

Final Report
of the
Advisory Committee on Rules
for Civil Procedure

Appointed by the
Supreme Court of the United States



November 1937

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LETTER OF TRANSMITTAL

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

OFFICE OF THE SECRETARY
SUPREME COURT OF THE UNITED STATES BUILDING

WASHINGTON, D. C.

*To the Honorable, The Chief Justice and Associate
Justices of the Supreme Court of the United
States:*

The members of the Advisory Committee, appointed by the Court to prepare and submit to the Court a draft of a unified system of rules of civil procedure for the United States district courts, herewith submit their final report.

A draft of the proposed rules was printed in April 1937, and generally distributed. On November 1, 1937, the Committee met to consider suggestions which had been received from the bench and bar as to the draft of April 1937. As the result of those suggestions and of further study of the April draft by members of the Committee, we are recommending many changes. These changes are set forth rule by rule in this report. Some of the changes are in matters of substance but the greater part were made for purposes of clarification. In connection with some of the changes we have added notes explaining the reasons for the changes. The reasons for other changes are obvious and need no

explanation. We also submit herewith a proposed set of forms.

Respectfully submitted.

WILLIAM D. MITCHELL,

Chairman,

GEORGE WHARTON PEPPER,

Vice-Chairman,

EDGAR B. TOLMAN, *Secretary,*

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EDMUND M. MORGAN,

WARREN OLNEY, JR.,

EDSON R. SUNDERLAND,

Advisory Committee on Rules

for Civil Procedure.

NOVEMBER 4, 1937.

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RECOMMENDATIONS OF THE ADVISORY COMMITTEE FOR CHANGES IN THE PROPOSED RULES OF CIVIL PROCEDURE AS PRINTED IN APRIL 1937

[In this report all number references to rules, pages, and lines are those of the Report of the Advisory Committee printed as of April 1937.]

Rule 1. Scope of Rules.

Amend Rule 1, page 1, to read as follows:

Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 83. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 4. Process.

Subdivision (a), page 7, lines 2-5. Amend to read as follows:

(a) **SUMMONS: ISSUANCE.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

NOTE

Note 4 to Rule 3, in the April 1937 draft, mentioned a point arising under statutes of limitation, because Rule 3 states that the action is commenced, by filing a complaint, and Rule 4 allowed delay between filing the complaint and delivering the summons to an officer for service. This change reduces the chance of such questions arising.

Subdivision (b), page 7, line 15. After "so" strike the comma.

Subdivision (c), page 7, line 18. Amend the subtitle by striking out the words "METHOD OF SERVICE:" and inserting the word "SERVED" after "WHOM", so that the subtitle will read: (c) BY WHOM SERVED.

Subdivision (d) (1), page 8, lines 36-37. Strike "adult member of his household" and substitute "person of suitable age and discretion then residing therein".

Subdivision (d) (3), page 8, line 54. After "officer," insert "a".

Subdivision (d) (4), page 9, lines 73-74. Strike "whether or not the United States is a defendant, wherein" and substitute "attacking the validity of".

Subdivision (d) (4), page 9, line 76. Strike "is attacked".

Subdivision (d) (6), page 9, line 86. After "state" strike the comma and substitute "or".

Subdivision (d) (6), page 9, line 87. After "corporation" strike the comma. After "other" strike "public or".

Subdivision (d) (6), page 9, line 88. After "organization" insert "thereof".

Subdivision (d) (7), page 9, line 101. After "United States" strike the comma. After "or" insert "in the manner prescribed".

Subdivision (e), page 10, lines 108-109. Strike "or Rule 74 (d) of these rules".

Subdivision (e), page 10, line 110. After "summons" insert a comma, before "notice" insert "a" and after "notice" insert a comma.

Subdivision (e), page 10, line 111. After "summons" strike the comma.

Subdivision (g), page 10, line 125. Strike "return it" and substitute "make proof of service thereof".

Subdivision (g), page 10, lines 130-131. Strike "return" and substitute "proof of service".

Rule 5. Service and Filing of Pleadings and Other Papers.

Subdivision (a), page 15, line 3. In the subtitle after "SERVICE" change the period to a colon and insert "WHEN REQUIRED."

Subdivision (a), page 15, line 9. Strike "claim,".

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Subdivision (a), page 15, lines 12-13. Strike "but only upon those not in default for failure to appear." and substitute "but no service need be made on parties in default for failure to appear except that pleadings asserting new and additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4."

Subdivision (a), page 15, lines 13-17. Strike the sentence "If any party has appeared by attorney, service upon him shall be made upon the attorney unless service upon the party himself is ordered by the court." and substitute the following:

"(b) **SAME: HOW MADE.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

Subdivision (a), page 15, line 23. Strike "a copy" and substitute "it".

Subdivision (a), page 15, line 24. Strike "a copy" and substitute "it".

Subdivision (a), page 15, line 26. Strike "a copy" and substitute "it".

Subdivision (a), page 15, lines 30-31. Strike "adult member of his household." and substitute "person of suitable age and discretion then residing therein."

Subdivision (a), page 15, line 32. Begin a new subdivision by inserting before "In" the subtitle "(c) **SAME; NUMEROUS DEFENDANTS.**"

As thus amended present Subdivision (a) will become Subdivisions (a), (b), and (c), and will read:

(a) **SERVICE: WHEN REQUIRED.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written

notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new and additional claims for relief against them, shall be served upon them in the manner provided for service of summons in Rule 4.

(b) **SAME: HOW MADE.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **SAME: NUMEROUS DEFENDANTS.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting

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an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

Subdivision (b), page 16, line 47. Change "(b)" to "(d)". Amend the subdivision, lines 47-54, to read as follows:

(d) FILING. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

Subdivision (c), page 16, line 55. Change "(c)" to "(e)".

Subdivision (c), page 16, line 60. Strike "and" and substitute "in which event he".

Rule 6. Time.

Subdivision (a), page 17, lines 9-10. Strike "the time shall run" and substitute "the period runs".

Subdivision (b), page 17, line 20. Strike "time" and substitute "period".

Subdivision (b), page 17, line 21. After "discretion" insert "(1)".

Subdivision (b), page 17, line 23. Strike "time" and substitute "period".

Subdivision (b), page 17, line 25. Strike the semicolon and insert "or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act earlier was the result of excusable neglect;".

Subdivision (b), page 17, line 26. Strike "time" and substitute "period".

Subdivision (b), page 17, line 28. Strike "time" and substitute "period".

Subdivision (b), pages 17-18, lines 29-32. Strike the sentence beginning "This rule does not", line 29, and ending "in Rule 57 (b).", line 32.

As thus amended Subdivision (b) will read:

(b) **ENLARGEMENT.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified period, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act earlier was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 56, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

Subdivision (c), page 18, lines 35-36. Strike "shall not be" and substitute "is not".

Subdivision (c), page 18, line 38. Strike "shall in no way affect" and substitute "in no way affects".

Subdivision (d), page 18, line 47. Strike "time" and substitute "period".

Subdivision (e), pages 18-19, lines 56-66. Strike the subdivision.

NOTE

Subdivision (e) was stricken because covered by Rule 12 (a).

Subdivision (f), page 19, line 67. Change "(f)" to "(e)".

Subdivision (f), page 19, line 70. Strike "time" and substitute "period".

Subdivision (f), page 19, line 73. Strike "time" and substitute "period".

Rule 7. Pleadings Designated: Motion Defined.

Page 20, lines 1-2. Change the title to read: **Pleadings Allowed; Form of Motions.**

Subdivision (a), page 20, lines 6-7. After "such" insert a semicolon and strike "or if the court orders a reply to an affirmative defense in the answer;".

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Subdivision (a), page 20, line 9. After "if" insert "leave is given under Rule 14 to summon".

Subdivision (a), page 20, lines 10-11. After "party" insert a semicolon and strike "is summoned under Rule 14 to appear in the action;". After "and" insert "there shall be".

Subdivision (a), page 20, line 14. After "allowed," insert "except that the court may order a reply to an answer or a third-party answer."

As thus amended Subdivision (a) will read:

(a) PLEADINGS. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Subdivision (b), page 20, line 15. In the title after "MOTIONS" strike the period and insert "AND OTHER PAPERS.". Strike "Any" and insert "(1) An".

Subdivision (b), page 20, line 21. Strike "the substance of".

Subdivision (c), page 20, line 24. Strike "(c) OTHER PAPERS." and substitute "(2)", making the paragraph which follows a part of Subdivision (b).

Subdivision (c), page 20, line 25. Strike "pleadings and relating to".

Subdivision (c), page 20, line 26. Strike "shall" and substitute "of pleadings". After "all" insert "motions and other".

As thus amended present Subdivisions (b) and (c) will read:

(b) **MOTIONS AND OTHER PAPERS.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Subdivision (d), page 20, line 28. Change "(d)" to "(c)".

Rule 8. General Rules of Pleading.

Subdivision (b), page 22, lines 16-17. Strike "In pleading to a preceding pleading," and capitalize "a" before "party".

Subdivision (b), page 22, line 18. Strike "defense or".

Subdivision (b), page 22, line 19. After "admit" strike the comma.

Subdivision (b), page 22, line 20. Strike "explain,".

Subdivision (b), page 22, line 26. Strike "desires" and substitute "intends in good faith".

Subdivision (b), page 22, lines 28-29. After "averment," strike "he shall not deny the averment generally or as averred, but".

Subdivision (b), page 22, line 34. Strike "shall" and substitute "may". After "denials" strike "only".

Subdivision (b), page 23, line 35. Strike "distinct" and substitute "designated". After "paragraphs" and before the semicolon insert ", or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits".

