

TEXAS RULES OF CIVIL PROCEDURE

PART VII - RULES RELATING TO SPECIAL PROCEEDINGS

SECTION 1. PROCEDURES RELATED TO HOME EQUITY LOAN FORECLOSURE

RULE 735. PROCEDURES

A party seeking to foreclose a lien created under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or Tex. Const. art. XVI, § 50(a)(7), for a reverse mortgage, that is to be foreclosed on grounds other than Tex. Const. art. XVI, § 50(k)(6)(A) or (B), may file: (1) a suit seeking judicial foreclosure; (2) a suit or counterclaim seeking a final judgment which includes an order allowing foreclosure under the security instrument and Texas Property Code § 51.002; or (3) an application under Rule 736 for an order allowing foreclosure.

RULE 736. EXPEDITED FORECLOSURE PROCEEDING

(1) **Application.** A party filing an application under Rule 736 seeking a court order allowing the foreclosure of a lien under Tex. Const. art. XVI, § 50(a)(6)(D), for a home equity loan, or § 50(k)(11), for a reverse mortgage, shall initiate such in rem proceeding by filing a verified application in the district court in any county where all or any part of the real property encumbered by the lien sought to be foreclosed (the "property") is located. The application shall:

- (A) be styled: "In re: Order for Foreclosure Concerning (Name of person to receive notice of foreclosure) and (Property Mailing Address) ";
- (B) identify by name the party who, according to the records of the holder of the debt, is obligated to pay the debt secured by the property;
- (C) identify the property by mailing address and legal description;
- (D) identify the security instrument encumbering the property by reference to volume and page, clerk's file number or other identifying recording information found in the official real property records of the county where all or any part of the property is located or attach a legible copy of the security instrument;
- (E) allege that:
 - (1) a debt exists;
 - (2) the debt is secured by a lien created under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or § 50(a)(7), for a reverse mortgage;

- (3) a default under the security instrument exists;
- (4) the applicant has given the requisite notices to cure the default and accelerate the maturity of the debt under the security instrument, Tex. Prop. Code § 51.002, Tex. Const. art. XVI, § 50(k)(10), for a reverse mortgage, and applicable law;
- (F) describe facts which establish the existence of a default under the security instrument; and
- (G) state that the applicant seeks a court order required by Tex. Const. art. XVI, § 50(a)(6)(D), for a home equity loan, or § 50(k)(11), for a reverse mortgage, to sell the property under the security instrument and Tex. Prop. Code § 51.002.

A notice required by Tex. Const. art. XVI, § 50(k)(10), for a reverse mortgage, may be combined or incorporated in any other notice referenced in Rule 736(1)(E)(4). The verified application and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

(2). **Notice.**

- (A) **Service.** Every application filed with the clerk of the court shall be served by the party filing the application. Service of the application and notice shall be by delivery of a copy to the party to be served by certified and first class mail addressed to each party who, according to the records of the holder of the debt is obligated to pay the debt. Service shall be complete upon the deposit of the application and notice, enclosed in a postage prepaid and properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. If the respondent is represented by an attorney and the applicant's attorney has knowledge of the name and address of the attorney, an additional copy of the application and notice shall be sent to respondent's attorney.
- (B) **Certificate of Service.** The applicant or applicant's attorney shall certify to the court compliance with the service requirements of Rule 736. The applicant shall file a copy of the notice and the certificate of service with the clerk of the court. The certificate of service shall be prima facie evidence of the fact of service.
- (C) **Form of Notice.** The notice shall be sufficient if it is in substantially the following form in at least ten point type:

Cause No. _____

In re: Order for Foreclosure

In the District Court

Concerning Cause No. _____ *(1) Of _____ County
and

_____ *(2) _____ Judicial District

NOTICE TO _____ *(3)

An application has been filed by _____, as Applicant, on *(4), in a proceeding described as:

"In re: Order for Foreclosure Concerning _____ *(1) and _____ *(2).

The attached application alleges that you, the Respondent, are in default under a security instrument creating a lien on your homestead under Tex. Const. art. XVI, § 50(a)(6), for a home equity loan, or § 50(a)(7), for a reverse mortgage. This application is now pending in this court.

Applicant seeks a court order, as required by Tex. Const. art. XVI, § 50(a)(6)(D) or § 50(k)(11), to allow it to sell at public auction the property described in the attached application under the security instrument and Tex. Prop. Code § 51.002.

You may employ an attorney. If you or your attorney do not file a written response with the clerk of the court at _____ *(5) on or before 10:00 a.m. on _____ *(6) an order authorizing a foreclosure sale may be signed. If the court grants the application, the foreclosure sale will be conducted under the security instrument and Tex. Prop. Code § 51-002.

You may file a response setting out as many matters, whether of law or fact, as you consider may be necessary and pertinent to contest the application. If a response is filed, the court will hold a hearing at the request of the applicant or respondent.

