

1952

# The Adjustment of the Scheme of the Federal Rules to the Peculiarities of Minnesota Practice

Benedict S. Deinard

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Deinard, Benedict S., "The Adjustment of the Scheme of the Federal Rules to the Peculiarities of Minnesota Practice" (1952).  
*Minnesota Law Review*. 888.  
<https://scholarship.law.umn.edu/mlr/888>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

## THE ADJUSTMENT OF THE SCHEME OF THE FEDERAL RULES TO THE PECULIARITIES OF MINNESOTA PRACTICE

BENEDICT S. DEINARD\*

**L**AWYERS who have not had any substantial experience under the Federal Rules should be reassured that they comprise a workable and uncomplicated system of procedure and practice, not radically different from the State practice with which we are so familiar. Modernization of State practice can proceed, broadly speaking, along the same lines, and therefore the Federal Rules can satisfactorily be transplanted—with some adjustment, of course—to our district courts. The Federal Rules substitute simplicity for artfulness in pleading, relying on postpleading discovery to illuminate the issues; substitute full disclosure before trial for suppression of the facts; and streamline procedure in many ways. But there is no cause for alarm on the part of practitioners that their adoption will introduce any strange heresies or mysteries into practice in the State courts.

But to that reassurance I should like to add the following predictions on points which may be overlooked:

- A. The Rules will increase the lawyers' work load in preparation of a case.
  - B. They will substantially increase the chambers work of the trial judges, because they are not susceptible of automatic application.
  - C. More than ever, they require an able trial judiciary.
- A. The experience of lawyers handling litigation in the Federal courts clearly indicates that the Federal Rules have increased the lawyers' work load in preparation of their cases. It is no longer possible to serve a complaint, read the answer, perhaps interpose a reply, and then put the file away to rest until the clerk calls the case for trial, meanwhile hopefully expecting that the case will be disposed of by settlement before trial. It is no longer possible to hide your case from view until you present it in court, and it is no longer safe to come into court without first probing your adversary's case. The technique of discovery has largely eliminated the possibility of surprise; it has also made last-minute preparation for trial impossible. In fact, it is amusing that the Rules have introduced a race for priority in discovery and inspection. When you commence a lawsuit, you may as well be prepared to have your opponent come

---

\*L.L.B., University of Minnesota Law School 1921, S.J.D., Harvard Law School 1922, Member of Minnesota Bar.

over with his answer in one hand and a notice of taking the plaintiff's deposition in the other. And only a reckless lawyer will permit the examination of his own client without first fully preparing his case.

No doubt discovery and the summary judgment procedure will eliminate trial of a substantial amount of worthless or trivial litigation. But, on the other side, it often involves dual preparation by counsel: first, in advance of discovery proceedings, and second, in advance of the trial. It often involves dual examination of witnesses: first, in counsel's office, and second, in open court. Pre-trial conference may be very helpful in simplifying the issues and, eventually, in shortening a trial. But it involves time in preparation and attendance. If you have been in the habit of starting a lawsuit without adequate preparation on the law and facts, and then awaiting the trial calendar before spending any real time on preparation, in the hope that somewhere along the way the case will probably be disposed of by settlement or otherwise before you have to make any substantial investment of time in the case, prepare to reform. That is no longer possible.

B. The Rules substantially increase the chambers work of the trial judges, because they are not susceptible of automatic application.

Many of the innovations introduced by the Rules involve discretionary action. One need only thumb through the first sections of the Rules to discover that few of the Rules are capable of automatic application. They usually involve a contested hearing and discretionary disposition by the court.<sup>1</sup>

- 
1. Rule 4.043) Defendant served by publication may be admitted to
    - 12.01) defend on a showing of "sufficient cause."
    - 4.07) Court "in its discretion" may allow process to be amended on terms.
      - 5.01) Court may relax requirements for service if defendants
      - 5.03) are numerous.
      - 5.01) Court may require service upon the party instead of upon his attorney.
      - 5.04) Court may dispense with filing of papers and may grant continuances.
    - 6.02) Court may enlarge time, "in its discretion," for cause shown.
    - 6.04) Court may change time specified for serving a motion.
    - 7.01) Court may order a reply.
    - 8.03) Court, "if justice requires" "on terms" may relieve pleader of mistaken designation of answer, etc.
    - 12.01) Court may change specified time for pleading after motion.
    - 12.02) Court may permit conversion of motion to dismiss or for judgment on the pleadings, into motion for summary judgment.
    - 12.03)

If lawyers were all filled with sweet reasonableness, no doubt many, if not most, interlocutory matters could be disposed of by stipulation or informal agreement on a give and take basis. But lawyers as a group are contentious by training, belligerent by habit, and disputatious by nature. They often welcome an opportunity to display their arguments. That inclination was particularly noticeable in the early years under the Federal Rules, when precedents were scant and interpretation was limited to the notes of the Committee and the proceedings of the first Institutes. After thirteen years, most doubtful points of construction have been authoritatively determined. But application to the facts at hand remains, commonly, a matter of judgment and discretion, for disinterested decision. Shall a non-resident plaintiff be required to come to the forum to give his deposition? Ordinarily yes, but circumstances may relieve him of that obligation, and judgment requires an examination of the peculiar facts of each case. Does "sufficient cause," or "cause," or "good cause" exist to require or warrant relief under Rules 4.043, 6.02, 30.02 and 34? Examples may be multiplied, but the point need not be labored.

It is inevitable that the chambers work of the trial judges will be substantially increased. Motions for discovery and production, under Rule 34, to require a witness to answer, under Rule 37.01, for protective orders under Rules 30.02 and 30.04, and similar applications may appear as frequently on the special term calendar as motions for temporary alimony do today. Motions for summary judgment may require the examination of lengthy affidavits and even transcripts of testimony taken on adverse examination. The elimination of trials means augmenting the volume of pre-trial hearings. They require time for hearings and careful consideration.

C. As the area of discretion widens, so, by the same token, the need for an able trial judiciary intensifies. For the extent of discretion exercisable by a judge is the measure of the skill required for its judicious exercise. Under the Federal Rules, few, if any, interlocutory orders are reviewable. Although this State's statutes on appeals to the Supreme Court have not yet been revised, it is plain that most discretionary orders will be reviewable, if at all, only on appeal from a final judgment. For all practical purposes, district court orders of a discretionary nature will be free from challenge.<sup>2</sup> In the Federal courts of our Division, for example, the

---

2. But cf. Louisell, *Discovery and Pre-trial under the Minnesota Rules*, 36 Minn. L. Rev. 633, 658 (1952), where the author suggests possible review of discovery orders by use of the extraordinary remedies of prohibition and mandamus.

Rules have met general acceptance because they have been administered by gifted judges, notable for their tact, imagination and realistic grasp of the problems of litigation. They will meet acceptance in the State courts if our State judges rise to the occasion.

It is axiomatic that no system of procedure can overcome the deficiencies of an incompetent judiciary. But the rigidities of a simple formulary system can restrain improvident action by sharply narrowing the area of discretion. By the same token, the elastic procedure under the new Rules aggravates the dangers of abusive discretion in incompetent hands. Administered by an able judiciary, the new Rules can accomplish their high purpose (expressed in Rule 1) : “. . . to secure the just, speedy, and inexpensive determination of every action.” In the hands of ill-trained and wilful judges, they can create mischief and oppression.

The Federal Rules as amended represent a satisfactory solution to the problems relating to procedure and practice in the Federal courts. I am not suggesting that they are above criticism, but for the purpose of this discussion I am accepting them as being adequate for their purposes.