As thus amended Subdivision (b) will read:

(b) **DEFENSES; FORM OF DENIALS.** A party shall state in short and plain terms his defenses to each

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claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

Subdivision (c), page 23, line 44, at the beginning of the line strike "tration" and substitute "tion".

Subdivision (c), page 23, line 54. Strike ", without requiring a reply may" and substitute "on terms, if justice so requires, shall".

Rule 9. Pleading Special Matters.

Subdivision (a), page 26, lines 8-9. Strike "A party desiring" and substitute "When a party desires".

Subdivision (a), page 26, line 12. After "capacity," insert "he".

Subdivision (f), page 27, line 42. Strike "or" and substitute "and".

Rule 10. Form of Pleadings.

Subdivision (a), page 28, line 6. Strike "of the pleading as provided" and substitute "as".

Rule 11. Signing of Pleadings.

Subdivision (a), page 29, line 2. Strike the subtitle "(a) BY ATTORNEY.". After "pleading" insert "of a party represented by an attorney".

Subdivision (a), page 29, line 3. After "signed" insert "by at least one attorney of record".

Subdivision (a), page 29, lines 3-4. Strike "by at least one attorney of record" and substitute ", whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address.".

Subdivision (a), page 29, line 7. After "affidavit." insert a new sentence as follows: "The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished.".

Subdivision (b), page 29, lines 21-24. Strike the subdivision.

As thus amended Rule 11 will read:

Rule 11. Signing of Pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the

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purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

Rule 12. Defenses—When and How Presented.

Page 30, lines 1-2. Change the title to read: **Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.**

Subdivision (a), page 31, line 19. After “service” insert “upon the United States Attorney”.

As thus amended the sentence in lines 15-20 will read:

The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States Attorney of the pleading in which the claim is asserted.

NOTE

Making the time to answer by the United States run from the date of service on the United States Attorney is the present provision of the Tucker Act.

Subdivision (a), page 31, lines 20-32. After “asserted.” strike the remainder of the subdivision, and substitute the following:

The service of any motion provided for in this rule alters the time fixed by these rules for serving any required responsive pleading as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court’s action; (2) if the court grants a mo-

tion for a more definite statement or for a bill of particulars, the responsive pleading may be served within the time usually allowed by these rules or within 10 days after service of the more definite statement or bill of particulars.

Subdivision (b), page 31, lines 33-34. Amend the subtitle to read: **HOW PRESENTED.**

Subdivision (b), page 31, line 36. Strike "an original" and substitute "a".

Subdivision (e), page 32, lines 69-70. Amend the subtitle to read: **MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.**

Subdivision (f), page 33, lines 89-96. Amend to read as follows:

(f) **MOTION TO STRIKE.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading.

Subdivision (g), page 33, line 99. After "for" strike the semicolon and insert "and then available to him."

Subdivision (g), page 33, line 100. Strike "and if" and the remainder of the subdivision through line 112, and substitute the following:

If a party makes a motion under this rule and does not include therein all grounds of motion which are then available to him, he shall not be permitted thereafter to make a motion based on any of the grounds so omitted, but prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.

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Subdivision (h), pages 33-34, lines 113-131. Amend to read as follows:

(h) **WAIVER OF DEFENSES.** A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

Rule 13. Counterclaim and Cross-Claim.

Subdivision (c), page 37, line 20. After "party" strike the comma and substitute a period. Strike "but" and insert "It".

Subdivision (h), page 38, lines 51-54. Strike "When the determination of a counterclaim or cross-claim requires for the granting of complete relief the presence of parties other than those to the original action," and substitute "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim,".

As thus amended Subdivision (h) will read:

(h) **ADDITIONAL PARTIES MAY BE BROUGHT IN.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to

be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

Rule 15. Amended and Supplemental Pleadings.

Subdivision (a), page 42, lines 14–20. Strike the sentence and substitute the following:

A party shall plead in response to an amended pleading or a pleading supplemented by a bill of particulars within the time for response to the original pleading or within 10 days after service of the amended pleading or bill of particulars, whichever period may be the longer, unless the court otherwise orders.

Rule 16. Pre-Trial Procedure; Formulating Issues.

Page 45, line 27. Strike “shall control” and substitute “controls”.

Page 45, line 28. After “action” change the period to a comma and insert “unless modified at the trial to prevent manifest injustice.”

Page 45, line 32. After “actions” insert “or to non-jury actions”.

Rule 17. Parties Plaintiff and Defendant; Capacity.

Subdivision (a), page 47, line 14. Strike “may” and substitute “shall”.

Subdivision (b), page 47, line 17. After “individual” insert “, other than one acting in a representative capacity,”.

Subdivision (b), page 47, line 22. Strike “governed” and substitute “determined”.

As thus amended Subdivision (b) will read:

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all

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other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held; except that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States.

Rule 18. Joinder of Claims and Remedies.

Subdivision (a), page 49, line 5. After "counterclaim" strike the comma.

Subdivision (a), page 49, line 11. After "20" insert a comma.

Subdivision (b), pages 49-50, lines 17-18. Strike "a prior proceeding" and substitute "another claim".

Rule 19. Necessary Joinder of Parties.

Subdivision (b), page 51, line 13. Strike "the original" and substitute "those already".

Subdivision (c), page 52, line 33. Strike "of persons".

Subdivision (c), page 52, line 34. After "him," insert "of persons".

Subdivision (c), page 52, lines 35-36. Strike "the original" and substitute "those already".

Subdivision (c), page 52, line 36. After "but" insert "who".

As thus amended, Subdivision (c) will read:

(c) SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED. In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

Rule 23. Class Actions.

Subdivision (a), page 56, line 5. Strike "a number". After "them" insert ", one or more,".

Subdivision (a), page 56, lines 7-8. Strike "join as plaintiffs or be joined as defendants," and substitute "sue or be sued,".

Subdivision (c), page 58, lines 44-48. Amend to read as follows:

(c) **DISMISSAL OR COMPROMISE.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it.

Rule 24. Intervention.

Subdivision (a), page 61, line 3. After "application" strike the comma.

Subdivision (a), page 61, line 9. After "in" strike "such" and substitute "the".

Subdivision (c), page 61, line 33. After "intervene." insert the following:

When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the Act of August 24, 1937.

Rule 25. Substitution of Parties.

Subdivision (d), page 64, line 44. Before "city" strike "or". After "city," insert "or other governmental agency,".

Subdivision (d), page 64, line 48. Strike "such officer".

Rule 26. Depositions Pending Action.

Subdivision (a), page 66, lines 3–12. Strike the sentence beginning “At any time”, line 3, and ending “both purposes.”, line 12, and substitute the following:

By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been filed, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes.

Subdivision (a), page 66, lines 14–17. Strike the sentence beginning “Oral depositions”, line 14, and ending, “Rule 31.”, line 17, and substitute “Depositions shall be taken only in accordance with these rules.”

Subdivision (d) (3), page 67, line 60. Strike “out of the district and”.

Subdivision (d) (3), page 68, line 67. After “age,” insert “sickness.”

Subdivision (d) (4), page 68, lines 78–81. Amend the paragraph to read as follows:

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

Subdivision (e), page 68, line 94. Before “Objection” insert “Subject to the provisions of Rule 32 (c),” and begin the word “Objection” with a small letter.

Subdivision (e), page 68, line 95. After “made” insert “at the trial or hearing”.

Subdivision (f), page 69, line 107. After “deposition” strike the period and insert “, but this shall not apply to the use by an adverse party of a deposition described in paragraph (2) of subdivision (d) of this rule.”

Rule 27. Depositions before action.

Amend Rule 27, pages 72, 73, and 74, to read as follows:

Rule 27. Depositions Before Action or Pending Appeal.**(a) BEFORE ACTION.**

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of the United States shall file a verified petition in the district court of the United States in the district of the residence of any expected adverse party. The petition shall be entitled in his own name as petitioner, showing: (1) that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and his interest therein, (3) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, (4) the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and praying for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in

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the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4 (d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4 (d), an attorney who shall represent them, and in case they are not otherwise represented shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17 (c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action subsequently brought involving the same subject matter in a dis-

district court of the United States, in accordance with the provisions of Rule 26 (d).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

NOTE

The revision is intended

- (1) to require service on the expected adverse parties of notice of the application for leave to perpetuate;
- (2) to require a finding by the court that the perpetuation may prevent a delay or failure of justice;

(3) to cover the case where an appeal is pending, and it may be desirable to preserve testimony for use in the event of further proceedings in the District Court; and

(4) to make it clear that the right to maintain an independent action to perpetuate testimony is not disturbed.

Rule 28. Persons Before Whom Depositions May Be Taken.

Subdivision (b), page 75, lines 10-25. Amend to read as follows:

(b) IN FOREIGN COUNTRIES. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

Rule 30. Depositions Upon Oral Examination.

Subdivision (b), page 77, line 23. After "taken," insert "or that it may be taken only at some designated place other than that stated in the notice or that it may be taken only on written interrogatories,".

Subdivision (c), page 77, line 45. After "stenographically" insert "and transcribed".

Subdivision (d), page 78, line 60. In the subtitle after "TERMINATE" insert "OR LIMIT."

Subdivision (d), page 78, lines 64-66. Strike "for the purpose of annoying, embarrassing, or oppressing" and substitute "in such manner as unreasonably to annoy, embarrass, or oppress".

Subdivision (d), page 78, line 71. After "deposition" strike the period and insert ", or limiting the scope and

manner of the taking of the deposition as provided in subdivision (b).”.