In your response to this application, you must provide your mailing address.
In addition, you must send a copy of your response to _____ *(7).

ISSUED

By

(Applicant or Attorney for Applicant)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this notice with a copy of the application was sent certified and regular mail to _____ *(3) on the _____ day of _____, 20____.

(signature)

(Applicant or Attorney for Applicant)

- * (1) name of respondent
- * (2) mailing address of property
- * (3) name and address of respondent
- * (4) date application filed
- * (5) address of clerk of court
- * (6) response due date
- * (7) name and address of applicant or applicant's or applicant's attorney

(D) The applicant shall state in the notice the date the response is due in accordance with Rule 736(3).

(E) The application and notice may be accompanied by any other notice required by state or federal law.

(3) **Response Due Date.** A response is due on or before 10:00 a.m. on the first Monday after the expiration of thirty-eight (38) days after the date of mailing of the application and notice to respondent, exclusive of the date of mailing, as set forth in the certificate of service.

(4) **Response.**

(A) The respondent may file a response setting out as many matters, whether of law or fact, as respondent deems necessary or pertinent to contest the application. Such response and any supporting affidavit shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence, provided that facts may be stated based upon information and belief if the grounds of such belief are specifically stated.

(B) The response shall state the respondent's mailing address.

(C) The response shall be filed with the clerk of the court. The respondent shall also send a copy of the response to the applicant or the applicant's attorney at the address set out in the notice.

(5) **Default.** At any time after a response is due, the court shall grant the application without further notice or hearing if:

(A) the application complies with Rule 736(1);

(B) the respondent has not previously filed a response; and

(C) a copy of the notice and the certificate of service shall have been on file with the clerk of the court for at least ten days exclusive of the date of filing.

- (6) **Hearing When Response Filed.** On the filing of a response, the application shall be promptly heard after reasonable notice to the applicant and the respondent. No discovery of any kind shall be permitted in a proceeding under Rule 736. Unless the parties agree to an extension of time, the issue shall be determined by the court not later than ten business days after a request for hearing by either party. At the hearing, the applicant shall have the burden to prove by affidavits on file or evidence presented the grounds for the granting of the order sought in the application.
- (7) **Only Issue.** The only issue to be determined under Rule 736 shall be the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and Tex. Prop. Code § 51.002.
- (8) **Order to Proceed with Notice of Sale and Sale.**
 - (A) **Grant or denial.** The court shall grant the application if the court finds applicant has proved the elements of Rule 736(1)(E). Otherwise, the court shall deny the application. The granting or denial of the application is not an appealable order.
 - (B) **Form of order.** The order shall recite the mailing address and legal description of the property, direct that foreclosure proceed under the security instrument and Tex. Prop. Code § 51.002, provide that a copy of the order shall be sent to respondent with the notice of sale, provide that applicant may communicate with the respondent and all third parties reasonably necessary to conduct the foreclosure sale, and, if respondent is represented by counsel, direct that notice of the foreclosure sale date shall also be mailed to counsel by certified mail.
 - (C) **Filing of order.** The applicant is to file a certified copy of the order in the real property records of the county where the property is located within ten business days of the entry of the order. Failure to timely record the order shall not affect the validity of the foreclosure or defeat the presumption of Tex. Const. art. XVI, § 50(i).
- (9) **Nonpreclusive Effect of Order.** No order or determination of fact or law under Rule 736 shall be res judicata or constitute collateral estoppel or estoppel by judgment in any other proceeding or suit. The granting of an application under these rules shall be without prejudice to the right of the respondent to seek relief at law or in equity in any court of competent jurisdiction. The denial of an application under these rules shall be without prejudice to the right of the applicant to re-file the application or seek other relief at law or in equity in any court of competent jurisdiction.
- (10) **Abatement and Dismissal.** A proceeding under Rule 736 is automatically abated if, before the signing of the order, notice is filed with the clerk of the court in which the application is pending that respondent has filed a petition contesting the right to foreclose in a district court in the county where the application is pending. A proceeding that has been abated shall be dismissed.

SECTION 3. FORCIBLE ENTRY AND DETAINER

RULE 738. MAY SUE FOR RENT

A suit for rent may be joined with an action of forcible entry and detainer, wherever the suit for rent is within the jurisdiction of the justice court. In such case the court in rendering judgment in the action of forcible entry and detainer, may at the same time render judgment for any rent due the landlord by the renter; provided the amount thereof is within the jurisdiction of the justice court.

RULE 739. CITATION

When the party aggrieved or his authorized agent shall file his written sworn complaint with such justice, the justice shall immediately issue citation directed to the defendant or defendants commanding him to appear before such justice at a time and place named in such citation, such time being not more than ten days nor less than six days from the date of service of the citation.

The citation shall inform the parties that, upon timely request and payment of a jury fee no later than five days after the defendant is served with citation, the case shall be heard by a jury.

