RULE 80A. REAL ACTIONS

(a) Applicability. Writs of entry are abolished, and these Rules of Civil Procedure shall govern the procedure in real actions including actions in the District Court to quiet title to real estate under 14 M.R.S.A. §§ 6651-6658 and 36 M.R.S.A. § 946, except as otherwise provided in this rule.

(b) Commencement of Action; Service. An action to recover any estate in fee simple, in fee tail, for life, or for any term of years shall be commenced by complaint and service of summons as in other civil actions.

(c) Complaint. The demanded premises shall be clearly described in the complaint. The plaintiff shall declare on the plaintiff's own seizin within 20 years then last past, without naming any particular day or averring a taking of the profits, and shall allege a disseizin by the defendant. The plaintiff shall set forth the estate which the plaintiff claims in the premises, but if the plaintiff proves a lesser estate than the plaintiff has alleged, amendment may be made to conform to the proof and judgment ordered accordingly. The plaintiff need not state in the complaint the origin of the plaintiff's title, but the court may, on motion of the defendant, order the plaintiff to file a statement of the plaintiff's title and its origin. The complaint shall include any claim against the defendant for damages which have accrued at the time of commencement of the action for the rents and profits of the premises or for any destruction or waste of the buildings or other property for which the defendant is by law answerable.

(d) Answer. All defenses shall be made by answer as in other actions. The defendant may defend for a part only of the premises, and when for a part only, it shall be described in the answer with like certainty as is required in the complaint. If the defendant defends for a part only, the plaintiff shall, subject to the provisions of Rule 54(b), have judgment against the defendant on the pleadings for recovery of possession of the part not defended. If the defendant by answer alleges that the defendant has been in possession of a tract of land lying in one body for 6 years or more before the commencement of the action, that only part of it is demanded, and that the plaintiff has as good a title to the whole as to such part, proof of that fact shall defeat the action unless the complaint is amended so as to include the whole tract, which the court may allow without costs. A defendant not in possession of the premises when the action was commenced may defeat the action by disclaiming in the answer any right or title to the premises.

(e) No Abatement by Death or Intermarriage. No real action shall be abated by the death or intermarriage of either party after it has been commenced. The court shall proceed to try and determine such action, but only after such notice as the court orders has been given to all persons interested in his estate.

(f) Judgment. The judgment shall declare the estate, if any, in all or in any part of the demanded premises to which the plaintiff is entitled; and if the plaintiff shall recover judgment for title and possession of all or any part of the demanded premises, the court may order one or more writs of possession to issue in accordance with law. If either party dies before a writ of possession is executed or the action is otherwise disposed of, any money payable by the defendant may be paid by the defendant, the defendant's executor or administrator, or by any person entitled to the estate under the defendant, to the plaintiff, or the plaintiff's executor or administrator with the same effect as if both parties were living. The writ of possession shall be issued in the name of the original plaintiff against the original defendant, although either or both are dead; and when executed, it shall enure to the use and benefit of the plaintiff, or of the person who is then entitled to the premises under the plaintiff, as if executed in the lifetime of the parties.

(g) Foreclosure of Mortgage. An action under this rule may be used for the purpose of the foreclosure of a mortgage of real estate as provided by law.

Reporter's Notes
December 1, 1959

Real actions are suits of a civil nature and so within the coverage of these rules, but here also a separate rule seems required. There is no intention to change present practice except in the specific respects referred to in this Note. There is no comparable federal rule.

Subdivision (a) abolishes writs of entry and states that these rules shall apply to real actions unless otherwise provided.

Subdivision (b) provides that a real action shall be commenced by complaint and service of summons as in other civil actions. The special provisions for service in R.S. 1954, Chap. 172, Sec. 1 (amended in 1959) [now 14 M.R.S.A. § 6701] are omitted. Rule 4 seems adequately to cover the problem. The words "of freehold", which were in the statute, are omitted from the rule and the 1959 amendment of the statute because estates for years are not estates of freehold.

