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REPORT

OF THE

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

Appointed by the

SUPREME COURT OF THE UNITED STATES

CONTAINING

PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

APRIL 1937

FOREWORD

For the purpose of inviting suggestions and criticisms, the following draft of proposed rules of civil procedure for the district courts of the United States has been printed and is being distributed to the members of the profession who have heretofore displayed an interest in the subject.

Under the enabling act the rules which may be adopted by the Supreme Court will not be reported to Congress prior to the beginning of the session in January 1938. Meanwhile criticisms of the draft proposed by the Advisory Committee will be useful. They should be sent in before September 15th, if possible.

COMMUNICATIONS ON THE SUBJECT SHOULD BE ADDRESSED TO THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, SUPREME COURT OF THE UNITED STATES BUILDING, WASHINGTON, D. C.

The profession will understand that the draft herewith printed has not yet been given consideration by the Supreme Court and represents only the recommendations of the Advisory Committee.

ADVISORY COMMITTEE ON RULES FOR
CIVIL PROCEDURE.

THE STATUTE AUTHORIZING UNIFORM RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES.

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however*, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.]

ORDERS OF THE SUPREME COURT APPOINTING THE ADVISORY COMMITTEE

SUPREME COURT OF THE UNITED STATES

October Term, 1934

[June 3, 1935]

It is ordered:

1. Pursuant to Section 2 of the Act of June 19, 1934, c. 651, 48 Stat. 1064, the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights.

2. To assist the Court in this undertaking the Court appoints the following Advisory Committee to serve without compensation:

William D. Mitchell, of New York City, Chairman.

Scott M. Loftin, of Jacksonville, Florida, President of the American Bar Association.

George W. Wickersham, of New York City, President of the American Law Institute.

Wilbur H. Cherry, of Minneapolis, Minnesota, Professor of Law at the University of Minnesota.

Charles E. Clark, of New Haven, Connecticut, Dean of the Law School of Yale University.

Armistead M. Dobie, of University, Virginia, Dean of the Law School of the University of Virginia.

Robert G. Dodge, of Boston, Massachusetts.

George Donworth, of Seattle, Washington.

Joseph G. Gamble, of Des Moines, Iowa.

Monte M. Lemann, of New Orleans, Louisiana.

Edmund M. Morgan, of Cambridge, Massachusetts, Professor of Law at Harvard University.

Warren Olney, Jr., of San Francisco, California.

Edson R. Sunderland, of Ann Arbor, Michigan, Professor of Law at the University of Michigan.

Edgar B. Tolman, of Chicago, Illinois.

Charles E. Clark, of New Haven, Connecticut, is appointed Reporter to the Advisory Committee.

3. It shall be the duty of the Advisory Committee, subject to the instructions of the Court, to prepare and submit to the Court a draft of a unified system of rules as above described.

4. During the recess of the Court the Chief Justice is authorized to fill any vacancy in the Advisory Committee which may occur through failure to accept appointment, resignation, or otherwise.

5. The Advisory Committee shall at all times be directly responsible to the Court. The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the Chief Justice or upon his order during a recess of the Court.

SUPREME COURT OF THE UNITED STATES

October Term, 1935

[February 17, 1936]

ORDER

It is ordered by this Court that George Wharton Pepper, of Philadelphia, Pennsylvania, be, and he hereby is, appointed a member of the Advisory Committee appointed June 3, 1935, to assist the Court in the preparation of a unified system of general rules for cases in equity and actions at law in the District Courts of the United States and in the Supreme Court of the District of Columbia, in place of George W. Wickersham, deceased.

REPORT OF THE ADVISORY COMMITTEE

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 report:

The draft of the forms mentioned in Rule 86 has not been completed but will be finished at an early date.

Some broad questions of policy were discussed in the Foreword to the Preliminary Draft printed and published in May 1936 (pp. viii–xviii). The additional comments which the Committee desire to make will be found in the notes to each rule appended to the draft of rules in this report.

Many changes have been made from the Preliminary Draft published in May 1936 and we recommend that this report be printed and dis-

tributed among the judges of the district courts and circuit courts of appeals, the committees of lawyers, the bar associations, and the individual members of the profession who have aided the Advisory Committee, with the object of obtaining further suggestions from members of the profession during the remainder of this year while the draft is under consideration by the Court.

The Advisory Committee organized and commenced work in June 1935, and since that date there has been hardly a period when either the whole Committee or subcommittees or individual members of the Committee have not been engaged on this work. The task has been laborious but interesting. We hope our draft will furnish material which will aid the Court in effecting real reform in the procedure in the district courts.

The Advisory Committee has been supported by the advice and assistance of committees appointed by the judges in the various judicial districts, of committees of bar associations, and of individual members of the profession. Attorneys in the Department of Justice and in other branches of the government service have given valuable advice on questions relating to government litigation. We doubt if any other effort for reform in judicial procedure has been accompanied by greater interest and cooperation on the part of the legal profession.

All suggestions of committees and individuals were copied and distributed to each member of the Advisory Committee, were carefully digested and then considered at the meetings of the whole Committee.

The rules, other than those on depositions, discovery, and summary judgments, were drafted under the supervision of Charles E. Clark, the Reporter, on whose staff James William Moore, Joseph M. Friedman, and others have rendered valuable service. Edson R. Sunderland supervised the draft on depositions, discovery, and summary judgments.

The Committee has been fortunate in the secretarial staff in its office in the Supreme Court of the United States Building at Washington. The speed and accuracy with which this staff, aided by the Photostat Section of the Department of Justice, has turned out the numerous drafts and revisions have been noteworthy.

Edward H. Hammond, assigned by the Attorney General to the Committee's staff, ably assisted by Leland L. Tolman, has not only aided in organizing the Committee's work but has really performed the full service of a member of the Advisory Committee.

The untiring and highly efficient service of Irene G. LeDane, head of the secretarial force, and her assistants, Lois L. Dennis and Virdelma J. Bass, is gratefully acknowledged.

When rules of civil procedure for the district courts are promulgated by the Court, consideration should be given to the question of whether a standing Advisory Committee, serving without compensation, should be appointed to receive suggestions from time to time from the members of the bench and bar and to aid the Court in drafting amendments which experience may show to be desirable.

Until the Court finishes its consideration of this report, the members of the present Advisory Committee are ready to perform such further service as the Court may require.

Respectfully submitted.

WILLIAM D. MITCHELL,
Chairman,
GEORGE WHARTON PEPPER,
Vice-Chairman,
EDGAR B. TOLMAN, *Secretary,*
CHARLES E. CLARK, *Reporter,*
WILBUR H. CHERRY,
ARMISTEAD M. DOBIE,
ROBERT G. DODGE,
GEORGE DONWORTH,
JOSEPH G. GAMBLE,
MONTE M. LEMANN,
SCOTT M. LOFTIN,
EDMUND M. MORGAN,
WARREN OLNEY, JR.,
EDSON R. SUNDERLAND,

Advisory Committee on Rules for Civil Procedure.

APRIL 30, 1937.

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

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APPENDIX

RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES

I. SCOPE OF RULES—ONE FORM OF ACTION

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. They shall be construed to secure, so far as possible, the just, speedy, and inexpensive determination of every action.

NOTE

1. This rule is subject to the limitations of Rule 83.

2. The expression "district courts of the United States" appearing in the statute authorizing the Supreme Court of the United States to promulgate rules of civil procedure does not include the district courts held in the territories and insular possessions. The rules, however, by virtue of the organic acts of the territories and insular possessions will apply to the district courts of Hawaii and Puerto Rico, but will not apply to the district courts of Alaska, the Virgin Islands, and the Canal Zone. Hawaii: U. S. C., Title 48, § 642 (Jurisdiction of district courts; authority of officers); § 645 (Appeals). Puerto Rico: U. S. C., Title 48, § 863 (District of Puerto Rico; Officers; jurisdiction; vacancies); § 864 (Appeals; removal of causes; certiorari; terms of district court; use of English language); § 865 (Appeals); § 867 (juries in district court; qualifications). Alaska: U. S. C., Title 48, § 23 (Constitution and laws of the United States extended); see § 90 (Laws submitted to Congress); see

also the complete code of civil procedure enacted under these statutes, Alaska Compiled Laws (1933) tit. 3. The Virgin Islands: U. S. C., Title 48, § 1392 (Local laws continued; courts; appeals); see also § 1405z (Judicial branch; divisions of district court; terms; rules of practice; process). The Canal Zone: U. S. C., Title 48, § 1344 (District Court generally; rules of practice).

3. These rules are drawn under the authority of the second section of the enabling statute, U. S. C., Title 28, § 723c (Union of equity and action at law rules; power of Supreme Court), and also, so far as not inconsistent with that section, other grants of rule-making power to the court. See also U. S. C., Title 28, § 723b (Rules in action at law; Supreme Court authorized to make), and for the former practice in equity and at law see U. S. C., Title 28, §§ 723 and 730 (conferring power on the Supreme Court to make rules of practice in equity) and the Equity Rules promulgated thereunder; U. S. C., Title 28, § 724 (Conformity act); Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity—Transfer); Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein); U. S. C., Title 28, §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

4. With the second sentence compare U. S. C., Title 28, §§ 777 (Defects of form; amendments), 767 (Amendment of process); Equity Rule 19 (Amendments Generally).

Rule 2. One Form of Action. There shall be one form of action to be known as "civil action".

NOTE

1. U. S. C., Title 28, § 384 (Suits in equity, when not sustainable) is superseded. U. S. C., Title 28,

§§ 723 and 730 (conferring power on the Supreme Court to make rules of practice in equity), are unaffected in so far as they relate to the rule-making power in admiralty. These sections, together with § 723b (Rules in actions at law; Supreme Court authorized to make) are continued in so far as they are not inconsistent with § 723c (Union of equity and action at law rules; power of Supreme Court). See Note to Rule 1. U. S. C., Title 28, §§ 724 (Conformity act), 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law), are superseded.

2. Reference to actions at law or suits in equity in all statutes should now be treated as referring to the civil action prescribed in these rules.

3. This rule follows in substance the usual introductory statements to code practices which provide for a single action and mode of procedure, with abolition of forms of action and procedural distinctions. Representative statutes are N. Y. Code 1848, § 62; N. Y. C. P. A. (1936) § 8; Calif. Code Civ. Proc. (Deering, 1931) § 307; 2 Minn. Stat. (Mason, 1927) §9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255.

II. COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 3. Commencement of Action. A civil action is commenced by filing a complaint with the court.

NOTE

1. Rule 5 (c) defines what constitutes filing with the court.

2. This rule governs the commencement of all actions, including those brought by or against the United States or an officer or agency thereof, regardless of whether service is to be made personally pursuant to Rule 4 (d), or otherwise pursuant to rule 4 (e).

3. With this rule compare Equity Rule 12 (Issue of Subpoena—Time for Answer) and the following statutes (and other similar statutes) which provide a similar method for commencing an action:

U. S. C., Title 28:

§ 45 (District courts; practice and procedure in certain cases under interstate commerce laws)

§ 762 (Petition in suit against United States)

§ 766 (Partition suits where United States is tenant in common or joint tenant)

4. This rule provides that the first step in an action is the filing of the complaint. Under Rule 4 this is to be followed by issuance and service of process. No time limit is fixed for the issuance or service of process. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in taking further steps after filing the complaint. When a federal or state statute of limitations is pleaded as a defense, a question may arise

under this rule whether the mere filing of the complaint stops the running of the statute or whether any further step is required, such as service of the summons and complaint or their delivery to the marshal for service.

Note to the Supreme Court

(a) The Committee calls the attention of the Court to the fact that this rule does not distinguish private actions from actions by or against the United States and governmental bodies and agencies. The statutory requirements of special service are retained in substance by Rule 4 (d) but it was felt that, so far as concerns commencement of action, uniformity with other federal civil actions could properly be required.

(b) This Rule must be read in conjunction with Rule 5 (b) on the filing of papers. Several members of the Committee prefer the system in force in New York, Minnesota, South Dakota, Washington, and a number of other code states. Under that system an action is commenced by the service of summons which is prepared and signed by the plaintiff or his attorney, either accompanied by or without the complaint, under rules varying in the different jurisdictions. No papers need be filed with the court, except on demand from the adverse party, unless and until the court is required to take some action. The advantages of that system are that it avoids early publicity, avoids the accumulation in the clerk's office of a vast number of actions which are eventually settled or abandoned, lessens the fees paid by litigants in actions which do not reach the stage where court action becomes necessary, and, in districts of extensive territorial jurisdiction, reduces the necessity of travelling great distances to file papers. It has been suggested that difficulties which are unknown under the present federal system may arise, particularly in actions involving the conflict of jurisdictions, and in actions for the infringement of patents and similar actions, the commencement of which may affect third parties. These are not insuperable. Probably the novelty of such a practice

among many members of the bar is, at the present time, the only serious obstacle to its adoption.

The Chairman requested that some estimate be made from past statistics of the number of cases in which the papers would never have been filed if that system had been in effect.

There are only two sources from which such an estimate can be made:

I. A Study of the Business of the Federal Courts—Part II—Civil Cases. (Published by The American Law Institute, May 1934);

II. Annual Report of the Attorney General of the United States, Fiscal Year Ended June 30, 1935 (covering as to this matter, however, only the period from January 1, 1935, to June 30, 1935).

I. would indicate that the papers in 40.63% of the cases, including therein the cases to which the government was a party, would not have been filed. If the cases to which the government was a party are excluded for the reason that there should always be a public record thereof, the papers in 28.10% of the cases would not have been filed.

II. would indicate that the papers in 42.74% of the cases, including therein the cases to which the government was a party, would not have been filed. If the cases to which the government was a party are excluded for the reason that there should always be a public record thereof, the papers in 30.65% of the cases would not have been filed.

In view of the criticisms by members of the bar in various parts of the country of that system when stated in the Preliminary Draft published in May 1936, and in deference to what therefore seemed to be the dominant opinion of the bar, several members of the Committee who personally prefer that system reluctantly concurred in the adoption of the rule as stated.

Rule 4. Process.

(a) SUMMONS: ISSUANCE. Upon request of the plaintiff, at any time after the filing of the complaint, one or more summons shall issue against any defendant or defendants.

(b) SAME: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint.

(c) METHOD OF SERVICE: BY WHOM. Service of all process shall be made by a United States marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 46. Special appointments to serve process shall be made freely when substantial savings in travel fees will result.

(d) SUMMONS: PERSONAL SERVICE. The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving

copies thereof at his dwelling house or usual place of abode with some adult member of his household or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending

a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action whether or not the United States is a defendant, wherein an order of an officer or agency of the United States not made a party is attacked, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon a state, municipal corporation, or other public or governmental organization subject to suit, by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States, or by the law of the state in which the service is

made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) SAME: OTHER SERVICE. Whenever a statute of the United States or Rule 74 (d) of these rules or an order of court provides for service of a summons or of notice or of an order in lieu of summons, upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. A subpoena may be served within the territorial limits provided in Rule 46.

(g) RETURN. The person serving the process shall return it to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make return does not affect the validity of the service.

(h) AMENDMENT. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result

to the substantial rights of the party against whom the process issued.

NOTE

Note to Subdivision (*a*). With the provision permitting additional summons upon request of the plaintiff, compare Equity Rule 14 (Alias Subpoena).

Note to Subdivision (*b*). This rule prescribes a form of summons which follows substantially the requirements stated in Equity Rules 12 (Issue of Subpoena—Time for Answer) and 7 (Process, Mesne and Final).

U. S. C., Title 28, § 721 (Sealing and testing of writs) is substantially continued in so far as it applies to a summons, but its requirements as to teste of process are superseded. U. S. C., Title 28, § 722 (Teste of process, day of) is superseded.

See Rule 12 (a) for a statement of the time within which the defendant is required to appear and defend.

See Rule 74 (c) for a different form of summons in actions for the condemnation of property for public use.

Note to Subdivision (*c*). This Rule continues U. S. C., Title 28, § 503, as amended June 15, 1936 (Marshals; duties) and such statutes as the following in so far as they provide for service of process by a marshal, but modifies them in so far as they may imply service by a marshal only:

U. S. C., Title 15:

§ 5 (Bringing in additional parties) (Sherman Act)

§ 10 (Bringing in additional parties)

§ 25 (Restraining violations; procedure)

U. S. C., Title 28:

§ 45 (Practice and procedure in certain cases under the interstate commerce laws)

Compare Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (*d*). Under this rule the complaint must always be served with the summons.

Paragraph (1). For an example of a statute providing for service upon an agent of an individual see U. S. C., Title 28, § 109 (Patent cases).

Paragraph (3). For a statute authorizing service upon a specified agent and requiring mailing to the defendant, see U. S. C., Title 6, § 7 (Surety companies as sureties; appointment of agents; service of process).

Paragraphs (4) and (5) provide a uniform and comprehensive method of service for all actions against the United States or an officer or agency thereof. For statutes providing for such service, see U. S. C., Title 7, §§ 217 (Proceedings for suspension of orders), 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission), 608c (15) (B) (Court review of ruling of Secretary of Agriculture), and 855 (Making § 608c (15) (B) applicable to orders of the Secretary of Agriculture as to handlers of anti-hog-cholera serum and hog-cholera virus); U. S. C., Title 26, § 1569 (Bill in chancery to clear title to realty on which the United States has a lien for taxes); U. S. C., Title 28, §§ 45 (District Courts; practice and procedure in certain cases under the Interstate Commerce laws), 763 (Petition in suit against the United States; service; appearance by district attorney), 766 (Partition suits where United States is tenant in common or joint tenant), 902 (Foreclosure of mortgages or other liens on property in which the United States has an interest). These and similar statutes are modified in so far as they prescribe a different method of service or dispense with the service of a summons.

For the Equity Rule on service, see Equity Rule 13 (Manner of Serving Subpoena).

Note to Subdivision (e). The provisions for the service of a summons or of notice or of an order in lieu of summons, contained in U. S. C., Title 8, § 405 (Cancellation of certificates of citizenship fraudulently or illegally procured) (service by publication in accordance with state law); U. S. C., Title 28, § 118 (Absent defendants in suits to enforce liens);

U. S. C., Title 35, § 72a (Jurisdiction of District Court of United States for the District of Columbia in certain equity suits where adverse parties reside elsewhere) (service by publication against parties residing in foreign countries); U. S. C., Title 38, § 445 (Action against the United States on a veteran's contract of insurance) (parties not inhabitants of or not found within the district may be served with an order of the court, personally or by publication) and similar statutes are continued by this rule. Title 24, § 378 of the Code of the District of Columbia (Publication against non-resident; those absent for six months; unknown heirs or devisees; for divorce or in rem; actual service beyond District) is continued by this rule.

Note to Subdivision (f). This Rule enlarges to some extent the present rule as to where service may be made. It does not, however, enlarge the jurisdiction of the district courts.

U. S. C., Title 28, §§ 113 (Suits in States containing more than one district) (where there are two or more defendants residing in different districts), 115 (Suits of a local nature), 116 (Property in different districts in same state), 838 (Executions run in all districts of state); U. S. C., Title 47, § 13 (Action for damages against a Railroad or Telegraph Company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of company found in state"); U. S. C., Title 49, § 321 (c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the state) and similar statutes, allowing the running of process throughout a state, are substantially continued.

U. S. C., Title 15, §§ 5 (Bringing in additional parties) (Sherman Act), 25 (Restraining violations; procedure); U. S. C., Title 28, §§ 44 (Procedure in certain cases under interstate commerce laws; service of processes of court), 117 (Property in different

states of the circuit; jurisdiction of receiver), 839 (Executions; run in every State and Territory) and similar statutes, providing for the running of process beyond the territorial limits of a state, are expressly continued.

Note to Subdivision (g). With the second sentence compare Equity Rule 15 (Process, by Whom Served).

Note to Subdivision (h). This rule substantially continues U. S. C., Title 28, § 767 (Amendment of process).

Note to the Supreme Court

Note to Subdivision (f). Service of process outside of the district but within the territorial limits of the state is allowed under U. S. C., Title 28, §§ 113 (Suits in states containing more than one district) (where there are two or more defendants residing in different districts), 115 (Suits of a local nature), 116 (Property in different districts in same state) and 838 (Executions run in all districts of state); U. S. C., Title 47, § 13 (Action for damages against a Railroad or Telegraph Company whose officer or agent in control of a telegraph line refuses or fails to operate such line in a certain manner—"upon any agent of company found in state"); and U. S. C., Title 49, § 321 (c) (Requiring designation of a process agent by interstate motor carriers and in case of failure so to do, service may be made upon any agent in the State). The statutes cited in the Note to Subdivision (f) as providing for service of process beyond the territorial limits of the state include the less extensive permission to serve process outside of the district but within the territorial limits of the state. The effect of this rule is to make service of this kind general. Some members of the bar question the power of the Court to make this extension.

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

(a) SERVICE. 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, claim, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but only upon those not in default for failure to appear. 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. 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 a copy to the attorney or to the party; or leaving a copy at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving a copy 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 adult member of his household. Service by mail is complete upon mailing. 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 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.

(b) FILING. All papers served upon a party, all pleadings, stipulations, written motions, and designations of record on appeal shall be filed with the court, together with proof of service when service is required. When a time is prescribed for the service of a pleading or other paper, it shall be filed with the court as well as served within that time.

(c) FILING WITH THE COURT DEFINED. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, and shall note thereon the filing date and forthwith transmit them to the office of the clerk.

NOTE

Note to Subdivision (a). Compare 2 Minn. Stat. (Mason, 1927) §§ 9240, 9241, 9242; N. Y. C. P. A. (1936) §§ 163, 164 and N. Y. R. C. P. (1936) Rules 20, 21; Wash. Rev. Stat. Ann. (Remington, 1932) §§ 244–249.

Note to Subdivision (b). This continues the present practice under Equity Rule 12 (Issue of Subpoena—Time for Answer).

Rule 6. Time.

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the time shall run until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(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 time, the court for cause shown may, at any time in its discretion with or without motion or notice, order the time enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; but it may not enlarge the time for taking any action under Rule 56, except as stated in subdivision (c) thereof, or the time for taking an appeal as provided by law. This rule does not limit the power of the court to grant relief

within the time and under the conditions prescribed in Rule 57 (b).

(c) UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding shall not be affected or limited by the expiration of a term of court. The expiration of a term of court shall in no way affect the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) FOR MOTIONS—AFFIDAVITS. A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different time is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 56 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) FOR PLEADING AFTER DISPOSITION OF MOTION. Unless a different time is fixed by these rules or by the court, the party against whom an order is made disposing of a motion under Rule 12 shall, within 10 days thereafter if he or his attorney is present in court when the order is made, or in other cases within 10 days after service upon him of notice of the order, proceed to plead further or take such other

step as is required by the order or by these rules.

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed time after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed time.

NOTE

Note to Subdivisions (a) and (b). These are amplifications along lines common in state practices, of Equity Rule 80 (Computation of Time—Sundays and Holidays) and of the provisions for enlargement of time found in Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer—Default—Decree Pro Confesso). Compare Ala. Code Ann. (Michie, 1928) § 13 and former Law Rule 8 of the Supreme Court of the District of Columbia, superseded in 1929 by Law Rule 8, Rules of the Supreme Court of the District of Columbia (1934).

Note to Subdivision (c). This eliminates the difficulties caused by the expiration of terms of court. Such statutes as U. S. C., Title 28, § 12 (Trials not discontinued by new term) are continued. Compare Rules of the United States District Court of Minnesota, Rule 25 (Minn. Stat. (Mason, Supp. 1936) p. 1089).

Note to Subdivision (d). Compare 2 Minn. Stat. (Mason, 1927) § 9246; N. Y. R. C. P. (1936) Rules 60 and 64.

Note to Subdivision (e). Compare the last sentence of Equity Rule 29 (Defenses—How Presented) and N. Y. C. P. A. (1936) § 283.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Designated; Motion Defined.