Subdivision (d), page 78, lines 71-72. Strike “If the order is made, the examination” and substitute “If the order made terminates the examination, it”.

Subdivision (d), page 78, line 75. After “party” before the comma insert “or deponent”.

Subdivision (d), page 78, line 77. After “order.” insert “In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.”.

As thus amended Subdivision (d) will read:

(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may make an order directing the officer conducting the examination to cease forthwith from taking the deposition, or limiting the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make possible a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable.

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Subdivision (e), page 78, line 82. Strike "over".

Subdivision (g) (2), page 80, lines 137-138. Strike "by oral examination".

Rule 31. Depositions of Witnesses Upon Written Interrogatories.

Subdivision (a), page 81, line 12. Strike "cross-interrogatories" and substitute "cross interrogatories".

Subdivision (a), page 81, line 14. Strike "re-direct" and substitute "redirect".

Subdivision (a), page 82, line 16. Strike "cross-interrogatories" and substitute "cross interrogatories".

Subdivision (a), page 82, line 17. Strike "re-direct-interrogatories" and substitute "redirect interrogatories".

Subdivision (a), page 82, line 18. Strike "re-cross-interrogatories" and substitute "recross interrogatories".

Subdivision (d), page 82, lines 34-40. Amend to read as follows:

(d) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After the service of interrogatories and prior to the taking of the testimony of the deponent, the court in which the action is pending may, on motion promptly made by a party or a deponent, upon notice and good cause shown, make any order specified in Rule 30 which is appropriate and just or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination.

Rule 32. Effect of Errors and Irregularities in Depositions.

Subdivision (d), page 84, line 42. In the subtitle before "COMPLETION" insert "As to".

Rule 33. Interrogatories to Parties.

Page 84, line 2. After "any" strike "other" and substitute "adverse".

Rule 34. Production of Documents and Things for Inspection, Copying, or Photographing.

Page 85, line 1. In the title before "Production" insert "Discovery and".

Page 86, line 17. After "inspecting" insert ", measuring, surveying,".

Page 86, line 19. After "object" insert "or operation".

Rule 35. Physical and Mental Examination of Persons.

Subdivision (a), page 86, line 5. Strike "involved" and substitute "in controversy".

Subdivision (b) (1), page 87, lines 15-19. Strike the sentence beginning "A party", line 15, and ending "conclusions.", line 19, and substitute the following:

"If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions."

Subdivision (b) (1), page 87, line 20. Strike "After such delivery" and substitute "After such request and delivery".

Subdivision (b) (1), page 87, lines 24-25. After "made," strike "in respect to" and substitute "of".

Subdivision (b) (1), page 87, line 27. Strike "any".

As thus amended Subdivision (b) (1) will read:

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

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Rule 36. Admission of Facts and of Genuineness of Documents.

Subdivision (a), page 89, lines 20-21. After "admission" strike "a specific denial under oath of the matters of which an admission is requested" and substitute "a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters".

Subdivision (b), page 89, lines 23-24. Strike "shall be" and substitute "is".

Rule 37. Refusal to Make Discovery: Consequences.

Subdivision (a), page 89, line 4. Strike "witness" and substitute "deponent".

Subdivision (a), page 90, line 13. Strike "witness" and substitute "deponent".

Subdivision (a), page 90, line 21. Strike "witness" and substitute "deponent".

Subdivision (b) (1), page 90, line 40. Strike "shall" and substitute "may".

Subdivision (b) (2), page 91, line 47. After "order" insert "made".

Subdivision (b) (2) (ii), line 73. After "testimony" strike the semicolon and insert ", or from introducing evidence of physical or mental condition."

Subdivision (c), page 92, line 91. After "truth" strike "or" and substitute "of".

NOTE

Note to Rule 37 (b) (2) (ii) and (iii): Objection has been made to this rule on the ground that denying to a defendant the right to make a defense is a denial of due process, under authority of *Hovey v. Elliott*, 167 U. S. 409. The Committee call attention to the later case of *Hammond Packing Co. v. State of Arkansas*, 212 U. S. 322, which distinguishes the earlier case. We suggest that the provisions of the rule find support in the later opinion.

Rule 38. Summary Judgment.

Subdivision (a), page 93, line 7. Before "affidavits" insert "supporting".

Subdivision (b), page 93, line 13. Before "affidavits" insert "supporting".

Subdivision (c), pages 93-94, lines 17-29. Strike the sentence beginning "Unless the adverse party", lines 17-18, and ending "as a matter of law.", line 29, and substitute the following:

The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Subdivision (d), page 94, line 31. After "rule" strike the comma.

Subdivision (g), page 95, lines 72-73. Strike "referred to in" and substitute "presented pursuant to".

Subdivision (g), page 95, line 73. Strike "were" and substitute "are".

Subdivision (g), page 95, line 74. After "faith" strike the comma.

Rule 39. Jury Trial of Right.

Subdivision (b), page 97, line 10. Strike "claim" and substitute "demand".

Subdivision (b), page 97, lines 10-11. After "time" strike "within 5" and substitute "after the commencement of the action and not later than 10".

Subdivision (b), page 97, line 12. After "issue." insert "Such demand may be endorsed upon a pleading of the party."

As thus amended Subdivision (b) will read:

(b) DEMAND. Any party may demand a trial by jury of any issue triable by a jury of right by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such

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demand may be endorsed upon a pleading of the party.

Subdivision (c), page 97, line 14. Strike "claim" and substitute "demand".

Subdivision (c), page 97, line 16. Strike "claimed" and substitute "demanded".

Subdivision (c), page 97, line 17. Strike "claimed" and substitute "demanded".

Subdivision (c), page 97, line 18. Strike "some only" and substitute "only some".

Subdivision (c), page 97, line 19. Strike "claim" and substitute "demand".

Subdivision (c), page 97, line 21. Strike "claim" and substitute "demand".

As thus amended, Subdivision (c) will read:

(c) **SAME: SPECIFICATION OF ISSUES.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

Subdivision (d), page 97, line 24. Strike "claim" and substitute "demand".

Subdivision (d), page 97, line 26. Strike "claim" and substitute "demand".

Rule 40. Trial by Jury or by the Court.

Subdivision (a), page 99, line 3. Strike "claimed" and substitute "demanded".

Subdivision (a), page 99, line 6. Strike "claimed" and substitute "demanded".

Subdivision (b), page 99, line 16. Strike "claimed" and substitute "demanded".

Subdivision (b), page 99, line 19. Strike "claim" and substitute "demand".

Subdivision (b), page 99, line 20. Strike "claim" and substitute "demand".

Subdivision (b), page 99, line 22. Strike "of that party".

Subdivision (b), page 99, lines 22-23. Strike "any issue tried by a jury." and substitute "a trial by a jury of any or all issues."

As thus amended Subdivision (b) will read:

(b) **BY THE COURT.** Issues not demanded for trial by jury as provided in Rule 39 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Subdivision (c), page 100, line 27. After "jury" strike the semicolon.

Subdivision (c), page 100, line 30. Strike "may" and substitute "the court".

Subdivision (c), page 100, line 31. After "parties," insert "may".

Subdivision (c), page 100, line 32. Strike "shall have" and substitute "has".

As thus amended Subdivision (c) will read:

(c) **ADVISORY JURY AND TRIAL BY CONSENT.** In all actions not triable by a jury of right the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Rule 42. Dismissal of Actions.

Subdivision (a) (1), page 102, line 7. Strike "1," and substitute "(i)".

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Subdivision (a) (1), page 102, line 9. Strike "2," and substitute "(ii)".

Subdivision (a) (1), page 102, line 10. After "who" insert "have".

Subdivision (a) (1), page 102, line 13. After "dismissal" strike "shall be" and substitute "is".

Subdivision (a) (1), page 102, line 15. Before "filed" insert "operates as an adjudication upon the merits when".

Subdivision (a) (1), page 102, line 18. After "claim" strike the comma and insert a period.

Subdivision (a) (1), page 102, lines 18-19. Strike "shall operate as an adjudication upon the merits."

As thus amended Subdivision (a) (1) will read:

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (c) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

Subdivision (a) (2), page 102, line 25. Before "court" omit one "the".

Subdivision (a) (2), page 102, line 35. Strike "shall be" and substitute "is".

Subdivision (b), page 103, line 48. Strike "shall otherwise specify" and substitute "otherwise specifies".

Subdivision (b), page 103, line 52. Strike "shall have the effect of" and substitute "operates as".

Subdivision (c), page 103, line 61. After "served" strike the comma.

Subdivision (d), page 103, line 66. Strike "shall commence" and substitute "commences".

Rule 43. Consolidation; Severance and Separate Trials.

Page 104, lines 1-2. Strike "Severance and".

Subdivision (a), page 104, lines 3-4. After "actions" strike "of a like nature or".

Subdivision (b), page 104, line 11. In the subtitle strike "SERVERANCE AND".

Subdivision (b), page 104, line 12. After "court" strike the comma.

Subdivision (b), page 104, line 13. After "prejudice" strike the comma.

Subdivision (b), page 104, lines 13-18. After "order" strike "claims which are" and the remainder of the subdivision and substitute "a separate trial of any claim, crossclaim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third-party claims, or issues."

As thus amended Subdivision (b) will read:

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

Rule 44. Evidence.

Subdivision (a), page 105, lines 14-15. After "evidence" strike "shall govern" and substitute "governs".

Subdivision (b), page 105, lines 23-24. Strike "opposing" and substitute "adverse".

Subdivision (b), pages 105-106, lines 27-45. Strike "he may call an adverse party" and the remainder of the subdivision and substitute the following:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions

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and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action.

