

Extra Copy

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

Table of Contents

	Page
I. Scope of Rules—One Form of Action:	
Rule 1. Scope of Rules.....	1
Rule 2. One Form of Action.....	2
II. Commencement of Action, Service of Process, Pleadings, Motions, and Orders:	
Rule 3. Commencement of Action.....	4
Rule 4. Process:	
(a) Summons: Issuance.....	7
(b) Same: Form.....	7
(c) Method of Service: By Whom.....	7
(d) Summons: Personal Service.....	7
(e) Same: Other Service.....	10
(f) Territorial Limits of Effective Service...	10
(g) Return.....	10
(h) Amendment.....	10
Rule 5. Service and Filing of Pleadings and Other Papers:	
(a) Service.....	15
(b) Filing.....	16
(c) Filing With the Court Defined.....	16
Rule 6. Time:	
(a) Computation.....	17
(b) Enlargement.....	17
(c) Unaffected by Expiration of Term.....	18
(d) For Motions—Affidavits.....	18
(e) For Pleading After Disposition of Mo- tion.....	18
(f) Additional Time After Service by Mail..	19
III. Pleadings and Motions:	
Rule 7. Pleadings Designated; Motion Defined:	
(a) Pleadings.....	20
(b) Motions.....	20
(c) Other Papers.....	20
(d) Demurrers, Pleas, Etc., Abolished.....	20

III. Pleadings and Motions—Continued.		Page
Rule 8. General Rules of Pleading:		
(a) Claims for Relief.....		22
(b) Defenses; Form of Denials.....		22
(c) Affirmative Defenses.....		23
(d) Effect of Failure to Deny.....		23
(e) Pleading to be Concise and Direct; Consistency.....		23
(f) Construction of Pleadings.....		24
Rule 9. Pleading Special Matters:		
(a) Capacity.....		25
(b) Fraud, Mistake, Condition of the Mind.....		26
(c) Conditions Precedent.....		26
(d) Official Document or Act.....		26
(e) Judgment.....		26
(f) Time and Place.....		27
(g) Special Damage.....		27
Rule 10. Form of Pleadings:		
(a) Caption; Names of Parties.....		27
(b) Paragraphs; Separate Statements.....		28
(c) Adoption by Reference; Exhibits.....		28
Rule 11. Signing of Pleadings:		
(a) By Attorney.....		29
(b) By a Party.....		29
Rule 12. Defenses—When and How Presented:		
(a) When Presented.....		30
(b) Defenses—How Presented by Pleading and Motion.....		31
(c) Motion for Judgment on the Pleadings.....		32
(d) Preliminary Hearings.....		32
(e) Motion to Make More Definite or Certain or for Bill of Particulars.....		32
(f) Motion to Strike.....		33
(g) Consolidation of Motions.....		33
(h) Waiver of Defenses.....		33
Rule 13. Counterclaim and Cross-Claim:		
(a) Compulsory Counterclaims.....		36
(b) Permissive Counterclaims.....		37
(c) Counterclaim Exceeding Opposing Claim.....		37
(d) Counterclaim Against the United States.....		37
(e) Counterclaim Maturing or Acquired After Pleading.....		37
(f) Omitted Counterclaim.....		37
(g) Cross-Claim Against Co-Party.....		37
(h) Additional Parties May Be Brought In.....		38
(i) Severance; Separate Trials; Separate Judgments.....		38

CONTENTS

XI

	Page
III. Pleadings and Motions—Continued.	
Rule 14. Third-Party Practice:	
(a) When Defendant May Bring in Third Party.....	39
(b) When Plaintiff May Bring in Third Party.....	40
Rule 15. Amended and Supplemental Pleadings:	
(a) Amendments.....	41
(b) Amendments to Conform to the Evidence.....	42
(c) Relation Back of Amendments.....	43
(d) Supplemental Pleadings.....	43
Rule 16. Pre-Trial Procedure; Formulating Issues.....	44
IV. Parties:	
Rule 17. Parties Plaintiff and Defendant; Capacity:	
(a) Real Party in Interest.....	47
(b) Capacity to Sue or Be Sued.....	47
(c) Infants or Incompetent Persons.....	48
Rule 18. Joinder of Claims and Remedies:	
(a) Joinder of Claims.....	49
(b) Joinder of Remedies; Fraudulent Conveyances.....	49
Rule 19. Necessary Joinder of Parties:	
(a) Necessary Joinder.....	51
(b) Effect of Failure to Join.....	51
(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.....	51
Rule 20. Permissive Joinder of Parties:	
(a) Permissive Joinder.....	53
(b) Separate Trials.....	53
Rule 21. Misjoinder and Non-Joinder of Parties.....	54
Rule 22. Interpleader.....	55
Rule 23. Class Actions:	
(a) Representation.....	56
(b) Secondary Action by Shareholders.....	57
(c) Dismissal or Compromise.....	58
Rule 24. Intervention:	
(a) Intervention of Right.....	61
(b) Permissive Intervention.....	61
(c) Procedure.....	61
Rule 25. Substitution of Parties:	
(a) Death.....	63
(b) Incompetency.....	64
(c) Transfer of Interest.....	64
(d) Public Officers; Death or Separation from Office.....	64

V. Depositions, Discovery, and Summary Judgments:

	Page
Rule 26. Depositions Pending Action:	
(a) When Depositions May be Taken.....	66
(b) Scope of Examination.....	66
(c) Examination and Cross-Examination....	67
(d) Use of Depositions.....	67
(e) Objections to Admissibility.....	68
(f) Effect of Taking or Using Depositions..	69
Rule 27. Depositions before Action:	
(a) Petition and Order.....	72
(b) Notice and Service.....	73
(c) Use of Deposition.....	74
Rule 28. Persons Before Whom Depositions May be Taken:	
(a) Within the United States.....	75
(b) In Foreign Countries.....	75
(c) Disqualification for Interest.....	75
Rule 29. Stipulations Regarding the Taking of Depositions.....	76
Rule 30. Depositions Upon Oral Examination:	
(a) Notice of Examination: Time and Place..	76
(b) Orders for the Protection of Parties and Deponents.....	77
(c) Record of Examination; Oath; Objections.....	77
(d) Motion to Terminate Examination.....	78
(e) Submission to Witness; Changes; Signing.....	78
(f) Certification and Filing by Officer; Copies; Notice of Filing.....	79
(g) Failure to Attend or to Serve Subpoena; Expenses.....	80
Rule 31. Depositions of Witnesses Upon Written Interrogatories:	
(a) Serving Interrogatories; Notice.....	81
(b) Officer to Take Responses and Prepare Record.....	82
(c) Notice of Filing.....	82
(d) Oral Examination May be Ordered.....	82
Rule 32. Effect of Errors and Irregularities in Depositions:	
(a) As to Notice.....	83
(b) As to Disqualification of Officer.....	83
(c) As to Taking of Deposition.....	83
(d) Completion and Return of Deposition....	84
Rule 33. Interrogatories to Parties.....	84
Rule 34. Production of Documents and Things for Inspection, Copying, or Photographing.....	85

CONTENTS

XIII

V. Depositions, etc.—Continued.	Page
Rule 35. Physical and Mental Examination of Persons:	
(a) Order for Examination.....	86
(b) Report of Findings.....	87
Rule 36. Admission of Facts and of Genuineness of Documents:	
(a) Request for Admission.....	88
(b) Effect of Admission.....	89
Rule 37. Refusal to Make Discovery; Consequences:	
(a) Refusal to Answer.....	89
(b) Failure to Comply with Order:	
(1) Contempt.....	90
(2) Other Consequences.....	90
(c) Expenses on Refusal to Admit.....	92
(d) Failure of Party to Attend or Serve Answers.....	92
(e) Failure to Respond to Letters Rogatory..	93
(f) Expenses Against United States.....	93
Rule 38. Summary Judgment:	
(a) For Claimant.....	93
(b) For Defending Party.....	93
(c) Motion and Proceedings Thereon.....	93
(d) Case Not Fully Adjudicated on Motion..	94
(e) Form of Affidavits; Further Testimony..	94
(f) When Affidavits are Unavailable.....	95
(g) Affidavits Made in Bad Faith.....	95
 VI. Trials:	
Rule 39. Jury Trial of Right:	
(a) Right Preserved.....	97
(b) Demand.....	97
(c) Same: Specification of Issues.....	97
(d) Waiver.....	97
Rule 40. Trial by Jury or by the Court:	
(a) By Jury.....	99
(b) By the Court.....	99
(c) Advisory Jury and Trial by Consent.....	99
Rule 41. Assignment of Cases for Trial.....	101
Rule 42. Dismissal of Actions:	
(a) Voluntary Dismissal: Effect Thereof:	
(1) By Plaintiff; By Stipulation....	101
(2) By Order of Court.....	102
(b) Involuntary Dismissal: Effect Thereof...	102
(c) Dismissal of Counterclaim, Cross-Claim, or Third-Party Claim.....	103
(d) Costs of Previously-Dismissed Action...	103
Rule 43. Consolidation; Severance and Separate Trials:	
(a) Consolidation.....	104
(b) Severance and Separate Trials.....	104

VI. Trials—Continued.	Page
Rule 44. Evidence:	
(a) Form and Admissibility.....	105
(b) Scope of Examination and Cross-Examination.....	105
(c) Record of Excluded Evidence.....	106
(d) Affirmation in Lieu of Oath.....	107
Rule 45. Proof of Official Record:	
(a) Authentication of Copy.....	108
(b) Proof of Lack of Record.....	109
(c) Other Proof.....	109
Rule 46. Subpoena:	
(a) For Attendance of Witnesses; Form; Issuance.....	114
(b) For Production of Documentary Evidence.....	114
(c) Service.....	114
(d) Subpoena for Taking Depositions; Place of Examination.....	115
(e) Subpoena for a Hearing or Trial.....	115
(f) Contempt.....	116
Rule 47. Exceptions Abolished.....	119
Rule 48. Jurors:	
(a) Examination of Jurors.....	120
(b) Alternate Jurors.....	120
Rule 49. Juries of Less than Twelve—Majority Verdict.....	122
Rule 50. Special Verdicts and Interrogatories:	
(a) Special Verdicts.....	122
(b) General Verdict Accompanied by Answer to Interrogatories.....	123
Rule 51. Motion for a Directed Verdict:	
(a) When Made: Effect.....	124
(b) Reservation of Decision on Motion.....	124
Rule 52. Instructions to Jury: Objection.....	127
Rule 53. Masters:	
(a) Appointment.....	128
(b) Reference.....	128
(c) Powers.....	129
(d) Proceedings:	
(1) Meetings.....	130
(2) Witnesses.....	130
(3) Statement of Accounts.....	131
(e) Report:	
(1) Contents and Filing.....	131
(2) In Non-Jury Actions.....	131
(3) In Jury Actions.....	132
(4) Stipulation as to Findings.....	132
(5) Draft Report.....	132

VII. Judgment and Appeal:

	Page
Rule 54. Judgments: Costs:	
(a) Definition; Form.....	134
(b) Judgment At Various Stages.....	134
(c) Demand for Judgment.....	134
(d) Costs.....	135
Rule 55. Default:	
(a) Entry.....	138
(b) Judgment:	
(1) By the Clerk.....	138
(2) By the Court.....	138
(c) Setting Aside Default.....	139
(d) Plaintiffs, Counterclaimants, Cross- Claimants.....	139
(e) Judgment Against the United States....	139
Rule 56. New Trials:	
(a) Grounds.....	141
(b) Time for Motion.....	141
(c) Time for Serving Affidavits.....	141
(d) On Initiative of Court.....	141
Rule 57. Relief from Judgment or Order:	
(a) Clerical Mistakes.....	143
(b) Fraud; Accident; Mistake; Surprise.....	143
Rule 58. Declaratory Judgments.....	144
Rule 59. Findings by the Court:	
(a) Effect.....	146
(b) Amendment.....	146
Rule 60. Entry of Judgment.....	151
Rule 61. Harmless Error.....	152
Rule 62. Appeal from a District Court to the Supreme Court of the United States.....	152
Rule 63. Appeal to a Circuit Court of Appeals:	
(a) How Taken.....	154
(b) Notice of Appeal.....	154
(c) Bond on Appeal.....	155
(d) Supersedeas Bond.....	155
(e) Failure to File or Insufficiency of Bond..	156
(f) Judgment Against Surety.....	157
(g) Docketing and Record on Appeal.....	157
Rule 64. Joint or Several Appeals; Summons and Sever- ance Abolished.....	161
Rule 65. Record on Appeal to a Circuit Court of Appeals:	
(a) Designation of Contents of Record on Appeal.....	161
(b) Transcript.....	162
(c) Form of Testimony.....	162
(d) Statement of Points.....	163
(e) Record to be Abbreviated.....	163

VII. Judgment and Appeals—Continued.

	Page
Rule 65—Continued.	
(f) Stipulation as to Record.....	163
(g) Record to be Prepared by Clerk— Necessary Parts.....	163
(h) Power of Court to Correct Record.....	164
(i) Order as to Original Papers or Exhibits..	165
(j) Record for Preliminary Hearing in Appellate Court.....	165
(k) Several Appeals.....	165
(l) Printing.....	165
Rule 66. Record on Appeal to a Circuit Court of Appeals; Agreed Statement.....	170
Rule 67. Stay of Proceedings to Enforce a Judgment:	
(a) Automatic Stay; Exceptions—Injunc- tions, Receiverships, and Patent Ac- countings.....	171
(b) Stay on Motion for New Trial or for Judgment.....	171
(c) Injunction Pending Appeal.....	172
(d) Stay Upon Appeal.....	172
(e) Stay in Favor of the United States or Agency Thereof.....	172
(f) Stay According to State Law.....	173
(g) Power of Appellate Court Not Limited..	173
Rule 68. Disability of a Judge.....	175
VIII. Provisional and Final Remedies and Special Proceedings:	
Rule 69. Seizure of Person or Property.....	176
Rule 70. Injunctions:	
(a) Preliminary; Notice.....	178
(b) Temporary Restraining Order; Notice; Hearing; Duration.....	178
(c) Security.....	180
(d) Form of Injunction or Restraining Order.....	180
(e) Employer and Employee; Interpleader..	180
Rule 71. Receivers.....	182
Rule 72. Deposit in Court.....	182
Rule 73. Offer of Judgment.....	183
Rule 74. Condemnation of Property for Public Use:	
(a) Joinder of Properties.....	184
(b) Complaint.....	184
(c) Process.....	184
(d) Service by Publication.....	185
(e) Defenses and Objections.....	186
(f) Order of Condemnation.....	186
(g) Ascertainment of Compensation; Ap- pointment of Commissioner.....	187

CONTENTS

XVII

VIII. Provisions and Final Remedies—Continued.

	Page
Rule 74—Continued.	
(h) Same; Commissioner's Report.....	187
(i) Same; Trial by the Court—by Jury....	188
(j) Title and Possession.....	188
(k) Compensation; Deposit, Payment.....	189
(l) Assessments for Benefits.....	189
(m) Compliance with State Procedure.....	189
Rule 75. Execution:	
(a) In General.....	192
(b) Against Certain Public Officers.....	193
Rule 76. Judgment for Specific Acts; Vesting Title.....	196
Rule 77. Registration of Judgments in Other District Courts.....	197
Rule 78. Process in Behalf of and Against Persons Not Parties.....	199

IX. District Courts and Clerks:

Rule 79. District Courts and Clerks:	
(a) District Courts Always Open.....	200
(b) Trials and Hearings; Orders in Cham- bers.....	200
(c) Clerk's Office and Orders by Clerk.....	200
(d) Notice of Orders or Judgments.....	201
Rule 80. Motion Day.....	201
Rule 81. Books Kept by the Clerk and Entries Therein:	
(a) Civil Docket.....	202
(b) Civil Order Book.....	203
(c) Indices; Calendars.....	203
Rule 82. Stenographer; Stenographic Report or Transcript as Evidence:	
(a) Stenographer.....	204
(b) Stenographic Report or Transcript as Evidence.....	204

X. General Provisions:

Rule 83. Applicability in General:	
(a) To What Proceedings Applicable.....	206
(b) Scire Facias.....	208
(c) Removed Actions.....	208
(d) Definitions:	
(1) Courts and Judges.....	209
(2) Law Applicable.....	209
Rule 84. Jurisdiction and Venue Unaffected.....	213
Rule 85. Rules by District Courts.....	214
Rule 86. Use of Forms.....	215
Rule 87. Title.....	216
Rule 88. Effective Date.....	216

APPENDIX

	Page
Table 1. Equity rules to which references are made in the notes to the Federal Rules of Civil Procedure.....	217
Table 2. 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.....	219

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

I. SCOPE OF RULES—ONE FORM OF
ACTION

1 **Rule 1. Scope of Rules.** These rules govern
2 the procedure in the district courts of the
3 United States in all suits of a civil nature
4 whether cognizable as cases at law or in equity.
5 They shall be construed to secure, so far as
6 possible, the just, speedy, and inexpensive de-
7 termination 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).

1 **Rule 2. One Form of Action.** There shall
2 be one form of action to be known as “civil
3 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

1 **Rule 3. Commencement of Action.** A civil
2 action is commenced by filing a complaint with
3 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.

1 **Rule 4. Process.**

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

6 (b) **SAME: FORM.** The summons shall be
7 signed by the clerk, be under the seal of the
8 court, contain the name of the court and the
9 names of the parties, be directed to the defend-
10 ant, state the name and address of the plain-
11 tiff's attorney, if any, otherwise the plaintiff's
12 address, and the time within which these rules
13 require the defendant to appear and defend,
14 and shall notify him that in case of his failure
15 to do so, judgment by default will be rendered
16 against him for the relief demanded in the
17 complaint.

18 (c) **METHOD OF SERVICE: BY WHOM.** Serv-
19 ice of all process shall be made by a United
20 States marshal, by his deputy, or by some per-
21 son specially appointed by the court for that
22 purpose, except that a subpoena may be served
23 as provided in Rule 46. Special appointments
24 to serve process shall be made freely when sub-
25 stantial savings in travel fees will result.

26 (d) **SUMMONS: PERSONAL SERVICE.** The
27 summons and complaint shall be served to-
28 gether. The plaintiff shall furnish the person
29 making service with such copies as are neces-
30 sary. Service shall be made as follows:

31 (1) Upon an individual other than an
32 infant or an incompetent person, by de-
33 livering a copy of the summons and of the
34 complaint to him personally or by leaving

35 copies thereof at his dwelling house or
36 usual place of abode with some adult mem-
37 ber of his household or by delivering a
38 copy of the summons and of the complaint
39 to an agent authorized by appointment or
40 by law to receive service of process.

41 (2) Upon an infant or an incompetent
42 person, by serving the summons and com-
43 plaint in the manner prescribed by the law
44 of the state in which the service is made
45 for the service of summons or other like
46 process upon any such defendant in an
47 action brought in the courts of general
48 jurisdiction of that state.

49 (3) Upon a domestic or foreign corpo-
50 ration or upon a partnership or other
51 unincorporated association which is sub-
52 ject to suit under a common name, by de-
53 livering a copy of the summons and of the
54 complaint to an officer, managing or
55 general agent, or to any other agent au-
56 thorized by appointment or by law to
57 receive service of process and, if the agent
58 is one authorized by statute to receive
59 service and the statute so requires, by also
60 mailing a copy to the defendant.

61 (4) Upon the United States, by deliver-
62 ing a copy of the summons and of the com-
63 plaint to the United States attorney for
64 the district in which the action is brought
65 or to an assistant United States attorney
66 or clerical employee designated by the
67 United States attorney in a writing filed
68 with the clerk of the court and by sending

69 a copy of the summons and of the com-
 70 plaint by registered mail to the Attorney
 71 General of the United States at Washing-
 72 ton, District of Columbia, and in any action
 73 whether or not the United States is a de-
 74 fendant, wherein an order of an officer or
 75 agency of the United States not made a
 76 party is attacked, by also sending a copy
 77 of the summons and of the complaint by
 78 registered mail to such officer or agency.

79 (5) Upon an officer or agency of the
 80 United States, by serving the United States
 81 and by delivering a copy of the summons
 82 and of the complaint to such officer or
 83 agency. If the agency is a corporation the
 84 copy shall be delivered as provided in para-
 85 graph (3) of this subdivision of this rule.

86 (6) Upon a state, municipal corpora-
 87 tion, or other public or governmental
 88 organization subject to suit, by delivering
 89 a copy of the summons and of the com-
 90 plaint to the chief executive officer thereof
 91 or by serving the summons and complaint
 92 in the manner prescribed by the law of
 93 that state for the service of summons or
 94 other like process upon any such
 95 defendant.

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

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

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

116 (f) TERRITORIAL LIMITS OF EFFECTIVE SERV-
117 ICE. All process other than a subpoena may be
118 served anywhere within the territorial limits
119 of the state in which the district court is held
120 and, when a statute of the United States so
121 provides, beyond the territorial limits of that
122 state. A subpoena may be served within the
123 territorial limits provided in Rule 46.

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

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

137 to the substantial rights of the party against
138 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.

1 **Rule 5. Service and Filing of Pleadings and**
2 **Other Papers.**

3 (a) SERVICE. Every order required by its
4 terms to be served, every pleading subsequent
5 to the original complaint unless the court oth-
6 erwise orders because of numerous defendants,
7 every written motion other than one which
8 may be heard *ex parte*, and every written no-
9 tice, appearance, claim, demand, offer of judg-
10 ment, designation of record on appeal, and
11 similar paper shall be served upon each of
12 the parties affected thereby, but only upon
13 those not in default for failure to appear. If
14 any party has appeared by attorney, service
15 upon him shall be made upon the attorney
16 unless service upon the party himself is or-
17 dered by the court. Service upon the attorney
18 or upon a party shall be made by delivering
19 a copy to him or by mailing it to him at his
20 last known address or, if no address is known,
21 by leaving it with the clerk of the court. De-
22 livery of a copy within this rule means:
23 handing a copy to the attorney or to the party;
24 or leaving a copy at his office with his clerk
25 or other person in charge thereof; or, if there
26 is no one in charge, leaving a copy in a con-
27 spicuous place therein; or, if the office is closed
28 or the person to be served has no office, leav-
29 ing it at his dwelling house or usual place of
30 abode with some adult member of his house-
31 hold. Service by mail is complete upon mail-
32 ing. In any action in which there are unusu-
33 ally large numbers of defendants, the court,
34 upon motion or of its own initiative, may

35 order that service of the pleadings of the de-
36 fendants and replies thereto need not be made
37 as between the defendants and that any cross-
38 claim, counterclaim, or matter constituting an
39 avoidance or affirmative defense contained
40 therein shall be deemed to be denied or avoided
41 by all other parties and that the filing of any
42 such pleading and service thereof upon the
43 plaintiff constitutes due notice of it to the
44 parties. A copy of every such order shall be
45 served upon the parties in such manner and
46 form as the court directs.

47 (b) FILING. All papers served upon a party,
48 all pleadings, stipulations, written motions,
49 and designations of record on appeal shall be
50 filed with the court, together with proof of
51 service when service is required. When a
52 time is prescribed for the service of a plead-
53 ing or other paper, it shall be filed with the
54 court as well as served within that time.

55 (c) FILING WITH THE COURT DEFINED. The
56 filing of pleadings and other papers with the
57 court as required by these rules shall be made
58 by filing them with the clerk of the court, ex-
59 cept that the judge may permit the papers to
60 be filed with him, and shall note thereon the
61 filing date and forthwith transmit them to the
62 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).

1 **Rule 6. Time.**

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

17 (b) ENLARGEMENT. When by these rules or
18 by a notice given thereunder or by order of
19 court an act is required or allowed to be done
20 at or within a specified time, the court for
21 cause shown may, at any time in its discretion
22 with or without motion or notice, order the
23 time enlarged if application therefor is made
24 before the expiration of the period originally
25 prescribed or as extended by a previous order;
26 but it may not enlarge the time for taking any
27 action under Rule 56, except as stated in sub-
28 division (c) thereof, or the time for taking an
29 appeal as provided by law. This rule does not
30 limit the power of the court to grant relief

31 within the time and under the conditions pre-
32 scribed in Rule 57 (b).

33 (c) UNAFFECTED BY EXPIRATION OF TERM.

34 The period of time provided for the doing of
35 any act or the taking of any proceeding shall
36 not be affected or limited by the expiration of
37 a term of court. The expiration of a term of
38 court shall in no way affect the power of a
39 court to do any act or take any proceeding in
40 any civil action which has been pending
41 before it.

42 (d) FOR MOTIONS—AFFIDAVITS. A written
43 motion, other than one which may be heard
44 *ex parte*, and notice of the hearing thereof
45 shall be served not later than 5 days before the
46 time specified for the hearing, unless a differ-
47 ent time is fixed by these rules or by order of
48 the court. Such an order may for cause shown
49 be made on *ex parte* application. When a mo-
50 tion is supported by affidavit, the affidavit shall
51 be served with the motion; and, except as
52 otherwise provided in Rule 56 (c), opposing
53 affidavits may be served not later than 1 day
54 before the hearing, unless the court permits
55 them to be served at some other time.

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

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

67 (f) **ADDITIONAL TIME AFTER SERVICE BY**
68 **MAIL.** Whenever a party has the right or is re-
69 quired to do some act or take some proceedings
70 within a prescribed time after the service of a
71 notice or other paper upon him and the notice
72 or paper is served upon him by mail, 3 days
73 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

1 **Rule 7. Pleadings Designated; Motion**
2 **Defined.**

3 (a) PLEADINGS. There shall be a complaint
4 and an answer; and there shall be a reply, if the
5 answer contains a counterclaim denominated
6 as such or if the court orders a reply to an
7 affirmative defense in the answer; an answer
8 to a cross-claim, if the answer contains a cross-
9 claim; a third-party complaint, if a person
10 who was not an original party is summoned
11 under Rule 14 to appear in the action; and a
12 third-party answer, if a third-party com-
13 plaint is served. No other pleading shall be
14 allowed.

15 (b) MOTIONS. Any application to the court
16 for an order shall be by motion which, unless
17 made during a hearing or trial, shall be made
18 in writing, shall state with particularity the
19 grounds therefor, and shall set forth the relief
20 or order sought. The requirement of writing
21 is fulfilled if the substance of the motion is
22 stated in a written notice of the hearing of the
23 motion.

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

28 (d) DEMURRERS, PLEAS, ETC., ABOLISHED.
29 Demurrers, pleas, and exceptions for insuffi-
30 ciency 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.