RULE 740. COMPLAINANT MAY HAVE POSSESSION

The party aggrieved may, at the time of filing his complaint, or thereafter prior to final judgment in the justice court, execute and file a possession bond to be approved by the justice in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to defendant in the event that the suit has been improperly instituted, and conditioned that the plaintiff will pay defendant all such costs and damages as shall be adjudged against plaintiff.

The defendant shall be notified by the justice court that plaintiff has filed a possession bond. Such notice shall be served in the same manner as service of citation and shall inform the defendant of all of the following rules and procedures:

- (a) Defendant may remain in possession if defendant executes and files a counterbond prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's bond. Said counterbond shall be approved by the justice and shall be in such amount as the justice may fix as the probable amount of costs of suit and damages which may result to plaintiff in the event possession has been improperly withheld by defendant;
- (b) Defendant is entitled to demand and he shall be granted a trial to be held prior to the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond;

- (c) If defendant does not file a counterbond and if defendant does not demand that trial be held prior to the expiration of said six-day period, the constable of the precinct or the sheriff of the county where the property is situated, shall place the plaintiff in possession of the property promptly after the expiration of six days from the date defendant is served with notice of the filing of plaintiff's possession bond; and
- (d) If, in lieu of a counterbond, defendant demands trial within said six-day period, and if the justice of the peace rules after trial that plaintiff is entitled to possession of the property, the constable or sheriff shall place the plaintiff in possession of the property five days after such determination by the justice of the peace.

RULE 741. REQUISITES OF COMPLAINT

The complaint shall describe the lands, tenements or premises, the possession of which is claimed, with sufficient certainty to identify the same, and it shall also state the facts which entitled the complainant to the possession and authorize the action under Sections 24.001 - 24.004, Texas Property Code.

RULE 742. SERVICE OF CITATION

The officer receiving such citation shall execute the same by delivering a copy of it to the defendant, or by leaving a copy thereof with some person over the age of sixteen years, at his usual place of abode, at least six days before the return day thereof; and on or before the day assigned for trial he shall return such citation, with his action written thereon, to the justice who issued the same.

RULE 742a. SERVICE BY DELIVERY TO PREMISES

If the sworn complaint lists all home and work addresses of the defendant which are known to the person filing the sworn complaint and if it states that such person knows of no other home or work addresses of the defendant in the county where the premises are located, service of citation may be by delivery to the premises in question as follows:

If the officer receiving such citation is unsuccessful in serving such citation under Rule 742, the officer shall no later than five days after receiving such citation execute a sworn statement that the officer has made diligent efforts to serve such citation on at least two occasions at all addresses of the defendant in the county where the premises are located as may be shown on the sworn complaint, stating the times and places of attempted service. Such sworn statement shall be filed by the officer with the justice who shall promptly consider the sworn statement of the officer. The justice may then authorize service according to the following:

- (a) The officer shall place the citation inside the premises by placing it through a door mail chute or by slipping it under the front door; and if neither method is possible or

practical, the officer shall securely affix the citation to the front door or main entry to the premises.

- (b) The officer shall that same day or the next day deposit in the mail a true copy of such citation with a copy of the sworn complaint attached thereto, addressed to defendant at the premises in question and sent by first class mail;
- (c) The officer shall note on the return of such citation the date of delivery under (a) above and the date of mailing under (b) above; and
- (d) Such delivery and mailing to the premises shall occur at least six days before the return day of the citation; and on or before the day assigned for trial he shall return such citation with his action written thereon, to the justice who issued the same.

It shall not be necessary for the aggrieved party or his authorized agent to make request for or motion for alternative service pursuant to this rule.

RULE 743. DOCKETED

The cause shall be docketed and tried as other cases. If the defendant shall fail to enter an appearance upon the docket in the justice court or file answer before the case is called for trial, the allegations of the complaint may be taken as admitted and judgment by default entered accordingly. The justice shall have authority to issue subpoenas for witnesses to enforce their attendance, and to punish for contempt.

RULE 744. DEMANDING JURY

Any party shall have the right of trial by jury, by making a request to the court on or before five days from the date the defendant is served with citation, and by paying a jury fee of five dollars. Upon such request, a jury shall be summoned as in other cases in justice court.

RULE 745. TRIAL POSTPONED

For good cause shown, supported by affidavit of either party, the trial may be postponed not exceeding six days.

RULE 746. ONLY ISSUE

In case of forcible entry or of forcible detainer under Sections 24.001 - 24.008, Texas Property Code, the only issue shall be as to the right to actual possession; and the merits of the title shall not be adjudicated.

RULE 747. TRIAL

If no jury is demanded by either party, the justice shall try the case. If a jury is demanded by either party, the jury shall be empaneled and sworn as in other cases; and after hearing the evidence it shall return its verdict in favor of the plaintiff or the defendant as it shall find.

