected by a judgment rendered between those before the Court

(c) If an indispensable party is not before the Court, it shall order him brought in. When persons are not before the Court who, although not indispensable, ought to be parties if complete relief is to be accorded between those already 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. 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 or liabilities.

For method of bringing in parties see Rule 34.

(Code Secs. 10975 and 10976 are expressly retained by paragraph (a). Paragraphs (a) and (b) replace Code Secs. 10981 and 10972 and like

Federal Rule 19-b, attempt a better statement of the difference between parties whose unavoidable absence does, and does not, defeat the action. For Iowa cases on indispensable parties, See Gunner v. Town, 228 Iowa 581, 293 N .W. 1 and Todd v. Crisman, 123 Iowa 699, 99 N. W. 686.)

26. **Parties Partly Interested.** A party need not be interested in obtaining or defending against all the relief demanded. Judgment may be given respecting one or more parties according to their respective rights or liabilities.

See Rules 186 and 121.

(New. See Federal Rule 20-a. Eliminates the need of complete mutuality between parties which heretofore often precluded joinder.)

27. **Remedy for Misjoinder.**

(a) **Parties.** Misjoinder of parties is no ground for dismissal of the action, but parties may be dropped by order of the Court on its own motion or that of any party at any stage of the action, on such terms as are just, or any claim against a party improperly joined may be severed and proceeded with separately.

For separate trials as to separate parties, see Rule 186.

(b) **Actions.** The only remedy for improper joinder of actions shall be by motion. On such motion the Court shall either order the causes docketed separately or strike those causes which should be stricken, always retaining at least one cause docketed in the original case. Before ruling on such motion, the party whose pleading is attacked may withdraw any of the causes claimed to be misjoined.

(New. Replaces the rule that misjoinder of actions was ground for demurrer or dismissal; retains advantages indicated in Minnesota Loan & Trust Co. v. Hannan, 215 Iowa 1060; also gives plaintiff the option to withdraw, or the Court the option to separately docket the actions misjoined. Cf. Code Secs. 10963, 10964, and Federal Rule 21, as to joinder of parties.)

28. **Dependent Remedies Joined.** An action heretofore cognizable only after another has been prosecuted to conclusion may be joined with the latter; and the Court shall grant relief according to the substantive rights of the parties. But there shall be no joinder of an action against an indemnitor or insurer with one against the indemnified party, unless a statute so provides.

(New. Taken from part of Federal Rule 18-b.)

(D) Counterclaims and Cross-claims

29. **Compulsory Counterclaims.** A pleading must contain a counterclaim for every cause of action then matured, and not the subject of a pending action, held by the pleader against any op-

posing party and arising out of the transaction or occurrence that is the basis of such opposing party's claim, unless its adjudication would require the presence of indispensable parties of whom jurisdiction cannot be acquired. A final judgment on the merits shall bar such a counterclaim, although not pleaded.

Indispensable parties are defined in Rule 25 (b).

(This and the following Rules replace Code Sec. 11151. They are new and are similar to Federal Rule 13-a.)

30. **Permissive Counterclaims.** Unless prohibited by Rule or statute, a party may counterclaim against an opposing party on any cause of action held by him when the action was originally commenced, and matured when pleaded.

For prohibited counterclaims see Code Sec. 12178, on replevin and Rule 275 on partition.

(This is the substance of Federal Rule 13-b and of Code Sec. 11151 (3), which prevents purchase of counterclaims after suit.)

31. **Joinder of Counterclaims.** A party pleading a counterclaim shall have the same right to join more than one cause of action as a plaintiff is granted under Rules 22 and 23.

See also Rules 72 and 74.

32. **Counterclaim Not Limited.** A counterclaim may, but need not, diminish or defeat recovery sought by the opposing party. It may claim relief in excess of, or different from, that sought in the opponent's pleadings.

(See Rules 355, 364. Federal Rule 13-c, and intended to eliminate the concept of offset which has heretofore frequently limited counterclaim procedure.)

33. **Cross-Petitions.**

(a) **Against Coparties.** A cross-petition may be filed by one party against a coparty, on a cause of action arising out of a transaction or occurrence which is the basis of the original action or any counterclaim therein. It may include the claim that such coparty is, or may be, liable to cross-petitioner for all or part of a claim asserted in the principal action against the cross-petitioner.

(Substance of Federal Rule 13-g.)

(b) **Against New Parties.** When a defendant to a petition, cross-petition or counterclaim will, if held liable thereon, thereby be entitled to a right of action against one not already a party, he may move to have such party brought in, to the end that the rights of all concerned may be determined in one action. Such motion must be supported by affidavit.

(Substitute for Code Sec. 11155. Taken from Wisconsin Rules. Analogous to Federal Rule 14.)

34. **Bringing in New Parties; Procedure.**

(a) When the presence of new parties is required to grant complete relief as to a counterclaim or cross-petition, the Court shall order them brought in if jurisdiction can be obtained.

(Supersedes Code Sec. 11154.)

See also Rule 74.

(b) New parties shall be brought in by serving them with original notice pursuant to Division III of these Rules.

(E) Interpleader

35. **Right of Interpleader.** A person who is or may be exposed to multiple liability or vexatious litigation because of several claims against him for the same thing, may bring an equitable action of interpleader against all such claimants. Their claims or titles need not have a common origin, nor be identical, and may be adverse to, or independent of each other. Such person may dispute his liability, wholly or in part;

(This and the following Rules supersedes Code Secs. 11002 to 11006, the only Iowa interpleader statutes. They liberalize the common law equitable interpleader in keeping with modern tendencies.)

36. **Same; By Defendants.** A defendant to an action which exposes him to similar liability or litigation may obtain such interpleader by counterclaim or cross-petition. Any claimant not already before the Court may be brought in to maintain or relinquish his claim to the subject of the action, and on his default after due service, the Court may decree him barred of such claim.

For procedure to bring in see Rule 34.

(Paragraphs (a) and (b) incorporate the substance of Federal Rule 22(1) and supersede Code Secs. 11002, 11003.)

37. **Deposit; Discharge.** If a party initiating interpleader admits liability for, or nonownership of, any property or amount involved, the Court may order it deposited in court or otherwise preserved, or secured by bond. After such deposit the Court, on hearing all parties, may absolve the depositor from obligation to such parties as to the property or amount deposited, before determining the rights of the adverse claimants.

38. **Substitution of Claimant.** If a defendant seeks an interpleader involving a third person, the latter may appear and make himself a defendant in lieu of the original defendant, who may then be discharged on complying with Rule 37.

(Rules 36-38 embrace the substance of Code Secs. 11002-11004, inclusive.)

39. **Injunction.** After petition and returns of original notices are filed in an interpleader, the Court may enjoin all parties before it from beginning or prosecuting any other suit as to the subject of the interpleader until its further order.

For injunctions generally see Rules 320 et seq.

(Taken in substance from Federal Interpleader Act, Title 28, U.S.C.A. Sec. 41(26).)

40. **Costs.** Costs may be taxed against the unsuccessful claimant in favor of the successful claimant and the party initiating the interpleader.

41. **Sheriff or Officer; Creditor.** When a sheriff or other officer is sued for taking personal property under a writ, or for the property so taken, he may exhibit such writ to the Court, with his affidavit that the property involved was taken under it. The attaching or execution creditor shall then be joined with the officer as a defendant; or may join on his own application. Any judgment against the officer and creditor shall provide that the latter's property be first exhausted to discharge it.

See Rule 224.

(Code Secs. 11005, 11006.)

(F) Class Actions

42. **Class Actions.** If the persons composing a class are so numerous that it is impracticable to bring all before the Court, such number of them as will insure adequate representation of all may sue or be sued on behalf of all, where the character of the right involved is:

(a) joint or common, or held primarily by one who has refused to enforce it, thereby entitling the class or its members to do so; or

(b) several, and the action seeks to adjudicate claims which do, or may, affect specific property; or

(c) several, and a common question of law or fact affects the several rights, and a common relief is sought.

(Substance of Federal Rule 23-a, not differing greatly from Code Sec. 10974, but recommended as a substitute primarily to make the Federal precedents available.)

43. **Virtual Representation.** Where persons composing a class which may be increased by others later born, do or may make a claim affecting specific property involved in an action to which all living members of the class are parties, any others later born

shall also be deemed to have been parties to the action and bound by any decree rendered therein.

(As bearing on the doctrine of virtual representation, see John Hancock Mutual Life Ins. Co. v. Dower, 222 Iowa 1377; Buchan v. German American Land Co., 180 Iowa 911; Harris v. Randolph, 213 Iowa 772. This rule requires all living members to be parties; not merely some of them as allowed by Rule 42 and by some of the above decisions.)

44. **Shareholder's Actions.** Shareholders in an incorporated or unincorporated association, who sue to enforce its rights because of its failure to do so, shall support their petition by affidavit, and allege their efforts to have the directors, trustees or other shareholders bring the action or enforce the right, or a sufficient reason for not making such effort.

(Substance of part of Federal Rule 23-b.)

45. **Compromise or Dismissal.** No class action shall be compromised or voluntarily dismissed without approval of the Court. In actions under Rule 42(a), notice of the proposed compromise or dismissal shall be given all members of the class in such manner as the Court may prescribe, otherwise notice may be given or omitted as the Court may direct.

For dismissal generally, see Rule 215.

46. **Adequate Representation.** Before final judgment in a class action, the Court shall inquire and determine that the parties before it adequately represent the class. If it deems such representation inadequate, it may order new parties brought in.

47. **Default Judgment.** No judgment by default for lack of appearance shall be entered in a class action. If no member of the class appears, the Court shall appoint an attorney to represent it, taxing his reasonable fees as costs in the case.

(New.)

DIVISION III

COMMENCEMENT OF ACTIONS*

48. **Commencing Actions.** A civil action is commenced by serving the defendant with an original notice.

49. **Tolling Limitations.** For the purpose of determining whether an action has been commenced within the time allowed by statutes for limitation of actions, whether the limitation inheres in the statute creating the remedy or not, the delivery of the original notice to the sheriff of the county in which the action is brought with the intent that it be served immediately, which intent shall be presumed unless the contrary appears, shall also be deemed a commencement of the action.

(Supersedes Code Sec. 11012.)

50. **Contents of Original Notice.** The original notice shall be directed to the defendant, and signed by plaintiff or his attorney with the signer's address. It shall name the plaintiff, the court, and the city or town, and county where the court convenes. It shall state either that the petition is on file in the office of the Clerk of the Court where the action is brought, or that it will be so filed by a stated date, which must not be more than ten days after service. It shall notify defendant to appear before said court within the specified number of days after service required by Rule 53 or Rule 54, and that unless he so appears, his default will be entered and judgment or decree rendered against him for the relief demanded in the petition. A copy of the petition may be attached; but if it is not or if the service is by publication, the notice shall contain a general statement of the cause or causes of action and the relief demanded, and, if for money, the amount thereof.

(Rules 48 and 50 supersede Code Sec. 11055.)

51. **Same; Notice of No Personal Claim.** A defendant who unreasonably defends when the original notice states that no personal judgment is asked against him, shall pay the costs occasioned thereby.

(Code Sec. 11065.)

*(This Division supersedes Chapter 489 of the Code, except Section 11056.1 and Sections 11092 to 11097, inclusive, which remain in force.
Code Chapters 487, 487.1 on Limitation of Actions remain unchanged except that Section 11012 is superseded by Rule 49 of this Division. Chapter 488 on Place of Bringing Action remains unchanged.)

52. **By Whom Served.** Original notices may be served by any person who is neither a party nor the attorney for a party to the action.

(Supersedes Code Sec. 11058 and precludes the attorney from serving his own notice.)

53. **Time for Appearance.** A defendant served by publication only, must appear on or before the date fixed in the notice as published, which date shall not be less than twenty days after the day of last publication. If served in any other manner, the defendant shall appear within twenty days after the day the original notice is served on him in all cases where:

(a) a copy of the petition is attached to the original notice; or

(b) the petition is on file when the notice is served, and the notice so states.

In all other cases the defendant shall appear within thirty days after the day such notice is served. Unless he so appears, he will be in default; but if he does appear, he shall have time to move or plead as provided in Rule 85.

(Supersedes Code Sec. 11059. Rule 85 covers time to move or answer which is within five days after the appearance date.)

54. **Same; Special Cases.** Any statute of Iowa which specially requires appearance by a particular defendant, or in a particular action, within a specified time, shall govern the time for appearance in such cases, rather than Rule 53.

(Examples of such special requirements are Code Secs. 10990.1 et seq. in actions against the State; Secs. 5038.01-5038.14 in motor vehicle cases against nonresidents; 49 G. A. ch. 303 in forcible entry and detainer. There are other statutes requiring appearance at or within a time differing from the general rule.)

55. **Failure to File Petition.** If the petition is not filed as stated in the original notice served, any defendant may have the case dismissed as to him, without notice, at plaintiff's cost; and may docket it for this purpose by filing his copy of the original notice, if need be.

For filing petition and copies, see Rule 82.

(Supersedes Code Sec. 11057.)

56. **Personal Service.** Original notices are "served" by delivering a copy to the proper person. Personal service may be made as follows:

(Code Sec. 11060 (1) is modified by dispensing with reading of the notice.)

(a) Upon any individual aged 18 years or more who has not been adjudged incompetent, either by taking his signed, dated

acknowledgment of service endorsed on the notice; or by serving him personally; or by serving, at his dwelling house or usual place of abode, any person residing therein who is at least 18 years old, but if such place is a rooming house, hotel, club or apartment building, the copy shall there be delivered to such a person who is either a member of his family or the manager, clerk, proprietor or custodian of such place.

(This supersedes Code Sec. 11060. It liberalizes so-called "substituted service", but has been limited somewhat since the final tentative draft submitted to the bar.)

(b) Upon a minor under 18 years old, by serving either the guardian of his person or property, unless the notice is served on behalf of such guardian, or his parent, or some person aged 18 years or more who has his care and custody, or with whom he resides, or in whose service he is employed.

(Code Sec. 11080 modified to eliminate uncertainties.)

(c) Upon any person judicially adjudged incompetent but not confined in a state hospital for the insane, by serving the guardian of his person or property, unless the notice is served on behalf of such guardian, or his spouse, or some person aged 18 years or more who has his care and custody, or with whom he resides.

(Code Sec. 11069 modified.)

(d) Any person, whether competent or not, confined in a county home, or in any state hospital for the insane, or any patient in the State University of Iowa Hospital or its psychopathic ward, or any patient or inmate of any institution in charge of the Iowa Board of Control or of the United States, may be served by the official in charge of such institution or his assistant. Proof of such service may be made by the certificate of such official, if the institution is in Iowa, or his affidavit if it is out of Iowa.

(Code Sec. 11070, broadened to include Federal Institutions and State insane hospitals out of Iowa.)

(e) If any defendant is a patient in any state or federal hospital for the insane, in or out of Iowa, or has been adjudged incompetent and is confined to a County Home, the official in charge of such institution or his assistant shall accept service on his behalf, if in his opinion direct service on the defendant would injuriously affect him, which shall be stated in such acceptance.

(Code Sec. 11068 broadened to include hospitals out of Iowa and county homes. Does not apply to the latter unless the defendant has been adjudged incompetent.)

(f) Upon a partnership, or an association suable under a common name, or a domestic or foreign corporation, by serving any

present or acting or last known officer thereof, or any general or managing agent, or any agent or person now authorized by appointment or by law to receive service of original notice, or on the general partner of a partnership.

(Embraces parts of but does not supersede Code Secs. 11077, 11072, 11073, 11074. Also 11079 except as to individuals, for which see (g), infra.)

(g) If the action, whether against an individual, corporation, partnership or other association suable under a common name, arises out of or is connected with the business of any office or agency maintained by the defendant in a county other than where the principal resides, by serving any agent or clerk employed in such office or agency.

(Code Sec. 11079.)

(h) Upon any city or town by serving its mayor or clerk.

(Code Sec. 11075.)

(i) Upon any county by serving its auditor or the chairman of its board of supervisors.

(Code Sec. 11071.)

(j) Upon any school district, school township or school corporation by serving its president or secretary.

(Code Sec. 11076.)

(k) Upon the State, where made a party pursuant to statutory consent or authorization for suit in the manner provided by such statute or any statute applicable thereto.

(Such statutes are now Code Secs. 10990.1, 10990.2, 10990.3, and the method of service is prescribed in Sec. 10990.2.)

(l) Upon any individual, corporation, partnership or association suable under a common name which shall have filed in this state a consent to service, or shall be subject to service, in any special manner provided by the statutes of this state, either as provided in these Rules or as provided in any such consent to service, or in accordance with any such statute relating thereto.

(This includes such situations as nonresident motorists, various methods of serving corporations or their agents, such statutes as Code Secs. 8338.49, 8581.09, 1905.54 and 11072-11074, inclusive, and many others. Such service may be made as heretofore.)

(m) Upon a governmental board, commission or agency, by serving its presiding officer, clerk or secretary.

(New.)

57. **Service on Sunday.** Original notice shall not be served on Sunday unless the plaintiff, his agent or attorney endorses

thereon his oath that personal service shall be impossible unless then made.

(Code Sec. 11064.)

58. **Member of General Assembly.** No member of the General Assembly shall be held to appear or answer in any civil action in any court in this state while such General Assembly is in session.

(Code Sec. 11089.)

59. **Returns of Service.**

(a) **Signature; Fees.** Iowa officers may make unsworn returns of original notices served by them, as follows: any sheriff or deputy sheriff, as to service in his own or a contiguous county; any other peace officer, or bailiff or marshal, as to service in his own territorial jurisdiction. The court shall take judicial notice of such signatures. All other returns, except those specified in Rules 56(d) and 56(e), shall be proved by the affidavit of the person making the service. If served in the State of Iowa by a person other than such peace officer acting within the territories above defined or in another state by a person other than a sheriff or other peace officer, no fees or mileage shall be allowed therefor.

(Supersedes Code Sec. 11066.)

(b) **Contents.** A return of personal service shall state the time, manner, and place thereof and name the person to whom copy was delivered; and if delivered under Rule 56(a) to a person other than defendant, it must also state the facts showing compliance with said Rule.

(Supersedes Code Sec. 11061.)

(c) **Endorsement and Filing.** If a sheriff receives the notice for service, he shall note thereon the date when received, and serve it without delay in his own or a contiguous county, and upon receiving his fees, shall either file it and his return with the clerk, or deliver it by mail or otherwise to the person from whom he received it.

(Supersedes Code Sec. 11062.)

60. **Service by publication; What cases.** After filing an affidavit that personal service cannot be had on an adverse party in Iowa, the original notice may be served by publication, in any action brought:

(a) for recovery of real property or any estate or interest therein;

(b) for the partition of real or personal property in Iowa;

(c) to foreclose a mortgage, lien, encumbrance or charge on real or personal property;

(d) for specific performance of a contract for sale of real estate;

(e) to establish, set aside or construe a will, if defendant resides out of Iowa;

(f) against a nonresident of Iowa or a foreign corporation which has property, or debts owing to it in Iowa, sought to be taken by any provisional remedy, or appropriated in any way;

(g) against any defendant who, being a nonresident of Iowa, or a foreign corporation, has or claims any actual or contingent interest in or lien on real or personal property in Iowa which is the subject of such action, or to which it relates; or where the action seeks to exclude such defendant from any lien, interest or claim therein;

(h) against any resident of the State who has departed therefrom, or from the county of his residence, with intent to delay or defraud his creditors, or to avoid service, or who keeps himself concealed with like intent;

(i) for divorce or separate maintenance or to modify a decree in such action, or to annul an illegal marriage, against a defendant who is a nonresident of Iowa or whose residence is unknown;

(j) to quiet title to real estate, against a defendant who is a nonresident of Iowa, or whose residence is unknown;

(k) by an executor, administrator or guardian, in an action or proceeding to sell or mortgage real estate of a decedent or ward, against a party who is a nonresident of Iowa or whose residence is unknown or against unknown parties;

(l) against a partnership, corporation or association suable under a common name, when no person can be found on whom personal service can be made;

(m) to vacate or modify a judgment or for a new trial under Rules 252 and 253.

(Code Sec. 11081 with the addition of clauses l and m and part of k, which are new.)

61. **Same; Unknown Defendants.** The original notice against unknown defendants shall be directed to the unknown claimants of the property involved, describing it. It shall otherwise comply with Rule 50.

(Sec. 11083 modified.)

62. **Same; How Published.** Publication of original notice shall be made after the filing of the petition, once each week for three consecutive weeks in a newspaper of general circulation, published in the county where the petition is filed; such newspaper to be selected by the plaintiff or his attorney. Service is complete on the date of the last publication.