(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 or if the court orders a reply to an affirmative defense in the answer; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14 to appear in the action; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed.

(b) MOTIONS. Any 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 substance of the motion is stated in a written notice of the hearing of the motion.

(c) OTHER PAPERS. The rules applicable to pleadings and relating to captions, signing, and other matters of form shall apply to all papers provided for by these rules.

(d) DEMURRERS, PLEAS, ETC., ABOLISHED. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

NOTE

1. A provision designating pleadings and defining a motion is common in the state practice acts. See Ill. C. P. A. (1933) § 32 (Designation and order of Pleadings); 2 Minn. Stat. (Mason, 1927) § 9246 (Definition of motion); and N. Y. C. P. A. (1936) § 113 (Definition of motion). Equity Rules 18 (Pleadings—Technical Forms Abrogated), 29 (Defenses—How Presented), and 33 (Testing Sufficiency of Defense) abolished technical forms of pleading, demurrers, and pleas, and exceptions for insufficiency of an answer.

2. *Note to Subdivision* (*a*). This is substantially Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (1935) O. 23, r. r. 1, 2 (Reply to counterclaim; amended, 1933, to be subject to the rules applicable to defenses, O. 21). See O. 21, r. r. 1–14); O. 27, r. 13 (When pleadings deemed denied and put in issue). Under the codes the pleadings are generally limited. A reply is sometimes required to an affirmative defense in the answer. Colo. Comp. Laws (1921) § 66; Ore. Code Ann. (1930) §§ 1–614, 1–616. In other jurisdictions no reply is necessary to an affirmative defense in the answer, but a reply may be ordered by the court. N. C. Code (1935) § 525; 1 S. D. Comp. Laws (1929) § 2357. A reply to a counterclaim is usually required. Ark. Civ. Code (Crawford, 1934) §§ 123–125; Wis. Stat. (1931) §§ 263.20, 263.21. U. S. C., Title 28, § 45 (District courts; practice and procedure in certain cases) is modified in so far as it may dispense with a reply to a counterclaim.

For amendment of pleadings, see Rule 15 dealing with amended and supplemental pleadings.

3. All statutes which use the words "petition", "bill of complaint", "plea", "demurrer", and other such terminology are modified in form by this rule.

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) DEFENSES; FORM OF DENIALS. In pleading to a preceding pleading, a party shall state in short and plain terms his defense or defenses to each claim asserted and shall admit, explain, 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 desires to deny only a part or a qualification of an averment, he shall not deny the averment generally or as averred, but 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 shall make his denials only as specific denials

of distinct averments or paragraphs; 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.

(c) AFFIRMATIVE DEFENSES. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, without requiring a reply may treat the pleading as if there had been a proper designation.

(d) EFFECT OF FAILURE TO DENY. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

(1) Each averment of a pleading shall be simple, concise, and direct. No techni-

cal forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) CONSTRUCTION OF PLEADINGS. All pleadings shall be so construed as to do substantial justice.

NOTE

Note to Subdivision (*a*). See Equity Rules 25 (Bill of Complaint—Contents), 30 (Answer—Contents—Counterclaim), and 31 (Reply—When Required—When Cause at Issue). Compare 2 Ind. Stat. Ann. (Burns, 1933) §§ 2–1004, 2–1015; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11305, 11314; Utah Rev. Stat. Ann. (1933) §§ 104–7–2, 104–9–1.

See Rule 19 (c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23 (b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (*b*). 1. This rule supersedes the methods of pleading prescribed in U. S. C., Title

19, § 508 (Persons making seizures pleading general issue and proving special matter); U. S. C., Title 35, §§ 40d (Proving under general issue, upon notice, that a statement in application for an extended patent is not true), 69 (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn. Practice Book (1934) §§ 107, 108, and 122; Conn. Gen. Stat. (1930) §§ 5508–5514. Compare the English practice, English Rules Under the Judicature Act (1935) O. 19, r. r. 17–20.

Note to Subdivision (*c*). This follows substantially English Rules Under the Judicature Act (1935) O. 19, r. 15 and N. Y. C. P. A. (1936) § 242, with "surprise" omitted in this rule.

Note to Subdivision (*d*). This is similar to Equity Rule 30 (Answer—Contents—Counterclaim); English Rules Under the Judicature Act (1935) O. 19, r. r. 13, 17; and to the practice in the States.

Note to Subdivision (*e*). This rule is an elaboration upon Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. See Clark, *Code Pleading* (1928), pp. 171–4, 432–5; Hankin, *Alternative and Hypothetical Pleading* (1924), 33 Yale L. J. 365.

Note to Subdivision (*f*). A provision of like import is of frequent occurrence in the codes. Ill. Rev. Stat. (1935) ch. 110, § 161 (3); 2 Minn. Stat. (Mason, 1927) § 9266; N. Y. C. P. A. (1936) § 275; 2 N. D. Comp. Laws Ann. (1913) § 7458.

Rule 9. Pleading Special Matters.

(a) CAPACITY. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is

made a party, except to the extent required to show the jurisdiction of the court. A party desiring to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) FRAUD, MISTAKE, CONDITION OF THE MIND. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) CONDITIONS PRECEDENT. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) OFFICIAL DOCUMENT OR ACT. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) JUDGMENT. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) TIME AND PLACE. For the purpose of testing the sufficiency of a pleading, averments of time or place are material and shall be considered like all other averments of material matter.

(g) SPECIAL DAMAGE. When items of special damage are claimed, they shall be specifically stated.

NOTE

Note to Subdivision (a). Compare Equity Rule 25 (Bill of Complaint—Contents) requiring disability to be stated; Utah Rev. Stat. Ann. (1933) § 104–13–15, enumerating a number of situations where a general averment of capacity is sufficient. For provisions governing averment of incorporation, see 2 Minn. Stat. (Mason, 1927) § 9271; N. Y. R. C. P. (1936) Rule 93; 2 N. D. Comp. Laws Ann. (1913) § 7981 et seq.

Note to Subdivision (b). See English Rules Under the Judicature Act (1935) O. 19, r. 22.

Note to Subdivision (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (1935) O. 19, r. 14; 2 Minn. Stat. (Mason, 1927) § 9273; N. Y. R. C. P. (1936) Rule 92; 2 N. D. Comp. Laws Ann. (1913) § 7461; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 288.

Note to Subdivision (e). The rule expands the usual code provisions on pleading a judgment by including judgments or decisions of administrative tribunals and foreign courts. Compare Ark. Civ. Code (Crawford, 1934) § 141; 2 Minn. Stat. (Mason, 1927) § 9269; N. Y. R. C. P. (1936) Rule 95; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 287.

Rule 10. Form of Pleadings.

(a) CAPTION; NAMES OF PARTIES. Every pleading shall contain a caption setting forth the name of the court, the title of

the action, the file number, and a designation of the pleading as provided in Rule 7 (a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) PARAGRAPHS; SEPARATE STATEMENTS. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) ADOPTION BY REFERENCE; EXHIBITS. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

NOTE

The first sentence is derived in part from the opening statement of Equity Rule 25 (Bill of Complaint—Contents). The remainder of the rule is an expansion in conformity with usual state provisions. For numbered paragraphs and separate statements, see Conn. Gen. Stat. (1930) § 5513; Ill. Rev. Stat. (1935) ch.

110, § 161; N. Y. R. C. P. (1936) Rule 90. For incorporation by reference, see N. Y. R. C. P. (1936) Rule 90. For written instruments as exhibits, see Ill. Rev. Stat. (1935) ch. 110, § 164.

Rule 11. Signing of Pleadings.

(a) By Attorney. Every pleading shall be signed in his individual name by at least one attorney of record. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. 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 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.

(b) By a Party. A party who is not represented by an attorney shall sign the pleading and shall be subject to the obligations and penalties herein prescribed for attorneys.

NOTE

This is substantially the content of Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. See also Equity Rule 36 (Officers Before Whom Pleadings Verified). Com-

pare to similar purposes, English Rules Under the Judicature Act (1935) O. 19, r. 4, and *Great Australian Mining Co.* v. *Martin*, L. R. 5 Ch. Div. 1, 10 (1877). Subscription of pleadings is required in many codes. 2 Minn. Stat. (Mason, 1927) § 9265; N. Y. R. C. P. (1936) Rule 91; 2 N. D. Comp. Laws Ann. (1913) § 7455.

This rule expressly continues any statute which requires a pleading to be verified or accompanied by an affidavit, such as:

U. S. C., Title 28:
§ 381 (Preliminary injunctions and temporary restraining orders)
§ 762 (Suit against the United States)

U. S. C., Title 28, § 829 (Costs; attorney liable for, when) is unaffected by this rule.

For complaints which must be verified under these rules, see Rule 23 (b) (Secondary Action by Shareholders) and 70 (Injunctions).

Rule 12. Defenses—When and How Presented.

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. 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 of the pleading in which the claim is asserted. The service of any motion provided for in this rule extends the time otherwise fixed by these rules for serving any required responsive pleading until the expiration of 10 days after notice that the court has denied the motion or has postponed the disposition thereof until the trial on the merits or, if a motion to make more definite and certain or for a bill of particulars is granted, until the expiration of the time for response to the original pleading or 10 days, whichever may be the longer, unless a different time is fixed by order of the court.

(b) DEFENSES—HOW PRESENTED BY PLEADING AND MOTION. Every defense, in law or fact, to a claim for relief in any pleading, whether an original claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a re-

sponsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)–(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION TO MAKE MORE DEFINITE OR CERTAIN OR FOR BILL OF PARTICULARS. Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike

the pleading to which the motion was directed or make such order as it deems just. A bill of particulars when filed becomes a part of the pleading which it supplements.

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

(g) CONSOLIDATION OF MOTIONS. A party who makes a motion under this rule may join with it the other motions herein provided for; and if he makes such a motion 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; except that prior to making any other such motions under this rule he may make a motion presenting objections to the jurisdiction of the court over the subject matter or over the person, or to the sufficiency of the process or its service, or to venue; and except that he may make a motion for judgment on the pleadings, as stated in subdivision (h) of this rule.

(h) WAIVER OF DEFENSES. Except as stated in this subdivision of this rule, a party waives all defenses and objections if he does not present them either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. The defenses or objections

for failure to state a claim upon which relief can be granted even though previously presented, or 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; but if made at the trial, shall then be disposed of as provided in Rule 15 (b) in the light of any evidence which may have been received. Whenever it appears by suggestion of the parties, or otherwise, that the court has not jurisdiction of the subject matter, it shall dismiss the action.

NOTE

Note to Subdivision (*a*). 1. Compare Equity Rules 12 (Issue of Subpoena—Time for Answer) and 13 (Reply—When Required—When Cause at Issue); 4 Mont. Rev. Codes Ann. (1935) §§ 9107, 9158; N. Y. C. P. A. (1936) § 263; N. Y. R. C. P. (1936) Rules 109–111.

2. U. S. C., Title 28, § 763 (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide an identical time for the United States or an officer or agency thereof to answer or otherwise defend are continued by this rule. In so far as any statutes not excepted in Rule 83 provide a different time for a defendant to defend, such statutes are modified. See U. S. C., Title 28, § 45 (District courts; practice and procedure in certain cases under the Interstate commerce laws) (30 days).

3. See Rule 6 (e) for the time within which to plead after disposition of a motion; and Rule 15 (a) for time within which to plead to an amended pleading or a pleading supplemented by a bill of particulars.

Note to subdivisions (b) and (d). 1. See generally Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N. Y. C. P. A. (1936) §§ 106–110; English Rules Under the Judicature Act (1935) O. 25, r. r. 1–4; Clark, *Code Pleading* (1928) pp. 371–381.

2. For provisions requiring defenses to be made in the answer or reply see English Rules Under the Judicature Act (1935) O. 25 r. r. 1–4; 1 Miss. Code Ann. (1930) §§ 378, 379. Compare Equity Rule 29 (Defenses—How Presented); U. S. C., Title 28, § 45 (District Courts; practice and procedure in certain cases) (under the interstate commerce laws). U. S. C., Title 28, § 45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif. Code Civ. Proc. (Deering, 1931) § 433; 4 Nev. Comp. Laws (Hillyer, 1929) § 8600. For provisions that the defendant may demur and answer at the same time, see Calif. Code Civ. Proc. (Deering, 1931) § 431; 4 Nev. Comp. Laws (Hillyer, 1929) § 8598.

3. Equity Rule 29 (Defenses—How Presented) abolished demurrers and substituted therefor a motion to dismiss "on a point of law going to the whole or a material part of the cause or causes of action stated in the bill." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn. Code Ann. (Williams, 1934) § 8784; Ala. Code Ann. (Michie, 1928) § 9479; 2 Mass. Gen. Laws (Ter. Ed.) ch. 231, §§ 15–18; Kansas Rev. Stat. Ann. (1923) §§ 60–705, 60–706.

Note to Subdivision (*c*) Compare Equity Rule 33 (Testing Sufficiency of Defense); N. Y. R. C. P. (1936) Rules 111 and 112.

Note to Subdivisions (*e*) *and* (*f*). Compare Equity Rules 20 (Further and Particular Statement in Pleading May be Required) and 21 (Scandal and impertinence); English Rules Under the Judicature Act (1935) O. 19, r. r. 7, 7A, 7B, 8; 4 Mont. Rev. Codes Ann. (1935) §§ 9166, 9167; N. Y. C. P. A. (1936) § 247; N. Y. R. C. P. (1936) Rule 103; Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 89–1033, 89–1034.

Note to Subdivision (*g*). Compare Rules of the Supreme Court of the District of Columbia (1924 am'd 1933), Equity Rule 11; N. M. Rules of Pleading, Practice and Procedure, 38 N. M. Rep. vii (105–408); Wash. Gen. Rules of the Superior Courts (Remington, 1932) Rule VI (e) & (f).

Note to Subdivision (*h*). Compare Calif. Code Civ. Proc. (Deering, 1931) § 434; 2 Minn. Stat. (Mason, 1927) § 9252; N. Y. C. P. A. (1936) §§ 278 and 279; Wash. Gen. Rules of the Superior Courts (Remington, 1932) Rule VI (e). This rule continues U. S. C., Title 28, § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U. S. C., Title 28, § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) PERMISSIVE COUNTERCLAIMS. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party, but may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) COUNTERCLAIM AGAINST THE UNITED STATES. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.

(e) COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) OMITTED COUNTERCLAIM. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim

may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) ADDITIONAL PARTIES MAY BE BROUGHT IN. 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, 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.

(i) SEVERANCE; SEPARATE TRIAL; SEPARATE JUDGMENTS. If the court orders severance or separate trials as provided in Rule 43 (b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

NOTE

1. This is substantially Equity Rule 30 (Answer—Contents—Counterclaim), broadened to include legal as well as equitable counterclaims.

2. Compare the English practice, English Rules Under the Judicature Act (1935) O. 19, r. r. 2 and 3, and O. 21, r. r. 10–17; *Beddall* v. *Maitland*, L. R. 17 Ch. Div. 174, 181, 182 (1881).

3. Certain states have also adopted almost unrestricted provisions concerning both the subject matter of and the parties to a counterclaim. This seems to be the modern tendency. Ark. Civ. Code (Crawford, 1934) §§ 117 (as amended) and 118; N. J. Comp. Stat.,

(Cum. Supp. 1911–1924) tit. 163, § 288; N. Y. C. P. A. (1936) §§ 262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis. Stat. (1931) § 263.14 (1) (c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, *Code Pleading* (1928), 486. Ky. Codes (Carroll, 1927) Civ. Pract. § 98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 84 (Jurisdiction and Venue Unaffected). For a discussion of federal jurisdiction and venue in regard to counterclaims and cross-claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations in Federal Procedure* (1936), 45 Yale L. J. 393, 410 *et seq.*

6. Statutes of the United States, such as U. S. C., Title 28, § 41 (1) (United States as plaintiff; civil suits at common law and in equity), relating to assigned claims in actions based on diversity of citizenship are not intended to be modified.

7. If the action proceeds to judgment without the interposition of a counterclaim as required by subdivision (a) of this rule, the counterclaim is barred. See *American Mills Co.*, v. *American Surety Co.*, 260 U. S. 360 (1922); *Marconi Wireless Telegraph Co.*, v. *National Electric Signalling Co.*, 206 Fed. 295 (E. D. N. Y. 1913); Hopkins, *Federal Equity Rules* (8th ed. 1933), p. 213; Simkins, *Federal Practice* (1934) p. 663.

8. For allowance of credits against the United States see U. S. C., Title 26, § 1672–1673 (Suits for refunds of internal revenue taxes—limitations); U. S. C., Title 28, §§ 774 (Suits by United States against individuals; credits), 775 (Suits under postal laws; credits); U. S. C., Title 31, § 227 (Offsets against judgments and claims against United States).

Rule 14. Third-Party Practice.

(a) When Defendant May Bring in Third Party. Before the service of his answer a de-

fendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) WHEN PLAINTIFF MAY BRING IN THIRD PARTY. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which

under this rule would entitle a defendant to do so.

NOTE

Third-party impleader is in some aspects a modern innovation in law and equity although well known in admiralty. Because of its many advantages a liberal procedure with respect to it has developed in England, in the federal admiralty courts, and in some American state jurisdictions. See English Rules Under the Judicature Act (1935) O. 16A, r. r. 1–13; United States Supreme Court Admiralty Rules (1920), Rule 56 (Right to Bring in Party Jointly Liable); Pa. Stat. Ann. (Purdon, 1936), tit. 12, § 141; Wis. Stat. (1931) § 260.19, (1), (3), (4), 260.20; N. Y. C. P. A. (1936) §§ 193 (2), 211 (a). Compare La. Code Pract. (Dart, 1932) §§ 378–388. For the practice in Texas as developed by judicial decision, see *Lottman* v. *Cuilla*, 288 S. W. 123, 126 (Tex. 1926). For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L. J. 393, 417 *et seq.*

Third-party impleader under the conformity act has been applied in actions at law in the federal courts. *Lowry and Co., Inc.* v. *National City Bank of New York*, 28 F. (2d) 895 (S. D. N. Y. 1928); *Yellow Cab Co. of Philadelphia* v. *Rodgers*, 61 F. (2d) 729 (C. C. A. 3rd, 1932).

Rule 15. Amended and Supplemental Pleadings.

(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after

it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. When a party is required to plead in response to an amended pleading or a pleading supplemented by a bill of particulars, he may respond thereto within the time for response to the original pleading or within 10 days, whichever may be the longer, unless a different time is fixed by order of the court.

(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

NOTE

See generally for the present federal practice, Equity Rules 19 (Amendments Generally), 28 (Amendment of Bill as of Course), 32 (Answer to Amended Bill), 34 (Supplemental Pleading), and 35 (Bills of Revivor and Supplemental Bills—Form); U. S. C., Title 28, §§ 399 (Amendments to show diverse citizenship) and 777 (Defects of form; amendments). See English Rules Under the Judicature Act (1935) O. 28, r. r. 1–13; O. 20, r. 4; O. 24, r. r. 1–3.

Note to Subdivision (*a*). The right to serve an amended pleading once as of course is common. 4 Mont. Rev. Codes Ann. (1935) § 9186; 1 Ore. Code Ann. (1930) § 1–904; 1 S. C. Code (Michie, 1932) § 493; English Rules Under the Judicature Act (1935) O. 28, r. 2. Provision for amendment of pleading before trial, by leave of court, is in almost every code. If there is no statute the power of the court to grant leave is said to be inherent. Clark, *Code Pleading* (1928), 498, 509.

Note to Subdivision (b). Compare Equity Rule 19 (Amendments Generally) and code provisions which allow an amendment "at any time in furtherance of justice," (e. g., Ark. Civ. Code (Crawford, 1934) § 155) and which allow an amendment of pleadings to conform to the evidence, where the adverse party has not been misled and prejudiced, (e. g., N. M. Stat. Ann. (Courtright, 1929) §§ 105–601, 105–602).

Note to Subdivision (c). "Relation back" is a well recognized doctrine of recent and now more frequent application. Compare Ala. Code Ann. (Michie, 1928) § 9513; Ill. Rev. Stat. (1935) ch. 110, § 174 (2); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308–3 (4). See U. S. C., Title 28, § 399 (Amendments to show diverse citizenship) for a provision for "relation back".

Note to Subdivision (d). This is an adaptation of Equity Rule 34 (Supplemental Pleadings).

Rule 16. Pre-Trial Procedure; Formulating Issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered shall control the subsequent course of the action. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or extend it to all actions.

NOTE

1. Similar rules of pre-trial procedure are now in force in Boston, Detroit, and Cleveland, and a rule substantially like this one has been proposed for the urban centers of New York state. For a discussion of the successful operation of pre-trial procedure in relieving the congested condition of trial calendars of the courts in such cities and for the proposed New York plan, see *A Proposal for Minimizing Calendar Delay in Jury Cases* (Dec. 1936—published by The New York Law Society); *Pre-Trial Procedure and Administration* (1937—published by The Judicial Council of The State of New York); *Report of the Commission on the Administration of Justice in New York State* (1934), pp. 50–52. Compare the English procedure known as the "summons for directions", English Rules Under the Judicature Act (1935) O. 38a; and a similar procedure in New Jersey, N. J. P. L. (1912) ch. 231, § 17, N. J. Laws (1926) ch. 61, N. J. Supreme Court Rules, 2 N. J. Misc. Rep.

(1924) 1230, Rules 94, 92, 93, 95 (as amended 1933, 11 N. J. Misc. Rep. (1933) 9551).

2. Compare the similar procedure under Rule 38 (d) (Defining the Issues When Case Not Fully Adjudicated on Motion for Summary Judgment). Rule 12 (g) (Consolidation of Motions), by requiring to some extent the consolidation of motions dealing with matters preliminary to trial, is a step in the same direction. In connection with clause (5) of this rule, see Rules 53 (b) (Masters; Reference) and 53 (e) (3) (Report: In Jury Actions).

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity.

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another may be brought in the name of the United States.

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual 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 other cases capacity to sue or be sued shall be governed 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.

(c) INFANTS OR INCOMPETENT PERSONS. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*, and if he is sued the court shall appoint a guardian *ad litem* to represent him. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

NOTE

Note to Subdivision (*a*). The real party in interest provision, except for the last clause which is new, is taken verbatim from Equity Rule 37 (Parties Generally—Intervention), except that the word "expressly" has been omitted. For similar provisions see N. Y. C. P. A. (1936) § 210; Wyo. Rev. Stat. Ann. (1931) §§ 89–501, 89–502, 89–503; English Rules Under the Judicature Act (1935) O. 16, r. 8. See also Equity Rule 41 (Suit to Execute Trusts of Will—Heir as Party). For examples of statutes of the United States providing particularly for an action for the use or benefit of another in the name of the United States, see U. S. C., Title 40, § 270b (Suit by persons furnishing labor and material for work on public building contracts * * * may sue on a payment bond, "in name of United States for use of party suing"); and U. S. C., Title 26 § 1645 (c) (Suits for penalties, fines, and forfeitures, under this title, where not otherwise provided for, to be in name of United States).

Note to Subdivision (*b*). For capacity see generally Clark and Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 Yale L. J. 1291, 1312–1317 (1935) and specifically *Coppedge* v. *Clinton*, 72 F. (2d) 531 (C. C. A. 10th, 1934) (natural person); *David Lupton's Sons Co.* v. *Automobile Corporation of America*, 225 U. S. 489 (1912) (corporation); *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476 (1933) (unincorporated ass'n.); *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) (federal substantive right enforced against unincorporated association); compare *Moffat Tunnel League* v. *United States*, 289 U. S. 113 (1933).

Note to Subdivision (*c*). The provision for infants and incompetent persons is substantially Equity Rule 70 (Suits by or Against Incompetents) with slight additions. Compare the more detailed English provisions, English Rules Under the Judicature Act (1935) O. 16, r. r. 16–21.