1 Rule 8. General Rules of Pleading.

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

16 (b) **DEFENSES; FORM OF DENIALS.** In plead-
17 ing to a preceding pleading, a party shall state
18 in short and plain terms his defense or de-
19 fenses to each claim asserted and shall admit,
20 explain, or deny the averments upon which
21 the adverse party relies. If he is without
22 knowledge or information sufficient to form a
23 belief as to the truth of an averment, he shall
24 so state and this has the effect of a denial.
25 Denials shall fairly meet the substance of the
26 averments denied. When a pleader desires to
27 deny only a part or a qualification of an
28 averment, he shall not deny the averment gen-
29 erally or as averred, but he shall specify
30 so much of it as is true and material
31 and shall deny only the remainder. Unless
32 the pleader intends in good faith to controvert
33 all the averments of the preceding pleading, he
34 shall make his denials only as specific denials

35 of distinct averments or paragraphs ; but, when
36 he does so intend to controvert all its aver-
37 ments, including averments of the grounds upon
38 which the court's jurisdiction depends, he may
39 do so by general denial subject to the obliga-
40 tions set forth in Rule 11.

41 (c) AFFIRMATIVE DEFENSES. In pleading to
42 a preceding pleading, a party shall set forth
43 affirmatively accord and satisfaction, arbitra-
44 tion and award, assumption of risk, contrib-
45 utory negligence, discharge in bankruptcy,
46 duress, estoppel, failure of consideration,
47 fraud, illegality, injury by fellow servant,
48 laches, license, payment, release, res judicata,
49 statute of frauds, statute of limitations, waiver,
50 and any other matter constituting an avoid-
51 ance or affirmative defense. When a party
52 has mistakenly designated a defense as a coun-
53 terclaim or a counterclaim as a defense, the
54 court, without requiring a reply may treat the
55 pleading as if there had been a proper desig-
56 nation.

57 (d) EFFECT OF FAILURE TO DENY. Aver-
58 ments in a pleading to which a responsive
59 pleading is required, other than those as to
60 the amount of damage, are admitted when not
61 denied in the responsive pleading. Averments
62 in a pleading to which no responsive pleading
63 is required or permitted shall be taken as
64 denied or avoided.

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

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

69 cal forms of pleading or motions are
70 required.

71 (2) A party may set forth two or more
72 statements of a claim or defense alterna-
73 tively or hypothetically, either in one
74 count or defense or in separate counts or
75 defenses. When two or more statements
76 are made in the alternative and one of
77 them if made independently would be suf-
78 ficient, the pleading is not made insuffi-
79 cient by the insufficiency of one or more
80 of the alternative statements. A party
81 may also state as many separate claims or
82 defenses as he has regardless of consist-
83 ency and whether based on legal or on
84 equitable grounds or on both. All state-
85 ments shall be made subject to the obliga-
86 tions set forth in Rule 11.

87 (f) CONSTRUCTION OF PLEADINGS. All plead-
88 ings shall be so construed as to do substantial
89 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.

1 **Rule 9. Pleading Special Matters.**

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

7 made a party, except to the extent required to
8 show the jurisdiction of the court. A party
9 desiring to raise an issue as to the legal exist-
10 ence of any party or the capacity of any party
11 to sue or be sued or the authority of a party
12 to sue or be sued in a representative capacity,
13 shall do so by specific negative averment,
14 which shall include such supporting particu-
15 lars as are peculiarly within the pleader's
16 knowledge.

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

23 (c) CONDITIONS PRECEDENT. In pleading the
24 performance or occurrence of conditions prece-
25 dent, it is sufficient to aver generally that all
26 conditions precedent have been performed or
27 have occurred. A denial of performance or
28 occurrence shall be made specifically and with
29 particularity.

30 (d) OFFICIAL DOCUMENT OR ACT. In pleading
31 an official document or official act it is suffi-
32 cient to aver that the document was issued or
33 the act done in compliance with law.

34 (e) JUDGMENT. In pleading a judgment or
35 decision of a domestic or foreign court, judi-
36 cial or quasi-judicial tribunal, or of a board
37 or officer, it is sufficient to aver the judgment
38 or decision without setting forth matter show-
39 ing jurisdiction to render it.

40 (f) **TIME AND PLACE.** For the purpose of
41 testing the sufficiency of a pleading, averments
42 of time or place are material and shall be con-
43 sidered like all other averments of material
44 matter.

45 (g) **SPECIAL DAMAGE.** When items of spe-
46 cial damage are claimed, they shall be specifi-
47 cally 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.

1 **Rule 10. Form of Pleadings.**

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

5 the action, the file number, and a desig-
6 nation of the pleading as provided in Rule
7 7 (a). In the complaint the title of the
8 action shall include the names of all
9 the parties, but in other pleadings it is
10 sufficient to state the name of the first party
11 on each side with an appropriate indication of
12 other parties.

13 (b) PARAGRAPHS; SEPARATE STATEMENTS.
14 All averments of claim or defense shall be
15 made in numbered paragraphs, the contents of
16 each of which shall be limited as far as prac-
17 ticable to a statement of a single set of circum-
18 stances; and a paragraph may be referred to
19 by number in all succeeding pleadings. Each
20 claim founded upon a separate transaction or
21 occurrence and each defense other than denials
22 shall be stated in a separate count or defense
23 whenever a separation facilitates the clear pre-
24 sentation of the matters set forth.

25 (c) ADOPTION BY REFERENCE; EXHIBITS.
26 Statements in a pleading may be adopted by
27 reference in a different part of the same plead-
28 ing or in another pleading or in any motion.
29 A copy of any written instrument which is an
30 exhibit to a pleading is a part thereof for all
31 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.

1 **Rule 11. Signing of Pleadings.**

2 (a) **BY ATTORNEY.** Every pleading shall be
3 signed in his individual name by at least one
4 attorney of record. Except when otherwise
5 specifically provided by rule or statute, plead-
6 ings need not be verified or accompanied by
7 affidavit. The signature of an attorney con-
8 stitutes a certificate by him that he has read
9 the pleading; that to the best of his knowledge,
10 information, and belief there is good ground
11 to support it; and that it is not interposed for
12 delay. If a pleading is not signed or is signed
13 with intent to defeat the purpose of this rule,
14 it may be stricken as sham and false and the
15 action may proceed as though the pleading
16 had not been served. For a wilful violation
17 of this rule an attorney may be subjected to
18 appropriate disciplinary action. Similar ac-
19 tion may be taken if scandalous or indecent
20 matter is inserted.

21 (b) **BY A PARTY.** A party who is not repre-
22 sented by an attorney shall sign the pleading
23 and shall be subject to the obligations and pen-
24 alties 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).

1 **Rule 12. Defenses—When and How Pre-** 2 **sented.**

3 (a) **WHEN PRESENTED.** A defendant shall
4 serve his answer within 20 days after the serv-
5 ice of the summons and complaint upon him,
6 unless the court directs otherwise when serv-
7 ice of process is made pursuant to Rule 4 (e).
8 A party served with a pleading stating a cross-
9 claim against him shall serve an answer there-
10 to within 20 days after the service upon him.
11 The plaintiff shall serve his reply to a counter-
12 claim in the answer within 20 days after serv-
13 ice of the answer or, if a reply is ordered by
14 the court, within 20 days after service of the
15 order, unless the order otherwise directs. The
16 United States or an officer or agency thereof

17 shall serve an answer to the complaint or to a
18 cross-claim, or a reply to a counterclaim, with-
19 in 60 days after the service of the pleading in
20 which the claim is asserted. The service of
21 any motion provided for in this rule extends
22 the time otherwise fixed by these rules for
23 serving any required responsive pleading until
24 the expiration of 10 days after notice that the
25 court has denied the motion or has postponed
26 the disposition thereof until the trial on the
27 merits or, if a motion to make more definite
28 and certain or for a bill of particulars is
29 granted, until the expiration of the time for
30 response to the original pleading or 10 days,
31 whichever may be the longer, unless a different
32 time is fixed by order of the court.

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

51 sponsive pleading or motion. If a pleading
52 sets forth a claim for relief to which the ad-
53 verse party is not required to serve a respon-
54 sive pleading, he may assert at the trial any
55 defense in law or fact to that claim for relief.

56 (c) MOTION FOR JUDGMENT ON THE PLEAD-
57 INGS. After the pleadings are closed but with-
58 in such time as not to delay the trial, any party
59 may move for judgment on the pleadings.

60 (d) PRELIMINARY HEARINGS. The defenses
61 specifically enumerated (1)-(6) in subdivi-
62 sion (b) of this rule, whether made in a plead-
63 ing or by motion, and the motion for judgment
64 mentioned in subdivision (c) of this rule, shall
65 be heard and determined before trial on ap-
66 plication of any party, unless the court orders
67 that the hearing and determination thereof be
68 deferred until the trial.

69 (e) MOTION TO MAKE MORE DEFINITE OR CER-
70 TAIN OR FOR BILL OF PARTICULARS. Before re-
71 sponding to a pleading or, if no responsive
72 pleading is permitted by these rules, within
73 20 days after the service of the pleading upon
74 him, a party may move for a more definite
75 statement or for a bill of particulars of any
76 matter which is not averred with sufficient
77 definiteness or particularity to enable him
78 properly to prepare his responsive pleading
79 or to prepare for trial. The motion shall point
80 out the defects complained of and the details
81 desired. If the motion is granted and the
82 order of the court is not obeyed within 10 days
83 after notice of the order or within such other
84 time as the court may fix, the court may strike

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

89 (f) MOTION TO STRIKE. The Court may,
90 upon motion made by a party before respond-
91 ing to a pleading or, if no responsive pleading
92 is permitted by these rules, within 20 days
93 after the service of the pleading upon him, or
94 of its own initiative, at any time, order any
95 redundant, immaterial, impertinent, or scan-
96 dalous matter stricken from any pleading.

97 (g) CONSOLIDATION OF MOTIONS. A party
98 who makes a motion under this rule may join
99 with it the other motions herein provided for;
100 and if he makes such a motion and does not
101 include therein all grounds of motion which
102 are then available to him, he shall not be per-
103 mitted thereafter to make a motion based on
104 any of the grounds so omitted; except that
105 prior to making any other such motions
106 under this rule he may make a motion present-
107 ing objections to the jurisdiction of the court
108 over the subject matter or over the person, or to
109 the sufficiency of the process or its service, or
110 to venue; and except that he may make a
111 motion for judgment on the pleadings, as
112 stated in subdivision (h) of this rule.

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

119 for failure to state a claim upon which relief
120 can be granted even though previously pre-
121 sented, or to state a legal defense to a claim,
122 may also be made by a later pleading, if one
123 is permitted, or by motion for judgment on the
124 pleadings, or at the trial on the merits; but if
125 made at the trial, shall then be disposed of as
126 provided in Rule 15 (b) in the light of any
127 evidence which may have been received.
128 Whenever it appears by suggestion of the
129 parties, or otherwise, that the court has not
130 jurisdiction of the subject matter, it shall dis-
131 miss 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.

1 **Rule 13. Counterclaim and Cross-Claim.**

2 (a) **COMPULSORY COUNTERCLAIMS.** A plead-
 3 ing shall state as a counterclaim any claim,
 4 not the subject of a pending action, which at
 5 the time of filing the pleading the pleader has
 6 against any opposing party, if it arises out of
 7 the transaction or occurrence that is the sub-
 8 ject matter of the opposing party's claim and
 9 does not require for its adjudication the pres-
 10 ence of third parties of whom the court can-
 11 not acquire jurisdiction.

12 (b) PERMISSIVE COUNTERCLAIMS. A plead-
13 ing may state as a counterclaim any claim
14 against an opposing party not arising out of
15 the transaction or occurrence that is the sub-
16 ject matter of the opposing party's claim.

17 (c) COUNTERCLAIM EXCEEDING OPPOSING
18 CLAIM. A counterclaim may or may not
19 diminish or defeat the recovery sought by the
20 opposing party, but may claim relief exceed-
21 ing in amount or different in kind from that
22 sought in the pleading of the opposing party.

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

29 (e) COUNTERCLAIM MATURING OR ACQUIRED
30 AFTER PLEADING. A claim which either ma-
31 tured or was acquired by the pleader after
32 serving his pleading may, with the permission
33 of the court, be presented as a counterclaim by
34 supplemental pleading.

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

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

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

50 (h) **ADDITIONAL PARTIES MAY BE BROUGHT**
51 **IN.** When the determination of a counter-
52 claim or cross-claim requires for the granting
53 of complete relief the presence of parties other
54 than those to the original action, the court
55 shall order them to be brought in as defend-
56 ants as provided in these rules, if jurisdiction
57 of them can be obtained and their joinder will
58 not deprive the court of jurisdiction of the
59 action.

60 (i) **SEVERANCE; SEPARATE TRIAL; SEPARATE**
61 **JUDGMENTS.** If the court orders severance
62 or separate trials as provided in Rule 43 (b),
63 judgment on a counterclaim or cross-claim
64 may be rendered when the court has jurisdic-
65 tion so to do, even if the claims of the oppos-
66 ing party have been dismissed or otherwise
67 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).

- 1 **Rule 14. Third-Party Practice.**
- 2 (a) WHEN DEFENDANT MAY BRING IN THIRD
- 3 PARTY. Before the service of his answer a de-

4 defendant may move *ex parte* or, after the serv-
5 ice of his answer, on notice to the plaintiff, for
6 leave as a third-party plaintiff to serve a sum-
7 mons and complaint upon a person not a party
8 to the action who is or may be liable to him or
9 to the plaintiff for all or part of the plaintiff's
10 claim against him. If the motion is granted
11 and the summons and complaint are served,
12 the person so served, hereinafter called the
13 third-party defendant, shall make his defenses
14 as provided in Rule 12 and his counterclaims
15 and cross-claims against the plaintiff, the
16 third-party plaintiff, or any other party as
17 provided in Rule 13. The third-party defend-
18 ant may assert any defenses which the third-
19 party plaintiff has to the plaintiff's claim.
20 The third-party defendant is bound by the
21 adjudication of the third-party plaintiff's lia-
22 bility to the plaintiff, as well as of his own to
23 the plaintiff or to the third-party plaintiff.
24 The plaintiff may amend his pleadings to as-
25 sert against the third-party defendant any
26 claim which the plaintiff might have asserted
27 against the third-party defendant had he been
28 joined originally as a defendant. A third-
29 party defendant may proceed under this rule
30 against any person not a party to the action
31 who is or may be liable to him or to the third-
32 party plaintiff for all or part of the claim made
33 in the action against the third-party defendant.

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

38 under this rule would entitle a defendant to
39 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).

1 **Rule 15. Amended and Supplemental**
2 **Pleadings.**

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

10 it is served. Otherwise a party may amend
11 his pleading only by leave of court or by writ-
12 ten consent of the adverse party; and leave
13 shall be freely given when justice so requires.
14 When a party is required to plead in response
15 to an amended pleading or a pleading suppl-
16 mented by a bill of particulars, he may respond
17 thereto within the time for response to the
18 original pleading or within 10 days, which-
19 ever may be the longer, unless a different time
20 is fixed by order of the court.

21 (b) AMENDMENTS TO CONFORM TO THE EVI-
22 DENCE. When issues not raised by the plead-
23 ings are tried by express or implied consent of
24 the parties, they shall be treated in all respects
25 as if they had been raised in the pleadings.
26 Such amendment of the pleadings as may be
27 necessary to cause them to conform to the evi-
28 dence and to raise these issues may be made
29 upon motion of any party at any time, even
30 after judgment; but failure so to amend does
31 not affect the result of the trial of these issues.
32 If evidence is objected to at the trial on the
33 ground that it is not within the issues made
34 by the pleadings, the court may allow the
35 pleadings to be amended and shall do so freely
36 when the presentation of the merits of the
37 action will be subserved thereby and the object-
38 ing party fails to satisfy the court that the ad-
39 mission of such evidence would prejudice him
40 in maintaining his action or defense upon the
41 merits. The court may grant a continuance to
42 enable the objecting party to meet such evi-
43 dence.

44 (c) RELATION BACK OF AMENDMENTS. When-
45 ever the claim or defense asserted in the
46 amended pleading arose out of the conduct,
47 transaction, or occurrence set forth or at-
48 tempted to be set forth in the original plead-
49 ing, the amendment relates back to the date of
50 the original pleading.

51 (d) SUPPLEMENTAL PLEADINGS. Upon mo-
52 tion of a party the court may, upon reasonable
53 notice and upon such terms as are just, permit
54 him to serve a supplemental pleading setting
55 forth transactions or occurrences or events
56 which have happened since the date of the
57 pleading sought to be supplemented. If the
58 court deems it advisable that the adverse party
59 plead thereto, it shall so order, specifying the
60 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).

1 **Rule 16. Pre-Trial Procedure; Formulati-**
 2 **ng Issues.** In any action, the court may in
 3 its discretion direct the attorneys for the par-
 4 ties to appear before it for a conference to
 5 consider

6 (1) The simplification of the issues;

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

9 (3) The possibility of obtaining admis-
 10 sions of fact and of documents which will
 11 avoid unnecessary proof;

12 (4) The limitation of the number of ex-
 13 pert witnesses;

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

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

20 The court shall make an order which recites
21 the action taken at the conference, the amend-
22 ments allowed to the pleadings, and the agree-
23 ments made by the parties as to any of the
24 matters considered, and which limits the issues
25 for trial to those not disposed of by admissions
26 or agreements of counsel; and such order
27 when entered shall control the subsequent
28 course of the action. The court in its discre-
29 tion may establish by rule a pre-trial calendar
30 on which actions may be placed for consider-
31 ation as above provided and may either con-
32 fine the calendar to jury actions or extend it
33 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

1 **Rule 17. Parties Plaintiff and Defendant;**
2 **Capacity.**

3 (a) **REAL PARTY IN INTEREST.** Every action
4 shall be prosecuted in the name of the real
5 party in interest; but an executor, adminis-
6 trator, guardian, trustee of an express trust,
7 a party with whom or in whose name a con-
8 tract has been made for the benefit of another,
9 or a party authorized by statute may sue in
10 his own name without joining with him the
11 party for whose benefit the action is brought;
12 and when a statute of the United States so
13 provides, an action for the use or benefit of
14 another may be brought in the name of the
15 United States.

16 (b) **CAPACITY TO SUE OR BE SUED.** The ca-
17 pacity of an individual to sue or be sued shall
18 be determined by the law of his domicile. The
19 capacity of a corporation to sue or be sued
20 shall be determined by the law under which
21 it was organized. In all other cases capacity
22 to sue or be sued shall be governed by the law
23 of the state in which the district court is held;
24 except that a partnership or other unincorpor-
25 ated association, which has no such capacity
26 by the law of such state, may sue or be sued
27 in its common name for the purpose of en-
28 forcing for or against it a substantive right
29 existing under the Constitution or law of the
30 United States.

31 (c) INFANTS OR INCOMPETENT PERSONS.
32 Whenever an infant or incompetent person has
33 a representative, such as a general guard-
34 ian, committee, conservator, or other like fi-
35 duciary, the representative may sue or defend
36 on behalf of the infant or incompetent person.
37 If an infant or incompetent person does not
38 have a duly appointed representative he may
39 sue by his next friend or by a guardian *ad*
40 *litem*, and if he is sued the court shall appoint
41 a guardian *ad litem* to represent him. The
42 court shall appoint a guardian *ad litem* for
43 an infant or incompetent person not other-
44 wise represented in an action or shall make
45 such other order as it deems proper for the
46 protection of the infant or incompetent
47 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.

1 **Rule 18. Joinder of Claims and Remedies.**

2 (a) JOINDER OF CLAIMS. The plaintiff in his
3 complaint or in a reply setting forth a counter-
4 claim and the defendant in an answer setting
5 forth a counterclaim, may join either as in-
6 dependent or as alternate claims as many
7 claims either legal or equitable or both as he
8 may have against an opposing party. There
9 may be a like joinder of claims when there are
10 multiple parties if the requirements of Rules
11 19, 20 and 22 are satisfied. There may be a like
12 joinder of cross-claims or third-party claims if
13 the requirements of Rules 13 and 14 respec-
14 tively are satisfied.

15 (b) JOINDER OF REMEDIES; FRAUDULENT
16 CONVEYANCES. Whenever a claim is one here-
17 tofore cognizable only after a prior proceed-

18 ing has been prosecuted to a conclusion, the
19 two claims may be joined in a single action;
20 but the court shall grant relief in that action
21 only in accordance with the relative substan-
22 tive rights of the parties. In particular, a
23 plaintiff may state a claim for money and a
24 claim to have set aside a conveyance fraudu-
25 lent as to him, without first having obtained a
26 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*.

1 **Rule 19. Necessary Joinder of Parties.**

- 2 (a) NECESSARY JOINDER. Subject to the pro-
3 visions of Rule 23 and of subdivision (b) of
4 this rule, persons having a joint interest shall
5 be made parties and be joined on the same side
6 as plaintiffs or defendants. When a person
7 who should join as a plaintiff refuses to do so,
8 he may be made a defendant or, in proper
9 cases, an involuntary plaintiff.
- 10 (b) EFFECT OF FAILURE TO JOIN. When per-
11 sons who are not indispensable, but who ought
12 to be parties if complete relief is to be accorded
13 between the original parties, have not been
14 made parties and are subject to the jurisdic-
15 tion of the court as to both service of process
16 and venue and can be made parties without de-
17 priving the court of jurisdiction of the parties
18 before it, the court shall order them sum-

19 moned to appear in the action. The court in
20 its discretion may proceed in the action with-
21 out making such persons parties, if its juris-
22 diction over them as to either service of proc-
23 ess or venue can be acquired only by their con-
24 sent or voluntary appearance or if, though
25 they are subject to its jurisdiction, their join-
26 der would deprive the court of jurisdiction of
27 the parties before it; but the judgment ren-
28 dered therein does not affect the rights or lia-
29 bilities of absent persons.

30 (c) SAME: NAMES OF OMITTED PERSONS AND
31 REASONS FOR NON-JOINDER TO BE PLEADED. In
32 any pleading in which relief is asked, the
33 pleader shall set forth the names of persons, if
34 known to him, who ought to be parties if com-
35 plete relief is to be accorded between the origi-
36 nal parties, but are not joined, and shall state
37 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).

1 **Rule 20. Permissive Joinder of Parties.**

2 (a) **PERMISSIVE JOINDER.** All persons may
3 join in one action as plaintiffs if they assert
4 any right to relief jointly, severally, or in the
5 alternative in respect of or arising out of the
6 same transaction, occurrence, or series of
7 transactions or occurrences and if any ques-
8 tion of law or fact common to all of them will
9 arise in the action. All persons may be joined
10 in one action as defendants if there is asserted
11 against them jointly, severally, or in the alter-
12 native, any right to relief in respect of or aris-
13 ing out of the same transaction, occurrence, or
14 series of transactions or occurrences and if any
15 question of law or fact common to all of them
16 will arise in the action. A plaintiff or defend-
17 ant need not be interested in obtaining or de-
18 fending against all the relief demanded.
19 Judgment may be given for one or more of the
20 plaintiffs according to their respective rights
21 to relief, and against one or more defendants
22 according to their respective liabilities.

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

28 him, and may order separate trials or make
29 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 parties 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.

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

NOTE

See English Rules Under the Judicature Act (1935) 0. 16, r. 11. See also Equity Rules 43 (Defect of Parties-Resisting Objection) and 44 (Defect of Parties-Tardy Objection).

1 **Rule 22. Interpleader.**

2 (1) Persons having claims against the
3 plaintiff may be joined as defendants and re-
4 quired to interplead when their claims are such
5 that the plaintiff is or may be exposed to
6 double or multiple liability. It is not ground
7 for objection to the joinder that the claims of
8 the several claimants or the titles on which
9 their claims depend do not have a common ori-
10 gin or are not identical but are adverse to and
11 independent of one another, or that the plain-
12 tiff avers that he is not liable in whole or in
13 part to any or all of the claimants. A de-
14 fendant exposed to similar liability may ob-
15 tain such interpleader by way of cross-claim
16 or counterclaim. The provisions of this rule
17 supplement and do not in any way limit the
18 joinder of parties permitted in Rule 20.

19 (2) The remedy herein provided is in addi-
20 tion to and in no way supersedes or limits the
21 remedy provided by Section 24 (26) of the
22 Judicial Code, as amended, U. S. C., Title 28,
23 § 41 (26). Actions under that section shall be
24 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.

1 **Rule 23. Class Actions.**

2 (a) REPRESENTATION. If persons constitut-
3 ing a class are so numerous as to make it im-
4 practicable to bring them all before the court,
5 such a number of them as will fairly insure
6 the adequate representation of all may, on be-
7 half of all, join as plaintiffs or be joined as
8 defendants, when the character of the right

9 sought to be enforced for or against the class
10 is

11 (1) joint, or common, or secondary in
12 the sense that the owner of a primary
13 right refuses to enforce that right and a
14 member of the class thereby becomes en-
15 titled to enforce it;

16 (2) several, and the object of the ac-
17 tion is the adjudication of claims which
18 do or may affect specific property in-
19 volved in the action; or

20 (3) several, and there is a common
21 question of law or fact affecting the sev-
22 eral rights and a common relief is sought.

23 (b) SECONDARY ACTION BY SHAREHOLDERS.

24 In an action brought to enforce a secondary
25 right on the part of one or more shareholders
26 in an association, incorporated or unincorpo-
27 rated, because the association refuses to en-
28 force rights which may properly be asserted by
29 it, the complaint shall be verified by oath and
30 shall aver (1) that the plaintiff was a share-
31 holder at the time of the transaction of which
32 he complains or that his share thereafter de-
33 volved on him by operation of law and (2)
34 that the action is not a collusive one to confer
35 on a court of the United States jurisdiction of
36 any action of which it would not otherwise have
37 jurisdiction. The complaint shall also set
38 forth with particularity the efforts of the
39 plaintiff to secure from the managing direc-
40 tors or trustees and, if necessary, from the
41 shareholders such action as he desires, and the

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

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

NOTE

Note to Subdivision (a). This is a substantial re-statement 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.

1 **Rule 24. Intervention.**

2 (a) **INTERVENTION OF RIGHT.** Upon timely
3 application, anyone shall be permitted to inter-
4 vene in an action: (1) when a statute of the
5 United States confers an unconditional right
6 to intervene; or (2) when the representation
7 of the applicant's interest by existing parties
8 is or may be inadequate and the applicant is
9 or may be bound by a judgment in such ac-
10 tion; or (3) when the applicant is so situated
11 as to be adversely affected by a distribution or
12 other disposition of property in the custody
13 of the court or of an officer thereof.

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

25 (c) **PROCEDURE.** A person desiring to inter-
26 vene shall serve a motion to intervene upon
27 all parties affected thereby. The motion shall
28 state the grounds therefor and shall be accom-
29 panied by a pleading setting forth the claim
30 or defense for which intervention is sought.
31 The same procedure shall be followed when a
32 statute of the United States gives a right to
33 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. (Court-right, 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) *Vavasasseur v. Krupp*, 9 Ch. D. 351 (1878) (persons out of the jurisdiction).

1 **Rule 25. Substitution of Parties.**

2 (a) DEATH.