RULE 747a. REPRESENTATION BY AGENTS

In forcible entry and detainer cases for non-payment of rent or holding over beyond the rental term, the parties may represent themselves or be represented by their authorized agents in justice court.

RULE 748. JUDGMENT AND WRIT

If the judgment or verdict be in favor of the plaintiff, the justice shall give judgment for plaintiff for possession of the premises, costs, and damages; and he shall award his writ of possession. If the judgment or verdict be in favor of the defendant, the justice shall give judgment for defendant against the plaintiff for costs and any damages. No writ of possession shall issue until the expiration of five days from the time the judgment is signed.

RULE 749. MAY APPEAL

In appeals in forcible entry and detainer cases, no motion for new trial shall be filed.

Either party may appeal from a final judgment in such case, to the county court of the county in which the judgment is rendered by filing with the justice within five days after the judgment is signed, a bond to be approved by said justice, and payable to the adverse party, conditioned that he will prosecute his appeal with effect, or pay all costs and damages which may be adjudged against him.

The justice shall set the amount of the bond to include the items enumerated in Rule 752.

Within five days following the filing of such bond, the party appealing shall give notice as provided in Rule 21a of the filing of such bond to the adverse party. No judgment shall be taken by default against the adverse party in the court to which the cause has been appealed without first showing substantial compliance with this rule.

RULE 749a. PAUPER'S AFFIDAVIT

If appellant is unable to pay the costs of appeal, or file a bond as required by Rule 749, he shall nevertheless be entitled to appeal by making strict proof of such inability within five days after the

judgment is signed, which shall consist of his affidavit filed with the justice of the peace stating his inability to pay such costs, or any part thereof, or to give security, which may be contested within five days after the filing of such affidavit and notice thereof to the opposite party or his attorney of record by any officer of the court or party to the suit, whereupon it shall be the duty of the justice of the peace in whose court the suit is pending to hear evidence and determine the right of the party to appeal, and he shall enter his finding on the docket as a part of the record. Upon the filing of a pauper's affidavit the justice of the peace or clerk of the court shall notice the opposing party of the filing of the affidavit of inability within one working day of its filing by written notification accomplished through first class mail. It will be presumed prima facie that the affidavit speaks the truth, and, unless contested within five days after the filing and notice thereof, the presumption shall be deemed conclusive; but if a contest is filed, the burden shall then be on the appellant to prove his alleged inability by competent evidence other than by the affidavit above referred to. When a pauper's affidavit is timely contested by the appellee, the justice shall hold a hearing and rule on the matter within five days.

If the justice of the peace disapproves the pauper's affidavit, appellant may, within five days thereafter bring the matter before the county judge for a final decision, and, on request, the justice shall certify to the county judge appellant's affidavit, the contest thereof, and all documents, and papers thereto. The county judge shall set a day for hearing, not later than five days, and shall hear the contest de novo. If the pauper's affidavit is approved by the county judge, he shall direct the justice to transmit to the clerk of the county court, the transcript, records and papers of the case.

A pauper's affidavit will be considered approved upon one of the following occurrences: (1) the pauper's affidavit is not contested by the other party; (2) the pauper's affidavit is contested by the other party and upon a hearing the justice determines that the pauper's affidavit is approved; or (3) upon a hearing by the justice disapproving of the pauper's affidavit the appellant appeals to the county judge who then, after a hearing, approves the pauper's affidavit.

No writ of possession may issue pending the hearing by the county judge of the appellant's right to appeal on a pauper's affidavit. If the county judge disapproves the pauper's affidavit, appellant may perfect his appeal by filing an appeal bond in the amount as required by Rule 749 within five days thereafter. If no appeal bond is filed within five days, a writ of possession may issue.

RULE 749b. PAUPER'S AFFIDAVIT IN NONPAYMENT OF RENT APPEALS

In a nonpayment of rent forcible detainer case a tenant/appellant who has appealed by filing a pauper's affidavit under these rules shall be entitled to stay in possession of the premises during the pendency of the appeal, by complying with the following procedure:

- (1) Within five days of the date that the tenant/appellant files his pauper's affidavit, he must pay into the justice court registry one rental period's rent under the terms of the rental agreement.
- (2) During the appeal process as rent becomes due under the rental agreement, the

tenant/appellant shall pay the rent into the county court registry within five days of the due date under the terms of the rental agreement.

- (3) If the tenant/appellant fails to pay the rent into the court registry within the time limits prescribed by these rules, the appellee may file a notice of default in county court. Upon sworn motion by the appellee and a showing of default to the judge, the court shall issue a writ of restitution.
- (4) Landlord/appellee may withdraw any or all rent in the county court registry upon a) sworn motion and hearing, prior to final determination of the case, showing just cause, b) dismissal of the appeal, or c) order of the court upon final hearing.
- (5) All hearings and motions under this rule shall be entitled to precedence in the county court.