The matter which is of concern to me is the adjustment of the scheme of the Federal Rules to the peculiarities of local practice in the State courts of Minnesota. Has the Committee adequately considered the impact of the adoption of the Federal scheme on the current practice Code and the decision law of Minnesota?

The Rules should simplify, clarify and improve procedure and practice. If they introduce doubts and novel problems, to that extent they fail of their purpose.

## I.

The first question that arises is as to the scope of the Rules.

When the Federal Rules were adopted, the United States Supreme Court with meticulous care defined their applicability. Rule 81(a)(1), for example, specified that “These rules do not apply to proceedings in admiralty . . . in bankruptcy or . . . in copyright . . . except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court. They do not apply to probate, adoption or lunacy proceedings, etc.” Then in the other subdivisions of Rule 81(a), the applicability or non-applicability of the rules was spelled out with respect to borderline cases. Rule 81(b) abolished writs of scire facias and mandamus, and specified that relief theretofore available under those writs “may be ob-

tained by appropriate action or motion under the practice prescribed in these rules."

By subsequent amendment, the scope of the Federal Rules has been somewhat enlarged, but little doubt as to applicability has been left.

In the Tentative Draft of the Minnesota Rules, an effort was made to exclude, by general formula (Tentative Rule 81.01), "procedure and practice in any special statutory proceeding," insofar as the Rules were inconsistent or in conflict with the statutory procedure and practice. But that effort was abandoned, and in its place was substituted revised Rule 81.01, which specifies the excepted inconsistent "statutory proceedings" by reference to a list in Appendix A.

The result has been to create a large area of proceedings in which applicability of the Rules is in doubt, particularly in the field of what are commonly known as the "extraordinary remedies."

### *1. Extraordinary Remedies.*

The Rules unfortunately leave in doubt how the extraordinary remedies are to be dealt with. They are not listed in Appendix A. Two alternative and inconsistent interpretations are possible as to the impact of the Rules on them:

a. That the extraordinary remedies are not "civil actions" within the scope of the Rules and, therefore, the statutory procedure and practice in them are neither governed by nor affected by the Rules, but remain unaffected.

b. That the extraordinary remedies are "civil actions" within the scope of the Rules and, therefore, the existing statutes regulating the procedure and practice in them are wholly superseded by the Rules.

The Committee might have treated the extraordinary remedies in a third or middle way, by adding them to the list of special proceedings enumerated in Appendix A, under Rule 81.01, thereby preserving the statutory proceedings in them so far as inconsistent or in conflict with the Rules, but otherwise supplementing the statutory procedure by the Rules. Evidently the middle course was considered by the Committee at one time, because habeas corpus and mandamus are mentioned in the Tentative Draft at p. 228 as examples of such "special statutory proceedings existing today in Minnesota." But before the final draft, the extraordinary remedies were dropped out or forgotten.

Which of the two remaining alternative interpretations the Com-

mittee intended, I find it very difficult to say, because it involves a dual semantic problem: (a) what did the legislature mean in the Enabling Act by "civil actions"; and (b) are the extraordinary remedies to be classified as "civil actions" in the sense of the Rules?

### *The Enabling Act*

A plausible argument could be made in support of the position that mandamus, habeas corpus and the other extraordinary remedies are not "civil actions" within the scope of the Act, and are, therefore, wholly unaffected by the Rules.

The Enabling Act (§ 1) limits the rule-making power of the Supreme Court to "civil actions."<sup>3</sup>

The question is presented: What is the precise meaning of "civil actions" as so used in the Enabling Act? The phrase "civil actions" is borrowed from the Minnesota statutes. Originally, at a time when the court of chancery was a distinct tribunal in Minnesota, it was used in the sense of a *case at law* commenced by summons, as distinguished from a suit in equity commenced by chancery subpoena. That was recognized in the Territorial Act of March 5, 1853,<sup>4</sup> the ancestor of § 540.01<sup>4a</sup> which abolishes the distinction between "actions at law and suits in equity."<sup>5</sup> It declared that equity suits and proceedings, for example mortgage foreclosures, should be commenced and conducted "by the like process, pleadings, trial and proceedings as in *civil actions*, and shall be called *civil actions*." [Italics added.]

In response to a contention that the statute did no more than change the form of process from a chancery subpoena to a summons, Justice Mitchell pronounced that it:

" . . . was designed to conform, not only the form of the process, but also the manner of its service in equity suits, to that which obtained in *all other civil actions*."<sup>6</sup> [Italics added.]

3. § 3 similarly limits the recommendatory function of the Judicial Council, and no doubt the same limitation is inherent in the other sections, although it should be noted that § 5, in conferring power upon any court of the first instance to adopt supplementary rules, speaks in general terms of "rules of court governing its practice," and in reserving the rule-making power of statutory administrative bodies also speaks of "rules governing its practice"; and that § 6, in providing for the present effectiveness and later supersession of existing laws, speaks of "All present laws relating to pleading, practice and procedure" without limitation to "civil actions."

4. Collated St., Terr. of Minn. 1853, c. 9; Pub. St. 1858, c. 57, p. 480.

4a. All references in text to statutes by section number only are to Minn. Stat., 1949.

5. *Gates v. Smith*, 2 Minn. 30 (21) (1858); see *Stone v. Bassett*, 4 Minn. 298 (215) (1860).

6. *Crombie v. Little*, 47 Minn. 581, 585, 50 N. W. 823, 824 (1891).

Since the abolition of the distinction between law and equity, the statutes have identified "civil actions" as commenced by service of summons and § 543.01 provides:

"Civil actions in the district court shall be commenced by the service of a summons as hereinafter provided."

In *H. L. Spencer Co. v. Koell* it was said:

"There is no other way of commencing an action in this state save by the service of a summons."<sup>7</sup>

Therefore, traditional usage for many years has distinguished actions or suits commenced by summons ("civil actions") from proceedings otherwise commenced ("special proceedings").<sup>8</sup>

Mandamus, habeas corpus, and other extraordinary remedies are not commenced by summons. Mandamus is commenced by the filing of a petition, the issuance of an order for a writ and a writ, and the service of these papers on the defendant. The writ prescribes the return day, and the court, in the writ, directs the manner of service.<sup>9</sup> The defendants are required to show cause by "answer made in the same manner as an answer to a complaint in a civil action," and the answer must be interposed on the return day of the writ "or such further day as the Court shall allow."<sup>10</sup> In *Hanson v. Emanuel*, an appeal in an election contest, the court, in explaining that when a special proceeding is required to be tried and determined as a civil action, the rules applicable to civil actions apply, pointed out:

"Findings of fact and conclusions of law and a judgment are required in mandamus which is a *special proceeding* in view of the statute that it be tried as a civil action."<sup>11</sup> [Italics added.]

Habeas corpus is commenced by a verified petition<sup>12</sup> and the writ is granted by the judge or the court commissioner. Issues are framed, and the matter tried in a summary way. Habeas corpus is an ancient writ designed to test the legality of a present restraint of petitioner's liberties. The power to issue habeas corpus is statutory, but for a definition of the writ, resort must be had to the common law.<sup>13</sup> In *State v. Buckham*, in holding that an order of discharge in habeas corpus could be reviewed by appeal but not by certiorari, the court pointed out that "Habeas corpus is a special proceeding, not

7. 91 Minn. 226, 228, 97 N. W. 974, 975 (1904).

8. *Uram v. St. Mary's Russian Orthodox Church*, 207 Minn. 569, 292 N. W. 200 (1940).

9. Minn. Stat. § 586.05 (1949).

10. *Ibid.*

11. 210 Minn. 51, 53, 297 N. W. 176, 177 (1941).