(Code Sec. 11104 which is not affected by these Rules, requires publication on the same day of the week when made in a newspaper published more often than once a week. Code Sec. 11084 modified to reduce publication to three weeks.)

63. **Same; Proof.** Before default is taken, proof of such publication shall be filed, sworn to by the publisher or an employee of the newspaper.

(Sec. 11085, modified.)

64. **Same; Actual Service.** Service of original notice in or out of Iowa according to Rule 56, supersedes the need of its publication.

65. **General Appearance.** A general appearance is any appearance except a special appearance. It is made either by:

(a) taking any part in a hearing or trial of the case, personally or by attorney, or

(b) by a written appearance filed with the clerk, or a notation on the appearance docket or oral announcement in open court;

(c) by filing a motion or pleading, other than under a special appearance.

See also Rule 87 limiting the effect of appearance alone.

(Code Sec. 11087.)

66. **Special Appearance.** A defendant may appear specially, for the sole purpose of attacking the jurisdiction of the court, but only before his general appearance. The special appearance shall be in writing, filed with the clerk and shall state the grounds thereof. If his special appearance is erroneously overruled, he may plead to the merits or proceed to trial without waiving such error.

See also Rule 104(a).

(Code Sec. 11088 modified to permit review after trial on the merits, which is new.)

DIVISION IV

PLEADINGS AND MOTIONS

67. **Technical Forms Abolished.** All common counts, general issues, demurrers, fictions and technical forms of action or pleading, are abolished. The form and sufficiency of all motions and pleadings shall be determined by these Rules, construed and enforced to secure a just, speedy and inexpensive determination of all controversies on their merits.

(Supersedes Code Sec. 11108. Abolishes demurrers and general denials and embraces 49 G. A. ch. 311, Sec. 1 (SF 25). Code Secs. 11213-11215, inclusive and Sec. 11217 are superseded generally as obsolete.)

68. **Allowable Pleadings.** The pleadings shall be: petition, answer, and such counterclaim, reply, amendment, cross-petition or petition of intervention, as these Rules allow.

For counterclaims, see Rules 29-32. For cross-petitions, see Rules 33, 34.

(Supersedes Code Sec. 11109. Excludes "Motions" from list of "Pleadings", so that Rules as to pleadings do not apply to motions and vice versa.)

69. **Pleadings Defined.** "Pleadings" as used in this Division, do not include motions. They are the parties' written statements of their respective claims or defenses. They shall be clear, concise, and avoid repetition or prolixity.

(Supersedes Code Sec. 11109, and makes plain that Rules for pleading do not embrace motions.)

70. **Petition.** The petition shall state whether it is at law or in equity, the facts constituting the cause or causes of action asserted, the relief demanded, and, if for money, the amount thereof.

For title, signature, etc., see Rule 78.

(Code Sec. 11111.)

71. **Answers for Ward.** All answers by guardians or guardians ad litem, or filed under Rule 14, shall state whether there is a return on file, showing that proper service has been had on the ward; and they shall deny all material allegations prejudicial to the ward.

(Supersedes Code Sec. 11116.)

72. **Answer.** The answer shall show on whose behalf it is filed, and specifically admit or deny each allegation or paragraph

of the petition, which denial may be for lack of information. It must state any additional facts deemed to show a defense. It may raise points of law appearing on the face of the petition to which it responds. It may contain as many defenses, legal or equitable, as the pleader may claim, which may be inconsistent. It may contain a counterclaim which must be in a separate division.

For counterclaims see Rule 29 et seq. See also Rules 79, 105, 176, 110 and 103.

(Supersedes Code Secs. 11114, 11115, 11130, 11193, 11199. Abolishes general denials. Specific admission or denial is facilitated by requiring numbered paragraphs. See Rule 79.

Permits legal questions to be raised by answer at law as well as in equity.)

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

Under Rule 102 facts asserted in a reply are denied by operation of law.

For disposition of points of law raised by reply, see Rules 105, 176.

(Supersedes Code Secs. 11130, 11156, 11157. Abolishes implied denials of new matter.)

74. **Cross Petition; Judgment.** Any cross-petition under Rule 33, and the answer and reply as to it, shall be governed by these Rules. Where judgment in the original case can be entered without prejudice to the rights in issue under a cross-petition or counterclaim, it shall not be delayed thereby.

See also Rules 186 and 221.

(Rule 33 supersedes Code Sec. 11155.)

75. **Interventions.** Any person interested in the subject matter of the litigation, or the success of either party to the action, or against both parties, may intervene at any time before trial begins, by joining with plaintiff or defendant or claiming adversely to both.

(Code Sec. 11174.)

76. **Same; Manner.** Every intervenor shall file a petition, and a separate copy for each party against whom he asserts a right. The clerk shall transmit such copy to the attorney for the adversary party, who shall, without further notice, move or plead thereto within seven days from the date of filing unless the court fixes a shorter time and notice thereof is given.

(Code Sec. 11176, adapted to these Rules, and recognizing Supreme Court decisions that no notice of an intervention is required.)

77. **Same; Disposition.** The intervenor shall have no right to delay, and shall pay the costs of the intervention unless he prevails.

(Code Sec. 11175.)

78. **Caption and Signature.** Each appearance, notice, motion, or pleading shall be captioned with the title of the case, naming the court, parties, and instrument, and shall bear the signature and address of the party or attorney filing it. After the petition, the caption need name only the first of several coparties.

(Requirement of the address is new.)

79. **Numbered Divisions and Paragraphs.** Each separate cause of action or defense must be stated in a separately numbered division. Every pleading shall be separated into numbered paragraphs, each of which shall contain, as nearly as may be, a distinct statement.

Code Secs. 11112, 11113, 11117, 11119. Numbering of paragraphs required at law as well as in equity to facilitate specific admissions or denials.)

80. **Verification Abolished; Affidavits.** (a) Pleadings need not be verified. Counsel's signature to every motion or pleading shall be deemed his certificate that there are good grounds for making the claims therein, and that it is not interposed for delay.

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

(Supersedes Code Secs. 11160-11170, inclusive. Where verifications are at present mandatory instead of optional, this Rule requires affidavit on personal knowledge.)

81. **Correcting or Recasting Pleadings.** On its own motion or that of any party, the court may order any prolix, confused or multiple pleading, to be recast in a concise single document within such time as the order may fix. In like manner, it may order any pleading not complying with these Rules to be corrected on such terms as it may impose.

(The first sentence is new and expressly sanctions a practice sometimes followed pursuant to the Court's inherent power. The second sentence covers Code Sec. 11120.)

82. **Filing, Copies, Delivery.** All motions and pleadings, with copy, shall be filed with the clerk, except that no copy of the petition need be filed if a copy was attached to the original

notice served upon each defendant. Sufficient additional copies of all motions and pleadings shall be filed to afford a copy for each adverse party appearing, but if more than one such party appear by the same counsel, only one copy need be filed for such parties. It shall be the duty of the pleader to file the required copies with the original if he then knows of the appearances; otherwise, immediately upon receipt of notice thereof to be given by the clerk. The copies shall be mailed or delivered forthwith by the clerk to the attorney of record for the adverse party or parties, if appearance is by attorney; otherwise to the parties.

(Supersedes Code Secs. 11110, 11124, 11125. Requires copies of *all* motions, including those for continuance or change of venue. Requires delivery by the clerk, notice of motion be elsewhere eliminated.)

83. **Failure to File Copies.** The court may strike from the files, any pleading of which copies are not filed as above required.

(Supersedes Code Sec. 11124. Eliminates continuance for want of copy.)

84. **Copy Fees.** A fee of ten cents per hundred words for each copy shall be taxed with the costs, to be the property of the attorney filing the copy.

(Code Sec. 11124 with additional provision settling the ownership of copy fees.)

85. **Time to Move or Plead.**

(a) **Motions.** Motions attacking a petition must be filed within five days after the appearance date, unless some other motion allowed before answer is already on file; and then within five days after such other motion is disposed of. All motions attacking subsequent pleadings must be filed within seven days after such pleading is filed.

(b) **Pleading.** Answer to a petition must be filed within five days after the appearance date, unless a motion is then on file, in which event answer must be filed within seven days after such motion is so disposed of as to require answer.

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

(d) **Answer or Reply to Amendments.** Answer or reply to any amendment, or any substituted or supplemental pleading, must be filed within seven days, unless a motion attacking it is

then on file, and then within seven days from the time the motion is so disposed of as to require or permit answer or reply. If the petition be amended before time for answering it, this Rule shall not require answer to the amendment to be made prior to the time for answering the original petition.

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

(f) **Extending Time.** For good cause, but not ex parte, the court may extend the time to amend, answer or reply for not more than thirty days beyond the times above specified. Except on written stipulation of all parties, it shall have no power to extend any such time further, or to extend at all the time for filing any motion.

(g) **Petition for Removal to Federal Court.** The filing of a petition for removal to the Federal Court, accompanied by the bond required by the Removal Act, shall suspend the time for filing any motions or pleadings until an order of the Federal Court is filed in the State Court, remanding the cause, or until it is made to appear the removal has not been perfected, whereupon the times hereinabove fixed for motions or pleadings shall begin anew.

See Rule 86 as to when time for re-pleader begins to run.

(Supersedes Code Secs. 11121-11123, inclusive, and 11134, 11136, 11137. A motion "attacking a pleading" under par. (a) does not include such motions as for change of venue, continuance, cost bond, etc., time for which is regulated by other Rules. Raising points of law by answer or reply is not a "motion", though often used in lieu thereof. Because any meritorious point can be raised in answer or reply promptness is required if the party desires to invoke the motion instead.)

86. **Pleading Over; Election to Stand.** If a party required or permitted to plead further by an order or ruling, fails to do so within the required time, he thereby elects to stand on the record theretofore made. On such election, the ruling shall be deemed a final adjudication without further judgment or order; reserving only such issues, if any, which remain undisposed of by such ruling and election. The clerk shall forthwith mail or deliver to the attorneys of record a notice of the filing of such ruling or order and the time for further pleading or election shall run only from the day after such mailing or delivery.

(Based on Code Secs. 11147, 11148, modified to make election automatic, without further order, delay or formality.)

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

For time of pleading, see Rules 85(a), 85(b);
For Defaults, see Rule 65; For Appearances, see Rule 66.
(New.)

88. **Amendments.** Any pleading may be amended before a pleading has been filed responding to it. The court, in furtherance of justice, may allow later amendments, including those to conform to the proof and which do not substantially change the claim or defense. The court may impose terms, or grant a continuance with or without terms, as a condition of such allowance.
(Code Secs. 11182, 11183.)

89. **Making and Construing Amendments.** All amendments must be on a separate paper, duly filed, without interlining or expunging prior pleadings. They will be construed as part of the original pleading which remains in effect, unless they are a complete substitute therefor.
(Code Sec. 11184.)

90. **Supplemental Pleading.** A party may file a supplemental pleading alleging facts material to the case which have happened subsequent to the commencement of the action, or come to his knowledge since his prior pleading. This shall not be a waiver of the former pleading.
(Code Secs. 11221, 11224.)

91. **Contract.** Every pleading referring to a contract must state whether it is written or oral. If the contract is the basis of the action or defense, it must be set forth in full.
(Code Sec. 11129.)

92. **Allegation of Time or Place.** When time is not material, it need not be averred, and if averred, need not be proved. When it is material, the date or duration of a continuous act, must be alleged. The place need be alleged only when it is part of the substance of the issue.
(Code Secs. 11194, 11195.)

93. **Exception.** A claim in derogation of general law, or founded on any kind of exception, shall be so pleaded as to set forth such claim or exception.
(Code Sec. 11200.)

94. **Judicial Notice; Statutes.** Matters of which judicial notice is taken need not be stated in any pleading. But a pleading asserting any statute, or a right derived therefrom, shall refer to such statute by plain designation. The court shall judicially notice the statutes of any state, territory or other jurisdiction of the United States so referred to.

(Code Secs. 11198, 11211, modified to include judicial notice of all American statute law. The court need, however, notice only the statute. Any foreign judicial decision construing it must be pleaded as heretofore. The trial judge may require the parties to furnish him information satisfactory to him, apart from the pleading, as to the statute referred to. See Rule 136 (d) as to Pretrial Conferences.)

95. **Unliquidated Damages.** No order shall require any pleading to itemize or apportion unliquidated damages claimed therein, nor to attribute any part thereof to any portion of the claim asserted.

(New. The Rules on Interrogatories are intended to provide means for discovering such matters and they are to be eliminated from the pleadings.)

96. **Malice.** A party intending to prove malice to affect damages, must aver the same.
(Code Sec. 11216.)

97. **Negligence; Mitigation.** In an action by an employee against an employer, or by a passenger against a common carrier to recover for negligence, plaintiff need not plead or prove his freedom from contributory negligence, but defendant may plead and prove contributory negligence in mitigation of damages.
(Code Sec. 11210.)

98. **Permissible Conclusions; Denials Thereof.** Partnership, corporate or representative capacity; or corporate authority to sue or do business in Iowa; or performance of conditions precedent; or judgments of a court, board or officer of special jurisdiction, may be pleaded as legal conclusions, without averring the facts comprising them. It shall not be sufficient to deny such averment in terms contradicting it, but the facts relied on must be stated.

(Code Secs. 11205-11208, inclusive with the addition of corporate authority to sue or do business in Iowa.)

99. **Account; Bill of Particulars; Denial.** A pleading founded on an account shall contain a bill of particulars thereof, by consecutively numbered items, which shall define and limit the proof, and may be amended as other pleadings. A pleading controvert-

ing such account, must specify the items denied, and any items not thus specified shall be deemed admitted.

For affidavit required for default, see Rule 232(a).

(Supersedes Code Secs. 11203, 11204.)

100. **Denying Signature.**

(a) **By Party.** If a pleading copies a writing purporting to be signed by an adverse party, such signature shall be deemed genuine for all purposes in the case, unless such party shall not only deny it, but support his denial by his own affidavit that it is not his genuine or authorized signature. He may, on application made during his time to plead, procure an inspection of the original writing.

(b) **By Nonparty.** If a pleading copies a non-negotiable writing purporting to be signed by a nonparty to the action, such signature shall be deemed genuine, unless a party denies it, and supports his denial by affidavit, which denial, may be for lack of information.

(Supersedes Code Secs. 11218-11220, inclusive. The party's "own" affidavit required him to sign personally.)

101. **Defenses To Be Specifically Pleaded.** Any defense that a contract or writing sued on is void or voidable, or was delivered in escrow, or which alleges any matter in justification, excuse, release or discharge, or which admits the facts of the adverse pleading but seeks to avoid their legal effect, must be specially pleaded.

(Code Sec. 11209.)

102. **What Admitted.** Every fact pleaded and not denied in a subsequent pleading, as permitted by these Rules, shall be deemed admitted, except allegations of value or amount of damage. Allegations of a reply shall be deemed denied by operation of law.

(Code Secs. 11201, 11202.)

103. **All Defenses in Answer.** Every defense in bar or abatement, or to the jurisdiction after a general appearance, shall be made in the answer or reply, save as allowed by Rule 104. No such defense shall overrule any other. But a party who presents and tries a defense in abatement alone, shall not thereafter be allowed to plead in bar.

See Rules 72, 73 and 104.

(Supersedes Code Secs. 11115, 11132, 11199, 11222, 11223.)

104. **Same; Exceptions.** Every defense in law or fact to any pleading must be asserted in the pleading responsive thereto, if

one is required, or if none is required, then at the trial, except that:

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

See also Rule 66.

(b) Failure to state a claim on which any relief can be granted, may be raised by motion to dismiss such claim, filed before answer.

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

(d) Such motions must specify wherein the pleading they attack is claimed to be insufficient.

(Supersedes Code Secs. 11130, 11149. Pars. (b) and (c) are substitutes for demurrer. The difference in terminology is because a claim may be dismissed, but a defense presents nothing affirmative to dismiss and so is stricken out. This Rule does not compel the use of motions under paragraphs (b) and (c), and the point may, and generally should, be raised in the answer or reply. See Rule 110.)

105. **Separate Adjudication of Law Points.** The Court may in its discretion, and must on application of either party, made after issues joined and before trial, separately hear and determine any point of law raised in any pleading which goes to the whole or any material part of the case. It shall enter an appropriate final order before trial of the remaining issues, adjudicating the point so determined, which shall not be questioned on the trial of any part of the case of which it does not dispose. If such ruling does not dispose of the whole case, it shall be deemed interlocutory for purposes of appeal.

See also last sentence of Rule 176.

(Supersedes Code Sec. 11131. Applies only to "pleadings", not to "motions", which are always heard separately.)

106. **Variance; Failure of Proof.** No variance between pleading and proof shall be deemed material unless it is shown to have misled the opposite party to his prejudice in maintaining his cause of action or defense. But where an allegation or defense is unproved in its general meaning, this shall not be held a mere variance but a failure of proof.

(Code Secs. 11177-11180, inclusive.)

107. **Special Action; Proper Remedy Awarded.** In any case of mandamus, certiorari, appeal to the District Court, or for specific equitable relief, where the facts pleaded and proved do not entitle the petitioner to the specific remedy asked, but do show him en-

titled to another remedy, the court shall permit him on such terms, if any, as it may prescribe, to amend by asking for such latter remedy, which may be awarded.

(New. Analogous to Rule 352 of Appellate Procedure.)

108. **Lost Pleading; Substitution.** If an original pleading is lost or withheld, the Court may order a copy substituted, or a substituted pleading filed.

(Code Sec. 11227.)

109. **Motion Defined.** A motion is an application made by any party or interested person for an order. It may contain several objects which grow out of, or are connected with, the action. It is not a "pleading".

(Supersedes Code Secs. 11229, 11230.)

110. **Failure to Move; Effect of Overruling Motion.** No pleading shall be held sufficient for failure to move to strike or dismiss it. If such motion is filed and overruled, error in such ruling is not waived by pleading over or proceeding further; and the moving party may always question the sufficiency of the pleading during subsequent proceedings.

(Supersedes Code Secs. 11144, 11145. If there is no pleading over, the ruling is an adjudication under Rule 87.)

111. **Motions Combined.** Motions to strike, for a more specific statement, and to dismiss, shall be contained in a single motion and only one such motion assailing the same pleading shall be permitted, unless the pleading is amended thereafter.

(Supersedes Code Sec. 11135.1. Includes any motion attacking a pleading, but not motions for other purposes, such as change of venue, for costs, etc. Allows alternative and inconsistent divisions in a motion.)

112. **Motion for More Specific Statement.** A party may move for a more specific statement of any matter not pleaded with sufficient definiteness to enable him to plead to it and for no other purpose. It shall point out the insufficiency claimed and particulars desired.

(Supersedes Code Secs. 11127, 11128. This motion will no longer lie to obtain evidence or information necessary to prepare for trial as distinct from preparation to plead. Discovery should be pursued under Rules 135-139, 121-134.)

113. **Striking Improper Matter.** Improper or unnecessary matter in a pleading may be stricken out on motion of the adverse party.

(Supersedes Code Sec. 11197.)

114. **Notice of Motion Unnecessary.** A party who has been served with original notice or has appeared, shall take notice of all motions filed in the action which are adverse to him, and of the regular motion day on which they will be heard.

For motion days and submission and determination of motions, see Rule 117.

(Supersedes Code Sec. 11232. Copies which will reach counsel are sufficient notice.)

115. **Discretionary Notice.** The Court may require counsel to be apprised, in any manner it directs, of the time and place at which it will hear or act on any motion, application or other matter other than at the regular motion day or pursuant to general assignment. This Rule shall be applied to expedite, not to delay, hearings and submissions.

(Supersedes Code Secs. 11233-11239, inclusive.)

116. **Proof of Facts in Motions.** Evidence to sustain or resist a motion may be by affidavit or in any other form to which the parties agree or the Court directs. The Court may require any affiant to appear for cross-examination.

(Supersedes Code Sec. 11231.)

117. **Motion Days; Disposition of Motions.**

(a) At least once each month, beginning on a day specified in advance by the judges of the judicial district, a motion day shall be held in each county. All motions made prior to trial on issues of fact, on file for twenty days or more, must then be submitted. Such motions not orally argued for any reason shall be deemed submitted without argument, unless they are then, or have previously been, set down for argument at some time, any place in the judicial district, not more than ten days thereafter, when they must be submitted without further postponement.

(b) The Court may order any motion submitted sooner than herein required, so as not to delay completing the issues or trial of the case.

(c) The trial court shall rule on all motions within thirty days after their submission, unless it extends the time for reasons stated of record.

(d) A "motion" within this Rule is any paper denominated as such, or any other matter requiring attention or order of court before the trial of the issues on their merits.