3 (1) If a party dies and the claim is not
4 thereby extinguished, the court within 2
5 years after the death may order substitu-
6 tion of the proper parties. If substitution
7 is not so made, the action shall be dis-
8 missed as to the deceased party. The mo-
9 tion for substitution may be made by the
10 successors or representatives of the de-
11 ceased party or by any party and, to-
12 gether with the notice of hearing, shall be
13 served on the parties as provided in Rule
14 5 (a) and upon persons not parties in the
15 manner provided in Rule 4 for the service
16 of a summons, and may be served in any
17 judicial district.

18 (2) In the event of the death of one or
19 more of the plaintiffs or of one or more
20 of the defendants in an action in which
21 the right sought to be enforced survives
22 only to the surviving plaintiff or plaintiffs
23 or only against the surviving defendant
24 or defendants, the action does not abate.
25 The death shall be suggested upon the rec-
26 ord and the action shall proceed in favor
27 of or against the surviving parties.

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

33 (c) TRANSFER OF INTEREST. In case of any
34 transfer of interest, the action may be con-
35 tinued by or against the original party, unless
36 the court upon motion directs the person to
37 whom the interest is transferred to be substi-
38 tuted in the action or joined with the original
39 party. Service of the motion shall be made as
40 provided in subdivision (a) of this rule.

41 (d) PUBLIC OFFICERS; DEATH OR SEPARATION
42 FROM OFFICE. When an officer of the United
43 States, the District of Columbia, a state,
44 county, or city, or any other officer specified
45 in the Act of February 13, 1925, c. 229, § 11
46 (43 Stat. 941), U. S. C., Title 28, § 780, is a
47 party to an action and during its pendency
48 such officer dies, resigns, or otherwise ceases to
49 hold office, the action may be continued and
50 maintained by or against his successor, if
51 within 6 months after the successor takes office
52 it is satisfactorily shown to the court that there
53 is a substantial need for so continuing and
54 maintaining it. Substitution pursuant to this
55 rule may be made when it is shown by supple-
56 mental pleading that the successor of an officer
57 adopts or continues or threatens to adopt or
58 continue the action of his predecessor in en-
59 forcing a law averred to be in violation of the
60 Constitution of the United States. Before a
61 substitution is made, the party or officer to be

62 affected, unless expressly assenting thereto,
63 shall be given reasonable notice of the applica-
64 tion therefor and accorded an opportunity to
65 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

1 **Rule 26. Depositions Pending Action.**

2 (a) WHEN DEPOSITIONS MAY BE TAKEN.

3 At any time after an answer has been filed, or
4 by leave of court after jurisdiction has been
5 obtained over any defendant or over property
6 which is the subject of the action, the testi-
7 mony of any person, whether a party or not,
8 may, at the instance of any party, be taken
9 by deposition upon oral examination or writ-
10 ten interrogatories for the purpose of dis-
11 covery, for use as evidence at the trial, or for
12 both purposes. The attendance of witnesses
13 may be compelled by the use of subpoena as
14 provided in Rule 46. Oral depositions shall
15 be taken only in accordance with Rule 30 and
16 written depositions only in accordance with
17 Rule 31. The deposition of a person confined
18 in prison may be taken only by leave of court
19 on such terms as the court prescribes.

20 (b) SCOPE OF EXAMINATION. Unless other-
21 wise ordered by the Court as provided by Rule
22 30 (b) or (d), the deponent may be exam-
23 ined regarding any matter, not privileged,
24 which is relevant to the subject matter involved
25 in the pending action, whether relating to the
26 claim or defense of the examining party or to
27 the claim or defense of any other party, in-
28 cluding the existence, description, nature, cus-
29 tody, condition, and location of any books, doc-
30 uments, or other tangible things and the iden-

31 tity and location of persons having knowledge
32 of relevant facts.

33 (c) EXAMINATION AND CROSS-EXAMINATION.
34 Examination and cross-examination of depo-
35 nents may proceed as permitted at the trial
36 under the provisions of Rule 44 (b).

37 (d) USE OF DEPOSITIONS. At the trial or upon
38 the hearing of a motion or an interlocutory
39 proceeding, any part or all of a deposition, so
40 far as admissible under the rules of evidence,
41 may be used against any party who was pres-
42 ent or represented at the taking of the deposi-
43 tion or who had due notice thereof, in accord-
44 ance with any one of the following provisions:

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

49 (2) The deposition of a party or of any
50 one who at the time of taking the deposi-
51 tion was an officer, director, or managing
52 agent of a public or private corporation,
53 partnership, or association which is a
54 party may be used by an adverse party for
55 any purpose.

56 (3) The deposition of a witness, whether
57 or not a party, may be used by any party
58 for any purpose if the court finds: 1, that
59 the witness is dead; or 2, that the witness
60 is out of the district and at a greater dis-
61 tance than 100 miles from the place of
62 trial or hearing, or is out of the United
63 States, unless it appears that the absence
64 of the witness was procured by the party

65 offering the deposition; or 3, that the wit-
66 ness is unable to attend or testify because
67 of age, infirmity, or imprisonment; or 4,
68 that the party offering the deposition has
69 been unable to procure the attendance of
70 the witness by subpoena; or 5, upon
71 application and notice, that such excep-
72 tional circumstances exist as to make it
73 desirable, in the interest of justice and
74 with due regard to the importance of pre-
75 senting the testimony of witnesses orally
76 in open court, to allow the deposition to
77 be used.

78 (4) If only part of a deposition is intro-
79 duced, the adverse party may introduce
80 any other part which is relevant to the
81 part introduced.

82 Substitution of parties does not affect the
83 right to use depositions previously taken;
84 and, when an action in any court of the
85 United States or of any state has been dis-
86 missed and another action involving the
87 same subject matter is afterward brought
88 between the same parties or their repre-
89 sentatives or successors in interest, all
90 depositions lawfully taken and duly
91 filed in the former action may be
92 used in the latter as if originally taken
93 therefor.

94 (e) OBJECTIONS TO ADMISSIBILITY. Objec-
95 tion may be made to receiving in evidence any
96 deposition or part thereof for any reason which
97 would require the exclusion of the evidence if
98 the witness were then present and testifying.

99 (f) EFFECT OF TAKING OR USING DEPOSITIONS.
100 A party shall not be deemed to make a person
101 his own witness for any purpose by taking his
102 deposition. The introduction in evidence of
103 the deposition or any part thereof for any
104 purpose other than that of contradicting or
105 impeaching the deponent makes the deponent
106 the witness of the party introducing the depo-
107 sition. At the trial or hearing any party may
108 rebut any relevant evidence contained in a
109 deposition whether introduced by him or by
110 any other party and, without having first called
111 them to the deponent's attention, may show
112 statements contradictory thereto made at any
113 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.

1 **Rule 27. Depositions Before Action.**

2 (a) PETITION AND ORDER. A person who de-
3 sires to perpetuate his own testimony or that
4 of another person regarding any matter that
5 may be cognizable in any court of the United
6 States, shall file a verified petition in the court
7 of the district of his residence or of the resi-
8 dence of an expected adverse party, entitled in
9 his own name as petitioner, showing: (1) that
10 the petitioner expects to be a party to an ac-
11 tion in a court of the United States but is
12 presently unable to bring it or cause it to be
13 brought, (2) the subject matter of the expected
14 action and his interest therein, (3) the facts
15 which he desires to establish by the proposed

16 testimony, (4) the names or a description of
17 the persons he expects will be adverse parties
18 and their addresses so far as known, and (5)
19 the names and addresses of the persons to be
20 examined and the substance of the testimony
21 which he expects to elicit from each. The court
22 shall then make an order designating the per-
23 sons whose depositions are to be taken and the
24 subject matter regarding which they are to be
25 examined and designating or describing the
26 persons to be served with notice as prospective
27 parties to the action. Depositions may then
28 be taken on oral examination or by written in-
29 terrogatories in accordance with these rules.
30 For the purpose of applying these rules to
31 depositions for perpetuating testimony, each
32 reference therein to the court in which the ac-
33 tion is pending shall be deemed to refer to the
34 court in which the petition for such deposition
35 was filed.

36 (b) NOTICE AND SERVICE. The persons to be
37 served with notice and the scope of the exami-
38 nation shall be as designated in the order, a
39 copy of which shall be attached to every notice
40 served. The notice may be served either
41 within or without the district or state in the
42 manner provided in Rule 4 for the service of
43 summons; but, if personal service cannot with
44 due diligence be made upon any person desig-
45 nated in the order, the court shall make such
46 order as is just for service by publication and
47 may appoint, for persons not personally
48 served, an attorney who may appear and
49 cross-examine the deponents.

50 (c) USE OF DEPOSITION. If a deposition to
 51 perpetuate testimony is taken under these
 52 rules or if, although not so taken, it would be
 53 admissible in evidence in the courts of general
 54 jurisdiction of the state in which it is taken, it
 55 may be used on a subsequent trial of the ex-
 56 pected action in a district court of the United
 57 States, in accordance with the provisions of
 58 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.

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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.

1 **Rule 28. Persons Before Whom Deposi-**
2 **tions May Be Taken.**

3 (a) **WITHIN THE UNITED STATES.** Within
4 the United States or within a territory or in-
5 sular possession subject to the dominion of the
6 United States, depositions shall be taken be-
7 fore an officer authorized to administer oaths
8 by the laws of the United States or of the place
9 where the examination is held.

10 (b) **IN FOREIGN COUNTRIES.** In a foreign
11 state or country depositions shall be taken be-
12 fore a secretary of embassy or legation, consul
13 general, consul, vice consul, or consular agent
14 of the United States, or before an officer with
15 authority to administer oaths appointed by
16 commission or under letters rogatory. A com-
17 mission or letters rogatory shall be issued only
18 when necessary or convenient, on application
19 and notice, and on such terms and with such
20 directions as are just and appropriate. Com-
21 missions may be addressed to officers either by
22 name or by descriptive title and letters roga-
23 tory may be addressed "To the Appropri-
24 ate Judicial Authority in [here name the
25 country]".

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

30 ployee of such attorney or counsel, or is
31 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.

1 **Rule 29. Stipulations Regarding the Tak-**
2 **ing of Depositions.** If the parties so stipulate
3 in writing, depositions may be taken before
4 any person, at any time or place, upon any
5 notice, and in any manner and when so taken
6 may be used like other depositions.

1 **Rule 30. Depositions Upon Oral Examina-**
2 **tion.**

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

16 (b) ORDERS FOR THE PROTECTION OF PARTIES

17 AND DEONENTS. After notice is served for
18 taking a deposition by oral examination, upon
19 motion seasonably made by any party or by
20 the person to be examined and upon notice and
21 for good cause shown, the court in which the
22 action is pending may make an order that the
23 deposition shall not be taken, or that certain
24 matters shall not be inquired into, or that the
25 scope of the examination shall be limited to
26 certain matters, or that the examination shall
27 be held with no one present except the parties
28 to the action and their officers or counsel, or
29 that after being sealed the deposition shall be
30 opened only by order of the court, or that
31 secret processes, developments, or research
32 need not be disclosed, or that the parties shall
33 simultaneously file specified documents or in-
34 formation enclosed in sealed envelopes to be
35 opened as directed by the court; or the court
36 may make any other order which justice re-
37 quires to protect the party or witness from
38 annoyance, embarrassment, or oppression.

39 (c) RECORD OF EXAMINATION; OATH; OBJEC-
40 TIONS. The officer before whom the deposition
41 is to be taken shall put the witness on oath
42 and shall personally, or by some one acting
43 under his direction and in his presence, record
44 the testimony of the witness. The testimony
45 shall be taken stenographically unless the
46 parties agree otherwise. All objections made
47 at the time of the examination to the qualifica-
48 tions of the officer taking the deposition, or to
49 the manner of taking it, or to the evidence
50 presented, or to the conduct of any party, and

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

60 (d) MOTION TO TERMINATE EXAMINATION.
61 At any time during the taking of the deposi-
62 tion, on motion of any party or of the de-
63 ponent and upon a showing that the examina-
64 tion is being conducted in bad faith or for the
65 purpose of annoying, embarrassing, or op-
66 pressing the deponent or party, the court in
67 which the action is pending or the court in the
68 district where the deposition is being taken
69 may make an order directing the officer con-
70 ducting the examination to cease forthwith
71 from taking the deposition. If the order is
72 made, the examination shall be resumed there-
73 after only upon the order of the court in which
74 the action is pending. Upon demand of the ob-
75 jecting party, the taking of the deposition shall
76 be suspended for the time necessary to make
77 possible a motion for an order.

78 (e) SUBMISSION TO WITNESS; CHANGES;
79 SIGNING. When the testimony is fully tran-
80 scribed the deposition shall be submitted to
81 the witness for examination and shall be read
82 over to or by him, unless such examination and
83 reading are waived by the witness and by the
84 parties. Any changes in form or substance

85 which the witness desires to make shall be en-
86 tered upon the deposition by the officer with a
87 statement of the reasons given by the witness
88 for making them. The deposition shall then
89 be signed by the witness, unless the parties by
90 stipulation waive the signing or the witness is
91 ill or cannot be found or refuses to sign. If
92 the deposition is not signed by the witness, the
93 officer shall sign it and state on the record the
94 fact of the waiver or of the illness or absence
95 of the witness or the fact of the refusal to sign
96 together with the reason, if any, given there-
97 for; and the deposition may then be used as
98 fully as though signed, unless on a motion to
99 suppress under Rule 32 (d) the court holds
100 that the reasons given for the refusal to sign
101 require rejection of the deposition in whole
102 or in part.

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

105 (1) The officer shall certify by indorse-
106 ment on the deposition that the witness
107 was duly sworn by him and that the dep-
108 osition is a true record of the testimony
109 given by the witness. He shall then
110 securely seal the deposition in an envelope
111 indorsed with the title of the action and
112 marked "Deposition of [here insert name
113 of witness]" and shall promptly file it
114 with the court in which the action is
115 pending or send it by registered mail to
116 the clerk thereof for filing.

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

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

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

124 (g) FAILURE TO ATTEND OR TO SERVE SUB-
125 POENA; EXPENSES.

126 (1) If the party giving the notice of
127 the taking of a deposition fails to attend
128 and proceed therewith and another party
129 attends in person or by attorney pursuant
130 to the notice, the court may order the
131 party giving the notice to pay to such
132 other party the amount of the reasonable
133 expenses incurred by him and his attorney
134 in so attending, including reasonable at-
135 torney's fees.

136 (2) If the party giving the notice of the
137 taking of a deposition of a witness by oral
138 examination fails to serve a subpoena
139 upon him and the witness because of such
140 failure does not attend, and if another
141 party attends in person or by attorney be-
142 cause he expects the deposition of that
143 witness to be taken, the court may order
144 the party giving the notice to pay to such
145 other party the amount of the reasonable
146 expenses incurred by him and his attorney
147 in so attending, including reasonable at-
148 torney'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.

1 **Rule 31. Depositions of Witnesses Upon** 2 **Written Interrogatories.**

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

15 interrogatories upon a party who has served
16 cross-interrogatories. Within 3 days after be-
17 ing served with re-direct-interrogatories, a
18 party may serve re-cross-interrogatories upon
19 the party proposing to take the deposition.

20 (b) OFFICER TO TAKE RESPONSES AND PRE-
21 PARE RECORD. A copy of the notice and copies
22 of all interrogatories served shall be delivered
23 by the party taking the deposition to the offi-
24 cer designated in the notice, who shall proceed
25 promptly, in the manner provided by Rule
26 30 (c), (e), and (f), to take the testimony of
27 the witness in response to the interrogatories
28 and to prepare, certify, and file or mail the
29 deposition, attaching thereto the copy of the
30 notice and the interrogatories received by him.

31 (c) NOTICE OF FILING. When the deposi-
32 tion is filed the party taking it shall promptly
33 give notice thereof to all other parties.

34 (d) ORAL EXAMINATION MAY BE ORDERED.
35 If a party upon receiving interrogatories
36 promptly moves for an order that the deposi-
37 tion shall not be taken except upon oral ex-
38 amination and shows cause why a satisfactory
39 deposition cannot be taken by written inter-
40 rogatories, 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).

1 **Rule 32. Effect of Errors and Irregulari-**
2 **ties in Depositions.**

3 (a) AS TO NOTICE. All errors and irregulari-
4 ties in the notice for taking a deposition are
5 waived unless written objection is promptly
6 served upon the party giving the notice.

7 (b) AS TO DISQUALIFICATION OF OFFICER.
8 Objection to taking a deposition because of
9 disqualification of the officer before whom it
10 is to be taken is waived unless made before the
11 taking of the deposition begins or as soon
12 thereafter as the disqualification becomes
13 known or could be discovered with reasonable
14 diligence.

15 (c) AS TO TAKING OF DEPOSITION.

16 (1) Objections to the competency of a
17 witness or to the competency, relevancy,
18 or materiality of testimony are not waived
19 by failure to make them before or during
20 the taking of the deposition, unless the
21 ground of the objection is one which might
22 have been obviated or removed if pre-
23 sented at that time.

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

34 (3) Objections to the form of written
35 interrogatories submitted under Rule 31
36 are waived unless served in writing upon
37 the party propounding them within the
38 time allowed for serving the succeeding
39 cross or other interrogatories and within
40 3 days after service of the last interroga-
41 tories authorized.

42 (d) COMPLETION AND RETURN OF DEPOSITION.
43 Errors and irregularities in the manner in
44 which the testimony is transcribed or the dep-
45 osition is prepared, signed, certified, sealed,
46 indorsed, transmitted, filed, or otherwise dealt
47 with by the officer under Rules 30 and 31 are
48 waived unless a motion to suppress the depo-
49 sition or some part thereof is made with rea-
50 sonable promptness after such defect is, or
51 with due diligence might have been, ascer-
52 tained.

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.

1 **Rule 33. Interrogatories to Parties.** Any
2 party may serve upon any other party writ-
3 ten interrogatories to be answered by the
4 party served or, if the party served is a
5 public or private corporation or a partner-
6 ship or association, by any officer thereof com-
7 petent to testify in its behalf. The interroga-
8 tories shall be answered separately and fully
9 in writing under oath. The answers shall be

10 signed by the person making them; and the
11 party upon whom the interrogatories have
12 been served shall serve a copy of the answers
13 on the party submitting the interrogatories
14 within 15 days after the delivery of the inter-
15 rogatories, unless the court, on motion and
16 notice and for good cause shown, enlarges or
17 shortens the time. Objections to any inter-
18 rogatories may be presented to the court
19 within 10 days after service thereof, with
20 notice as in case of a motion; and answers shall
21 be deferred until the objections are deter-
22 mined, which shall be at as early a time as is
23 practicable. No party may, without leave of
24 court, serve more than one set of interroga-
25 tories 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.

1 **Rule 34. Production of Documents and**
2 **Things for Inspection, Copying, or Photo-**
3 **graphing.** Upon motion of any party show-
4 ing good cause therefor and upon notice
5 to all other parties, the court in which an
6 action is pending may (1) order any party
7 to produce and permit the inspection and copy-
8 ing or photographing, by or on behalf of the
9 moving party, of any designated documents,
10 papers, books, accounts, letters, photographs,
11 objects, or tangible things, not privileged,
12 which constitute or contain evidence material

13 to any matter involved in the action and which
14 are in his possession, custody, or control; or
15 (2) order any party to permit entry upon
16 designated land or other property in his pos-
17 session or control for the purpose of inspecting
18 or photographing the property or any desig-
19 nated relevant object thereon. The order
20 shall specify the time, place, and manner of
21 making the inspection and taking the copies
22 and photographs and may prescribe such
23 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).

1 **Rule 35. Physical and Mental Examina-**
2 **tion of Persons.**

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

7 a physical or mental examination by a phy-
8 sician. The order may be made only on motion
9 for good cause shown and upon notice to the
10 party to be examined and to all other parties
11 and shall specify the time, place, manner, con-
12 ditions, and scope of the examination and the
13 person or persons by whom it is to be made.

14 (b) REPORT OF FINDINGS.

15 (1) A party causing the examination to
16 be made shall deliver to the party exam-
17 ined, upon his request, a copy of a detailed
18 written report of the examining physician
19 setting out his findings and conclusions.
20 After such delivery the party causing the
21 examination to be made shall be entitled
22 upon request to receive from the party
23 examined a like report of any examina-
24 tion, previously or thereafter made, in re-
25 spect to the same mental or physical con-
26 dition. If the party examined refuses to
27 deliver any such report the court on mo-
28 tion and notice may make an order re-
29 quiring delivery on such terms as are
30 just, and if a physician fails or refuses to
31 make such a report the court may exclude
32 his testimony if offered at the trial.

33 (2) By requesting and obtaining a re-
34 port of the examination so ordered or by
35 taking the deposition of the examiner, the
36 party examined waives any privilege he
37 may have in that action or any other in-
38 volving the same controversy, regarding
39 the testimony of every other person who
40 has examined or may thereafter examine

41 him in respect of the same mental or
42 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.

1 **Rule 36. Admission of Facts and of Genu-**
2 **ineness of Documents.**

3 (a) REQUEST FOR ADMISSION. At any time
4 after the pleadings are closed, a party may
5 serve upon any other party a written request
6 for the admission by the latter of the genuine-
7 ness of any relevant documents described in
8 and exhibited with the request or of the truth
9 of any relevant matters of fact set forth
10 therein. Copies of the documents shall be de-
11 livered with the request unless copies have al-
12 ready been furnished. Each of the matters of
13 which an admission is requested shall be

14 deemed admitted unless, within a period des-
15 ignated in the request, not less than 10 days
16 after service thereof or within such further
17 time as the court may allow on motion and
18 notice, the party to whom the request is di-
19 rected serves upon the party requesting the
20 admission a specific denial under oath of the
21 matters of which an admission is requested.

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

NOTE

Compare similar rules: Equity Rule 58 (last para-
graph, which provides for the admission of the execu-
tion 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.

1 **Rule 37. Refusal to Make Discovery:**
2 **Consequences.**

3 (a) REFUSAL TO ANSWER. If a party or
4 other witness refuses to answer any question
5 propounded upon oral examination, the exam-
6 ination shall be completed on other mat-
7 ters or adjourned, as the proponent of
8 the question may prefer. Thereafter, on
9 reasonable notice to all persons affected
10 thereby, he may apply to the court in the dis-

11 triet where the deposition is taken for an order
12 compelling an answer. Upon the refusal of a
13 witness to answer any interrogatory submitted
14 under Rule 31 or upon the refusal of a party
15 to answer any interrogatory submitted under
16 Rule 33, the proponent of the question may on
17 like notice make like application for such an
18 order. If the motion is granted and if the
19 court finds that the refusal was without sub-
20 stantial justification the court shall require the
21 refusing party or witness and the party or
22 attorney advising the refusal or either of them
23 to pay to the examining party the amount of
24 the reasonable expenses incurred in obtaining
25 the order, including reasonable attorney's fees.
26 If the motion is denied and if the court finds
27 that the motion was filed without substantial
28 justification, the court shall require the exam-
29 ining party or the attorney advising the mo-
30 tion or both of them to pay to the refusing
31 party or witness the amount of the reasonable
32 expenses incurred in opposing the motion,
33 including reasonable attorney's fees.

34 (b) FAILURE TO COMPLY WITH ORDER.

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

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

45 under subdivision (a) of this rule requir-
 46 ing him to answer designated questions,
 47 or an order under Rule 34 to produce any
 48 document or other thing for inspection,
 49 copying, or photographing or to permit it
 50 to be done, or to permit entry upon land
 51 or other property, or an order made under
 52 Rule 35 requiring him to submit to a phys-
 53 ical or mental examination, the court may
 54 make such orders in regard to the refusal
 55 as are just, and among others the
 56 following:

57 (i) An order that the matters
 58 regarding which the questions were
 59 asked, or the character or description
 60 of the thing or land, or the contents
 61 of the paper, or the physical or men-
 62 tal condition of the party, or any
 63 other designated facts shall be taken
 64 to be established for the purposes of
 65 the action in accordance with the
 66 claim of the party obtaining the
 67 order;

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

74 (iii) An order striking out plead-
 75 ings or parts thereof, or staying fur-
 76 ther proceedings until the order is
 77 obeyed, or dismissing the action or
 78 proceeding or any part thereof, or

79 rendering a judgment by default
80 against the disobedient party;
81 (iv) In lieu of any of the fore-
82 going orders or in addition thereto,
83 an order directing the arrest of any
84 party or agent of a party for disobey-
85 ing any of such orders except an
86 order to submit to a physical or men-
87 tal examination.

88 (c) **EXPENSES ON REFUSAL TO ADMIT.** If a
89 party, after being served with a request under
90 Rule 36 to admit the genuineness of any docu-
91 ments or the truth or any matters of fact,
92 serves a sworn denial thereof and if the party
93 requesting the admissions thereafter proves
94 the genuineness of any such document or the
95 truth of any such matter of fact, he may apply
96 to the court for an order requiring the other
97 party to pay him the reasonable expenses in-
98 curred in making such proof, including reason-
99 able attorney's fees. Unless the court finds
100 that there were good reasons for the denial or
101 that the admissions sought were of no substan-
102 tial importance, the order shall be made.

103 (d) **FAILURE OF PARTY TO ATTEND OR SERVE**
104 **ANSWERS.** If a party or an officer or manag-
105 ing agent of a party wilfully fails to appear
106 before the officer who is to take his deposition,
107 after being served with a proper notice, or
108 fails to serve answers to interrogatories sub-
109 mitted under Rule 33, after proper service of
110 such interrogatories, the court on motion and
111 notice may strike out all or any part of any
112 pleading of that party, or dismiss the action

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

115 (e) FAILURE TO RESPOND TO LETTERS ROGA-
116 TORY. A subpoena may be issued as provided
117 in the Act of July 3, 1926, c. 762, § 1 (44 Stat.
118 835), U. S. C., Title 28, § 711, under the cir-
119 cumstances and conditions therein stated.

120 (f) EXPENSES AGAINST UNITED STATES.
121 Expenses and attorney's fees are not to be im-
122 posed upon the United States under this rule.

1 **Rule 38. Summary Judgment.**

2 (a) FOR CLAIMANT. A party seeking to re-
3 cover upon a claim, counterclaim, or cross-
4 claim or to obtain a declaratory judgment
5 may, at any time after the pleading in answer
6 thereto has been served, move with or with-
7 out affidavits for a summary judgment in his
8 favor upon all or any part thereof.

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

15 (c) MOTION AND PROCEEDINGS THEREON.
16 The motion shall be served at least 10 days
17 before the time specified for the hearing. Un-
18 less the adverse party prior to the day of hear-
19 ing serves opposing affidavits setting forth
20 facts sufficient to constitute a denial or avoid-
21 ance, the judgment sought shall be rendered
22 forthwith if (1) the pleadings of the moving
23 party and also (2) the depositions and admis-
24 sions on file together with the affidavits, if

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

30 (d) CASE NOT FULLY ADJUDICATED ON MO-
31 TION. If on motion under this rule, judg-
32 ment is not rendered upon the whole case or
33 for all the relief asked and a trial is neces-
34 sary, the court at the hearing of the motion,
35 by examining the pleadings and the evidence
36 before it and by interrogating counsel, shall if
37 practicable ascertain what material facts exist
38 without substantial controversy and what ma-
39 terial facts are actually and in good faith con-
40 troverted. It shall thereupon make an order
41 specifying the facts that appear without sub-
42 stantial controversy, including the extent to
43 which the amount of damages or other relief
44 is not in controversy, and directing such fur-
45 ther proceedings in the action as are just.
46 Upon the trial of the action the facts so speci-
47 fied shall be deemed established, and the trial
48 shall be conducted accordingly.