Rule 18. Joinder of Claims and Remedies.

(a) JOINDER OF CLAIMS. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim, may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) JOINDER OF REMEDIES; FRAUDULENT CONVEYANCES. Whenever a claim is one heretofore cognizable only after a prior proceed-

ing has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

NOTE

Note to Subdivision (*a*). 1. Recent development, both in code and common law states, has been toward unlimited joinder of actions. See Ill. Rev. Stat. (1935) § 172; N. J. Comp. Stat. (Cum. Supp. 1911–1924) tit. 163, § 287 as modified by N. J. Sup. Ct. Rules (1926) Rule 21; N. Y. C. P. A. (1936) § 258 as amended by Laws of 1935, ch. 339.

2. This provision for joinder of actions has been patterned upon Equity Rule 26 (Joinder of Causes of Action) and broadened to include multiple parties. Compare the English practice, English Rules Under the Judicature Act (1935) O. 18, r. r. 1–9 (noting rules 1 and 6). The earlier American codes set forth classes of joinder, following the now abandoned New York rule. See N. Y. C. P. A. § 258 before amended in 1935; compare Kan. Rev. Stat. Ann. (1923) § 60–601; Wis. Stat. (1931) § 263.04.

3. The provisions of this rule for the joinder of claims are subject to Rule 84 (Jurisdiction and Venue Unaffected). For the jurisdictional aspects of joinder of claims, see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L. J. 393, 397–410. For severance of claims for trial, see Rule 43 (b).

Note to Subdivision (*b*). This rule is inserted to make it clear that in a single action a party should be accorded all the relief to which he is entitled regard-

less of whether it is legal or equitable or both. This necessarily includes a deficiency judgment in foreclosure actions formerly provided for in Equity Rule 10. In respect to fraudulent conveyances the rule changes the former rule requiring a prior judgment against the owner (*Braun* v. *American Laundry Mach. Co.*, 56 F. (2d) 197 (S. D. N. Y., 1932)) to conform to the provisions of the Uniform Fraudulent Conveyance Act, §§ 9 and 10. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act*, 46 Harvard Law Rev. 404, 444 (1936).

Note to the Supreme Court

The Committee is of the opinion that subdivision (b) deals with a procedural matter for which the court has the power to provide by rule. The same view apparently obtains in the federal decisions. See *Braun* v. *American Laundry Mach. Co.*, *supra.*

Rule 19. Necessary Joinder of Parties.

(a) NECESSARY JOINDER. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) EFFECT OF FAILURE TO JOIN. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between the original parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them sum-

moned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

(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 of persons, if known to him, who ought to be parties if complete relief is to be accorded between the original parties, but are not joined, and shall state why they are omitted.

NOTE

Note to Subdivision (*a*). The first sentence with verbal changes (e. g., "united" interest for "joint" interest) is to be found in Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provision is common. Compare Alaska Comp. Laws (1933) § 3392 (containing in same sentence a "class suit" provision); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89–515 (immediately followed by "class suit" provisions, § 89–516). See also Equity Rule 42 (Joint and Several Demands).

The joinder provisions of this rule are subject to Rule 84 (Jurisdiction and Venue Unaffected).

Note to Subdivision (*b*). For the substance of this rule See Equity Rule 39 (Absence of Persons who Would be Proper Parties) and U. S. C., Title 28, § 111

(When part of several defendants cannot be served); *Camp* v. *Gress*, 250 U. S. 308 (1919). See also the second and third sentences of Equity Rule 37 (Parties Generally—Intervention).

Note to Subdivision (*c*). For the substance of this rule see the fourth subdivision of Equity Rule 25 (Bill of Complaint—Contents).

Rule 20. Permissive Joinder of Parties.

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) SEPARATE TRIALS. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against

him, and may order separate trials or make other orders to prevent delay or prejudice.

NOTE

The provisions for joinder here stated are in substance the provisions found in England, California, Illinois, New Jersey, and New York. They represent only a moderate expansion of the present federal equity practice to cover both law and equity actions.

With this rule compare also Equity Rules 26 (Joinder of Causes of Action), 37 (Parties Generally—Intervention), 40 (Nominal Parties), and 42 (Joint and Several Demands).

The provisions of this rule for the joinder of partiee are subject to Rule 84 (Jurisdiction and Venue Unaffected).

Note to Subdivision (*a*). The first sentence is derived from English Rules Under the Judicature Act (1935) O. 16, r. 1 (plaintiffs) and r. 4 (defendants). Compare Calif. Code Civ. Proc. (Deering, 1931) §§ 378, 379 (a); Ill. Rev. Stat. (1935) ch. 110, §§ 151, 152; 2 N. J. Comp. Stat., (Cum Supp. 1911–1924) tit. 163, §§ 280, 282; N. Y. C. P. A. (1936) §§ 209, 211. The second and third sentences are derived from English Rules Under the Judicature Act (1935) O. 16, r. 4.

Note to Subdivision (*b*). This is derived from English Rules Under the Judicature Act (1935) O. 16, r. r. 1 and 5.

Rule 21. Misjoinder and Non-Joinder of Parties. Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

NOTE

See English Rules Under the Judicature Act (1935) O. 16, r. 11. See also Equity Rules 43 (Defect of Parties-Resisting Objection) and 44 (Defect of Parties-Tardy Objection).

Rule 22. Interpleader.

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Section 24 (26) of the Judicial Code, as amended, U. S. C., Title 28, § 41 (26). Actions under that section shall be conducted in accordance with these rules.

NOTE

The first paragraph provides both for strict interpleader and for actions in the nature of interpleader under the former equity practice. The last sentence

of the first paragraph expressly reserves the right to utilize such procedure along the newer and more liberal lines of joinder in the alternative. Compare Calif. Code Civ. Proc. (Deering, 1931) § 386; Conn. Gen. Stat. (1930) § 5911 (action in nature of interpleader). Compare also English Rules Under the Judicature Act (1935) O. 57, r. r. 1–17. This paragraph restates the better practice on interpleader, as developed by judicial decision. It does not change the rules on service of process, jurisdiction, or venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 70 (e).

This rule substantially continues such statutory provisions as U. S. C., Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U. S. C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, *The Federal Interpleader Act of 1936:* I and II (1936), 45 Yale L. J. 963, 1161.

Rule 23. Class Actions.

(a) REPRESENTATION. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such a number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants, when the character of the right

sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) SECONDARY ACTION BY SHAREHOLDERS. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the

reasons for his failure to obtain such action or the reasons for not making such effort.

(c) DISMISSAL OR COMPROMISE. No class action shall be dismissed or compromised without the approval of the court on such notice to other members of the class as the court may require.

NOTE

Note to Subdivision (a). This is a substantial restatement of Equity Rule 38 as that rule has been construed. It applies to all actions, whether formerly denominated legal or equitable. For a general analysis of class actions, effect of judgment, and requisites of jurisdiction see Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L. J. 551, 570 *et seq.* (1937); cf. Arnold and James, *Cases on Trials, Judgments and Appeals* (1936) 175; and see Blume, *Jurisdictional Amount in Representative Suits*, 15 Minn. L. Rev. 501 (1931).

The general test of Equity Rule 38 (Representatives of Class) that the question should be "one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court," is a common test. For states which require the two elements of a common or general interest *and* numerous persons, as provided for in Equity Rule 38, see Del. ch. Rule 113; Fla. Comp. Gen. Laws Ann. (Supp. 1936) § 4918 (7); Ga. Code Ann. (Michie, 1926) § 5415, and see English Rules Under the Judicature Act (1935) O. 16, r. 9. For statutory provisions providing for class actions when the question is one of common or general interest *or* when the parties are numerous, see Ala. Code Ann. (Michie, 1928) § 5701; Ind. Stat. Ann. (Burns, 1933) Civ. Code § 277; N. Y. C. P. A. (1936) § 195; Wis. Stat. (1931) ch. 260, § 12. These statutes have, however, been uniformly construed as though phrased

in the conjunctive. See *Garfein* v. *Stiglitz*, 260 Ky. 430, 86 S. W. (2d) 155 (1935). The rule adopts the test of Equity Rule 38, but defines what constitutes a "common or general interest". Compare with code provisions which make the action dependent upon the propriety of joinder of the parties. See Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932). For discussion of what constitutes "numerous persons" see Wheaton, *Representative Suits Involving Numerous Litigants*, 19 Corn. L. Q. 399 (1934); Note, 36 Harv. L. Rev. 89 (1922).

Clause (1). Joint, Common, or Secondary Right. This clause is illustrated in actions brought by or against representatives of an unincorporated association. See *Oster* v. *Brotherhood of Locomotive Firemen and Enginemen*, 271 Pa. 419, 114 Atl. 377 (1921); *Pickett* v. *Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (NS) 1067 (1906); *Colt* v. *Hicks*, 179 N. E. 335 (Ct. of App. Ind. 1932). Compare Rule 17 (b) as to when an unincorporated association has capacity to sue or be sued in its common name; *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U. S. 344 (1922) (an unincorporated association was treated as an entity for the purpose of enforcing against it a federal substantive right); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L. J. 551, 566 (for discussion of jurisdictional requisites when an unincorporated association sues or is sued in its common name and jurisdiction is founded upon diversity of citizenship). For an action brought by representatives of one group against representatives of another group for distribution of a fund held by an unincorporated association, see *Smith* v. *Swormstedt*, 57 U. S. 288 (1853).

For an action to enforce a right or rights held in common by policyholders against the corporate issuer of the policies, see *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356 (1921). See also *Terry* v. *Little*, 101 U. S. 216 (1880); *John A. Roebling's Sons Co.* v.

Kinnicutt, 248 Fed. 596 (D. C. N. Y. 1917) dealing with the right held in common by creditors to enforce the statutory liability of stockholders.

Typical of a secondary action is a suit by stockholders to enforce a corporate right. For discussion of the general nature of these actions see *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288 (1936); Glenn, *The Stockholder's Suit—Corporate and Individual Grievances*, 33 Yale L. J. 580 (1924); McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421 (1937). See also subdivision (b) of this rule which deals with Shareholder's Action; Note, 15 Minn. L. Rev. 453 (1931).

Clause (*2*). A creditor's action for liquidation or reorganization of a corporation is illustrative of this clause. An action by a stockholder against certain named defendants as representatives of numerous claimants presents a situation converse to the creditor's action.

Clause (*3*). See *Everglades Drainage League* v. *Napoleon Howard Drainage Dist.*, 253 Fed. 246 (D. C. Fla. 1918); *Gramling* v. *Maxwell*, 52 F. (2d) 256 (D. C. N. C. 1931), approved in 30 Mich. L. Rev. 624 (1932); *Skinner* v. *Mitchell*, 108 Kan. 861, 197 Pac. 569 (1921); *Duke of Bedford* v. *Ellis* (1901) A. C. 1, for class actions when there were numerous persons and there was only a question of law or fact common to them; and see Blume, *The "Common Questions" Principle in the Code Provision for Representative Suits*, 30 Mich. L. Rev. 878 (1932).

Note to Subdivision (*b*). This is Equity Rule 27 (Stockholder's Bill) with verbal changes.

The Committee consider it beyond their functions to deal with the question of the effect of judgments on persons who are not parties. No attempt has been made to state the effect of the judgments upon members of a class who have not been specifically named as parties to the action.

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in such action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

NOTE

The right to intervene given by the following and similar statutes is preserved, but the procedure for its assertion is governed by this rule:

U. S. C., Title 28:

§ 45a (Special attorneys; participation by Interstate Commerce Commission; intervention) (in certain cases under interstate commerce laws)

§ 48 (Suits to be against United States; intervention by United States)

U. S. C., Title 40:

§ 276a–2 (b) (Bonds of contractors for public buildings or works; rights of persons furnishing labor and materials).

Compare with the last sentence of Equity Rule 37 (Parties Generally—Intervention). This rule amplifies and restates the present federal practice at law and in equity. For the practice in admiralty see Admiralty Rules 34 (How Third Party May Intervene) and 42 (Claims Against Proceeds in Registry). See generally Moore and Levi, *Federal Intervention* (1936), 45 Yale L. J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen. Code Ann. (Page, 1926) § 11263; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89–522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (Colo. Code Civ. Proc. Ann. (Mills, 1933) § 22; La. Code Pract. (Dart, 1932) Arts. 389–394; Utah Rev. Stat. Ann. (1933) §104–3–24). The English intervention practice is based upon various rules and decisions and falls into the two categories of absolute right and discretionary right. For the absolute right see English Rules Under the Judicature Act (1935) O. 12, r. 24 (admiralty); r. 25 (land); r. 23 (probate); O. 57, r. 12 (execution); J. A. (1925) §§ 181, 182, 183 (2) (divorce); *In Re Metro-*

political Amalgamated Estates, Ltd., 2 Ch. 497 (1912) (receivership); *Wilson* v. *Church*, 9 Ch. Div. 352 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916) *Vavasseur* v. *Krupp*, 9 Ch. D. 351 (1878) (persons out of the jurisdiction).

Rule 25. Substitution of Parties.

(a) DEATH.

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 (a) and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiff or plaintiffs or only against the surviving defendant or defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

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(b) INCOMPETENCY. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) TRANSFER OF INTEREST. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. When an officer of the United States, the District of Columbia, a state, county, or city, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency such officer dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be

affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

NOTE

Note to Subdivision (*a*). 1. The first paragraph of this rule is based upon Equity Rule 45 (Death of Party—Revivor) and U. S. C., Title 28, § 778 (Death of parties; substitution of executor or administrator). The *scire facias* procedure provided for in the statute cited is superseded and the writ is abolished by Rule 83 (b). Paragraph two states the content of U. S. C., Title 28, § 779 (Death of one of several plaintiffs or defendants). With these two paragraphs compare generally English Rules Under the Judicature Act (1935) O. 17, r. r. 1–10.

2. This rule modifies U. S. C., Title 28, §§ 778 (Death of parties; substitution of executor or administrator), 779 (Death of one of several plaintiffs or defendants), and 780 (Survival of actions, suits, or proceedings, etc., in so far as they differ from it.

Note to Subdivisions (*b*) *and* (*c*). These are a combination and adaptation of N. Y. C. P. A. (1936) § 83 and Calif. Code Civ. Proc. (Dearing, 1931) § 385.

Note to Subdivision (*d*). With the first and last sentences compare U. S. C., Title 28, § 780 (Survival of actions, suits, or proceedings, etc. With the second sentence of this subdivision compare *Ex parte La Prade*, 289 U. S. 444 (1933).

V. DEPOSITIONS, DISCOVERY, AND SUMMARY JUDGMENTS

Rule 26. Depositions Pending Action.

(a) WHEN DEPOSITIONS MAY BE TAKEN. At any time after an answer has been filed, or by leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action, the testimony of any person, whether a party or not, may, at the instance of any party, be taken by deposition upon oral examination or written interrogatories for the purpose of discovery, for use as evidence at the trial, or for both purposes. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 46. Oral depositions shall be taken only in accordance with Rule 30 and written depositions only in accordance with Rule 31. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the Court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the iden-

tity and location of persons having knowledge of relevant facts.

(c) EXAMINATION AND CROSS-EXAMINATION. Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 44 (b).

(d) USE OF DEPOSITIONS. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness is out of the district and at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party

offering the deposition; or 3, that the witness is unable to attend or testify because of age, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is introduced, the adverse party may introduce any other part which is relevant to the part introduced.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) OBJECTIONS TO ADMISSIBILITY. Objection may be made to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(f) EFFECT OF TAKING OR USING DEPOSITIONS. A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent.

NOTE

Note to Subdivision (a). This rule freely authorizes the taking of depositions under the same circumstances and by the same methods whether for the purpose of discovery or for the purpose of obtaining evidence. Many states have adopted this practice on account of its simplicity and effectiveness, safeguarding it by imposing such restrictions upon the subsequent use of the deposition at the trial or hearing as are deemed advisable. See Ark. Dig. Stat. (Crawford & Moses, 1921) §§ 4205–6; Calif. Code Civ. Proc. (Deering, 1931) § 2021; Colo. Code Civ. Proc. Ann. (Mills, 1933) § 392; Idaho Code Ann. (1932) § 16–906; Ill. Rules of Pract. (1933) Rule 19; Ill. Rev. Stat. (1935) ch. 51, § 24; Ind. Stat. Ann. (Burns, 1933) §§ 2–1501, 2–1506; Ky. Codes (Carroll, 1927) Civ. Pract. § 557; Mo. Rev. Stat. (1929) § 1753; 4 Mont. Rev. Codes Ann. (1935) § 10645; Neb. Comp. Stat. (1929) ch. 20, §§ 1246–7; Nev. Comp. Laws (Hillyer, 1929) § 9001; N. H. Pub. Laws (1926) ch. 337, § 1; N. C. Code Ann. (1931) § 1809; N. D. Comp. Laws

Ann. (1913) §§ 7889–7897; Ohio Gen. Code Ann. (Page, 1926) §§ 11525–6; Ore. Code Ann. (1930) ch. 9, § 1503; S. D. Comp. Laws (1929) §§ 2713–16; Tex. Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev. Stat. Ann. (1933) § 104–51–7; Wash. Rules of the Sup. Ct., Rule 8 (150 Wash. XXXVII); W. Va. Code (1931) ch. 57, art. 4, § 1. Compare Equity Rules 47 (Deposition—To be Taken in Exceptional Instances); 54 (Depositions Under Revised Statutes, Sections 863, 865, 866, 867—Cross-Examination); 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness).

This and subsequent rules incorporate, modify, and broaden the provisions for depositions under U. S. C., Title 28, §§ 639 (Depositions *de bene esse;* when and where taken; notice), 640 (Same; mode of taking), 641 (Same; transmission to the court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem* and *in perpetuam*). These statutes are superseded in so far as they differ from this and subsequent rules. U. S. C., Title 28, § 643 (Depositions; taken in mode prescribed by state laws) is superseded by the third sentence of Subdivision (a).

While a number of states permit discovery only from parties or their agents, others either make no distinction between parties or agents of parties and ordinary witnesses, or authorize the taking of ordinary depositions, without restriction, from any persons who have knowledge of relevant facts. See Ark. Dig. Stat. (Crawford & Moses, 1921) §§ 4205–6; Idaho Code Ann. (1932) § 16–906; Ill. Rules of Pract. (1933) Rule 19; Ill. Rev. Stat. (1935) ch. 51, § 24; Ind. Stat. Ann. (Burns, 1933) § 2–1501; Ky. Codes (Carroll, 1927) Civ. Pract. §§ 554–558; Md. Ann. Code (Bagby, 1924) Art. 35, § 21; 2 Minn. Stat. (Mason, 1927) § 9820; Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) §§ 1246–7; N. H. Pub. Laws (1926) ch. 337, § 1; N. D. Comp. Laws Ann. (1913) § 7897; Ohio Gen. Code Ann. (Page, 1926) §§ 11525–6;

S. D. Comp. Laws (1929) §§ 2713–16; Tex. Stat. (Vernon, 1928) arts. 3738, 3752, 3769; Utah Rev. Stat. Ann. (1933) § 104–51–7; Wash. Rules of Sup. Ct., Rule 8 (150 Wash. XXXVII); W. Va. Code (1931) ch. 57, art. 4, § 1.

The more common practice in the United States is to take depositions on notice by the party desiring them, without any order from the court, and this has been followed in these rules. See Calif. Code Civ. Proc. (Deering, 1931) § 2031; Fla. Comp. Gen. Laws Ann. (1927) §§ 4405–7; Idaho Code Ann. (1932) § 16–902; Ill. Rules of Pract. (1933) Rule 19; Ill. Rev. Stat. (1935) ch. 51, § 24; Ind. Stat. Ann. (Burns, 1933) § 2–1502; Kan. Rev. Stat. Ann. (1923) § 60–2827; Ky. Codes (Carroll, 1927) § 565; 2 Minn. Stat. (Mason, 1927) § 9820; Mo. Rev. Stat. (1929) § 1761; 4 Mont. Rev. Codes Ann. (1935) § 10651; Nev. Comp. Laws (Hillyer, 1929) § 9002; N. C. Code Ann. (1931) § 1809; N. D. Comp. Laws Ann. (1913) § 7895; Utah Rev. Stat. Ann. (1933) § 104–51–8.

Note to Subdivision (b). While the old chancery practice limited discovery to facts supporting the case of the party seeking it, this limitation has been largely abandoned by modern legislation. See Ala. Code Ann. (Michie, 1928) §§ 7764–7773; Ind. Stat. Ann. (Burns, 1926) §§ 383, 465, 564–568; Iowa Code (1931) § 11185; Ky. Codes (Carroll, 1927) Civ. Pract. §§ 557, 606 (8); La. Code Pract. (Dart, 1932) arts. 347–356; Mass. Gen. Laws (Ter. Ed.) ch. 231, §§ 61–67; Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) §§ 20–1246, 20–1247; N. H. Pub. Laws (1926) ch. 337, § 1; Ohio Gen. Code Ann. (Page, 1926) §§ 11497, 11526; Tex. Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis. Stat. (1931) § 326.12; Ontario Consol. Rules of Pract. (1928) Rules 237–347; Quebec Code of Civ. Proc. (Curran, 1922) §§ 286–290.

Note to Subdivisions (d), (e), and (f). The restrictions here placed upon the use of depositions at the trial or hearing are substantially the same as those provided in U. S. C., Title 28, § 641, for depositions

taken *de bene esse*, with the additional provision that any deposition may be used when the court finds the existence of exceptional circumstances. Compare English Rules Under the Judicature Act (1935) O. 37, r. 18 (with additional provision permitting use of deposition by consent of the parties). See also Equity Rule 64 (Former Depositions, etc. May be Used Before a Master); and 2 Minn. Stat. (Mason, 1927) § 9835 (Use in a subsequent action of a deposition filed in a previously dismissed action between the same parties and involving the same subject matter).

A slight relaxation of the rule against impeaching one's own witness is here proposed, but only to the extent of allowing self-contradictions to be shown. See Wigmore, *Evidence*, vol. 3, § 1856a, and the following statutes which authorize a party to impeach his own witness by showing inconsistent statements made by the witness: Fla. Comp. Gen. Laws (1927) § 4377; Ind. Stat. Ann. (Burns, 1933) § 2–1726; Ky. Codes (Carroll, 1927) Civ. Pract. § 596; Tex. Stat. (Vernon, 1928) art. 750, Code Crim. Proc.

Rule 27. Depositions Before Action.

(a) PETITION AND ORDER. 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 court of the district of his residence or of the residence of an expected adverse party, entitled in his own name as petitioner, showing: (1) that the petitioner expects to be a party to an action 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, (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. The court shall then make an order designating the persons whose depositions are to be taken and the subject matter regarding which they are to be examined and designating or describing the persons to be served with notice as prospective parties to the action. Depositions may then be taken on oral examination or by written interrogatories 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.

(b) NOTICE AND SERVICE. The persons to be served with notice and the scope of the examination shall be as designated in the order, a copy of which shall be attached to every notice served. The notice may be served either within or without the district or state in the manner provided in Rule 4 for the service of summons; but, if personal service cannot with due diligence be made upon any person designated in the order, the court shall make such order as is just for service by publication and may appoint, for persons not personally served, an attorney who may appear and cross-examine the deponents.

(c) 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 general jurisdiction of the state in which it is taken, it may be used on a subsequent trial of the expected action in a district court of the United States, in accordance with the provisions of Rule 26 (d).

NOTE

This rule incorporates and broadens the scope of U. S. C., Title 28, § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) in so far as that statute authorizes the taking of depositions to perpetuate testimony for anticipated actions as distinguished from pending actions. In so far as the provisions of that statute and similar statutes differ from this rule, they are superseded. This rule incorporates U. S. C., Title 28, § 645 (Depositions *in perpetuam;* admissible at discretion of court) and broadens it.