(Substitute for Code Secs. 11133, 11138 and part of Sec. 11439. Does not apply to motions after trial. If ruling within 30 days is occasionally impracticable, the same point can be raised by answer and get unlimited consideration; but the vast bulk of motions must be disposed of promptly.)

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

(New.)

119. **Order Defined.** Every direction of the Court, made in writing and not included in the judgment or decree, is an order.

(Code Sec. 11240.)

120. **When and How Entered.** A judge may enter judgments, orders or decrees at any time after the matter has been submitted, effective when filed with the Clerk, regardless of where signed. The Clerk shall promptly mail or deliver notice of such entry, or copy thereof, to each party appearing, or to one of his attorneys.

For entry of record see Rule 226.

For Clerk's notice to counsel, see Rule 86.

(Supersedes Code Secs. 11241, 11242, 11242.1, 11243, 11244 and similar statutes in other chapters.)

DIVISION V

DISCOVERY AND INSPECTION*

121. **Interrogatories; Time; Nature.** In actions other than actions in justice court or class B actions in municipal court a party may, after the appearance of an adversary and after filing his own pleading, file in duplicate not over thirty numbered interrogatories to be answered by such adversary, if they are necessary to enable the interrogating party adequately to prepare for trial. They may inquire as to the existence, nature, custody, control, condition or location of books or documents. They shall not require the adversary to disclose the names of the witnesses by whom or the manner in which he will establish his case.

(Supersedes Code Secs. 11185-11192, inclusive. The limit in number is from Massachusetts. The interrogatorios are required to be separate from the pleadings because they should neither delay making up the issues, nor encumber the pleadings from which the issues are to be determined.)

122. **Same; More Than Thirty.** Upon application to the Court and showing good cause therefor the Court may permit filing more than thirty interrogatories and may then specify the number which may be filed, and the time for filing and answering them.

(New.)

123. **Same; Objections; Time to Answer.** The Clerk shall deliver the copy of the interrogatories as provided in Rule 82. 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.

(New.)

*(This division supersedes Code Secs. 11185-11192, relating to interrogatories, Secs 11316-11319, relating to production of papers, chapter 491.1, relating to mental examination, and sec. 11127, so far as motions for more specific statement have heretofore been used to discover evidence. It also deals with other forms of discovery, except pretrial procedure.)

124. **Same; Answers.**

(a) Duplicate sworn answers shall be filed, separately answering each interrogatory responsively, and as fully as may be.

(b) Answers for a party not a natural person shall be by such representative or officer as has knowledge of the facts involved.
(New.)

125. **Same; Insufficient Answers.**

(a) Copy of the answers shall be delivered as provided in Rule 82.

(b) Within seven days thereafter, the interrogating party may file a motion to strike the answers or any part thereof for the reason that the same are unresponsive, or for any other proper reason.

(c) If these interrogatories are unanswered, or are answered in an incomplete or evasive manner, the interrogating party may within seven days after their delivery, or after the time for filing has expired, make application to the Court for an order requiring the answering person 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.
(New.)

126. **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 person. If a motion to strike any of the answers has been filed, that motion may be heard at the same time.
(New.)

127. **Oral Answers.** An order for oral answers shall fix the time and place therefor, which shall be within the judicial district; but if the answering person lives over 100 miles from the place of the action the Court may in its discretion direct that such person shall not be required to appear in Court for oral examination, but that in lieu thereof, the oral deposition of such person may be taken at such time and place as the Court may prescribe, in the manner provided for the taking of depositions of witnesses. Rules as to witnesses generally will apply to such examination but no witness fees or mileage will be allowed.

(It is contemplated that ordinarily the party will be required to appear. Since he is not merely a witness, the Court has power to require this. However, if the answer is comparatively unimportant, or the evasion doubtful, deposition may be substituted.)

128. **Oral Answers; Use of Answers.** The answers to interrogatories, whether contained in the written answers or as secured by oral examination or by deposition may be used only as follows: (1) To contradict or impeach the testimony of the interrogated party as a witness. (2) As admissions of the interrogated party. If only part of the interrogatories and answers are offered in evidence by a party, any other party may introduce all or any part of the interrogatories and answers which explain or are relevant to the part introduced. A party does not, by introducing such answers, make the interrogated party his own witness.

(This Rule illustrates the purpose of the interrogatories which is not to produce evidence for the record, but information to enable the party to prepare for trial.)

129. **Production of Books or Documents.**

(a) After issue is joined in any action, any party may file an application for the production or inspection of any books or papers, not privileged, which are in the 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. The movant need not use such documents as evidence at the trial.

(b) The Court shall fix the time and place for 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.

(Supersedes Code Secs. 11316-11319. Differs from present practice principally in eliminating statement as to facts to be proved, in requiring specification of the documents and in expressly requiring that issue shall have first been joined. Information necessary to specify the particular documents may be procured under Rule 121.)

130. **Same; Order.** The Court may order the production or inspection of such books and documents as, in its discretion, it deems material to a just determination of the cause, and on any terms or conditions it deems suitable to protect the documents, their owner, or any other person.
(New.)

131. **Inspection of Property.** On motion and hearing, as in Rules 126 and 129, a party may be ordered to permit his adversary to inspect, view, measure, survey or photograph any personalty or real estate or object or operation thereon, which is

relevant to any issue. The order shall specify the time, manner, place and any terms upon which this shall be done.

(Similar to Federal Rule 34.)

132. **Physicial or Mental Examination.** The Court may, in its discretion, proceeding as in Rules 126 and 129, order a physician to examine as to any physical or mental condition of a party which is in controversy in the action. The order shall specify the scope, time, place and manner of the examination and name the examiner. The party examined may have any representative present throughout any such examination.

(Broadens Code Chapter 491.1; Similar to Federal Rule 35.)

133. **Physical or Mental Examination; Copy of Reports; Privilege.**

(a) The party thus examined shall be furnished on his request, with a copy of the examiner's findings and conclusions, stated in detail. He shall thereafter, deliver to the examining party a like report of the prior or subsequent findings of any other physician who examines him on the same subject.

(b) If the party examined thus requests and obtains the examiner's report, or takes the examiner's deposition, he waives any privilege in that action or any other involving the same controversy, regarding the testimony of any physician or other person as to the condition for which the examination was ordered.

(c) If either above request is not complied with, the Court, on motion may order compliance, or may exclude the testimony of any physician whose report is not thus furnished.

(New. The obligation to furnish reports is optional with the party examined and the waiver of privilege is not obligatory. Federal Rule 35.)

134. **Noncompliance with Orders.** For disobedience to any order made under Rules 121-133 inclusive, the Court may make any further orders that are just, including but not limited to:

(a) Forbidding the disobedient party to avail himself of designated claims or defenses, or introduce designated documents, or objects, or testimony as to designated matters;

(b) Striking pleadings or parts thereof, or staying further proceedings until compliance, or dismissing the action or any part thereof, or treating the disobedient party as in contempt or default and rendering judgment accordingly;

(c) Any other order contemplated by these Rules.

(Analogous to Federal Rule 37.)

DIVISION VI

PRETRIAL PROCEDURE*

135. **Pretrial Calendar.** The Court may provide for a pretrial calendar in any county, which may extend to all actions, or be limited either to jury or nonjury actions.

136. **Pretrial Conference.** After issues are joined, the Court may in its discretion, and shall on request of any attorney in the case, direct all attorneys in the action to appear before it for a conference to consider:

(a) The necessity or desirability of amending the pleadings;

(b) Agreeing to admissions of facts, documents or records not really controverted, to avoid unnecessary proof;

(c) Limiting the number of expert witnesses;

(d) Settling any facts of which the Court is to be asked to take judicial notice;

(e) Any other matter which may aid, expedite or simplify trial of any issue.

137. **Pretrial Conference; Record.** On the request of any interested counsel or the Court, the reporter must record the entire conference, or any designated part thereof.

138. **Orders.** The Court shall make an entry reciting any action taken at the conference, which will control the subsequent course of the action relative to matters it includes, unless modified to prevent manifest injustice.

139. **Power not Enlarged.** The four foregoing Rules shall not abridge or enlarge the power of the Court to make orders without agreement of the parties.

(Federal Rule 16, but providing for a record of the conference, and making its calling mandatory on the request of either party.)

*The Rules in this division are new to Iowa. They are substantially the Federal Rules.

DIVISION VII

DEPOSITIONS AND PERPETUATION OF TESTIMONY*

(A) Depositions

140. **Depositions Generally; Stipulation.** Depositions shall be governed wholly by these Rules; but may be differently taken in any respect, if that be in accord with the written stipulation of the parties. Subject to the restrictions in Rule 141 a party may take the deposition of any person.

(New.)

141. **Restrictions.**

(a) The deposition of an adverse party, or of any person whose testimony is sought as a representative of such adverse party, or whose acts or conduct, made the subject of the deposition, is material to the rights asserted against said adverse party, may not be taken for purposes of discovery, nor at all unless ordered by the Court upon application, notice and hearing and a showing that the witness is or is about to go beyond the reach of a subpoena, or is for any other cause expected to be unable to attend at the time of trial. The application shall state the matter proposed to be inquired into. If the Court finds that the application is made in good faith, and not for purposes of discovery, and that it should be granted, it shall order the taking of the deposition and prescribe the scope of the examination, which shall in no event require such deponent to disclose the names of the witnesses by whom, or the manner in which the adverse party will establish his case.

(New. Under the Iowa decisions the practice heretofore has not permitted the taking of the deposition of an adverse party for any purpose. See Bagley v. District Ct. 218 Iowa 34, 254 N. W. 26. This rule permits it upon order of court, but not for purposes of discovery. It also prohibits for such purpose, taking the deposition of a representative of an adverse party such as the driver of his car, his agent for whose acts he is sought to be held, etc. In this it is less liberal than the Federal Rules on Discovery. In permitting deposition of a party or representative to produce material evidence it is more liberal than the Iowa practice heretofore.)

(b) Depositions before answers are all filed, or of a person in prison, may be taken only by leave of Court, on such terms as the Court prescribes.

(Code Secs. 11339, 11340 are not affected. Code Sec. 11362 prohibiting taking on certain days is superseded as unnecessary.)

*(There are no new Rules as to Evidence or witnesses, but Chapter 494 of the Code is superseded, as to Code Secs. 11316-11319, inclusive, by Division V, Supra, and as to Code Secs. 11358-11366, inclusive, 11368-11396, inclusive, and 11399-11407, inclusive, by this Division.)

142. **Defaults; Notice.** If a party requires proof to obtain a judgment upon a default, he may take depositions, after serving notice on the attorney of record for the defaulted party, or, if none, on the Clerk. Parties in default need not be given notice as to depositions taken under any other Rule.

(Code Sec. 11378 modified.)

143. **Scope of Examination.** Subject to the restrictions in Rule 141 and unless otherwise ordered by the Court, a deponent may be examined on any relevant matter, not privileged or self-incriminating, concerning any claim or defense of any party to the action, and as to the existence, description, nature, custody, location or condition of any books, documents, or objects, and the location or identity of persons knowing relevant facts.

(New. Permits examination for purposes of discovery except as to parties, representatives, etc.)

144. **Use of Depositions.** Any part of a deposition, so far as admissible under the rules of evidence, may be used upon the trial or at an interlocutory hearing or upon the hearing of a motion in the same action against any party who appeared when it was taken, or stipulated therefor, or had due notice thereof, either:

(a) To impeach or contradict deponent's testimony as a witness; or

(b) For any purpose if, when it was taken, deponent was a party adverse to the offeror, or was an officer, director or managing agent of any adverse party which is not a natural person; or

(c) For any purpose, if the Court finds that the offeror was unable to procure deponent's presence at the trial by subpoena; or that deponent is out of the state or more than one hundred miles distant from the trial, and such absence was not procured by the offeror; or that deponent is dead, or unable to testify because of age, illness, infirmity or imprisonment.

(d) On application and notice, the Court may also permit a deposition to be used for any purpose, under exceptional circumstances making it desirable in the interests of justice; having due regard for the importance of witnesses testifying in open court.

(Cf. Federal Rule 26.)

145. **Effect of Taking or Using.**

(a) If a party offers only part of a deposition, his adversary may require him to offer all of it relevant to the portion offered; and any other party may offer other relevant parts.

(b) A party does not make deponent his own witness by taking his deposition or using it solely under Rules 144 (a), or 144 (b). A party introducing a deposition for any other purpose makes the deponent his witness, but may contradict his testimony by relevant evidence.

(Cf. Federal Rule 26.)

146. **Substituted Parties; Successive Actions.** Substitution of parties does not prevent use of depositions previously taken and filed in the action. If an action is dismissed, depositions legally taken therein may be used in any subsequent action involving the same subject matter, between the same parties, their representatives or successors in interest.

(Cf. Federal Rule 26.)

147. **Oral Examination; Notice.**

(a) Oral depositions may be taken only in this State, or outside it at a place within one hundred miles from the nearest Iowa point. But, on hearing, on notice, of a motion of a party desiring it, the Court may order it orally taken at any other specified place, if the issue is sufficiently important and the testimony cannot reasonably be obtained on written interrogatories.

(b) The party taking an oral deposition must first serve reasonable notice on all other parties not in default for want of appearance, stating the time and place thereof and the name and address of the deponent, or if that is unknown, a description identifying him or the class or group to which he belongs. The Court, on motion of any party so served, may for good cause enlarge or shorten the time.

For manner of serving notice see Rule 156. On objecting to notice see Rule 158(a).

(Cf. Federal Rule 30.)

148. **Conduct of Oral Examination.** Deponent shall first be sworn by the officer before whom his deposition is taken. His testimony must be taken stenographically by such officer or a person acting in his presence under his direction and transcribed. The completed deposition must include all objections interposed, including those to the manner of taking it, to the officer's qualification, to any conduct or to any testimony. Evidence objected to shall be taken subject to the objection. Any adverse party may orally cross-examine the deponent; or if he does not participate orally, he may transmit to the officer written interrogatories,

which the officer shall put to deponent, whose answers shall be recorded verbatim.

For questions which witness need not answer see Rule 143.
For stipulating to modify any of the foregoing, see Rule 140.

(Cf. Federal Rule 30.)

149. **Reading and Signing.**

(a) No oral deposition reported and transcribed by an official reporter of the State of Iowa need be submitted to or read or signed by the deponent.

(b) In other cases, the completed deposition shall be submitted to deponent and read by or to him, and the officer shall note thereon any changes deponent may direct, and his reasons for such direction. Deponent shall then sign the deposition, unless he is ill or cannot be found. If he refuses to sign, the officer shall record such refusal and the reasons given therefor, and himself sign it. A deposition not signed by deponent may, nevertheless, be used at the trial unless the Court holds, on motion to suppress under Rule 158 (f), that deponent refused to sign it for reasons which require its rejection.

For waiving signature, reading, etc., see Rule 140.

(Cf. Federal Rule 30.)

150. **On Written Interrogatories.**

(a) A party may take depositions on written interrogatories after first serving all other parties not in default for want of appearance with copies thereof and with a notice stating the name, or title, and address of the officer to take them, and the name and address of the deponents.

(b) The adversary parties may thereafter, serve successive interrogatories on each other, but only as follows: cross-interrogatories within ten days after the notice; re-direct interrogatories within five days after the latter service; and re-cross interrogatories within three days thereafter. On application of any party, the Court may, for good cause shown, shorten or enlarge the time for serving any such succeeding interrogatories.

(c) Within the time required for cross-interrogatories, the adverse party may elect instead, to appear and orally cross-examine, by serving notice thereof on the party taking the deposition. The latter shall then within five days serve the former with notice of the date, hour and place where the deposition will be taken, which shall allow a reasonable time to enable the adverse party to attend;

and may also waive his original written interrogatories and examine the deponent orally.

For manner of service see Rule 156.

(This Rule preserves the right of oral cross-examination.)

151. **Answers to Interrogatories.** The party taking a deposition on written interrogatories shall promptly transmit a copy of the notice and all interrogatories to the officer designated in the notice. The officer shall promptly take deponent's answers thereto and complete the deposition, all as provided in Rules 148 and 149, except that answers need not be taken stenographically.

152. **Certification and Return; Copies.**

(a) The officer taking any deposition shall certify thereon that the witness was duly sworn, and that the deposition is a true record of the testimony given and of all objections interposed. He shall seal it securely in an envelope endorsed with the title of the action and "Deposition of (name of witness)", and promptly file it with the Clerk or send it to him by registered mail.

(b) The Clerk shall immediately give notice of the filing of all depositions to all parties who have appeared in the action.

(c) On payment of his reasonable charges therefor, the officer shall furnish any party or the deponent with a copy of the deposition.

153. **Before Whom Taken.**

(a) No deposition shall be taken before any party, or any person financially interested in the action, or an attorney or employee of any party, or any person related by consanguinity or affinity within the fourth degree to any party, his attorney, or an employee of either of them.

(b) Depositions within the United States or a territory or insular possession thereof may be taken before any person authorized to administer oaths, by the laws of the United States or of the place where the examination is held.

(c) Depositions in a foreign land may be taken before a secretary of embassy or legation, or a consul, vice consul, consul-general or consular agent of the United States, or under Rule 154.

(Federal Rule 28.)

154. **Letters Rogatory.** A commission or letters rogatory to take depositions in a foreign land shall be issued only when convenient or necessary, on application and notice, and on such

terms and with such directions as are just and appropriate. They shall specify the officer to take the deposition, by name or descriptive title, and may be addressed: "To the Appropriate Judicial Authority of (country)".

(Federal Rule 28.)

155. **Subpoenas.**

(a) On application of any party, or proof of service of a notice to take depositions under Rule 147 or Rule 150, the Clerk of the Court where the action is pending shall issue subpoenas for persons named or described in said notice or application. No such subpoena shall call for production of documents unless the Court on notice and hearing so orders.

(b) No resident of Iowa shall be thus subpoenaed to attend out of the county where he resides, or is employed, or transacts his business in person.

(Cf. Federal Rule 45-d and Code Sec. 11366, which is superseded.)

156. **Notice; Service.** Notices or interrogatories under Rules 147 to 160 inclusive may be served upon the party, or any attorney of record for him, either by personal delivery or by ordinary United States mail addressed to his address of record.

157. **Costs.**

(a) **Generally.** Costs of taking and proceeding to procure a deposition shall be advanced by the party taking it, and he cannot use it in evidence until such costs are paid. The costs shall be noted in the return or certificate, and taxed by the Clerk. The judgment shall award against the losing party only such portion of these costs as were necessarily incurred for testimony offered and admitted upon the trial.

(The last sentence requires the party taking the deposition to bear the cost of any portion taken for discovery.)

(b) **Failure to Attend.** The Court may order the party taking a deposition to pay the adverse party his costs and expenses, including reasonable attorney fees, for attending at the specified time and place for oral cross-examination (being entitled thereto), if the deposition is not then taken for absence of the party, or of the witness due to the party's failure to subpoena him.

(Federal Rule 30.)

158. **Irregularities; Objections.**

(a) **Notice.** All objections to any notice of taking any depositions are waived unless promptly served in writing upon the party giving the notice.

(b) **Officer.** Objection to the officer's qualification to take a deposition is waived unless made before such taking begins, or as soon thereafter as objector knows it or could discover it with reasonable diligence.

(c) **Interrogatories.** All objections to the form of any written interrogatory served under Rule 150 are waived unless the objector serves them on the interrogating party in the time allowed him for serving succeeding interrogatories and, as to the last interrogatories authorized, within three days after the service thereof.

(d) **Taking Deposition.** Errors or irregularities occurring during an oral deposition as to any conduct or manner of taking it, or the oath, or the form of any question or answer; and any other errors which might thereupon have been cured, obviated or removed, are waived unless seasonably objected to when it is taken.

(e) **Testimony.** Except as above provided, testimony taken by deposition may be objected to at the trial on any ground which would require its exclusion if given by a witness in open court, and objections to testimony, or competency of a witness, need not be made prior to or during the deposition, unless the grounds thereof could then have been obviated or removed.

(f) **Motion to Suppress.** All objections to the manner of transcribing the testimony, or to preparing, signing, certifying, sealing, endorsing, transmitting, filing the deposition, or the officer's dealing with it, are waived unless made by motion to suppress it, or the part complained of, filed with reasonable promptness after the objector knows of, or could with reasonable diligence discover, the defect. No such motion shall be sustained unless the defect is substantial and materially affects the right of some party.

(Cf. Federal Rules 32, 26-e.)

(B) Perpetuating Testimony

159. **Common Law Preserved.** The following Rules do not limit the Court's common law powers to entertain actions to perpetuate testimony.