49 (e) FORM OF AFFIDAVITS; FURTHER TESTI-
50 MONY. Supporting and opposing affidavits
51 shall be made on personal knowledge, shall set
52 forth such facts as would be admissible in evi-
53 dence, and shall show affirmatively that the
54 affiant is competent to testify to the matters
55 stated therein. Sworn or certified copies of
56 all papers or parts thereof referred to in an
57 affidavit shall be attached thereto or served
58 therewith. The court may permit affidavits to

59 be supplemented or opposed by depositions or
 60 by further affidavits.

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

70 (g) AFFIDAVITS MADE IN BAD FAITH.
 71 Should it appear to the satisfaction of the
 72 court at any time that any of the affidavits re-
 73 ferred to in this rule were presented in bad
 74 faith, or solely for the purpose of delay, the
 75 court shall forthwith order the party employ-
 76 ing them to pay to the other party the amount
 77 of the reasonable expenses which the filing of
 78 the affidavits caused him to incur, including
 79 reasonable attorney's fees, and any offending
 80 party or attorney may be adjudged guilty of
 81 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

1 **Rule 39. Jury Trial of Right.**

2 (a) **RIGHT PRESERVED.** The right of trial
3 by jury as declared by the Seventh Amend-
4 ment to the Constitution or as given by a
5 statute of the United States shall be preserved
6 to the parties inviolate.

7 (b) **DEMAND.** Any party may demand a
8 trial by jury of any issue triable by a jury
9 of right by serving upon the other parties a
10 claim therefor in writing at any time within
11 5 days after the service of the last pleading
12 directed to such issue.

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

23 (d) **WAIVER.** The failure of a party to
24 serve a claim as required by this rule and to
25 file it as required by Rule 5 (b) constitutes a
26 waiver by him of trial by jury. A claim for
27 trial by jury made as herein provided may
28 not be withdrawn without the consent of the
29 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).

1 **Rule 40. Trial by Jury or by the Court.**

2 (a) **BY JURY.** When trial by jury has
3 been claimed as provided in Rule 39, the
4 action shall be designated upon the docket
5 as a jury action. The trial of all issues so
6 claimed shall be by jury, unless (1) the par-
7 ties or their attorneys of record, by written
8 stipulation filed with the court or by an
9 oral stipulation made in open court and en-
10 tered in the record, consent to trial by the
11 court sitting without a jury or (2) the court
12 upon motion or of its own initiative finds that
13 a right of trial by jury of some or all of those
14 issues does not exist under the Constitution or
15 statutes of the United States.

16 (b) **BY THE COURT.** Issues not claimed for
17 trial by jury as provided in Rule 39 shall be
18 tried by the court; but, notwithstanding the
19 failure of a party to claim a jury in an action
20 in which such a claim might have been made
21 of right, the court in its discretion upon mo-
22 tion of that party may order any issue tried
23 by a jury.

24 (c) ADVISORY JURY AND TRIAL BY CONSENT.
25 In all actions not triable by a jury of right
26 the court upon motion or of its own initiative
27 may try any issue with an advisory jury; or,
28 except in actions against the United States
29 when a statute of the United States provides
30 for trial without a jury, may, with the con-
31 sent of both parties, order a trial with a jury
32 whose verdict shall have the same effect as if
33 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).

1 **Rule 41. Assignment of Cases for Trial.**

2 The district courts shall provide by rule for
 3 the placing of actions upon the trial calendar
 4 (1) without request of the parties or (2) upon
 5 request of a party and notice to the other par-
 6 ties or (3) in such other manner as the courts
 7 deem expedient. Precedence shall be given to
 8 actions entitled thereto by any statute of the
 9 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).

1 **Rule 42. Dismissal of Actions.**

2 (a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

3 (1) *By Plaintiff; By Stipulation.* Sub-
 4 ject to the provisions of Rule 23 (c) and
 5 of any statute of the United States, an
 6 action may be dismissed by the plaintiff

7 without order of court 1, by filing a notice
8 of dismissal at any time before service of
9 the answer or 2, by filing a stipulation of
10 dismissal signed by all the parties who
11 appeared generally in the action. Unless
12 otherwise stated in the notice of dismissal
13 or stipulation, the dismissal shall be with-
14 out prejudice, except that a notice of dis-
15 missal filed by a plaintiff who has once
16 dismissed in any court of the United
17 States or of any state an action based on
18 or including the same claim, shall operate
19 as an adjudication upon the merits.

20 (2) *By Order of Court.* Except as
21 provided in paragraph (1) of this sub-
22 division of this rule, an action shall not
23 be dismissed at the plaintiff's instance
24 save upon order of the court and upon
25 such terms and conditions as the the court
26 deems proper. If a counterclaim has
27 been pleaded by a defendant prior to the
28 service upon him of the plaintiff's motion
29 to dismiss, the action shall not be dis-
30 missed against the defendant's objection
31 unless the counterclaim can remain pend-
32 ing for independent adjudication by the
33 court. Unless otherwise specified in the
34 order, a dismissal under this paragraph
35 shall be without prejudice.

36 (b) INVOLUNTARY DISMISSAL: EFFECT
37 THEREOF. For failure of the plaintiff to pros-
38 ecute or to comply with these rules or any
39 order of court, a defendant may move for dis-
40 missal of an action or of any claim against

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

54 (c) DISMISSAL OF COUNTERCLAIM, CROSS-
55 CLAIM, OR THIRD-PARTY CLAIM. The provi-
56 sions of this rule apply to the dismissal of any
57 counterclaim, cross-claim, or third-party
58 claim. A voluntary dismissal by the claimant
59 alone pursuant to paragraph (1) of subdivi-
60 sion (a) of this rule shall be made before a re-
61 sponsive pleading is served, or, if there is none,
62 before the introduction of evidence at the trial
63 or hearing.

64 (d) COSTS OF PREVIOUSLY-DISMISSED ACTION
65 If a plaintiff who has once dismissed an action
66 in any court shall commence an action based
67 upon or including the same claim against the
68 same defendant, the court may make such
69 order for the payment of costs of the action
70 previously dismissed as it may deem proper
71 and may stay the proceedings in the action
72 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).

1 **Rule 43. Consolidation; Severance and**
2 **Separate Trials.**

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

11 (b) SEVERANCE AND SEPARATE TRIALS. The
12 court, in furtherance of convenience or
13 to avoid prejudice, may order claims which are
14 joined in an action or any counterclaims
15 which do not diminish or defeat the recovery
16 sought against the counterclaimant to be pro-
17 ceeded with in separate actions; or it may
18 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).

1 **Rule 44. Evidence.**

2 (a) **FORM AND ADMISSIBILITY.** In all trials
 3 the testimony of witnesses shall be taken
 4 orally in open court, unless otherwise pro-
 5 vided by these rules. All evidence shall be
 6 admitted which is admissible under the
 7 statutes of the United States, or under the
 8 rules of evidence heretofore applied in the
 9 courts of the United States on the hearing of
 10 suits in equity, or under the rules of evidence
 11 applied in the courts of general jurisdiction
 12 of the state in which the United States court
 13 is held. In any case, the statute or rule which
 14 favors the reception of the evidence shall
 15 govern and the evidence shall be presented
 16 according to the most convenient method pre-
 17 scribed in any of the statutes or rules to which
 18 reference is herein made. The competency
 19 of a witness to testify shall be determined in
 20 like manner.

21 (b) **SCOPE OF EXAMINATION AND CROSS-EX-**
 22 **AMINATION.** A party may show that any
 23 witness, whether called by him or by an op-
 24 posing party, has previously made, under
 25 oath or otherwise, statements contradictory to
 26 his testimony without having first called them
 27 to his attention. He may call an adverse

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28 party and interrogate him by leading ques-
29 tions and contradict and impeach him in all
30 respects as if he had been called by an oppos-
31 ing party. The opposing party also may
32 contradict and impeach any such witness. A
33 party may interrogate any unwilling or hos-
34 tile witness by leading questions. When a
35 party calls a witness and examines him as to
36 some of the issues, an opposing party may
37 cross-examine the witness upon all the mate-
38 rial and pertinent issues of the action; but if
39 the witness is an adverse party the cross-ex-
40 amination shall be limited to the subject mat-
41 ter of his examination in chief. The term
42 "adverse party" as herein used includes an
43 officer, director, or managing agent of a pub-
44 lic or private corporation or of a partnership
45 or association which is an adverse party.

46 (c) RECORD OF EXCLUDED EVIDENCE. In an
47 action tried by a jury, if an objection to a
48 question propounded to a witness is sustained
49 by the court, the examining attorney may
50 make a specific offer of what he expects to
51 prove by the answer of the witness. The
52 court may require the offer to be made out of
53 the hearing of the jury. The court may add
54 such other or further statement as clearly
55 shows the character of the evidence, the form
56 in which it was offered, the objection made,
57 and the ruling thereon. In actions tried with-
58 out a jury the same procedure may be fol-
59 lowed, except that the court upon request
60 shall take and report the evidence in full, un-
61 less it clearly appears that the evidence is not

62 admissible on any ground or that the witness
63 is privileged.

64 (d) AFFIRMATION IN LIEU OF OATH. When-
65 ever under these rules an oath is required to
66 be taken, a solemn affirmation may be ac-
67 cepted in lieu thereof.

NOTE

Note to subdivision (a). The first sentence is a re-statement 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.

1 Rule 45. Proof of Official Record.

2 (a) AUTHENTICATION OF COPY. An official
3 record or an entry therein, when admissible
4 for any purpose, may be evidenced by an offi-
5 cial publication thereof or by a copy attested
6 by the officer having the legal custody of the
7 record, or by his deputy, and accompanied
8 with a certificate that such officer has the cus-
9 tody. If the office in which the record is kept
10 is within the United States or within a terri-
11 tory or insular possession subject to the do-
12 minion of the United States, the certificate
13 may be made by a judge of a court of record
14 of the district or political subdivision in which
15 the record is kept, authenticated by the seal
16 of the court, or may be made by any public
17 officer having a seal of office and having official
18 duties in the district or political subdivision in

19 which the record is kept, authenticated by the
20 seal of his office. If the office in which the
21 record is kept is in a foreign state or country,
22 the certificate may be made by a secretary of
23 embassy or legation, consul general, consul,
24 vice consul, or consular agent or by any officer
25 in the foreign service of the United States sta-
26 tioned in the foreign state or country in which
27 the record is kept, and authenticated by the
28 seal of his office.

29 (b) **PROOF OF LACK OF RECORD.** A written
30 statement signed by an officer having the cus-
31 tody of an official record or by his deputy that
32 after diligent search no record or entry of a
33 specified tenor is found to exist in the records
34 of his office, accompanied by a certificate as
35 above provided, is admissible as evidence that
36 the records of his office contain no such record
37 or entry.

38 (c) **OTHER PROOF.** This rule does not pre-
39 vent the proof of official records or of entry
40 or lack of entry therein by any method author-
41 ized 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.

1 **Rule 46. Subpoena.**

2 (a) **FOR ATTENDANCE OF WITNESSES; FORM;**
3 **ISSUANCE.** Every subpoena shall be issued by
4 the clerk under the seal of the court, shall state
5 the name of the court and the title of the ac-
6 tion, and shall command each person to whom
7 it is directed to attend and give testimony at a
8 time and place therein specified. The clerk
9 may issue a subpoena in blank to a party re-
10 questing it, who before service thereof shall fill
11 it in as above provided.

12 (b) **FOR PRODUCTION OF DOCUMENTARY EVI-**
13 **DENCE.** A subpoena may also command the
14 person to whom it is directed to produce
15 the books, papers, or documents designated
16 therein; but the court, upon motion made
17 promptly and in any event at or before the
18 time specified in the subpoena for compliance
19 therewith, may (1) quash the subpoena if it is
20 unreasonable and oppressive or (2) condition
21 denial of the motion upon the advancement by
22 the person in whose behalf the subpoena is
23 issued of the reasonable cost of producing the
24 books, papers, or documents.

25 (c) **SERVICE.** A subpoena may be served by
26 the marshal, by his deputy, or by any other
27 person who is not a party and is not less than
28 18 years of age. Service of a subpoena upon
29 a person named therein shall be made by ex-
30 hibiting the original and by delivering a copy
31 thereof to such person and by tendering to him
32 the fees for one day's attendance and the mile-
33 age allowed by law. When the subpoena is
34 issued on behalf of the United States or an

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

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

39 (1) Proof of service of a notice to take
 40 a deposition as provided in Rules 30 (a)
 41 and 31 (a) constitutes a sufficient authori-
 42 zation for the issuance by the clerk of the
 43 district court for the district in which the
 44 deposition is to be taken of subpoenas for
 45 the persons named or described therein.
 46 The clerk shall not issue a subpoena com-
 47 manding the production of books, papers,
 48 or documents on the taking of a deposi-
 49 tion, without an order of the court.

50 (2) A resident of the district in which
 51 the deposition is to be taken may be re-
 52 quired to attend an examination only in
 53 the county wherein he resides or is em-
 54 ployed or transacts his business in person.
 55 A nonresident of the district may be re-
 56 quired to attend only in the county
 57 wherein he is served with a subpoena, or
 58 within 40 miles from the place of service,
 59 or at such other place as is fixed by an
 60 order of court.

61 (e) SUBPOENA FOR A HEARING OR TRIAL.

62 (1) At the request of any party sub-
 63 poenas for attendance at a hearing or trial
 64 shall be issued by the clerk of the district
 65 court for the district in which the hearing
 66 or trial is held. A subpoena requiring the
 67 attendance of a witness at a hearing or
 68 trial may be served at any place within the

69 district, or at any place without the dis-
70 trict that is within 100 miles of the place
71 of the hearing or trial specified in the sub-
72 poena; and, when a statute of the United
73 States provides therefor, the court upon
74 proper application and cause shown may
75 authorize the service of a subpoena at any
76 other place.

77 (2) A subpoena directed to a witness in
78 a foreign country shall issue under the cir-
79 cumstances and in the manner and be
80 served as provided in the Act of July 3,
81 1926, c. 762, §§ 1, 3 (44 Stat. 835), U. S. C.,
82 Title 28, §§ 711, 713.

83 (f) CONTEMPT. Failure by any person
84 without adequate excuse to obey a subpoena
85 served upon him shall be deemed a contempt
86 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).

1 **Rule 47. Exceptions Abolished.** No for-
2 mal exception to a ruling or an order of the
3 court is necessary; but for all purposes for
4 which an exception has heretofore been nec-
5 essary it is sufficient that an objecting party,
6 at the time the ruling or order of the court is
7 made or sought, makes known to the court
8 the action which he desires the court to take
9 or his objection to the action of the court;
10 and if a party has no opportunity to object
11 to a ruling or order the absence of an objec-
12 tion 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.

1 **Rule 48. Jurors.**

2 (a) **EXAMINATION OF JURORS.** The court
3 may permit the parties or their attorneys to
4 conduct the examination of prospective jurors
5 or may itself conduct the examination. In the
6 latter event, the court shall permit the parties
7 or their attorneys to supplement the examina-
8 tion by such further inquiry as it deems proper
9 or shall itself submit to the prospective jurors
10 such additional questions of the parties or
11 their attorneys as it deems proper.

12 (b) **ALTERNATE JURORS.** The court may di-
13 rect that one or two jurors in addition to the
14 regular panel be called and impanelled to sit
15 as alternate jurors. Alternate jurors in the
16 order in which they are called shall replace
17 jurors who for any reason become unable to
18 perform their duties prior to the final submis-
19 sion to the jury. Alternate jurors shall be
20 drawn in the same manner, shall have the same
21 qualifications, shall be subject to the same
22 examination and challenges, shall take the
23 same oath, and shall have the same functions,
24 powers, facilities, and privileges as the prin-
25 cipal jurors. An alternate juror who does not
26 replace a principal juror shall be discharged
27 upon the final submission to the jury. If one

28 or two alternate jurors are called each party
29 is entitled to one peremptory challenge in ad-
30 dition to those otherwise allowed by law. The
31 additional peremptory challenge may be used
32 only against an alternate juror, and the other
33 peremptory challenges allowed by law shall not
34 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.

1 **Rule 49. Juries of Less than Twelve—**
2 **Majority Verdict.** The parties may stipulate
3 that the jury shall consist of any number less
4 than twelve or that a verdict or a finding of a
5 stated majority of the jurors shall be taken as
6 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).

1 **Rule 50. Special Verdicts and Interrogatories.**
2 **tories.**
3 (a) SPECIAL VERDICTS. The Court may re-
4 quire a jury to return only a special verdict in
5 the form of a special written finding upon each
6 issue of fact. In that event the court may sub-
7 mit to the jury written questions susceptible
8 of categorical or other brief answer or may
9 submit written forms of the several special
10 findings which might properly be made under
11 the pleadings and evidence; or it may use such
12 other method of submitting the issues and re-
13 quiring the written findings thereon as it
14 deems most appropriate. The court shall give
15 to the jury such explanation and instruction
16 concerning the matter thus submitted as may
17 be necessary to enable the jury to make its
18 finding upon each issue. If in so doing the
19 court omits any issue of fact raised by the
20 pleadings or by the evidence, each party
21 waives his right to a trial by jury of the issue

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

28 (b) GENERAL VERDICT ACCOMPANIED BY AN-
29 SWER TO INTERROGATORIES. The court may sub-
30 mit to the jury, together with appropriate
31 forms for a general verdict, written interroga-
32 tories upon one or more issues of fact the de-
33 cision of which is necessary to a verdict. The
34 court shall give such explanation or instruc-
35 tion as may be necessary to enable the jury
36 both to make answers to the interrogatories
37 and to render a general verdict, and the court
38 shall direct the jury both to make written an-
39 swers and to render a general verdict. When
40 the general verdict and the answers are har-
41 monious, the court shall direct the entry of the
42 appropriate judgment upon the verdict and
43 answers. When the answers are consistent
44 with each other but one or more is inconsistent
45 with the general verdict, the court may direct
46 the entry of judgment in accordance with the
47 answers, notwithstanding the general verdict
48 or may return the jury for further considera-
49 tion of its answers and verdict or may order a
50 new trial. When the answers are inconsistent
51 with each other and one or more is likewise in-
52 consistent with the general verdict, the court
53 shall not direct the entry of judgment but may
54 return the jury for further consideration of
55 its answers and verdict or may order a new
56 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.

1 **Rule 51. Motion for a Directed Verdict.**

2 (a) **WHEN MADE: EFFECT.** A party may
3 move for a directed verdict at the close of the
4 evidence offered by an opponent without
5 thereby waiving his right to offer evidence in
6 the event that the motion is not granted. A
7 motion for a directed verdict which is not
8 granted is not a waiver of trial by jury even
9 though all parties to the action have moved
10 for directed verdicts. A motion for a di-
11 rected verdict shall state the specific grounds
12 therefor.

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

15 made at the close of all the evidence is denied
16 or for any reason is not granted, the court is
17 deemed to have submitted the action to the
18 jury subject to a later determination of the
19 legal questions raised by the motion. Within
20 10 days after the reception of a verdict, a
21 party who has moved for a directed verdict
22 may move to have the verdict and any judg-
23 ment entered thereon set aside and to have
24 judgment entered in accordance with his mo-
25 tion for a directed verdict; or if a verdict was
26 not returned such party, within 10 days after
27 the jury has been discharged, may move for
28 judgment in accordance with his motion for a
29 directed verdict. A motion for a new trial
30 may be joined with this motion, or a new trial
31 may be prayed for in the alternative. If a
32 verdict was returned the court may allow the
33 judgment to stand, or reopen the judgment
34 and either order a new trial or direct the entry
35 of judgment as if the requested verdict had
36 been directed. If no verdict was returned the
37 court may direct the entry of judgment as if
38 the requested verdict had been directed or
39 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

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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.

1 **Rule 52. Instructions to Jury: Objection.**
2 At the close of the evidence or at such earlier
3 time as the court reasonably directs, any party
4 may file written requests that the court in-
5 struct the jury on the law as set forth in the
6 requests. The court shall inform counsel of
7 its proposed action upon the requests prior to
8 their arguments to the jury, but the court shall
9 instruct the jury after the arguments are com-
10 pleted. No party may assign as error the giv-
11 ing or the failure to give an instruction unless
12 he objects thereto before the jury retires to
13 consider its verdict, stating distinctly the mat-
14 ter to which he objects and the grounds of his
15 objection. Opportunity shall be given to

16 make the objection out of the hearing of the
17 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.

1 **Rule 53. Masters.**

2 (a) APPOINTMENT. Each district court with
3 the concurrence of a majority of all the judges
4 thereof may appoint one or more standing
5 masters for its district, and the court in which
6 any action is pending may appoint a special
7 master therein. As used in these rules the
8 word "master" includes a referee, an auditor,
9 and an examiner. The compensation to be
10 allowed to a master shall be fixed by the court,
11 and shall be charged upon and borne by such
12 of the parties or paid out of any fund or
13 subject-matter of the action, which is in the
14 custody and control of the court as the court
15 shall direct. The master shall not retain his
16 report as security for his compensation; but
17 when the party ordered to pay the compensa-
18 tion allowed by the court does not pay it after
19 notice and within the time prescribed by the
20 court, the master is entitled to a writ of execu-
21 tion against the delinquent party, or the court
22 in its discretion may hold the delinquent in
23 contempt.

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

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

32 (c) POWERS. The order of reference to the
33 master may specify or limit his powers and
34 may direct him to report only upon particular
35 issues or to do or perform particular acts or to
36 receive and report evidence only and may fix
37 the date for beginning and closing the hearings
38 and for the filing of the master's report. Sub-
39 ject to the specifications and limitations stated
40 in the order, the master has and shall exercise
41 the power to regulate all proceedings in every
42 hearing before him and to do all acts and
43 take all measures necessary or proper for the
44 efficient performance of his duties under the
45 order. He may require the production before
46 him of evidence upon all matters contained in
47 the reference, including the production of all
48 books, papers, vouchers, documents, and writ-
49 ings applicable thereto. He may rule upon
50 the admissibility of evidence unless otherwise
51 directed by the order of reference and shall
52 have the authority to put witnesses on oath
53 and may himself examine them and may call
54 the parties to the action and examine them
55 upon oath. When a party so requests, the
56 master shall make a record of the evidence of-
57 fered and excluded in the same manner as
58 provided for a court in Rule 44 (c).

59 (d) PROCEEDINGS:

60 (1) *Meetings*. When a reference is
61 made, the clerk shall forthwith furnish
62 the master with a copy of the order of
63 reference. Upon receipt thereof the
64 master shall forthwith set a time and place
65 for the first meeting of the parties or their
66 attorneys to be held within 20 days after
67 the date of the order of reference unless
68 the order of reference otherwise provides,
69 and shall notify the parties or their at-
70 torneys. In every reference it shall be the
71 duty of the master to proceed with all
72 reasonable diligence. Either party, on
73 notice to the parties and master, may
74 apply to the court for an order requiring
75 the master to speed the proceedings and
76 to make his report. If a party fails to
77 appear at the time and place appointed,
78 the master may proceed *ex parte* or, in his
79 discretion, adjourn the examination and
80 proceedings to a future day, giving notice
81 to the absent party or his attorney of such
82 adjournment.

83 (2) *Witnesses*. The parties may pro-
84 cure the attendance of witnesses before the
85 master by the issuance and service of
86 subpoenas as provided in Rule 46. The
87 failure of any witness to appear or his
88 refusal without adequate excuse to give
89 evidence shall be a contempt of the court
90 and shall be subject to the consequences,
91 penalties, and remedies provided in Rules
92 37 and 46.

93 (3) *Statement of Accounts.* When
94 matters of accounting are in issue before
95 the master, he may prescribe the form in
96 which the accounts shall be submitted and
97 in any proper case may require or receive
98 in evidence a statement by a certified pub-
99 lic accountant who is called as a witness.
100 Upon objection of a party to any of the
101 items thus submitted or upon a showing
102 that the form of statement is insufficient,
103 the master may require a different form
104 of statement to be furnished, or the ac-
105 counts or specific items thereof to be
106 proved by oral examination of the account-
107 ing parties or upon written interroga-
108 tories or in such other manner as he
109 directs.

110 (e) **REPORT.**

111 (1) *Contents and Filing.* The master
112 shall prepare a report upon the matters
113 submitted to him by the order of refer-
114 ence and, if required to make findings of
115 fact and conclusions of law, he shall set
116 them forth in the report. He shall file the
117 report with the clerk of the court and in
118 an action to be tried without a jury,
119 unless otherwise directed by the order of
120 reference, shall file with it a transcript of
121 the proceedings and of the evidence and
122 the original exhibits. The clerk shall forth-
123 with mail to all parties notice of the filing.

124 (2) *In Non-Jury Actions.* In an ac-
125 tion to be tried without a jury the court
126 shall accept the master's findings of

127 fact unless clearly erroneous. Within 10
128 days after being served with notice of the
129 filing of the report any party may serve
130 written objections thereto upon the other
131 parties. The court after hearing may
132 adopt the report or may modify it or may
133 reject it in whole or in part or may receive
134 further evidence.

135 (3) *In Jury Actions.* In an action to
136 be tried by a jury the master shall not be
137 directed to report the evidence. His find-
138 ings upon the issues submitted to him
139 shall be admissible as evidence of the mat-
140 ters found and may be read to the jury,
141 subject to the ruling of the court upon any
142 objections in point of law which may be
143 made to the report.

144 (4) *Stipulation as to Findings.* The
145 effect of a master's report shall be the
146 same whether or not the parties have con-
147 sented to the reference; but, when the
148 parties stipulate that a master's findings
149 of fact shall be final, only questions of law
150 arising upon the report shall thereafter
151 be considered.

152 (5) *Draft Report.* Before filing his re-
153 port a master may submit a draft thereof,
154 to counsel for all parties for the purpose
155 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).

VII. JUDGMENT AND APPEAL

1 **Rule 54. Judgments: Costs.**

2 (a) **DEFINITION; FORM.** Judgment as used
3 in these rules includes a decree and any order
4 from which an appeal lies. A judgment shall
5 not contain a recital of any pleadings, the re-
6 port of any master, or the record of any prior
7 proceedings.