Subdivision (c) is a combination of R.S.1954, Chap. 172, Sec. 21 (description of premises), Sec. 2 (declaration of seizin and disseizin), Sec. 3 (setting forth of estate claimed), and Sec. 11 (recovery of damages in same action). These sections were repealed in 1959. The addition to the third sentence is designed to change the law. It appears that the effect of Sec. 4 and Sec. 8 of Chap. 172 (amended in 1959) [now 14 M.R.S.A. §§ 6901-6902] is that a plaintiff who proves a lesser estate than he has alleged can get no relief whatever. The rule allows amendment to conform to the proof in such a case. Probably such an amendment would be possible in any event because Rule 15(b) is made generally applicable by subdivision (a) of this rule, but since it is contrary to the wording of the existing statute, a specific statement seems desirable. Actually it appears that under present practice an amendment may be allowed. *Parker v. Murch*, 64 Me. 54 (1874).

The final sentence is broader than Sec. 11 (repealed in 1959), which seems to make the inclusion of a claim for damages permissive only; but it reflects the case law. *Bemis v. Diamond Match Co*., 128 Me. 335, 147 A. 417 (1929). The wording is designed to make it clear that a separate action for mesne profits or for damage to the premises may still be brought against a third person, as stated in Sec. 15 (amended in 1959) [now 14 M.R.S.A. § 6955], *Bemis v. Diamond Match Co., supra*, or against the defendant for damages accruing after the commencement of the real action. *Larrabee v. Lumbert*, 36 Me. 440 (1853).

Subdivision (d) makes it clear that defenses hitherto in abatement are now to be included in the answer. The second and third sentences are intended to correspond to R.S.1954, Chap. 172, Secs. 6 and 22 (both amended in 1959) [now 14 M.R.S.A. §§ 6801 and 7052], with the added provision for a separate judgment, subject to Rule 54(b), for the part of the premises not defended. The fourth sentence is a paraphrase of the last sentence of Sec. 21 (repealed in 1959), and is not intended to change the practice. The fifth sentence is also taken from Sec. 6 (amended in 1959) [now 14 M.R.S.A. § 6801].

Subdivision (e) is taken from R.S.1954, Chap. 172, Sec. 16 (repealed in 1959). The change in wording to the effect that the trial shall proceed "only after such notice" is to emphasize the result of *Butts v. Fitzgerald*, 151 Me. 505, 121 A.2d 364 (1956).

Subdivision (f) incorporates that part of R.S.1954, Chap. 172, Sec. 18 (amended in 1959) [now 14 M.R.S.A. § 6704], which provides for a writ of possession. The words "judgment for title and possession" do not appear in the

statute, but are taken from the form of Execution for Possession. This subdivision includes the substance of R.S.1954, Chap. 172, Secs. 39 and 40 (repealed in 1959).

The addition of subdivision (g) is to make clear that a real action may be used in the foreclosure of a mortgage of real estate.

Public Laws of 1959, c. 317 amended R.S.1954, Chap. 172, to substitute the word "plaintiff" for "demandant", and to use the word "defendant" to refer to the defending party. These changes, both conform to the terminology of the rules and serve to clear up the inconsistent senses in which the word "tenant" was used in the statute.

Perhaps some reference to the parts of the statute not incorporated in the rule is desirable. R.S.1954, Chap. 172, Secs. 4 and 8 [now 14 M.R.S.A. § 6901–6902] deal in large part with what the demandant must prove in order to win his case. To that extent they are substantive, and will remain unaffected by the rule. The procedural aspects have been changed, as discussed above. Similarly, Secs. 5 and 7 [now 14 M.R.S.A. §§ 6702, 6802] are substantive, and hence excluded.

Section 9 [now 14 M.R.S.A. § 6751] is also excluded. Insofar as it allows joinder or severance in an action of this sort, it is procedural, but in the light of *Clarke v. Hilton*, 75 Me. 426, holding that a tenant in common suing alone can recover only his own proportion of the estate, it has substantive overtones. It is not superseded or otherwise affected by these rules.

Sections 12 and 14 [now 14 M.R.S.A. §§ 6952, 6954] are obviously substantive and unaffected by the rule. The second paragraph of Sec. 18 [now 14 M.R.S.A. § 6704] is thought to be incorporated into subdivision (f) by the words "in accordance with law," insofar as it deals with what the clerk shall do, and the Court is not empowered to touch what the register of deeds shall do.

Section 20 [14 M.R.S.A. § 6956] in setting forth when betterments shall be allowed is substantive. The subsequent detailed treatment of valuation of betterments, election of the demandant to abandon, and the like are largely substantive, and to the extent that they include procedural points they are unaffected by the rules.