RULE 749c. APPEAL PERFECTED

When an appeal bond has been timely filed in conformity with Rule 749 or a pauper's affidavit approved in conformity with Rule 749a, the appeal shall be perfected.

RULE 750. FORM OF APPEAL BOND

The appeal bond authorized in the preceding article may be substantially as follows:

"The State of Texas,

"County of _____

"Whereas, upon a writ of forcible entry (or forcible detainer) in favor of A.B., and against C.D., tried before , a justice of the peace of county, a judgment was rendered in favor of the said A.B. on the _____ day of _____, A.D. _____, and against the said C.D., from which the said C.D. has appealed to the county court; now, therefore, the said C.D. and his sureties, covenant that he will prosecute his said appeal with effect and pay all costs and damages which may be adjudged against him, provided the sureties shall not be liable in an amount greater than \$ _____, said amount being the amount of the bond herein.

"Given under our hands this _____ day of _____, A.D. _____."

RULE 751. TRANSCRIPT

When an appeal has been perfected, the justice shall stay all further proceedings on the judgment, and immediately make out a transcript of all the entries made on his docket of the proceedings had

in the case; and he shall immediately file the same, together with the original papers and any money in the court registry, including sums tendered pursuant to Rule 749b(1), with the clerk of the county court of the county in which the trial was had, or other court having jurisdiction of such appeal. The clerk shall docket the cause, and the trial shall be de novo.

The clerk shall immediately notify both appellant and the adverse party of the date of receipt of the transcript and the docket number of the cause. Such notice shall advise the defendant of the necessity for filing a written answer in the county court when the defendant has pleaded orally in the justice court.

The trial, as well as all hearings and motions, shall be entitled to precedence in the county court.

RULE 752. DAMAGES

On the trial of the cause in the county court the appellant or appellee shall be permitted to plead, prove and recover his damages, if any, suffered for withholding or defending possession of the premises during the pendency of the appeal.

Damages may include but are not limited to loss of rentals during the pendency of the appeal and reasonable attorney fees in the justice and country courts provided, as to attorney fees, that the requirements of Section 24.006 of the Texas Property Code have been met. Only the party prevailing in the county court shall be entitled to recover damages against the adverse party. He shall also be entitled to recover court costs. He shall be entitled to recover against the sureties on the appeal bond in cases where the adverse party has executed such bond.

RULE 753. JUDGMENT BY DEFAULT

Said cause shall be subject to trial at any time after the expiration of eight full days after the date the transcript is filed in the county court. If the defendant has filed a written answer in the justice court, the same shall be taken to constitute his appearance and answer in the county court, and such answer may be amended as in other cases. If the defendant made no answer in writing in the justice court, and if he fails to file a written answer within eight full days after the transcript is filed in the county court, the allegations of the complaint may be taken as admitted and judgment by default may be entered accordingly.

RULE 755. WRIT OF POSSESSION

The writ of possession, or execution, or both, shall be issued by the clerk of the county court according to the judgment rendered, and the same shall be executed by the sheriff or constable, as in other cases; and such writ of possession shall not be suspended or superseded in any case by appeal from such final judgment in the county court, unless the premises in question are being used as the principal residence of a party.

SECTION 4. PARTITION OF REAL ESTATE

RULE 756. PETITION

The plaintiff's petition shall state:

- (a) The names and residence, if known, of each of the other joint owners, or joint claimants, of such property.
- (b) The share or interest which the plaintiff and the other joint owners, or joint claimants, of same own or claim so far as known to the plaintiff.
- (c) The land sought to be partitioned shall be so described as that the same may be distinguished from any other and the estimated value thereof stated.

RULE 757. CITATION AND SERVICE

Upon the filing of a petition for partition, the clerk shall issue citation for each of the joint owners, or joint claimants, named therein, as in other cases, and such citations shall be served in the manner and for the time provided for the service of citations in other cases.

RULE 758. WHERE DEFENDANT IS UNKNOWN OR RESIDENCE IS UNKNOWN

If the plaintiff, his agent or attorney, at the commencement of any suit, or during the progress thereof, for the partition of land, shall make affidavit that an undivided portion of the land described in plaintiff's petition in said suit is owned by some person unknown to affiant, or that the place of residence of any known party owning an interest in land sought to be partitioned is unknown to affiant, the Clerk of the Court shall issue citation for publication, conforming to the requirements of Rules 114 and 115, and served in accordance with the directions of Rule 116. In case of unknown residence or party, the affidavit shall include a statement that after due diligence plaintiff and the affiant have been unable to ascertain the name or locate the residence of such party, as the case may be, and in such case it shall be the duty of the court trying the action to inquire into the sufficiency of the diligence so stated before granting any judgment.