12. Minn. Stat. § 589.02 (1949).

13. See 32 Minn. L. Rev. 508 (1948).



only because it is *not an ordinary civil action*, but because it is so expressly classified in our statutes."<sup>14</sup> [Italics added.]

Quo warranto likewise differs from the "ordinary civil action." Quo warranto in Minnesota is not the old common law writ, but rather the information in the nature of quo warranto as left by the changes brought about by 9 Anne, c. 20. Normally it is brought by the Attorney General, but the district court has discretionary power to grant leave to a private relator. And the statutory requirements of service of notice of trial in ordinary civil actions, for example, are not applicable because it is a special proceeding.<sup>15</sup> And the court has power to impose a fine against the usurper, as well as a judgment of ouster.<sup>16</sup>

There is also statutory justification for distinguishing special proceedings from "civil actions." Section 484.01, defining the jurisdiction of the district courts, provides that they "shall have original jurisdiction *in all civil actions . . . , in all special proceedings* not exclusively cognizable by some other Court or Tribunal, and in all other cases wherein such jurisdiction is especially conferred upon them by law." [Italics added.]

Although it is difficult to extract a clear principle from the statutes and dicta of the Supreme Court, it is thus at least arguable that, according to established usage, the extraordinary remedies are not included in the statutory or traditional meaning of a "civil action."

It is equally arguable, however, that mandamus and the other extraordinary remedies are to be treated as "civil actions" within the scope of the act.

The Supreme Court has said that "mandamus has lost its original prerogative character and *has become a civil action* in which, upon a proper showing, the writ ordinarily issues as a matter of course."<sup>17</sup> [Italics added.] And Dunnell states:

"In our practice, mandamus is assimilated to an ordinary civil action."<sup>18</sup>

Even under the English practice, an application for a prerogative writ of mandamus is a civil proceeding, and is an "action" within the British Practice Act.<sup>19</sup>

Similarly, it is settled in Minnesota that "habeas corpus is an

14. 29 Minn. 462 (1882).

15. *State v. Village of Kent*, 96 Minn. 255, 104 N. W. 948 (1905).

16. Minn. Stat. § 556.05 (1949).

17. *Dexner v. Houghton*, 153 Minn. 284, 286, 190 N. W. 179 (1922).

18. 4 Dunnell's Digest § 5767(a) (2d ed. 1927).

19. *Rex v. Westminster*, [1917] 2 K. B. 215.

independent proceeding to enforce a civil right."<sup>20</sup> It is "certainly civil in its nature."<sup>21</sup> It is a "civil proceeding."<sup>22</sup>

In addition to the common law information in the nature of quo warranto, there is the statutory remedy which embodies some of the features of quo warranto informations.<sup>23</sup> The statutory remedy has been said to be "a civil action and not a special proceeding."<sup>24</sup>

The fact that extraordinary remedies are not commenced by summons is not necessarily conclusive. The new Rules are not themselves confined to such actions as are commenced by a summons. For example, Rule 67.02 provides for a deposit in court "when no action is brought." Rule 27.01 permits depositions before any action brought on the filing of a petition and the service of notice.

Outside of Minnesota, authority may be found to support each of the alternative constructions of the term "civil actions." Thus a glance at the authorities gathered in 55 C. J. S. (Mandamus) pp. 16-17 will show that mandamus has defied classification. Under various statutes, in various contexts, it has been held to be and not to be "a civil action."

"It has been said that the attempt to classify the proceeding in mandamus is always futile, and that it is *sui generis*."<sup>25</sup>

#### *The Rules*

As the arguments drawn from the statutes and decisions are thus inconclusive, the Advisory Committee could reasonably have adopted either of the two possible constructions of the term "civil actions" as used in the Enabling Act. The Committee, however, has left in grave doubt whether it considered the extraordinary remedies as "civil actions" for the purpose of the Rules.

Rule 1 declares that the rules govern the procedure "in all suits of a civil nature, with the exceptions stated in Rule 81." It thereby adopts the terminology of the Federal Rules. But it is clear that the description "all suits of a civil nature" is intended to be synonymous with "civil action," because Rule 2, borrowing the statement from § 540.01 declares:

"There shall be one form of action to be known as 'civil action'";

and Rule 3.01 provides how "a civil action" shall be commenced.

20. *State v. Utecht*, 206 Minn. 41, 287 N. W. 229 (1939).

21. *State v. McDonald*, 123 Minn. 84, 142 N. W. 1051 (1913).

22. *Ex parte Tom Tong*, 108 U. S. 556 (1883), cited approvingly in the *McDonald* case, note 21 *supra*.

23. Minn. Stat. §§ 556.01-556.13 (1949).

24. *State v. Village of Kent*, 96 Minn. 255, 268, 104 N. W. 948, 952 (1905).

25. See 55 C. J. S. 16 (1948).

The uncertainty as to whether the term "civil action" as thus employed extends to the extraordinary remedies is nowhere resolved in the Rules. Rule 81.01 provides that:

"These rules do not govern procedure and practice in the statutory proceedings listed in Appendix A insofar as the statutes are inconsistent or in conflict with the procedure and practice provided by these rules"—

excepting, in turn, as in Rule 81.03, any statutory provision that an "act in a civil proceeding shall be done in the manner provided by law," is made to refer to the Rules.<sup>26</sup>

When we examine Appendix A, we find a number of special statutory proceedings listed which differ from the ordinary "civil action" in the same respects as do the extraordinary remedies, namely in that (a) they are not commenced by summons (the criterion in § 543.01), (b) the court's power depends upon and is limited to the statutory grant of power, and (3) some of them have been expressly declared not to be civil actions.

For example:

(1) A statutory election contest (c. 208).

Commenced by filing a petition in the District Court (§ 208.01) or by filing and serving a written notice of the contest (§ 208.03-208.07), which is treated as a pleading. Held a special proceeding, *and not a civil action*.<sup>27</sup>

(2) Drainage (c. 105).

Commenced by the Commissioner filing a petition to construct a ditch, the judge appointing viewers to ascertain the benefits and damages. Persons aggrieved may then petition for appraisal (§ 105.13-105.20) and demand a jury trial (§ 105.24). Held, "not a civil action, but, like a proceeding to establish a highway, a special proceeding."<sup>28</sup>

(3) Condemnation (eminent domain) (c. 117).

Commenced by presenting a petition to the District Court. Notice served like a "summons in a civil action" (§ 117.05). On appeal from an award of damages, cause to be tried by a jury

26. The Tentative Draft of Rule 81.01 excluded "any special statutory proceeding." In the re-draft the exceptions were limited to "the statutory proceedings listed in Appendix A," and the qualifying word "special" was omitted. But the title of the rule, "Special Statutory Proceedings" was preserved, and Appendix A is entitled "Special Statutory Proceedings under Rule 81.01," although in the text of the Appendix the list of statutes is described as "pertaining to special proceedings which will be excepted."

27. *Hanson v. Emanuel*, 210 Minn. 51, 297 N. W. 176 (1941); *Ford v. Wright*, 13 Minn. 518 (480), 525 (487) (1868); *Whallon v. Bancroft*, 4 Minn. 109 (70) (1860).

28. *County of McLeod v. Nutter*, 111 Minn. 345, 126 N. W. 1100 (1910).

and disposed of according to the rules applicable to ordinary civil actions.<sup>29</sup>

(4) Adoption.<sup>30</sup>

Commenced by application.

(5) Change of Name.<sup>31</sup>

Commenced by application.