8 (b) **JUDGMENT AT VARIOUS STAGES.** When
9 more than one claim for relief is presented in
10 an action, the court at any stage, upon a deter-
11 mination of the issues material to a particular
12 claim and all counterclaims arising out of the
13 transaction or occurrence which is the subject
14 matter of the claim, may enter a judgment dis-
15 posing of such claim. The judgment shall ter-
16minate the action with respect to the claim so
17 disposed of and the action shall proceed as to
18 the remaining claims. In case a separate judg-
19 ment is so entered, the court by order may
20 stay its enforcement until the entering of a
21 subsequent judgment or judgments and may
22 prescribe such conditions, if any, as are neces-
23 sary to secure the benefit thereof to the party
24 in whose favor the judgment is entered.

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

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

34 (d) COSTS. Except when express provision
35 therefor is made either in a statute of the
36 United States or in these rules, costs shall be
37 allowed as of course to the prevailing party
38 unless the court otherwise directs; but costs
39 against the United States, its officers and
40 agencies shall be imposed only to the extent
41 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 non-compliance with an order of I. C. C. for payment of money)

1 **Rule 55. Default.**

2 (a) ENTRY. When the court has obtained
3 jurisdiction of a party against whom a judg-
4 ment for affirmative relief is sought and he
5 has failed to plead or otherwise defend as pro-
6 vided by these rules, the clerk shall enter his
7 default.

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

10 (1) *By the Clerk.* When the plain-
11 tiff's claim against a defendant is for a
12 sum certain or for a sum which can by
13 computation be made certain, the clerk
14 upon request of the plaintiff and upon
15 affidavit of the amount due shall enter
16 judgment for that amount and costs
17 against the defendant, if he has been de-
18 faulted for failure to appear and if he is
19 not an infant or incompetent person.

20 (2) *By the Court.* In all other cases
21 the party entitled to a judgment by de-
22 fault shall apply to the court therefor;
23 but no judgment by default shall be en-
24 tered against an infant or incompetent
25 person unless represented in the action by
26 a general guardian, committee, conserva-
27 tor, or other such fiduciary who has ap-
28 peared therein. If the party against
29 whom judgment by default is sought has

30 appeared in the action, he (or, if appear-
31 ing by representative, his representative)
32 shall be served with written notice of the
33 application for judgment at least 3 days
34 prior to the hearing on such application.
35 If, in order to enable the court to enter
36 judgment or to carry it into effect, it is
37 necessary to take an account or to deter-
38 mine the amount of damages or to estab-
39 lish the truth of any averment by evidence
40 or to make an investigation of any other
41 matter, the court may conduct such hear-
42 ings or order such references as it deems
43 necessary and proper and shall accord a
44 right of trial by jury to the parties when
45 and as required by any statute of the
46 United States.

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

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

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

64 his claim or right to relief by evidence satis-
65 factory 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.

1 **Rule 56. New Trials.**

2 (a) **GROUND.** A new trial may be granted
3 to all or any of the parties and on all or part
4 of the issues (1) in an action in which there
5 has been a trial by jury, for any of the rea-
6 sons for which new trials have heretofore
7 been granted in actions at law in the courts
8 of the United States; and (2) in an action
9 tried without a jury, for any of the reasons
10 for which rehearings have heretofore been
11 granted in suits in equity in the courts of the
12 United States. In ruling on a motion for a
13 new trial in an action which had been tried
14 without a jury, the court has power to open
15 the judgment if one has been entered, to take
16 additional testimony, to amend findings of
17 fact and conclusions of law, or to make new
18 findings and conclusions, and to direct the
19 entry of a new judgment.

20 (b) **TIME FOR MOTION.** A motion for a new
21 trial shall be served within 10 days after the
22 entry of the judgment, except that a motion
23 for a new trial on the ground of newly discov-
24 ered evidence may be made after the expira-
25 tion of such period and before the expiration
26 of the time for appeal, with leave of court
27 obtained on notice and hearing and on a show-
28 ing of due diligence.

29 (c) **TIME FOR SERVING AFFIDAVITS.** When
30 a motion for new trial is based upon affi-
31 davits they shall be served with the motion.
32 The opposing party shall have 10 days after
33 such service within which to serve opposing

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

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

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.

1 **Rule 57. Relief from Judgment or Order.**

2 (a) **CLERICAL MISTAKES.** Clerical mistakes
3 in judgments, orders, or other parts of the
4 record and errors therein arising from over-
5 sight or omission may be corrected by the court
6 at any time of its own initiative or on the mo-
7 tion of any party and after such notice, if any,
8 as the court orders.

9 (b) **FRAUD; ACCIDENT; MISTAKE; SURPRISE.**
10 On motion made with reasonable diligence and
11 served before the time for appeal expires, the
12 court upon such terms as are just may relieve
13 a party or his legal representative from a judg-
14 ment, order, or default, on the ground of fraud,
15 accident, mistake, surprise, or inadvertence.
16 Service of a motion under this subdivision does
17 not affect the finality of a judgment or suspend
18 its operation. This rule does not limit the
19 power of a court to entertain an independent
20 action to relieve a party or his legal representa-
21 tive from a judgment, order, or default.

NOTE

Note to Subdivision (a). See Equity Rule 72 (Cor-
rection 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 cor-
rection of clerical errors and for amendment after
judgment, see Va. Code (Michie, 1930) §§ 6329, 6333.

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.

1 **Rule 58. Declaratory Judgments.** The
2 procedure for obtaining a declaratory judg-
3 ment pursuant to Section 274 (d) of the Judi-
4 cial Code, as amended, U. S. C., Title 28, § 400,
5 shall be in accordance with these rules, and the
6 right to trial by jury may be claimed under the
7 circumstances and in the manner provided in
8 Rules 39 and 40. The existence of another
9 adequate remedy does not preclude a judgment
10 for declaratory relief in cases where it is ap-
11 propriate. The court may order a speedy
12 hearing of an action for a declaratory judg-
13 ment 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*.

1 **Rule 59. Findings by the Court.**

2 (a) **EFFECT.** In all actions tried upon the
3 facts without a jury, the court shall find the
4 facts specially and state separately its conclu-
5 sions of law thereon and direct the entry of
6 the appropriate judgment; and in granting or
7 refusing interlocutory injunctions the court
8 shall similarly set forth the findings of fact
9 and conclusions of law which constitute the
10 grounds of its action. No request for findings
11 is necessary. Findings of fact shall not be set
12 aside unless clearly erroneous, and due regard
13 shall be given to the opportunity of the trial
14 court to judge of the credibility of the wit-
15 nesses. The findings of a master, to the extent
16 that the court adopts them, shall be considered
17 as the findings of the court.

18 (b) **AMENDMENT.** Upon motion of a party
19 made within 10 days after entry of judgment
20 the court may amend its findings or make addi-
21 tional findings and may amend the judgment
22 accordingly. The pendency of the motion
23 does not affect the finality of the judgment or
24 suspend its operation; and the motion may be
25 made with a motion for a new trial pursuant
26 to Rule 56. When findings of fact are made
27 in actions tried by the court without a jury, the
28 question of the sufficiency of the evidence to
29 support the findings may thereafter be raised
30 whether or not the party raising the question
31 has made in the district court an objection to
32 such findings or has made a motion to amend
33 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 abolishing 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.

1 **Rule 60. Entry of Judgment.** Unless the
2 court otherwise directs, judgment upon the
3 verdict of a jury shall be entered forthwith by
4 the clerk; but the court shall direct the appro-
5 priate judgment to be entered upon a special
6 verdict or upon a general verdict accompanied
7 by answers to interrogatories returned by a
8 jury pursuant to Rule 50. When the
9 court directs the entry of a judgment that
10 a party recover only money or costs or
11 that there be no recovery, the clerk shall
12 enter judgment forthwith upon receipt by him
13 of the direction; but when the court directs en-
14 try of judgment for other relief, the judge
15 shall promptly settle or approve the form of
16 the judgment and direct that it be entered by
17 the clerk. The notation of a judgment in the
18 civil docket as provided by Rule 81 (a) shall
19 constitute the entry of the judgment; and the
20 judgment shall not be effective before such
21 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.

1 **Rule 61. Harmless Error.** No error in
2 either the admission or the exclusion of evi-
3 dence and no error or defect in any ruling or
4 order or in anything done or omitted by the
5 court or by any of the parties shall be ground
6 for granting a new trial or for setting aside
7 a verdict or for vacating, modifying, or other-
8 wise disturbing a judgment or order, unless
9 refusal to take such action appears to the
10 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).

1 **Rule 62. Appeal from a District Court to**
2 **the Supreme Court of the United States.**
3 When an appeal is permitted by law from a
4 district court to the Supreme Court of the
5 United States, an appeal shall be taken by
6 petition for appeal accompanied by an as-
7 signment of errors. The petition shall be
8 allowed, a citation issued, a jurisdictional
9 statement filed, and the record on appeal made
10 and certified as prescribed by law and the

- 11 Rules of the Supreme Court of the United
12 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.

1 **Rule 63. Appeal to a Circuit Court of** 2 **Appeals.**

3 (a) HOW TAKEN. When an appeal is per-
4 mitted by law from a district court to a circuit
5 court of appeals and within the time pre-
6 scribed, a party may appeal from a judgment
7 by filing with the district court a notice of
8 appeal. Failure of the appellant to take any
9 of the further steps to secure the review of the
10 judgment appealed from does not affect the
11 validity of the appeal, but is ground only for
12 such remedies as are specified in this rule or,
13 when no remedy is specified, for such action as
14 the appellate court deems appropriate, which
15 may include dismissal of the appeal.

16 (b) NOTICE OF APPEAL. The notice of ap-
17 peal shall specify the parties taking the ap-
18 peal; shall designate the judgment or part
19 thereof appealed from; and shall name the
20 court to which the appeal is taken. Notifica-
21 tion of the filing of the notice of appeal shall
22 be given by the clerk by mailing copies thereof
23 to all the parties to the judgment other than

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

34 (c) BOND ON APPEAL. Whenever a bond
35 for costs on appeal is required by law, the bond
36 shall be filed with the notice of appeal. The
37 bond shall be in the sum of two hundred and
38 fifty dollars, unless the court fixes a different
39 amount or unless a supersedeas bond is filed,
40 in which event no separate bond on appeal is re-
41 quired. The bond on appeal shall have suffi-
42 cient surety and shall be conditioned to secure
43 the payment of costs if the appeal is dismissed
44 or the judgment affirmed, or of such costs as
45 the appellate court may award if the judgment
46 is modified. If a bond on appeal in the sum of
47 two hundred and fifty dollars is given, no ap-
48 proval thereof is necessary. After a bond on
49 appeal is filed an appellee may raise objections
50 to its form or sufficiency for determination by
51 the clerk.

52 (d) SUPERSEDEAS BOND. Whenever an ap-
53 pellant entitled thereto desires a stay on ap-
54 peal, he may present to the court for its
55 approval a supersedeas bond which shall have
56 such surety or sureties as the court requires.

57 The bond shall be conditioned for the satisfac-
58 tion of the judgment in full together with
59 costs, interest, and damages for delay, if for
60 any reason his appeal is dismissed or if the
61 judgment is affirmed, and to satisfy in full
62 such modification of the judgment and such
63 costs, interest, and damage as the appellate
64 court shall adjudge and award. When the
65 judgment is for the recovery of money not
66 otherwise secured, the amount of the bond
67 shall be fixed at such sum as will cover the
68 whole amount of the judgment remaining un-
69 satisfied, costs on the appeal, interest, and
70 damages for delay, unless the court after
71 notice and hearing and for good cause shown
72 fixes a different amount or orders security
73 other than the bond. When the judgment
74 determines the disposition of the property in
75 controversy as in real actions, replevin, and
76 actions to foreclose mortgages or when such
77 property is in the custody of the marshal or
78 when the proceeds of such property or a bond
79 for its value is in the custody or control of the
80 court, the amount of the bond shall be fixed at
81 such sum only as will secure the amount re-
82 covered for the use and detention of the
83 property, the costs of the action, costs on
84 appeal, interest, and damages for delay.

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

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

95 (f) JUDGMENT AGAINST SURETY. By enter-
96 ing into an appeal or supersedeas bond given
97 pursuant to subdivisions (b) and (c) of this
98 rule, the surety submits himself to the juris-
99 diction of the court and appoints the clerk of
100 the court as his irrevocable agent upon whom
101 any papers affecting his liability on the bond
102 may be served. His liability may be enforced
103 on motion without the necessity of an inde-
104 pendent action. The motion and such notice
105 of the motion as the court prescribes may be
106 served on the clerk of the court.

107 (g) DOCKETING AND RECORD ON APPEAL.
108 The record on appeal as provided for in Rules
109 65 and 66 shall be filed with the appellate court
110 and the action there docketed within 40 days
111 from the date of the notice of appeal; except
112 that when more than one appeal is taken from
113 the same judgment to the same appellate court,
114 the district court may prescribe the time for
115 filing and docketing, which in no event shall be
116 less than 40 days from the date of the first
117 notice of appeal. In all cases the district
118 court in its discretion and with or without
119 motion or notice may extend the time for filing
120 the record on appeal and docketing the action,
121 if its order for extension is made before the
122 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.

1 **Rule 64. Joint or Several Appeals; Sum-**
2 **mons and Severance Abolished.** Parties in-
3 terested jointly, severally, or otherwise in a
4 judgment may join in an appeal therefrom;
5 or, without summons and severance, any one of
6 them may appeal separately or any two or
7 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).

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

3 (a) DESIGNATION OF CONTENTS OF RECORD ON
4 APPEAL. Promptly after an appeal to a cir-
5 cuit court of appeals is taken, the appellant

6 shall serve upon the appellee and file with the
7 district court a designation of the portions of
8 the record, proceedings, and evidence to be
9 contained in the record on appeal. Within 10
10 days thereafter any other party to the appeal
11 may serve and file a designation of additional
12 portions of the record, proceedings, and evi-
13 dence to be included.

14 (b) TRANSCRIPT. If there is designated for
15 inclusion any evidence or proceedings at a trial
16 or hearing which was stenographically re-
17 ported, the appellant shall file with his desig-
18 nation two copies of the reporter's transcript
19 of the evidence or proceedings included in his
20 designation; and, if the designation includes
21 only part of the reporter's transcript, the ap-
22 pellant shall file two copies of such additional
23 parts thereof as the appellee may need to en-
24 able him to designate and file the parts he de-
25 sires to have added. One of the copies so
26 filed by the appellant shall be available for the
27 use of the other parties and for use in the
28 appellate court in printing the record.

29 (c) FORM OF TESTIMONY. Testimony of
30 witnesses designated for inclusion need not be
31 in narrative form, but may be in question and
32 answer form. A party may prepare and file
33 with his designation a condensed statement in
34 narrative form of all or part of the testimony,
35 and any other party to the appeal, if dissatis-
36 fied with the narrative statement, may require
37 testimony in question and answer form to be
38 substituted for all or part thereof.

39 (d) STATEMENT OF POINTS. If the appel-
40 lant does not designate for inclusion the com-
41 plete record and all the proceedings and evi-
42 dence in the action, he shall serve with his
43 designation a concise statement of the points
44 on which he intends to rely on the appeal.

45 (e) RECORD TO BE ABBREVIATED. All mat-
46 ter not essential to the decision of the ques-
47 tions presented by the appeal shall be omitted.
48 Formal parts of all exhibits and more than one
49 copy of any document shall be excluded. Doc-
50 uments shall be abridged by omitting all irrele-
51 vant and formal portions thereof. For any
52 infraction of this rule or for the unnecessary
53 substitution by one party of evidence in ques-
54 tion and answer form for a fair narrative
55 statement proposed by another, the appellate
56 court may withhold or impose costs as the
57 circumstances of the case and discouragement
58 of like infractions in the future may require;
59 and for such infractions, costs may be imposed
60 upon offending attorneys and parties.

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

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

73 nated, copies of the following: the material
74 pleadings without unnecessary duplication;
75 the verdict or the findings of fact and conclu-
76 sions of law together with the direction for the
77 entry of judgment thereon; the opinion; the
78 judgment or part thereof appealed from; the
79 notice of appeal with date of filing; the desig-
80 nations or stipulations of the parties as to mat-
81 ter to be included in the record; and any state-
82 ment by the appellant of the points on which
83 he intends to rely. The matter so certified
84 and transmitted constitutes the record on ap-
85 peal. The clerk shall transmit with the record
86 on appeal a copy thereof for use in printing
87 the record, if a copy is required by the rules
88 of the circuit court of appeals.

89 (h) POWER OF COURT TO CORRECT RECORD.
90 It is not necessary for the record on appeal
91 to be approved by the district court or judge
92 thereof, but, if any difference arises as to
93 whether the record truly discloses what oc-
94 curred in the district court, the difference shall
95 be submitted to and settled by that court and
96 the record made to conform to the truth. If
97 anything material to either party is omitted
98 from the record on appeal by error or accident
99 or is misstated therein, the parties by stipula-
100 tion, or the district court, either before or after
101 the record is transmitted to the appellate court,
102 or the appellate court, on a proper suggestion
103 or of its own initiative, may direct that the
104 omission or misstatement shall be corrected,
105 and if necessary that a supplemental record

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

108 (i) ORDER AS TO ORIGINAL PAPERS OR EX-
109 HIBITS. Whenever the district court is of opin-
110 ion that original papers or exhibits should be
111 inspected by the appellate court or sent to the
112 appellate court in lieu of copies, it may make
113 such order therefor and for the safekeeping,
114 transportation, and return thereof as it deems
115 proper.

116 (j) RECORD FOR PRELIMINARY HEARING IN
117 APPELLATE COURT. If, prior to the time the
118 complete record on appeal is settled and certi-
119 fied as herein provided, a party desires to
120 docket the appeal in order to make in the ap-
121 pellate court a motion for dismissal, for a stay
122 pending appeal, for additional security on the
123 bond on appeal or on the supersedeas bond, or
124 for any intermediate order, the clerk of the
125 district court at his request shall certify and
126 transmit to the appellate court a copy of such
127 portion of the record or proceedings below as
128 is needed for that purpose.

129 (k) SEVERAL APPEALS. When more than
130 one appeal is taken to the same court from the
131 same judgment, a single record on appeal shall
132 be prepared containing all the matter desig-
133 nated or agreed upon by the parties, without
134 duplication.

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

139 the rules of the court to which the appeal is
140 taken; but the type, paper, and dimensions of
141 printed matter in the circuit court of appeals
142 shall conform to the rules of the Supreme
143 Court relating to records on appeals to that
144 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 (1) 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.

1 **Rule 66. Record on Appeal to a Circuit**
2 **Court of Appeals; Agreed Statement.**
3 When the questions presented by an appeal to
4 a circuit court of appeals can be determined
5 without an examination of all the pleadings,
6 evidence, and proceedings in the court below,
7 the parties may prepare and sign a statement
8 of the case showing how the questions arose
9 and were decided in the district court and set-
10 ting forth only so many of the facts averred
11 and proved or sought to be proved as are essen-
12 tial to a decision of the questions by the ap-
13 pellate court. The statement shall include a
14 copy of the judgment appealed from, a copy
15 of the notice of appeal with its filing date, and
16 a concise statement of the points to be relied
17 on by the appellant. If the statement con-
18 forms to the truth, it, together with such ad-
19 ditions as the court may consider necessary
20 fully to present the questions raised by the
21 appeal, shall be approved by the district court
22 and shall then be certified to the appellate
23 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.

1 **Rule 67. Stay of Proceedings to Enforce**
2 **a Judgment.**

3 (a) AUTOMATIC STAY; EXCEPTIONS—INJUNC-
4 TIONS, RECEIVERSHIPS, AND PATENT ACCOUNT-
5 INGS. Except as stated herein, no execution shall
6 issue upon a judgment nor shall proceedings
7 be taken for its enforcement until the expira-
8 tion of 10 days after its entry. Unless other-
9 wise ordered by the court, an interlocutory or
10 final judgment in an action for an injunction
11 or in a receivership action, or a judgment or
12 order directing an accounting in an action
13 for infringement of letters patent, shall not
14 be stayed during the period after its entry and
15 until an appeal is taken or during the pend-
16 ency of an appeal. The provisions of subdivi-
17 sion (c) of this rule shall govern the suspend-
18 ing, modifying, restoring, or granting of an
19 injunction during the pendency of an appeal.

20 (b) STAY ON MOTION FOR NEW TRIAL OR FOR
21 JUDGMENT. In its discretion and on such con-
22 ditions for the security of the adverse party
23 as are proper, the court may stay the execu-
24 tion of or any proceedings to enforce a judg-
25 ment pending the disposition of a motion for
26 a new trial made pursuant to Rule 56, or of a
27 motion for relief from a judgment or order
28 made pursuant to Rule 57, or of a motion for
29 judgment in accordance with a motion for a
30 directed verdict made pursuant to Rule 51, or
31 of a motion for amendment to the findings or
32 for additional findings made pursuant to Rule
33 59 (b).

34 (c) INJUNCTION PENDING APPEAL. When
35 an appeal is taken from an interlocutory or
36 final judgment granting, dissolving, or deny-
37 ing an injunction, the court in its discretion
38 may make an order suspending, modifying,
39 restoring, or granting an injunction during the
40 pendency of the appeal upon such terms as to
41 bond or otherwise as it considers proper for
42 the security of the rights of the adverse party.
43 No such order shall be made without the con-
44 currence of two of the judges of the district
45 court that entered the judgment appealed from
46 or the assent of all the judges thereof, evi-
47 denced by their signatures to the order, if that
48 court is a district court of three judges spe-
49 cially constituted pursuant to a statute of the
50 United States.

51 (d) STAY UPON APPEAL. When an appeal
52 is taken the appellant by giving a supersedeas
53 bond may obtain a stay subject to the ex-
54 ceptions contained in subdivision (a) of this
55 rule. The bond may be given at or after the
56 time of filing the notice of appeal or of procur-
57 ing the order allowing the appeal, as the case
58 may be. The stay is effective when the super-
59 sedeas bond is approved by the court.

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

68 (f) STAY ACCORDING TO STATE LAW. In any
69 state in which a judgment is a lien upon the
70 property of the judgment debtor and in which
71 the judgment debtor is entitled to a stay of exe-
72 cution, a judgment debtor shall be entitled, in
73 the district court held therein, to such stay as
74 would be accorded him had the action been
75 maintained in the courts of that state.

76 (g) POWER OF APPELLATE COURT NOT LIM-
77 ITED. The provisions in this rule do not limit
78 any power of an appellate court or of a judge
79 or justice thereof to stay proceedings during
80 the pendency of an appeal or to suspend, mod-
81 ify, restore, or grant an injunction during the
82 pendency of an appeal or to make any order
83 appropriate to preserve the status quo or the
84 effectiveness of the judgment subsequently to
85 be entered; and these rules do not supersede
86 the provisions of Section 210 of the Judicial
87 Code, as amended, U. S. C., Title 28, § 47a, or
88 of other statutes of the United States to the
89 effect that stays pending appeals to the Su-
90 preme Court may be granted only by that court
91 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.

1 **Rule 68. Disability of a Judge.** If by rea-
2 son of death, sickness, or other disability, a
3 judge before whom an action has been tried
4 is unable to perform the duties to be by him
5 performed under these rules after a verdict is
6 returned or findings of fact and conclusions
7 of law are filed, then any other judge regu-
8 larly sitting in or assigned to the court in
9 which the action was tried may perform those
10 duties; but if such other judge is satisfied that
11 he cannot perform those duties because he did
12 not preside at the trial or for any other rea-
13 son, 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.

VIII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

1 **Rule 69. Seizure of Person or Property.**

2 At the commencement of or during the course
3 of an action, all remedies providing for seizure
4 of person or property for the purpose of se-
5 curing satisfaction of the judgment ultimately
6 to be entered in the action shall be available
7 under the circumstances and in the manner
8 provided by the then existing law of the state
9 in which the district court is held, subject to
10 the following qualifications: (1) any existing
11 statute of the United States governs to the ex-
12 tent to which it is applicable; (2) the action
13 in which any of the foregoing remedies is used
14 shall be commenced and prosecuted or, if re-
15 moved from a state court, shall be prosecuted
16 after removal, pursuant to these rules. The
17 remedies thus available include arrest, attach-
18 ment, garnishment, replevin, sequestration,
19 and other corresponding or equivalent reme-
20 dies, however designated and regardless of
21 whether by state procedure the remedy is an-
22 cillary to an action or must be obtained by an
23 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).

1 **Rule 70. Injunctions.**

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

5 (b) TEMPORARY RESTRAINING ORDER; NO-
6 TICE; HEARING; DURATION. No temporary re-
7 straining order shall be granted without no-
8 tice to the adverse party unless it clearly
9 appears from specific facts shown by affidavit

10 or by the verified complaint that immediate
11 and irreparable injury, loss, or damage will
12 result to the applicant before notice can be
13 served and a hearing had thereon. Every tem-
14 porary restraining order granted without no-
15 tice shall be indorsed with the date and hour of
16 issuance; shall be filed forthwith in the clerk's
17 office and entered of record; shall define the
18 injury and state why it is irreparable and why
19 the order was granted without notice; and
20 shall expire by its terms within such time after
21 entry, not to exceed 10 days, as the court fixes,
22 unless within the time so fixed the order, for
23 good cause shown, is extended for a like period
24 or unless the party against whom the order is
25 directed consents that it may be extended for
26 a longer period. The reasons for the extension
27 shall be entered of record. In case a temporary
28 restraining order is granted without notice, the
29 motion for a preliminary injunction shall be
30 set down for hearing at the earliest possible
31 time and shall take precedence of all matters
32 except older matters of the same character;
33 and when the motion comes on for hearing the
34 party who obtained the temporary restraining
35 order shall proceed with the application for a
36 preliminary injunction and, if he does not do
37 so, the court shall dissolve the temporary re-
38 straining order. On 2 days' notice or on such
39 shorter notice as the court may prescribe, given
40 to the party who obtained the temporary re-
41 straining order without notice, the adverse
42 party may appear and move its dissolution or

43 modification and in that event the court shall
44 proceed to hear and determine such motion as
45 expeditiously as the ends of justice require.

46 (c) SECURITY. No restraining order or pre-
47 liminary injunction shall issue except upon the
48 giving of security by the applicant, in such
49 sum as the court deems proper, for the pay-
50 ment of such costs and damages as may be in-
51 curred or suffered by any party who is found
52 to have been wrongfully enjoined or restrained.
53 No such security shall be required of the
54 United States or of an officer or agency
55 thereof.

56 (d) FORM OF INJUNCTION OR RESTRAINING
57 ORDER. Every order granting an injunction
58 and every restraining order shall set forth the
59 reasons for its issuance; shall be specific in
60 terms; shall describe in reasonable detail, and
61 not by reference to the complaint or other doc-
62 ument, the act or acts sought to be restrained;
63 and shall be binding only upon the parties to
64 the action, their officers, agents, servants, em-
65 ployees, and attorneys, and upon those persons
66 in active concert or participation with them
67 who receive actual notice of the order by per-
68 sonal service or otherwise.