Page 107. After line 67, insert a new subdivision as follows:

(e) **EVIDENCE ON MOTIONS.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Rule 45. Proof of Official Record.

Subdivision (c), page 109, line 41. After "statute" strike the period and insert "or by the rules of evidence at common law."

Rule 46. Subpoena.

Subdivision (a), page 114, lines 8-11. Strike the sentence beginning "The clerk", line 8, and ending "above provided.", line 11, and substitute the following:

The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

Subdivision (c), page 114, lines 29-30. Strike "by exhibiting the original and".

Subdivision (d) (1), page 115, lines 46-49. Strike the sentence beginning "The clerk shall", line 46, and ending "of the court.", line 49, and substitute the following:

A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.

Subdivision (f), page 116, line 85. Strike "shall" and substitute "may".

Rule 47. Exceptions Abolished.

Page 119, line 1. In the title strike "**Abolished**" and substitute "**Unnecessary**".

Page 119, lines 1-3. Strike "No formal exception to a ruling or an order of the court is necessary;" and substitute "Formal exceptions to rulings or orders of the court are unnecessary;"

Page 119, line 5. Strike "an objecting" and substitute "a".

Page 119, line 9. After "court" before the semicolon insert "and his grounds therefor".

Page 119, line 10. After "and" insert a comma.

Page 119, line 11. After "order" insert "at the time it is made,".

Page 119, line 12. Strike "shall" and substitute "does".

As thus amended Rule 47 will read:

Rule 47. Exceptions Unnecessary. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

Rule 48. Jurors.

Subdivision (b), page 120, lines 17-19. Strike "for any reason become unable to perform their duties prior to the

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final submission to the jury." and substitute ", prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties."

Subdivision (b), page 120, line 27. Strike "upon the final submission to the jury." and substitute "after the jury retires to consider its verdict."

As thus amended Subdivision (b) will read:

(b) **ALTERNATE JURORS.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

Rule 50. Special Verdicts and Interrogatories.

Subdivision (a), page 122, line 3. Begin the word "Court" with a small letter.

Subdivision (a), page 123, line 24. Strike "omitted issue" and substitute "issue omitted without such demand".

Rule 51. Motion for a Directed Verdict.

Subdivision (a), page 124, lines 2-3. Strike "may move" and substitute "who moves".

Subdivision (a), page 124, lines 4-5. Strike "without thereby waiving his right to" and substitute "may".

Subdivision (a), page 124, line 6. Strike the period after "granted" and insert ", without having reserved the right so to do and to the same extent as if the motion had not been made."

As thus amended Subdivision (a) will read:

(a) **WHEN MADE: EFFECT.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

Subdivision (b), page 125, line 33. After "stand" strike the comma. After "or" insert "may".

Page 126. In paragraph three of the "NOTE," change the name of the first case cited to read "*Northern Ry. Co. v. Page*,".

Page 127. In the last paragraph of the "Note to the Supreme Court" strike "forward" and substitute "Foreword".

Rule 52. Instructions to Jury: Objection.

Page 127, line 3. After "time" insert "during the trial".

Rule 53. Masters.

Subdivision (a), page 128, line 2. In the subtitle after "APPOINTMENT" before the period insert "AND COMPENSATION".

Subdivision (a), page 128, line 11. After "upon" strike "and borne by".

Subdivision (a), page 128, line 15. Strike "shall" and substitute "may".

Subdivision (a), page 128, line 21. After "party" change the comma to a period.

Subdivision (a), page 128, lines 21-23. Strike "or the court in its discretion may hold the delinquent in contempt."

Subdivision (c), page 129, line 37. Strike "date" and substitute "time and place".

Subdivision (c), page 129, lines 51-52. Strike "shall have" and substitute "has".

Subdivision (c), page 129, line 57. After "manner" insert "and subject to the same limitations".

Subdivision (c), page 129, line 58. After "provided" insert "in Rule 44 (c)". After "court" insert "sitting without a jury." and strike "in Rule 44 (c).".

As thus amended the last sentence of Subdivision (c), lines 55-58, will read:

When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 44 (c) for a court sitting without a jury.

Subdivision (d) (1), page 130, line 63. After "thereof" insert "unless the order of reference otherwise provides,".

Subdivision (d) (1), page 130, lines 67-68. Strike "unless the order of reference otherwise provides,".

Subdivision (d) (1), page 130, line 70. Strike "In every reference it shall be" and substitute "It is".

Subdivision (d) (1), page 130, line 79. Strike "examination and".

Subdivision (d) (1), page 130, line 81. Strike "or his attorney of such" and substitute "of the".

As thus amended Subdivision (d) (1) will read:

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise

provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

Subdivision (d) (2), page 130, lines 86-92. Strike the sentence beginning "The failure of", lines 86-87, and ending "Rules 37 and 46.", lines 91-92, and substitute the following:

If without adequate excuse any witness fails to appear or give evidence, he may be punished as for a contempt and be subject to the consequences, penalties, and remedies provided in Rules 37 and 46.

Subdivision (e) (2), page 132, line 131. After "parties." insert "Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d).".

Subdivision (e) (2), page 132, line 134. Strike the period and insert "or may recommit it with instructions.".

As thus amended Subdivision (e) (2) will read:

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Ap-

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plication to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

Subdivision (e) (3), page 132, line 139. Strike "shall be" and substitute "are".

Subdivision (e) (4), page 132, line 145. Strike "shall be" and substitute "is".

Rule 54. Judgments: Costs.

Subdivision (a), page 134, line 2. Enclose the word "Judgment" in quotation marks.

Subdivision (a), page 134, line 5. Before "pleadings" strike "any".

Subdivision (a), page 134, line 6. Before "master" strike "any" and substitute "a". Before "prior" strike "any".

As thus amended Subdivision (a) will read:

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Subdivision (c), page 134, lines 26-27. Strike "shall not in amount exceed or in kind be different from" and substitute "shall not be different in kind from or exceed in amount".

Subdivision (d), page 135, line 39. After "officers" insert a comma.

Subdivision (d), page 135, line 41. After "law." insert the following:

Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 55. Default.

Subdivision (a), page 138, lines 2-3. Strike "the court has obtained jurisdiction of".

Subdivision (a), page 138, line 4. Strike "and he".

Subdivision (a), page 138, line 6. After "rules" insert "and that fact is made to appear by affidavit or otherwise".

NOTE. This change is made necessary by the change in Rule 5 (b), now 5 (d). FILING.

As thus amended Subdivision (a) will read:

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Subdivision (b) (2), page 138, line 27. Strike "fiduciary" and substitute "representative".

Subdivision (d), page 139, line 53. Strike "shall".

Rule 56. New Trials.

Subdivision (a), page 141, line 13. Strike "which had been".

Subdivision (a), page 141, line 14. Strike "has power to" and substitute "may".

Subdivision (a), page 141, line 15. Strike "to".

Subdivision (a), page 141, line 16. Strike "to".

Subdivision (a), page 141, line 17. After "law" strike the comma. After "or" strike "to".

Subdivision (a), page 141, line 18. Strike "to".

Subdivision (b), page 141, line 21. Strike "within" and substitute "not later than".

Subdivision (c), page 141, line 32. Strike "shall have" and substitute "has".

Subdivision (c), page 142, line 34. Strike "time" and substitute "period". After "extended" insert "for an additional period not exceeding 20 days either".

Subdivision (c), page 142, line 35. Strike both commas.

Subdivision (c), page 142, lines 35-36, strike "written stipulation of the parties," and substitute "the parties by written stipulation."

Subdivision (c), page 142, lines 36-37. Strike "for an additional period not exceeding 20 days."

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As thus amended Subdivision (c) will read:

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

Subdivision (d), page 142, lines 39-40. Strike "At any time within" and substitute "Not later than".

Rule 57. Relief From Judgment or Order.

Subdivision (b), page 143, lines 9-21. Amend to read as follows:

(b) **MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE.** On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified.

NOTE

This revision is

(1) to conform more closely to the wording of state statutes, such as, California Code Civil Procedure, § 473; New York Civil Practice Act, § 108; and § 9233 General Statutes of Minnesota, which have received judicial construction over a long period of years; and

(2) to preserve the provisions of the Federal statute referred to.

Rule 58. Declaratory Judgments. Page 144, line 6. Strike "claimed" and substitute "demanded".

Rule 59. Findings by the Court.

Subdivision (a), page 146, lines 10-11. Strike "No request for findings is necessary." and substitute "Requests for findings are not necessary for purposes of review."

Subdivision (b), page 146, line 19. Strike "within" and substitute "not later than".

Subdivision (b), page 146, lines 22-24. Strike "The pendency of the motion does not affect the finality of the judgment or suspend its operation; and".

Subdivision (b), page 146, line 24. Begin the word "the" with a capital letter.

Subdivision (b), page 146, line 33. After "them" strike the comma.

Rule 60. Entry of Judgment.

Page 151, lines 18-19. Strike "shall constitute" and substitute "constitutes".

Page 151, line 20. Strike "shall not be" and substitute "is not".

Rule 61. Harmless Error.

Page 152, line 5. Strike "shall be" and substitute "is".

Page 152, line 10. After "justice." insert the following:
The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 62. Appeal From a District Court to the Supreme Court of the United States.

Page 152, line 2. In the title insert a period after "Supreme Court" and strike "of the United States."

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Page 152, line 7. Strike "petition" and substitute "appeal".

Rule 63. Appeal to a Circuit Court of Appeals.

Subdivision (b), page 155, line 33. After "notification." insert the following:

The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

Subdivision (c), page 155, line 50. Strike "to its form or sufficiency" and substitute "to the form of the bond or to the sufficiency of the surety".