The provisions of this rule are quite similar to Calif. Code Civ. Proc. (Deering, 1931) §§ 2084–2089, and Iowa Code (1935) §§ 11400–11407. For other state provisions, see Ill. Rev. Stat. (1935) ch. 15, §§ 39–46; 2 Minn. Stat. (Mason, 1927) §§ 9839–9850; N. Y. C. P. A. (1936) § 295, and N. Y. R. C. P. (1936) Rule 123; 3 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 1249–1253. Compare English Rules Under the Judicature Act (1935) O. 37, r. r. 35–38. The provision for appointment of an attorney to appear in behalf of persons not personally served is similar to Iowa Code (1935) § 11402.

Note to the Supreme Court

The case of *Union Solvents Corp.* v. *Butacet Corp.*, 2 Fed. Supp. 375 (D. C., Del. 1933) held that the perpetuation of testimony constituted an independent action requiring grounds of federal jurisdiction.

The Committee is of the belief that the proceeding authorized by this rule (Rule 27) is not such a new action and no independent grounds of jurisdiction are required.

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held.

(b) IN FOREIGN COUNTRIES. In a foreign state or country depositions shall be taken before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or before an officer with authority to administer oaths 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. Commissions may be addressed to officers either by name or by descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in [here name the country]".

(c) DISQUALIFICATION FOR INTEREST. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or em-

ployee of such attorney or counsel, or is financially interested in the action.

NOTE

In effect this rule is substantially the same as U. S. C., Title 28, § 639 (Depositions *de bene esse;* when and where taken; notice). U. S. C., Title 28, § 642 (Depositions, acknowledgments, and affidavits taken by notaries public) is incorporated within the terms of the first sentence.

Compare Calif. Code Civ. Proc. (Deering, 1931) § 2024.

Rule 29. Stipulations Regarding the Taking of Depositions. If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

Rule 30. Depositions Upon Oral Examination.

(a) NOTICE OF EXAMINATION: TIME AND PLACE. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) ORDERS FOR THE PROTECTION OF PARTIES

AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) RECORD OF EXAMINATION; OATH; OBJECTIONS. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and

any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(d) MOTION TO TERMINATE 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 for the purpose of annoying, embarrassing, or oppressing 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. If the order is made, the examination shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the taking of the deposition shall be suspended for the time necessary to make possible a motion for an order.

(e) SUBMISSION TO WITNESS; CHANGES; SIGNING. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read over to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance

which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) CERTIFICATION AND FILING BY OFFICER; COPIES; NOTICE OF FILING.

(1) The officer shall certify by indorsement on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish

a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness by oral examination fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

NOTE

Note to Subdivision (*a*). This is in accordance with common practice. See U. S. C., Title 28, § 639 (Depositions *de bene esse*; when and where taken; no-

tice), the relevant provisions of which are incorporated in this rule; Calif. Code Civ. Proc. (Deering, 1931) § 2031; and statutes cited in respect to notice in the *Note* to Rule 26 (a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

Note to Subdivisions (b) and (d). These are introduced as a safeguard for the protection of parties and deponents on account of the unlimited right of discovery given by Rule 26.

Note to Subdivisions (c) and (e). These follow the general plan of Equity Rule 51 (Evidence Taken Before Examiners, etc.) and U. S. C., Title 28, §§ 640 (Depositions *de bene esse*; mode of taking), and 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the deponent is not satisfied with it. See also Equity Rule 50 (Stenographer—Appointment—Fees).

Note to Subdivision (f). Compare Equity Rule 55 (Depositions Deemed Published When Filed).

Note to Subdivision (g). This is similar to 2 Minn. Stat. (Mason, 1927) § 9833, but is more extensive.

Rule 31. Depositions of Witnesses Upon Written Interrogatories.

(a) SERVING INTERROGATORIES; NOTICE. A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross-interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve re-direct-

interrogatories upon a party who has served cross-interrogatories. Within 3 days after being served with re-direct-interrogatories, a party may serve re-cross-interrogatories upon the party proposing to take the deposition.

(b) OFFICER TO TAKE RESPONSES AND PREPARE RECORD. A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (c), (e), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) NOTICE OF FILING. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(d) ORAL EXAMINATION MAY BE ORDERED. If a party upon receiving interrogatories promptly moves for an order that the deposition shall not be taken except upon oral examination and shows cause why a satisfactory deposition cannot be taken by written interrogatories, the court may make the order.

NOTE

This rule is in accordance with common practice. In most of the states listed in the *Note* to Rule 26 (a), provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the *Note* to Rule 26 (a).

Rule 32. Effect of Errors and Irregularities in Depositions.

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 3 days after service of the last interrogatories authorized.

(d) COMPLETION AND RETURN OF DEPOSITION. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

NOTE

This rule is in accordance with common practice. In most of the states listed in the *Note* to Rule 26, provisions similar to this rule will be found in the statutes which in their respective statutory compilations follow those cited in the *Note* to Rule 26.

Rule 33. Interrogatories to Parties. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be

signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

NOTE

This rule restates the substance of Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness), with modifications to conform to these rules.

Rule 34. Production of Documents and Things for Inspection, Copying, or Photographing. Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material

to any matter involved in the action and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting or photographing the property or any designated relevant object thereon. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

NOTE

In England orders are made for the inspection of documents, English Rules Under the Judicature Act (1935) O. 31, r. r. 14, *et seq.*, or for the inspection of tangible property or for entry upon land, O. 50, r. 3. Michigan provides for inspection of damaged property when such damage is the ground of the action. Mich. Court Rules Ann. (Searl, 1933) Rule 41, § 2.

Practically all states have statutes authorizing the court to order parties in possession or control of documents to permit other parties to inspect and copy them before trial. See Ragland, *Discovery Before Trial* (1932), Appendix, setting out the statutes.

Compare Equity Rule 58 (Discovery—Interrogatories—Inspection and Production of Documents—Admission of Execution or Genuineness) (fifth paragraph).

Rule 35. Physical and Mental Examination of Persons.

(a) ORDER FOR EXAMINATION. In an action in which the mental or physical condition of a party is involved, the court in which the action is pending may order him to submit to

a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF FINDINGS.

(1) A party causing the examination to be made shall deliver to the party examined, upon his request, a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such 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, in respect to the same mental or physical condition. If the party examined refuses to deliver any 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.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine

him in respect of the same mental or physical condition.

NOTE

Physical examination of parties before trial is authorized by statute or rule in a number of states. See Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 4468; Mich. Court Rules Ann. (Searl, 1933) Rule 41, § 2; N. J. Comp. Stat. (1910) p. 2226; N. Y. C. P. A. (1936) § 306; S. D. Comp. Laws (1929) § 2716A; Wash. Rev. Stat. Ann. (Remington, 1932) § 1230–1.

Mental examination of parties is authorized in Iowa. Iowa Code (1935) ch. 491–F1. See McCash, *The Evolution of the Doctrine of Discovery and Its Present Status in Iowa*, 20 Ia. L. Rev. 68 (1934).

The constitutionality of legislation providing for physical examination of parties was sustained in *Lyon* v. *Railway Co.*, 142 N. Y. 298, 37 N. E. 113 (1894), and *McGovern* v. *Hope*, 63 N. J. L. 76, 42 Atl. 830 (1899). In *Union Pacific Ry. Co.* v. *Botsford*, 141 U. S. 250 (1890), it was held that the court could not order the physical examination of a party in the absence of statutory authority.

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

(a) REQUEST FOR ADMISSION. At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be

deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a specific denial under oath of the matters of which an admission is requested.

(b) EFFECT OF ADMISSION. Any admission made by a party pursuant to such request shall be for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

NOTE

Compare similar rules: Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judicature Act (1935) O. 32; Ill. C. P. A. (1933) § 58, and Rule 10 (§ 104); Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 69; Mich. Court Rules Ann. (Searl, 1933) Rule 42; N. J. Laws 1912, ch. 231, § 18; N. Y. C. P. A. (1936) § 323; Wis. Stat. (1931) § 327.22.

Rule 37. Refusal to Make Discovery: Consequences.

(a) REFUSAL TO ANSWER. If a party or other witness refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the dis-

trict where the deposition is taken for an order compelling an answer. Upon the refusal of a witness to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or witness and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was filed without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) FAILURE TO COMPLY WITH ORDER.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal shall be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made

under subdivision (a) of this rule requiring him to answer designated questions, or an order under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or

rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) EXPENSES ON REFUSAL TO ADMIT. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth or any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action

or proceeding or any part thereof, or enter a judgment by default against that party.

(e) FAILURE TO RESPOND TO LETTERS ROGATORY. A subpoena may be issued as provided in the Act of July 3, 1926, c. 762, § 1 (44 Stat. 835), U. S. C., Title 28, § 711, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

Rule 38. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time specified for the hearing. Unless the adverse party prior to the day of hearing serves opposing affidavits setting forth facts sufficient to constitute a denial or avoidance, the judgment sought shall be rendered forthwith if (1) the pleadings of the moving party and also (2) the depositions and admissions on file together with the affidavits, if

any, attached to or served with the motion show upon their face that, except as to the amount of damages, there is no genuine issue as to any material fact and that he is entitled to a judgment as a matter of law.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to

be supplemented or opposed by depositions or by further affidavits.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits referred to in this rule were presented in bad faith, or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

NOTE

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600

applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (1935) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1935) ch. 110, §§ 185, 238, and 239), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1936) Rule 13; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommends that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L. J. 423.

Note to Subdivision (d). A practice similar to that provided in this rule has been employed for some years in the Wayne Circuit Court in Detroit, Michigan, and has been recently adopted, as used in Detroit, by the Superior Court in Boston. See *A Proposal for Minimizing Calendar Delay in Jury Cases* (published by the New York Law Society, 1936) discussing the practice as employed in the above courts.

See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

Note to Subdivisions (e) and (f). These are similar to rules in Michigan, which have proved satisfactory. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

VI. TRIALS

Rule 39. Jury Trial of Right.

(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(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 claim therefor in writing at any time within 5 days after the service of the last pleading directed to such issue.

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

(d) WAIVER. The failure of a party to serve a claim as required by this rule and to file it as required by Rule 5 (b) constitutes a waiver by him of trial by jury. A claim for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

NOTE

This rule provides for the preservation of the constitutional right of trial by jury as directed in the enabling act (Act of June 19, 1934, 48 Stat. 1064, U. S. C., Title 28, § 723c), and it and the next rule make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions. Thus the claim must be made at once on initial pleading or appearance under Ill. Rev. Stat. (Smith-Hurd, 1933) § 188; 6 Tenn. Code Ann. (Williams, 1934) § 8734; and Wyo. Rev. Stat. Ann. (1931) § 89–1320, Laws 1915, ch. 66, § 1, amending Comp. Stat. (1910) § 4514; within 10 days after the pleadings are completed or the case is at issue under Conn. Gen. Stat. (1930) § 5624; Hawaii Rev. Laws (1935) § 4101; Mass. Gen. Laws (Ter. Ed.) ch. 231, § 60; Mich. Comp. Laws (1929) § 14263, Mich. Court Rules Ann. (Searle, 1933) Rule 33 (15 days); England (until 1933) O. 36, r. r. 2 and 6; and Ontario Jud. Act (1927) § 57 (1) (4 days, or, where prior notice of trial, 2 days from such notice); or at a definite time varying, under different codes, from 10 days before notice of trial to 10 days after notice, or, as in many, when the case is called for assignment, Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 3802; Calif. Code Civ. Proc. (Deering, 1931) § 631, par. 4; Iowa Code (1931) § 10724; 4 Nev. Comp. Laws. (Hillyer, 1929) § 8782; N. M. Stat. Ann. (Courtright, 1929) § 105–814; N. Y. Laws 1927, ch. 696, and 1929, ch. 196, amending C. P. A. § 426 (applying to New York, Bronx, Richmond, Kings, and Queens counties); Ohio Gen. Code Ann. (Page, 1926) § 11466 (applying to Hamilton and Cuyahoga counties); R. I. Laws 1929, ch. 1327, amending Gen Laws (1923) ch. 337, § 6; Utah Rev. Stat. Ann. (1933) § 104–23–6; Wash. Rev. Stat. Ann. (Remington, 1932) § 316; England (4 days after notice of trial), Administration of Justice Act (1933) § 6 and amended rule under the Judicature Act, O. 36, r. 1; Australia High Court Procedure Act (1921) § 12,

Rules, O. 33, r. 2; Alberta Rules of Ct. (1914) 172, 183, 184; British Columbia Sup. Ct. Rules (1925) O. 36, r. r. 2, 6, 11, and 16; New Brunswick Jud. Act (1927) O. 36, r. r. 2 and 5. See James, *Trial by Jury and the New Federal Rules of Procedure* (1936), 45 Yale L. J. 1022.

Rule 83 (c) provides for claim for jury trial in removed actions.

The right to trial by jury as declared in U. S. C., Title 28, § 770 (Trial of issues of fact; by jury; exceptions), and similar statutes, is unaffected by this rule. This rule modifies U. S. C., Title 28, § 773 (Trial of issues of fact; by court).

Rule 40. Trial by Jury or by the Court.

(a) By Jury. When trial by jury has been claimed as provided in Rule 39, the action shall be designated upon the docket as a jury action. The trial of all issues so claimed shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) By the Court. Issues not claimed for trial by jury as provided in Rule 39 shall be tried by the court; but, notwithstanding the failure of a party to claim a jury in an action in which such a claim might have been made of right, the court in its discretion upon motion of that party may order any issue tried by a jury.

(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, may, with the consent of both parties, order a trial with a jury whose verdict shall have the same effect as if trial by jury had been a matter of right.

NOTE

The provisions for express waiver of jury trial found in U. S. C., Title 28, § 773 (Trial of issues of fact; by court) are incorporated in this rule. See Rule 39, however, which extends the provisions for waiver of jury. U. S. C., Title 28, § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co.* v. *Condon Nat. Bank*, 260 U. S. 235 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif. Code Civ. Proc. (Deering, 1931) § 592; Colo. Code Civ. Proc. Ann. (Mills, 1933) § 190; Conn. Gen. Stat. (1930) § 5625; 2 Minn. Stat. (Mason, 1927) § 9288; 4 Mont. Rev. Codes Ann. (1935) § 9327; N. Y. C. P. A. (1936) § 430; Ohio Gen. Code Ann. (Page, 1926) § 11380; Okla. Stat. Ann. (Harlow, 1931) § 351; Utah Rev. Stat. Ann. (1933) § 104–23–5; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 315; Wis. Stat. (1931) § 270.07. See Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U. S. C., Title 28, § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co.* v. *Savannah River Lumber*

Co., 280 Fed. 358 (C. C. A. 4th, 1922); *Fed. Res. Bk. of San Francisco* v. *Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F. (2d) 922 (C. C. A. 9th, 1926), cert. den. 270 U. S. 646 (1926); *Watt* v. *Starke*, 101 U. S. 247, 25 L. Ed. 826 (1879).

Rule 41. Assignment of Cases for Trial.

The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the United States.

NOTE

U. S. C., Title 28, § 769 (Notice of case for trial) is modified. See Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also Equity Rule 47 (Continuances).

For examples of statutes giving precedence, see U. S. C., Title 28, § 47 (Injunctions as to orders of Interstate Commerce Commission); § 380 (Injunctions; alleged unconstitutionality of state statutes); § 768 (Priority of cases where a state is party); Title 15, § 28 (Anti-trust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under Interstate Commerce laws; expedition of suits).

Rule 42. Dismissal of Actions.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(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 1, by filing a notice of dismissal at any time before service of the answer or 2, by filing a stipulation of dismissal signed by all the parties who appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal shall be without prejudice, except that a notice of dismissal 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, shall operate as an adjudication upon the merits.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph shall be without prejudice.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against

him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal shall otherwise specify, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, shall have the effect of an adjudication upon the merits.

(c) DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

(d) COSTS OF PREVIOUSLY-DISMISSED ACTION If a plaintiff who has once dismissed an action in any court shall commence an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

NOTE

Note to subdivision (*a*). Compare Ill. C. P. A., § 52 (Ill. Rev. Stat. (1935) ch. 110, par. 180) and English Rules Under the Judicature Act (1935) O. 26.

Note to subdivision (*b*). This provides for the equivalent of a nonsuit on motion by the defendant after the completion of the presentation of evidence by the plaintiff. It also provides in actions tried without a jury for the equivalent of a directed verdict in actions tried by a jury as provided in Rule 51 (Motion for a Directed Verdict).

Rule 43. Consolidation; Severance and Separate Trials.

(a) CONSOLIDATION. When actions of a like nature or involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEVERANCE AND SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, may order claims which are joined in an action or any counterclaims which do not diminish or defeat the recovery sought against the counterclaimant to be proceeded with in separate actions; or it may order separate trials thereof in the same action.

NOTE

This rule continues the substance of U. S. C., Title 28, § 734 (Orders to save costs; consolidation of causes of like nature) but in so far as the statute differs from this rule, it is modified.

Compare Ark. Dig. Stat. (Crawford & Moses, 1921) § 1081; Calif. Code Civ. Proc. (Deering, 1931) § 1048; N. M. Code (1915) § 4212; N. Y. C. P. A. (1936) §§ 96, 97; American Judicature Society, Bulletin XIV, (1919) Art. 26.

For the entry of separate judgments, see Rule 54 (b) (Judgment in Favor of and Against Various Parties and at Various Stages).

Rule 44. Evidence.

(a) FORM AND ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence shall govern and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A party may show that any witness, whether called by him or by an opposing party, has previously made, under oath or otherwise, statements contradictory to his testimony without having first called them to his attention. He may call an adverse

party and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by an opposing party. The opposing party also may contradict and impeach any such witness. A party may interrogate any unwilling or hostile witness by leading questions. When a party calls a witness and examines him as to some of the issues, an opposing party may cross-examine the witness upon all the material and pertinent issues of the action; but if the witness is an adverse party the cross-examination shall be limited to the subject matter of his examination in chief. The term "adverse party" as herein used includes an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.

(c) RECORD OF EXCLUDED EVIDENCE. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not

admissible on any ground or that the witness is privileged.

(d) AFFIRMATION IN LIEU OF OATH. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

NOTE

Note to subdivision (*a*). The first sentence is a restatement of the substance of U. S. C., Title 28, § 635 (Proof in common-law actions), § 637 (Proof in equity and admiralty), and Equity Rule 40 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *subdivision* (*b*) on contradiction and cross-examination modify U. S. C., Title 28, § 725 (Laws of states as rules of decision) in so far as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure* (1936), 45 Yale L. J. 622. The last sentence in effect continues U. S. C., Title 28, § 631 (Competency of witnesses governed by State laws).

Note to subdivision (*b*). With respect to the first sentence, see 2 *Wigmore on Evidence* (2nd ed., 1923) § 902 *et seq.;* with respect to the second sentence, see 4 *Wigmore on Evidence* (2nd, 1923) § 1885 *et seq.*

Note to subdivision (*c*). See Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac* v. *Lochren*, 143 Fed. 211 (C. C. A. 8th, 1906). See also *Blease* v. *Garlington*, 92 U. S. 1 (1875); *Nelson* v. *United States*, 201 U. S. 92, 115 (1906); *Unkel* v. *Wills*, 281 Fed. 20 (C. C. A. 8th, 1922).

Note to subdivision (d). See Equity Rule 78 (Affirmation in Lieu of Oath) and U. S. C., Title 1, § 1 (Words imparting singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to the Supreme Court

The first impression of the Committee was against touching the field of evidence. It later became clear that on account of the union of law and equity there would be doubt as to the rules of evidence to be applied. We think it essential to deal with the subject at least to the extent expressed in subdivision (a) of this rule. Having gone that far the Committee made the further provisions in subdivision (b) of this rule and summarized in Rule 45 the law on proof of official records now scattered through many Federal statutes.

Rule 45. Proof of Official Record.

(a) AUTHENTICATION OF COPY. An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in

which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) PROOF OF LACK OF RECORD. A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) OTHER PROOF. This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute.

NOTE

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including these specifically provided for by statutes of the United States. Such statutes are not superseded, however, and proof may also be made according to their provisions whenever they differ from this rule. Some of these statutes are:

U. S. C., Title 28:

§ 661 (Copies of department or corporation records and papers; admissibility; seal)

§ 662 (Same; in office of General Counsel of the Treasury)
§ 663 (Instruments and papers of Comptroller of Currency; admissibility)
§ 664 (Organization certificates of national banks)
§ 665 (Transcripts from books of Treasury in suits against delinquents; admissibility)
§ 666 (Same; certificate by Secretary or Assistant Secretary)
§ 669 (Copies of returns in returns office admissible)
§ 670 (Admissibility of copies of statements of demands by Post Office Department)
§ 671 (Admissibility of copies of post office records and statement of accounts)
§ 672 (Admissibility of copies of records in General Land Office)
§ 673 (Admissibility of copies of records, and so forth, of Patent Office)
§ 674 (Copies of foreign letters patent as prima facie evidence)
§ 675 (Copies of specifications and drawings of patents admissible)
§ 676 (Extracts from journals of Congress admissible when injunction of secrecy removed)
§ 677 (Copies of records in offices of United States consuls admissible)
§ 678 (Books and papers in certain district courts)
§ 679 (Records in clerk's office, western district of North Carolina)
§ 680 (Records in clerks' offices of former district of California)
§ 681 (Original records lost or destroyed; certified copy admissible)

§ 682 (Same; when certified copy not obtainable)
§ 685 (Same; certified copy of official papers)
§ 687 (Authentication of legislative acts; proof of judicial proceedings of state)
§ 688 (Proofs of records in offices not pertaining to courts)
§ 689 (Copies of foreign records relating to land titles)
§ 695 (Writings and records made in regular course of business; admissibility)
§ 695e (Same; foreign documents on record in public offices; certification)

U. S. C., Title 1:
§ 30 (Statutes at large; contents; admissibility in evidence)
§ 30a ("Little and Brown's" edition of laws and treaties competent evidence of Acts of Congress)
§ 54 (Codes and supplements as establishing prima facie the laws of United States and District of Columbia, etc.)
§ 55 (Copies of supplements to Code of Laws of United States and of District of Columbia Code and supplements; conclusive evidence of original)

U. S. C., Title 5:
§ 490 (Records of Department of Interior; authenticated copies as evidence)

U. S. C., Title 6:
§ 7 (Surety Companies as sureties; appointment of agents; service of process)

U. S. C., Title 8:
§ 9a (Citizenship of children of persons naturalized under certain laws; repatriation of native-born women married to aliens prior to September 22, 1922; copies of proceedings)

§ 356 (Regulations for execution of naturalization laws; certified copies of papers as evidence)

§ 399b (d) (Certifications of naturalization records; authorization; admissibility as evidence)

U. S. C., Title 11:

§ 44 (d), (e), (f), (g) (Bankruptcy court proceedings and orders as evidence)

§ 204 (Extensions extended, etc.; evidence of confirmation)

§ 207 (j) (Corporate reorganizations; certified copy of decree as evidence)

U. S. C., Title 15:

§ 127 (Trade-mark records in Patent Office; copies as evidence)

U. S. C., Title 20:

§ 52 (Smithsonian Institution; evidence of title to site and buildings)

U. S. C., Title 25:

§ 6 (Bureau of Indian Affairs; seal; authenticated and certified documents; evidence)

U. S. C., Title 31:

§ 46 (Laws governing General Accounting Office; copies of books, records, etc. thereof as evidence)

U. S. C., Title 38:

§ 11g (Seal of Veterans' Administration; authentication of copies of records)

U. S. C., Title 40:

§ 238 (National Archives; reproductions of archives; fee; admissibility in evidence of reproductions)

§ 270c (Bonds of contractors for public works; right of person furnishing labor or material to copy of bond)

U. S. C., Title 43:

§§ 57–59 (Copies of land surveys in certain states and districts admissible as evidence)

§ 83 (General Land Office registers and receivers; transcripts of records as evidence)

U. S. C., Title 46:

§ 823 (Records of Maritime Commission; copies; publication of reports; evidence)

U. S. C., Title 47:

§ 154 (m) (Federal Communications Commission; copies of reports and decisions as evidence)

§ 412 (Documents filed with Federal Communications Commission as public records; prima facie evidence; confidential records)

U. S. C., Title 49:

§ 14 (3) (Interstate Commerce Commission reports and decisions; printing and distribution of copies)

§ 19a (i) (Valuation of property of carriers by Interstate Commerce Commission; final published valuations to be prima facie evidence)

§ 16 (13) (Copies of schedules, tariffs, etc. filed with Interstate Commerce Commission to be prima facie evidence)

Acknowledgment is made of valuable suggestions from Dean John H. Wigmore and his special memorandum on Proof of Official Documents and Records. See also Wigmore, *A Critique of the Federal Court Rules Draft—Three Larger Aspects of the Work Which Require Further Consideration* (1936) 22 A. B. A. J. 811, 813.