160. **Before Action; Application.** An application to take depositions to perpetuate testimony for use in an action not yet pending, shall be entitled in the name of the applicant, be supported by affidavit, and show:

(a) that he expects to be a party to an action cognizable in some court of record of Iowa, which he is then unable to bring or cause to be brought;

(b) the subject matter of such action, and his interest therein;

(c) the facts to be shown by the proposed testimony, and his reasons for desiring to perpetuate it;

(d) the name or description of each expected adverse party, with address if known;

(e) the name and address of each depondent and the substance of his testimony. It shall be filed in the court where the prospective action might be brought.

(Rules 159-167 are similar in substance to Federal Rule 27.)

161. **Same; Notice.** 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 twenty 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 upon less than twenty days notice.

162. **Same; Guardian Ad Litem.** Before hearing the application, the Court shall appoint some attorney to act as guardian ad litem for any party under legal disability or not personally served with notice, who shall cross-examine for his ward if any deposition is ordered, and unless an attorney has been so appointed the deposition shall not be admissible against such party in any subsequent action.

163. **When Ordered; Who Not Examined.** If satisfied that the petition is not for the purpose of discovery, and that its allowance may prevent future delay or failure of justice, and that applicant is unable to bring the contemplated action or cause it to be brought, the Court shall order the testimony perpetuated, designating the deponents, the subject matter of their examination, when, where and before whom their deposition shall be taken, and whether orally or on written interrogatories.

(Excluding the purpose of discovery is a departure from the Federal Rules.)

164. **Taking and Filing Testimony.** Depositions shall be taken as directed in said order; and shall be otherwise governed by Rules 148 to 153 and 158. For the purpose of applying these Rules to depositions for perpetuating testimony, each reference therein to the Court in which the application was filed shall be deemed to refer to the Court in which the petition for such deposition was filed. Unless the Court enlarges the time, all such depositions must be filed therein within thirty days after the date fixed for taking them, and if not so filed cannot be later received in evidence.

(The last sentence is added to the Federal Rule.)

165. **Use; Limitation.** Any party to any later action involving any expected adverse party who was named in the application, and served with notice as hereinbefore required, or involving his privies or successors in interest, may use such deposition, or a certified copy thereof, if the deponent is dead or insane or his attendance cannot be obtained.

166. **Perpetuating Testimony Pending Appeal.** During the time allowed for taking an appeal from judgment of a court of record or during the pendency of such appeal, that Court may, on motion, allow testimony to be perpetuated for use in the event of further proceedings before it. The motion shall state the name and address of each proposed deponent, the substance of his expected testimony, and the reason for perpetuating it. If the Court finds such perpetuation is proper to avoid a failure or delay of justice, and the depositions are not sought for discovery, it may order them taken as in Rules 163 and 164. When taken and filed as thus provided, they shall be used and treated as though they had been taken pending the trial of the action.

DIVISION VIII

CHANGE OF VENUE*

167. **Grounds for Change.** On motion, the place of trial may be changed as follows:

(a) **County.** If the county where the case would be tried is a party and the motion is by an adverse party, the issue being triable by a jury, and a jury having been demanded;

(b) **Interest of Judge.** Where the trial judge is directly interested in the action, or related by consanguinity or affinity within the fourth degree to any party so interested;

(c) **Prejudice or Influence.** If the trial judge, or the inhabitants of the county, are so prejudiced against the moving party, or if an adverse party has such undue influence over such inhabitants, that the movant cannot obtain a fair trial. The motion in such case shall be supported by affidavit of the movant and three disinterested persons, none being his agent, servant, employee or attorney, nor related to him by consanguinity or affinity within the fourth degree. The other party shall have a reasonable time to file counter affidavits. Affiants may be examined pursuant to Rule 116;

(d) **Agreement.** Pursuant to written agreement of the parties;

(e) **Fraud in Contract.** A defendant, sued in a county where he does not reside, on a written contract expressly performable in such county, who has filed a sworn answer claiming fraud in the inception of said contract as a complete defense thereto, may have the case transferred to the county of his residence. Within ten days after the transfer is ordered, he must file a bond in an amount fixed by the Court, with sureties approved by the Clerk, for payment of all costs; and any judgment rendered against him shall include in such costs a reasonable amount fixed by the Court for expenses incurred by plaintiff and his attorney by reason of the change.

(Combines Code Secs. 11408, 11411, 11412, 11413, but eliminates change for inability to obtain a jury or for undue influence of an attorney; and limits the persons whose affidavits may be used.)

*(This Division supersedes chapter 495 of the Code except, however, that Code Sec. 11424 is superseded only insofar as it applies to civil actions. Code Secs. 11053, 11054 are also superseded.)

168. **Limitations.** Change of venue shall not be allowed:

(a) In an appeal from a justice of the peace; or

(b) Under Rule 167(c) where the issues are triable to the Court alone, except for prejudice of the judge; or

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

(d) After a continuance, except for a cause arising since such continuance or not known to movant prior thereto; or

(e) After one change, for any cause then existing, and known or ascertainable with reasonable diligence.

In no event shall more than two changes be allowed to any party.

(Code Secs. 11409, 11414 combined.)

169. **Subsequent Change.** Where the case is tried after a change of place of trial, and the jury disagrees or a new trial is granted, the Court may in its discretion allow a subsequent change, under Rule 167(a), (b), (c) or (d); subject to Rule 168.

(Code Sec. 11410.)

170. **Of Whole Case.** A change may be granted on motion of one of several coparties; and the whole cause shall then be transferred, unless separate trials are granted under Rule 186.

(Supersedes and changes Code Sec. 11421.)

171. **Where Tried.** Unless the change is under Rule 167(e), the Court granting it shall order the trial held in a convenient county in the judicial district, or if the ground applies to all such counties, then of another judicial district. If the ground applies only to a judge, the Court in its discretion may refuse a change and procure another judge to try the case where it was brought, or the Supreme Court may designate such other judge.

(Supersedes Code Secs. 11415, 11416, 11417.)

172. **Costs.** Unless the change is under Rule 167(d) or 167(e), the order shall designate generally all costs occasioned by the change, which movant must pay before the change is perfected. Failure to make such payment within ten days from the order waives the change of venue.

(Supersedes Code Sec. 11423.)

173. **Transferring Cause.** When a change is ordered and the required costs paid, the Clerk shall forthwith transmit to the proper Court his transcript of the proceedings, with any original papers, of which he shall retain an authenticated copy. The case

shall be docketed in the second Court without fee and shall proceed.

(Substitute for Code Sec. 11419, combined with Secs. 11420, 11422.)

174. **Jury Fees.** If the trial after change consumes more than one calendar day, the Court shall certify the number of days consumed; and the county where the action was brought shall pay the county where it was tried a sum equal to $3.00 per day for each juror who tried the case.

(Supersedes Code Sec. 11424, so far as it relates to civil cases. That Section also applies to criminal cases and as to those, is not affected by these Rules.)

175. **Action Brought in Wrong County.**

(a) An action brought in the wrong county may be prosecuted there until termination, unless a defendant, before answer, moves for its change to the proper county. Thereupon the Court shall order the change at plaintiff's cost, which may include reasonable compensation for defendant's trouble and expense, including attorney's fees, in attending in the wrong county.

(b) If all such costs are not paid within a time to be fixed by the Court, or the papers are not filed in the proper Court within twenty days after such order, the action shall be dismissed.

(Substitute for Code Secs. 11053, 11054. Does not affect Sec. 11051, which does not deal with change of venue.)

DIVISION IX

TRIAL AND JUDGMENT*

(A) Trials

176. **Trials and Issues.** A trial is a judicial examination of issues in an action, whether of law or fact. Issues arise where a pleading of one party maintains a claim controverted by an adverse party. Issues are either of law or fact. An issue of fact arises on a material allegation of fact in a pleading which is denied in an adversary's pleading or by operation of law. All other issues are issues of law which must be tried first.

For allegations and denials of fact, see Rules 70-76; 100.
For denials by operation of law, see e.g. Rule 102.
For separate trial of law issue see Rule 105.
(Combines Code Secs. 11426, 11427, 11428.)

177. **Demand for Jury Trial.**

(a) Jury trial is waived if not demanded according to this Rule; but a demand once filed may not be withdrawn without consent of all parties not in default.

(b) A party desiring jury trial of an issue must file a written demand therefor, either by endorsement on his pleading, or within ten days after the last pleading directed to that issue.

(c) Unless limited to a specific issue, every such demand shall be deemed to include all issues triable to a jury. If a limited demand is filed, any other party may, within ten days thereafter or such shorter time as the Court may order, file his demand for a jury trial of some or all other issues.

(This and the next Rule supersedes Code Secs. 11429, 11519. Similar to Federal Rule 38 and part of 39.)

178. **To Court or Jury.** All issues shall be tried to the Court except those for which a jury is demanded. Issues for which a jury is demanded shall be tried to a jury unless the Court finds

See comment under Rule 177.

*(This Division and the next supersede chapter 496 of the Code, except the following:
Code Secs. 11430-11434, inclusive, as to taking evidence; Code Secs. 11456-11458, inclusive, as to reporting testimony; Code Secs. 11482, 11486, 11496.1, 11570, 11583 and 11584; Code Sec. 11560 as to costs in event of new trial; Code Secs. 11602-11607, inclusive, as to judgment liens; Code Secs. 11613-11620, inclusive, as to commissioner's deeds; Code Sec. 11621 as to penalty for not satisfying a paid judgment.
The several sections rewritten in or superseded by the Rules are noted under the appropriate Rules.
This Division and the next contain much new and changed matter, notation of which appears under the Rules introducing it.)

that there is no right thereto or all parties appearing at the trial waive a jury in writing or orally in open court.

179. **Findings by Court**

(a) The Court trying an issue of fact without a jury, whether by equitable or ordinary proceedings, shall find the facts in writing, separately stating its conclusions of law; and direct an appropriate judgment. No request for findings is necessary for purposes of review. Findings of a master shall be deemed those of the Court to the extent it adopts them.

(b) On motion joined with or filed within the time allowed for a motion for a new trial, the findings may be enlarged or amended, and the judgment modified accordingly. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding, without having objected to it by such motion or otherwise.

(Supersedes Code Sec. 11435. Includes substance of part of Federal Rule 52.)

180. **Exceptions Unnecessary.** Exceptions to rulings or orders of Court are unnecessary whenever a matter has been called to the attention of the Court, by objection, motion or otherwise and the Court has ruled thereon.

This Rule has nothing to do with bills of exceptions to complete an otherwise incomplete record, for which see Rule 241.
(Supersedes and changes Code Secs. 11536, 11537, 11542, 11543.)

181. **Trial Assignments.** Trial courts shall provide by rule for placing actions on the calendar for trial to Court or jury, giving precedence to actions entitled thereto. Such rules shall provide that the Court must place any case on the assignment and compel its trial, on request of any party after issues are made up, and shall have no power thereafter to grant any delay except on motion for continuance or consent of all parties in open court.

(Supersedes Code Secs. 11438, 11439 and part of Secs. 11440, 11441, relating to assignments and calendars. Code Sec. 11439 as to motions is superseded by Rule 117.)

182. **Motions for Continuance.**

(a) Motions for continuance shall be filed without delay after the grounds therefor become known to the party or his counsel. Such a motion may be amended only to correct a clerical error.

(b) A case shall not lose its place on the calendar when a party applies for time to seek a continuance, unless it is then continued at the option of the other party at applicant's costs, whereupon

the Clerk shall forthwith enter judgment for costs unless otherwise ordered by the Court or agreed by the parties.

That the motion need not be served; see Rule 115.

(This and the next two rules supersede Code Secs. 11442-11455, inclusive.)

183. **Causes for Continuance.**

(a) A continuance may be allowed for any cause not growing out of the fault or negligence of the applicant, which satisfies the Court that substantial justice will be more nearly obtained. It shall be allowed if all parties so agree.

(b) All such motions based on absence of evidence must be supported by affidavit of the party, his agent or attorney, and must show: (1) The name and residence of the absent witness, or, if unknown, that affiant has used diligence to ascertain them; (2) What efforts, constituting due diligence, have been made to obtain such witness or his testimony, and facts showing reasonable grounds to believe the testimony will be procured by the next term; (3) What particular facts, distinct from legal conclusions, affiant believes the witness will prove, and that he believes them to be true and knows of no other witness by whom they can be fully proved. If the Court finds such motion sufficient, the adverse party may avoid the continuance by admitting that the witness if present, would testify to the facts therein stated, as the evidence of such witness.

184. **Objections; Ruling; Costs.** The adverse party may at once, or within such reasonable time as the Court allows, file specific written objections to the motion for continuance, which shall be part of the record. Where the defenses are distinct, the cause may be continued as to any one or more defendants. Every continuance shall be at the cost of the movant unless otherwise ordered by the Court.

185. **Consolidation.** Unless some party objects, stating that he will be prejudiced thereby, the Court may consolidate separate actions which involve common questions of law or fact; or order a single trial of any or all issues therein. In such cases, it may make such orders concerning the proceedings as tend to avoid unnecessary cost or delay.

(Supersedes Code Sec. 11226.)

186. **Separate Trials.** In any action the Court may, for convenience or to avoid prejudice, order a separate trial of any claim,

counterclaim, cross-claim, or of any separate issue of fact, or any number of any of them. Any claim against a party may be thus severed and proceeded with separately.

As to separate trial of points of law, see Rule 105.

(Supersedes Code Sec. 11437.)

187. **Empanelling Jury.**

(a) **Selection.** The Clerk shall prepare and deposit in a box separate ballots containing the names of all persons returned or added as jurors. At each jury trial he shall select sixteen jurors by closing and shaking the box to intermingle the ballots, and drawing them from the box without seeing the names. He shall list all jurors so drawn. Before drawing begins, either party may require that the names of all jurors be called, and have an attachment for those absent who are not engaged in other trials; but the Court may wait for its return or not, in its discretion.

(Supersedes Code Secs. 11459, 11477-11479 and changes them to omit some details.)

(b) **Oath or Examination.** The prospective jurors shall be sworn. The parties may then examine those drawn. The Court may conduct such examination as it deems proper. It may on its own motion exclude any juror.

(Cf. first sentence of Federal Rule 47.)

(c) **Challenges.** Challenges are objections to trial jurors, and may be either to the panel or to an individual juror. Coparties at the trial cannot sever their peremptory challenges, but must join in them unless the Court otherwise orders. The Court shall determine the law and fact as to all challenges, and must either allow or deny them.

(Combines Code Secs. 11460, 11461, 11474.)

(d) **Same; to Panel.** Before any juror is sworn, either party may challenge the panel, in writing, distinctly specifying the grounds, which can be founded only on a material departure from the statutory requirements for drawing or returning the jury. On trial thereof, any officer, judicial or ministerial, whose irregularity is complained of, and any other persons, may be examined concerning the facts specified. If the Court sustains the challenge it shall discharge the jury, no member of which can serve at that trial.

(Combines Code Secs. 11462-11465, inclusive.)

(e) **Same; to Juror.** Challenge to an individual juror, peremptory or for cause, must be made before the jury is sworn to try the case. A juror peremptorily challenged must be excused

without reasons being given. On demand of either party to a challenge for cause, the juror shall answer every question pertinent to the inquiry, and other evidence may be taken.

(Combines Code Secs. 11466, 11467, 11468, 11473.)

(f) **Same; For Cause.** A juror may be challenged by either party for any of the following causes: (1) conviction of a felony; (2) want of any statutory qualification required to make him a competent juror; (3) physical or mental defects rendering him incapable of performing the duties of a juror; (4) consanguinity or affinity within the ninth degree to the adverse party; (5) being guardian, ward, master, servant, landlord or tenant of the adverse party, or a member of his family or in his employ; or being a client of any attorney engaged in the cause; (6) being a party adverse to the challenging party in any civil action; or having complained of or been accused by him in a criminal prosecution; (7) having already sat upon a 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 a state of mind which will prevent him from rendering a just verdict; (10) being interested in a question like the issue to be tried; (11) having requested, directly, or indirectly, that his name be returned as a juror for the regular biennial period; (12) having served in the District Court as a grand or petit juror during the last preceding calendar year.

Exemption from jury service is not a ground of challenge, but the privilege of the person exempt.

(Combines Code Secs. 11472, 11476.)

(g) **Number; Striking.** Each side may peremptorily challenge three jurors and must strike off two but before the examination of the jury commences the Court may in its discretion authorize and fix the number of additional peremptory challenges where there are two or more parties represented by different counsel. After all challenges for cause are completed, plaintiff and defendant shall alternately make or waive their peremptory challenges by appropriate notations on the jury list. Thereafter each side in like manner shall strike off two jurors from the list.

(Supersedes Code Sec. 11469 and permits award of additional peremptory challenges in certain cases.)

(h) **Vacancies.** After a peremptory challenge is exercised or a challenge for cause sustained, another juror shall be called and

examined before further challenges are made, and shall be subject to being challenged or stricken as are other jurors.

(Code Sec. 11470.)

(i) **Jury Sworn.** The Clerk shall read the names of the twelve jurors who remain on the list after all others have been challenged or stricken. These shall constitute the jury and shall be sworn substantially as follows:

"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."

(Code Secs. 11471, 11471.1.)

188. **Saturday a Religious Day.** No juror whose religious faith requires him to keep the seventh day of the week can be compelled to attend on that day, prior to final submission of the case.

(Supersedes and alters Code Sec. 11475.)

189. **Alternate Jurors.** The Court may empanel one or two alternate jurors whose qualifications, powers, functions, facilities, and privileges shall be the same as regular jurors. After the regular jury is selected, the Clerk shall draw the names of two more persons than are to serve under this Rule, who shall be sworn and subject to examination and challenge for cause as provided in Rule 187. Each party must then strike off one such name, and the one or two remaining shall be sworn to try the case with the regular jury, and sit at the trial. Alternate jurors shall, in the order they were drawn, replace any juror who becomes unable to act, or is disqualified, before the jury retires, and if not so needed shall then be discharged.

(New.)

190. **Returning Ballots to Box.** When a jury is sworn, the ballots containing the names of those absent or excused from the trial shall be immediately returned to the box. Those containing the names of jurors sworn shall be set aside, and returned to the box immediately on the discharge of that jury.

(Combines Code Secs. 11480, 11481.)

191. **Procedure After Jury Sworn.** After the jury is sworn, the trial shall proceed in the following order.

(1) The party having the burden of proof on the whole action may briefly state his claim, and by what evidence he expects to prove it;

(2) The other party may similarly state his defense and evidence;

(3 The first above party must then produce his evidence; to be followed by that of the adverse party;

(4) The parties will be confined to rebutting evidence, unless the Court 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, unless otherwise permitted by the Court.

(Code Sec. 11485, modified by the last clause.)

192. **Further Testimony for Mistake.** At any time before final submission, the Court may allow any party to offer further testimony to correct an evident oversight or mistake, imposing such terms as it deems just.

(Code Sec. 11505.)

193. **Adjournments.** After trial begins, the Court, may in furtherance of justice, adjourn it for such time, and on such conditions as to costs or otherwise, as it deems just.

For admonishing jury on adjournment, see Rule 199(a).

(Code Sec. 11502.)

194. **View.** When the Court deems proper, it may order an officer to conduct the jury in a body to view any real or personal property, or any place where a material fact occurred, and to show it to them. No other person shall speak to them during their absence on any subject connected with the trial.

(Code Sec. 11496.)

195. **Arguments.** The parties may either submit the case or argue it. The party with the burden of the issue shall have the opening and closing argument. In opening, he shall disclose all points he relies on, and if his closing argument refers to any new material point or fact not so disclosed, the adverse party may reply thereto, which shall close the argument. A party waiving opening argument is limited, in closing, to reply to the adverse argument; otherwise the adverse party shall have the closing argument. The Court may limit the time for argument to itself, but not for arguments to the jury.

(Combines Code Secs. 11487, 11488, and 11490.)

196. **Instructions.** The court shall instruct the jury as to the law applicable to all the material issues in the case and such instructions shall be in writing and in consecutively numbered paragraphs and shall be read to the jury without comment or explanation. At the close of the evidence, or such prior time as the Court may reasonably fix, any party may file written requests that the jury be instructed as set forth in such requests. Before argument to the jury begins, the Court shall furnish counsel with a preliminary draft of instructions which it expects to give on all controversial issues, which shall not be part of the record. Before reading them to the jury, the Court shall submit to counsel its instructions in their final form, noting this fact of record, and granting reasonable time for counsel to make objections after argument to the jury and before the instructions are read to the jury. Within such time, all objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal. But if the Court thereafter revises or adds to the instructions, similar specific objection to the revision or additon may be made in the motion for new trial, and if not objections, except as above provided, shall be part of the record.