Subdivision (d), page 156, line 60. Strike "his" and substitute "the".

Subdivision (d), page 156, line 63. Strike "damage" and substitute "damages".

Subdivision (d), page 156, line 64. Strike "shall" and substitute "may".

Subdivision (d), page 156, line 80. Before "bond" insert "supersedeas".

Subdivision (f), page 157, line 97. Strike "(b) and (c)" and substitute "(c) and (d)".

Subdivision (f), page 157, line 106. After "court" strike the period and insert "who shall forthwith mail copies to the surety if his address is known."

As thus amended Subdivision (f) will read:

(f) JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and appoints the clerk of the court as his irrevocable agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.

Subdivision (g), page 157, line 112. After "that" insert a comma.

Subdivision (g), page 158, line 124. After "order" change the period to a semicolon and insert "but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal."

As thus amended the last sentence of Subdivision (g), lines 117-124, will read:

In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

Rule 64. Joint or Several Appeals; Summons and Severance Abolished.

Page 161, line 1. In the title after "Appeals" and before the semicolon insert "To the Supreme Court or to a Circuit Court of Appeals" so that the title will read: **Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished.**

Page 161, line 5. After "one" insert "or more".

Rule 65. Record on Appeal to a Circuit Court of Appeals.

Subdivision (b), page 162, line 20. After "designation" strike "; and," and substitute a period. Begin the word "if" with a capital letter.

Subdivision (b), page 162, line 25. After "added" change the period to a comma and insert "and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed."

As thus amended Subdivision (b) will read:

(b) TRANSCRIPT. If there is designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the

appellant shall file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. One of the copies so filed by the appellant shall be available for the use of the other parties and for use in the appellate court in printing the record.

Subdivision (g), page 164, line 77. After "thereon;" insert "in an action tried without a jury, the master's report, if any;".

Subdivision (1), page 166, line 142. Begin the word "rules" with a capital letter.

Subdivision (1), page 166, line 144. Begin the word "Court" with a small letter.

Rule 67. Stay of Proceedings to Enforce a Judgment.

Subdivision (a), page 171, line 17. Strike "shall".

Subdivision (c), page 172, lines 43-50. Strike the sentence beginning "No such order", line 43, and ending "United States.", line 50, and substitute the following:

If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order.

Subdivision (f), page 173, line 72. Strike "shall be" and substitute "is".

Rule 68. Disability of a Judge.

Page 175, line 4. Strike "by him".

Page 175, line 5. After "performed" insert "by the court".

Rule 69. Seizure of Person or Property.

Page 176, line 2. Strike "or" and substitute "and".

Page 176, line 6. Strike "shall be" and substitute "are".

Page 176, lines 8-9. Strike "then existing law of the state in which the district court is held," and substitute "law of the state in which the district court is held, existing at the time the remedy is sought,".

As thus amended the first sentence of Rule 69 will read:

At the commencement of and during the course of an action, 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 are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules.

Pages 176-177. Amend the first paragraph of the "NOTE" to read as follows:

This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought. Under U. S. C., Title 28, § 726 (Attachments as provided by state laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable state law, and the district courts might, from time to time, by general rules, adopt such state laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Rule 70. Injunctions.

Subdivision (b), page 179, line 31. Strike "shall take" and substitute "takes".

Subdivision (b), page 179, lines 38-39. Strike "or on such shorter notice as the court may prescribe, given".

Subdivision (b), page 179, line 41. Strike the comma after "notice" and insert "or on such shorter notice to that party as the court may prescribe,".

As thus amended the last sentence of Subdivision (b), lines 38-45, will read:

On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

Subdivision (d), page 180, line 56. In the subtitle after "FORM" insert "AND SCOPE" so that the subtitle will read: (d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER.

Subdivision (d), page 180, line 63. Strike "shall be" and substitute "is".

Subdivision (e), page 180, line 70. In the subtitle after "INTERPLEADER" strike the period and substitute "; CONSTITUTIONAL CASES."

Subdivision (e), page 181, line 80. After "interpleader" strike the period and insert "; or the Act of August 24, 1937, relating to actions to enjoin the enforcement of acts of Congress."

As thus amended Subdivision (e) will read:

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTIONAL CASES. These rules do not modify the Act of October 15, 1914, c. 323, §§ 1 and 20 (38 Stat. 730), U. S. C., Title 29, §§ 52 and 53, or the Act of March 23, 1932, c. 90 (47 Stat. 70), U. S. C., Title 29, c. 6, relating to temporary restraining orders and preliminary injunctions in actions

affecting employer and employee; or the provisions of Section 24 (26) of the Judicial Code as amended, U. S. C., Title 28, § 41 (26), relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or the Act of August 24, 1937, relating to actions to enjoin the enforcement of acts of Congress.

Rule 71. Receivers. Page 182, lines 1-2. Strike "applicable to" and substitute "in".

Rule 72. Deposit in Court.

Page 182, line 6. After "party," strike "may," and substitute "and".

Page 182, line 7. After "court," insert "may".

Rule 73. Offer of Judgment.

Page 183, line 10. After "accepted," strike "the defending party" and substitute "either party".

Page 183, line 15. Strike "shall not be" and substitute "is not".

Page 183, line 18. After "costs" insert "in the district court".

Rule 74. Condemnation of Property for Public Use. Pages 184-192. Strike all of Rule 74 and the note thereto.

NOTE

The Advisory Committee has concluded to eliminate this rule, and to provide in Rule 83 that, except as to appeals, the rules should not apply to proceedings to condemn property under the power of eminent domain. This is a matter principally affecting the United States, as very few condemnations by other agencies reach the United States District Court. At an early stage the Committee decided not to fix the procedure in such cases. Their reasons were that at present, condemnation proceedings by the United States are governed by statutes of the United States, prescribing different procedure for various agencies and departments of the Government, or, in the absence of such statutes, by local state practice under the Conformity Act. The conditions vary so much in the states and for the Government departments that we concluded it would be difficult to write a uniform rule of procedure which would fit them all. The Committee continued in that belief until shortly before the preparation of the April

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1937 draft of the rules, when the officials of the Department of Justice having to do with condemnation cases urgently requested the Committee to propose rules on this subject. The Committee then reluctantly undertook it, but, as the subject is complicated and requires a full knowledge of all the federal statutes and local state laws, yielded to the request of the Government with the understanding that the rules would be drafted largely by the lawyers in the Government service and supervised by a sub-committee of the Advisory Committee. Rule 74 was the result. Since it was published last April many objections have been urged against it by counsel for various governmental agencies, whose procedure in condemnation cases has been prescribed by federal statutes. Some of these agencies want to be excepted in whole or in part from the operation of the uniform rule proposed in April. Furthermore, the Department of Justice has recently preferred to have government condemnations conducted by local attorneys familiar with the state practice, which is applied under the Conformity Act, where the acts of Congress do not prescribe the practice. Under that system the Department of Justice now prefers to work under the Conformity Act, without a uniform rule of procedure. For all these reasons the Department has recently suggested that we eliminate this rule, and the Advisory Committee has cheerfully acquiesced in the suggestion, as it conforms to our original impression that the new rules should not apply to condemnation cases. If a uniform rule were to be adopted, proposed Rule 74, in our opinion, offers a sound system. It would need some revision, but on the whole is good. Except for certain modifications made by our sub-committee, it embodies suggestions of attorneys in the Department of Justice who are especially competent and experienced in this field.

Rule 75. Execution.

Subdivision (a), page 192, line 4. Strike "shall direct" and substitute "directs".

Subdivision (a), page 192, lines 5-6. Strike "practice and procedure relative to" and substitute "procedure on".

Subdivision (a), page 192, line 6. Before "proceedings" strike "to" and substitute "in".

Subdivision (a), page 192, line 7. Before "proceedings" strike "to" and substitute "in".

Subdivision (a), page 192, line 9. Strike "then existing".

Subdivision (a), page 193, line 11. Before "except" insert "existing at the time the remedy is sought,".

Subdivision (a), page 193, line 12. Strike "shall govern" and substitute "governs".

Subdivision (a), page 193, line 13. After "applicable." insert "In aid of the judgment or execution," and begin "The" with a small letter.

Subdivision (a), page 193, lines 15-16. After "may" strike ", in aid of the judgment or writ of execution,".

As thus amended Subdivision (a) will read:

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by the practice of the state in which the district court is held.

Rule 76. Judgment for Specific Acts; Vesting Title.

Page 196, line 3. After "land" strike the comma.

Page 196, line 4. After "documents" strike the comma.

Page 196, line 5. After "act" strike the comma.

Page 196, lines 9-10. Strike "shall have" and substitute "has".

Page 197, line 21. Strike "shall have the force and" and substitute "has the".

Rule 77. Registration of Judgments in Other District Courts.

Page 197, line 3. After "court" insert "and which has become final through expiration of the time for appeal or by mandate on appeal".

As thus amended the first sentence of Rule 77, lines 2-5, will read:

A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment.

NOTE

The Committee believed that a judgment should not be registered in another district while there is any chance of modification on appeal. In the April draft, a note calls attention to the question whether the subject matter of this rule relates merely to practice and procedure or affects substantive rights. A memorandum on this subject, prepared by the Committee's staff, is available for the use of the Court.

Page 197, lines 6-7. Strike "shall have" and substitute "has".

Page 197, line 12. After "entered" strike the comma.

Page 197, line 13. Before "an" strike "if".

Rule 79. District Courts and Clerks.

Subdivision (d), page 201, lines 33-34. Strike "noting in the civil docket of the".