69 (e) EMPLOYER AND EMPLOYEE; INTER-
70 PLEADER. These rules do not modify the Act of
71 October 15, 1914, c. 323, §§ 1 and 20 (38 Stat.
72 730), U. S. C., Title 29, §§ 52 and 53, or the Act
73 of March 23, 1932, c. 90 (47 Stat. 70), U. S. C.,
74 Title 29, c. 6, relating to temporary restraining
75 orders and preliminary injunctions in actions
76 affecting employer and employee; or the pro-

77 visions of Section 24 (26) of the Judicial Code
 78 as amended, U. S. C., Title 28, § 41 (26), relat-
 79 ing to preliminary injunctions in actions of
 80 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)

1 **Rule 71. Receivers.** The practice appli-
 2 cable to the administration of estates by re-
 3 ceivers or by other similar officers appointed
 4 by the court shall be in accordance with the
 5 practice as heretofore followed in the courts
 6 of the United States or as provided in rules
 7 promulgated by the district courts, but all ap-
 8 peals in receivership proceedings are subject
 9 to these rules.

1 **Rule 72. Deposit in Court.** In an action
 2 in which any part of the relief sought is a
 3 judgment for a sum of money or the disposi-
 4 tion of a sum of money or the disposition of
 5 any other thing capable of delivery, a party,
 6 upon notice to every other party, may, by leave
 7 of court, deposit with the court all or any part
 8 of such sum or thing. Money paid into court
 9 under this rule shall be deposited and with-
 10 drawn in accordance with the provisions of

11 Sections 995 and 996, Revised Statutes, as
12 amended, U. S. C., Title 28, §§ 851, 852; the
13 Act of June 26, 1934, c. 756, § 23 (48 Stat.
14 1236), U. S. C., Title 31, § 725v; or any like
15 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).

1 **Rule 73. Offer of Judgment.** At any time
2 more than 10 days before the trial begins, a
3 party defending against a claim may serve
4 upon the adverse party an offer to allow judg-
5 ment to be taken against him for the money
6 or property or to the effect specified in his
7 offer, with costs then accrued. If within 10
8 days after the service of the offer the adverse
9 party serves written notice that the offer is
10 accepted, the defending party may then file
11 the offer and notice of acceptance together
12 with proof of service thereof and thereupon
13 the clerk shall enter judgment. If the offer
14 is not so accepted it shall be deemed with-
15 drawn and evidence thereof shall not be ad-
16 missible. If the adverse party fails to obtain
17 a judgment more favorable than that offered,
18 he shall not recover costs from the time of the
19 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).

1 **Rule 74. Condemnation of Property for**
2 **Public Use.** The procedure prescribed by
3 these rules is modified in the following respects
4 as to all actions for the taking of property for
5 public use and the ascertainment of just com-
6 pensation for the taking.

7 (a) **JOINDER OF PROPERTIES.** One or more
8 separate and distinct lots or parcels of prop-
9 erty sought to be taken for the same uses,
10 whether in the same or different ownership,
11 may be proceeded against in the same action.

12 (b) **COMPLAINT.** The names of the defend-
13 ants may be omitted from the caption of the
14 complaint and they may be described in the
15 title as "the owners of and persons interested
16 in the property sought to be taken." In the
17 body of the complaint the names of all the
18 owners of and persons interested in the prop-
19 erty sought to be taken shall be stated if known,
20 and all others may be made parties under the
21 designation of "unknown owners". A de-
22 scription of the property and of the estate or
23 interest therein sought to be taken and the au-
24 thority for and the purpose of the taking, shall
25 be briefly stated.

26 (c) **PROCESS.** The summons need not con-
27 tain the names of all defendants, but each sum-
28 mons may contain only the names of those

29 upon whom it is intended to be served. It is
30 unnecessary to serve a copy of the complaint
31 with the summons, but the summons shall state
32 that the action is brought for the taking of
33 property for public use, shall briefly describe
34 the property and the use, shall require the
35 defendant to appear and to serve and file his
36 defenses within 20 days after the service of
37 summons, and shall notify him that upon his
38 failure so to do he will be precluded from
39 thereafter contesting the right of the plaintiff
40 to take the property sought to be condemned.
41 Except under the circumstances stated in sub-
42 division (d) of this rule, the summons shall be
43 personally served as provided in Rule 4 (c)
44 and (d).

45 (d) SERVICE BY PUBLICATION. If it is shown
46 by the complaint or otherwise that there are
47 parties defendant who are not inhabitants of
48 the state in which the action is brought or
49 who are unknown or whose places of residence
50 are unknown or who for any other reason can-
51 not be personally served with summons or if
52 there are persons who have been made parties
53 under the designation of "unknown owners",
54 the court may order that such parties shall be
55 notified of the pendency of the action by pub-
56 lication. The published notice shall state the
57 names of the defendants to be served by publi-
58 cation so far as known, and may designate all
59 others as "unknown owners". It shall briefly
60 describe the property and the intended use,
61 and shall state a date not less than 40 days
62 after the date of the first publication thereof

63 at which the defendants designated therein
64 may appear and present their objections, if
65 any, to the taking, as provided in subdivision
66 (e) of this rule. The order shall name a news-
67 paper of general circulation published in the
68 general vicinity of the property, in which the
69 notice shall be published. The notice shall be
70 published once each week for 3 successive
71 weeks. The first publication shall be not more
72 than 10 days after the date of the order.
73 Proof of publication may be by affidavit of
74 the publisher or his agent or of an attorney
75 of record for the plaintiff. The court may
76 direct that the plaintiff in addition to pub-
77 lishing the notice shall post it in such manner
78 and a such place as the court prescribes.

79 (e) DEFENSES AND OBJECTIONS. Within the
80 time specified in the summons or notice, each
81 defendant, in lieu of an answer, shall present
82 in a single motion to dismiss or for other ap-
83 propriate relief, all of his objections and de-
84 fenses to the right of the plaintiff to take his
85 property for the use specified in the complaint.
86 All such objections and defenses not so pre-
87 sented are waived. A copy of the motion shall
88 be served on the plaintiff's attorney of record
89 and filed with the court with proof or accept-
90 ance of service.

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

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

106 (g) ASCERTAINMENT OF COMPENSATION; AP-
107 POINTMENT OF COMMISSIONER. Upon the entry
108 of the order of condemnation the court shall
109 appoint a competent and disinterested person
110 as commissioner to ascertain and report to the
111 court the just compensation for the property
112 sought to be taken. The order of appointment
113 shall designate the time and place of the first
114 session of the hearing to be held by the com-
115 missioner and specify the time within which
116 his report is to be filed with the court. The
117 commissioner shall view the property sought
118 to be taken, gather information deemed by him
119 to be material, and accord to the parties an
120 opportunity to present at such hearing and at
121 any adjournment thereof, evidence as to the
122 value of the property.

123 (h) SAME; COMMISSIONER'S REPORT. The
124 commissioner shall ascertain and report the
125 just compensation to be awarded for each
126 separate and distinct lot or parcel of property,
127 or for the interest therein sought to be taken.
128 He shall not hear, determine, or report upon
129 controversies respecting title or respecting ap-
130 portionment of compensation. The report of

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

137 (i) SAME; TRIAL BY THE COURT—BY JURY.

138 Within 20 days after filing of the report, any
139 party to the action who conceives himself to
140 be aggrieved as to the compensation awarded
141 by the report may serve and file specific ob-
142 jections thereto. All objections may be tried
143 by the court unless trial by jury has been de-
144 manded. At the time of filing such objections,
145 any party may file a demand that they be tried
146 by a jury, whereupon a jury shall be im-
147 panelled to try them. The issue to be sub-
148 mitted to the jury is the amount of just com-
149 pensation for the taking of the lot or parcel
150 of property as to which objections have been
151 filed, and does not include controversies re-
152 specting title or respecting apportionment of
153 compensation. The trial of the issue before
154 the jury shall be conducted as in other actions.

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

164 prior to the ascertainment or payment of com-
165 pensation.

166 (k) COMPENSATION; DEPOSIT, PAYMENT.

167 The plaintiff may deposit in court for the
168 benefit of the owners of the property sought
169 to be taken the amount of compensation as-
170 certained for the respective lots and parcels.
171 If there are controversies respecting title or
172 respecting apportionment of compensation, as
173 to any lot or parcel of the property sought
174 to be taken or to any of the money deposited,
175 the court, on motion of any such claimant and
176 notice to all other claimants, may hear and
177 determine the controversy and make appro-
178 priate orders in respect to the disposition and
179 distribution of money so deposited.

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

191 (m) COMPLIANCE WITH STATE PROCEDURE.

192 If the action involves the taking of property
193 for public use under the right of eminent do-
194 main of a state, recourse shall be had to the
195 procedural rules of that state to the extent
196 necessary to preserve to the parties substantive

197 rights under the Constitution of that state
198 and under the statutes thereof granting the
199 right of condemnation. In any such case the
200 procedure provided for in this rule shall be
201 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)

1 **Rule 75. Execution.**

2 (a) IN GENERAL. Process to enforce a judg-
 3 ment for the payment of money shall be a writ
 4 of execution, unless the court shall direct
 5 otherwise. The practice and procedure rela-
 6 tive to execution, to proceedings supplemen-
 7 tary to and in aid of a judgment, and to pro-
 8 ceedings on and in aid of execution shall be in
 9 accordance with the then existing practice and
 10 procedure of the state in which the district

11 court is held, except that any statute of the
12 United States shall govern to the extent that
13 it is applicable. The judgment creditor or his
14 successor in interest when that interest ap-
15 pears of record, may, in aid of the judgment or
16 writ of execution, examine any person, includ-
17 ing the judgment debtor, in the manner pro-
18 vided in these rules for taking depositions or
19 in the manner provided by the practice of the
20 state in which the district court is held.

21 (b) AGAINST CERTAIN PUBLIC OFFICERS.
22 When a judgment has been entered against a
23 collector or other officer of revenue under the
24 circumstances stated in Section 989, Revised
25 Statutes, U. S. C., Title 28, § 842, or against
26 an officer of Congress in an action mentioned
27 in the Act of March 3, 1875, c. 130, § 8 (18 Stat.
28 401), U. S. C., Title 2, § 118, and when the
29 court has given the certificate of probable
30 cause for his act as provided in those statutes,
31 execution shall not issue against the officer or
32 his property but the final judgment shall be
33 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).

1 **Rule 76. Judgment for Specific Acts; Vest-**
2 **ing Title.** If a judgment directs a party to
3 execute a conveyance of land, or to deliver
4 deeds or other documents, or to perform any
5 other specific act, and the party fails to com-
6 ply within the time specified, the court may
7 direct the act to be done at the cost of the dis-
8 obedient party by some other person appointed
9 by the court and the act when so done shall
10 have like effect as if done by the party. On
11 application of the party entitled to perform-
12 ance, the clerk shall issue a writ of attachment
13 or sequestration against the property of the
14 disobedient party to compel obedience to the
15 judgment. The court may also in proper
16 cases adjudge the party in contempt. If real
17 or personal property is within the district, the
18 court in lieu of directing a conveyance thereof
19 may enter a judgment divesting the title of
20 any party and vesting it in others and such

21 judgment shall have the force and effect of a
22 conveyance executed in due form of law.
23 When any order or judgment is for the de-
24 livery of possession, the party in whose favor
25 it is entered is entitled to a writ of execution
26 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.

1 **Rule 77. Registration of Judgments in**
2 **Other District Courts.** A judgment en-
3 tered in any district court may be registered
4 in any other district court by filing therein
5 an authenticated copy of the judgment.
6 When so registered the judgment shall
7 have the same effect and like proceed-
8 ings for its enforcement may be taken
9 thereon in the court in which it is registered
10 as if the judgment had been originally entered
11 by that court. If in the court in which the
12 judgment was originally entered, the judgment
13 has been satisfied in whole or in part or if an
14 order has been made modifying or vacating it
15 or affecting or suspending its operation, the
16 party procuring the registration shall and any

17 other party may file authenticated copies of
18 the satisfaction or order with the court in
19 which the judgment is registered. This rule
20 shall not be construed to limit the effect of the
21 Act of February 20, 1905, c. 592, § 20 (33 Stat.
22 729), as amended, U. S. C., Title 15, § 100; or
23 the Act of March 4, 1909, c. 320, §§ 36 and 37
24 (35 Stat. 1084), U. S. C., Title 17, §§ 36 and 37;
25 or § 56 of the Judicial Code, U. S. C., Title 28,
26 § 117; or to authorize the registration else-
27 where of an order or a judgment rendered in a
28 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.

1 **Rule 78. Process in Behalf of and Against**
2 **Persons Not Parties.** When an order is
3 made in favor of a person who is not a party
4 to the action, he may enforce obedience to the
5 order by the same process as if he were a
6 party; and, when obedience to an order may
7 be lawfully enforced against a person who is
8 not a party, he is liable to the same process
9 for enforcing obedience to the order as if he
10 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).

IX. DISTRICT COURTS AND CLERKS

1 **Rule 79. District Courts and Clerks.**

2 (a) DISTRICT COURTS ALWAYS OPEN. The
3 district courts shall be deemed always open for
4 the purpose of filing any pleading or other
5 proper paper, of issuing and returning mesne
6 and final process, and of making and directing
7 all interlocutory motions, orders, and rules.

8 (b) TRIALS AND HEARINGS; ORDERS IN CHAM-
9 BERS. All trials upon the merits shall be con-
10 ducted in open court and so far as convenient
11 in a regular court room. All other acts or pro-
12 ceedings may be done or conducted by a judge
13 in chambers, without the attendance of the
14 clerk or other court officials and at any place
15 either within or without the district; but no
16 hearing, other than one *ex parte*, shall be con-
17 ducted outside the district without the consent
18 of all parties affected thereby.

19 (c) CLERK'S OFFICE AND ORDERS BY CLERK.
20 The clerk's office with the clerk or a deputy
21 in attendance shall be open during business
22 hours on all days except Sundays and legal
23 holidays. All motions and applications in the
24 clerk's office for issuing mesne process, for is-
25 suing final process to enforce and execute judg-
26 ments, for entering defaults or judgments by
27 default, and for other proceedings which do
28 not require allowance or order of the court are
29 grantable of course by the clerk; but his action
30 may be suspended or altered or rescinded by
31 the court upon cause shown.

32 (d) NOTICE OF ORDERS OR JUDGMENTS. Im-
33 mediately upon the noting in the civil docket
34 of the entry of an order or judgment made in
35 the absence of a party who has appeared, if
36 the order or judgment disposes of any issue
37 raised by him, the clerk shall serve a notice of
38 the entry by mail in the manner provided for
39 in Rule 5 (a), and shall make a note in the
40 docket of the mailing. Thereafter a party
41 asserting lack of notice of the entry of the
42 order or judgment has the burden of establish-
43 ing lack of notice. Such mailing is sufficient
44 notice for all purposes for which notice of the
45 entry of an order or judgment must be given;
46 but any party may in addition serve a notice
47 of such entry in the manner provided in Rule
48 5 (a) for the service of papers. The entry of
49 an order or judgment, other than a judgment
50 entered forthwith on a verdict, shall not of it-
51 self be deemed notice to the parties or their
52 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).

1 **Rule 80. Motion Day.** Unless local condi-
2 tions make it impracticable, each district court
3 shall establish regular times and places, at in-
4 tervals sufficiently frequent for the prompt
5 dispatch of business, at which motions requir-

6 ing notice and hearing may be heard and dis-
7 posed of; but the judge at any time or place
8 and on such notice, if any, as he considers
9 reasonable may make and direct all inter-
10 locutory orders, rulings, and proceedings for
11 the advancement, conduct, and hearing of
12 actions.

13 To expedite its business, the court may make
14 provision by rule or order for the submission
15 and determination of motions without oral
16 hearing upon brief written statements of rea-
17 sons 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.

1 **Rule 81. Books Kept by the Clerk and En-**
2 **tries Therein.**

3 (a) CIVIL DOCKET. The clerk shall keep a
4 book known as "civil docket" of such form
5 and style as may be prescribed by the Attor-
6 ney General under the authority of the Act of
7 June 30, 1906, c. 3914, § 1 (34 Stat. 754), as
8 amended, U. S. C., Title 28, § 568, or other
9 statutory authority, and shall enter therein
10 each civil action to which these rules are made
11 applicable. Actions shall be assigned consecu-
12 tive file numbers. The file number of each

13 action shall be noted on the folio of the docket
14 whereon the first entry of the action is made.
15 All papers filed with the clerk, all process is-
16 sued and returns made thereon, all appear-
17 ances, orders, verdicts, and judgments shall
18 be noted chronologically in this book on the
19 folio assigned to the action and shall be
20 marked with its file number. These notations
21 shall be brief but shall show the nature of each
22 paper filed or writ issued and the substance
23 of each order or judgment of the court and
24 of the returns showing execution of process.
25 When an action has been properly claimed or
26 ordered for trial by jury, the clerk shall enter
27 the word "jury" on the folio assigned to that
28 action.

29 (b) CIVIL ORDER BOOK. The clerk shall also
30 keep a book for civil actions entitled "civil
31 order book" in which shall be kept in the se-
32 quence of their making exact copies of all
33 final judgments and orders, all orders affect-
34 ing title to or lien upon real or personal prop-
35 erty, all appealable orders, and such other
36 orders as the court may direct.

37 (c) INDICES; CALENDARS. Separate and
38 suitable indices of the civil docket and of the
39 civil order book shall be kept by the clerk
40 under the direction of the court. There shall
41 be prepared under the direction of the court
42 calendars of all actions ready for trial, which
43 shall distinguish "jury actions" from "court
44 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.

1 **Rule 82. Stenographer; Stenographic Re-**
 2 **port or Transcript as Evidence.**

3 (a) STENOGRAPHER. A court or master
 4 may direct that evidence be taken steno-
 5 graphically and may appoint a stenographer for
 6 that purpose. His fees shall be fixed by the
 7 court and taxed ultimately as costs. The cost
 8 of a transcript shall be paid in the first in-
 9 stance by the party ordering the transcript.

10 (b) STENOGRAPHIC REPORT OR TRANSCRIPT
 11 AS EVIDENCE. Whenever the testimony of a
 12 witness at a trial or hearing which was steno-
 13 graphically reported is admissible in evidence

14 at a later trial, it may be proved by the tran-
15 script thereof duly certified by the person who
16 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

1 **Rule 83. Applicability in General.**

2 (a) TO WHAT PROCEEDINGS APPLICABLE.

3 (1) These rules shall not apply to pro-
4 ceedings in admiralty; nor to proceedings
5 in bankruptcy or proceedings in copyright
6 under the Act of March 4, 1909, c. 320, § 25
7 (35 Stat. 1081), as amended, U. S. C., Title
8 17, § 25, except in so far as they may be
9 made applicable thereto by rules promul-
10 gated by the Supreme Court of the United
11 States. They shall not apply to probate or
12 lunacy proceedings in the District Court
13 of the United States for the District of
14 Columbia except to appeals therein.

15 (2) In the following proceedings ap-
16 peals shall be governed by these rules; but
17 they shall not be applicable otherwise than
18 on appeal, except to the extent that the
19 practice in such proceedings is not set
20 forth in statutes of the United States and
21 has heretofore conformed to the practice
22 in actions at law or suits in equity: ad-
23 mission to citizenship, habeas corpus, quo
24 warranto, and forfeiture of property for
25 violation of a statute of the United States.

26 (3) In proceedings under the Act of
27 February 12, 1925, c. 213 (43 Stat. 883),
28 U. S. C., Title 9, or under the Act of
29 May 20, 1926, c. 347, § 9 (44 Stat. 585),

30 U. S. C., Title 45, § 159, these rules
31 shall apply to appeals, but otherwise
32 only to the extent that matters of pro-
33 cedure are not provided for in those
34 statutes.

35 (4) These rules do not alter the method
36 prescribed by the Act of February 18,
37 1922, c. 57, § 2 (42 Stat. 388), U. S. C.,
38 Title 7, § 292; or by the Act of June 10,
39 1930, c. 436, § 7 (46 Stat. 534), as amended,
40 U. S. C., Title 7, § 499g (c), for instituting
41 proceedings in the district courts of the
42 United States to review orders of the Sec-
43 retary of Agriculture; or prescribed by the
44 Act of June 25, 1934, c. 742, § 2 (48 Stat.
45 1214), U. S. C., Title 15, § 522, for insti-
46 tuting proceedings to review orders of
47 the Secretary of Commerce; or prescribed
48 by the Act of February 22, 1935, c. 18, § 5
49 (49 Stat. 31), U. S. C., Title 15, § 715d (c),
50 for instituting proceedings to review
51 orders of petroleum control boards; but
52 the conduct of such proceedings in the dis-
53 trict courts shall be made to conform with
54 these rules so far as applicable.

55 (5) These rules do not alter the prac-
56 tice in the district courts of the United
57 States prescribed in the Act of July 5,
58 1935, c. 372, §§ 9 and 10 (49 Stat. 453),
59 U. S. C., Title 29, §§ 159 and 160 (e), (g),
60 and (i), for beginning and conducting
61 proceedings to enforce orders of the Na-
62 tional Labor Relations Board; and in re-
63 spects not covered by those statutes, the

64 practice in the district courts shall con-
65 form to these rules so far as applicable.

66 (6) Proceedings for mandamus author-
67 ized by any statute of the United States
68 shall be treated as actions in which the re-
69 lief sought is a mandatory injunction; and
70 the pleadings and practice therein shall
71 conform to these rules.

72 (7) These rules do not apply to pro-
73 ceedings under the Act of September 13,
74 1888, c. 1015, § 13 (25 Stat. 479), as
75 amended, U. S. C., Title 8, § 282, nor to
76 proceedings for review of compensa-
77 tion orders under the Act of March 4, 1927,
78 c. 509, § 21 (44 Stat. 1436), U. S. C., Title
79 33, § 921. The provisions of the Act of
80 June 29, 1906, c. 3592, § 15 (34 Stat. 601),
81 as amended, U. S. C., Title 8, § 405, for
82 service by publication and allowing the de-
83 fendant 60 days within which to answer
84 shall remain in effect.

85 (b) SCIRE FACIAS. The writ of *scire facias*
86 is abolished.

87 (c) REMOVED ACTIONS. These rules shall
88 apply to civil actions removed to the district
89 courts of the United States from the state
90 courts and shall govern all procedure after re-
91 moval. Repleading shall not be necessary
92 unless the court so orders. In a removed ac-
93 tion in which the defendant has not answered,
94 he shall answer or present the other defenses
95 or objections available to him under these rules
96 within the time allowed for answer by the law
97 of the state or within 5 days after the filing

98 of the transcript of the record in the district
99 court of the United States, whichever period is
100 longer. If at the time of removal all necessary
101 pleadings have been filed, a party entitled to
102 trial by jury under Rule 39 and who has not
103 already waived his right to such trial shall be
104 accorded it, if his claim therefor is served
105 within 10 days after the record of the ac-
106 tion is filed in the district court of the United
107 States.

108 (d) DEFINITIONS.

109 (1) *Courts and Judges.* Whenever in
110 these rules reference is made to a district
111 court or to a district judge, the reference
112 includes the District Court of the United
113 States for the District of Columbia or a
114 justice thereof; and whenever reference
115 is made to a circuit court of appeals or
116 to a judge thereof, the reference includes
117 the United States Court of Appeals for
118 the District of Columbia or a justice
119 thereof.

120 (2) *Law Applicable.* Whenever in
121 these rules the law of the state in which
122 the district court is held is made appli-
123 cable, the law applied in the District
124 of Columbia governs proceedings in the
125 District Court of the United States for
126 the District of Columbia. When the
127 word "state" is used, it shall, if appro-
128 priate, include the District of Columbia.
129 When the term "statute of the United
130 States" is used, it includes, so far as
131 concerns proceedings in the District

132 Court of the United States for the Dis-
 133 trict of Columbia, any Act of Con-
 134 gress or law locally applicable to and in
 135 force in the District of Columbia. When
 136 the law of a state is referred to, the word
 137 "law" shall include the statutes of that
 138 state and the state judicial decisions
 139 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".

- 1 **Rule 84. Jurisdiction and Venue Unaf-**
- 2 **ected.** These rules shall not be construed to
- 3 extend or limit the jurisdiction of the district

4 courts of the United States or the venue of
5 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).

1 **Rule 85. Rules by District Courts.** Each
2 district court by action of a majority of the
3 judges thereof may make for its district rules
4 and regulations governing pleading, practice,
5 and procedure, not inconsistent with these
6 rules, and may from time to time alter and
7 amend them. Copies of rules and amendments,
8 if any, so made by any district court shall upon
9 their promulgation be furnished to the Su-
10 preme Court of the United States. In all cases
11 not provided for by rule, the district courts
12 may regulate their practice in any manner not
13 inconsistent with these rules.

14 [Alternative Rule 85. Insert in third line
15 of the above, after the word "thereof", the
16 following: "and with the concurrence of a ma-
17 jority 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.

- 1 **Rule 86. Use of Forms.** The forms at-
- 2 tached to these rules in the Appendix of Forms,
- 3 with appropriate changes as circumstances
- 4 may require, shall be considered sufficient
- 5 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.

1 **Rule 87. Title.** These rules may be known
2 and cited as the Federal Rules of Civil
3 Procedure.