(Supersedes Code Secs. 11491-11495, inclusive.)

197. **Additional Instructions.** While the jury is deliberating, the court may in its discretion further instruct the jury, in the presence of or after notice to counsel. Such instruction shall be in writing, be filed as other instructions in the case, and be a part of the record and any objections thereto shall be made in a motion for a new trial.

(Supersedes Code Sec. 11506.)

198. **What Jury May Take.** When retiring to deliberate, the jury shall take with them all exhibits in evidence except as otherwise ordered. Depositions shall not be so taken unless all the evidence is in writing and none has been stricken out.

(Supersedes Code Sec. 11503.)

199. **Separation and Deliberation of Jury.**

(a) A jury once sworn shall not separate unless so ordered by the Court, who must then advise them that it is the duty of each juror not to converse with any other juror or person, nor suffer himself to be addressed on the subject of the trial; and that, dur-

ing the trial it is the duty of each juror to avoid, as far as possible, forming any opinion thereon until the cause is finally submitted to him.

(b) On final submission, the jury shall retire for deliberation, and be kept together in charge of an officer until they agree on a verdict or are discharged by the Court. Such officer must not suffer any communication to be made to them, nor make any himself, except to ask them if they have agreed on a verdict, unless by order of Court; nor communicate to any person the state of their deliberations, or the verdict agreed upon before it is rendered.

(Combines Code Secs. 11497, 11498.)

200. **Discharge; Retrial.** The Court may discharge a jury because of any accident or calamity requiring it, or by consent of all parties, or when on an amendment a continuance is ordered, or if they have deliberated until it satisfactorily appears that they cannot agree. The case shall be retried immediately or at a future time, as the Court directs.

(Combines Code Secs. 11500, 11501.)

201. **Court Open for Verdict.** The Court may adjourn as to other business while the jury is absent, but shall be open for every purpose connected with the cause submitted to the jury until it returns a verdict or is discharged.

(Code Sec. 11504; supersedes Code Sec. 11552.)

202. **Food and Lodging.** The Court may order the sheriff to provide suitable food and lodging at the expense of the county for a jury being kept together to try or deliberate on a cause.

(Code Sec. 11507.)

203. **Rendering Verdict.**

(a) **Majority.** Before verdict is returned, the parties may stipulate that it may be rendered by a stated majority of the jurors. In the absence of such stipulation a verdict must be unanimous.

(b) **Return; Poll.** The jury agreeing on a verdict shall bring it into court, where it shall be read to them, and inquiry made if it is their verdict. A party may then require a poll, which shall be by the Clerk of Court asking each juror if it is his verdict. If any juror expresses disagreement on such poll or inquiry, the jury shall be sent out for further deliberation; otherwise, the verdict is complete and the jury shall be discharged.

(c) **Sealed.** 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.

(Par. (a) is a substitute for Code Sec. 11483. Code Secs. 11508-11510, inclusive, are combined.)

204. **Form and Entry of Verdict.** The verdict shall be in writing, signed by a foreman chosen by the jury. It shall be sufficient in form if it expresses the jury's intent. It shall be filed with the Clerk, and entered of record after being put in form by the Court if need be.

For judgment on verdict, see Rule 222.

(Combines Code Secs. 11517, 11518 and part of Sec. 11508.)

205. **Special Verdicts.** The Court may require that the verdict consist wholly of special written findings on each issue of fact. It shall then submit in writing questions susceptible of categorical or brief answers, or forms of several special findings that the jury might properly make under the issues and evidence, or submit the issues and require the findings in any other appropriate manner. It shall so instruct the jury as to enable it to find upon each issue submitted. If the submission omits any issue of fact, any party not demanding submission of such issue before the jury retires waives jury trial thereof, and the Court may find upon it; failing which, it shall be deemed found in accord with the judgment on the special verdict. The Court shall direct such judgment on the special verdict and answers as is appropriate thereto.

(This and the following rule supersede Code Secs. 11511-11514 and 11576. Cf. Federal Rule 49.)

206. **Interrogatories.** The jury in any case in which it renders a general verdict may be required by the Court, and must be so required on the request of any party to the action, to find specially upon any particular questions of fact, to be stated to it in writing, which questions of fact shall be submitted to the attorneys of the adverse party before argument to the jury is commenced. The instructions shall be such as will enable the jury to answer the interrogatories and return the verdict. If both are harmonious, the Court shall order the appropriate judgment. If the answers are consistent with each other, but any is inconsistent with the general verdict, the Court may order judgment appropriate to the answers notwithstanding the verdict, or a new trial, or send the jury back for further deliberation. If the answers are inconsistent with each other, and any is inconsistent with the

verdict, the Court shall not order judgment, but either send the jury back or order a new trial.

See comment under Rule 205.

207. **Reference.** A "master" includes a referee, auditor or examiner. On a showing of exceptional conditions requiring it, the Court may appoint a master as to any issues not to be tried to a jury. The Clerk shall forthwith furnish the master with a copy of the order appointing him.

(Rules 207-214 supersede Code Secs. 11520-11535. Cf. Federal Rule 53.)

208. **Same; Compensation.** The Court shall fix the master's compensation and order it paid or advanced by such parties, or from such fund or property, as it may deem just. Execution may issue on such order at the master's demand. He shall not retain his reports as security for his compensation.

209. **Same; Powers.** The order may specify or limit the master's powers or duties or the issue on which he is to report, or the time within which he shall hold hearings or file his report; or specify that he merely take and report evidence. But except as so limited he shall have and exercise power to regulate all proceedings before him; to administer oaths and to do all acts and take all measures appropriate for the efficient performance of his duties; to compel production before him of any witness or party, whom he may himself examine, or of any evidence on any matters embraced in the reference, and to rule on admissibility of evidence. He shall, on request, make a record of evidence offered and excluded. He may appoint a shorthand reporter whose fees shall be advanced by the requesting party.

210. **Same; Speedy Hearing.** Upon his appointment the master shall forthwith notify the parties of the time and place of their first meeting before him, which shall be within twenty days or such other time as the Court's order may fix. If a party so notified fails to appear, the master may proceed ex parte, or, in his discretion, adjourn to a future day, giving notice thereof to the absent party. It is the duty of the master to proceed with all reasonable diligence; and the Court, after notice to the master and the parties, may order him to expedite proceedings or make his report.

211. **Same; Witnesses.** Any party may subpoena witnesses before a master as for trial in open court; and a witness failing to

appear or testify without good cause shall be subject to the same punishment and consequences.

212. **Same; Accounts.** The master may prescribe the form for submission of accounts which are in issue before him. In any proper case he may require or receive in evidence the statement of a certified public accountant who testifies as a witness. If any item submitted or stated is objected to, or shown insufficient in form, the master may require that a different form be furnished, or that the accounts or any item thereof be proved by oral testimony or written interrogatories of the accounting parties, or in such other manner as he directs.

213. **Same; Filing Report.** The master shall file with the Clerk the original exhibits, and a transcript of the proceedings and evidence before him, if there be one, otherwise his summary thereof, with his report on the matters submitted to him in the order of reference, including separate findings and conclusions if so ordered. He may previously submit a draft of his report to counsel for their suggestions.

214. **Same, Disposition.** The Clerk shall forthwith mail notice of filing the report to all attorneys of record; and within ten days thereafter, unless the Court enlarges the time, any party may file written objections to it. Application for action on said report, or objections, shall be by motion, to be heard on such notice as the Court prescribes. The report shall have the same effect whether or not the reference was by consent; but where parties stipulate that the master's findings shall be final, only questions of law arising upon the report shall thereafter be considered. The Court shall accept the master's findings of fact unless clearly erroneous; and may adopt, reject or modify the report wholly on in any part, or recommit it with instructions.

215. **Voluntary Dismissals.** A party may, without order of Court, dismiss his own petition, counterclaim, cross-petition or petition of intervention, at any time before the trial has begun. Thereafter a party may dismiss his action or his claim therein only by consent of the Court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this Rule shall be without prejudice, unless otherwise

stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against him on the merits, unless otherwise ordered by the court, in the interests of justice.

(This and the next three Rules supersede Code Secs. 11562-11565, and adopt the substance of Federal Rule 41.)

216. **Involuntary Dismissal.** A party may move for dismissal of any action or claim against him, if the party asserting it fails to comply with these Rules or any order of Court. After the plaintiff has completed his evidence, a defendant may move for dismissal because plaintiff has shown no right to relief, under the law or facts, without waiving his right to offer evidence thereafter.

(The last sentence includes the present motion to direct verdict. Motion to dismiss under it is permissible in equity cases as well.)

217. **Effect of Dismissal.** All dismissals not governed by Rule 215 or not for want of jurisdiction or improper venue, shall operate as adjudications on the merits unless they specify otherwise.

218. **Costs of Previously Dismissed Action.** Where a plaintiff sues on a cause of action that was previously dismissed against the same defendant in any Court of any state or the United States the Court may stay such suit until the costs of the prior action are paid.

(New.)

(B) Judgments Generally

219. **Judgment Defined.** Every final adjudication of any of the rights of the parties in an action is a judgment.

(Supersedes Code Sec. 11567.)

220. **For Part; In Abatement.** A party who succeeds in part only may have judgment expressly for the part on which he succeeds, and against him as to the rest. The findings and judgment must distinguish between matter in abatement and bar; and a judgment in abatement and not on the merits must so declare.

Bar or Abatement; see also Rule 103.

(Code Secs. 11568, 11569.)

221. **As To Some Parties Only.** Where the action involves two or more parties, the Court may, in its discretion, and though it has jurisdiction of them all, render judgment for or against some of them only, whenever the prevailing party would have been entitled thereto had the action involved him alone, or whenever a several judgment is proper; leaving the action to proceed as to the other parties.

See also Rule 74.

(Combines Code Secs. 11571, 11572.)

222. **Judgment on the Pleadings, etc.** Any party may, at any time, on motion, have any judgment to which he is entitled under the uncontroverted facts stated in all the pleadings, or on any portion of his claim or defense which is not controverted, leaving the action to proceed as to any other matter of which such judgment does not dispose.

(Code Sec. 11574 broadened to permit judgment on the pleadings.)

223. **On Verdict.** The Clerk must forthwith enter judgment upon a verdict when filed, unless it is special, or the Court has ordered the case reserved for future argument or consideration.

For judgment on special verdict, see Rule 205.

For judgment on election by standing on or failing to amend pleading, see Rule 87.

(Code Sec. 11575.)

224. **Principal and Surety; Order of Liability.** A judgment against principal and surety shall recite the order of their liability upon it. A "surety" includes all persons whose liability on the claim is posterior to that of another.

See Rule 41.

(Code Sec. 11577.)

225. **On Counterclaim; Excess.** If any party recovers judgment against an adverse party in excess of a judgment recovered by the latter against him, judgment shall be given for the excess, with any other affirmative relief to which either may be entitled.

(Code Sec. 11578, revised to conform to these Rules.)

226. **By Agreement.** Except in actions for divorce, separate maintenance and annullment of marriage, the Clerk shall forthwith enter any judgment upon which all parties agree in open court, or by writing filed with the Clerk; and execution may issue forthwith unless otherwise agreed.

(Supersedes Code Sec. 11579.)

227. **Entry.** All judgments and orders must be entered on the record of the court and clearly specify the relief granted or the order made.

See Rule 120.

(Code Sec. 11582.)

228. **Notes Surrendered.** The Clerk shall not, unless by special order of the Court, enter or record any judgment based on a

note or other written evidence of indebtedness until such note or writing is first filed with him for cancellation.

(Code Sec. 11582.1, clarified.)

229. **Affidavit of Identity.** The Clerk shall not enter a personal judgment until the creditor, his agent or attorney, files an affidavit stating the full name, occupation and residence of the judgment debtor, to affiant's information and belief. If such residence is in an incorporated place of more than 5,000 population, the affidavit shall include the street number of debtor's residence and business address, if any. But a judgment entered or recorded without such affidavit shall not be invalid.

(New. Adapted from Minnesota Statutes. Intended to eliminate confusion as to identity of judgment defendant.)

(C) Defaults and Judgments Thereon*

230. **Default Defined.** A party shall be in default whenever he (a) fails to appear as required in Rule 53 or 54, or, has appeared, without thereafter filing any motion or pleading as stated in Rule 87; or (b) fails to move or plead further as required in Rule 86, unless judgment has already resulted under Rule 87; or (c) withdraws his pleading without permission to replead, or withdraws his appearance or fails to present himself for trial; or (d) fails to comply with any order of Court or do any act which permits entry of default against him, under any Rule or statute.

(Supersedes Code Sec. 11587.)

231. **How Entered.** If a party not under legal disability or not a prisoner in a reformatory or penitentiary is in default under Rule 230(a), the Clerk, on demand of the adverse party, must forthwith enter such default of record without any order of Court. All other defaults shall be entered by the Court.

(Cf. Federal Rule 55(a).)

232. **Judgment on Default.** Judgment upon a default shall be rendered as follows:

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

(b) In all cases the Court on request of the prevailing party,

*(The seven Rules in this sub-division supersede Code Secs. 11587-11593, inclusive, and Sec. 11600. Code Sec. 11601 is not superseded. They conform the practice to a system not depending on terms of court for defaults or judgments, and otherwise depart from the existing statutory procedure.)

shall order the judgment to which he is entitled, and the Clerk shall enter the judgment so ordered. If no judge is holding court in the county, such order may be made by a judge anywhere in the judicial district as provided in Rule 120. The Court may, and on demand of any party not in default shall, either hear any evidence or accounting required to warrant the judgment or refer it to a master; or submit it to a jury if proper demand has been made therefor under Rule 177.

See Rules 13, 14, 17 and 71 as to hearings on default against incompetents, prisoners, etc., and guardians ad litem therein.

See Rules 46 and 47 as to required hearing in defaulted class suit.

(Cf. Federal Rule 55-b.)

233. **Notice; Notice of Default in Certain Cases.** When any judgment other than one in rem has been taken by default against a party served with notice delivered to another person as provided in Rule 56(a), the Clerk shall immediately give written notice thereof, by ordinary mail to such party at his last known address, or the address where such service was had. The Clerk shall make a record of such mailing. Failure to give such notice shall not invalidate the judgment.

(New.)

234. **On Published Service.** No personal judgment shall be entered against a person served only by publication, unless he has appeared.

(Supersedes Code Sec. 11600. Code Sec. 11601 is not affected by these Rules. It was held unconstitutional in Raher v. Raher, 150 Iowa 511, but has not been repealed by the legislature.)

235. **Relief in Other Cases.** The judgment may award any relief consistent with the petition and embraced in its issues; but unless the defaulting party has appeared, it cannot exceed what is demanded against him in the petition as limited by the original notice.

(Code Sec. 11573, modified to substitute "appearance" for "answer".)

236. **Setting Aside Default.** On motion and for good cause shown, and upon such terms as the Court prescribes, but not ex parte, the Court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty. Such motion must be filed promptly after the discovery of the grounds thereof, but not more than sixty days after entry of the judgment. Its filing shall not affect the finality of the judgment or impair its operation.

For new trial after 60 days, see Rules 251-253.

(Fixes new time limit in lieu of expiration of term and broadens Code Sec. 11589 in other particulars.)

(D) Summary Judgments

237. **On What Claims.** Summary judgment may be entered in an action, upon any claim therein, which is either:

(a) to recover a debt, or some other money demand which is liquidated, with or without interest arising on a negotiable instrument, or on a recognizance, or on a judgment for a stated sum, or on any contract, express or implied, except quasi contract; or

(b) to recover a sum under a statute fixing its amount or creating a liability in the nature of a contract; or

(c) on a guaranty of a debt, or of some other claim that is liquidated; or

(d) to recover specific chattels, with or without damages for their detention, but any such claim for more than nominal damages which is unliquidated, may be severed and retained for separate trial as provided in Rule 186; or

(e) to quiet or settle title to real estate or any interest therein; or

(f) to discharge an invalid lien or mortgage.

(New. Taken from Connecticut.)

238. **Procedure.** Plaintiff making a claim described in Rule 237 may file a motion for summary judgment thereon at any time after defendant appears, before or after answer. He shall support the motion by affidavit of himself or some person with personal knowledge of the facts, verifying the claim and the amount of money, if any, yet due thereon, and his belief that no defense exists against it. The Clerk shall mail or deliver the copy of the motion as required in Rule 82. Judgment shall be entered as prayed in the motion unless within ten days after it is filed, or such other time as the Court may, for good cause, allow, the defendant resists it with affidavits showing facts which the Court deems sufficient to permit him to defend. Hearing on the motion, if thus resisted, shall be as provided in Rule 117. The Court may, on plaintiff's motion, strike any affidavits filed by defendant which it finds insufficient, frivolous or made only for delay.

(New. Connecticut practice adapted to conform to these Rules.)

239. **On Motion in Other Cases.** Judgments may be obtained on motion by sureties against principals or co-sureties for money due because paid by them as such; by clients against attorneys, by plaintiffs in execution against sheriffs, constables or other officers for money or property collected by them, and for damages; and in all other cases specially authorized by statute.

(Code Sec. 11608.)

240. **Same; Procedure.** If motion under Rule 239 is filed in an action already pending, the procedure shall be as in Rule 238. Otherwise notice shall be served on the party against whom relief is sought at least ten days before the hearing thereof, stating when the motion will be filed and, in plain ordinary language, its nature and grounds, fixing the time and place of the hearing thereon. If the motion is not filed by the day specified it shall be deemed abandoned, if it is filed the Court shall hear it at the time fixed in the notice without further pleadings, and give judgment according to the very right of the matter.

For Declaratory Judgments, a species of special action, see Rule 261, et seq.

(Supersedes Code Secs. 11609-11612, inclusive, adapting them to these Rules.)

DIVISION X

PROCEEDINGS AFTER JUDGMENT*

241. **Bill of Exceptions.**

(a) **When Necessary.** A bill of exceptions shall be necessary only to effect a showing of material portions of the record of the cause not shown by the court files, entries, or legally certified shorthand notes of the trial; if any.

(b) **Affidavits.** Not more than five affidavits in support of any exception may be filed with the bill. Controverting affidavits, not exceeding five, may be filed within seven days thereafter, the Court, for good cause shown, may extend the time for filing such affidavits.

(c) **Certification; Judge; Bystanders.** The proposed bill of exceptions shall be promptly presented to the trial judge, who shall sign it if it fairly presents the facts. If he refuses, and counsel so certifies, and at least two bystanders attest in writing that the exceptions are correctly stated, the bill thus certified and attested shall be filed and become part of the record.

(d) **Same; Disability.** Whenever the Judge or master who tried the cause is for any reason unable to sign a bill of exceptions or certify the shorthand reporter's record, the same may be done by his successor, or by any Judge of the Court in which the proceeding was pending.

(Supersedes Code Secs. 11541 and 11547 and amplifies the latter. It leaves Code Secs. 11456-11458, inclusive, unchanged.)

242. **New Trial Defined.** A new trial is the re-examination in the same court of any issue of fact or part thereof, after a verdict, or master's report, or a decision of the Court.

(Code Sec. 11549.)

243. **Judgment Notwithstanding Verdict, etc.** Any party may, on motion, have judgment in his favor despite an adverse verdict, or the jury's failure to return any verdict:

*(This Division, with Division IX covers much of the statutory material of Chapter 496 of the Code. For sections in that Chapter not affected, see note to Division IX. This Division supersedes all of Chapter 552 relating to vacation of judgments, Code Sec. 12257 as to certain new trials and Code Secs. 11668, 11669, 11670, 11671, but not Sec. 11668.1 relating to Executions.)

(a) If the pleadings of the opposing party omit to aver some material fact or facts necessary to constitute a complete cause of action or defense and the motion clearly specifies such failure or omission; or

See also Rule 244(i).

(Supersedes Code Secs. 11553, 11554, and applies to failure of verdict as well as an adverse verdict.)

(b) If the movant was entitled to have a verdict directed for him at the close of all the evidence, and moved therefor, and the jury did not return such verdict, the Court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.

(New. Permits entry of proper judgment without a new trial where a verdict should have been directed.)

244. **New Trial.** The aggrieved party may, on motion, have an adverse verdict, decision or report or some portion thereof vacated and a new trial granted, for any of the following causes, but only if they materially affected his substantial rights:

(a) Irregularity in the proceedings of the Court, jury, master, or prevailing party; or any order of the Court or master or abuse of discretion which prevented the movant from having a fair trial;

(b) Misconduct of the jury or prevailing party;

(c) Accident or surprise which ordinary prudence could not have guarded against;

(d) Excessive or inadequate damages appearing to have been influenced by passion or prejudice;

(e) Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property;

(f) That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law;

(g) Material evidence; newly discovered, which could not with reasonable diligence have been discovered and produced at the trial;

(h) Errors of law occurring in the proceedings, or mistakes of fact by the Court.