Subdivision (d), page 201, lines 34-37. Strike "made in the absence of a party who has appeared, if the order or judgment disposes of any issue raised by him,".

Subdivision (d), page 201, line 39. After "5" strike "(a)" and insert "upon every party affected thereby who is not in default for failure to appear".

Subdivision (d), page 201, lines 40-43. Strike "Thereafter a party asserting lack of notice of the entry of the order or judgment has the burden of establishing lack of notice.".

Subdivision (d), page 201, line 45. After "order" strike "or judgment must be given;" and substitute "is required by these rules;".

Subdivision (d), page 201, line 48. After "5" strike "(a)".

Subdivision (d), page 201, lines 48-52. Strike "The entry of an order or judgment, other than a judgment entered forthwith on a verdict, shall not of itself be deemed notice to the parties or their attorneys."

As thus amended subdivision (d) will read:

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

NOTE

As drafted in April 1937, the rule seems to have caused some confusion among members of the bar, as to the need for notice of the entry of an order or judgment. The revision makes it clear that the provisions for notice only relate to situations where notice may be required by the rules. The Acts of Congress provide that the time for taking appeals to the Circuit Court of Appeals or to the Supreme Court, runs from the date of entry of the judgment, without regard to notice of the entry. Hence, the notice provided for in this rule has nothing to do with the running of the time for appeal.

Rule 80. Motion Day.

Page 202, lines 9-10. Strike "and direct all interlocutory orders, rulings, and proceedings" and substitute "orders".

As thus amended the first paragraph of Rule 80, lines 1-12, will read:

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

Rule 81. Books Kept by the Clerk and Entries Therein.

Subdivision (a), page 203, line 18. Strike "this book" and substitute "the civil docket".

Subdivision (a), page 203, line 24. After "process." insert "The notation of an order or judgment shall show the date the notation is made."

Subdivision (a), page 203, lines 25-28. Amend the sentence in these lines to read "When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word 'jury' on the folio assigned to that action."

As thus amended Subdivision (a) will read:

(a) **CIVIL DOCKET.** The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C., Title 28, § 568, or other statutory authority, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically

in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

Rule 82. Stenographer; Stenographic Report or Transcript as Evidence.

Subdivision (a), page 204, line 7. Before "taxed" insert "may be" and after "costs" change the period to a comma and insert "in the discretion of the court."

As thus amended the second sentence of Subdivision (a), lines 6-7, will read:

His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court.

Page 204, between lines 9-10, insert a new Subdivision (b) as follows:

(b) OFFICIAL STENOGRAPHERS. Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals.

Subdivision (b), page 204, line 10. Change "(b)" to "(c)".

NOTE

Subdivision (b) is new. See proceedings of the recent Conference of Senior Circuit Judges.

Rule 83. Applicability in General.

Subdivision (a) (1), page 206, line 3. Strike "shall not" and substitute "do not".

Subdivision (a) (1), page 206, line 11. Strike "shall not" and substitute "do not". After "probate" insert ", adoption,".

Subdivision (a) (2), page 206, line 16. Strike "shall be" and substitute "are". After "rules" change the semicolon to a comma.

Subdivision (a) (2), page 206, line 17. Strike "shall not be" and substitute "are not".

Subdivision (a) (2), page 206, line 18. After "appeal" strike the comma.

Subdivision (a) (3), page 206, line 28. After "Title 9," insert "relating to arbitration,".

Subdivision (a) (3), page 207, line 30. After "§ 159," insert "relating to boards of arbitration of railway labor disputes,".

Subdivision (a) (3), page 207, line 31. Strike "shall".

Subdivision (a) (4), page 207, line 49. After "(c)," insert "as extended,".

Subdivision (a) (4), page 207, line 53. After "conform" strike "with" and substitute "to".

Subdivision (a) (6), page 208, lines 66-71. Strike all of the paragraph.

Subdivision (a) (7), page 208, line 72. Change "(7)" to "(6)".

Subdivision (a) (7), page 208, line 75. After "282," strike "nor" and insert "relating to deportation of Chinese, or".

Subdivision (a) (7), page 208, line 77. After "the" insert "Longshoremen's and Harbor Workers' Compensation Act,".

Subdivision (a) (7), page 208, lines 79-84. Amend the sentence in these lines to read: "The provisions for service

by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, §15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, remain in effect.”.

As thus amended present Subdivision (a) (7) will read:

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese, or to proceedings for review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, § 21 (44 Stat. 1436), U. S. C., Title 33, § 921. The provisions for service by publication and allowing the defendant 60 days within which to answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, remain in effect.

Between lines 84-85 insert a new paragraph of Subdivision (a) as follows:

(7) In proceedings for condemnation of property under the power of eminent domain appeals are governed by these rules, but they are not applicable otherwise than on appeal.

Subdivision (b), page 208, lines 85-86. Amend to read as follows:

(b) **SCIRE FACIAS AND MANDAMUS.** The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

Subdivision (c), page 208, line 87. Strike “shall”.

Subdivision (c), page 208, line 90. Strike “shall”.

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Subdivision (c), page 208, line 91. Strike "shall not be" and substitute "is not".

Subdivision (c), page 209, line 104. Strike "claim" and substitute "demand".

Subdivision (d), page 209, line 108. Amend the subtitle to read: (d) DISTRICT OF COLUMBIA; COURTS AND JUDGES.

Subdivision (d) (1), page 209, line 109. Strike "(1) COURTS AND JUDGES."

Subdivision (d) (2), page 209, line 120. Make this paragraph a separate subdivision by striking "(2)" and substituting "(e)" with the subtitle "LAW APPLICABLE."

Subdivision (d) (2), page 209, lines 127-128. Strike "it shall, if appropriate, include" and substitute "it includes, if appropriate,".

Subdivision (d) (2), page 210, line 134. Strike "or law".

Subdivision (d) (2), page 210, line 137. Strike "shall include" and substitute "includes".

Rule 85. Rules by District Courts.

Page 214, lines 3-7. Strike "make for its district rules and regulations governing pleading, practice, and procedure, not inconsistent with these rules, and may from time to time alter and amend them." and substitute "from time to time make and amend rules governing its practice not inconsistent with these rules."

Page 214, line 7. After "amendments" strike the comma.

Page 214, line 8. Strike "if any,".

Page 214, lines 14-17. Strike all of Alternative Rule 85.

In the "NOTE," page 215, strike all of the second paragraph, beginning "[*Note to Alternative Rule 85.*]".

In the "Note to the Supreme Court," page 215, strike the last sentence, beginning "After considerable discussion . . .".

Rule 86. Forms.

Amend Rule 86, page 215, to read as follows:

Rule 86. Forms. The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate.

NOTE

This change is to make it clear that the rules control the forms, and that the forms do not supersede the rules.

Rule 88. Effective Date.

Page 216, line 1. Strike "shall" and substitute "will".

Page 216, line 6. Strike "shall" and substitute "will".

Page 216, line 7. Strike "shall".

Page 216, line 11. After "application" strike "to pending actions" and substitute "in a particular action pending when the rules take effect".

Page 216, lines 13-14. Strike "shall apply" and substitute "applies".

As thus amended, the last sentence of Rule 88, lines 7-14, will read:

They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

NOTE

The draft of April 1937 indicates that the court's action in not applying the rules to cases pending when the rules take effect should be uniform in all pending cases. The revision is to show that the discretion of the court should be guided by the circumstances of particular cases.

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CHANGES RECOMMENDED IN THE ARRANGEMENT OF THE RULES

Transpose Rule 38 (**Summary Judgment**) so that it will immediately precede what is now Rule 58 (**Declaratory Judgments**). On page 66, in what is now the title to Chapter V (**DEPOSITIONS, DISCOVERY, AND SUMMARY JUDGMENTS**), after "DEPOSITIONS" strike the comma and substitute "and". After "DISCOVERY" strike "AND SUMMARY JUDGMENTS".

Transpose Rules 56 (**New Trials**) and 57 (**Relief from Judgment or Order**) so that they will immediately follow what is now Rule 60 (**Entry of Judgment**).

Transpose Rule 59 (**Findings by the Court**) so that it will immediately follow what is now Rule 52 (**Instructions to Jury: Objection**).

Transpose Rules 62 (**Appeals from a District Court to the Supreme Court**), 63 (**Appeals to a Circuit Court of Appeals**), 64 (**Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished**), 65 (**Record on Appeal to a Circuit Court of Appeals**), and 66 (**Record on Appeal to a Circuit Court of Appeals; Agreed Statement**) so that they will immediately precede what is now Chapter IX (**DISTRICT COURTS AND CLERKS**) covering Rules 79 through 82. Make the rules thus transposed a separate new chapter, titled "IX APPEALS". Renumber what is now Chapter IX (**DISTRICT COURTS AND CLERKS**) as Chapter X, and renumber what is now Chapter X (**GENERAL PROVISIONS**) as Chapter XI. In what is now the title to Chapter VII (**JUDGMENT AND APPEALS**), strike the words "AND APPEALS".

NOTE

After these transpositions are made, the arrangement of the rules in Chapter VII will be 54, 55, 38, 58, 60, 56, 57, 61, 67, 68. All of the rules after Rule 38 will require

renumbering. The renumbering necessitates clerical corrections in the Rules, in the Table of Contents, in the Notes to the Rules, in the Appendices (pp. 217-224 of the April 1937 Report), in the Index (pp. 225-250 of the April 1937 Report), and in the Appendix of Forms (pp. 59-79 *infra*). None of these corrections is reflected in this report.