(6) Petition by mortgagor to cultivate land sold under foreclosure.<sup>32</sup>

Commenced by petition filed with the court in the county wherein foreclosure is pending; petition and notice of motion to be served like "summons in a civil action."

Applying the maxim "Expressio unius est exclusio alterius" as an aid to construction one might properly infer that mandamus and the other extraordinary remedies were intended to be governed by the Rules.

Whether such inference is warranted, however, is doubtful since none of the statutes regulating procedure in the extraordinary remedies are listed in either Appendix B(1) or Appendix B(2) as "superseded," pursuant to the provisions of Rule 86.02. But appendices B(1) and B(2) may possibly have been intended as only a partial list of those statutes superseded by operation of law. Section 6 of the Enabling Act provides for the supersession of "All present laws . . . insofar as they are in conflict" with the Rules, without any requirement of specification. That principle was recognized by the Committee in its note to Rule 1.01 in the Tentative Draft, where it stated:

"Unless certain procedures and practices are specifically or generally excepted in Rule 81, then these rules will be the only rules of practice and procedure in district courts."

The procedure in mandamus, habeas corpus, quo warranto, etc., is in many respects inconsistent and in conflict with the procedure and practice established by the Rules. That has already been pointed out in discussing whether or not they are to be treated as civil actions. On the premise that the extraordinary remedies are "civil actions," then the Code provisions regulating them are now of "no further force and effect."<sup>33</sup>

Since the whole matter is inconclusive and not capable of assured answer, it would have been far better had the Committee

29. Minn. Stat. § 117.14 (1949).

30. Minn. Stat. §§ 259.01-259.11 (1949).

31. Minn. Stat. §§ 259.10 and 259.11 (1949).

32. Minn. Stat. §§ 256.11-256.15 (1949).

33. Enabling Act § 6.

recognized the extraordinary remedies as *sui generis* or of unique character,<sup>34</sup> and therefore listed them with special statutory proceedings. The troublesome questions now presented could have been prevented by the inclusion of the extraordinary remedies in Appendix A.

In view of the doubt that appears to exist as to the status of the extraordinary remedies, it is suggested that the Supreme Court should now clarify the matter as the Federal Rules do: The Court should either (1) now adopt a rule declaring that the extraordinary remedies are not to be governed in any respect by the new rules, or, alternatively, should (2) amend Rule 81 to include them in Appendix A so that the basic statutory provisions will persevere but may be supplemented by consistent provisions of the Rules, such as the discovery provisions.

Otherwise the bar will be confronted with the riddle as to how, for example, to commence a mandamus proceeding. Shall the relator follow the requirements of c. 586, and file a petition, secure an order and a writ fixing the return date, and make service in the manner directed by the writ? Or, on the other hand, shall he prepare a complaint in the usual form, issue a summons under Rules 3.01 and 4.01, attach it to the complaint (as required by Rule 3.02) and have it served by the Sheriff (under Rule 4.02) in the manner prescribed for personal service under Rule 4.03?

If the defendant wants to challenge the complaint, or writ, shall he demur as allowed by the mandamus statute, or, on the other hand, (since Rule 7.01 abolishes demurrers) shall he make a motion to dismiss under Rule 12.02?

If the defendant answers, may the plaintiff demur to the answer, as permitted by our decisions under the statute, or is he limited to making a motion for judgment on the pleadings under Rule 12.02, or for summary judgment under Rule 56, or to strike under Rule 12.06?

The same problem will confront anyone desiring to start a habeas corpus proceeding. Shall he file a petition as required by § 589, or shall he start an ordinary action as defined by the Rules?

These doubts and complexities are gratuitous and should be removed.

## 2. *Other Special Proceedings Not Listed.*

A revision of Rule 81.03 could remove some of the doubt that

---

34. See *Shypulske v. Waldorf Paper Products Co.*, 232 Minn. 394, 45 N. W. 2d 549 (1951); *In re Dissolution of E. C. Warner Co.*, 232 Minn. 207, 45 N. W. 2d 388 (1950).

now exists as to other special proceedings not listed at all in Appendix A.

For example, the chapter on mortgage foreclosures<sup>35</sup> is not so listed nor is it included in the superseded statutes listed in Appendices B(1) and B(2). Whether or not so listed, it is covered by the conformity provision of Rule 81.03, as to any act required by the statute to "be done in the manner provided by law." But § 581.01 provides:

"Actions for foreclosure of mortgages shall be governed by the same rules and provisions of statute as *civil actions*, except as in this chapter provided." [Italics added.]

There are no relevant exceptions—the later sections relating only to sales, redemption, etc.

The question arises whether § 581.01 is a statute providing that an act "be done in the manner provided by law" within the meaning of Rule 81.03. If it is not, the further question arises whether § 581.01 refers to the practice in civil actions prior to the Rules, or the practice established by the new Rules.

On December 6, 1951, three additional items were added to Appendix A by amendment:

- (1) Ch. 217, Delinquent personal property taxes;
- (2) Ch. 278, Objections and defense to real estate taxes;
- (3) § 501.33-501.38, Proceedings relating to trusts.

But there are other statutory proceedings which have been ignored that do not seem distinguishable from the listed ones, *e.g.*, c. 260, proceedings in the matter of dependent, neglected and delinquent children in counties having a population of 100,000; § 555.08, supplementary relief in declaratory judgment proceedings; and others that a careful search of the statutes would disclose.

### 3. Divorces.

The chapter on divorce<sup>36</sup> is listed in Appendix A as one of the "special statutory proceedings" excepted by Rule 81.01 from the operation of the rules insofar as the statutes are inconsistent or in conflict with them. However, to the extent that the divorce statutes provide that "any act . . . shall be done *in the manner provided by law*," the Rules are incorporated, by the express provision of Rule 81.03.<sup>37</sup>

The first question is what provisions in the chapter on divorce are inconsistent with the Rules?

35. Minn. Stat. § 581.01 *et seq.* (1949).

36. Minn. Stat. § 518.01 *et seq.* (1949).

37. *Cf.* Rule 65 which preserves the existing statutory procedure in injunction proceedings.

Section 518.12 provides for thirty days to answer in a divorce case. That is obviously in conflict with Rule 12.01 which prescribes twenty days. Therefore, § 518.12 prevails, and a thirty-day summons remains necessary in a divorce suit.

The next question is what provisions of the Rules are consistent and may be treated as supplementary to the statutes?

The whole discovery technique is adaptable to divorce suits, for there is now no provision in the divorce statutes inconsistent with it. Section 518.20, prior to its repeal by the Laws of 1951, c. 551, did provide for a limited discovery in connection with the restoration to a wife of personal estate that has come to a husband by reason of the marriage. It empowered the court to "require the husband to disclose on oath what personal property has come to him by reason of the marriage and how the same has been disposed of and what portion thereof remains in his hands." That provision might have been claimed to have been inconsistent with the discovery provisions of the Rules. But since the enactment of c. 551, Laws 1951, there is no independent discovery provision in the chapter on divorce. Therefore, there is no reason why the discovery provisions of the Rules should not apply.

The third question is the effect of Rule 81.03.

Section 518.13 provides:

"When issue is joined, like proceedings shall be had *as in civil actions.*" [Italics added.]

The section does not employ the phrase "in the manner provided by law" used in Rule 81.03; instead, it uses the phrase "proceedings . . . as in civil actions."

That leaves open and free for dispute the question whether § 518.13 shall be deemed to refer (1) to the established procedure "in civil actions" under the Code prior to and unaffected by the rules, or (2) to the new procedure in "civil actions" introduced by the rules.