Rule 46. Subpoena.

(a) FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk may issue a subpoena in blank to a party requesting it, who before service thereof shall fill it in as above provided.

(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

(c) SERVICE. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by exhibiting the original and by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an

officer or agency thereof, fees and mileage need not be tendered.

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The clerk shall not issue a subpoena commanding the production of books, papers, or documents on the taking of a deposition, without an order of the court.

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

(e) SUBPOENA FOR A HEARING OR TRIAL.

(1) At the request of any party subpoenas for attendance at a hearing or trial shall be issued by the clerk of the district court for the district in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the

district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena; and, when a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place.

(2) A subpoena directed to a witness in a foreign country shall issue under the circumstances and in the manner and be served as provided in the Act of July 3, 1926, c. 762, §§ 1, 3 (44 Stat. 835), U. S. C., Title 28, §§ 711, 713.

(f) CONTEMPT. Failure by any person without adequate excuse to obey a subpoena served upon him shall be deemed a contempt of the court from which the subpoena issued.

NOTE

This rule applies to subpoenas *ad testificandum* and *duces tecum* issued by the district courts for attendance at a hearing or a trial, or to take depositions. It does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority. The enforcement of such subpoenas by the district courts is regulated by appropriate statutes. Many of these statutes do not place any territorial limits on the validity of subpoenas so issued, but provide that they may be served anywhere within the United States. Among such statutes are the following:

U. S. C., Title 7, §§ 222 and 511n (Secretary of Agriculture)

U. S. C., Title 15, § 49 (Federal Trade Commission)

U. S. C., Title 15, §§ 77v (b), 78u (c), 79r (d) (Securities and Exchange Commission)

U. S. C., Title 16, §§ 797 (g) and 825f (Federal Power Commission)
U. S. C., Title 19, § 1333 (b) (Tariff Commission)
U. S. C., Title 22, §§ 268, 270d and e (International Joint Commission)
U. S. C., Title 26, §§ 614, 619 (b) (Board of Tax Appeals)
U. S. C., Title 26, § 1523 (a) (Internal Revenue Officers)
U. S. C., Title 29, § 161 (Labor Relations Board)
U. S. C., Title 33, § 506 (Secretary of War)
U. S. C., Title 35, §§ 54–56 (Patent Office proceedings)
U. S. C., Title 38, § 133 (Veterans' Administration)
U. S. C., Title 41, § 39 (Secretary of Labor)
U. S. C., Title 45, § 157 (h) (Board of Arbitration under Railway Labor Act)
U. S. C., Title 45, § 222 (b) (Investigation Commission under Railroad Retirement Act of 1935)
U. S. C., Title 46, § 1124 (b) (Maritime Commission)
U. S. C., Title 47, § 409 (c) and (d) (Federal Communications Commission)
U. S. C., Title 49, § 12 (2) and (3) (Interstate Commerce Commission)
U. S. C., Title 49, § 173a (Secretary of Commerce)

Note to subdivisions (*a*) *and* (*b*). These simplify the form of subpoena as provided in U. S. C., Title 28, § 655 (Witnesses; subpoenas; form; attendance of); and broaden U. S. C., Title 28, § 636 (Production of books and writings) to include all actions, and to extend to any person. With the provision for relief from an oppressive or unreasonable subpoena *duces tecum*, compare N. Y. C. P. A. (1936) § 404.

Note to subdivision (*c*). This provides for the simple and convenient method of service permitted under many state codes; e. g., N. Y. C. P. A. (1936) § 220; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 225. Compare Equity Rule 15 (Process, By Whom Served).

For statutes governing fees and mileage of witnesses see:

U. S. C., Title 28:

§ 600a (Per diem; mileage)

§ 600c (Amount per diem and mileage for witnesses; subsistence)

§ 600d (Fees and mileage in certain states)

§ 601 (Witnesses' fees; enumeration)

§ 602 (Fees and mileage of jurors and witnesses)

§ 603 (No officer of court to have witness fees)

Note to subdivision (d). The method provided in paragraph (1) for the authorization of the issuance of subpoenas has been employed in some districts. See *Henning* v. *Boyle*, 112 Fed. 397 (1901). The requirement of an order for the issuance of a subpoena *duces tecum* is in accordance with U. S. C., Title 28, § 647 (Deposition under *dedimus potestatem*; subpoena *duces tecum*). The provisions of paragraph (2) are in accordance with common practice. See U. S. C., Title 28, § 648 (Deposition under *dedimus potestatem*; witnesses, when required to attend); N. Y. C. P. A. (1936) § 300; N. J. Comp. Stat. (1910) p. 4098, as amended by L. 1924, ch. 93, p. 183.

Note to subdivision (e). The first paragraph continues the substance of U. S. C., Title 28, § 654 (Witnesses; subpoenas; may run into another district). Compare U. S. C., Title 11, § 69 (Referees in bankruptcy; contempts before) (production of books and writings) which is not affected by this rule. For examples of statutes which allow the court, upon proper application and cause shown, to authorize the clerk of the court to issue a subpoena for a witness who lives in another district and at a greater distance than 100 miles from the place of the hearing or trial, see:

U. S. C., Title 15:

§ 23 (Suits by United States; subpoenas for witnesses) (under antitrust laws).

U. S. C., Title 38:

§ 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions).

The second paragraph continues the present procedure applicable to certain witnesses who are in foreign countries. See U. S. C., Title 28, §§ 711 (Letters rogatory to take testimony of witness, addressed to court of foreign country; failure of witness to appear; subpoena) and 713 (Service of subpoena on witness in foreign country).

Note to subdivision (*f*). Compare Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

Rule 47. Exceptions Abolished. No formal exception to a ruling or an order of the court is necessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that an objecting 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 if a party has no opportunity to object to a ruling or order the absence of an objection shall not thereafter prejudice him.

NOTE

Abolition of formal exceptions is often provided by statute. See Ill. C. P. A. Ann. (1933) art. viii, § 80; Neb. Comp. Stat. (1929) § 20–1139; N. M. Stat. Ann. (Courtright, 1929) § 105–830; N. Y. C. P. A. (1936) § 446 as amended by L. 1936, Ch. 915; N. D. Comp. Laws Ann. (1913) § 7653; Ohio Laws (1935) § 11560; 1 S. D. Comp. Laws (1929) § 2542; Utah Rev. Stat. Ann. (1933) §§ 104–39–2, 104–24–18; Va. Rules of Court, Rule 22, 163 Va. 5, 12 (1935); Wis. Stat. (1931)

§ 270–39. Rule 52, *infra*, deals with objections to the court's instructions to the jury.

U. S. C., Title 28, §§ 776 (Bill of exceptions; authentication; signing of by judge) and 875 (Review of findings in case tried without a jury) are superseded in so far as they provide for formal exceptions, and a bill of exceptions.

Rule 48. Jurors.

(a) EXAMINATION OF JURORS. The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(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 for any reason become unable to perform their duties prior to the final submission to the jury. 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 upon the final submission to the jury. 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.

NOTE

Note to subdivision (*a*). This permits a practice found very useful by federal trial judges. For an example of a state practice in which the examination by the court is supplemented by further inquiry by counsel, see Rule 27 of the Code of Rules for the District Courts of Minnesota, 175 Minn. xxvii (1928).

Note to subdivision (*b*). The provision for an alternate juror is one often found in modern state codes. See N. C. Code (1935) § 2330a; Ohio Gen. Code Ann. (Page, Supp. 1929–1935) § 11419–47; Pa. Stat. Ann. (Purdon, 1936) Title 17, § 1153; Wis. Stat. (1935) § 270.25; Compare U. S. C., Title 28, § 417a (Alternate jurors in criminal trials); N. J. Stat. Service (1935) §§ 53–11a, 11b, 11c.

Provisions for qualifying, drawing, and challenging of jurors are found in U. S. C., Title 28:

§ 411 (Qualifications and exemptions)
§ 412 (Manner of drawing)
§ 413 (Apportioned in district)
§ 415 (Not disqualified because of race or color)
§ 416 (Venire; service and return)
§ 417 (Talesmen for petit jurors)
§ 418 (Special juries)
§ 423 (Jurors not to serve more than once a year)
§ 424 (Challenges)

and D. C. Code (1930) Title 18, §§ 341–360.

Rule 49. Juries of Less than Twelve—Majority Verdict. The parties may stipulate that the jury shall consist of any number less than twelve or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

NOTE

For provisions in state codes, compare Utah Rev. Stat. Ann. (1933) § 48–0–5 (In civil cases parties may agree in open court on lesser number of jurors); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 323 (Parties may consent to any number of jurors not less than three).

Rule 50. Special Verdicts and Interrogatories.

(a) SPECIAL VERDICTS. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its finding upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue

so omitted unless before the jury retires he demands its submission to the jury. As to an omitted issue the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

NOTE

The federal courts are not bound to follow state statutes authorizing or requiring the court to ask a jury to find a special verdict or to answer interrogatories. *Victor American Fuel Co.* v. *Peccarich*, 209 Fed. 568 (C. C. A. 8th, 1913) cert. den. 232 U. S. 727 (1914); *Spokane and I. E. R. Co.* v. *Campbell*, 217 Fed. 518 (C. C. A. 9th, 1914), aff'd 241 U. S. 497 (1916); Simkins, *Federal Practice* (1934) § 186. The power of a territory to adopt by statute the practice under *subdivision* (*b*) has been sustained. *Walker* v. *New Mexico and Southern Pacific R. R.*, 165 U. S. 593 (1897); *Southwestern Brewery and Ice Co.* v. *Schmidt*, 226 U. S. 162 (1912).

Compare Wis. Stat. (1933) §§ 270.27, 270.28 and 270.30; Green, *A New Development in Jury Trial* (1927), 13 A. B. A. J. 715; Morgan, *A Brief History of Special Verdicts and Special Interrogatories* (1923), 32 Yale L. J. 575.

The provisions of U. S. C., Title 28, § 400 (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

Rule 51. Motion for a Directed Verdict.

(a) WHEN MADE: EFFECT. A party may move for a directed verdict at the close of the evidence offered by an opponent without thereby waiving his right to offer evidence in the event that the motion is not granted. 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.

(b) RESERVATION OF DECISION ON MOTION. Whenever a motion for a directed verdict

made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand, or reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

NOTE

Note to subdivision (*a*). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner* v. *Motion Picture Patents Co.*, 254 U. S. 233 (1920); *Union Indemnity Co.* v. *United States*, 74 F. (2d) 645 (C. C. A. 6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the

federal cases. See Simkins, *Federal Practice* (1934) § 189.

Note to subdivision (*b*). For comparable state practice upheld under the Conformity Act, see *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654 (1935); compare *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913).

See *Great Northern Ry. Co.* v. *Paige*, 274 U. S. 65 (1927), following the Massachusetts practice of alternative verdicts, explained in Thorndike, *Trial by Jury in United States Courts*, 26 Harv. L. Rev. 732 (1913). See also Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 600–601, and note 32, (1915).

Note to the Supreme Court

It was voted by the Committee to submit the following alternative rule in a Note to the Court:

[Alternative Rule 51. Same as Rule 51 above, but with the following added at the end of the Rule:

"Except that, in actions where there is a right to a trial by jury under the Seventh Amendment to the Constitution, the court shall not, without the consent of the jury, reserve the question of the sufficiency of the evidence to support a verdict in favor of any party who shall object to such reservation."]

The Committee is of the opinion that the practice set forth in *subdivision* (*b*) of the rule is a very desirable one and should be provided for to the full extent permitted under the Seventh Amendment. It, therefore, believes that the rule should, if possible, be stated without the matter contained in the proviso set forth in the alternative rule, but feels that the question how far the restrictions contained in the proviso are necessary in the light of the three cases cited in the Note should be referred to the Court for determination.

The opinion in *Baltimore and Carolina Line* v. *Redman*, 295 U. S. 654 (1935) states that the action of the court in taking the verdict while reserving the decision on a question of law was done with the implied consent of the parties. The Committee is in doubt

whether this fact was a basis for the decision. Furthermore, there are authorities which hold that at common law, before the adoption of our Constitution, the court without the consent of the parties could take verdict subject to later decision on a question of law, provided the jury consented. On the point that prior to the adoption of the Seventh Amendment, common law judges sometimes reserved the law point if the jury consented, see Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 600 (1915); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 685 (1918); *Note*, 34 Mich. L. Rev., 93, 98 (1935); Thorndike, *Trial by Jury in the United States Courts*, 26 Harv. L. Rev. 732, 737 (1913). The alternate provision covers both of these points. It assumes that the consent of the parties is necessary unless the jury consents. Whether the alternate provision shall be added depends on the proper interpretation of the *Redman* case.

See page xii of the forword of the Preliminary Draft of these rules printed in May, 1936.

Rule 52. Instructions to Jury: Objection. At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to

make the objection out of the hearing of the jury.

NOTE

Supreme Court Rule 8 requires exceptions to the charge of the court to the jury which shall distinctly state the several matters of law in the charge to which exception is taken. Similar provisions appear in the rules of the various Circuit Courts of Appeals.

Rule 53. Masters.

(a) APPOINTMENT. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon and borne by such of the parties or paid out of any fund or subject-matter of the action, which is in the custody and control of the court as the court shall direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party, or the court in its discretion may hold the delinquent in contempt.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In

actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.

(c) POWERS. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the date for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters contained in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and shall have the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner as provided for a court in Rule 44 (c).

(d) PROCEEDINGS:

(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 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 unless the order of reference otherwise provides, and shall notify the parties or their attorneys. In every reference it shall be 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 examination and proceedings to a future day, giving notice to the absent party or his attorney of such adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 46. The failure of any witness to appear or his refusal without adequate excuse to give evidence shall be a contempt of the court and shall be subject to the consequences, penalties, and remedies provided in Rules 37 and 46.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) REPORT.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and in an action to be tried without a jury, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(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. 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.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him shall be admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report shall be the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

NOTE

Note to subdivision (*a*). This is a modification of Equity Rule 68 (Appointment and Compensation of Masters). Compare Equity Rules 49 (Evidence Taken

Before Examiners, etc.) and 53 (Notice of Taking Testimony Before Examiner, etc.).

Note to subdivision (*b*). This is substantially Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex Parte Peterson*, 253 U. S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920).

Note to subdivision (*c*). This is Equity Rules 62 (Powers of Master) and 65 (Claimants Before Master Examinable by Him) with slight modifications. Compare Equity Rules 49 (Evidence Taken Before Examiners, etc.) and 51 (Evidence Taken Before Examiners, etc.).

Note to subdivision (*d*). (1) This is substantially a combination of the second sentence of Equity Rule 59 (Reference to Master—Exceptional, Not Usual) and Equity Rule 60 (Proceedings Before Master).

(2) This is substantially Equity Rule 52 (Attendance of Witnesses Before Commissioner, Master, or Examiner).

(3) This is substantially Equity Rule 63 (Form of Accounts Before Master).

Note to subdivision (*e*). This is Equity Rules 61 (Master's Report—Documents Identified but not Set Forth), 61½ (Master's Report—Presumption as to Correctness—Review), and 66 (Return of Master's Report—Exceptions—Hearing), with modifications to cover also reports by auditors, referees, and examiners, and references in actions formerly legal. Compare Equity Rule 67 (Costs on Exceptions to Master's Report). See *Camden* v. *Stuart*, 144 U. S. 104 (1892); *Ex Parte Peterson*, 253 U. S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920).

Rule 54. Judgments: Costs.

(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 any pleadings, the report of any master, or the record of any prior proceedings.

(b) JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions, if any, as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(c) DEMAND FOR JUDGMENT. A judgment by default shall not in amount exceed or in kind be different from that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by de-

fault, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) COSTS. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law.

NOTE

Note to subdivision (*a*). The second sentence is derived substantially from Equity Rule 71 (Form of Decree).

Note to subdivision (*b*). This provides for the separate judgment of equity and code practice. See Wis. Stat. (1931) § 270.54; Compare N. Y. C. P. A. (1936) § 476.

Note to subdivision (*c*). For the limitation on default contained in the first sentence, see 2 N. D. Comp. Laws Ann. (1913) § 768; N. Y. C. P. A. (1936) § 479. Compare English Rules Under the Judicature Act (1935) O. 13, r. r. 3–12. The remainder is a usual code provision. It makes clear that a judgment should give the relief to which a party is entitled, regardless of whether it is legal or equitable or both. This necessarily includes the deficiency judgment in foreclosure cases formerly provided for by Equity Rule 10 (Decree for Deficiency in Foreclosure, etc.).

Note to subdivision (*d*). For the present rule in common law actions, see *Ex parte Peterson*, 253 U. S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1934), 21 Va. L. Rev. 397.

The provisions as to costs in actions in *forma pauperis* contained in U. S. C., Title 28, §§ 832–836 are unaffected by this rule. Other sections of U. S. C., Title 28, which are unaffected by this rule are: §§ 815 (Costs; plaintiff not entitled to, when), 821 (Costs; infringement of patent; disclaimer), 825 (Costs; several actions), 829 (Costs; attorney liable for, when), and 830 (Costs; bill of; taxation).

The provisions of the following and similar statutes as to costs against the United States and its officers and agencies are specifically continued:

U. S. C., Title 15, §§ 77v (a), 78aa, 79y (Securities and Exchange Commission)
U. S. C., Title 16, § 825p (Federal Power Commission)
U. S. C., Title 26, §§ 1569 (d) and 1645 (d) (Internal revenue actions)
U. S. C., Title 26, § 1670 (b) (2) (Reimbursement of costs of recovery against revenue officers)
U. S. C., Title 28, § 817 (Internal revenue actions)
U. S. C., Title 28, § 836 (United States—actions in *forma pauperis*)
U. S. C., Title 28, § 842 (Actions against revenue officers)
U. S. C., Title 28, § 870 (United States—in certain cases)
U. S. C., Title 28, § 906 (United States—foreclosure actions)
U. S. C., Title 47, § 401 (Communications Commission)

The provisions of the following and similar statutes as to costs are unaffected:

U. S. C., Title 7, § 210 (f) (Actions for damages based on an order of the Secretary of Agriculture)
U. S. C., Title 7, § 499g (c) (Same as § 210 (f))
U. S. C., Title 8, § 45 (Action against district attorneys in certain cases)
U. S. C., Title 15, § 15 (Actions for violation of antitrust laws)

U. S. C., Title 15, § 72 (Actions for violation of law forbidding importation or sale of articles at less than market value or wholesale prices)
U. S. C., Title 15, § 77k (Actions by persons acquiring securities registered with untrue statements under Securities Act of 1933)
U. S. C., Title 15, § 78i (e) (Certain actions under the Securities Exchange Act of 1934)
U. S. C., Title 15, § 78r (Substantially same as 78i (e))
U. S. C., Title 15, § 96 (Infringement of trademark)
U. S. C., Title 15, § 99 (Infringement of trademark)
U. S. C., Title 15, § 124 (Infringement of trademark)
U. S. C., Title 19, § 274 (Certain actions under customs law)
U. S. C., Title 30, § 32 (Action to determine right to possession of mineral lands in certain cases)
U. S. C., Title 31, §§ 232 and 234 (Action for making false claims upon United States)
U. S. C., Title 33, § 927 (Actions under Harbor Workers' Compensation Act)
U. S. C., Title 35, § 67 (Infringement of patent)
U. S. C., Title 35, § 69 (Infringement of patent)
U. S. C., Title 35, § 71 (Infringement of patent)
U. S. C., Title 45, § 153p (Actions for non-compliance with an order of National R. R. Adjustment Board for payment of money)
U. S. C., Title 46, § 38 (Action for penalty for failure to register vessel)
U. S. C., Title 46, § 829 (Action based on non-compliance with an order of Maritime Commission for payment of money)
U. S. C., Title 46, § 941 (Certain actions under Ship Mortgage Act)
U. S. C., Title 46, § 1227 (Actions for violation of certain shipping statutes)

U. S. C., Title 47, § 206 (Actions for certain violations of 1934 Communications Act)
U. S. C., Title 49, § 16 (2) (Action based on noncompliance with an order of I. C. C. for payment of money)

Rule 55. Default.

(a) ENTRY. When the court has obtained jurisdiction of a party against whom a judgment for affirmative relief is sought and he has failed to plead or otherwise defend as provided by these rules, the clerk shall enter his default.

(b) JUDGMENT. Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such fiduciary who has appeared therein. If the party against whom judgment by default is sought has

appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) SETTING ASIDE DEFAULT. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 57 (b).

(d) PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS. The provisions of this rule shall apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

(e) JUDGMENT AGAINST THE UNITED STATES. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes

his claim or right to relief by evidence satisfactory to the court.

NOTE

This represents the joining of the equity decree *pro confesso* (Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by the Conformity Act. For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 42 (b).

Note to subdivision (*a*). The provision for the entry of default comes from the Massachusetts practice, 8 Ann. Laws (1933) ch. 231, § 57.

Note to subdivision (*b*). The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N. Y. C. P. A. (1936) § 485, in Calif. Code Civ. Proc. (Deering, 1931) § 585 (1), and in Conn. Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif. Code, *supra*, § 585 (2); N. Y. C. P. A. (1936) § 490; 2 Minn. Stat. (Mason, 1927) § 9256 (3); Wash. Rev. Stat. Ann. (Remington, 1932) § 411 (2). U. S. C., Title 28, § 785 (Action to recover forfeiture on bond) and similar statutes are preserved by the last clause of paragraph (2).

Note to subdivision (*e*). This restates substantially the last clause of U. S. C., Title 28, § 763 (Action against the United States under the Tucker Act). As this rule governs in all actions against the United States, U. S. C., Title 28, § 45 (Practice and procedure in certain cases under the interstate commerce laws) and similar statutes are modified in so far as they contain anything inconsistent therewith.

Rule 56. New Trials.

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. In ruling on a motion for a new trial in an action which had been tried without a jury, the court has power to open the judgment if one has been entered, to take additional testimony, to amend findings of fact and conclusions of law, or to make new findings and conclusions, and to direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served within 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(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 shall have 10 days after such service within which to serve opposing

affidavits, which time may be extended by the court for good cause shown, or, by written stipulation of the parties, for an additional period not exceeding 20 days. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. At any time within 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

NOTE

This rule represents an amalgamation of the petition for rehearing of Equity Rule 69 (Petition for Rehearing) and the motion for new trial of U. S. C., Title 28, § 391 (New trials; harmless error), made in the light of the experience and provision of the code states. Compare Calif. Code Civ. Proc. (Deering, 1931) §§ 656–663a. U. S. C., Title 28, § 391 (New trials; harmless error) is thus substantially continued in this rule. U. S. C., Title 28, § 840 (Executions; stay on conditions) is modified in so far as it contains time provisions inconsistent with *subdivision* (*b*).