FORMS RECOMMENDED BY THE ADVISORY COMMITTEE

APPENDIX OF FORMS

(See Rule 86)

Introductory Statement

1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms. Each form assumes the action to be brought in the Southern District of New York. If the district in which an action is brought has divisions, the division should be indicated in the caption.

2. Except where otherwise indicated each pleading, motion, and other paper should have a caption similar to that of the summons, with the designation of the particular paper substituted for the word "Summons". In the caption of the summons and in the caption of the complaint all parties must be named but in other pleadings and papers, it is sufficient to state the name of the first party on either side, with an appropriate indication of other parties. See Rules 4 (b), 7 (b) (2), and 10 (a).

3. In Form 3 and the forms following, the words, "Allegation of jurisdiction", are used to indicate the appropriate allegation in Form 2.

4. Each pleading, motion, and other paper is to be signed in his individual name by at least one attorney of record (Rule 11). The attorney's name is to be followed by his address as indicated in Form 3. In forms following Form 3 the signature and address are not indicated.

5. If a party is not represented by an attorney, the signature and address of the party are required in place of those of the attorney.

Form 1.—SUMMONS

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF NEW YORK

Civil Action, File Number -----

A. B., Plaintiff	<i>Summons</i>
v.	
C. D., Defendant	

To the above-named Defendant:

You are hereby summoned and required to serve upon -----, plaintiff's attorney, whose address is -----, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

-----,
Clerk of Court.

[Seal of the U. S. District Court]

Dated -----

(This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.)

Form 2.—ALLEGATION OF JURISDICTION

(a) Jurisdiction founded on diversity of citizenship and amount.

Plaintiff is a citizen of the State of Connecticut and defendant is a corporation incorporated under the laws of the State of New York. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(b) Jurisdiction founded on the existence of a Federal question and amount in controversy.

The action arises under the Constitution of the United States, Article ----, Section ----; [the ---- Amendment to the Constitution of the United States, Section ----]; [the Act of -----, ---- Stat. ----; U. S. C., Title ----, § ----];

¹ If the United States or an officer or agency thereof is a defendant, the time to be inserted as to it is 60 days.

[the Treaty of the United States with (here describe the treaty)]², as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars.

(c) Jurisdiction founded on the existence of a question arising under particular statutes.

The action arises under the Act of ----, ---- Stat, ----; U. S. C., Title ----, § ----, as hereinafter more fully appears.

Notes

1. *Diversity of Citizenship.* If the plaintiff is an assignee, he should allege such other facts of citizenship as will show that he is entitled to prosecute his action under U. S. C., Title 28, § 41 (1).

2. *Jurisdiction Founded on Some Fact Other Than Diversity of Citizenship.* The allegation as to the matter in controversy may be omitted in any case where by law no jurisdictional amount is required. See for example, U. S. C., Title 28, § 41 (2)-(28).

3. *Pleading Venue.* Since improper venue is an affirmative dilatory defense, it is not necessary for plaintiff to include allegations showing the venue to be proper.

4. It is sufficient to allege that a corporation is incorporated in a particular state, there being, for jurisdictional purposes, a conclusive presumption that all of its members or stockholders are citizens of that State, *Marshall v. Baltimore and Ohio R. R. Co.*, 16 How. 314 (U. S. 1853); Henderson, *Position of Foreign Corporations in American Constitutional Law* (1918) 54-64. See Form No. 124 and note thereto, and Form No. 125, 1 Sylvester's *Bender's Federal Forms*.

Form 3.—COMPLAINT ON A PROMISSORY NOTE

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ten thousand dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

² Use the appropriate phrase or phrases. The general allegation of the existence of a Federal question is ineffective unless the matters constituting the claim for relief as set forth in the complaint raise a Federal question.

Wherefore plaintiff demands judgment against defendant for the sum of ten thousand dollars, interest, and costs.

Signed: _____,
Attorney for Plaintiff.

Address: _____

Notes

1. The pleader may use the material in one of the three sets of brackets. His choice will depend upon whether he desires to plead the document verbatim, or by exhibit, or according to its legal effect.

2. Under the rules free joinder of claims is permitted. See Rules 8 (e) and 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as Counts successively numbered. In particular the rules permit alternative and inconsistent pleading. See Form 10.

Form 4.—COMPLAINT ON AN ACCOUNT

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars according to the account hereto annexed as Exhibit A.
Wherefore (etc. as in Form 3).

Form 5.—COMPLAINT FOR GOODS SOLD AND DELIVERED

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for goods sold and delivered by defendant to plaintiff between June 1, 1936 and December 1, 1936.
Wherefore (etc. as in Form 3).

Note.

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

Form 6.—COMPLAINT FOR MONEY LENT

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money lent by plaintiff to defendant on June 1, 1936.
Wherefore (etc. as in Form 3).

Form 7.—COMPLAINT FOR MONEY PAID BY MISTAKE

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9 (b)].
Wherefore (etc. as in Form 3).

Form 8.—COMPLAINT FOR MONEY HAD AND RECEIVED

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ten thousand dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff.
Wherefore (etc. as in Form 3).

Form 9.—COMPLAINT FOR NEGLIGENCE

1. Allegation of jurisdiction.
2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of One Thousand Dollars.
Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars and costs.

Note.

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Form 10.—COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

A. B., Plaintiff

v.

C. D. and E. F., Defendants

1. Allegation of jurisdiction.
2. On June 1, 1936, in a public highway called Boyleston Street in Boston, Massachusetts, defendant C. D. or defendant E. F., or both defendants C. D. and E. F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.
3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of One Thousand Dollars.

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ten thousand dollars and costs.

Form 11.—COMPLAINT FOR CONVERSION

1. Allegation of jurisdiction.
 2. On or about December 1, 1936, defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.
- Wherefore plaintiff demands judgment against defendant in the sum of ten thousand dollars, interest, and costs.

Form 12.—COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. Allegation of jurisdiction.
2. On or about December 1, 1936, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

3. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

4. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ten thousand dollars.

Note.

Here, as in Form 3, plaintiff may set forth the contract verbatim in the complaint or plead it, as indicated, by exhibit, or plead it according to its legal effect. Furthermore, plaintiff may seek legal or equitable relief or both even though this was impossible under the system in operation before these rules.

Form 13.—COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18 (b)

A. B., Plaintiff

v.

C. D. and E. F., Defendants

1. Allegation of jurisdiction.

2. Defendant C. D. on or about ---- executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant C. D. promised to pay to plaintiff or order on ---- the sum of Five Thousand Dollars with interest thereon at the rate of ---- percent. per annum].

3. Defendant C. D. owes to plaintiff the amount of said note and interest.

4. Defendant C. D. on or about ---- conveyed all his property, real and personal [or specify and describe] to defendant E. F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefor plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ten thousand dollars and interest; (2) that the

aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

Form 14.—COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYER'S LIABILITY ACT

1. Allegation of jurisdiction.
2. During all the times herein mentioned defendant owned and operated in interstate commerce a railroad which passed through a tunnel located at ---- and known as Tunnel No. -----.
3. On or about June 1, 1936, defendant was repairing and enlarging the tunnel in order to protect interstate trains and passengers and freight from injury and in order to make the tunnel more conveniently usable for interstate commerce.
4. In the course of thus repairing and enlarging the tunnel on said day defendant employed plaintiff as one of its workmen, and negligently put plaintiff to work in a portion of the tunnel which defendant had left unprotected and unsupported.
5. By reason of defendant's negligence in thus putting plaintiff to work in that portion of the tunnel, plaintiff was, while so working pursuant to defendant's orders, struck and crushed by a rock, which fell from the unsupported portion of the tunnel, and was (here describe plaintiff's injuries).
6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ---- dollars per day. By these injuries he has been made incapable of any gainful activity, has suffered great physical and mental pain, and has incurred expense in the amount of ---- dollars for medicine, medical attendance, and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of ---- dollars and costs.

Form 15.—COMPLAINT FOR DAMAGES UNDER MERCHANT MARINE ACT

1. Allegation of jurisdiction.

2. During all the times herein mentioned defendant was the owner of the steamship ---- and used it in the transportation of freight for hire by water in interstate and foreign commerce.

3. During the first part of (month and year) at ---- plaintiff entered the employ of defendant as an able seaman on said steamship under seaman's articles of customary form for a voyage from ---- ports to the Orient and return at a wage of ---- dollars per month and found, which is equal to a wage of ---- dollars per month as a shore worker.

4. On June 1, 1936, said steamship was about ---- days out of the port of ---- and was being navigated by the master and crew on the return voyage to ---- ports. (Here describe weather conditions and the condition of the ship and state as in an ordinary complaint for personal injuries the negligent conduct of defendant.)

5. By reason of defendant's negligence in thus (brief statement of defendant's negligent conduct) and the unseaworthiness of said steamship, plaintiff was (here describe plaintiff's injuries).

6. Prior to these injuries, plaintiff was a strong, able-bodied man, capable of earning and actually earning ---- dollars per day. By these injuries he has been made incapable of any gainful activity; has suffered great physical and mental pain, and has incurred expense in the amount of ---- dollars for medicine, medical attendance, and hospitalization.

7. Plaintiff elects to maintain this action under the provisions of section 33 of chapter 250 of the Act of June 5, 1920.

Wherefore plaintiff demands judgment against defendant in the sum of ---- dollars and costs.

Form 16.—COMPLAINT FOR INFRINGEMENT OF PATENT

1. Allegation of jurisdiction.

2. On May 16, 1934, United States Letters Patent No. ---- were duly and legally issued to plaintiff for an inven-

tion in an electric motor; and since that date plaintiff has been and still is the owner of those Letters Patent.