1 **Rule 88. Effective Date.** These rules shall
2 take effect on the day which is 3 months sub-
3 sequent to the adjournment of the second
4 regular session of the 75th Congress, but if
5 that day is prior to September 1, 1938, then
6 these rules shall take effect on September 1,
7 1938. They shall govern all proceedings in
8 actions brought after they take effect and also
9 all further proceedings in actions then pend-
10 ing, except to the extent that in the opinion of
11 the court their application to pending actions
12 would not be feasible or would work injustice,
13 in which event the former procedure shall
14 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	U. S. Code	Federal Rules of Civil Procedure
Constitution.....	25 (T)	Tit. 7, § 217.....	4, 67, 70
7th Amendment.....	39 (T)	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. 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		
Tit. 6.....	63, 67, 70		
§ 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		

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 15, § 26	70	Tit. 19, § 1333 (c)	83
28	41, 67	Tit. 20, § 52	45
49	46, 83	Tit. 22, § 21 (h)	75
72	54	240	41
77k	54	268	46
77t (b)	70	270d	46
77t (c)	83	270e	46
77v (a)	54	Tit. 24, § 78	74
77v (b)	46	Tit. 25, § 6	45
78i (e)	54	Tit. 26, § 614	46
78r	54	619 (b)	46
78u (c)	46	1523 (a)	46
78u (e)	70	1569	4
78u (f)	83	1569 (d)	54
78aa	54	1610 (a)	75
79r (d)	46	1645 (c)	17
79r (f)	70	1645 (d)	54
79r (g)	83	1670 (b)(2)	54
79y	54	1672-1673	13
96	54	Tit. 28, § 12	6
99	54	13	79
100	77 (T)	41 (1)	13
124	54	41 (26)	22 (T), 70 (T), 72
127	45	44	4
522	83 (T)	45	3, 4, 7, 12, 55
715d (c)	83 (T)	45a	24
Tit. 16, § 423k	74	46	70
426d	74	47	41, 67, 70
517	74	47a	67 (T)
797 (g)	46	48	24
814	74	71	83
820	83	72	83
825f	46	73	83
825m (b)	83	74	83
825p	54	75	73
831x	74	76	83
Tit. 17, § 25	83 (T), 83	77	83
36	77 (T)	78	83
37	77 (T)	79	83
Tit. 19, § 199	75	80	12, 83
274	54	81	83
508	8		
1333 (b)	46		

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
109	4	503	4
111	19	556	81
113	4	567	81
115	4	568	81 (T), 81
116	4	574	75
117	4, 77 (T)	600a	46
118	4	600c	46
122	75	600d	46
225	63	601	46
226	63	602	46
227	63, 67	603	46
227a	63, 67	631	44
228	63	635	44
228a	63	636	46
230	63	637	44
252	77	639	26, 28, 30
345	62	640	26, 30
350	75	641	26, 30
376	69	642	28
377	69	643	26
378	70	644	26, 27
379	70	645	27
380	41, 67, 70	646	26
381	11, 70	647	46
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	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 677	45	Tit. 28, § 750	69
678	45	755	69
679	45	756	69
680	45	757	69
681	45	758	69
682	45	759	69
685	45	760	69
687	45	762	3, 11
688	45	763	4, 12, 55
689	45	764	59, 65
695	45	766	3, 4
695 e	45	767	1, 4
711	37 (T), 46(T), 46	768	41
713	46 (T), 46	769	41
721	4	770	39
722	4	772	40
723	1, 2	773	39, 40, 59
723b	1, 2, 83	774	13
723c	1, 2, 39, 83	775	13
724	1, 2	776	47, 65, 68
725	44, 83	777	1, 15, 61
726	69	778	25
727	75	779	25
729	69, 75	780	25 (T), 25
730	1, 2	785	55
731	85	786	75
734	43	811	75
737	69	813	81
738	69	815	54
739	69	817	54
740	69	821	54
741	69	825	54
742	69	829	11, 54
743	69	830	54
744	69	832	54, 62, 63
745	69	833	54
746	69	834	54
747	69	835	54
748	69	836	54
749	69	838	4, 75
		839	4, 75
		840	56, 67, 75

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 841	67, 75	Tit. 31, § 46	45
842	54, 75(T), 75	§ 195	75
843	69, 75	227	13
844	69, 75	232	54
845	69, 75	234	54
846	75	725v	72 (T)
847	75	Tit. 33, § 495	83
848	75	506	46
849	75	591	74
850	75	916	75
851	72 (T)	918	75
852	72 (T)	921	83 (T)
861a	62, 63	927	54
861b	62, 63	Tit. 34, § 365 (c)	75
862	63, 65	Tit. 35, § 40d	8
863	65	54	46
864	65	55	46
865	65	56	46
866	65	67	54
867	63	69	8, 54
868	62	71	54
869	62, 63, 75	72a	4
870	54, 62, 63, 67	Tit. 38, § 11g	45
872	62, 63	54	75
873	62	133	46
874	62, 63, 67, 75	393	75
875	47, 59	445	4, 22, 46
902	4	618	75
906	54	Tit. 40, § 120	74
Tit. 29, c. 6	70 (T)	238	45
§ 52	70 (T)	257	74
53	70 (T)	258	74
107	63	Tit. 40, § 270b	17
159	83 (T)	270c	45
160(e)	83 (T)	276a-2 (b)	24
160(g)	83 (T)	361-386	74
160(i)	83 (T)	Tit. 41, § 39	46
161	46	Tit. 43, § 57	45
Tit. 30, § 32	54	58	45
		59	45
		83	45

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 43, § 175-----	75	Tit. 48, § 642-----	1
Tit. 45, § 88-----	83	645-----	1
153p-----	54, 83	863-----	1
157 (h)-----	46	864-----	1
159-----	83 (T)	865-----	1
185-----	83	867-----	1
222 (b)-----	46	1344-----	1
Tit. 46, § 38-----	54	1371o-----	75
823-----	45	1392-----	1
829-----	54	1405z-----	1
941-----	54	Tit. 49, § 12 (2)-----	46
1124 (b)-----	46	12 (3)-----	46
1227-----	54	14 (3)-----	45
Tit. 47, § 11-----	83	16 (2)-----	54
13-----	4	16 (13)-----	45
154 (m)-----	45	19a (i)-----	45
206-----	54	19a (l)-----	83
401-----	54	20 (9)-----	83
401 (a)-----	83	44-----	41, 67
406-----	83	74 (g)-----	75
409 (c)-----	46	97-----	22
409 (d)-----	46	173a-----	46
412-----	45	321 (c)-----	4
Tit. 48, § 23-----	1	Tit. 50, § 171-----	74
90-----	1	172-----	74

INDEX

A

	Rule	Page
Abatement—Death of one or more of several parties not to cause.....	25 (a, 2)	63
Accounts—Statement, master may prescribe form, etc., of.....	53 (d, 3)	131
Actions. (<i>See Civil Actions.</i>)		
Administrators. (<i>See Fiduciaries.</i>)		
Admiralty:		
Rules not to apply to.....	83 (a)	206
Rule-making power not affected.....	2 (note)	2-3
Admissibility of Evidence. (<i>See Evidence.</i>)		
Admissions:		
Averments in pleadings, when admitted by failure to deny.....	8 (d)	23
as to Genuineness of documents or truth of facts set forth therein.....	36	88
Affidavits:		
on Motion for summary judgment.....	38	93 ff
of Newspaper publishers, etc., as to publication of notice of condemnation proceedings.....	74 (d)	186
by Plaintiff, as to amount due in case of default..	55 (b, 1)	138
to Pleadings not required; exception.....	11 (a)	29
of Return of process by person other than marshal or deputy.....	4 (g)	10
Supporting a motion, service of: opposing affidavits..	6 (d)	18
Supporting motion for new trial, service of; opposing and reply affidavits.....	56 (c)	141
for Temporary restraining orders.....	70 (b)	178
Affirmations—Acceptance in lieu of an oath.....	44 (d)	107
Agencies of the United States. (<i>See United States.</i>)		
Alternate Jurors.....	48 (b)	120
Amendment:		
Correction of clerical mistakes, etc., in the record..	57 (a)	143
of Findings, motions for.....	59 (b)	146
of Findings, on motion for new trial.....	56 (a)	141
of Pleadings allowed after conference to simplify issues, etc.....	16	45
of Pleadings by plaintiff, to assert claims against third-party defendants.....	14 (a)	40
of Pleadings, general provisions as to.....	15	41-44
of Process.....	4 (h)	10
of Rules made by district courts.....	85	214
to Set up counterclaim.....	13 (f)	37
Ancillary Remedies (<i>See Arrest; Attachment and Gar- nishment; Seizure of Person or Property.</i>)		
Answer (<i>see also Defenses: Pleadings</i>):		
Designation as a pleading.....	7 (a)	20
Service within 20 days; exceptions.....	12 (a)	30
Appeals:		
Appellate Court's power to stay proceedings not limited by rule 67.....	67 (g)	173
Applicability of the rules to, in special instances.....	83 (a)	206
in Condemnation proceedings in District of Colum- bia.....	74 (l)	189

	Rule	Page
Appeals—Continued.		
Designation of record on appeal, service of; filing	5 (a, b)	15, 16
from District courts to circuit courts of appeals	63	154- 161
from District courts to Supreme Court	62	152
from Joint, etc., judgments	64	161
from Judgments as to injunctions, effect of	67 (c)	172
in Receivership proceedings subject to the rules	71	182
Record on appeal, provisions in general as to; agreed statements	65, 66	161- 170
Stay on appeal, by giving supersedeas bond	67 (d)	172
Time for, not extended by Rule 57 (b)	57 (b, note)	144
by United States, no security, etc., required	67 (e)	172
Appearances:		
Noting in "civil docket"	81 (a)	203
Service of	5 (a)	15
Applicability of the Rules	1, 83	1, 206- 213
Arbitration:		
Setting forth, as affirmative defense	8 (c)	23
under United States Arbitration Act, application of the rules restricted	83 (a, 3)	206
Arrest:		
for Disobedience of orders of court	37 (b, 2)	92
State laws as to, effect of	69	176
Associations:		
Capacity, how determined	17 (b)	47
Depositions of officers, etc., use by an adverse party	26 (d) (2)	67
Interrogatories to, as parties, how served	33	84
Officers, etc., may be examined by adverse party as if under cross-examination	44 (b)	106
Service of summons and complaint on	4 (d, 3, 7)	8, 9
Attachment and Garnishment:		
Issue of writ by clerk of court	76	196
State laws as to, effect of	69	176
Attorney-General:		
"Civil docket", to prescribe form and style of	81 (a)	202
Copy of summons and complaint against United States to be sent to	4 (d, 4)	8
Attorneys:		
Affidavit as to publication of notice of condemnation proceedings	74 (d)	186
Appointment for persons not personally served with notice of taking of depositions before action	27 (b)	73
Conference for simplification of issues, etc	16	44
Examination of prospective jurors	48 (a)	120
Master may submit draft of report to, for suggestions	53 (e, 5)	132
Service of pleadings, etc., on	5 (a)	15
Signature of pleadings; penalty for violation of rule	11 (a)	29
Taking of depositions before attorneys, etc., restricted	28 (c)	75
Auditors. (See Masters.)		
B		
Bankruptcy:		
Appeals, etc., recommendation as to	83 (note)	213
Discharge in, as affirmative defense	8 (c)	23
Rules not to apply to proceedings in; exception	83 (a)	206

INDEX

227

	Rule	Page
Bill of Particulars:		
Motion for	12 (e)	32
Response to, time for	15 (a)	42
Bonds:		
on Appeal	63 (c)	155
Not required of United States on appeal	67 (e)	172
Supersedeas bonds	63 (c-f), 65 (j), 67 (d)	155- 157, 165, 172
C		
Calendars:		
Advancement of actions for declaratory judgments	58	144
Preparation under direction of court; jury actions to be distinguished from court actions	81 (c)	203
Pre-trial calendar	16	45
Trial calendar, placing of actions on	41	101
Capacity of Parties	9 (a), 17	25, 47-49
Caption of Pleadings, etc.	7 (c), 10 (a), 74 (b)	20, 27, 184
Certificates:		
as to Custody of official records	45	108
by Officer taking depositions	30 (f)	79
Signature of pleading to be considered certificate as to it	11 (a)	29
Charge to the Jury. (<i>See</i> Juries.)		
Chinese Deportation Proceedings	83 (a, 7)	208
Circuit Courts of Appeals:		
Appeals from district courts to	63, 66	154- 161, 170
Printing of record on appeal to conform to rules of Supreme Court	65 (l)	166
Term includes United States Court of Appeals for District of Columbia	83 (d, 1)	209
Cities. (<i>See</i> Municipal Corporations.)		
Civil Actions:		
Commencement of	3	4
Consolidation, severance, etc.	43	104
Entering in "civil docket" and "civil order book"	81 (a, b)	202, 203
at Law or in equity, in district courts, governed by the rules	1	1
One form of action, known as "civil action"	2	2
"Civil Docket" and "Civil Order Book"	81	202- 204
Civil Procedure:		
Additional rules may be made by district courts	85	214
in District courts, rules to apply to	1	1
Effect of rules on proceedings in pending actions	88	216
Rules to be cited as Federal Rules of Civil Procedure	87	216
Claims:		
Alternative or hypothetical claims allowed; legal and equitable claims	8 (e, 2)	24
Joinder of	18 (a)	49
Separate statement of	10 (b)	28
Service of	5 (a)	15

	Rule	Page
Claims—Continued.		
Severance of claims, etc., joined in single action-----	13 (i),	
	21, 43 (b)	38, 54, 104
Short and plain statement to be set forth in pleading-	8 (a)	22
Class Actions-----	23	56-60
Clerk of Court:		
Appeals, duties in connection with--	63 (b, c, f), 65 (f-h, j)	154, 155, 157, 163- 165
“Civil Docket” and “Civil Order Book”, duties in connection with-----	81	202- 204
Default, duties in case of-----	55 (a, b)	138
Entry of judgments-----	60	151
Filing of pleadings and other papers with-----	5 (c)	16
Masters’ reports, to mail notice of filing of-----	53 (e, 1)	131
Offer of judgment, entry of judgment on acceptance-	73	183
Office open during business hours all days except Sundays and holidays; powers and duties of clerk-----	79 (c, d)	200, 201
Pleadings, etc., leaving of copy with clerk if address of party or attorney not known-----	5 (a)	15
Reference, to furnish master with copy of-----	53 (d, 1)	130
Subpoenas, issue of-----	46	114ff
Summons to be signed by-----	4 (b)	7
Writ of attachment or sequestration, issue of-----	76	196
Commencement of Actions-----	3	4
Commissioners in Condemnation Proceedings-----	74 (g, h)	187
Complaint (<i>see also</i> Pleadings):		
in Condemnation proceedings-----	74 (b)	184
Designation as a pleading-----	7 (a)	20
Filing before summons issued-----	4 (a)	7
Filing of-----	3	4
Joinder of claims in-----	18 (a)	49
in Secondary actions by shareholders, what to con- tain-----	23 (b)	57
Service of-----	4 (d)	7
Service on third-party defendants-----	14 (a)	39-40
Title of action to include names of all parties-----	10 (a)	28
Computation of Time-----	6 (a)	17
Condemnation of Property for Public Use-----	74	184- 192
Conditions Precedent—Averment of, in pleadings; denial-----	9 (c)	26
Congress:		
Actions against officers, restriction on issue of exe- cutions-----	75 (b)	193
Consolidation of Actions-----	43	104
Consolidation of Motions-----	12 (g)	33
Constitution of the United States:		
Enforcement of allegedly unconstitutional laws, substitution of successors to officers in case of----	25 (d)	64
Seventh Amendment, right of trial by jury pre- served-----	39, 51 (note)	97, 126
Substantive rights under, enforcement by or against partnerships or unincorporated associations-----	17 (b)	47
Construction of Pleadings-----	8 (f)	24
Construction of the Rules-----	1	1

INDEX

229

	Rule	Page
Consular Officers:		
Certification as to custody of official records.....	45 (a)	109
Depositions abroad may be taken before.....	28 (b)	75
Contempt:		
Affidavits on motion for summary judgment presented in bad faith may be deemed.....	38 (g)	95
Failure to comply with judgment for specific acts..	76	196
Failure to obey subpoena.....	46 (f), 53 (d, 2)	{ 116, 130
Failure to pay compensation of master.....	53 (a)	128
Refusal to answer questions.....	37 (b, 1)	90
Continuances:		
Granting of, to enable party to meet evidence objected to, upon amendment of pleadings.....	15 (b)	42
Orders for, in connection with refusal to give summary judgment.....	38 (f)	95
Copies:		
of Depositions, furnishing of.....	30 (f)	79
of Documents as to which admission of genuineness sought.....	36 (a)	88
of Documents, etc., orders for making of.....	34	85
of Judgments of district courts, filing in any other district court; of satisfaction, etc.....	77	197
of Notice and of interrogatories, to officer designated for taking of depositions.....	31 (b)	82
of Official records, as evidence.....	45 (a)	108
of Order of reference, clerk to furnish master with..	53 (d, 1)	130
of Papers referred to in affidavits in connection with motions for summary judgment.....	38 (e)	94
of Pleadings, etc., delivery of.....	5 (a)	15
of Report of physical or mental examination of a party, delivery of.....	35 (b)	87
of Rules made by district courts to be furnished to Supreme Court.....	85	214
of Subpoenas, delivery to person served.....	46 (c)	114
of Summons and complaint, service of.....	4 (d)	7-9
of Transcripts, etc., on appeal.....	65	162ff
Copyright:		
Rules not to apply to proceedings in; exception....	83 (a)	206
Rules, recommendation as to.....	83 (note)	213
Corporations:		
Capacity, how determined.....	17 (b)	47
Condemnation proceedings brought by State corporations.....	74 (note)	190
Depositions of officers, etc., use by an adverse party.....	26 (d) (2)	67
Interrogatories to, as parties, how served.....	33	84
Officers, etc., may be examined by adverse party as if under cross-examination.....	44 (b)	106
Service of summons and complaint on.....	4 (d, 3, 7)	8, 9
Shareholders, secondary actions by.....	23 (b)	57
Costs:		
Allowance as of course to prevailing party; exceptions.....	54 (d)	135
Bond for costs on appeal.....	63 (c, d)	155
Compensation of a master, how borne.....	53 (a)	128
in Default cases.....	55 (b) (1)	138
Depositions, party giving notice of taking but failing to attend, etc., may be ordered to pay expenses, etc., of party attending.....	30 (g)	80
for Failure to abridge documents, etc., for record on appeal.....	65 (e)	163

	Rule	Page
Costs—Continued.		
on Granting or denial of motion to compel answer to questions or interrogatories.....	37 (a)	90
Not to be imposed on United States under Rule 37.....	37 (f)	93
on Offer of judgment.....	73	183
against a Plaintiff who has once dismissed action involving same claim.....	42 (d)	103
on Refusal to admit genuineness of documents, etc.....	37 (c)	92
Security for, before issue of restraining order or preliminary injunction.....	70 (c)	180
Stenographer's fees to be taxed as.....	82 (a)	204
Counsel. (<i>See Attorneys.</i>)		
Counterclaims (<i>see also Claims</i>):		
Answers to, time for service of; defenses.....	12 (a, b)	30, 31
Default provisions applicable in case of.....	55 (d)	139
Dismissal of.....	42 (c)	103
Dismissal of action restricted in case counterclaim filed.....	42 (a, 2)	102
General provisions as to.....	13	36-39
How set forth in pleading.....	8 (a)	22
Interpleader may be obtained by.....	22	55
Joinder of claims in.....	18 (a)	49
Motion for summary judgment in case of.....	38	93-96
Reply required, if answer contains a counterclaim denominated as such.....	7 (a)	20
Service as between defendants may be dispensed with.....	5 (a)	15-16
Severance of.....	43 (b)	104
Third parties may be brought in by plaintiff in case of.....	14 (b)	40
Counties—Suits by or against officers, procedure in case of death, resignation, etc.....	25 (d)	64
Cross-Claims (<i>see also Claims</i>):		
Answer to, designated as a pleading.....	7 (a)	20
Answers to, time for service of; defenses.....	12 (a, b)	30, 31
Default provisions applicable in case of.....	55 (d)	139
Dismissal of.....	42 (c)	103
General provisions as to; cross-claims against co-defendants.....	13 (g-i)	37-38
How set forth in pleading.....	8 (a)	22
Interpleader may be obtained by.....	22	55
Joinder of claims in, when allowed.....	18 (a)	49
Motion for summary judgment in case of.....	38	93-96
Service as between defendants may be dispensed with.....	5 (a)	15-16
Cross-Examination:		
of Deponents.....	26 (c)	67
General rule as to.....	44 (b)	105
Cross-Interrogatories.....	31 (a)	81
D		
Damages:		
Determination, in case of judgment by default... ..	55 (b, 2)	139
Security for, before issue of restraining order or preliminary injunction.....	70 (c)	180
Special damage, items to be specifically stated in pleadings.....	9 (g)	27
Death:		
of Parties, effect on proceedings.....	25	63
of Party or attorney not to affect sufficiency of notice of appeal.....	63 (b)	155
of Witness, as ground for use of deposition.....	26 (d, 3)	67

INDEX

231

	Rule	Page
Declaratory Judgments.....	38, 58	93, 144
Decrees. (See Judgments.)		
Default:		
Entering by clerk of court.....	79 (c)	200
Entry of; judgment.....	55	138- 140
Judgment against defendant by, in case of failure to appear and defend within time required.....	4 (b)	7
Judgment by, for wilful failure of party to attend examination, etc.....	37 (d)	92
Judgments by, restrictions on.....	54 (c)	134
Defendant. (See Parties.)		
Defenses:		
Affirmative defenses.....	8 (c)	23
Alternative or hypothetical statement allowed; legal and equitable defenses.....	8 (e, 2)	24
in Condemnation proceedings.....	74 (c, e)	185, 186
How set out in pleading.....	8 (b)	22
Separate statement of.....	10 (b)	28
Service as between defendants may be dispensed with.....	5 (a)	15-16
of Third-party defendants.....	14 (a)	40
When and how presented; waiver of defenses.....	12	30ff
Definitions:		
"Adverse party", in case of corporations, etc.....	44 (b)	106
"Civil action".....	2	2
Commencement of an action.....	3	4
Filing of papers with the court.....	5 (c)	16
Delivery of copies of pleadings, etc.....	5 (a)	15
Entry of judgment.....	60	151
Inclusion of District of Columbia in certain expres- sions.....	83 (d)	209
Judgment to include decree and order from which appeal lies.....	54 (a)	134
"Law" of a State.....	83 (d, 2)	210
"Master".....	53 (a)	128
Record on appeal.....	65 (g)	164
Third-party plaintiff and third-party defendant.....	14 (a)	40
Delivery:		
of Copies of documents as to which admission of genuineness sought.....	36 (a)	88
of Copies of pleadings, etc.....	5 (a)	15
of Copy of report of physician as to physical or mental condition of a party.....	35 (b)	87
Enforcement of judgments for delivery of documents, etc.....	76	196
Demand for Judgment.....	54 (c)	134
Demurrers—for Insufficiency of pleading not to be used.....	7 (d)	20
Denials:		
of Averments in pleadings; form, etc.; effect of failure to deny averments.....	8 (b, d)	22, 23
of Genuineness of documents, etc.....	36 (a)	88
of Performance or occurrence of conditions precedent to be made specifically.....	9 (c)	26
Sworn denial of genuineness of documents or truth of facts alleged, effect in case genuineness or truth proved.....	37 (c)	92

	Rule	Page
Depositions:		
Before action, provisions as to.....	27	72-75
Effect of errors and irregularities.....	32	83
Examination of witnesses on written interrogatories; oral examination.....	31	81-82
Officers before whom depositions may be taken.....	28	75
on Oral examination, procedure in connection with taking of.....	30	76-81
Pending action, provisions as to.....	26	66-72
Refusal to answer questions, effect of; procedure....	37	89-93
Stipulations as to taking of.....	29	76
Subpoena for taking.....	46 (d)	115
Deposits:		
of Compensation in condemnation proceedings.....	74 (k)	189
of Money, etc., in court.....	72	182
Directed Verdicts. (See Verdicts.)		
Disability of a Judge.....	68	175
Dismissal of Action:		
Class actions not to be dismissed without approval of court on notice.....	23 (c)	58
on Death of party, if substitution not made.....	25 (a, 1)	63
Depositions taken may be used in subsequent action between same parties, etc.....	26 (d)	68
for Lack of jurisdiction.....	12 (h)	34
Misjoinder of parties not ground for.....	21	54
Provisions in general as to.....	42	{ 101- 104
for Wilful failure of party to attend examination, etc.....	37 (d)	92
District Attorney:		
Service of summons and complaint against United States on.....	4 (d, 4)	8
District Courts:		
Additional rules may be adopted by majority of judges.....	85	214
Always open for filing of papers, etc.....	79 (a)	200
Appeals to circuit courts of appeals.....	63	{ 154- 161
Appeals to Supreme Court.....	62	152
Application of rules to.....	1, 831,	206ff
Appointment of standing masters; special masters..	53 (a)	128
Approval of agreed statements for certification to appellate court.....	66	170
Jurisdiction or venue not extended or limited by the rules.....	4 (f, note), 84	{ 13, 213
Motion day, provisions in general as to.....	80	201
Record on appeal, discretion as to.....	65 (h, i)	{ 164, 165
Registration of final judgments of other district courts.....	77	197
Rules for placing of actions on trial calendar.....	41	101
Specially-constituted district courts. (See Specially- Constituted District Courts.)		
Term includes District Court for District of Co- lumbia.....	83 (d, 1)	209
District of Columbia:		
Condemnation proceedings, how affected by Rule 74..	74 (l)	189
District Court of the U. S., applicability of general rules to.....	83 (a, 1) (d)	{ 206 209

	Rule	Page
District of Columbia—Continued.		
Divorce orders or judgments, Rule 77 not to authorize filing outside District.....	77	198
Service by publication, D. C. Code 24:378 continued in force.....	4 (e, note)	13
Suits by or against officers, procedure in case of death, resignation, etc.....	25 (d)	64
Diversity of Citizenship:		
Assigned claims in actions based on, not affected by Rule 13.....	13 (note)	39
Docket:		
Civil docket, notation of judgment in.....	60	151
“Civil docket,” provisions in general as to.....	81 (a, c)	202–204
Designation of actions for jury trial.....	40 (a)	99
Notation of mailing notice of order or judgment.....	79 (d)	201
Documents:		
Abridgment for record on appeal.....	65 (e)	163
Admissions as to genuineness, etc.....	36	88
Copies may be attached to pleadings.....	10 (c)	28
Genuineness, orders as to expense of proving.....	37 (c)	92
Judgments for delivery of, how enforced.....	76	196
Official, pleading as to.....	9 (d)	26
Official records as evidence.....	45	108–113
Production before masters.....	53 (c)	129
Production for inspection, etc.....	34	85
Production may be required by subpoena.....	46 (b, d)	114, 115
Refusal to produce, effect of.....	37 (b, 2)	90–92
Testimony as to, by deposition.....	26 (b)	66
E		
Effective Date of Rules.....	88	216
Eminent Domain Proceedings.....	74	184–192
Enlargement of Time.....	6 (b)	17
Equity:		
Civil actions in district courts governed by the rules.....	1	1
Legal and equitable claims may be stated in one complaint, etc.....	8 (e, 2), 18 (a)	24, 49
Superseding of certain provisions of U. S. Code as to.....	2 (note)	2–3
Error:		
Assignment of errors in appeal to Supreme Court..	62	152
Correction of errors in judgments, orders, etc.....	57	143
in Depositions, etc., effect of.....	32	83
Giving or failing to give instructions to jury, when not to be assigned as error.....	52	127
Restriction on granting new trial, setting aside verdict, etc., for.....	61	152
Evidence:		
Court may receive, after master’s report filed.....	53 (e, 2)	132
Depositions. (See Depositions.)		
Error in admission or exclusion of, when ground for new trial, etc.....	61	152
Findings of master to be admissible as.....	53 (e, 3)	132
before Masters, rules as to.....	53 (c)	129
Objections on ground of not being within issues made by pleadings, amendment of pleadings, etc., in case of.....	15 (b)	42

Evidence—Continued.	Rule	Page
Objections to testimony taken by deposition.....	30 (c)	77
of Offer of judgment, when not admissible.....	73	183
Official records as.....	45	{ 108— 113
Prohibition on introducing, in case of refusal to obey orders of court.....	37 (b, 2)	91
Provisions in general as to.....	44	{ 105— 108
Reports of commissioners in condemnation proceed- ings, when admissible.....	74 (h)	188
Stenographic reporting of.....	82	204
Sufficiency to support a verdict, reservation of question as to.....	51 (note)	126
Transcript, for record on appeal.....	65	161ff
Examination of Witnesses. (<i>See</i> Depositions; Wit- nesses.)		
Examiners. (<i>See</i> Masters.)		
Exceptions:		
Formal exceptions not necessary.....	47	119
for Insufficiency of pleading not to be used.....	7 (d)	20
Executions:		
Issue, time for.....	67 (a)	171
Issue to enforce order or judgment for delivery of possession.....	76	197
against Party ordered to pay compensation of mas- ter.....	53 (a)	128
Provisions in general as to.....	75	{ 192— 196
Executors. (<i>See</i> Fiduciaries.)		
Exhibits (<i>see also</i> Tangible Things):		
Formal parts omitted from record on appeal.....	65 (e)	163
Orders for safekeeping, in connection with appeals.....	65 (i)	165
Use in connection with pleadings.....	10 (c)	28
Expenses. (<i>See</i> Costs.)		
Extension of Time. (<i>See</i> Time.)		