For partial new trials which are permissible under *subdivision* (*a*), see *Gasoline Products Co. Inc.* v. *Champlin Refining Co.*, 283 U. S. 494 (1931); *Schuerholz* v. *Roach*, 58 F. (2d) 32 (1932); *Simmons* v. *Fish*, 210 Mass. 563 (1912) (sustaining and recommending the practice and citing federal cases and cases in accord from about sixteen states and *contra* from three states). The procedure in several states provides specifically for partial new trials. Ariz. Rev. Code Ann. (Struckmeyer, 1928) § 3852; Calif. Code Civ. Proc. (Deering, 1931); Ill. Rev. Stat. (1935) ch. 110, par. 220 (f); Md. Ann. Code (Bagby, 1924) Art. 5, § 26; Mich. Court Rules (Searl, 1933) Rule 47 (2); Miss.

Sup. Ct. Rule 12, 161 Miss. 903, 905 (1931); N. J. Sup. Ct. Rules 131, 132, 147 (1929); N. D. Laws (1927) ch. 214, § 7844.

Rule 57. Relief from Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) FRAUD; ACCIDENT; MISTAKE; SURPRISE. On motion made with reasonable diligence and served before the time for appeal expires, the court upon such terms as are just may relieve a party or his legal representative from a judgment, order, or default, on the ground of fraud, accident, mistake, surprise, or inadvertence. Service of 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 to entertain an independent action to relieve a party or his legal representative from a judgment, order, or default.

NOTE

Note to Subdivision (a). See Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich. Court Rules Ann. (Searl, 1933) Rule 48 (3); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 464 (3); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89–2301 (3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va. Code (Michie, 1930) §§ 6329, 6333.

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Note to Subdivision (b). Application to the court under this subdivision does not extend the time for taking an appeal, as distinguished from the motion for new trial. This section is based upon Calif. Code Civ. Proc. (Deering, 1931) § 473.

Rule 58. Declaratory Judgments. The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be claimed under the circumstances and in the manner provided in Rules 39 and 40. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

NOTE

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California, Michigan, and Kentucky.

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 56 Sup. Ct. 466, 473,

80 L. Ed. 688 (1936). The existence or non-existence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring* v. *Koepke*, 263 Mich. 466 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the federal act. Compare *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. —, 57 Sup. Ct. 461, 81 L. Ed. adv. op. 394 (1937); *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U. S. 249 (1933); *Gully, Tax Collector* v. *Interstate Natural Gas Co.*, 82 F. (2d) 145 (C. C. A. 5th, 1936); *Ohio Casualty Ins. Co.* v. *Plummer*, 13 Fed. Supp. 169 (S. D. Tex., 1935); Borchard, *Declaratory Judgments* (1934), *passim*.

Rule 59. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. No request for findings is necessary. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) AMENDMENT. Upon motion of a party made within 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The pendency of the motion does not affect the finality of the judgment or suspend its operation; and the motion may be made with a motion for a new trial pursuant to Rule 56. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them, or a motion for judgment.

NOTE

See equity Rule 70½, as amended Nov. 25, 1935, (Findings of Fact and Conclusions of Law) and U. S. C., Title 28, § 764 (Opinion, findings, and conclusions in action against United States) which are substantially continued in this rule. The provisions of U. S. C., Title 28, §§ 773 (Trial of issues of fact; by court) and 875 (Review in cases tried without a jury) are superseded in so far as they provide a different method of finding facts and a different method of appellate review. In the following states findings of fact are required in all cases tried without a jury: Arkansas, Civ. Code (Crawford, 1934) § 364; California, Code Civ. Proc. (Deering, 1931) §§ 633–634; Colorado, Code Civ. Proc. Ann. (Mills, 1933) § 307; Connecticut, Practice Book (1934) § 232; Idaho, Code Ann. (1932) §§ 7–302, 7–305; Massachusetts (equity cases), Ann. Laws (1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, Comp. Laws (Hillyer, 1929) § 8783; New Jersey, Sup. Ct. Rule 113 (1929); New Mexico, Stat. Ann. (Courtright, 1929) § 105–813; North Carolina, Code (1935) § 569; North Dakota, Comp. Laws (1913) § 7641; Oregon, Code Ann. (1930) § 2–502; South Carolina, Code (Michie, 1932) § 649; South Dakota, Comp. Laws (1924) §§ 2525–2526; Utah, Rev. Stat. Ann. (1933) § 104–26–2; Vermont (where jury trial waived), Pub. Laws (1933) § 2069; Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1931) § 270.33.

In the following states the review of findings of fact in all non-jury cases, including jury waived cases, is assimilated to the equity review: Alabama, Code Ann. (Michie, 1928) §§ 9498, 8599; California, Code Civ. Proc. (Deering, 1931) § 956 (a); but see 20 Calif. Law Rev. 171 (1932); Colorado, *Johnson* v. *Kountze*, 21 Colo. 486, 43 Pac. 445 (1895); Illinois, *Baker* v. *Hinricks*, 359 Ill. 138 (1934), *Weiniger* v. *Metropolitan Fire Ins. Co.*, 359 Ill. 584 (1935); Minnesota, *State Bank of Gibbon* v. *Walter*, 167 Minn. 37, 38 (1926), *Waldron* v. *Page*,

191 Minn. 302 (1934); New Jersey, N. J. Comp. Stat. (Cum. Supp. 1911–1924) tit. 163, § 303, as interpreted in *Bussy* v. *Hatch*, 95 N. J. L. 56, 111 A. 546 (1920); New York, *York Mortgage Corporation* v. *Clotar Const. Corp.*, 254 N. Y. 128, 133 (1930); North Dakota, Laws (1933) ch. 208, § 7846, *Milnor Holding Co.* v. *Holt*, 63 N. D. 362, 370, 248 N. W. 315 (1933); Oklahoma, *Wichita Mining and Improvement Co.* v. *Hale*, 20 Okla. 159, 167 (1908); South Dakota, *Randall* v. *Buck Township*, 4 S. D. 337, 57 N. W. 4 (1893); Texas, *Custard* v. *Flowers*, 14 S. W. (2d) 109 (1929); Utah, Rev. Stat. Ann. (1933) § 104–41–5; Vermont, *Roberge* v. *Troy*, 105 Vt. 134 (1933); Washington, Rev. Stat. Ann. (Remington, 1932) §§ 308–316; *McCullough* v. *Puget Sound Realty Associates*, 76 Wash. 700, 136 Pac. 1146 (1913), but see *Cornwall* v. *Anderson*, 85 Wash. 369, 148 Pac. 1 (1915); West Virginia, *Kinsey* v. *Carr*. 60 W. Va. 449, 55 S. E. 1004 (1906); Wisconsin, Stat. (1931) § 251.09; *Campbell* v. *Sutliff*, 193 Wis. 370, 214 N. W. 374 (1927), *Gissler* v. *Erwin Co.*, 182 Wis. 315, 193 N. W. 363 (1924).

For examples of an assimilation of the review of findings of fact in cases tried without a jury to the review at law see *Meriden Trust and Safe Deposit Co.* v. *I. Burton Miller*, 88 Conn. 157, 90 A. 228 (1914); New Mexico, Stat. Ann. (Courtright, 1929) §§ 105–818, 105–2520; *Fraser* v. *State Savings Bank*, 18 N. M. 340, 137 Pac. 592 (1912).

Note to the Supreme Court

With reference to the third sentence of this rule, the Committee feels that, if power exists so to do, these rules should make clear the effect given to findings of fact in cases tried without a jury, whether jury-waived cases or cases in which a jury trial is not available of right to the parties.

(1) The mandate of the second section of the enabling statute provides for the uniting of "the general rules prescribed * * * for cases in equity with those in

actions at law so as to secure one form of civil action and procedure for both: *provided, however,* that in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate." Under this mandate there are two categories of issues of fact in civil actions:

(a) Those issues of fact as to which a right to trial by jury exists as at common law and declared by the Seventh Amendment, and has been claimed for such trial in accordance with these rules.

(b) Those issues of fact as to which no right to jury trial exists or as to which such right to jury trial has been waived. The first class of issues is tried by a jury; the second class is tried by the court, subject to the court's discretionary power to order such issues tried by a jury or referred. The verdict of the jury upon the issues of fact in the first class is binding on the reviewing court if there is any evidence at all to support it. But a problem arises in connection with the second class of issues, as to the effect of findings of fact by the court. There are at least three solutions. The first is to retain the present system of review, viz., that in jury-waived cases, the findings of fact shall have the same effect as the verdict of a jury in an action at law; while in equity cases, the findings of fact are reviewable as to the weight of the supporting evidence as well as the sufficiency. The objection to this is that it perpetuates the very procedural distinctions we are attempting to abolish. The second solution is to provide that the findings of fact in all cases should be reviewed in the same way, and that they should have the same effect as the verdict of a jury. Such treatment, though providing for a uniform and simple method of review and fulfilling the mandate of our enabling statute, has not met with approval by a majority of the Committee. The third is the system here proposed. This fulfills the mandate of the statute, while also abolising the ancient procedural distinctions

on review for a natural division which preserves the jury trial intact, but leaves all other trials subject to review. The rule stated in the third sentence of *subdivision* (*a*) accords with the decisions on the scope of the review in modern equity practice. See *Silver King Coalition Mines Co.* v. *Consolidated Mining Co.*, 204 Fed. 166 (C. C. A. 8th, 1913), cert. den. 229 U. S. 624 (1913); *Warren* v. *Keep*, 155 U. S. 265 (1894); *Furrer* v. *Ferris*, 145 U. S. 132 (1892); *Tilghman* v. *Proctor*, 125 U. S. 136, 149 (1887); *Kimberly* v. *Arms*, 129 U. S. 512, 524 (1889).

(2) If the rules in equity are to be joined with those at law so as to secure one form of civil action and procedure for both in the district court, a large measure of the advantage of that union will thus be lost by retaining a divided practice on appeal unless these rules can declare an effect to the findings other than that now existing.

(3) The practice in the code states is not clear, and the federal courts could do a distinct service to procedural reform by setting a standard by a rule of this form. Illinois and Michigan have abolished the necessity of special findings due to great difficulties and technicalities involved. Some eight or nine states have assimilated the old equity findings to the findings in law cases. Some eighteen states have adopted the system proposed in this rule. Of the remaining states, a large number have slipped back into the old forms of separate concepts of review for cases formerly at law or in equity.

The Committee therefore recommends the above provision; it further feels that authority to make it exists. A memorandum of authorities supporting the power of this Court to make rules of appellate review of this form has been prepared by the Reporter and is available. See Clark, *Power of Supreme Court to make Rules of Appellate Procedure* (1936), 49 Harv. L. Rev. 1303.

Rule 60. Entry of Judgment. Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 50. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 81 (a) shall constitute the entry of the judgment; and the judgment shall not be effective before such entry.

NOTE

See Wis. Stat. (1931) § 270.31 (entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is to the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare Idaho Code Ann. (1932) § 7–1101, and 4 Mont. Rev. Codes Ann. (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some states such as Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 431, in jury cases the judgment is entered two days

after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments are entered by clerk, subject to the court's direction.

Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties shall be ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.

NOTE

A combination of U. S. C., Title 28, §§ 391 (New trials; harmless error) and 777 (Defects of form; amendments) with modifications. See *McCandless* v. *United States*, 298 U. S. 342 (1936). Compare Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence).

Rule 62. Appeal from a District Court to the Supreme Court of the United States. When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The petition shall be allowed, a citation issued, a jurisdictional statement filed, and the record on appeal made and certified as prescribed by law and the

Rules of the Supreme Court of the United States governing such an appeal.

NOTE

In so far as the Rules of the Supreme Court of the United States prescribe a different method to perfect a direct appeal than is prescribed in the succeeding rule (Rule 63), there are two methods of appeal: (1) the method prescribed in this rule for a direct appeal from a district court to the Supreme Court of the United States; (2) the method prescribed in Rule 63 for an appeal from a district court to a circuit court of appeals.

Rule 62 applies only to those cases prescribed in U. S. C., Title 28, § 345 (Appellate jurisdiction from decrees of United States district courts). The following and similar statutes concerning direct appeals to the Supreme Court are continued in effect, subject, however, to modification by rules of the Supreme Court which may hereafter be promulgated in so far as such rules may prescribe a different method of appeal than is now provided:

U. S. C., Title 28:

§ 861a (Writ of error abolished; substitution of appeal)
§ 861b (Statutes governing writs of error to apply to appeals)
§ 868 (Citation on writ of error to district court by Supreme Court)
§ 869 (Bond in error and on appeal)
§ 870 (Same; not required of United States)
§ 872 (Writs of error returnable to Supreme Court or to circuit court of appeals)
§ 873 (Amendment of former writ of error)
§ 874 (Supersedeas)

U. S. C., Title 28, § 832 (Suits, and so forth, by poor persons; prepayment of fees and costs) is continued.

Note to the Supreme Court

The Committee is of the opinion that to produce uniformity in accordance with the simple system in criminal appeals prescribed by this Court (See 292 U. S. 661, 662–663 (1934)) as well as that prescribed in these Rules (See Rules 63 and 65), the Court should consider the abolition of the petition for appeal accompanied by an assignment of errors, allowance, and citation and the substitution therefor of the notice of appeal and the method of preparing the record provided in these Rules.

Rule 63. Appeal to a Circuit Court of Appeals.

(a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(b) Notice of Appeal. The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than

the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. The notification to a party shall be given by mailing a copy of the notice of appeal to his attorney of record or, if the party is not represented by an attorney, then to the party at his last known address, and such notification is sufficient notwithstanding the death of the party or of his attorney prior to the giving of the notification.

(c) BOND ON APPEAL. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to its form or sufficiency for determination by the clerk.

(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires.

The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason his appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damage as the appellate court shall adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

(e) FAILURE TO FILE OR INSUFFICIENCY OF BOND. If a bond on appeal or a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the ap-

pellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) JUDGMENT AGAINST SURETY. By entering into an appeal or supersedeas bond given pursuant to subdivisions (b) and (c) 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.

(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 65 and 66 shall be filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal; except that when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the first notice of appeal. 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 docket-

123 ing as originally prescribed or as extended by
124 a previous order.

NOTE

1. This rule prescribes the method of appeal from a district court to a circuit court of appeals. To the extent to which the following statutes prescribe a different method for the taking of an appeal from the district courts to a circuit court of appeals, they are superseded:

U. S. C., Title 28:
§ 228 (Allowance of appeals)
§ 228a (Provisions relating to appellate procedure continued in force for circuit courts of appeals)
§ 867 (Citation on former writ of error)
§ 872 (Writs of error returnable to Supreme Court or circuit court of appeals).

Those statutes were modified by:

U. S. C., Title 28:
§ 861a (Writ of error abolished; substitution of appeal)
§ 861b (Statutes governing writs of error to apply to appeals).

2. In the cases which come within the Federal Rules of Civil Procedure, this rule governs the taking of an appeal from a district court to a circuit court of appeals, in the situations provided for by statute, such as U. S. C., Title 28, § 225 (Appellate jurisdiction), *Subsection* (*a*) (Review of final decisions), *Subsection* (*b*) (Review of interlocutory orders or decrees of district courts), U. S. C., Title 28, §§ 226 (Review of judgments of district courts exercising concurrent jurisdiction with Court of Claims or adjudicating claims against the United States), 227 (Appeals in proceedings for injunctions and receivers), 227a (Appeals in suits in equity for infringement of letters patent for inventions; stay of proceedings for accounting).

3. This rule continues in effect the statutes providing for the time for taking an appeal such as:

U. S. C., Title 28:

§ 227 (Appeals in proceeding for injunctions and receivers)

§ 230 (Time for making application for appeal).

Note to subdivision (a). This supplants the petition for appeal, the order allowing an appeal, and the citation on appeal; and, in the cases to which this rule applies, supersedes U. S. C., Title 28, §§ 862 (Removal of causes by former writs of error), 872 (Writs of errors returnable to Supreme Court or to circuit courts of appeals), and 867 (Citation on former writ of error), all as modified by U. S. C., Title 28, § 861a (Writ of error abolished; substitution of appeal), and § 861b (Statutes governing writs of error to apply to appeals). It substitutes therefor the notice of appeal which is common in a great number of the code states, including Arizona, Rev. Code Ann. (Struckmeyer, 1928) § 3663; Idaho, Code Ann. (1932) § 11–202; Illinois, Rev. Stat. (1935) ch. 110, par. 257, Rule 33; Michigan, Comp. Laws (Mason, supp. 1933) Rule 56; Minnesota, 2 Stat. (Mason, 1927) § 9492; Montana, 4 Codes Ann. (1935) § 9733; New York, C. P. A. (1936) § 562; Ohio, Laws (1935) § 12223–5; Washington, 4 Rev. Stat. Ann. (Remington, 1932) § 1719; Wisconsin, Stat. (1931) § 306.02.

Note to subdivision (b). No assignments of error need be filed in the district court, but see Rule 65 (d) (Statement of Points) for the service by the appellant of a statement of the points on which he intends to rely on the appeal. Compare the state provisions cited above. The provision regarding assignments of error contained in U. S. C., Title 28, § 862 (Removal of causes by former writ of error) as modified by U. S. C., Title 28, § 861a (Writ of error abolished; substitution of appeal) and § 861b (Statutes governing writs of error to apply to appeals) are superseded in so far as

no assignments of error are required to be filed in the district court. Compare Rule 9 of the Supreme Court of the United States and the rules of the various circuit courts of appeals.

Note to subdivision (c). This continues in effect the substance of U. S. C., Title 28, §§ 832 (Suits, and so forth, by poor persons; prepayment of fees and costs), 869 (Bond in error and on appeal), 870 (Bond in error and on appeal; not required of United States). This rule does not affect the additional bond as a condition of appeal which may be required by U. S. C., Title 28, § 227 (Appeals in proceedings for injunctions and receivers). As to the amount of the bond, the rules of the circuit courts of appeals provide as follows: Second Circuit—$250, Rule 12; the other circuits leave the amount of the bond to be fixed by the district court. U. S. C., Title 6, § 6 (Surety companies as sureties) is modified in so far as it may require approval of a $250 bond on appeal. As to the method of accepting bonds, compare N. Y. C. P. A. (1936) § 566; 2 Minn. Stat. (Mason, 1927) § 9499.

Note to subdivision (d). This modifies U. S. C., Title 28, § 874 (Supersedeas). Provisions have been here added for giving the district court power to ameliorate the possible harshness of the present rules in proper cases. Compare Rule 36 of the Supreme Court of the United States and the rules of the various circuit courts of appeals.

Note to subdivision (e). This is incorporated to make clear the extent of the jurisdiction of the district court to entertain motions for failure to file or for insufficiency of a bond on appeal or a supersedeas bond.

Note to subdivision (f). Compare U. S. C., Title 29, § 107 (Issuance of injunctions in labor disputes; undertakings) which is continued by this rule in so far as it is applicable to a bond on appeal or a supersedeas bond. This subdivision provides a remedy in addition to any other remedies against sureties, such as those provided in U. S. C., Title 6 (Official and Penal Bonds). U. S. C., Title 6 contains complete pro-

visions for surety companies on federal bonds, providing for qualified surety companies, § 6 (Surety companies as sureties); for the appointment of process agents, § 7 (Appointment of agents; service of process); for conditions upon which the Secretary of Treasury shall grant authority to do business, § 8 (Deposit of charter); for quarterly statements to be filed with Secretary of the Treasury, § 9 (Quarterly Statements); for jurisdiction of actions on bonds (Jurisdiction of suits on bonds); and various other provisions, §§ 11–15.

Note to subdivision (*g*). Compare the rules of the various circuit courts of appeals. The first, second, third, fifth, sixth, seventh, and ninth circuits allow 30 days for the docketing of the case, while those of the fourth, eighth, and tenth circuits allow 40 days.

Rule 64. Joint or Several Appeals; Summons and Severance Abolished. Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one of them may appeal separately or any two or more of them may join in an appeal.

NOTE

For the federal practice on summons and severance, see *Masterson* v. *Herndon*, 10 Wall. 416 (1870) and *Hartford Accident and Indemnity Co.* v. *Bunn*, 285 U. S. 169 (1932). The practice of summons and severance is not common in the state practices; see *Doty* v. *Strong*, 1 Pinney 165, 168 (Wis., 1842).

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

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a circuit court of appeals is taken, the appellant

shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

(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; and, 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. 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.

(c) FORM OF TESTIMONY. Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) STATEMENT OF POINTS. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) RECORD TO BE ABBREVIATED. All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like infractions in the future may require; and for such infractions, costs may be imposed upon offending attorneys and parties.

(f) STIPULATION AS TO RECORD. Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) RECORD TO BE PREPARED BY CLERK—NECESSARY PARTS. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not desig-

nated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof for use in printing the record, if a copy is required by the rules of the circuit court of appeals.

(h) POWER OF COURT TO CORRECT RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record

shall be certified and transmitted by the clerk of the district court.

(i) ORDER AS TO ORIGINAL PAPERS OR EXHIBITS. Whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) RECORD FOR PRELIMINARY HEARING IN APPELLATE COURT. If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) SEVERAL APPEALS. When more than one appeal is taken to the same court from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

(l) PRINTING. What part of the record on appeal filed in the appellate court shall be printed and the manner of the printing and the supervision thereof shall be as prescribed in

the rules of the court to which the appeal is taken; but the type, paper, and dimensions of printed matter in the circuit court of appeals shall conform to the rules of the Supreme Court relating to records on appeals to that Court.

NOTE

This rule applies only to appeals to a circuit court of appeals, and not to the direct appeal from the district court to the Supreme Court of the United States provided for in Rule 62. Compare Equity Rule 75 (Record on Appeal—Reduction and Preparation), Equity Rule 76 (Record on Appeal—Reduction and Preparation—Costs—Correction of Omissions).

This rule continues U. S. C., Title 28, § 764 (Opinion, findings, and conclusions in action against United States) in so far as that statute relates to the record on appeal, and supersedes U. S. C., Title 28, § 776 (Bill of exceptions; authentication; signing of by judge). The following statutes are modified in so far as they prescribe a different record:

U. S. C., Title 28:

§ 862 (Removal of causes by former writ of error)

§ 863 (Transcript on appeals)

§ 865 (Printed transcript of record on appeal to circuit court of appeals)

§ 866 (Printed record as part of transcript on appeal to Supreme Court)

Compare Rules 8 and 10 of the Supreme Court of the United States and rules of the various circuit courts of appeals.

Compare U. S. C., Title 28, § 864 (One record) with the provision in the rule for a single record.

Note to the Supreme Court

1. *Elimination of Narrative Record.* This rule does not require the narrative form of record nor does it

forbid its use. It allows a party to offer a narrative statement and permits his adversary to reject it and substitute question and answer form. The narrative form of testimony has been adversely criticized by the bar, by a considerable section of the bench, and by commentators. For a discussion of this topic, see Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929), 42 Harv. L. Rev. 483; Lane, *Twenty Years Under the Federal Equity Rules* (1933), 46 Harv. L. Rev. 638, as well as the earlier articles by Lane, which are cited therein; Hopkins, *Federal Equity Rules* (8th ed. 1933), 307, n. 1. The only states which still require the narrative form to be used as in Equity rule 75 (b) are: Alabama, (bills of exception only) Cir. Court Rule 32, ii, iii, iv (1932); Arizona, (bills of exceptions, depositions, statements of facts) Supreme Court Rule iv (1), (7) (1928); Florida, Special Rule 1, Circuit Court Rules at Law (1915); Massachusetts, (bills of exception; compare *Cornell-Andrews etc. Co.* v. *Boston & Providence R. R.*, 215 Mass. 381, 387 (1913) and *Taylor* v. *Pierce Bros. Ltd.*, 219 Mass. 187 (1914) which indicate that the courts favor a narrative form as opposed to question and answer form); Missouri, (parole evidence in equity cases) Sup. Ct. Rule 7 (1934); Montana, Sup. Ct. Rule vii (1931); North Carolina, Sup. Ct. Rule 19 (4) (1933). Minnesota (Rule 8 (2) Sup. Ct., 1934) and Missouri (in law when the parties disagree, Sup. Ct. Rule 6, 1934) allow the narrative form optionally.