That doubt should be resolved by a clarifying amendment to the Rules. It may be done by an amendment to Rule 81.03 so that it will read substantially as follows:

"Where any statute heretofore or hereafter enacted, whether or not listed in Appendix A, provides that any act in a civil proceeding shall be done 'in a manner provided by law,' or 'as in civil actions' or 'as civil actions,' such act shall be done in accordance with these rules."

#### 4. *Torrens Proceedings.*

The question will still remain under Rule 81.03 as to the effect

of the Rules on Torrens proceedings. They are listed in Appendix A and thereby come within Rule 81.01.

But the statutory section with respect to service of the summons, § 508.16, provides that the summons "shall be served in the manner *now* provided by law for the service of a summons in a civil action in the District Court, except as hereinafter provided." [Italics added.] There follow provisions for serving the state by delivering a copy to the Attorney General, who shall transmit the summons to the county attorney; and provision for service on non-residents by publication, etc.

Assuming that the existing provision in Rule 81.03—"shall be done in the manner provided by law"—would cover any equivalent statement such as is contained in the divorce statutes, or that the suggested clarifying amendment should be adopted, the question remains would it cover a situation where the statute specifies that an act shall be done in the manner "*now* provided by law?" This raises an additional ambiguity that should be cured by amendment.

#### 5. *Superseded Statutes and Rules.*

Appendix B(2), described as a "list of statutes superseded by Rules" purports to list both the statutes and District Court Rules thus superseded. There are obviously some statutes and District Court Rules, however, which have not been included in Appendices B as being superseded, and yet are superseded. Checking at random, we find that Rule 6.01, drawn verbatim from Federal Rule 6(a), prescribes that "When the period of time . . . is less than seven days, intermediate Sundays and holidays shall be excluded in the computation." However, § 645.16 ("computation of time") excludes Sundays or holidays only "when the last day of the period falls on" such a day. The Tentative Draft notes the difference.<sup>38</sup> Yet § 645.16 is not listed in either Appendix.

Again, the Tentative Draft noted that District Court Rule 13 will be partly superseded by Rule 4.01 as to the form of summons, and District Court Rule 21 by Rule 6.04, but neither District Court Rule has been included in the Appendices.

Careful search of the Code and Court Rules should be made to cull out unnoticed superseded items.

## II.

In addition to the ambiguities as to their scope, the Rules are

---

38. Advisory Committee, Minnesota Rules of Civil Procedure 36 (Tent. Draft 1950).



deficient in a number of other respects. Some of these deficiencies are discussed in this and the succeeding sections of this article.

Rule 43.01 blindly follows the phraseology of the comparable Federal Rule<sup>39</sup> which was intended to resolve the troublesome conflicts that arose in the Federal courts as to the admissibility of evidence and competency of witnesses where there were differences between the Federal statutes on the subject, the Federal Rules of evidence in equity, and the practice in the state where the Federal court was sitting. According to the Committee note<sup>40</sup> Rule 43.01 "adopts Federal Rule 43(a) insofar as it is applicable to state practice" by incorporating a provision that all evidence shall be received which is admissible under :

"the statutes of this state, or under the rules of evidence heretofore applied in the trials of actions in the courts of this state."

To this provision is appended a verbatim quotation from the Federal rule :

"In any case, the statute or rule which favors the reception of the evidence governs."

Adoption of the rule in Minnesota can be justified only on the fantastic premise that heretofore there have been available in the courts of Minnesota two conflicting and competing standards of admissibility—one statutory, the other non-statutory ; one favoring the reception, and the other the exclusion of evidence under a given set of circumstances. Such a premise posits some sort of transcendental common law of evidence in Minnesota, existing apart from and independently of the statutes relating to proof.

This is not to suggest that the Federal Rule was not warranted, although as the Committee noted there were differences of opinion as to its effectiveness.<sup>41</sup> But no doubt the situation in the Federal courts called for correction. The rules of evidence in chancery varied somewhat from the rules of the common law.<sup>42</sup> In addition, the rules of evidence in equity in the Federal courts somewhat varied from the local state rules. In common law trials under the Conformity Act, in the absence of a Federal statute, the state rule including statutory rules governed. But a Federal statute, if there were one, prevailed over the state rule upon the same subject. There

---

39. Fed. R. Civ. P. 43(a).

40. Advisory Committee, Minnesota Rules of Civil Procedure 150 (Tent. Draft 1950).

41. See 1 Wigmore, Evidence 199-204 (3d ed. 1940).

42. 1 *id.* at 14-16.

were, thus in the Federal courts competing rules as to admissibility, and great confusion as to which body of law, state or Federal, should govern in a particular case.<sup>43</sup>

But that situation never existed in Minnesota. In the state courts of Minnesota, there has never been more than one standard of admissibility. The statutes are supreme except as restrained by the State or Federal Constitution. Of course, there may be alternative modes of proof. For example, an account book may be more easily established by recourse to the Uniform Business Records as Evidence Act<sup>44</sup> than by the Shop-Book statute,<sup>45</sup> while the same account book may be proved under common law rules without the benefit of any statute. But that simply means that these modes of proof are complementary—not that there are competing grounds of admissibility.<sup>46</sup>

The *reductio ad absurdum* appears in the final sentence, as to the competency of witnesses, likewise quoted verbatim from the Federal Rule:

“The competency of a witness shall be determined in like manner.”

For the competency of a witness in Minnesota is purely statutory, and every witness of sufficient understanding is competent unless some statutory disqualification exists.<sup>47</sup>

But assuming that there be some underlying common-law test of competency in Minnesota, and that a statute such as the Dead Man's statute<sup>48</sup> creates incompetency, does the Rule seriously mean that the statutory disqualification is to be abolished, and that, despite the statutory disqualification, the witness becomes competent again?

Section 595.02 prohibits examination of a clergyman as to confessions to him in his professional character. The statute created a privilege where the common law recognized none.<sup>49</sup> Does the Rule seriously intend that the privilege shall now be abolished?

A provision meaningful in relation to the Federal courts has been pointlessly added in a context where it is, at the best, devoid of meaning, or, at the worst, mischievous.

---

43. 1 *id.* at 171 *et seq.*

44. Minn. Stat. §§ 600.01-600.04 (1949).

45. Minn. Stat. § 600.05 (1949).

46. That principle is given express recognition by the new rules in the case of official records. See Rule 44.

47. Minn. Stat. § 595.02 (1949).

48. Minn. Stat. § 595.04 (1949).

49. *In re* Contempt of Emil Swanson, 183 Minn. 602, 237 N. W. 589 (1931).

## III.

Rule 54.04 provides that "Costs and disbursements may be taxed by the Clerk on two days' notice." It contains no provision for taxation *ex parte* in a default case. Neither does § 549.10, from which that portion of the Rule is drawn, and which is superseded by it.

The Rules expressly made applicable to default judgments have been taken from the Federal Rules without regard to the different meanings given the term "costs" in Federal and local Minnesota practice. Rule 55.01, subparagraph (1), provides that in a default case "upon a contract for the payment of money only" the Clerk upon affidavit of the amount due shall enter judgment for the amount due "and costs against the defendants."

The phrase "and costs against the defendants" is taken verbatim from Federal Rule 55(b)(1) and is broad enough to cover all taxable costs and disbursements in federal practice. It is at least doubtful whether it is broad enough to cover disbursements under the Minnesota practice.

The predecessor Minnesota statute § 544.07, now superseded, contained no provision for costs. It provided, in case of default:

"(1) If the action be upon contract for the payment of money only, the clerk shall enter judgment for the *amount stated in the summons.*" [Italics added.]