3. Defendant has for a long time past been and still is infringing those Letters Patent by making, selling, and using electric motors embodying the patented invention, and will continue to do so unless enjoined by this court.

4. Plaintiff has placed the required statutory notice on all electric motors manufactured and sold by him under said Letters Patent, and has given written notice to defendant of his said infringement.

Wherefore plaintiff demands a preliminary and final injunction against further infringement by defendant and those controlled by defendant, an accounting for profits and damages, and an assessment of costs against defendant.

Form 17.—COMPLAINT FOR INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITION

1. Allegation of jurisdiction.

2. Prior to March 2, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled -----.

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject-matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class -----, No. -----".

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of ---- and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book

entitled _____, which was copied largely from plaintiff's copyrighted book, entitled _____

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2".

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner.

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright and to account and pay over to plaintiff all the gains, profits, and advantages derived by defendant from his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies in his possession or under his control infringing said copyright and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

Form 18.—COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. Allegation of jurisdiction.

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ten thousand dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936,

and annually thereafter as a condition precedent to its continuance in force.

3. No part of the premium due June 1, 1936, was ever paid and the policy ceased to have any force or effect on July 1, 1936.

4. Thereafter, on September 1, 1936, G. H. and K. L. died as the result of a collision between a locomotive and the automobile in which G. H. and K. L. were riding.

5. Defendant C. D. is the duly appointed and acting executor of the will of G. H.; defendant E. F. is the duly appointed and acting executor of the will of K. L.; defendant X. Y. claims to have been duly designated as beneficiary of said policy in place of K. L.

6. Each of defendants, C. D., E. F., and X. Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G. H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy, and has made demand for payment thereof.

7. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G. H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G. H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

Form 19.—MOTION TO DISMISS, PRESENTING DEFENSES OF FAILURE TO STATE A CLAIM, OF LACK OF SERVICE OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF JURISDICTION UNDER RULE 12 (b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the Southern District of New York, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M. N. and X. Y. hereto annexed as Exhibit A and Exhibit B respectively.

3. To dismiss the action on the ground that it is in the wrong district because (a) the jurisdiction of this court is invoked solely on the ground that the action arises under the Constitution and laws of the United States and (b) the defendant is a corporation incorporated under the laws of the State of Delaware and is an inhabitant thereof.

4. To dismiss the action on the ground that the court lacks jurisdiction because the amount actually in controversy is less than three thousand dollars exclusive of interest and costs.

Signed: -----
Attorney for Defendant.

Address: -----

Notice of Motion

To: -----
Attorney for Plaintiff,

 Please take notice, that the undersigned will bring the above motion on for hearing before this Court at Room -----, United States Courts and Post Office Building, Borough

of Manhattan, City of New York, on the ____ day of _____, 193___, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed: _____
Attorney for Defendant.

Address: _____

Note

The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7 (b).

Form 20.—ANSWER PRESENTING DEFENSES UNDER RULE 12 (b)

First Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Defense

If defendant is indebted to plaintiffs for the goods mentioned in the complaint, he is indebted to them jointly with G. H. G. H. is alive; is a citizen of the State of New York and a resident of this district, is subject to the jurisdiction of this court, as to both service of process and venue; can be made a party without depriving this court of jurisdiction of the present parties, and has not been made a party.

Third Defense

Defendant admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

Fourth Defense

The right of action set forth in the complaint did not accrue within six years next before the commencement of this action.

Counterclaim

(Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint. No statement of the grounds on which the court's jurisdiction depends need be made unless the counterclaim requires independent grounds of jurisdiction.)

Cross-Claim Against Defendant M. N.

(Here set forth the claim constituting a cross-claim against defendant M. N. in the manner in which a claim is pleaded in a complaint. The statement of grounds upon which the court's jurisdiction depends need not be made unless the cross-claim requires independent grounds of jurisdiction.)

Note

The above form contains the various defenses provided for in Rule 12 (b). The first defense raises the legal sufficiency of the complaint. Its effect is equivalent to a general demurrer or a motion to dismiss.

The second defense is equivalent to a plea in abatement.

The third defense is equivalent to an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8 (c).

The answer also includes a counterclaim and a cross-claim.

Form 21.—ANSWER TO COMPLAINT SET FORTH IN FORM 8, WITH COUNTERCLAIM FOR INTERPLEADER

Defense

Defendant admits the allegations stated in paragraph 1 of the complaint; and denies the allegations stated in paragraph 2 to the extent set forth in the counterclaim herein.

Counterclaim for Interpleader

1. Defendant received the sum of ten thousand dollars as a deposit from E. F.
2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E. F.

3. E. F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E. F. to be made a party defendant to respond to the complaint and to this counterclaim.³

(2) That the court order the plaintiff and E. F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E. F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

Form 22.—MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave to make E. F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed: _____,
Attorney for Defendant C. D.

Address: _____

Notice of motion

(Contents the same as in Form 19. No notice is necessary if the motion is made before the moving defendant has served his answer)

Exhibit A

District Court of the United States for the Southern District of New York

³ Rule 13 (h) provides for the court ordering parties to a counterclaim, but who are not parties to the original action, to be brought in as defendants.

CIVIL ACTION FILE NUMBER ----

A. B., PLAINTIFF
 v.
 C. D., DEFENDANT AND THIRD-PARTY
 PLAINTIFF
 v.
 E. F., THIRD-PARTY DEFENDANT

Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon
 -----, plaintiff's attorney whose address
 is -----, and upon -----
 -----, who is attorney for C. D., defendant and third-
 party plaintiff, and whose address is -----
 -----, an answer to the third-party complaint which
 is herewith served upon you and an answer to the com-
 plaint of the plaintiff, a copy of which is herewith served
 upon you, within 20 days after the service of this summons
 upon you exclusive of the day of service. If you fail to
 do so, judgment by default will be taken against you for
 the relief demanded in the third-party complaint.

-----,
Clerk of Court.

[Seal of District Court]

Dated -----

United States District Court for the Southern District of
New York

CIVIL ACTION FILE NUMBER ----

A. B., PLAINTIFF
 v.
 C. D., DEFENDANT AND THIRD-PARTY
 PLAINTIFF
 v.
 E. F., THIRD-PARTY DEFENDANT

Third-Party complaint

1. Plaintiff A. B. has filed against defendant C. D. a
 complaint, a copy of which is hereto attached as "Ex-
 hibit C".

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D., or upon which A. B. is entitled to recover from E. F. and not from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: _____,
Attorney for C. D., Third-party Plaintiff.
 Address: _____

**Form 23.—MOTION TO INTERVENE AS A DEFENDANT UNDER
 RULE 24**

(Based upon the complaint, Form 16)

District Court of the United States for the Southern Dis-
 trict of New York

CIVIL ACTION FILE NUMBER ----

A. B., PLAINTIFF	} <i>Motion to intervene as a defendant</i>
v.	
C. D., DEFENDANT	
E. F., APPLICANT FOR INTERVENTION	

E. F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that he is the manufacturer and vendor to the defendant, as well as to others, of the articles alleged in the complaint to be an infringement of plaintiff's patent, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action.⁴

Signed: _____,
Attorney for E. F., Applicant for Intervention.
 Address: _____

⁴ For other grounds of intervention, either of right or in the discretion of the court, see Rule 24 (a) and (b).

Notice of Motion

(Contents the same as in Form 19)

District Court of the United States for the Southern District of New York

CIVIL ACTION FILE NUMBER ----

A. B., PLAINTIFF v. C. D., DEFENDANT E. F., INTERVENER	}	<i>Intervener's answer</i>
---	---	----------------------------

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert the legality of the issuance of the Letters Patent to plaintiff.

Second Defense

Plaintiff is not the first inventor of the articles covered by the Letters Patent specified in his complaint, since articles substantially identical in character were previously patented in Letters Patent granted to intervener on January 5, 1920.

Signed: -----,
Attorney for E. F., Intervener.
 Address: -----

**Form 24.—MOTION FOR PRODUCTION OF DOCUMENTS ETC.
 UNDER RULE 34**

Plaintiff A. B. moves the court for an order requiring defendant C. D.

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

(Here list the documents and describe each of them.)

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

(Here list the objects and describe each of them.)

(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).

Defendant C. D. has the possession, custody, or control of each of the foregoing documents and objects and of the above mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

Signed: _____,
Attorney for Plaintiff.

Address: _____

Notice of motion

(Contents the same as in Form 19)

Exhibit A

STATE OF _____,

County of _____

A. B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the above mentioned items is relevant to some issue in the action.)

Signed: A. B.

[Jurat]

Form 25.—REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A. B. requests defendant C. D. to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.
 (Here list the statements.)

Signed: -----,
Attorney for Plaintiff.
 Address: -----

Form 26.—ALLEGATION OF REASON FOR OMITTING PARTY

When it is necessary, under Rule 19 (c), for the pleader to set forth in his pleading the names of persons who ought to be made parties, but who are not so made, there should be an allegation such as the one set out below :

John Doe named in this complaint is not made a party to this action [because he is not subject to the jurisdiction of this court]; [because he cannot be made a party to this action without depriving this court of jurisdiction].

Form 27.—NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 63 (b)

Notice is hereby given that C. D. and E. F., defendants above named, hereby appeal to the Circuit Court of Appeals for the Second Circuit [from the order (describing it)] [from the final judgment] entered in this action on -----, 19....

Signed: -----,
Attorney for Appellants C. D. and E. F.
 Address: -----

Note

Use either the material in the first set of brackets or that in the second, as the case requires. If the appeal is from a part only of an order or judgment that part must be specified.

Rule 63 (b) does not require the appellee to be named. It does require the clerk to notify all other parties than appellant.