Of the forty-two or forty-three states which do not require the narrative form of record, the division is about equal between (1) those which require that a transcript of the entire evidence, as taken by the stenographer, be inserted in the record on appeal so far as it relates to the errors relied upon; for example, Michigan, Court Rules Ann. (Searl, 1933) Rules 66 (3) and 66 (7); New York, C. P. A. (1936) § 576; Ohio, Gen. Laws (1935) § 12223–8, and (2) those which permit the full stenographic transcript of relevant evidence to be used in the record on appeal at the option

of one of the parties or the court; for example, California, Code Civ. Proc. (Deering, 1931) § 953 (a); Illinois, Rev. Stat. (1935) ch. 110, par. 260 (1), (c) and (d); Missouri, Rev. Stat. (1929) § 1033; South Carolina, Code (Michie, 1932), Sup. Ct. Rule 2, p. 1272; Wyoming, Rev. Stat. (1931) § 89–4905.

2. *Note to subdivision (l) respecting printing.* Some confusion exists as to whether the district courts or the circuit courts of appeals shall supervise the printing of records for the circuit courts of appeals. This arises because of the Act of February 13, 1911 (ch. 47, 36 Stat. 901; secs. 865, 866), which provides that on appeal to the circuit court of appeals from a *final* judgment, the appellant shall cause the record to be printed "under such rules as the lower court shall prescribe." This seems to give the district court charge of the printing of the record. In some of the circuit courts of appeals the clerks claim the right to supervise the printing of the record. In the Circuit Court of Appeals of the Second Circuit, there is a rule (Rule XXI) that in cases covered by the Act of February 13, 1911, (appeals from *final* judgments) the appellant shall cause the record to be printed, (presumably under the rules of the district court), but in other classes of appeals the printing shall be supervised by the clerk of the court of appeals. The Advisory Committee felt obliged to deal with this subject because the Act of February 13, 1911, purports to impose some powers and duties on the district courts in respect of printing records on appeal. Our conclusion was that the district courts should have nothing to do with the supervision of printing in the upper courts; so it is provided in subdivision (l) of Rule 65 that this subject shall be governed by the rules of the court to which the appeal is taken.

If the rule had stopped there the result would have been to supersede the provision in the Act of February 13, 1911 which provides that printed records in the circuit courts of appeals from final judgments of

district courts shall be "in such form as the Supreme Court of the United States shall by rule prescribe". The desire to preserve this authority in the Supreme Court explains the presence in subdivision (l) of the provision to that effect. This power in the Supreme Court does not seem to have been exercised. Its purpose was to enable the Supreme Court to prescribe the form of type and dimensions of printed matter in printed records in the circuit courts of appeals so that extra copies of those records might be used in the Supreme Court without reprinting. Rules of the Supreme Court (13 and 26) now provide that in cases of *appeals* to the Supreme Court or where the record below is reprinted for the use of the Supreme Court, the work shall be done under the supervision of the clerk and the size of type and dimensions of printed matter are specified. On the other hand, Supreme Court Rule 38, relating to review on certiorari provides in paragraph 7, that when certiorari is granted, it is permissible to use printed copies of the record "as printed below". Printed records in the respective United States circuit courts of appeals are not uniform and do not always conform to the rules of the Supreme Court respecting the dimensions of printed matter or of size of type or spacing between lines.

Consideration was given by the Committee to the question whether in the circuit courts of appeals the supervision of printing and the designation of printers should be in the hands of the clerk of that court or whether appellants should be allowed to take charge of the printing and make their own arrangements therefor, subject to rules as to the form of the print. There has been some complaint from lawyers that printing done under the supervision of clerks costs substantially more than where the parties engage their own printers. This is a problem outside of the province of district court rules and should be settled by the rules of the appellate courts. The question whether the records in the circuit courts of appeals should be

printed or cases heard on typewritten records is also a matter to be settled by the rules of the appellate courts. As our Rule 65 is drawn any United States circuit court of appeals which is willing to hear an appeal on a typewritten record may do so by requiring appellant to furnish sufficient typewritten copies of the record on appeal.

Rule 66. Record on Appeal to a Circuit Court of Appeals; Agreed Statement. When the questions presented by an appeal to a circuit court of appeals can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the district court and shall then be certified to the appellate court as the record on appeal.

NOTE

Compare Equity Rule 77 (Record on Appeal—Agreed Statement). Its provisions are adopted with appropriate modifications to conform to these rules.

Rule 67. Stay of Proceedings to Enforce a Judgment.

(a) AUTOMATIC STAY; EXCEPTIONS—INJUNCTIONS, RECEIVERSHIPS, AND PATENT ACCOUNTINGS. Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, or a judgment or order directing an accounting in an action for infringement of letters patent, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (c) of this rule shall govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 56, or of a motion for relief from a judgment or order made pursuant to Rule 57, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 51, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 59 (b).

(c) INJUNCTION PENDING APPEAL. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may make an order suspending, modifying, restoring, or granting an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. No such order shall be made without the concurrence of two of the judges of the district court that entered the judgment appealed from or the assent of all the judges thereof, evidenced by their signatures to the order, if that court is a district court of three judges specially constituted pursuant to a statute of the United States.

(d) STAY UPON APPEAL. When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) STAY IN FAVOR OF THE UNITED STATES OR AGENCY THEREOF. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) STAY ACCORDING TO STATE LAW. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor shall be entitled, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state.

(g) POWER OF APPELLATE COURT NOT LIMITED. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; and these rules do not supersede the provisions of Section 210 of the Judicial Code, as amended, U. S. C., Title 28, § 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof.

NOTE

Note to subdivision (*a*). The first sentence states the substance of the last sentence of U. S. C., Title 28, § 874 (Supersedeas). The remainder of the subdivision states the substance of the last clause of U. S. C., Title 28, § 227 (Appeals in proceedings for injunctions; receivers; and admiralty), and of § 227a (Appeals in suits in equity for infringement of letters patent for invention; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

Note to subdivision (*b*). This supersedes U. S. C., Title 28, § 840 (Executions; stay on conditions).

Note to subdivision (*c*). Compare Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone Co.* v. *Public Service Commission*, 260 U. S. 212 (1922). See Simkins, *Federal Practice* (1934), § 916 in regard to the effect of appeal on injunctions and the giving of bonds. See U. S. C., Title 6 (Penal and official bonds) for bonds by surety companies. For statutes providing for a specially constituted district court of three judges, see:

U. S. C., Title 7:
- § 217 (Proceedings for suspension of orders of Secretary of Agriculture under Stockyards Act)—by reference.
- § 499k (Injunctions; application of injunction laws governing orders of Interstate Commerce Commission to orders of Secretary of Agriculture under Perishable Commodities Act)—by reference.

U. S. C., Title 15:
- § 28 (Antitrust laws; suits against monopolies expedited)

U. S. C., Title 28:
- § 47 (Injunctions as to orders of interstate commerce commission, etc.)
- § 380 (Injunctions; alleged unconstitutionality of State statutes)

U. S. C., Title 49:
- § 44 (Suits in equity under interstate commerce laws; expedition of suits)

Note to subdivision (*d*). This modifies U. S. C., Title 28, § 874 (Supersedeas). See Rule 36 (2), Rules of the Supreme Court of the United States, which governs supersedeas bonds on direct appeals to the Supreme Court, and Rule 63 (d), of these rules, which governs supersedeas bonds on appeals to a circuit court

of appeals. The provisions governing supersedeas bonds in both kinds of appeals are substantially the same.

Note to subdivision (e). This states the substance of U. S. C., Title 28, § 870 (Bond; not required of the United States).

Note to subdivision (f). This states the substance of U. S. C., Title 28, § 841 (Executions; stay of one term) with appropriate modification to conform to the provisions of Rule 6 (c) as to terms of court.

Rule 68. Disability of a Judge. If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be by him performed under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

NOTE

This rule adapts and extends the provisions of U. S. C., Title 28, § 776 (Bill of exceptions; authentication; signing of by the judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

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VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

Rule 69. Seizure of Person or Property. At the commencement of or 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 shall be available under the circumstances and in the manner provided by the then existing law of the state in which the district court is held, 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. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

NOTE

This rule adopts the existing federal law, making it clear, however, that the applicable state law is that law existing at the time of bringing suit rather than that at the time the statute was enacted, and to this extent

supersedes U. S. C., Title 28, § 726 (Attachments as provided by State laws). See generally U. S. C., Title 28, §§ 729 (Proceedings in vindication of civil rights) and 377 (Power to issue writs).

Lis pendens. No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting state laws of property. It has been held that in the absence of a state statute expressly providing for the recordation of notice of the pendency of federal actions, the commencement of a federal action is notice to all persons affected. *King* v. *Davis*, 137 Fed. 198 (C. C., W. D. Va., 1903). It has been held, however, that when a state statute does so provide expressly, its provisions are binding. *United States* v. *Calesien Timber Co.*, 236 Fed. 196 (C. C. A. 5th, 1916).

For statutes of the United States on attachment, see, e. g.:

U. S. C., Title 28:

§ 737 (Attachment in postal suits)
§ 738 (Attachment; application for warrant)
§ 739 (Attachment; issue of warrant)
§ 740 (Attachment; trial of ownership of property)
§ 741 (Attachment; investment of proceeds of attached property)
§ 742 (Attachment; publication of attachment)
§ 743 (Attachment; personal notice of attachment)
§ 744 (Attachment; discharge; bond)
§ 745 (Attachment; accrued rights not affected)
§ 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see, e. g.:

U. S. C., Title 28:

§ 748 (Garnishment in suits by United States against a corporation)

§ 749 (Garnishment; issue tendered on denial of indebtedness)
§ 750 (Garnishment; garnishee failing to appear)

For statutes of the United States on arrest, see, e. g.:
U. S. C., Title 28:
§ 376 (Writs of ne exeat)
§ 755 (Special bail in suits for duties and penalties)
§ 756 (Defendant giving bail in one district and committed in another)
§ 757 (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
§ 758 (Bail and affidavits; taking by commissioners)
§ 759 (Calling of bail in Kentucky)
§ 760 (Clerks may take bail de bene esse)
§ 843 (Imprisonment for debt)
§ 844 (Imprisonment for debt; discharge according to State laws)
§ 845 (Imprisonment for debt; jail limits)

For Statutes of the United States on replevin, see, e. g.:
U. S. C., Title 28:
§ 747 (Replevy of property taken under revenue laws).

Rule 70. Injunctions.

(a) PRELIMINARY; NOTICE. No preliminary injunction shall be issued without notice to the adverse party.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit

or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice or on such shorter notice as the court may prescribe, given to the party who obtained the temporary restraining order without notice, 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.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

(d) FORM OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER. 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 pro-

visions 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.

NOTE

Note to subdivisions (*a*) *and* (*b*). These are taken from U. S. C., Title 28, § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to subdivision (*c*). Except for the last sentence, this is substantially U. S. C., Title 28, § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements:

U. S. C., Title 15, §§ 77t (b), 78u (e), and 79r (f) (Securities and Exchange Commission)

It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U. S. C., Title 6 (Penal and Official Bonds) for bonds by surety companies.

Note to subdivision (*d*). This is substantially U. S. C., Title 28, § 383 (Injunctions; requisites of order; binding effect).

Compare Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes. For other statutes dealing with injunctions which are continued, see, e. g.:

U. S. C., Title 28:

§ 47 (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)

§ 46 (Suits to enjoin orders of Interstate Commerce Commission to be against United States)

§ 378 (Injunctions; when granted)
§ 379 (Injunctions; stay in State courts)
§ 380 (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)
U. S. C., Title 7:
§ 216 (Court proceedings to enforce orders; injunction)
§ 217 (Proceedings for suspension of orders)
U. S. C., Title 15:
§ 25 (Restraining violations; procedure)
§ 26 (Injunctive relief for private parties; exceptions)
§ 77t (b) (Injunctions and prosecution of offenses)
§ 4 (Jurisdiction of courts; duty of district attorney; procedure)

Rule 71. Receivers. The practice applicable to the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice as heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules.

Rule 72. Deposit in Court. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, may, by leave of court, deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of

Sections 995 and 996, Revised Statutes, as amended, U. S. C., Title 28, §§ 851, 852; the Act of June 26, 1934, c. 756, § 23 (48 Stat. 1236), U. S. C., Title 31, § 725v; or any like statute.

NOTE

This rule provides for deposit in court generally, continuing similar special provisions contained in such statutes as U. S. C., Title 28, § 41 (26) (Original jurisdiction of bills of interpleader, and of bills in the nature of interpleader). See generally *Howard* v. *United States*, 184 U. S. 676 (1901); Admiralty Rules 37 (Bringing Funds into Court), 41 (Funds in Court Registry), and 42 (Claims Against Proceeds in Registry.) With the first sentence, compare English Rules Under the Judicature Act (1935) O. 22, r. 1 (1).

Rule 73. Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, the defending party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof shall not be admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs from the time of the offer but shall pay costs from that time.

NOTE

See 2 Minn. Stat. (Mason, 1927) § 9323; 4 Mont. Rev. Codes Ann. (1935) § 9770; N. Y. C. P. A. (1936) § 177.

For the recovery of costs against the United States, see Rule 54 (d).

Rule 74. Condemnation of Property for Public Use. The procedure prescribed by these rules is modified in the following respects as to all actions for the taking of property for public use and the ascertainment of just compensation for the taking.

(a) JOINDER OF PROPERTIES. One or more separate and distinct lots or parcels of property sought to be taken for the same uses, whether in the same or different ownership, may be proceeded against in the same action.

(b) COMPLAINT. The names of the defendants may be omitted from the caption of the complaint and they may be described in the title as "the owners of and persons interested in the property sought to be taken." In the body of the complaint the names of all the owners of and persons interested in the property sought to be taken shall be stated if known, and all others may be made parties under the designation of "unknown owners". A description of the property and of the estate or interest therein sought to be taken and the authority for and the purpose of the taking, shall be briefly stated.

(c) PROCESS. The summons need not contain the names of all defendants, but each summons may contain only the names of those

upon whom it is intended to be served. It is unnecessary to serve a copy of the complaint with the summons, but the summons shall state that the action is brought for the taking of property for public use, shall briefly describe the property and the use, shall require the defendant to appear and to serve and file his defenses within 20 days after the service of summons, and shall notify him that upon his failure so to do he will be precluded from thereafter contesting the right of the plaintiff to take the property sought to be condemned. Except under the circumstances stated in subdivision (d) of this rule, the summons shall be personally served as provided in Rule 4 (c) and (d).

(d) SERVICE BY PUBLICATION. If it is shown by the complaint or otherwise that there are parties defendant who are not inhabitants of the state in which the action is brought or who are unknown or whose places of residence are unknown or who for any other reason cannot be personally served with summons or if there are persons who have been made parties under the designation of "unknown owners", the court may order that such parties shall be notified of the pendency of the action by publication. The published notice shall state the names of the defendants to be served by publication so far as known, and may designate all others as "unknown owners". It shall briefly describe the property and the intended use, and shall state a date not less than 40 days after the date of the first publication thereof

at which the defendants designated therein may appear and present their objections, if any, to the taking, as provided in subdivision (e) of this rule. The order shall name a newspaper of general circulation published in the general vicinity of the property, in which the notice shall be published. The notice shall be published once each week for 3 successive weeks. The first publication shall be not more than 10 days after the date of the order. Proof of publication may be by affidavit of the publisher or his agent or of an attorney of record for the plaintiff. The court may direct that the plaintiff in addition to publishing the notice shall post it in such manner and a such place as the court prescribes.

(e) DEFENSES AND OBJECTIONS. Within the time specified in the summons or notice, each defendant, in lieu of an answer, shall present in a single motion to dismiss or for other appropriate relief, all of his objections and defenses to the right of the plaintiff to take his property for the use specified in the complaint. All such objections and defenses not so presented are waived. A copy of the motion shall be served on the plaintiff's attorney of record and filed with the court with proof or acceptance of service.

(f) ORDER OF CONDEMNATION. When such a motion is overruled or when any party fails to defend as required by this rule, the court may enter an order of condemnation declaring that the plaintiff has a lawful right to take the property sought to be condemned, for the

public use described in the complaint, upon the payment of just compensation as of the date of the filing of the complaint, to be ascertained according to law. After the entry of such an order, no objection to the exercise of the right of condemnation shall be filed or heard and the plaintiff shall not be permitted to dismiss or discontinue the proceeding except on such terms as the court fixes.

(g) ASCERTAINMENT OF COMPENSATION; APPOINTMENT OF COMMISSIONER. Upon the entry of the order of condemnation the court shall appoint a competent and disinterested person as commissioner to ascertain and report to the court the just compensation for the property sought to be taken. The order of appointment shall designate the time and place of the first session of the hearing to be held by the commissioner and specify the time within which his report is to be filed with the court. The commissioner shall view the property sought to be taken, gather information deemed by him to be material, and accord to the parties an opportunity to present at such hearing and at any adjournment thereof, evidence as to the value of the property.

(h) SAME; COMMISSIONER'S REPORT. The commissioner shall ascertain and report the just compensation to be awarded for each separate and distinct lot or parcel of property, or for the interest therein sought to be taken. He shall not hear, determine, or report upon controversies respecting title or respecting apportionment of compensation. The report of

the commissioner is conclusive upon all parties in interest, unless objections are filed thereto as hereinafter provided. The report is not admissible as evidence either of value or of damage in any trial by jury but is admissible in a trial of any issue by the court.

(i) SAME; TRIAL BY THE COURT—BY JURY. Within 20 days after filing of the report, any party to the action who conceives himself to be aggrieved as to the compensation awarded by the report may serve and file specific objections thereto. All objections may be tried by the court unless trial by jury has been demanded. At the time of filing such objections, any party may file a demand that they be tried by a jury, whereupon a jury shall be impanelled to try them. The issue to be submitted to the jury is the amount of just compensation for the taking of the lot or parcel of property as to which objections have been filed, and does not include controversies respecting title or respecting apportionment of compensation. The trial of the issue before the jury shall be conducted as in other actions.

(j) TITLE AND POSSESSION. Notwithstanding the entry of an order of condemnation, the plaintiff shall not acquire title or right of possession until compensation has been paid or is secured or assured in such manner as the court approves; but nothing in these rules shall be construed to limit or affect a right granted by any statute of the United States to acquire and take title to and possession of any property

prior to the ascertainment or payment of compensation.

(k) COMPENSATION; DEPOSIT, PAYMENT. The plaintiff may deposit in court for the benefit of the owners of the property sought to be taken the amount of compensation ascertained for the respective lots and parcels. If there are controversies respecting title or respecting apportionment of compensation, as to any lot or parcel of the property sought to be taken or to any of the money deposited, the court, on motion of any such claimant and notice to all other claimants, may hear and determine the controversy and make appropriate orders in respect to the disposition and distribution of money so deposited.

(l) ASSESSMENTS FOR BENEFITS. These rules do not apply to any proceeding in which the Commissioners of the District of Columbia seek to condemn private property for public use and, in connection with the taking, seek to assess benefits upon other property; except that in such a proceeding, appeals from the district court to the United States Court of Appeals for the District of Columbia shall be taken, perfected, and conducted as prescribed in these rules.

(m) COMPLIANCE WITH STATE PROCEDURE. If the action involves the taking of property for public use under the right of eminent domain of a state, recourse shall be had to the procedural rules of that state to the extent necessary to preserve to the parties substantive

rights under the Constitution of that state and under the statutes thereof granting the right of condemnation. In any such case the procedure provided for in this rule shall be modified accordingly.

NOTE

Proceedings for the taking of private property by the United States for public use, in the exercise of its power of eminent domain, are now required with some exceptions to be conducted in conformity with the procedural statutes of the state in which the property is situated. (U. S. C., Title 40, § 258).

In the various states, territories and insular possessions of the United States there have been found 269 different methods of judicial procedure in different classes of condemnation cases and 56 methods of non-judicial or administrative procedure. (First Report of Judicial Council of Michigan (1931) § 46, pages 55–56.)

The present requirement that in the exercise of the right of eminent domain of the United States conformity must be had with these 325 methods of procedure causes expense, delay, and uncertainty.

Rule 74 seeks to avoid these difficulties by providing for a system which is a simplified composite of the provisions of various federal and state statutes.

A condemnation proceeding brought by a state corporation under a state statute has been held to be "a suit at common law". (*Kohl* v. *United States*, 91 U. S. 367, 23 L. Ed. 449 (1876)). Such a proceeding may either be brought originally in the district courts of the United States or removed to those courts if diversity of citizenship and the requisite amount in controversy satisfy jurisdictional requirements. (*Mississippi and Rum River Boom Co.* v. *Patterson*, 98 U. S. 403 (1897); *Searl* v. *School Dist. No. 2*, 124 U. S. 197

(1887); *Madisonville Traction Company* v. *Mining Company*, 196 U. S. 239 (1904).

In the *Madisonville case*, *supra*, and in cases cited therein, it has been held that condemnation cases brought by state corporations in the exercise of a power delegated by the state might be governed by procedure prescribed by the laws of the United States, whether the cases were begun in or removed to the Federal courts. See also *Franzen* v. *C. M. & St. P. Ry. Co.*, 278 Fed. 370, 372 (C. C. A. 7th, 1921).

There are 56 Acts of Congress authorizing the exercise of this power by the Government and its officers and agencies. These statutes for the most part do not prescribe procedure, but where procedure is prescribed, it is by no means uniform.

The following are instances of Acts which merely authorize the exercise of the power without specific declaration as to the procedure:

U. S. C., Title 16:
- § 426d (Stones River National Park; Acquisition of land for parks by the Secretary of War)
- § 517 (National forest reservations; title to lands to be acquired by Secretary of Agriculture)

The following are instances of Acts which authorize condemnation and declare that the procedure is to conform with that of similar actions in state courts:

U. S. C., Title 16:
- § 423k (Richmond National Battlefield Park; Acquisition of lands by Secretary of Interior)
- § 814 (Exercise by water power licensee of power of eminent domain)

U. S. C., Title 24:
- § 78 (Condemnation of land for the former National Home for Disabled Volunteer Soldiers)

U. S. C., Title 33:
§ 591 (Condemnation of land and materials for river and harbor improvement by Secretary of War)
U. S. C., Title 40:
§ 257 (Condemnation of realty for sites for public building and for other public uses by Secretary of Treasury authorized)
§ 258 (Same: procedure)
U. S. C., Title 50:
§ 171 (Acquisition of land by Secretary of War for national defense)
§ 172 (Acquisition of property by Secretary of War, etc. for production of lumber)

The following are illustrations of Acts in which a more or less complete code of procedure is set forth in connection with the taking:

U. S. C., Title 16, § 831x (Condemnation by Tennessee Valley Authority)
U. S. C., Title 40:
§ 120 (Acquisition of lands for public use in District of Columbia)
§§ 361–386 (Acquisition of lands in District of Columbia for use of United States; condemnation)

Rule 75. Execution.

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court shall direct otherwise. The practice and procedure relative to execution, to proceedings supplementary to and in aid of a judgment, and to proceedings on and in aid of execution shall be in accordance with the then existing practice and procedure of the state in which the district

court is held, except that any statute of the United States shall govern to the extent that it is applicable. The judgment creditor or his successor in interest when that interest appears of record, may, in aid of the judgment or writ of execution, 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.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Section 989, Revised Statutes, U. S. C., Title 28, § 842, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, c. 130, § 8 (18 Stat. 401), U. S. C., Title 2, § 118, and when the court has given the certificate of probable cause for his act as provided in those statutes, execution shall not issue against the officer or his property but the final judgment shall be satisfied as provided in such statutes.