RULE 759. JUDGMENT WHERE DEFENDANT CITED BY PUBLICATION

When the defendant has been duly cited by publication in accordance with the preceding rule, and no appearance is entered within the time prescribed for pleadings, the court shall appoint an attorney to defend in behalf of such owner or owners, and proceed as in other causes where service is made by publication. It shall be the special duty of the court in all cases to see that its decree protects the rights of the unknown parties thereto. The judge of the court shall fix the fee of the attorney so

appointed, which shall be entered and collected as costs against said unknown owner or owners.

RULE 760. COURT SHALL DETERMINE, WHAT

Upon the hearing of the cause, the court shall determine the share or interest of each of the joint owners or claimants in the real estate sought to be divided, and all questions of law or equity affecting the title to such land which may arise.

RULE 761. APPOINTMENT OF COMMISSIONERS

The court shall determine before entering the decree of partition whether the property, or any part thereof, is susceptible of partition; and, if the court determines that the whole, or any part of such property is susceptible of partition, then the court for that part of such property held to be susceptible of partition shall enter a decree directing the partition of such real estate, describing the same, to be made in accordance with the respective shares or interests of each of such parties entitled thereto, specify in such decree the share or interest of each party, and shall appoint three or more competent and disinterested persons as commissioners to make such partition in accordance with such decree and the law, a majority of which commissioners may act.

RULE 762. WRIT OF PARTITION

The clerk shall issue a writ a partition, directed to the sheriff or any constable of the county, commanding such sheriff or constable to notify each of the commissioners of their appointment as such, and shall accompany such writ with a certified copy of the decree of the court directing the partition.

RULE 763. SERVICE OF WRIT OF PARTITION

The writ of partition shall be served by reading the same to each of the persons named therein as commissioners, and by delivering to any one of them the accompanying certified copy of the decree of the court.

RULE 764. MAY APPOINT SURVEYOR

The court may, should it be deemed necessary, appoint a surveyor to assist the commissioners in making the partition, in which case the writ of partition shall name such surveyor, and shall be served upon him by reading the same to him.

RULE 765. RETURN OF WRIT

A writ of partition, unless otherwise directed by the court, shall be made returnable twenty days from date of service on the commissioner last served; and the officer serving it shall endorse thereon the time and manner of such service.

RULE 766. SHALL PROCEED TO PARTITION

The commissioners, or a majority of them, shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of law and these rules.

RULE 767. MAY CAUSE SURVEY

If the commissioners deem it necessary, they may cause to be surveyed the real estate to be partitioned into several tracts or parcels.

RULE 768. SHALL DIVIDE REAL ESTATE

The commissioners shall divide the real estate to be partitioned into as many shares as there are persons entitled thereto, as determined by the court, each share to contain one or more tracts or parcels, as the commissioners may think proper, having due regard in the division to the situation, quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled. The commissioners shall then proceed by lot to set apart to each of the parties entitled one of said shares, determined by the decrees of the court.

RULE 769. REPORT OF COMMISSIONERS

When the commissioners have completed the partition, they shall report the same in writing and under oath to the court, which report shall show:

- (a) The property divided, describing the same.
- (b) The several tracts or parcels into which the same was divided by them, describing each particularly.
- (c) The number of shares and the land which constitutes each share, and the estimated value of each share.
- (d) The allotment of each share.
- (e) The report shall be accompanied by such field notes and maps as may be necessary

to make the same intelligible.

The clerk shall immediately mail written notice of the filing of the report to all parties.

RULE 770. PROPERTY INCAPABLE OF DIVISION

Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, cannot be made, it shall order a sale of so much as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution or by private or public sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests.

RULE 771. OBJECTIONS TO REPORT

Either party to the suit may file objections to any report of the commissioners in partition within thirty days of the date the report is filed, and in such case a trial of the issues thereon shall be had as in other cases. If the report be found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the Court, and the same proceedings had as in the first instance.

SECTION 5. PARTITION OF PERSONAL PROPERTY

RULE 772. PROCEDURE

An action seeking partition of personal property as authorized by Section 23.001, Texas Property Code, shall be commenced in the same manner as other civil suits, and the several owners or claimants of such property shall be cited as in other cases.

RULE 773. VALUE ASCERTAINED

The separate value of each article of such personal property, and the allotment in kind to which each owner is entitled, shall be ascertained by the court, with or without a jury.

RULE 774. DECREE OF COURT EXECUTED

When partition in kind of personal property is ordered by the judgment of the court, a writ shall be issued in accordance with such judgment, commanding the sheriff or constable of the county where the property may be to put the parties forthwith in possession of the property allotted to each respectively.

RULE 775. PROPERTY SOLD

When personal property will not admit of a fair and equitable partition, the court shall ascertain the proportion to which each owner thereof is entitled, and order the property to be sold, and execution shall be issued to the sheriff or any constable of the county where the property may be describing such property and commanding such officer to sell the same as in other cases of execution, and pay over the proceeds of sale to the parties entitled thereto, in the proportion ascertained by the judgment of the court.