Costs recoverable on a default judgment of \$100.00 or more in an action for the recovery of money only, amount to \$5.00 under § 549.01. Rule 55.01 makes no mention of disbursements, although the prevailing party is entitled to them in a default case as in a contested case under § 549.04.

Again, Rule 5.01 specifies that "no service need be made on parties in default for failure to appear" except pleadings asserting new or additional claims for relief.

That leaves open the question as to whether Rule 54.04 was intended and will be interpreted as applying to default cases, and requiring notice in order to permit the prevailing party to recover costs and/or disbursements.

## IV.

Rule 58.01 introduces a combination of the existing Code provision on entry of judgment<sup>50</sup> with Federal Rule 58. The third and fourth sentences attempt a merger of the provisions of both: the

---

50. Minn. Stat. § 548.03 (1949).

first clause of the third sentence and the fourth sentence are verbatim copies of the first two sentences in § 548.03, while the second clause of the third sentence is a variant of the provision in the Federal Rule that "The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry,"—for which Rule 58.01 substitutes "this entry constitutes the entry of the judgment; and the judgment is not effective before such entry." In the Tentative Draft, the Committee noted that "the notation of judgment provision has been modified to conform to Sec. 548.03."<sup>51</sup>

The problem arises, how will Rule 58.01 affect Minnesota law? Under § 548.03, it has been established that there is no judgment prior to the entry of the judgment by the clerk in the judgment book, and that the statute wiped out in Minnesota the common law distinction between *rendition* of judgment and *entry* of judgment, excepting for two cases:

(1) A judgment lien employed for redemption purposes, was not subject to attack for failure of the clerk to enter it in the judgment book, if it appeared in the judgment roll and was otherwise regular;<sup>52</sup> (2) A *nunc pro tunc* entry of judgment is permissible where a judgment is actually "rendered" by the court but not correctly entered, through clerical error. In *Hampshire Arms Hotel Co. v. Wells*, the court said:

"A court can give effect to a judgment as of an earlier time only when the judgment was *rendered* at that time."<sup>53</sup> [Italics added.]

But by "render," evidently the court meant "intended to be entered" by the judge.

It may well be that Rule 58.01 may have repealed these exceptions without intending to, and without accomplishing any useful purpose. It is true that Rule 60.01 permits the correction of clerical errors in judgments as well as in orders, but that may not reach the point as to the court's power to correct the judgment *nunc pro tunc*. The borrowing from the Federal rule was unnecessary to clarify the provisions of § 548.03, and introduces possible confusion. It should be deleted.

---

51. Advisory Committee, Minnesota Rules of Civil Procedure 196 (Tent Draft 1950).

52. *Clark v. Butts*, 73 Minn. 361, 76 N. W. 199 (1898).

53. 210 Minn. 286, 288, 298 N. W. 452, 453 (1941).

## V.

Under the statute regulating appeals to the Supreme Court,<sup>54</sup> an order sustaining a demurrer is appealable.<sup>55</sup> Even where right to demur is only impliedly conferred, the order is appealable.<sup>56</sup>

Rule 7.01 abolishes the demurrer, and Rule 12.02 substitutes a motion to dismiss. There is no statute at present authorizing an appeal from an order granting a motion to dismiss or, on certificate, from an order denying such motion. An order of dismissal is but an order upon which judgment may be entered, and appeal must be from the judgment under § 605.09(1), excepting where the dismissal is for want of jurisdiction. In the latter case, appeal will lie under § 605.09(4), because the order "in effect determines the action, and prevents a judgment from which an appeal might be taken."<sup>57</sup> Similarly, an order denying motion to dismiss for laches is not appealable.<sup>58</sup>

Will the court treat the statute granting the right to appeal from an order sustaining a demurrer (§ 605.09(4)) as equivalently applicable to an order granting a motion to dismiss under Rule 12.02? Or will the court treat an order of dismissal as non-appealable, and to that extent abolish the present system of dual appeal, leaving available only an appeal from the judgment? The Enabling Act specifies that the rules "shall not abridge, enlarge or modify the substantive right of any litigant."<sup>59</sup> Right to appeal is a substantive right in Minnesota which, therefore, cannot be impaired by the Rules. But an existing mode of appeal is not a substantive right, and, therefore, no doubt, preservation of a dual system of appeals from orders and judgments is not required. Moreover, on an appeal from a judgment "any intermediate orders involving the merits" may be reviewed;<sup>60</sup> in other words, appeal from a judgment presents the case in its broadest aspect. Therefore, either interpretation is permissible.

Certainly, the bar is entitled to have the matter clarified.

---

54. Minn. Stat. § 605.09 (1949).

55. Also, an order overruling if certified. Minn. Stat. § 605.09(4) (1949); *Sandy v. Walter Butler, Shipbuilders*, 221 Minn. 215, 21 N. W. 2d 612 (1946). Otherwise the district court cannot certify important and doubtful questions to the Supreme Court. *Newton v. Mpls. Street Ry.*, 185 Minn. 189, 240 N. W. 470 (1932).

56. *State v. Cook*, 119 Minn. 407, 138 N. W. 432 (1912).

57. *Jones v. Rahilly*, 16 Minn. 177 (1870) (1870); *Bulau v. Bulau*, 208 Minn. 529, 294 N. W. 845 (1940).

58. *Dody v. Peterson*, 219 Minn. 198, 17 N. W. 2d 322 (1945).

59. Minn. Laws 1947, c. 498, § 1.

60. Minn. Stat. § 605.09(1) (1949).

## VI.

Rule 4.04 provides for substituted service or for constructive service, in five listed cases. It has no counterpart in the Federal Rules. It combines, modifies and supersedes §§ 543.11 and 543.12. By combining them, it is reverting to the original text; both sections were originally contained in a single section. However, the unfortunate result is to preserve outmoded and inadequate statutory requirements, and also to preserve the incompatible catalogue of cases recited in § 543.12.

The useless provision in § 543.11 for "return not found" has been omitted, but an affidavit is still required, "stating the existence of one of such cases and that he believes the defendant is not a resident of the state, or cannot be found therein." The statement of belief as to non-residence, etc., is tautological as to cases (1) and (2), because a statement of "the existence of one of such cases" necessarily includes a statement either that the defendant, a resident, has "departed from the state, etc.," or "keeps himself concealed therein, etc." (Case (1)), or that the defendant, a resident, "has departed from the state, or cannot be found therein" (Case (2)(a)), or that the defendant "is a non-resident individual, or a foreign corporation, etc." (Case (2)(b)). The last sentence of the first paragraph of the Rule equates "personal service of such summons without the state," with publication. No doubt this means that the summons served shall be accompanied by the complaint as required by Rule 3.02, but the usage may easily be misleading.

The five cases in which jurisdiction can be secured by substituted service or by constructive service under Rule 4.04 also continue the incompatible catalogue of cases under superseded § 543.12 and predecessor statutes, including one justifiable case of jurisdiction in personam, one unjustified attempt to exercise jurisdiction in personam, one case of jurisdiction quasi-in-rem, and three cases of in rem proceedings—all lumped together.

The statute of 1866<sup>61</sup> contained five cases:

1. Where defendant is
  - A. A foreign corporation
  - B. With property in the state (same as § 543.12(1)).
2. Where defendant is
  - A. A resident, who
  - B. Has either
    - (1) Departed from the state, or

---

61. Gen. Stat. 1866, c. 66, § 49.

- (2) Keeps himself concealed therein,
- C. Intending either
  - (1) To defraud his creditors, or
  - (2) To avoid service (same as first half of § 543.12(2)).
- 3. Where defendant is
  - A. A non-resident having
  - B. Property in the state and
  - C. The action arises on contract, and
  - D. The Court has jurisdiction of the subject of the action (same as § 543.12(3) except for the elimination of (C)).
- 4. Action for divorce (same as first half of § 543.12(4), excepting for the addition of the requirement of an order for service by publication).
- 5. Where
  - A. The subject of the action is real or personal property in the state and
  - B. Either
    - (1) Defendant has or claims a lien or interest in it or
    - (2) Relief is to exclude the defendant therefrom (same as § 543.12(5)).