(i) On any ground stated in Rule 243, the motion specifying the defect or cause giving rise thereto.

For setting aside Defaults, see Rule 236; other new Trials, see Rules 251 and 252.

(Supersedes, but contains the substance of Code Secs. 11550, 11548, adding inadequacy of damages to ground (d), and modifying clause (h) because of abolition of Exceptions.)

245. **Motion; Affidavits.** Motion under Rules 243 and 244 shall be in writing; and if based on grounds stated in Rule 244(b), 244(c), or 244(g) may be sustained and controverted by affidavits and heard pursuant to Rule 116.

(Part of Code Sec. 11551, adapted to these Rules.)

246. **Stay.** If motions under Rules 243 or 244 or petition under Rule 252 are timely filed, the Court may, in its discretion and on such terms, if any, as it deems proper order a stay of any or all further proceedings, executions or process to enforce the judgment, pending disposition of such motion or petition.

(New.)

247. **Time for Motions and Exceptions.** Motions under Rules 243 and 244 and bills of exception under Rule 241 must be filed within ten days after the verdict, report or decision is filed, or the jury is discharged, as the case may be, unless the Court, for good cause shown and not ex parte, grants an additional time not to exceed thirty days.

(Supersedes Code Secs. 11551, 11556.)

248. **Nonwaiver.** Any motion may be filed under Rules 243 or 244 without waiving the right to file or rely on any other of such motions.

(Code Sec. 11555.)

249. **Issues Tried By Consent; Amendment.** In deciding motions under Rules 243 or 244, the Court shall treat issues actually tried by express or implied consent of the parties but not embraced in the pleadings, as though they had been pleaded. Either party may then amend to conform his pleadings to such issues and the evidence upon them; but failure so to amend shall not affect the result of the trial.

(Supersedes Code Secs. 11557, 11558, 11559.)

250. **Conditional New Trial.** The Court may permit a party to avoid a new trial under Rules 243 or 244 by agreeing to such terms or conditions as it may impose, which shall then be shown of record and a judgment entered accordingly.

(Supersedes Code Sec. 11561.)

251. **Retrial After Published Notice.**

(a) **Retrial.** Except in actions for divorce and annullment of marriage, if judgment is entered against a defendant who did not appear and was served only by publication, he or any person legally representing him may, within six months after entry of

judgment, apply for retrial and on giving security for costs is then entitled to his defense and trial as though there were no judgment.

(Supersedes Code Secs. 11595 and 11598 and shortens the time from two years to six months.)

(b) **New Judgment.** After such retrial, the Court may confirm the judgment, or modify or set it aside and order a party to restore any money or property remaining in his possession under it, or to repay the value of any money or property he thus received.

For effect on title of good faith purchaser, see Rule 254.

(Code Sec. 11596.)

252. **Judgment Vacated or Modified; Grounds.** Upon timely petition and notice under Rule 253 the Court may correct, vacate or modify a final judgment or order, or grant a new trial on any of the following grounds:

(a) Mistake, neglect or omission of the Clerk;

(b) Irregularity or fraud practiced in obtaining the same;

(c) Erroneous proceedings against a minor or person of unsound mind, when such errors or condition of mind do not appear in the record;

(d) Death of a party before entry of the judgment or order, and its entry without substitution of his proper representative;

(e) Unavoidable casualty or misfortune preventing the party from prosecuting or defending;

(f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial, and was not discovered within the time for moving for new trial under Rule 244.

(Rules 252-256 supersede chapter 552 of the Code. They eliminate Code Sec. 12796; add and discard some grounds; make the proceedings uniformly by petition and notice, and otherwise adapt the chapter to the plan of these Rules. They also supersede Code Secs. 12255-12257; see Rule 251.)

253. **Same; Petition, Notice, Trial.**

(a) **Petition.** A petition for relief under Rule 252 must be filed in the original action within one year after the rendition of the judgment or order involved. It shall state the grounds for relief, and, if it seeks a new trial, show that they could not have been discovered in time to proceed under Rules 236 or 244, and were discovered afterwards. Unless the pleadings in the original action alleged a meritorious action or defense the petition shall do so. It shall be supported by affidavit as provided in Rule 80(b).

(b) **Notice.** After filing the petition, and also within the year aforesaid, petitioner must serve the adverse party with an original notice in the manner provided in Division III of these Rules.

(c) **Trial.** The Court shall promptly assign the petition for trial, not less than twenty days after notice is served. The petition shall stand denied without answer; otherwise the issues and pleadings, and form and manner of the trial shall be the same, as nearly as may be, as in the trial of an ordinary action to the court, and with the same right of appeal. No new cause of action shall be introduced.

(d) **Preliminary Determination.** The Court may try and determine the validity of the grounds to vacate or modify a judgment or order before trying the validity of the cause of action or defense claimed.

(e) **Judgment.** After a stay under Rule 246 if the original judgment or order is affirmed, additional judgment shall be entered against the petitioner for the costs of the trial, and also, in the Court's discretion, for damages not exceeding ten percent of the judgment affirmed.

254. **Titles and Liens Protected.**

(a) The title of a good faith purchaser to property sold under the original judgment shall not be affected or impaired by any judgment, order or proceeding under Rules 251 to 253 inclusive.

(b) If the original judgment is merely modified pursuant to either of said Rules, all liens or securities obtained under it shall be preserved in the modified judgment.

(Combines Code Secs. 12797 and 11597.

255. **Other Proceedings Not Invoked.**

Code Sections 12255-12257 inclusive shall not be invoked. Rules 252, 253 and 254 shall apply in lieu thereof.

(New. Supersedes the Code Sections specified which now appear in Chapter 517, relating to Recovery of Real Property.)

256. **Judgment Discharged on Motion.** Where matter in discharge of a judgment has arisen since its rendition, the defendant or any interested person may, on motion in a summary way, have the same discharged in whole or in part, according to the circumstances.

(Code Sec. 11585.)

257. **Fraudulent Assignment; Motion.** The Court may, on motion, inquire into the assignment of a judgment, or its entry to the use of any party, and cancel the assignment or strike out such

use, in whole or in part, whenever it determines the same to be inequitable, fraudulent or done in bad faith.

(Code Sec. 11586.)

258. **Execution; Duty of Officer.** An officer receiving an execution must execute it with diligence. He shall levy on such property of the judgment debtor as is likely to bring the exact amount, as nearly as practicable. He may make successive levies if necessary. He shall collect the things in action, by suit in his own name if need be, or sell them. He shall sell sufficient property levied on to satisfy the execution, paying the proceeds, less his own costs, to the Clerk.

(Rules 258, 259 and 260 supersede and change Code Secs. 11664, 11668, 11669, 11670, 11671, but not Sec. 11668.1 which remains unaffected. The officer's endorsement is governed by Rule 259.)

259. **Same; Endorsement.** The officer shall endorse on the execution, the day and hour he receives it; and the levy, sale, or other act done by virtue of it, with the date thereof; and the date and amount of any receipts or payments toward its satisfaction. Each endorsement shall be made at the time of the act or receipt; but no levy or sale under the execution shall be impaired by failure to make any such endorsement at the time here provided.

(Preserves the levy despite failure of timely endorsement.)

260. **Same; Levy on Personalty.** Levy on personalty may be made under an attachment or general execution by either of the following methods, but no lien is created until compliance with one of them.

(a) By the officer taking possession of the property, and appending to the execution its exact description at length, with the date of the levy, and affixing his signature; or

(b) If the creditor or his agent first so request in writing, the officer may view the property, inventory its exact description at length, and append such inventory to the execution, with his signed statement of the number and title of the case, the amount claimed under the execution, the exact location of the property and in whose possession; and file with the county recorder of the county where the property is located his certified transcript of such inventory and statement. Such filing shall then be constructive notice of the levy to all persons. The Recorder shall index the transcript as a chattel mortgage and the officer shall release the same on the margin of the index whenever his writ is satisfied or the levy discharged.

(Par. (b) is new. It provides an alternative method of levy on personalty without taking possession.)

DIVISION XI

DECLARATORY JUDGMENTS*

261. **Declaratory Judgments Permitted.** Courts of record within their respective jurisdictions shall declare rights, status, and other legal relations whether or not further relief is or could be claimed. It shall be no objection that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form or effect, and such declarations shall have the force and effect of a final decree. The existence of another remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The enumeration in the next three Rules does not limit or restrict the exercise of the general power herein referred to.

(Substantially Sec. 1 of Uniform Declaratory Judgments Act and a substitute for Sec. 5 thereof. See also Federal Rule 57.)

262. **Construing Contracts, etc.** Any person interested in a contract, oral or written, or a will, or whose rights, status or other legal relations are affected by a statute, or any municipal ordinance, rule, regulation, contract or franchise, may have determined any question of the construction or validity thereof or arising thereunder, and obtain a declaration of rights, status or legal relations thereunder.

(Substantially Sec. 2 of Uniform Declaratory Judgments Act with oral contracts, rules and regulations included.)

263. **Before or After Breach.** A contract may be construed either before or after there has been a breach thereof.

(Sec. 3, Uniform Act.)

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

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

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

*(The Rules in this Division are new. There is no corresponding chapter in the Code.)

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

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

(Sec. 4 of Uniform Act extended to include all fiduciaries and all types of guardianships.)

265. **Discretionary.** The Court may refuse to render a declaratory judgment or decree where it would not, if rendered, terminate the uncertainty or controversy giving rise to the proceeding.

(Substantially Sec. 6 of Uniform Act.)

266. **Supplemental Relief.** Supplemental relief based on a declaratory judgment may be granted wherever necessary or proper. The application therefor shall be by petition in the original case. If the Court deems the petition sufficient, it shall, on such reasonable notice as it prescribes, require any adverse party whose rights have been adjudicated to show cause why such relief should not be granted forthwith.

267. **Review.** All orders, judgments or decrees under Rules 261-266 inclusive may be reviewed as other judgments, orders or decrees.

(Sec. 7, Uniform Act.)
(Similar to, but not identical with Sec. 8 of Uniform Act.)

268. **Jury Trial.** The right of trial by jury shall not be abridged or extended by Rules 261-267.

(Substitute for Sec. 9 of Uniform Act.)

269. "**Person**". The word "person", in Rules 261-268, shall include any individual or entity capable of suing or being sued under the laws of Iowa.

DIVISION XII

PARTITION OF REAL AND PERSONAL PROPERTY*

270. **The Action; Pending Probate.** Real or personal property may be partitioned by equitable proceedings. Where the entire interest in real estate is owned by a decedent on whose estate administration or probate is pending, the action cannot be begun until six months after the notice of the administrator's appointment, nor at any time while an application for authority to sell such real estate is pending in the probate proceeding.

(Supersedes Code Sec. 12310 and introduces prohibition when the court in probate has jurisdiction.)

271. **Petition.** The petition shall describe the property and plaintiff's interest therein. It shall name the other owners and all indispensable lienholders as defined in Rule 273(a), and state the nature and extent of each interest or lien, all so far as known.

(Supersedes Code Sec. 11312.)

272. **Abstracts.** The Court may order a complete abstract to be filed covering any real estate involved, requiring that any party produce any abstract he has or controls, and that plaintiff complete the same, or supply the whole if no part is available. The expense thereof shall be taxed as costs. Such abstracts shall be available for use of the Court or any party during the proceedings. A like order may be made as to plats and surveys.

(Supersedes and changes Code Sec. 12313.)

273. **Parties.**

(a) **Indispensable Parties.** All owners of undivided interests, and all holders of liens against less than the entire property are indispensable parties to any partition. All holders of any liens on personalty are also indispensable to its partition.

(b) **Optional Parties.** Other persons having actual, apparent, claimed or contingent interests, and holders of liens on the entire real estate, may also be made parties.

(Supersedes Code Secs. 12314, 12315, 12323.)

274. **Early Appearance.** After a petition is filed seeking partition of personalty only, the Court may order appearance and

*(This Division supersedes chapter 522 of the Code. That chapter dealt primarily with real estate, but partition of personalty has been permitted by Supreme Court decisions.)

hearing at any specified time and place in the judicial district on not less than five days personal service of original notice on all defendants.

(New.)

275. **Joinder and Counterclaim.** Except as permitted by this Rule there shall be no joinder of any other cause of action and no counterclaim. But any party may perfect or quiet title to the property, or have an adjudication of the rights of any or all parties as to any or all matters growing out of or connected with it, including liens between them. Real and personal property owned by the same persons may be partitioned in the same action; and the same referee may act as to both.

(New, but the joinders permitted have nearly all been permitted heretofore by Supreme Court decisions.)

276. **Jurisdiction of Property; Proceeds.** The property or its proceeds shall be subject to the order of the Court until the right becomes fully vested. After a sale, each party, including holders of liens from which the property has been freed by the sale, shall have the same rights or interests in the proceeds as they had in the property sold, subject to a prior charge for costs.

(Supersedes Code Sec. 12316.)

277. **Same; Estate Less than Fee.** The Court shall make suitable provision as to the proceeds of any share held for life or years or in remainder, which may be done by appointing a trustee for the proceeds involved.

(Substitute for Code Sec. 12350.)

278. **Division or Sale.** Property shall be partitioned by sale and division of the proceeds, unless a party prays for partition in kind by its division into parcels, and shows that such partition is equitable and practicable. But personalty which is subject to any lien on the whole or any part can only be partitioned by sale.

(Supersedes and changes Code Sec. 12326.)

279. **Decree.** The decree shall establish the shares and interests of the owners in the property. A decree for partition in kind shall appoint three referees unless the parties agree on a smaller number. A decree ordering a sale shall appoint one or more referees, and three disinterested freeholders to appraise the property, and may direct either a public or private sale. All other matters involved in the cause, including those relating to liens,

may be determined by the same decree, or later supplemental decree or decrees.

Sale for less than appraisement, see Rule 291.

(Combines parts of Code Secs. 12325, 12326, 12327, 12343 and adds other provisions.)

280. **Liens.** The Court shall by supplemental decree, adjudge the nature, extent, priority or validity of any lien of any party, not previously determined, after causing the referees to give such notice to the interested parties as it may prescribe, and upon issues made up as the Court directs. No partition in kind shall be had until after such adjudication; but a sale need not wait thereon, and the pendency of any such controversy shall not delay distribution of the proceeds to any party not affected by the lien.

(Supersedes Code Secs. 12320, 12321, 12322, 12324.)

281. **Sale Free of Liens.** Personalty must be sold free of liens. Real property must be sold free of all liens, except those which are held against the entire property sold.

For initial or supplemental decree as to liens, see Rules 279 and 280.

(Supersedes Code Sec. 12323.)

282. **Possession and Preservation of Property.** The Court may order the referee to lease or take possession of any property involved in the action. It may also preserve the property either by injunction or by any other appropriate provision for its care and custody. Expenses incurred under this Rule, when allowed by the Court, shall be part of the costs.

(Supersedes and adds to Code Sec. 12328.)

283. **Referees to Divide; Oath; Inability.** Referees authorized to make partition in kind shall qualify by taking oath and need give no bond. If they are unable to make such division, they shall so report to the Court, which will then order a sale of personal property without further notice. As to real estate, such report will be heard under Rule 286, whereupon any further decree of sale or otherwise, may be made which is proper under the exigencies of the case.

(New.)

284. **Partition in Kind.** The referees who partition real estate in kind shall mark out each parcel by visible monuments, and file report thereof. They may employ a surveyor or assistants to aid them, if necessary, whose fees and expenses, when allowed by the Court, shall be part of the costs.

(Code Sec. 12329 with provision for costs added.)

285. **Same; Specific Allotment.** The Court may, for good reasons shown, order referees making a partition in kind to allot a particular tract or article to a particular party.

(Supersedes Code Sec. 12331.)

286. **Same; Report; Notice; Hearing.** Referees shall file a report of their proposed partition in kind, describing with reasonable particularity the respective shares and the specific property allotted to each owner, with a plat of any real estate involved. The Court shall promptly fix a time and place of hearing thereon, and the referees shall give at least ten days notice thereof in such manner as the Court directs. On hearing, the Court may approve, modify or disapprove the report, and refer it to the same or different referees or order a sale.

(Supersedes Code Secs. 12330, 12333, 12334.)

287. **Same; Decree; Recording.**

(a) **Decree; Costs.** On approving a partition in kind, the Court shall enter a decree allotting each party the property or share set off to him, apportioning the costs among the allottees and entering judgment against each for his share thereof, which shall be a lien on the property allotted to him, and for which special execution may issue on demand of anyone interested.

Further as to costs, see Rule 293.

(b) **Recording.** If the decree involves real estate, the Clerk shall file with the recorder of his own county and each other county where any of the real estate lies, a certified transcript of so much of the decree as shows the book and page where it is recorded, the confirmation of the shares and interests in the property apportioned, the names of the parties found entitled to share therein, and an accurate description of each parcel allotted to each several owner. Such transcript shall be presented to the county auditor for transfer, and recorded in the deed records, and indexed as a conveyance of each parcel, with the name of the allottee as grantee and names of all other parties as grantors.

(Code Secs. 12334-12337 adapted to these Rules.)

288. **Referees to Sell; Bond.** A referee to make sale shall qualify by taking oath. No bond shall be required before sale unless the referee is to sell personalty or take possession of real estate, in which case he shall give such bond as the Court directs. Before conveying real estate, he shall also give bond for one hundred twenty-five percent of the total sale price, payable to the

parties entitled to the proceeds, conditioned for the faithful discharge of his duties in connection with the sale and its proceeds.

(Supersedes and changes Code Sec. 12341.)

289. **Sales; Notice; Expense; Approval.**

(a) **Approval.** All sales shall be subject to the approval of the Court, unless it dispenses with approval of a public sale of personalty, which may then be sold on full payment of the price bid.

(b) **Expense.** If authorized by the Court, referees may advertise the sale beyond the required notice, or employ an auctioneer, clerk or assistant; and the expense thereof when allowed by the Court, shall be part of the costs.

(c) **Notice of Public Sale.** The referees shall give notice of the time and place of any public sale, by two publications, at least six days apart, in some newspaper of general circulation in the county where the sale is to be held. The last publication shall be at least seven days prior to the sale in case of real estate, and at least four days prior thereto in case of personalty.

(Supersedes Code Sec. 12342.)

290. **Report of Sale; Notice.**

(a) **Generally.** The referees shall report all proposed sales to the Court, which in its discretion, may require a hearing thereon at a specified time and place, in which event the referees shall give notice to the interested parties as the Court then directs.

(b) **Notice Mandatory.** Such notice and hearing must be accorded to any party who, before the report is approved, files with the Clerk, a duplicate request therefor, bearing his name and the address to which notice is to be sent. The Clerk shall docket the request, and transmit the copy to any referee forthwith, or if none has been appointed, then as soon as appointment is made. The referee shall mail notice of the hearing to such party at his address shown in the request within a time prescribed by the Court, which may direct that other parties be also notified.

(Supersedes Code Sec. 12344 and introduces new requirement for notice to parties desiring it.)

291. **Approving Sale; Conveyance.** The Court by express order may approve a private sale though it be for less than the appraised value. No real estate shall be conveyed until the sale is approved by the Court; and no conveyance shall be made until the price is fully paid.

(Supersedes Code Secs. 12343, 12345.)

292. **Deed; Validity.** A referee's deed, recorded in the county where the land lies, shall be valid against all subsequent purchasers, and against all persons interested at the time, who were parties to the proceeding.

(Code Sec. 12346.)

293. **Costs.** All costs shall be advanced by the plaintiff, but eventually paid by all parties proportionately to their interests; except costs created by contests, which shall be taxed against the losing contestant unless otherwise ordered. No contest shall deprive plaintiff's attorney of the fee specified in Rule 294. If partition is in kind, costs shall be adjudged, and may be collected as provided in Rule 287(a). If partition is by sale, the costs shall be paid from the proceeds and deducted from the shares of the parties against whom they are taxed. These remedies for collecting costs shall be cumulative of other remedies.

(Supersedes Code Sec. 12339 and makes further provisions relative to attorneys fees in event of contest; and for collection of costs where partition is in kind.)

294. **Attorney Fees.** On partition of real estate, but not of personalty, the Court shall fix, and tax as costs, a fee in favor of plaintiff's attorney, which cannot exceed the following amount, computed on the sale price, or by appraisement if no sale is made:

1. On the first two hundred dollars or fraction thereof obtained, ten per cent;

2. On the excess of two hundred to five hundred dollars, five per cent;

3. On the excess of five hundred to one thousand dollars, three per cent; and

4. On all sums in excess of one thousand dollars, one per cent.

(Code Sec. 12340 without change in the schedule.)