NOTE

Note to subdivision (a). This follows in substance U. S. C., Title 28, §§ 727 (Executions as provided by State laws) and 729 (Proceedings in vindication of civil rights), except that the state procedure followed is that of the time when the execution proceedings are taken.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

U. S. C., Title 12:

§ 91 (Transfers by bank and other acts in contemplation of insolvency)

§ 632 (Jurisdiction of United States district courts in cases arising out of foreign banking; jurisdiction where Federal reserve bank a party)

U. S. C., Title 19:

§ 199 (Judgments, how payable)

U. S. C., Title 26:

§ 1610 (a) (Surrender of property subject to distraint)

U. S. C., Title 28:

§ 122 (Creation of new district or transfer of territory; lien)

§ 350 (Time for making application for appeal or certiorari; stay pending application for certiorari)

§ 489 (District Attorneys; reports to Department of Justice)

§ 574 (Marshals, fees enumerated)

§ 786 (Judgments for duties; collected in coin)

§ 811 (Interest on judgments)

§ 838 (Executions; run in all districts of State)

§ 839 (Executions; run in every State and Territory)

§ 840 (Executions; stay on conditions), as modified by Rule 67 (b)

§ 841 (Executions; stay of one term), as modified by Rule 67 (f)

§ 842 (Executions; against officers of revenue in cases of probable cause), as incorporated in Rule 75 (b)

§ 843 (Imprisonment for debt)

§ 844 (Imprisonment for debt; discharge according to State laws)

§ 845 (Imprisonment for debt; jail limits)

§ 846 (Fieri Facias; appraisal of goods; appraisers)

§ 847 (Sales; real property under order or decree)

§ 848 (Sales; personal property under order or decree)
§ 849 (Sales; necessity of notice)
§ 850 (Sales; death of marshal after levy or after sale)
§ 869 (Bond in former error and on appeal), as incorporated in Rule 63 (c)
§ 874 (Supersedeas), as modified by Rules 63 (d) and 67 (d)

U. S. C., Title 31:
§ 195 (Purchase on execution)

U. S. C., Title 33:
§ 918 (Collection of defaulted payments)

U. S. C., Title 49:
§ 74 (g) (Causes of action arising out of Federal control; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

U. S. C., Title 2:
§ 118 (Actions against officers for official acts)

U. S. C., Title 5:
§ 729 (Annuities not subject to assignment, execution, levy or other legal process)

U. S. C., Title 10:
§ 610 (Exemption from arrest on civil process)

U. S. C., Title 22:
§ 21 (h) (Retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

U. S. C., Title 33:
§ 916 (Assignment and exemption from claims of creditors)

U. S. C., Title 34:
§ 365 (c) (Medal of Honor Roll; special pension to persons enrolled)

U. S. C., Title 38:
§ 54 (Attachment, levy or seizure of moneys due pensioners prohibited)
U. S. C., Title 38:
§ 393 (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.)
§ 618 (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)
U. S. C., Title 43:
§ 175 (Exemption from execution of homestead land)
U. S. C., Title 48:
§ 1371o (Exemption from execution and so forth).

Rule 76. Judgment for Specific Acts; Vesting Title. If a judgment directs a party to execute a conveyance of land, or to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done shall have like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such

judgment shall have the force and effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

NOTE

Compare Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare with the provision in this rule that the judgment may itself vest title, Tenn. Ann. Code (Williams, 1934) § 10594; Conn. Gen. Stat. (1930) § 5455; N. M. Stat. Ann. (Courtright, 1929) § 117–117; Ohio Gen. Code Ann. (Page, 1926) § 11590; and England, Supreme Court of Judicature Act (1925), § 47.

Rule 77. Registration of Judgments in Other District Courts. A judgment entered in any district court may be registered in any other district court by filing therein an authenticated copy of the judgment. When so registered the judgment shall have the same effect and like proceedings for its enforcement may be taken thereon in the court in which it is registered as if the judgment had been originally entered by that court. If in the court in which the judgment was originally entered, the judgment has been satisfied in whole or in part or if an order has been made modifying or vacating it or affecting or suspending its operation, the party procuring the registration shall and any

other party may file authenticated copies of the satisfaction or order with the court in which the judgment is registered. This rule shall not be construed to limit the effect of the Act of February 20, 1905, c. 592, § 20 (33 Stat. 729), as amended, U. S. C., Title 15, § 100; or the Act of March 4, 1909, c. 320, §§ 36 and 37 (35 Stat. 1084), U. S. C., Title 17, §§ 36 and 37; or § 56 of the Judicial Code, U. S. C., Title 28, § 117; or to authorize the registration elsewhere of an order or a judgment rendered in a divorce action in the District of Columbia.

NOTE

Compare the provisions of U. S. C., Title 28, § 252 (Judgments for set-off or counterclaims) for the registration of judgments of the Court of Claims in favor of the United States. "Any transcript of such judgment, filed in the clerk's office of any district court, shall be entered upon the records thereof, and shall thereby become and be a judgment of such court and be enforced as other judgments in such court are enforced."

Provision for the registration of judgments in other courts is possible in some 46 British jurisdictions; and has been supported as to all judgments, state as well as federal, by the American Bar Association, which has advocated congressional legislation in this matter since 1927. See 52 A. B. A. Rep. 77–85, 292–310 (1927), and draft of an act at page 319; W. W. Cook, *The Powers of Congress Under the Full Faith and Credit Clause* (1919), 28 Yale L. J. 421–449; Yntema, *The Enforcement of Foreign Judgments in Anglo-American Law* (1935), 33 Mich. L. Rev. 1128, 1150 *et seq.*; G. W. C. Ross, *Full Faith and Credit in a Federal System* (1936), 20 Minn. L. Rev. 140–190.

Compare provisions for the docketing of state judgments in other districts or counties of the same state. See N. Y. C. P. A. (1936) §§ 502, 502a; 4 Mont. Rev. Codes Ann. (1935) § 9413; Ill. Rev. Stat. (1935) ch. 77, pars. 81, 82.

Note to the Supreme Court

The Committee believes that this rule, as a matter of policy, is a highly desirable one. See authorities cited in the Note. There remains the question whether this rule deals with a matter of practice and procedure or a matter of substantive law.

Rule 78. Process in Behalf of and Against Persons Not Parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

NOTE

Compare Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell* v. *Allison*, 21 Wall. 289 (1874); *Farmers' Loan and Trust Co.* v. *Chicago and A. R. R. Co.*, 44 Fed. 653 (C. C. Ind. 1890); *Robert Findlay Mfg. Co.* v. *Hygrade Lighting Fixture Corp.*, 288 Fed. 80 (E. D. N. Y. 1923); *Thompson* v. *Smith*, Fed. Cas. No. 13,977 (C. C. Minn. 1870).

Rule 79. District Courts and Clerks.

(a) DISTRICT COURTS ALWAYS OPEN. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one *ex parte,* shall be conducted outside the district without the consent of all parties affected thereby.

(c) CLERK'S OFFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the noting in the civil docket of the entry of an order or judgment made in the absence of a party who has appeared, if the order or judgment disposes of any issue raised by him, the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 (a), and shall make a note in the docket of the mailing. Thereafter a party asserting lack of notice of the entry of the order or judgment has the burden of establishing lack of notice. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment must be given; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 (a) for the service of papers. 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.

NOTE

This rule states the substance of U. S. C., Title 28, § 13 (Courts open as courts of admiralty and equity). Compare Equity Rules 1 (District Court Always Open For Certain Purposes—Orders at Chambers), 2 (Clerk's Office Always Open, Except, etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

Rule 80. Motion Day. 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 requir-

ing 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 and direct all interlocutory orders, rulings, and proceedings for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

NOTE

Compare Equity Rule 6 (Motion Day) with the first paragraph of this rule. The second paragraph authorizes a procedure found helpful for the expedition of business in some of the federal and state courts. Compare Chicago Municipal Court Code (1933), Rules 269, 270, 271.

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

(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 this book 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. When an action has been properly claimed or ordered for trial by jury, the clerk shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL ORDER BOOK. The clerk shall also keep a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all final judgments and orders, all orders affecting title to or lien upon real or personal property, all appealable orders, and such other orders as the court may direct.

(c) INDICES; CALENDARS. Separate and suitable indices of the civil docket and of the civil order book shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions".

NOTE

Compare Equity Rule 3 (Books Kept by Clerk and Entries Therein). In connection with this rule, see also the following statutes of the United States:

U. S. C., Title 28:
§ 568 (Same; reports of moneys received; dockets)
U. S. C., Title 5:
§ 301 (Officials for investigation of official acts, records and accounts of marshals, attorneys, clerks of courts, United States commissioners, referees and trustees)
§ 318 (Accounts of district attorneys)
U. S. C., Title 28:
§ 556 (Clerks of district courts; books open to inspection)
§ 567 (Clerk of district courts; accounts)
§ 813 (Indices of judgment debtors to be kept by clerks)

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

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

(a) STENOGRAPHER. A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and taxed ultimately as costs. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.

(b) STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence

at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

NOTE

Note to subdivision (*a*). This follows substantially Equity Rule 50 (Stenographer—Appointment—Fees).

Note to subdivision (*b*). Compare Iowa Code (1935) § 11353.

X. GENERAL PROVISIONS

Rule 83. Applicability in General.

(a) To What Proceedings Applicable.

(1) These rules shall not apply to proceedings in admiralty; nor to proceedings in bankruptcy or proceedings in copyright under the Act of March 4, 1909, c. 320, § 25 (35 Stat. 1081), as amended, U. S. C., Title 17, § 25, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They shall not apply to probate or lunacy proceedings in the District Court of the United States for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals shall be governed by these rules; but they shall not be applicable otherwise than on appeal, except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States.

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, or under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585),

U. S. C., Title 45, § 159, these rules shall apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of Commerce; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform with these rules so far as applicable.

(5) These rules do not alter the practice in the district courts of the United States prescribed in the Act of July 5, 1935, c. 372, §§ 9 and 10 (49 Stat. 453), U. S. C., Title 29, §§ 159 and 160 (e), (g), and (i), for beginning and conducting proceedings to enforce orders of the National Labor Relations Board; and in respects not covered by those statutes, the

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practice in the district courts shall conform to these rules so far as applicable.

(6) Proceedings for mandamus authorized by any statute of the United States shall be treated as actions in which the relief sought is a mandatory injunction; and the pleadings and practice therein shall conform to these rules.

(7) 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, nor to proceedings for review of compensation orders under the Act of March 4, 1927, c. 509, § 21 (44 Stat. 1436), U. S. C., Title 33, § 921. The provisions of the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § 405, for service by publication and allowing the defendant 60 days within which to answer shall remain in effect.

(b) SCIRE FACIAS. The writ of *scire facias* is abolished.

(c) REMOVED ACTIONS. These rules shall apply to civil actions removed to the district courts of the United States from the state courts and shall govern all procedure after removal. Repleading shall not be necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing

of the transcript of the record in the district court of the United States, whichever period is longer. If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 39 and who has not already waived his right to such trial shall be accorded it, if his claim therefor is served within 10 days after the record of the action is filed in the district court of the United States.

(d) DEFINITIONS.

(1) *Courts and Judges.* Whenever in these rules reference is made to a district court or to a district judge, the reference includes the District Court of the United States for the District of Columbia or a justice thereof; and whenever reference is made to a circuit court of appeals or to a judge thereof, the reference includes the United States Court of Appeals for the District of Columbia or a justice thereof.

(2) *Law Applicable.* Whenever in these rules the law of the state in which the district court is held is made applicable, the law applied in the District of Columbia governs proceedings in the District Court of the United States for the District of Columbia. When the word "state" is used, it shall, if appropriate, include the District of Columbia. When the term "statute of the United States" is used, it includes, so far as concerns proceedings in the District

Court of the United States for the District of Columbia, any Act of Congress or law locally applicable to and in force in the District of Columbia. When the law of a state is referred to, the word "law" shall include the statutes of that state and the state judicial decisions construing them.

NOTE

Note to Subdivision (a). Compare the enabling act, Act of June 19, 1934, U. S. C., Title 28, §§ 723b (Rules in actions at law; Supreme Court authorized to make) and 723c (Union of equity and action at law rules; power of Supreme Court.) For the application of these rules in bankruptcy and copyright proceedings, see Orders XXXVI and XXXVII in Bankruptcy and Rule 1 of Rules of Procedure under the copyright act, Act of March 4, 1909, U. S. C., Title 17, § 25 (Infringement and rules of procedure).

Some statutes which will be affected by paragraph (6) are:

U. S. C., Title 7:

§ 222 (Federal Trade Commission powers adopted for enforcement of Stockyards Act) (By reference to Title 15, § 49)

U. S. C., Title 15:

§ 49 (Enforcement of Federal Trade Commission orders and antitrust laws)

§ 77t (c) (Enforcement of Securities and Exchange Commission orders and Securities Act of 1933)

§ 78u (f) (Same; Securities Exchange Act of 1934)

§ 79r (g) (Same; Public Utility Holding Company Act of 1935)

U. S. C., Title 16:
§ 820 (Proceedings in equity for revocation or to prevent violations of license of Federal Power Commission licensee)
§ 825m (b) (Mandamus to compel compliance with Federal Water Power Act, etc.)
U. S. C., Title 19:
§ 1333 (c) (Mandamus to compel compliance with orders of Tariff Commission, etc.)
U. S. C., Title 33:
§ 495 (Removal of bridges over navigable waters)
U. S. C., Title 45:
§ 88 (Mandamus against Union Pacific Railroad Company)
§ 153 (p) (Mandamus to enforce orders of Adjustment Board under Railway Labor Act)
§ 185 (Same; National Air Transport Adjustment Board) (By reference to § 153)
U. S. C., Title 47:
§ 11 (Powers of Federal Communications Commission)
§ 401 (a) (Enforcement of Federal Communications Act and orders of Commission)
§ 406 (Same; compelling furnishing of facilities; mandamus)
U. S. C., Title 49:
§ 19a (*l*) (Mandamus to compel compliance with Interstate Commerce Act)
§ 20 (9) (Jurisdiction to compel compliance with interstate commerce laws by mandamus)

Note to subdivision (c). Such statutes as the following dealing with the removal of actions are substantially continued and made subject to these rules:

U. S. C., Title 28:

§ 71 (Removal of suits from state courts)
§ 72 (Same; procedure)
§ 73 (Same; suits under grants of land from different states)
§ 74 (Same; causes against persons denied civil rights)
§ 75 (Same; petitioner in actual custody of state court)
§ 76 (Same; suits and prosecutions against revenue officers)
§ 77 (Same; suits by aliens)
§ 78 (Same; copies of records refused by clerk of state court)
§ 79 (Same; previous attachment bonds or orders)
§ 80 (Same; dismissal or remand)
§ 81 (Same; proceedings in suits removed)
§ 82 (Same; record; filing and return)
§ 83 (Service of process after removal)

U. S. C., Title 28, § 72, *supra*, however, is modified by shortening the time for pleading in removed actions.

Note to subdivision (d). The last sentence of this subdivision modifies U. S. C., Title 28, § 725 (Laws of States as rules of decision) in so far as that statute has been construed to govern matters of procedure and to exclude state judicial decisions relative thereto.

Note to the Supreme Court

It is recommended that at the time these rules are promulgated the following rules also be promulgated in place of Orders XXXVI and XXXVII in Bankruptcy and Rule 1 in Copyright.

BANKRUPTCY

XXXVI

Appeals

Appeals shall be regulated, except as otherwise provided by the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Federal Rules of Civil Procedure.

XXXVII

General Provisions

In proceedings, formerly denominated at law or in equity, instituted for the purpose of carrying into effect the provisions of the Act, or for enforcing the rights and remedies given by it, the Federal Rules of Civil Procedure, established by the Supreme Court of the United States, shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance or pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.

COPYRIGHT

I

The Federal Rules of Civil Procedure, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the Act of March fourth, nineteen hundred and nine, entitled "An Act to amend and consolidate the acts respecting copyright".

Rule 84. Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the district

courts of the United States or the venue of actions therein.

NOTE

These rules grant extensive power of joining claims and counterclaims in one action, but, as this rule states, such grant does not extend federal jurisdiction. The rule is declaratory of existing practice under the Federal Equity Rules with regard to such provisions as Equity Rule 26 on Joinder of Causes of Action and Equity Rule 30 on Counterclaims. Compare Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure*, 45 Yale L. J. 393 (1935).

Rule 85. Rules by District Courts. Each district court by action of a majority of the judges thereof may 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. Copies of rules and amendments, if any, so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

[Alternative Rule 85. Insert in third line of the above, after the word "thereof", the following: "and with the concurrence of a majority of the circuit judges for the circuit,".]

NOTE

This rule substantially continues U. S. C., Title 28, § 731 (Rules of practice in district courts) with the additional requirement that copies of such rules and amendments be furnished to the Supreme Court of the

United States. See Equity Rule 79 (Additional Rules by District Court). With the last sentence compare Admiralty Rule 44 (Right of Trial Courts to Make Rules of Practice).

[*Note to Alternative Rule 85.*] Equity Rule 79 (Additional Rules by District Court) with modifications. U. S. C., Title 28, § 731 (Rules of practice in district courts) is modified by the requirement of a concurrence of a majority of the circuit judges for the circuit and the requirement that copies of such rules and amendments be furnished to the Supreme Court of the United States. With the last sentence compare Admiralty Rule 44 (Right of Trial Courts to Make Rules of Practice).

Note to the Supreme Court

Equity Rule 79 (Additional Rules by District Court) contains the requirement of a concurrence of a majority of the circuit judges, as set forth in the alternative rule, although no such requirement appears in the statute, U. S. C., Title 28, § 731 (Rules of practice in district courts). After considerable discussion it was the sense of the Committee that alternative rules be submitted for consideration of the court.

Rule 86. Use of Forms. The forms attached to these rules in the Appendix of Forms, with appropriate changes as circumstances may require, shall be considered sufficient under these rules.

NOTE

In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading. Compare Mass. Gen. Laws (Ter. Ed.) ch. 231, § 147, Forms 1–47; English Annual Practice (1933) Appendix A to M, inclusive; Conn. Practice Book (1934) pp. 47–68, 123–427.

Rule 87. Title. These rules may be known and cited as the Federal Rules of Civil Procedure.

Rule 88. Effective Date. These rules shall take effect on the day which is 3 months subsequent to the adjournment of the second regular session of the 75th Congress, but if that day is prior to September 1, 1938, then these rules shall take effect on September 1, 1938. They shall 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 to pending actions would not be feasible or would work injustice, in which event the former procedure shall apply.

NOTE

See Equity Rule 81 (These Rules Effective February 1, 1913—Old Rules Abrogated).

APPENDIX

TABLE I

When the Federal Rules of Civil Procedure become effective, they will supplant the Equity Rules since in general they cover the field now covered by the Equity Rules and the Conformity Act.

This table shows the Equity Rules to which references are made in the notes to the Federal Rules of Civil Procedure.

Equity Rules	Federal Rules of Civil Procedure	Equity Rules	Federal Rules of Civil Procedure
1	79	26	18, 20, 84
2	79	27	23
3	81	28	15
4	79	29	6, 7, 12, 55
5	79	30	8, 13, 84
6	80	31	7, 8, 55
7	4, 76	32	15
8	6, 76	33	7, 12
9	76	34	15
10	18, 54	35	15
11	78	36	11
12	3, 4, 5, 12, 55	37	17, 19, 20, 24
13	4, 12	38	23
14	4	39	19
15	4, 46	40	20, 44
16	6, 55	41	17
17	55	42	19, 20
18	7	43	12, 21
19	1, 15	44	12, 21
20	12	45	25
21	11, 12	46	44, 61
22	1	47	26
23	1, 40	48	44
24	11	49	53
25	8, 9, 10, 19	50	30, 82

Equity Rules	Federal Rules of Civil Procedure	Equity Rules	Federal Rules of Civil Procedure
51	30, 53	67	53
52	46, 53	68	53
53	53	69	56
54	26	70	17
55	30	70½	59
56	41	71	54
57	41	72	57, 61
58	26, 33, 34, 36	73	70
59	53	74	67
60	53	75	65
61	53	76	65
61½	53	77	66
62	53	78	44
63	53	79	85
64	26	80	6
65	53	81	88
66	53		

TABLE II

This table shows the Constitution, its amendments, and the sections of the United States Code to which references are made in the Federal Rules of Civil Procedure and the notes thereto.

[Unless followed by "(T)", to indicate that the reference appears in the text of the Rule, the references appear in the Note to the Rule.]

Constitution and its amendments	Federal Rules of Civil Procedure
Constitution	25 (T)
7th Amendment	39 (T)

U. S. Code	Federal Rules of Civil Procedure
Tit. 1, § 1	44
30	45
30a	45
54	45
55	45
Tit. 2, § 118	75 (T), 75
Tit. 5, § 301	81
318	81
490	45
729	75
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§ 6	63
7	4, 45, 63
8	63
9	63
11	63
12	63
13	63
14	63
15	63
Tit. 7, § 210 (f)	54
216	70
Tit. 7, § 217	4, 67, 70
222	46, 83
292	83 (T)
499g (c)	54, 83 (T)
499k	4, 67
511n	46
608c (15) (B)	4
855	4
Tit. 8, § 9a	45
45	54
282	83 (T)
356	45
399b (d)	45
405	4, 83 (T)
Tit. 9,	83 (T)
Tit. 10, § 610	75
Tit. 11, § 44 (d)	45
44 (e)	45
44 (f)	45
44 (g)	45
69	46
204	45
207 (j)	45
Tit. 12, § 91	75
632	75
Tit. 15, § 4	70
5	4
10	4
15	54
23	46
25	4, 70

U. S. Code	Federal Rules of Civil Procedure
Tit. 15, § 26	70
28	41, 67
49	46, 83
72	54
77k	54
77t (b)	70
77t (c)	83
77v (a)	54
77v (b)	46
78i (e)	54
78r	54
78u (c)	46
78u (e)	70
78u (f)	83
78aa	54
79r (d)	46
79r (f)	70
79r (g)	83
79y	54
96	54
99	54
100	77 (T)
124	54
127	45
522	83 (T)
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797 (g)	46
814	74
820	83
825f	46
825m (b)	83
825p	54
831x	74
Tit. 17, § 25	83 (T), 83
36	77 (T)
37	77 (T)
Tit. 19, § 199	75
274	54
508	8
1333 (b)	46
Tit. 19, § 1333 (c)	83
Tit. 20, § 52	45
Tit. 22, § 21 (h)	75
240	41
268	46
270d	46
270e	46
Tit. 24, § 78	74
Tit. 25, § 6	45
Tit. 26, § 614	46
619 (b)	46
1523 (a)	46
1569	4
1569 (d)	54
1610 (a)	75
1645 (c)	17
1645 (d)	54
1670 (b)(2)	54
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Tit. 28, § 12	6
13	79
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41 (26)	22 (T), 70 (T), 72
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45	3, 4, 7, 12, 55
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47	41, 67, 70
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48	24
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73	83
74	83
75	73
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79	83
80	12, 83
81	83

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 82	83	Tit. 28, § 424	48
83	83	489	75
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111	19	556	81
113	4	567	81
115	4	568	81 (T), 81
116	4	574	75
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225	63	601	46
226	63	602	46
227	63, 67	603	46
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228	63	635	44
228a	63	636	46
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345	62	640	26, 30
350	75	641	26, 30
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377	69	643	26
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382	70	648	46
383	70	654	46
384	2	655	46
391	56, 61	661	45
397	1, 2	662	45
398	1, 2	663	45
399	12, 15	664	45
400	50, 58 (T)	665	45
411	48	666	45
412	48	669	45
413	48	670	45
415	48	671	45
416	48	672	45
417	48	673	45
417a	48	674	45
418	48	675	45
423	48	676	45

U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 677	45
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738	69
739	69
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742	69
743	69
744	69
745	69
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811	75
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815	54
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53	70 (T)
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