SECTION 6. PARTITION: MISCELLANEOUS PROVISIONS

RULE 776. CONSTRUCTION

No provision of the statutes or rules relating to partition shall affect the mode of proceeding prescribed by law for the partition of estates of decedents among the heirs and legatees, nor preclude partition in any other manner authorized by the rules of equity, which rules shall govern in proceedings for partition in all respects not provided for by law or these rules.

RULE 777. PLEADING AND PRACTICE

The same rules of pleading, practice and evidence which govern in other civil actions shall govern in suits for partition, when not in conflict with any provisions of the law or these rules relating to partition.

RULE 778. COSTS

The court shall adjudge the costs in a partition suit to be paid by each party to whom a share has been allotted in proportion to the value of such share.

SECTION 7. QUO WARRANTO

RULE 779. JOINDER OF PARTIES

When it appears to the court or judge that the several rights of divers parties to the same office or franchise may properly be determined on one information, the court or judge may give leave to join all such persons in the same information in order to try their respective rights to such office or franchise.

RULE 780. CITATION TO ISSUE

When such information is filed, the clerk shall issue citation as in civil actions, commanding the defendant to appear and answer the relator in an information in the nature of a quo warranto.

RULE 781. PROCEEDING AS IN CIVIL CASES

Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in other cases of trial of civil cases in this State. Either party may prosecute an appeal or writ of error from any judgment rendered, as in other civil cases, subject, however, to the provisions of Rule 42, Texas Rules of Appellate Procedure, and the appellate court shall give preference to such case, and hear and determine the same as early as practicable.

RULE 782. REMEDY CUMULATIVE

The remedy and mode of procedure hereby prescribed shall be construed to be cumulative of any now existing.

Section 8. Trespass to Try Title

RULE 783. REQUISITES OF PETITION

The petition shall state:

- (a) The real names of the plaintiff and defendant and their residences, if known.
- (b) A description of the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and state the county or counties in which the same are situated.
- (c) The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, the petition shall state the same and the amount thereof.
- (d) That the plaintiff was in possession of the premises or entitled to such possession.
- (e) That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.
- (f) If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.
- (g) It shall conclude with a prayer for the relief sought.

RULE 784. THE POSSESSOR SHALL BE DEFENDANT

The defendant in the action shall be the person in possession if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

RULE 785. MAY JOIN AS DEFENDANTS, WHEN

The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise, may claim title to the premises, or any part thereof, adversely to the plaintiff.

RULE 786. WARRANTOR, ETC., MAY BE MADE A PARTY

When a party is sued for lands, the real owner or warrantor may make himself, or may be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

RULE 787. LANDLORD MAY BECOME DEFENDANT

When such action shall be commenced against a tenant in possession, the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant; and he shall be entitled to make the same defense as if the suit had been originally commenced against him.

RULE 788. MAY FILE PLEA OF "NOT GUILTY" ONLY

The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements, he shall state the facts entitling him to the same.

RULE 789. PROOF UNDER SUCH PLEA

Under such plea of "not guilty" the defendant may give in evidence any lawful defense to the action except the defense of limitations, which shall be specially pleaded.

RULE 790. ANSWER TAKEN AS ADMITTING POSSESSION

Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at

the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only.

RULE 791. MAY DEMAND ABSTRACT OF TITLE

After answer filed, either party may, by notice in writing, duly served on the opposite party or his attorney of record, not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies.

RULE 792. TIME TO FILE ABSTRACT

Such abstract of title shall be filed with the papers of the cause that within thirty days after the service of the notice, or within such further time that the court on good cause shown may grant; and in default thereof, the court may, after notice and hearing prior to the beginning of trial, order that no written instruments which are evidence of the claim or title of such opposite party be given on trial.

RULE 793. ABSTRACT SHALL STATE, WHAT

The abstract mentioned in the two preceding rules shall state:

- (a) The nature of each document or written instrument intended to be used as evidence and its date; or
- (b) If a contract or conveyance, its date, the parties thereto and the date of the proof of acknowledgment, and before what officer the same was made; and
- (c) Where recorded, stating the book and page of the record.
- (d) If not recorded in the county when the trial is had, copies of such instrument, with the names of the subscribing witnesses, shall be included. If such unrecorded instrument be lost or destroyed it shall be sufficient to state the nature of such instrument and its loss or destruction.

RULE 794. AMENDED ABSTRACT

The court may allow either party to file an amended abstract of title, under the same rules, which authorize the amendment of pleadings so far as they are applicable; but in all cases the documentary evidence of title shall at the trial be confined to the matters contained in the abstract of title.

RULE 795. RULES IN OTHER CASES OBSERVED

The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court and conformable to the principles of trial by ejectment, except as otherwise provided by these rules.

RULE 796. SURVEYOR APPOINTED, ETC.