295. **Other Fees.** Appraisers and referees in all partition suits, as well as any attorney employed by a referee with approval of the Court, shall receive such reasonable compensation as the Court allows, which shall be part of the costs.

(Code Sec. 12351, as amended 49 G. A., chapter 304.)

296. **Final Reports.** Unless all interested parties waive it in writing, the Court shall fix a time and place of hearing the referee's final report, and prescribe the time and manner of notice which the referees shall give to all interested persons.

(New.)

297. **Paying Small Sums.** Whenever a minor, having no legal guardian, is entitled to proceeds of a partition sale, not in excess of two hundred dollars, the Court may order the referee discharged of all liability therefor, by paying them to the minor's parent or natural guardian, or the person with whom he resides, for the use of such minor, and taking a receipt therefor.

(New. Cf. Code Sec. 12077.1, which is not affected by these Rules.)

298. **Unborn Parties.** When a person not in being may have a contingent or a prospective vested interest as a cotenant of real estate, the Court shall have jurisdiction over the interest of such person, and shall appoint a suitable guardian ad litem, to act for him in such proceeding, and Rules 12 to 14 shall apply in such cases. The decree of partition and the division or sale thereunder shall be of the same force and effect as to all such persons, or persons claiming by, through or under them, as though they were in being when the decree was entered, and the property or proceeds of the interest of such person shall be subject to the order of the Court until the right thereto becomes fully vested.

(Code Sec. 12351.1.)

DIVISION XIII

QUO WARRANTO*

299. **For What Causes.** A civil action in the nature of quo warranto, triable by equitable proceedings, may be brought in the name of the state against any defendant who is

(a) unlawfully holding or exercising any public office or franchise in Iowa, or an office in any Iowa corporation; or

(b) a public officer who has done or suffered to be done, an act which works a forfeiture of his office; or

(c) acting as a corporation in Iowa without being authorized by law so to act; or

(d) a corporation exercising powers not conferred by law, or doing or omitting acts, which work a forfeiture of its corporate rights or privileges; or

(e) a person or corporation claiming under a patent, permit, certificate of convenience and necessity or license of any nature which was granted by the state because of fraud, or mistake or ignorance of a material fact, or the terms of which have expired or been violated by the defendant, or which the defendant has in any manner forfeited. The action in such cases shall be to annul or vacate the patent, permit, certificate or license in question.

(Supersedes Code Sec. 12417. Makes the action equitable; broadens subdivision (e) and permits corporations to be defendants therein.)

300. **By Whom Brought.**

(a) The county attorney of the county where the action lies may bring it in his discretion, and must do so when directed by the Governor, General Assembly or the Supreme or District Court, unless he may be a defendant, in which event the Attorney General may, and shall when so directed, bring the action.

(b) If on demand of any citizen of the state, the county attorney fails to bring the action, the attorney general may do so, or such citizen may apply to the court where the action lies for leave to bring it. On leave so granted, and after filing bond for costs in an amount fixed by the court, with sureties approved by the clerk, the citizen may bring the action and prosecute it to completion.

(Supersedes Code Secs. 12419, 12420.)

*(This Division supersedes chapter 631 of the Code, except Secs. 12426, 12427, and 12431-12438, inclusive.)

301. **No Joinder or Counterclaim.** In such action there shall be no joinder of any other cause of action, and no counterclaim.

(Code Sec. 12418.)

302. **Petition.** The petition shall state the grounds on which the action is brought, and if it involves an office, franchise or right claimed by others than the defendant, it shall name them; and they may be made parties.

(Supersedes Code Secs. 12421-12423, inclusive. The notice and general procedure will be governed by these Rules on those subjects.)

303. **Judgment.**

(a) The judgment shall determine all rights and claims of all parties respecting the matters involved, and shall include any provision necessary to enforce their rights as so determined, or to accomplish the objects of the decision.

(b) The judgment shall also determine which party, if any, is entitled to hold any office in controversy.

(c) If a party is unlawfully holding or exercising any office, franchise or privilege, or if a corporation has violated the law by which it exists or been guilty of any act or omission which amounts to a surrender or forfeiture of its privileges, the judgment shall oust such party from such office or franchise, or forfeit such privilege, and forbid such party to exercise or use any such office, franchise or privilege.

(d) If a party has merely exercised powers or privileges to which he was not entitled, but which does not warrant forfeiture under the law, the judgment shall prohibit him from the further exercise thereof.

(Supersedes Code Secs. 12424, 12428, 12429.)

304. **Costs.**

(a) Judgment against any defendant or intervenor shall include judgment for the costs of the action. Judgment against a pretended corporation shall adjudge the costs against the person or persons acting as such.

(b) If the action fails, the court may adjudge the costs against any private individual who brought it; otherwise they shall be paid as provided by the statutes governing costs in criminal cases.

(Supersedes Code Secs. 12422, 12428, 12430. The general chapter on Contempt will be available to enforce the judgment.)

305. **Corporation Dissolved.** If the judgment dissolves a corporation, the court shall make appropriate orders for the dissolution as provided by the statutes in force.

(Preserves Code Secs. 12432-12438, inclusive.)

DIVISION XIV

CERTIORARI*

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

(This Rule and Rule 308 supersede Code Sec. 12456. Examples of specific statutes authorizing certiorari are Secs. 12550, 2573.11, 6466-6470, 1905.53.)

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

(Supersedes Code Sec. 12459 and clarifies title. Contents of petition are governed by rules of pleading generally.)

308. **Other Remedies.** The writ shall not be denied or annulled because plaintiff has another plain, speedy or adequate remedy; but the relief by way of certiorari shall be strictly limited to questions of jurisdiction or illegality of the acts complained of, unless otherwise specially provided by statute.

See also Rule 107 as to treating petition as one for other proper relief.

(Supersedes Code Sec. 12456. Allows jurisdiction or illegality to be thus challenged despite other remedies, if that is all the party seeks to raise.)

309. **The Writ.** The writ may be granted only by the District Court unless it is directed to that court or a Municipal or Superior Court; and then by the Supreme Court or a Justice thereof. It shall be issued by the Clerk of the Court where the petition is filed, under its seal. It shall command the defendant to certify to that court, at a specified time and place, a transcript of so much of defendant's records and proceedings as are complained of in the petition or as may be pertinent thereto, together with the facts of the case, describing or referring to them or any of them with convenient certainty; and also to have then and there the writ.

(Supersedes Code Sec. 12457. Dispenses with complete transcript where that is not necessary for the review. Writs ordered by a Justice will be issued by the Clerk of the Supreme Court, as is the present practice.)

*(This Division supersedes chapter 533 of the Code.)

310. **Stay; Bond.** The Court or Justice granting the writ may, in its or his discretion, stay the original proceedings, though no stay is asked. Such stay, when sought by plaintiff, can be granted only on his filing bond with penalty and conditions, including security for costs, prescribed by such court or justice, and sureties approved by it or its clerk.

(Supersedes Code Sec. 12458.)

311. **Notice of Issuing Writ.** The writ may issue without notice on filing the petition, unless it is filed before a final order or decree in the original proceedings, or the plaintiff seeks a stay. Before issuing the writ in the latter cases, the Court or Justice shall, and in any case may in his discretion, fix a time and place for hearing and prescribe reasonable notice to defendant thereof. Such hearing shall be confined to the sufficiency of the petition, what records or proceedings shall be certified, and the terms of any bond to be given.

(Combines and supersedes Code Secs. 12460, 12461, limiting the preliminary hearing and requiring it if certiorari precedes final disposition of the original case.)

312. **Service of Writ.** Unless the defendant accepts service of the writ, it shall be served by a sheriff or deputy sheriff. If directed to a court, service shall be on a Judge or Clerk thereof; if to a board or other tribunal on its Secretary, Clerk or any member. Service shall be by delivery of the original writ; and a copy, with return of service, shall be returned to the office of its issuance.

(Supersedes Code Sec. 12462.)

313. **Return to Writ; By Whom.** Where the writ is directed to a court, return thereto, if practicable, shall be made and signed by the Judge whose action is complained of, otherwise by any Judge of that court; where directed to an officer, he shall make and sign the return; where directed to a board or tribunal, return thereto shall be made and signed by its presiding officer, or its clerk or secretary.

(New.)

314. **Defective Return.** If the return is defective, the Court or Justice who issued the writ, on his own motion or that of any party, may order a further return; or compel obedience to the writ or to such order, by attachment or citation for contempt.

(Supersedes Code Sec. 12463.)

315. **Trial.** When full return has been made, the Court shall fix a time and place of hearing, and hear the parties upon the

record made by the return. In its discretion, it may receive any transcript of the evidence taken in the original proceeding, and such other oral or written evidence as is explanatory of the matters contained in the return. Such transcript and additional evidence shall be considered for the sole purpose of determining the legality of the proceedings, and the sufficiency of the evidence before the original tribunal, board or officer to sustain its, or his action, unless otherwise specially provided by statute.

(This and the following Rule supersede Code Sec. 12464.)

316. **Judgment Limited.** Unless otherwise specially provided by statute, the judgment on certiorari shall be limited to sustaining the proceedings below, or annulling the same wholly or in part, to the extent that they were illegal or in excess of jurisdiction, and prescribing the manner in which either party may proceed further, nor shall such judgment substitute a different or amended decree or order for that being reviewed.

317. **Nature of Proceeding.** The action shall be by ordinary proceedings, so far as applicable.

(Code Sec. 12465.)

318. **Appeal.** Appeal to the Supreme Court lies from a judgment of the district court in a certiorari proceeding, and will be governed by the Rules applicable to appeals in ordinary actions.

(Code Sec. 12466.)

319. **Limitation.** No writ of certiorari shall issue or be sustained unless the petition is filed within six months from the time the inferior tribunal, board or officer exceeded its jurisdiction or otherwise acted illegally.

(Supersedes Code Sec. 12467. Reduces time limit and makes date of filing petition the determining factor.)

DIVISION XV

INJUNCTIONS*

320. **Independent or Auxiliary Remedy.** An injunction may be obtained as an independent remedy by an action in equity, or as an auxiliary remedy in any action. In either case, the party applying therefor may claim damages or other relief in the same action. An injunction may be granted as part of the judgment; or may be granted by order at any prior stage of the proceedings, and is then known as a temporary injunction.

(Supersedes Code Secs. 12512, 12513, 12514.)

321. **Temporary; When Allowed.** A temporary injunction may be allowed:

(a) when the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure him, or,

(b) where, during the litigation, it appears that a party is doing, procuring or suffering to be done, or threatens or is about to do, an act violating the other party's right respecting the subject of the action and tending to make the judgment ineffectual, or,

(c) in any case specially authorized by statute.

For injunctions in interpleader actions, see Rule 39.

(Supersedes Code Sec. 12515.)

322. **Endorsing Refusal.** A court, or Justice of the Supreme Court, refusing a temporary injunction shall endorse the refusal on the petition therefor.

(This and the next Rule afford a substitute for Code Sec. 12523.)

323. **Same; Statement Re Prior Presentation.** A petition seeking a temporary injunction shall state, or the attorney shall certify thereon, whether a petition for the same relief, or part thereof, has been previously presented to and refused by any court or Justice, and if so, by whom and when.

(See comment under Rule 322.)

*(This Division supersedes chapter 535 of the Code.)

324. **Same; Outside District.** No temporary injunction shall be granted by a District Court different from the one where the action is, or will be, pending, except upon affidavit that the application therefor cannot be promptly made to the latter court.

(Supersedes Code Secs. 12517, 12518, 12520.

325. **Same; By Whom Granted.** A temporary injunction may be granted by:

(a) the court in which the action is or will be pending;

(b) the Supreme Court or a Justice thereof;

(c) any other district court, when permitted by Rule 324.

(Supersedes Code Sec. 12516.)

326. **Same: Notice.** Before granting a temporary injunction, the Court may require reasonable notice of the time and place of hearing therefor to be given the party to be enjoined. Such notice and hearing must be had for 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 a building or other work, or the board of supervisors of a county, or to restrain a nuisance.

(Supersedes Code Secs. 12530, 12521-12525, inclusive.)

327. **Same; Bond.** The order directing a temporary injunction must require that before the writ issues, a bond be filed, with a penalty to be specified in the order, which shall be one hundred twenty-five per cent of the probable liability to be incurred. Such bond with sureties to be approved by the clerk, shall be conditioned to pay all damages which may be adjudged against petitioner by reason of the injunction. But in actions for divorce, separate maintenance or anuulment of marriage, the Court in its discretion may waive any bond, or fix its penalty in any amount deemed just and reasonable.

(Supersedes Code Secs. 12526, 12529.)

328. **Same; Dissolution.** A party against whom a temporary injunction is issued without notice may, at any time, move the court where the action is pending to dissolve, vacate or modify it. Such motion shall be submitted to that court. But if the injunction was granted by a Justice or court of a different district under Rule 324, the court or Justice that ordered it shall hear the motion, if it be shown by affidavit that prompt hearing cannot be obtained in the court where the action is pending.

(Supersedes Code Secs. 12524, 12531, 12532, 12533, 12534.)

329. **Enjoining Proceedings or Judgment; Venue; Bond.** An action seeking to enjoin proceedings in a civil action, or on a judgment or final order, must be brought in the county and court where such proceedings are pending or such judgment or order was obtained, unless that be the Supreme Court, in which case the action must be brought in the court from which appeal was taken. Any bond in such action must be further conditioned to pay or comply with such judgment or order, or to pay any judgment that may be recovered against the petitioner on the cause of action enjoined.

(Supersedes Code Secs. 12527, 12528.)

330. **Violation as Contempt.** Violation of any provision of any temporary or permanent injunction shall constitute contempt and be punished accordingly.

(Supersedes Code Secs. 12535-12539, inclusive.)

DIVISION XVI

APPELLATE PROCEDURE*

331. **From Final Judgment.**

(a) All final judgments and decisions of courts of record may be appealed to the Supreme Court, except as provided in this Rule and in Rule 333.

(b) No interlocutory ruling or decision may be appealed, except as provided in Rule 332, until after the final judgment or order. No error in such interlocutory ruling or decision is waived by pleading over, or proceeding to trial. On appeal from the final judgment, such ruling or decision may be assigned as error, where shown to have substantially affected the rights of the complaining party.

(New. Makes all intermediate orders reviewable on appeal from any final judgment. Prohibits appeals before final judgment except upon allowance by the Supreme Court or the Chief Justice.)

332. **From Interlocutory Orders.**

(a) Any party aggrieved by an interlocutory ruling or decision, including one appearing specially whose objections to jurisdiction have been overruled, may apply to the Supreme Court or any Justice thereof to grant an appeal in advance of final judgment. Such appeal may be granted, after notice and hearing as provided in Rules 347 and 353, on finding that such ruling or decision involves substantial rights and will materially affect the final decision, and that a determination of its correctness before trial on the merits will better serve the interests of justice.

(b) The order granting such appeal may be on terms of advancing it for prompt submission. It shall stay further proceedings below, and may require bond.

(New.)

333. **Amount in Controversy.** Except where the action involves an interest in real estate, no appeal shall be taken in any case where the amount in controversy, as shown by the pleadings, is less than three hundred dollars, unless the trial judge, within thirty days after the judgment or order is entered, certifies that the cause is one in which appeal should be allowed. The right

*(This Division supersedes all of chapter 555 of the Code, and Rules 14-a1 and 15-a to 32, inclusive of the present Supreme Court Rules.)

of appeal is not affected by any remission of any part of the verdict or judgment.

(Supersedes Code Sec. 12833. Increases amount necessary for appeal from one hundred dollars to three hundred dollars.)

334. **Scope of Review.** Review in equity cases shall be de novo. In all other cases, the Supreme Court shall constitute a court for correction of errors at law; and findings of fact in jury-waived cases shall have the effect of a special verdict.

335. **Time for Appeal.** Appeals to the Supreme Court must be taken within, and not after, thirty days from the entry of the order, judgment or decree, unless a motion for new trial or for judgment notwithstanding the verdict is filed as provided in Rule 247, and then within thirty days after the ruling on such motion.

(Supersedes Code Sec. 12832. Reduces time for appeal to thirty days.)

336. **How Taken; Notice; Delivery.** Appeal is taken and perfected by filing a notice with the Clerk of the court where the order, judgment or decree was entered, signed by the appellant or his attorney. It shall specify the parties taking the appeal, and the decree, judgment, order or part thereof appealed from. The Clerk shall forthwith mail or deliver a copy of such notice to the attorneys of record for all parties other than the appellant, or to any such party who has no attorney of record, at his last known address. No failure of the Clerk to mail or deliver any notice shall affect the validity of the appeal.

(Supersedes Code Secs. 12837, 12838, 12840. Substitutes filing with Clerk for service of notice of appeal.)

337. **Supersedeas; Bond.**

(a) No appeal shall stay proceedings under a judgment or order unless appellant executes a bond with sureties, to be filed with and approved by the Clerk of the court where the judgment or order was entered. The condition of such bond shall be that he will satisfy and perform the judgment if affirmed, or any judgment or order, not exceeding in amount or value, the obligation of the judgment or order appealed from, which the Supreme Court may render or order to be rendered by the trial court; and also all costs and damages adjudged against him on the appeal, and all rents of or damage to property during the pendency of the appeal, of which appellee is deprived by reason of the appeal.

(b) If the judgment or order appealed from be for money, the penalty of such bond shall be one hundred twenty-five per-

cent of the amount, including costs, unless, in exceptional cases the trial court fix a larger amount; in all other cases, an amount sufficient to save appellee harmless from the consequences of the appeal; but in no event less than three hundred dollars

(c) No appeal shall vacate or affect the judgment or order appealed from; but the Clerk shall issue a written order requiring the appellee and all others to stay proceedings under it, or such part of it as has been appealed from, when the appeal bond is filed and approved.

(Supersedes Code Secs. 12858-12861, inclusive.)

338. **Bond; Hearing on Sufficiency.** If any party to an appeal is aggrieved by the Clerk's approval of, or refusal to approve, a supersedeas bond tendered by appellant, he may apply to the trial Court, on at least three days notice to the adverse party, to review the Clerk's action. Pending such hearing, the Court may recall or stay all proceedings under the order or judgment appealed from. On such hearing, it shall itself determine the sufficiency of the bond, and if the Clerk has not approved the bond, the Court shall, by written order, fix its conditions and determine the sufficiency of the security; or if the Court determines that a bond approved by the Clerk is insufficient in security or defective in form, it shall discharge such bond and fix a time for filing a new one; all as appears by the circumstances shown at the hearing.

(Supersedes Code Secs. 12865, 12866.)

339. **Judgment on Bond.** If the Supreme Court affirms the judgment appealed from, it may, on motion of the appellee, render judgment against appellant and the sureties on the appeal bond for the amount of the judgment, with damages and costs; or may remand the cause to the trial court for the determination of such damages and costs, and the entry of judgment on the bond.

(Supersedes Code Sec. 12872.)

340. **Record on Appeal.**

(a) Promptly after taking an appeal to the Supreme Court, appellant shall file with the Clerk of the trial court duplicate typewritten *abstract* of so much of the record in that court, including pleadings, evidence, rulings, orders, judgment and all proceedings in the case, as is material to the appeal. Where exhibits will be copied in full in the printed record, the abstract may so state and refer to them by letter, number or other appropriate designation, without copying them.

The reporter's transcript shall be filed at the same time; and these Rules relative to it shall also apply to Bills of Exceptions under Rule 241. The cost of the transcript shall be taxed in the trial court.

The Clerk shall forthwith notify the attorneys of record for the appellee of such filing.

(New. The record should be abstracted, that is, summarized and abridged, retaining the essentials. Only exhibits which will be copied in full in the record may be referred to by number alone. If their abbreviation is proposed it must be included in the typed abstract.)

(b) If the abstract does not embrace the whole record, and all evidence and proceedings in the transcript, depositions and exhibits, it shall include a concise statement of all points upon which appellant will rely on the appeal, which shall be limited thereto.

(The statement of points is required when appellant intends to ask review of errors of law which can be presented on part only of the record and such part alone is abstracted. It is then needed to enable the appellee to determine whether such part alone is sufficient.)