It is clear that taken alone, case (1) was quasi-in-rem, jurisdiction being grounded only upon ownership of property in the state by the foreign corporation—*not* upon the foreign corporation transacting business in the state.<sup>62</sup>

Case (2) was in personam, grounded on residence and permitting publication as substituted service.

Case (3) was quasi-in-rem or in rem.

Case (4) was in rem.

Case (5) was in rem.

However, the 1866 statute required not only proof by a sheriff's return "not found" that "the defendant cannot be found within the

---

62. It is true that the statute did not expressly state that a lien had to be obtained, but that is implicit from a consideration of the history of the provision as to acquiring jurisdiction over a foreign corporation. Under the territorial laws there was no provision for serving a summons on a foreign corporation except by publication,—the general provision for service being held inapplicable on the theory that foreign corporations can have no existence in Minnesota. *Sullivan v. LaCrosse Co.*, 10 Minn. 386 (308) (1865). But in the General Statutes of 1866, a provision for serving foreign corporations by serving an officer, director or managing agent was added, but only "when it has property within this state, or the cause of action arose therein." Since service by publication was permissible only on a showing that the defendant could not be found in the state, it seems clear that personal jurisdiction of foreign corporations could not be obtained by publication.

state"—but also an affidavit that plaintiff or his attorney "believes that the defendant is not a resident of the state, *and* cannot be found therein." [Italics added.]

The latter requirement was plainly in direct opposition to case (2), which depended on residence. The requirement for the dual showing was accordingly amended to cast it in the disjunctive, so that the affidavit could properly include a resident who could not be personally served within the state.

Later the second half of § 543.12(2) was added. It provides for jurisdiction quasi-in-rem, and not in personam, as to a resident who cannot be served in the state, but who has property subject to seizure. It covers a case

6. Where defendant is
  - A. A resident who
  - B. Has either
    - (1) Departed from the state, or
    - (2) Cannot be found therein and
  - C. Has property or credits therein on which plaintiff has acquired a garnishment or attachment lien.

This case constituted a confusing addition because requirements A and B are adequate to ground in personam jurisdiction and are the equivalent of case (2) under the 1866 statute, and the attachment or garnishment lien can be acquired without resorting to the lien as ground for jurisdiction. Similarly the foreclosure provision which appears as § 543.12(6) merely duplicates case (5), with special reference to real estate mortgages and liens.

These six cases are set forth in superseded § 543.12 as follows:  
"Such service [service by publication] shall be sufficient to confer jurisdiction:

- (1) When the defendant is a foreign corporation, having property within the state;
- (2) When the defendant, being a resident of the state, has departed therefrom with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or has departed therefrom, or cannot be found therein, and has property or credits therein upon which the plaintiff has acquired a lien by attachment or garnishment;
- (3) When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action;
- (4) When the action is for a divorce, or a separation from



bed and board, and the court shall have ordered that service be made by published notice;

(5) When the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien;

(6) When the action is to foreclose a mortgage or to enforce a lien on real estate."

Rule 4.04 varies the cases set out in § 543.12 as follows:

Case (1) under Rule 4.04 replaces the first half of § 543.12

(2);

Case (2) (a) replaces the second half of § 543.12(2);

Case (2) (b) replaces both §§ 543.12(1) and 543.12(3), removing from (3) the requirement "the Court has jurisdiction of the subject of the action" and limiting (1) by the requirement that an attachment or garnishment lien be acquired on the foreign corporation's property;

Case (3) replaces § 543.12(4), with separate maintenance substituted for separation from bed and board;

Case (4) replaces § 543.12(5);

Case (5) replaces § 543.12(6).

Case (1) is justifiable only on the understanding that it provides means for obtaining in personam jurisdiction. It allows substituted service upon residents, over whom the court can exercise personal jurisdiction because they are residents. In lieu of personal service within the state by "delivering a copy" of the summons to the defendant "personally or leaving" it at his usual place of abode, etc., pursuant to Rule 4.03(a), the summons may be published or served personally without the state. That is, as to residents, a form of substituted service by which jurisdiction is acquired in personam. It is distinguishable from "constructive, not personal, service," which can be had on non-residents in actions quasi-in-rem.<sup>63</sup>

As to a non-resident, of course, the availability of property in the state for seizure in an indispensable requirement. Thus, if an action for divorce goes beyond the dissolution of the res (the marital status), and attempts to impose a judgment for alimony, it becomes either an action in personam (in which case service by publication can be justified only on the ground of residence plus inability to make personal service because the resident has departed

---

63. *Pomeroy v. National City Company*, 209 Minn. 155, 164, 296 N. W. 513, 516 (1941).

or is concealed), or an action quasi-in-rem, limited to the property seized.<sup>64</sup>

Case (2) is an action quasi-in-rem, where jurisdiction, in the absence of a voluntary general appearance, is limited to the property seized, and service by publication is not for the purpose of acquiring personal or unlimited jurisdiction, but merely for the purpose of giving notice sufficient to satisfy the requirements of procedural due process. It is an improvement over the superseded statute inasmuch as it avoids the confusion in § 543.12 of combining in personam and quasi-in-rem cases in a single bracket, and also clarifies the ground for publishing a summons against a foreign corporation.

Case (3) preserves a confusion inherent in § 543.12(4). An action for separate maintenance in Case (3) contemplates jurisdiction in personam, but it is defective for failure to state the indispensable requirement of residence or domicile in the state. An action for separate maintenance is not quasi-in-rem unless the husband has property within the state which can be reached by process.<sup>65</sup> Without basis in domicile or residence of the defendant, there is no apparent ground for securing in personam jurisdiction by constructive service in such cases. The divorce action in Case (3), however, is a true in rem proceeding, with the marital status as the res in the state of the domicile of the parties. Prior to the abolition of "separation from bed and board" in 1933, such separations were coupled with divorces in Case (3), but "separate maintenance" has been substituted by the Rules.<sup>66</sup>

Cases (4) and (5) are also true in rem proceedings.

Case (5) preserves an unnecessary duplication, as to a specialized case, *viz.*, foreclosure of real estate mortgage and enforcement of a real estate lien. If the duplication is to be preserved, there is no apparent reason why foreclosure of chattel mortgages and enforcement of other chattel liens should not be included. It may have been thought that since in Minnesota a chattel mortgage cannot be foreclosed until the chattel mortgagee has secured possession of the mortgaged property (normally through replevin), that a chattel

64. *Roberts v. Roberts*, 135 Minn. 397, 399, 161 N. W. 148, 149 (1917).

65. *Pye v. Magnuson*, 178 Minn. 531, 227 N. W. 895 (1929).