The judge of the court may, either in term time or in vacation, at his own discretion, or on motion of either party to the action appoint a surveyor, who shall survey the premises in controversy pursuant to the order of the court, and report his action under oath to such court. If said report be not rejected for good cause shown, the same shall be admitted as evidence on the trial.

RULE 797. SURVEY UNNECESSARY, WHEN

Where there is no dispute as to the lines or boundaries of the land in controversy, or where the defendant admits that he is in possession of the lands or tenements included in the plaintiff's claim, or title, an order of survey shall be unnecessary.

RULE 798. COMMON SOURCE OF TITLE

It shall not be necessary for the plaintiff to deraign title beyond a common source. Proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source. Before any such certified copies shall be read in evidence, they shall be filed with the papers of the suit three days before the trial, and the adverse party served with notice of such filing as in other cases. Such certified copies shall not be evidence of title in the defendant unless offered in evidence by him. The plaintiff may make any legal objection to such certified copies, or the originals thereof, when introduced by the defendant.

RULE 799. JUDGMENT BY DEFAULT

If the defendant, who has been personally served with citation according to law or these rules fails to appear and answer by himself or attorney within the time prescribed by law or these rules for other actions in the district court, then judgment by default may be entered against him and in favor of the plaintiff for the title to the premises, or the possession thereof, or for both, according to the petition, and for all costs, without any proof of title by the plaintiff.

RULE 800. PROOF EX PARTE

If the defendant has been cited only by publication, and fails to appear and answer by himself, or by

attorney of his own selection, or if any defendant, having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him prima facie to recover, whereupon the proper judgment shall be entered.

RULE 801. WHEN DEFENDANT CLAIMS PART ONLY

Where the defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance.

RULE 802. WHEN PLAINTIFF PROVES PART

Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs.

RULE 803. MAY RECOVER A PART

When there are two or more plaintiffs or defendants any one or more of the plaintiffs may recover against one or more of the defendants the premises, or any part thereof, or any interest therein, or damages, according to the rights of the parties.

RULE 804. THE JUDGMENT

Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession.

RULE 805. DAMAGES

Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises. If special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue.

RULE 806. CLAIM FOR IMPROVEMENTS

When the defendant or person in possession has claimed an allowance for improvements in accordance with Sections 22.021 - 22.024, Texas Property Code, the claim for use and occupation and damages mentioned in the preceding rule shall be considered and acted on in connection with

such claim by the defendant or person in possession.

RULE 807. JUDGMENT WHEN CLAIM FOR IMPROVEMENTS IS MADE

When a claim for improvements is successfully made under Sections 22.021 -22.024, Texas Property Code, the judgment shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in Sections 22.021 - 22.024, Texas Property Code so far as applicable to the case before the court.

RULE 808. THESE RULES SHALL NOT GOVERN, WHEN

Nothing in Sections 22.001 - 22.045, Texas Property Code, shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law under which the same accrued, or by which the same were regulated or in any manner affected.

RULE 809. THESE RULES SHALL NOT GOVERN, WHEN

Nothing in these rules relating to trespass to try title shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law under which the same accrued, or by which the same were regulated or in any manner affected.

SECTION 9. SUITS AGAINST NON-RESIDENTS

RULE 810. REQUISITES OF PLEADINGS

The petition in actions authorized by Section 17.003, Civil Practice and Remedies Code, shall state the real names of the plaintiff and defendant, and shall describe the property involved with sufficient certainty to identify the same, the interest which the plaintiff claims, and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit, and to decree the title or right of the party entitled thereto; and the court may issue the appropriate order to carry such decree, judgment or order into effect; and whenever such petition has been duly filed and citation thereon has been duly served by publication as required by Rules 114 -116, the plaintiff may, at any time prior to entering the decree by leave of court first had and obtained, file amended and supplemental pleadings that do not subject additional property to said suit without the necessity of reciting the defendants so cited as aforesaid.

RULE 811. SERVICE BY PUBLICATION IN ACTIONS UNDER

SECTION 17.003, CIVIL PRACTICE AND REMEDIES CODE

In actions authorized by Section 17.003, Civil Practice and Remedies Code, service on the defendant or defendants may be made by publication as is provided by Rules 114 -116 or by service of notice of the character and in the manner provided by Rule 108.

RULE 812. NO JUDGMENT BY DEFAULT

No judgment by default shall be taken in such case when service has been had by publication, but in such case the facts entitling the plaintiff to judgment shall be exhibited to the court on the trial; and a statement of facts shall be filed as provided by law and these rules in suits against nonresidents of this State served by publication, where no appearance has been made by them.

RULE 813. SUIT TO EXTINGUISH LIEN

If said suit shall be for the extinguishment of a lien or claim for money on said property that may be held by the defendant, the amount thereof, with interest, shall be ascertained by the court; and the same deposited in the registry of the court, subject to the drawn by the parties entitled thereto; but in such case no decree shall be entered until said sum is deposited; which fact shall be noted in said decree.