(c) Within twenty days after such filing, or such longer time as the trial court may allow or the parties agree to in writing, any other party to the appeal may, in like manner, file duplicate amendments to appellant's abstract, proposing corrections, substitutions or additions thereto. At the expiration of the time for amendment, either party, on not less than three days written notice, may present the proposed abstract and all such proposed amendments, if any, to the Judge before whom the case was tried, who shall settle any differences to the end that the abstract correctly shows the evidence and proceedings at the trial, and is in form as provided by these Rules. The Trial Court shall then append to appellant's proposed abstract an order settling the same with any corrections, substitutions or additions it has allowed in conformity with these Rules.

(New.)

(d) Testimony of witnesses may be abstracted wholly or in part in condensed or narrative form, but if any party to the appeal deems any portion thereof to be of particular importance, he may state or substitute that part in question and answer form. Any party dissatisfied with another's proposed narrative statement of any testimony may require the questions and answers comprising it to be substituted for such narrative statement.

(e) Formal parts of all exhibits, and more than one copy of any document, shall be omitted. Documents shall be abridged by omitting formal or irrelevant parts. This Rule shall also apply to exhibits to pleadings.

(f) The abstract allowed as above or under paragraph (h) hereof shall constitute the Record on which the cause shall be submitted on the appeal. The appellant shall cause it to be printed, so as also to contain in full any exhibits designated in the abstract by number alone, as provided in paragraph (a) hereof.

For correcting Record, see Rule 341.

(Note the different use of the term "abstract". When settled and printed it is called the "record".)

(g) The Supreme Court may impose or withhold costs for any addition or substitution of irrelevant matter, or the use of needless questions and answers for the narrative statement. To aid it in this respect only, the Clerk of the trial court, at the request of the aggrieved party, shall certify to the Supreme Court the reporter's transcript, depositions, exhibits and proposed abstract and amendments thereto.

(When sent up under this paragraph the transcript is not to be used in reviewing the case, but only in determining costs.)

(h) Instead of proceeding under paragraphs (b) and (c) hereof, the parties may file with or include in the abstract proposed by any party to the appeal, their written agreement that it is correct. The trial court shall thereupon certify that such abstract has been so agreed to, and is the Record on appeal.

(i) Abstracts and the printed Record shall contain a brief index of their contents, in which the pleadings shall appear in the order of their filing.

341. **Correcting Record; Certification.**

(a) If anything material to either party is omitted from the Record on appeal by error or accident, or is misstated therein, the parties by stipulation, or the trial court, either before or after the Record is transmitted to the Supreme Court, or the Supreme Court on its own initiative or proper suggestion, may direct the correction thereof; and, if necessary, that further proceedings be had and a supplemental Record be prepared and certified in the trial court; or may require the Clerk of the trial court to certify to the Supreme Court any or all of the evidence or proceedings below.

(b) Any part or all of the record, including exhibits, in the trial court shall, at the request of the Supreme Court or any Justice thereof, be certified and transmitted by the Clerk of the court below to the Supreme Court.

(Supersedes Code Sec. 12854.)

342. **Filing and Docketing.**

(a) Within ninety days after filing notice of appeal, or such longer time as the trial court may grant on application and hearing, appellant shall file the printed record with the Clerk of the trial court, with one printed copy for the attorney or attorneys for each other party to the Record and for each such party not represented by attorney. The cause shall be entitled as it was in the court below, with the party taking the appeal called the appellant, and all other parties appellees. The Clerk shall mail or deliver a copy of the record to each of such attorneys or parties, as provided in Rule 336 or Rule 353, and shall endorse upon the other copy his certificate of such filing and mailing, and mail it, so endorsed, to the Clerk of the Supreme Court.

(b) When appellant files the printed Record in the trial court, he shall forthwith mail or deliver seventeen printed copies thereof, with a filing fee of three dollars, to the Clerk of the Supreme Court, who shall then docket the cause.

(c) If the printed record is not filed by the appellant with the Clerk of the trial court within ninety days after filing the notice of appeal or within such further time as fixed by the trial court, the appellee may file with the Clerk of the Supreme Court a copy of the final judgment or order appealed from, or other matters required, certified to by the Clerk of the trial court, and cause the case to be docketed, and the appeal upon motion shall be dismissed, or the judgment or order affirmed.

(Supersedes Code Sec. 12848.)

343. **Filing Briefs.** In all cases, whether in equity or at law, the appellant shall file his brief with the Clerk of the trial court within forty-five days after filing his Record, unless such time is enlarged in accordance with Rule 347(b) or suspended under Rule 348(d). He shall also file one "service copy" for the Clerk's certification, and copies for the other parties or their attorneys as provided in Rule 342, which copies the Clerk shall forthwith mail or deliver in like manner. The Clerk shall thereupon return the service copy to appellant's attorney, first certifying thereon the fact and date of his delivery or mailing copies of the brief, and to whom. Appellant shall thereupon transmit the service copy and seventeen other printed copies of his brief to the Clerk of the Supreme Court.

Within thirty days after appellant's brief is thus filed, the appellee shall serve and file his brief in like manner.

Appellant shall, within fifteen days thereafter file and serve his reply brief, if any, in like manner.

344. **Form and Contents of Briefs.**

(a) Appellant's opening brief shall contain:

(1) A Statement of the Case, not ordinarily to exceed one page, showing the nature of the action, what the issues were, and how they were decided, and what questions are presented by the appeal;

(2) A Statement of the Facts, stating the principal facts in narrative form, with references to the pages and lines of the Record to support each statement. But if such references are fully supplied in the Argument, they may be omitted from this Statement.

(3) A Statement of Errors relied on for reversal when the appeal presents questions of law; or a Statement of Propositions relied on, when it is triable de novo. The errors or propositions shall be separately stated and numbered, in substantially the order they are presented in the Division of the Brief.

(4) In Separately numbered Divisions:

(First) A Statement of the "error" or "proposition" relied on and discussed in that division, with references to the pages and lines of the Record, sufficient to show fully the manner in which the error arose and the ruling of the trial court thereon.

(Second) Separately numbered or lettered Brief Points substantially conforming to the "Statement of Errors" or "Propositions" and stating without argument the grounds of complaint of the ruling and citing authorities supporting each point.

(Third) The argument shall follow the statement of the brief points and authorities in each division, and be confined thereto. Errors or propositions not stated or argued shall be deemed waived.

(b) If two or more errors relied on present closely related propositions of law or fact, the brief points and arguments may be presented in one Division.

(c) Argument of any error which relates to the sufficiency of the evidence to sustain a ruling on any point shall supply full references to the pages and lines of the Record, unless such evi-

dence is fully stated, with such references, in the Statement of Facts.

(d) Appellee's Brief and Appellant's Reply shall follow the above outline as nearly as may be, but without unnecessary repetition.

345. **Printing and Costs.** The Record and Briefs shall be printed on unruled, unglazed white paper, with type commonly known as small pica, and leaded lines. The printed portion of each page shall be four inches wide and seven inches long with margins of two inches. Headings, and matter specially emphasized may be printed in bold face type. The lines of the Record must be numbered consecutively on each page.

The cost of printing, not to exceed one dollar per page, shall be certified by the printer on the document filed; and the amount actually paid, when certified by the attorney, shall be taxed in the Supreme Court as costs.

Motions, applications and petitions may be typewritten.

(Note the requirement that the *printer* certify the cost of printing and the attorney the amount actually paid.)

346. **Submission and Oral Argument.** A party desiring to be heard orally shall so state at the end of his Brief; and unless he does so he will be heard orally only in reply to his adversary's oral argument, if any. The oral arguments shall conform to rules prescribed by the Supreme Court.

347. **Writs and Orders in the Supreme Court.**

(a) **Writs and Process.** The Supreme Court shall issue all writs and processes necessary for the exercise and enforcement of its appellate jurisdiction and in the furtherance of its supervisory control over all inferior judicial tribunals and officers thereof throughout the state; and may enforce its mandates by fine and imprisonment, and imprisonment may be continued until obeyed.

(b) **Orders.** Every application for an order in the Supreme Court shall be in writing, served upon the adverse party or his attorney of record, with a notice that it will come on for hearing before the Supreme Court or a Justice thereof at a stated time and place. By stipulation and arrangement with the Court or Justice the parties may fix the time and place of hearing.

(c) **Hearings.** No order shall be issued except upon reasonable notice and opportunity to make resistance, but if it be made to appear that great and irreparable loss would ensue if the matter were delayed, an order may be entered effective only until final order is made. The Supreme Court may hear oral arguments on an application for order if it deems them desirable; otherwise, the matter shall be submitted without oral argument. One or more Justices may act for the Court in such matters.

348. **Motions to Dismiss.**

(a) Appellee's motion to dismiss an appeal must be in writing, supported by written brief, and served on appellant and filed with the Clerk of the Supreme Court within ten days after filing the Record, if the grounds therefor then exist. If he desires to present the motion orally, he shall so request therein.

(b) The Chief Justice shall fix the time for submission of such motion, which must be not less than ten days after its filing. If he determines oral argument is desirable, he shall assign it for oral argument; otherwise he shall assign it for submission on the briefs. The Clerk shall forthwith notify each party of the time and manner of the submission.

(c) Appellant's resistance, if any, shall be served and filed not less than three days prior to the date fixed for such submission.

(d) The Court may rule on the motion to dismiss before requiring submission of the appeal or may order the motion submitted with the appeal. The time intervening between service of the motion and the Court's order overruling the motion, or providing that it be submitted with the appeal, shall be excluded in determining the time within which the parties' respective Briefs on the merits must be filed.

(e) If grounds for dismissal of an appeal arise after the Record is filed, appellee may file and serve such motion to dismiss and supporting brief. The Court shall then determine when, and on what notice, the same shall be heard, and whether submission of the appeal shall be stayed and may make appropriate orders respecting the time for filing briefs on the merits.

349. **Remands.** When a judgment is reversed for error in overruling a motion to direct a verdict, or a motion for judgment under Rule 244(b), or a motion to withdraw an issue from the consideration of the jury, and the granting of the motion

would have terminated the case in favor of appellant, the Supreme Court may enter, or direct the trial court to enter final judgment as if such motion had been initially sustained; providing that, if it appears from the Record that the material facts relating thereto were not fully developed at the trial, or if, in the opinion of the Supreme Court, the ends of justice will be served thereby, a new trial shall be awarded of such issue or of the whole case.

(This is new as general practice, but accords with what has occasionally been done in certain cases. See Wilson v. Findley, 223 Iowa 1281.)

350. **Rehearings.**

(a) No notice of intention to file a petition for rehearing need be given; but the petition and brief thereon shall be filed with the Clerk of the Supreme Court within thirty days after filing the opinion, or such longer time as the Chief Justice, on written application served on the opposing parties, may allow. The petition and supporting brief must be printed either separately or together. Petitioner shall file eighteen copies thereof, together with one additional copy for the attorney or attorneys for each other party to the appeal, and each party not represented by attorney. The Clerk shall mail or deliver one copy to each such attorney or party forthwith; but his failure shall not impair the petitioner's right to consideration of his petition. The opposing party shall have fifteen days after filing of the petition and brief, in which to file resistance thereto.

(b) The parties shall have such right to argue a petition for rehearing orally on its submission as the Court may prescribe by rule.

(c) The Court may deny a rehearing, modify its opinion or order a resubmission. If resubmission is ordered, it shall designate the time for filing briefs, and counsel shall be entitled to oral argument on the resubmission; but the order therefor may designate the point or points to be argued.

351. **Procedendo.** Unless otherwise ordered by the Court, no procedendo shall issue for thirty days after an opinion is filed, nor thereafter while a petition for rehearing, filed according to these Rules, is pending.

352. **Certiorari or Appeal.** If any case is brought to the Supreme Court by appeal or certiorari, and the Court is of the opinion that the other of these remedies was the proper one, the

case shall not be dismissed, but shall proceed as though the proper form of review had been sought.

353. **Service Generally.** Whenever service on a party to an appeal is required or permitted under Rules 331-350 inclusive, it shall be made by delivering copy to his attorney of record, or if he have none, then by delivery to him or mailing to his last known address, or if no address is known, by leaving a copy for him with the Clerk of the Supreme Court. Delivery of copy within this Rule means either handing it to the attorney or party, or leaving it at his office with his clerk or other person in charge thereof, or if no one is in charge leaving it in a conspicuous place therein; or if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person over eighteen years of age residing therein; or mailing it to his office address. Service by mail is complete on mailing. Proof of service may be made by written acknowledgment, or by affidavit of the person making the service, who may be an attorney in the case or his clerk.

DIVISION XVII

COURTS OF JUSTICES OF THE PEACE*

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

(Supersedes Code Sec. 10527.)

355. **Counterclaims and Transfer to District Court.** In an action commenced in justice court for the recovery of money only, where the sum claimed is in excess of twenty-five dollars, any defendant may have the same transferred to the district court by filing with the justice at least twenty-four hours prior to the time for appearance fixed in the notice, a bond with sureties approved by the justice, in double the amount claimed by the plaintiff but in no case less than one hundred dollars and conditioned that such defendant will pay any judgment with costs recovered by the plaintiff against the defendant in the district court. Upon the filing of such bond and the approval of the sureties by the justice, the justice shall forthwith transcript the action to the district court. Where the amount claimed by plaintiff is twenty-five dollars or less any defendant may transfer such a justice court action to the district court upon the filing of an affidavit stating that he has a counterclaim in an amount in excess of the jurisdiction of the court, arising out of the transaction or occurrence that is the subject matter of the

*(This Division modifies and supplements chapter 474 of the Code. It supersedes Code Secs. 10527, 10535, 10596, 10597, 10584, 10588 and 10599.)

plaintiff's claim, and which upon transfer will be filed, and by filing a bond as above provided. Such affidavit and bond shall be filed at least twenty-four hours prior to the time fixed for appearance in the notice.

(See Rule 32. New. Modifies Code Sec. 10535.)

356. **Proceedings Upon Transfer.** Upon transfer of an action from the justice court to the district court, and within five days after the filing of the transcript in the district court the plaintiff shall file a written petition. When petition has been so filed, the defendant shall plead or move thereto within ten days after the filing of the transcript. Thereafter the rules of pleading and practice shall be the same as though the action had originally been commenced in the district court. If the petition is not filed as provided herein the action shall be dismissed at plaintiff's costs.

(New.)

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

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

(b) By the appealing party serving notice of the appeal upon the appellee, his agent, or the attorney who appeared for him, within twenty days after the judgment appealed from is rendered. Such notice shall be served in the same manner as is provided for service of original notice. If the appellee is a non-resident or foreign corporation and does not appear by agent or attorney, or if for any reason it is not possible to make service of such notice upon the appellee, his agent or attorney, the notice of appeal may be served upon the justice who rendered the judgment appealed from.

(Supersedes Code Sec. 10596.)

358. **Filing of Bond on Appeal.** The appeal bond must be filed in the office of the Clerk of the court to which the appeal is taken, within twenty days after the rendition of the judgment appealed from. It shall be in an amount determined by the Clerk to be sufficient to secure the judgment and costs of appeal and with sureties approved by said Clerk.

(Supersedes Code Sec. 10584.)

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

(New.)

360. **Judgment Upon Appeal on Dismissal for Lack of Prosecution.** When any judgment has been appealed or taken up by writ of error for review and shall be dismissed in the district or superior court for lack of prosecution, the Clerk shall enter judgment against the party or parties appealing in accordance with the judgment of the justice court.

(New.)

361. **Deposit of Money in Lieu of Bond.** When a bond is required any party in lieu of filing a bond, may deposit money in the sum fixed or specified as the amount of the bond. The rights of parties in and to the money so deposited shall be the same as their rights under the bond if one had been filed. Money deposited with a justice in lieu of a bond shall be transmitted by the justice to the Clerk of the court to which the case is appealed, transferred or brought for review by writ of error.

(New.)

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

(New.)

DIVISION XVIII

MUNICIPAL COURT*

363. **Filing and Docketing.** Unless the petition in class "A" cases or the original notice in class "B" cases is filed with the Clerk of the court at least five days before the date set in the original notice for appearance, the defendant shall not be held to appear and answer. If the petition or original notice, as the case may be, is not so filed the defendant may have the case dismissed at plaintiff's cost, without notice, by filing a copy of the original notice with the Clerk and paying the filing fee. No new action shall be commenced in any court of this state based upon the same claim or demand unless the costs in such dismissed action are fully paid by the claimant and satisfied of record.

(New.)

364. **Transfer to District Court; In Cases Brought in the Municipal Court.** When any defendant files a counterclaim in an amount in excess of the jurisdiction of the Court, arising out of the transaction or occurrence that is the subject matter of plaintiff's claim, such defendant, by motion filed with such counterclaim, may have the case transferred to the district court, upon the filing in the municipal court of a bond in an amount, and within the time fixed and with sureties approved by the Court. The bond shall be conditioned for the payment of all court costs assessed or adjudged against such defendant by the district court in connection with such case.

(New. See Rule 32.)

365. **Same; Manner and Proceedings.** Upon transfer of an action from the municipal court to the district court the Clerk of the municipal court shall forthwith transmit to the Clerk of the district court a transcript of the proceedings, with any original papers, of which he shall retain an authentic copy. The case shall be docketed without fee. The rights of the parties and the practice and procedure shall be the same as in actions originally commenced in district court.

(New.)

*(These few Rules are additional to the statutes in chapter 475 of the Code, which are not affected.)

DIVISION XIX

RULES OF A GENERAL NATURE

366. **Computing Time; Holidays.** In computing time under these Rules the first day shall be excluded and the last day included, and if the last day is a Sunday or holiday, the time shall extend to the next day not a Sunday or holiday. Holidays shall be only: January first, February twelfth and twenty-second, May thirtieth, July fourth, November eleventh, December twenty-fifth, the first Monday in September, the day of general election, and any day proclaimed or designated by the President or the Governor as a day of Thanksgiving.

(New.)

367. **Death, Retirement or Disability of Judge.**

(a) In the event of the death or disability of a Judge in the course of a proceeding at which he is presiding, or while a motion for new trial or for judgment notwithstanding the verdict, or for other relief, is pending, any other Judge of the District may be called in, or a Judge from another District may be assigned by the Chief Justice of the Supreme Court to hear or act upon the same, and, if in his opinion he can proceed with the matter or determine the motion he shall do so; otherwise he may order a continuance, declare a mistrial, order a new trial of all or any of the issues, or make such disposition of the matter as the situation warrants.

(b) In the event of the death or disability of a Judge who has under advisement an undecided motion, or case tried to him without a jury, any other Judge of the District may be called in, or a Judge from another District may be appointed by the Chief Justice of the Supreme Court to consider the same, and, if by a review of the transcript or a re-argument he can, in his opinion, sufficiently inform himself to enable him to render a decision, he shall do so; otherwise he may order a continuance, declare a mistrial, or order a new trial of all or any of the issues, or direct the recalling of any witnesses, or make such disposition of the matter as the situation warrants.

(c) In the event of the death, disability or retirement of a Judge before the record for appeal in any case tried by him shall have been settled, the same shall be settled by another Judge of

the District, or by a Judge of another District appointed for that purpose by the Chief Justice of the Supreme Court.

((a), (b), and (c) are new.)

368. **Appeal to District Court from Administrative Body.** Where appeal to the District Court from an action or decision of any officer, body or board is provided for by statute and the statute does not provide for the formulation of the issues either before such officer, body or board, or in the District Court, the appellant shall file a petition in the District Court within ten days after perfecting the appeal, or within such time as may be prescribed by the Court. The appellee shall file motion or an answer to such petition within ten days thereafter, or within such further time as may be prescribed by the Court. Thereafter the rules of pleading and procedure in actions in the District Court shall be applicable.

(New.)

369. **Effect of Notice by Posting.** Except in probate proceedings, or where expressly authorized by statute, notice by posting shall not be recognized as having any effect, and where the Court is authorized to prescribe the notice to be given, notice by posting shall not be prescribed.

(New.)

370. **Comments and Footnotes.** All references to sources, comments, and footnotes are incorporated solely for convenience in the use of the Rules and do not form a part thereof.

371. **Power of Supreme Court to Change.** The Supreme Court shall have power to revoke, change or supplement any of these Rules which prescribe the procedure in that court. Under this power the Court may revoke, change or supplement any Rule in Division XVI hereof except Rules 331-339 inclusive. Any such change or addition shall take effect at such time as the Court shall prescribe.

APPENDIX I

STATUTES OF NO FURTHER FORCE AND EFFECT

(Column 1 of this table contains a list of statutes which are of no further force and effect. Column 2 shows what Rule or Rules of Civil Procedure have rendered each of these statutes of no further force and effect.)*

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*(That a statute is shown in this table as superseded does not indicate that the procedure has been changed by these Rules. The greater portion of the statutes listed as of no further force and effect have been incorporated in the Rules, either verbatim or in substance or with slight modifications necessary to make them conform to the system of practice contemplated under the Rules.)

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