66. Limited divorces from bed and board were abolished by Minn. Laws 1933, c. 165. Before 1933, the courts, without statutory authority, recognized the right of a wife living apart to separate maintenance. *Baier v. Baier*, 91 Minn. 165, 97 N. W. 671 (1903). Minn. Laws 1933, c. 165 did not abolish such suits for separate maintenance. *Barich v. Barich*, 201 Minn. 34, 275 N. W. 421 (1937). In such a suit, the court may give judgment against the attached property of a non-resident defendant. *Pye v. Magnuson*, 178 Minn. 531, 227 N. W. 895 (1929).

mortgage foreclosure was, in any event, covered by case (4). But, by the same token, it is clear that a real estate foreclosure is likewise comprehended within case (4).<sup>67</sup> Therefore, both types of foreclosure stand on the same basis. That the Minnesota courts can constitutionally proceed in rem or quasi-in-rem as to chattels located within the state is settled.<sup>68</sup> If Case (5) is to be enlarged as suggested, by including chattel liens, then there should be an equivalent amendment of Rule 4.041, so that the summons, if published, will indicate what chattel property is involved.

Apart from the incompatibility and duplication of cases, there are several confusing items. As a condition of service by publication in any of the five cases, plaintiff or his attorney must file an affidavit with the court stating the "existence of one of such cases." Case (3) of the Rule, however, contains a requirement that "the court shall have ordered that service be made by published notice," an order which can only be entered pursuant to written motion under Rule 7.02. There is a duplication of showing, first by motion and then by affidavit. The showing would have to be the same in each case, for the court would hardly order service by publication without a showing that the defendant is a non-resident who cannot be served in the normal way within the state. In fact, former District Court Rule 9(c) required a showing of "what efforts have been made to ascertain the residence of the defendant for the purpose of making personal service." This duplication should be eliminated.

Another confusing item has been preserved. Section 518.09 provides that "an action for divorce or separate maintenance may be brought by a wife in her own name." But § 518.11 in the chapter on divorces, which provides for personal service out of the state, is apparently applicable only to divorce actions. It makes no reference to separate maintenance. It provides that :

"If personal service cannot well be made, the Court may order service of the summons by publication, which publication shall be made as in other actions."

With reference to personal service of a divorce summons out of the state, the Supreme Court in *Bunderman v. Bunderman*<sup>69</sup> has held that it is unnecessary to comply with the requirements of § 543.11 (now Rule 4.04) by securing a return not found or filing an affidavit, despite the fact that § 543.12(4) expressly covered an

67. *Crombie v. Little*, 47 Minn. 581, 585, 50 N. W. 823, 824 (1891).

68. *First Trust Company of St. Paul v. Matheson*, 187 Minn. 468, 246 N. W. 1 (1932).

69. 117 Minn. 366, 135 N. W. 998 (1912).

“action for divorce.” Since the requirement for return not found has been eliminated, there is no difficulty about that. But the problem remains with respect to the affidavit required by Rule 4.04.

Since the chapter on divorce, insofar as it prescribes a conflicting or inconsistent procedure, is excepted from the Rules, presumably the *Bunderman* case will still be law, and it will be unnecessary to file an affidavit or otherwise follow the requirements of Rule 4.04 in a divorce action, if service is by *personal service outside the state*. On the other hand, if the action is for divorce but service is to be made by *publication*, an affidavit will have to be filed and the other requirements of Rule 4.04 followed.<sup>70</sup>

But if the action is for separate maintenance, the plaintiff will not be relieved from following the requirements of Rule 4.04, whether he is making service personally out of the state or by publication. And, furthermore, unless the defendant is a resident, the plaintiff cannot expect to secure in personam jurisdiction. Even if the defendant is a resident, a question will arise as to whether or not Rule 4.04 has supplied the necessary technique for securing such jurisdiction as procedural due process may allow.

The confusion is accentuated by the fact that the first paragraph of Rule 4.04 declares “personal service . . . without the state” to be the equivalent of publication. But when we come to Case (3), such service is made proper only when the court shall have ordered “that service be made by published notice.” What point can there be in procuring an order for publication as a basis for making personal service outside of the state?

As to quasi-in-rem jurisdiction, other means of securing a lien than garnishment and attachment should be recognized, *e.g.*, a lien secured in a creditor’s suit.

## VII.

Rule 8.03 is a verbatim copy of Federal Rule 8(c). It lists the affirmative defenses that must be specially pleaded. The Committee note indicates, by quoting a note of the Judicial Council, that the Rule “will not change present judicial rules.”<sup>71</sup> Certainly that statement is too broad with respect to the plea of illegality. For it has been settled in Minnesota that the defense of illegality can be raised under a general denial or by the court on its own motion.<sup>72</sup>

70. *Pugsley v. Magerfleisch*, 161 Minn. 246, 201 N. W. 323 (1924).

71. Advisory Committee, Minnesota Rules of Civil Procedure 48 (Tent. Draft 1950).

72. *Halos v. Nachbar*, 196 Minn. 387-390, 265 N. W. 26-27 (1936); *Vos v. Albany Co.*, 191 Minn. 197, 203, 253 N. W. 549, 550 (1934).

Furthermore, in replevin cases, a so-called "affirmative defense"—including, no doubt, illegality—may be shown under a general denial.<sup>73</sup>

It is true that the new Rules nowhere mention replevin.<sup>74</sup> But Rule 64 preserves "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action . . . under the circumstances and in the manner provided by the law of the state." It may well be that replevin cases should be conformed to the practice in other civil actions, but there is no reason to believe that replevin has been abolished as a remedy.

Moreover, in at least one other respect, Rule 8.03 apparently does not reflect the existing rules of pleading with respect to fraud. The Supreme Court, while recognizing that fraud is ordinarily "new matter to be specially pleaded and is inadmissible under a general denial," has established that this principle has no application "where a written instrument is introduced in support of a general allegation not disclosing its existence." In such a case, the opposing party need not anticipate its production, and when confronted with it can show fraud without having pleaded it.<sup>75</sup> Rule 8.03 does not indicate whether that judge-made rule has been preserved.

### VIII.

Rule 45.03 requires personal service of a subpoena. The Committee noted<sup>76</sup> that the Rule supercedes § 596.02, which permits substituted service in the same manner as a summons. The Committee regretfully noted "It appears that the present statute is as fully desirable and gives a slightly broader method of service."

It seems unfortunate that for the mere purpose of conformity to the Federal Rule,<sup>77</sup> a useful provision for substituted service should have been abandoned. In the case of an unwilling or recalcitrant witness, the substituted service of a subpoena appears to be a necessity.

73. 5 Dunnell's Digest § 8412 (2d ed. 1927); *Walker v. Ward*, 104 Minn. 386, 116 N. W. 647 (1908) (fraud); *Adamson v. Wiggins*, 45 Minn. 448, 48 N. W. 185 (1891) (usury).

74. Minn. Stat. § 565.01 *et seq.* (1949) (Claim and Delivery).

75. *Turner v. Edwards*, 207 Minn. 455, 457, 292 N. W. 257, 258 (1940).

76. Advisory Committee, Minnesota Rules of Civil Procedure 158 (Tent. Draft 1950).

77. Fed. R. Civ. P. 45(c).

## IX.

There has been an ineffective attempt to adopt the Federal practice as to the immediate and automatic entry of judgment upon entry of verdict or findings. Rule 58.01 was designed, according to the Committee note, to adopt Federal rule 58.

But Rule 58.02 nullifies the effectiveness of the practice by providing for a stay of entry of judgment, in accordance with the customary practice before the Rules. Apparently, in actual practice, the question now asked of counsel upon submission of the case, "Do you agree upon a stay?" will still be asked; stay will be entered; and Rule 58.01 will become ineffective.

## CONCLUSION

What has been said suggests some of the problems which may arise in the effort to adapt the Federal Rules to the peculiarities of Minnesota practice. Only experience under the new Minnesota Rules will prove to what extent amendments may be required. It seems clear, however, that much unnecessary litigation as to the scope and application of the Rules could be avoided if the Rules were appropriately amended now.