F

Fees. (<i>See</i> Costs.)		
Fiduciaries:		
as Parties.....	17 (a)	47
as Representatives of infants or incompetent per- sons.....	17 (c), 55 (b, 2)	48, 138
Filing of Papers:		
Bond on appeal.....	63 (c, e)	{ 155, 156
Complaint, as commencement of action.....	3	4
Copies of judgments entered in another district court; of satisfaction, etc.....	77	197
Depositions.....	30 (f), 31 (b)	79, 82
District courts always open for.....	79 (a)	200
General provisions as to; definition.....	5 (b, c)	16
Motion to dismiss, etc., condemnation proceedings.....	74 (e)	186
Notice of appeal.....	63 (a)	154
Objections to report of commissioner in condemna- tion proceedings.....	74 (h, i)	188
Offer of judgment accepted.....	73	183
Record on appeal.....	63 (g)	157
Report of master.....	53 (e, l)	131
Temporary restraining orders.....	70 (b)	179
Transcript, etc., on appeal.....	65	161ff

INDEX

235

	Rule	Page
Findings:		
Amendment, etc., on motion for new trial.....	56 (a)	141
Copies to be included in record on appeal.....	65 (g)	164
by the Jury.....	50 (a)	122
of Master.....	53 (e)	131
of Physician, as to physical or mental condition of party.....	35 (b)	87
Provisions in general as to.....	59	146
Foreclosure Actions, Deficiency Judgments in.....	18 (b, note)	51
Foreign Service Officers. (See Consular Officers.)		
Forfeitures for Violation of Federal statute, rules not to apply to; exceptions.....	83 (a, 2)	206
Forms:		
of Complaint in condemnation proceedings.....	74 (b)	184
of Denials.....	8 (b)	22
of Injunction or restraining order.....	70 (d)	180
of Judgments.....	54 (a)	134
One form of action, known as "civil action".....	2	2
of Pleadings.....	10	27-29
Rules as to captions, etc., of pleadings to apply to other papers.....	7 (c)	20
of Statement of accounts, master may require.....	53 (d, 3)	131
of Subpoenas.....	46 (a)	114
of Summons.....	4 (b)	7
of Summons in condemnation proceedings.....	74 (c)	184
Use of forms given in Appendix of Forms.....	86	215
Fraud:		
Averments of, in pleadings.....	9 (b)	26
Pleading as a defense.....	8 (c)	23
Relief from judgments, etc., on account of.....	57 (b)	143
Fraudulent Conveyances:		
Claim to set aside, joinder with claim for money.....	18 (b)	49
G		
Guardians. (See Fiduciaries.)		
Guardians <i>ad litem</i>	17 (c)	48
H		
Habeas Corpus Proceedings:		
Rules not to apply to; exceptions.....	83 (a, 2)	206
Harmless Error.....	61	152
Holidays:		
Clerk's office not open on.....	79 (c)	200
How counted, in computation of time.....	6 (a)	17
I		
Incompetent persons:		
Judgments by default against, when permitted..	55 (b, 2)	138
Procedure in case a party becomes incompetent...	25 (b)	64
Service of summons and complaint on.....	4 (d, 2)	8
Suits by or against, representation in.....	17 (c)	48
Infants:		
Judgments by default against, when permitted..	55 (b, 2)	138
Service of summons and complaint on.....	4 (d, 2)	8
Suits by or against, representation in.....	17 (c)	48
Injunctions:		
Interlocutory, findings in connection with granting or refusing.....	59 (a)	146

Injunctions—Continued.	Rule	Page
Pending appeal, status of.....	67 (a, c)	171, 172
Preliminary injunctions and temporary restraining orders.....	70	178– 182
Stay of judgment in action for, restriction on.....	67 (a)	171
Instructions to Jury.....	52	127
Insular Possessions:		
District courts, applicability of the rules to.....	1 (note)	1
Interlocutory Injunctions. (<i>See</i> Injunctions.)		
Introlocutory Judgments. (<i>See</i> Judgments.)		
Interlocutory Orders:		
District courts always open for making and directing.....	79 (a)	200
Making by judge at any time or place.....	80	202
Interpleader:		
General provisions as to.....	22	55
Preliminary injunctions, U. S. C. 28: 41 (26) not modified by Rule 70.....	70 (e)	180
Interrogatories:		
Accounts, masters may require proof upon written interrogatories.....	53 (d, 3)	131
to the Jury.....	50 (b)	123
Objections to form of written interrogatories under Rule 31, when waived.....	32 (c, 3)	84
to Parties.....	33	84
refusal to answer, procedure in case of.....	37	90ff
to Witnesses taking depositions.....	26, 27, 30 (c), 31	66– 75, 78 81–82
Intervention.....	24	61
Issues:		
Conference for simplification, etc., of.....	16	44
Specification of issues for trial by jury.....	39	97
Submission to jury, U. S. C. 28: 400 covered by Rule 50.....	50 (note)	124
Summary judgment if no genuine issue except amount of damages.....	38 (c)	93
Trial by court if not claimed for jury trial.....	40	99

J

Joinder:		
Appeals, interested parties may join in.....	64	161
of Claims against separate parcels of property, in condemnation proceedings.....	74 (a)	184
of Claims and remedies.....	18	49–51
of Parties.....	19–22	51–56
Judges:		
Additional rules, promulgation by action of majority of judges.....	85	214
of Appellate courts, power to stay proceedings not limited by Rule 67.....	67 (g)	173
Concurrence of majority for appointment of standing masters.....	53 (a)	128
Disability, procedure in case of.....	68	175
Filing of papers with, in judge's discretion; endorsement.....	5 (c)	16
Form of judgment, approval in certain cases.....	60	151
Justices of District Court for District of Columbia included in references to district judges.....	83 (d, 1)	209

	Rule	Page
Judges—Continued.		
Making of interlocutory orders, etc., at any time or place.....	80	202
Powers of judge in chambers.....	79 (b)	200
Record on appeal need not be approved by.....	65 (h)	164
Judgments (see also Orders):		
Amendment on motion; motions to amend findings not to affect finality nor suspend operation.....	59 (b)	146
Appeals from. (See Appeals.)		
in Class actions, no attempt to state effect on persons not parties.....	23 (b, note)	60
Copy of judgment appealed from to be included in record on appeal.....	65 (g), 66	{ 164, 170
Correction of clerical mistakes, etc., in.....	57 (a)	143
on Counter-claim or cross-claim.....	13 (i)	38
Declaratory judgments.....	58	144
by Default. (See Default.)		
Deficiency judgments in foreclosure actions..	18 (b, note)	51
Definition, form, etc.....	54	{ 134- 138
Demand for.....	8 (a)	22
Enforcement of judgments for specific acts.....	76	196
Entry of.....	60	151
Entry, effect of; duty of clerk.....	79 (d)	201
Entry of judgment appropriate to findings.....	59 (a)	146
Executions. (See Executions.)		
How pleaded.....	9 (e)	26
on Motion for a directed verdict.....	51 (b)	125
Motion for summary judgment; procedure.....	38	93-96
No prejudice against persons not joined as parties..	19 (b)	52
Notation in "civil docket" and "civil order book".....	81 (a, b)	203
Offer of judgment; effect, procedure.....	73	183
for One or more of several plaintiffs and against one or more of several defendants.....	20 (a)	53
on the Pleadings, motion for.....	12 (c, h)	32, 33
Registration with other district courts.....	77	197
Relief from, in case of fraud, mistake, etc.....	57 (b)	143
Reopening, on motion for new trial.....	56 (a)	141
on Special verdicts; on general verdict accompanied by answers to interrogatories.....	50	123
Stay of proceedings to enforce.....	67	{ 171- 175
Vacating for error, etc., when permitted.....	61	152
Juries. (See also Verdicts):		
Actions ordered for trial by jury to be so entered in "civil docket" and calendars.....	81 (a, c)	203
in Default cases, when permitted.....	55 (b, 2)	139
Examination of jurors; alternate jurors.....	48	120
Instructions to.....	52	127
Pre-trial calendars in jury actions.....	16	45
Right of trial by jury in actions removed from State courts.....	83 (c)	209
Right of trial by jury in procedure for declaratory judgments.....	58	144
Right of trial by jury; waiver; what issues to be tried by jury.....	39, 40	{ 97- 101
Special verdicts; answers to interrogatories.....	50	{ 122- 124
Stipulation for juries of less than twelve or for majority verdict.....	49	122

	Rule	Page
Juries—Continued.		
Trial of issues as to just compensation for property condemned.....	74 (i)	188
Jurisdiction:		
Dismissal of actions for lack of.....	12 (h), 42 (b)	{ 34, 103
of District courts not extended or limited by the rules.....	4 (f, note), 84	{ 13, 213
Matter showing jurisdiction to render judgments, etc., need not be stated where judgment, etc., pleaded.....	9 (e)	26
Objections to jurisdiction, raising by motion.....	12 (b)	31
Statement of grounds on which jurisdiction depends to be stated in pleading setting forth claim for re- lief.....	8 (a), 9 (a)	22, 25

L

Labor Disputes:		
Temporary restraining orders and preliminary in- junctions, U. S. C. 29:52, 53, c. 6, not modified by Rule 70.....	70 (e)	180
Law and Equity. (See Union of Law and Equity.)		
Laws. (See Statutes.)		
Letters Rogatory.....	28 (b), 37 (e)	75, 93
Lis Pendens.....	69 (note)	177
Lunatics. (See Incompetent Persons.)		

M

Mandamus Proceedings.....	83 (a, 6)	208
Marshals:		
Service of process.....	4 (c)	7
Service of subpoenas.....	46 (c)	114
Masters:		
Appointment, reference, powers, proceedings, re- port, etc.....	53	{ 128- 133
Appointment of stenographer authorized when necessary.....	82 (a)	204
Conference of attorneys to consider advisability of preliminary reference of issues to.....	16	44
Findings, effect of.....	59 (a)	146
Report not to be contained in judgment.....	54 (a)	134
Minors. (See Infants.)		
Misjoinder of Parties—Effect of.....	21	54
Motions:		
to Amend findings.....	59 (b)	146
Application for order to be made by.....	7 (b)	20
to Change time for taking depositions.....	30 (a)	76
for Correction of mistakes, etc.....	57	143
for Determination of controversies as to title, etc., in condemnation proceedings.....	74 (k)	189
Directed to pleadings, general provisions as to.....	12	30-36
for a Directed verdict.....	51	{ 124- 127
for Dismissal of action.....	42	102
for Dismissal, etc., of condemnation proceedings.....	74 (e)	186
to Enforce liability of sureties on appeal or super- seas bond.....	63 (f)	157
Interlocutory, district courts always open for making of.....	79 (a)	200
for Intervention.....	24 (c)	61

	Rule	Page
Motions—Continued.		
Motion day, provisions in general as to.....	80	201
for New trial, etc., stay of judgment in case of.....	67 (b)	171
for New trial, time for.....	56 (b)	141
for Oral examination in connection with depositions.....	31 (d)	82
to Permit supplemental pleadings.....	15 (d)	43
for Physical or mental examination of parties.....	35	87
for Production of documents, etc.....	34	85
Service of; filing.....	5 (a, b)	15, 16
for Substitution of parties.....	25	63-64
for Summary judgment.....	38	93 ff
to Suppress depositions.....	30 (e), 32 (d)	79, 84
as to Temporary restraining orders.....	70 (b)	179
to Terminate examination of a deponent.....	30 (d)	78
of Third-party defendants.....	14 (a)	39-40
Time for service of; pleading, etc., after disposition by order of court.....	6 (d, e)	18
Municipal Corporations:		
Service of summons and complaint on.....	4 (d, 6)	9
Suits by or against officers, procedure in case of death, resignation, etc.....	25 (d)	64
N		
National Labor Relations Board:		
Proceedings to enforce orders of.....	83 (a, 5)	207
Naturalization Proceedings—Rules not to apply to; ex- ceptions.....	83 (a, 2, 7)	206, 208
New Trials:		
Granting in case of disability of judge who presided at first trial.....	68	175
after Motion for directed verdict.....	51 (b)	125
Motions for, motions to amend findings may be made with.....	59 (b)	146
Ordering when action of jury inconsistent.....	50 (b)	123
Provisions in general as to.....	56	141
Stay of execution of judgments pending disposition of motions for.....	67 (b)	171
Nonresidents:		
Attendance, where required.....	46 (d, 2)	115
Notification of condemnation proceedings by publi- cation.....	74 (d)	185
Service of summons, etc., on.....	4 (e)	10
Nonsuit:		
Equivalent for, in Rule 42 (b).....	42 (b, note)	104
Notice:		
of Appeal, filing of; form.....	63 (a, b)	154
of Appeal, included in record on appeal.....	65 (g), 66	164, 170
of Application for judgment by default.....	55 (b, 2)	138
of Application for order compelling witnesses to answer questions.....	37 (a)	89
of Application for substitution, in certain cases.....	25 (d)	64
of Application to court for order to master to speed proceedings; of adjournment of proceedings before master.....	53 (d, 1)	130
of Case for trial, U. S. C. 28:769 modified.....	41, (note)	101
of Condemnation proceedings, publication of.....	74 (d)	185
of Deposit of money, etc., in court.....	72	182
of Entry of order or judgment.....	79 (d)	201
of Filing of depositions.....	30 (f), 31 (c)	80, 82

Notice—Continued.	Rule	Page
of Hearing as to title, etc., in condemnation proceedings.....	74 (k)	189
of Hearing, service in case of substitution of parties.....	25 (a, 1)	63
of Interlocutory orders, etc.....	80	202
in Lieu of summons, service of.....	4 (e)	10
of Master's report.....	53 (e, 1)	131
to Members of a class before dismissal of class action.....	23 (c)	58
of Motion to permit supplemental pleadings.....	15 (d)	43
of Objections to interrogatories to parties.....	33	85
of Preliminary injunctions and temporary restraining orders.....	70	178ff
of Request for additional time for denial of genuineness of documents, etc.....	36 (a)	89
Service of notices.....	5 (a)	15
of Taking of depositions before action.....	27 (b)	73
of Taking of depositions on oral examination.....	30 (a)	76
of Taking of depositions, waiver of errors and irregularities unless objection promptly served.....	32 (a)	83
of Written interrogatories for deponents.....	31 (a)	81

O

Objections:

to Condemnation proceedings, presentation in a single motion.....	74 (e, f)	186
to Evidence on ground of not being within issues made by pleadings, amendment of pleadings, etc., in case of.....	15 (b)	42
to Instructions to the jury, or failure to give instruction.....	52	127
to Interrogatories to parties.....	33	85
to Master's report, time for service of; ruling of court on.....	53 (e, 2, 3)	132
to Notice for taking depositions, disqualification of officer, competency of witness, etc.....	32	83
to Pleadings, process, venue, etc., may be made by motion, etc.....	12 (b, g, h)	31, 33
to Question propounded to a witness, discretionary power of examining attorney in case of.....	44 (c)	106
to Receiving depositions.....	26 (e)	68
to Report of commissioner in condemnation proceedings.....	74 (h, i)	188
to Ruling or order of court.....	47	119
to Testimony in depositions on oral examination.....	30 (c)	77
Offer of Judgment:		
General provisions as to.....	73	183
Service of.....	5 (a)	15
Officers of the United States. (See United States.)		
Orders (see also Judgments):		
Applications for, by motion in writing; exception....	7 (b)	20
to Compel answers to questions.....	37	89ff
of Condemnation of property.....	74 (f)	186
for Continuance, etc., in connection with refusal to give summary judgment.....	38 (f)	95
Correction of clerical mistakes, etc., in.....	57 (a)	143
for Depositions before action.....	27 (a)	73
for Dismissal of actions.....	42 (a, 2)	102
Disposing of motions, time for further action.....	6 (e)	18
Effect of entry; duty of clerk.....	79 (d)	201
for Enlargement of time.....	6 (b)	17

Orders—Continued.	Rule	Page
as to Expenses of proving genuineness of documents, etc.....	37 (c)	92
Formal exceptions not necessary; objections.....	47	119
Included in term "judgment", if appealable.....	54 (a)	134
Interlocutory, district courts always open for making and directing.....	79 (a)	200
Interlocutory, making by judge at any time or place.....	80	202
in Lieu of summons, service of.....	4 (e)	10
to Master to speed proceedings.....	53 (d, 1)	130
for New trial, on court's initiative, to specify grounds.....	56 (d)	142
Notation in "civil docket" and "civil order book".....	81 (a, b)	203
for Oral examination in connection with depositions.....	31 (d)	82
for or against Persons not parties, enforcement of.....	78	199
for Physical or mental examination of parties.....	35	86
against Plaintiff for costs of previously dismissed action involving same claim.....	42 (d)	103
for Production of documents, etc.....	34	85
as to Production of documents, etc., effect of refusal to obey.....	37 (b, 2)	91
for Protection of parties and deponents, in connection with depositions.....	30 (b, d)	77, 78
for Publication of notice of condemnation proceedings.....	74 (d)	185
Reciting action taken at conference of attorneys for simplification of issues, etc.....	16	45
of Reference to master may specify or limit his powers.....	53 (c)	129
Relief from, in case of fraud, mistake, etc.....	57 (b)	143
for Safekeeping, etc., of exhibits in connection with appeals.....	65 (i)	165
for Separate trials, in case of joinder of parties; adding or dropping of parties.....	20 (b), 21	53, 54
Service of orders required by their terms to be served.....	5 (a)	15
Specifying facts as to which no substantial controversy exists.....	38 (d)	94
for Subpoenas commanding production of books, etc.....	46 (d, 1)	115
to Summon persons who ought to be parties.....	19 (b)	51
Suspending, etc., injunctions, pending appeal.....	67 (c)	172
Temporary restraining orders.....	70	178-182
as to Time for service of motions.....	6 (d)	18
Vacating for error, etc., when permitted.....	61	152

P

Parties:

Additional parties may be brought in by counter claim or cross-claim.....	13(h)	38
Capacity need not be averred, but may be specifically denied.....	9 (a)	25
Depositions pending action, taking of.....	26 (a)	66
Examination as if under cross-examination.....	44 (b)	105
Examination of prospective jurors.....	48 (a)	120
Examination on written interrogatories.....	33	84
Instructions to the jury, written requests for.....	52	127
Joinder of.....	19, 20	51-54
Misjoinder not ground for dismissal; dropping or adding parties.....	21	54
Names to be contained in summons.....	4 (b)	7

	Rule	Page
Parties—Continued.		
Names to be included in title of action, in the complaint.....	10 (a)	28
Physical and mental examination of.....	35	86-88
Real party in interest; capacity.....	17	47-49
Refusal to answer questions, effect of; procedure....	37	89-93
Relatives, etc., depositions not to be taken before...	28 (c)	75
Signature of pleadings, if not represented by attorney.....	11 (b)	29
Substitution.....	25	63-65
Substitution not to affect right to use depositions....	26 (d)	68
Third parties. (<i>See</i> Third Parties.)		
Willful failure to attend examination, etc., penalty for.....	37 (d)	92
Partnerships:		
Capacity, how determined.....	17 (b)	47
Depositions of officers, etc., use by an adverse party.....	26 (d, 2)	67
Interrogatories to, as parties, how served.....	33	84
Officers, etc., may be examined by adverse party as if under cross-examination.....	44 (b)	106
Service of summons and complaint on.....	4 (d, 3, 7)	8, 9
Patents:		
Infringement cases, restriction on stay of judgments in.....	67 (a)	171
Petroleum Control Boards:		
Proceedings to review orders of.....	83 (a, 4)	207
Plaintiff. (<i>See</i> Parties.)		
Pleadings (<i>see also</i> Answer; Complaint; Reply):		
Additional rules may be made by district courts....	85	214
Amendment, by plaintiff, to assert claims against third-party defendants.....	14 (a)	40
Amendment, general provisions as to; supplemental pleadings.....	15	41-44
Amendments after conference to simplify issues, etc..	16	45
Copies to be included in record on appeal.....	65 (g)	164
Counterclaims and cross-claims to be stated in; amendment etc., to set up counterclaim.....	13	36, 37
Designation of; demurrers, etc., for insufficiency not to be used.....	7	20
after Disposition of motions, time allowed for.....	6 (e)	18
Form of.....	10	27-29
General rules as to.....	8	22-25
in Intervention.....	24 (c)	61
Motions directed to, general provisions as to.....	12	30-36
Names of persons who should be parties to be set forth in pleadings in which relief asked.....	19 (c)	52
Not to be recited in judgments.....	54 (a)	134
in Removed actions.....	83 (c)	208
Service of; filing.....	5	15-16
Signing of.....	11	29
of Special matters.....	9	25-27
Striking of. (<i>See</i> Striking of Pleadings.)		
Practice. (<i>See</i> Civil Procedure.)		
Preliminary Hearings.....	12 (d)	32
Pre-Trial Procedure.....	16	44-46
Printing:		
of Record on appeal, as prescribed in rules of appellate court.....	65 (l)	165
Prisoners—Depositions may be taken only by leave of court.....	26 (a)	66
Procedure. (<i>See</i> Civil Procedure.)		

INDEX

243

Process:	Rule	Page
in Condemnation proceedings.....	74 (c)	184
Issuing and returning, district courts always open for; issue by clerk.....	79 (a, c)	200
Noting in "civil docket".....	81 (a)	203
Objections to, raising by motion.....	12 (b)	31
for or against Persons not parties.....	78	199
Service of; return; amendment.....	4 (c, f-h)	7, 10
Summons. (See Summons.)		

Publication:		
of Notice of condemnation proceedings.....	74 (d)	185
of Notice to take depositions before action.....	27 (b)	73
Service by, continuance of certain provisions as to.....	4 (e, note)	12
Service by, U. S. C. 8:405 to remain in effect....	83 (a, 7)	208

Q

Quo Warranto:		
Rules not to apply to; exceptions.....	83 (a, 2)	206

R

Receivers:		
Practice in relation to, same as heretofore followed in Federal courts; exceptions.....	71	182
Stay of judgment in receivership action, restriction on.....	67 (a)	171
Record on Appeal.....	65, 66	{ 161- 170
Referees. (See Masters.)		
References to Masters. (See Masters.)		
Refusal to Make Discovery.....	37	89-93
Registered Mail:		
Copies of summons and complaint against United States.....	4 (d, 4)	8
Depositions to be sent to clerk for filing.....	30 (f)	79
Relation Back of Amendments.....	15 (c)	43
Removed Actions—Rules to apply to.....	83 (c)	208
Replevin—State laws as to, effect of.....	69	176
Reply (see also Pleadings):		
Designation as a pleading; when required.....	7 (a)	20
Joinder of claims in.....	18 (a)	49
Service within 20 days; exceptions.....	12 (a)	30
Representation of a Class.....	23 (a)	56
Residents of District—Attendance, where required....	46 (d, 2)	115
Restraining Orders. (See Injunctions.)		
Return of Process.....	4 (g)	10
Revenue Cases—Judgments against collectors, etc., re- striction on issue of executions.....	75 (b)	193
Rule-Making by District Courts.....	85	214

S

Scire Facias:		
Writ abolished.....	83(b)	208
Scope of Rules.....	1	1
Seal of Court:		
Record on appeal to be under.....	65 (g)	163
Subpoenas to be under.....	46 (a)	114
Summons to be under.....	4 (b)	7
Secret Processes, etc.:		
Orders to prevent disclosure in depositions.....	30 (b)	77
Secretary of Agriculture:		
Proceedings to review orders of.....	83 (a, 4)	207

	Rule	Page
Secretary of Commerce:		
Proceedings to review orders of.....	83 (a, 4)	207
Seizure of Person or Property—Remedies providing for..	69	176
Service—		
of Answers, etc., time for.....	12 (a)	30-31
of Answers to interrogatories under Rule 33, effect of failure.....	37 (d)	92
of Copy of motion to dismiss condemnation proceedings.....	74 (e)	186
of Designation of portions of record, etc., for appeal..	65 (a, d)	{ 161- 163 81- 82, 84
of Interrogatories.....	31 (a, b), 33	
by Mail, three days extra allowed for action in case of.....	6 (f)	19
of Motion, etc., for substitution of parties.....	25 (a-c)	63-64
of Motion for new trial, and affidavits.....	56 (b, c)	141
of Motion for summary judgment.....	38 (c)	93
of Motions, time for.....	6 (d)	18
of Notice of application for judgment by default..	55 (b, 2)	138
of Notice of taking of depositions before action....	27 (b)	73
of Objections to master's report.....	53 (c, 2)	132
of Objections to notice for taking depositions or to form of written interrogatories.....	32 (a, c)	83, 84
of Objections to report of commissioner in condemnation proceedings.....	74 (i)	188
of Offer of judgment, and acceptance.....	73	183
of Papers affecting liability of surety on appeal or supersedeas bond.....	63 (f)	157
of Pleadings, etc.....	5	15
of Process in general.....	4 (c, f)	7, 10
by Publication, in condemnation proceedings.....	74 (d)	185
of Request for admission of genuineness of documents, etc.; of denial.....	36 (a)	88
of Subpoenas.....	46 (c), 53 (d, 2)	{ 114, 130
of Summons and complaint, etc.....	4 (d, e)	7-10
of Summons and complaint on third-party defendants.....	14 (a)	40
of Summons in condemnation proceedings.....	74 (c)	{ 184- 185
of Sworn denial of genuineness of documents, etc....	37 (c)	92
Set-Off. (<i>See</i> Counterclaims.)		
Severance:		
of Claims, etc., joined in single action....	13 (i), 21, 43 (b)	{ 38, 54, 104
of Judgments, not required on appeal.....	64	161
Shareholders' Secondary Actions.....	23 (b)	57
Special Matters—Pleading of.....	9	25-27
Specially-Constituted District Courts:		
Appeals from injunction orders, etc., two judges must concur in orders pending appeal.....	67 (c)	172
States:		
Eminent domain procedure, compliance with.....	74 (m)	189
Laws. (<i>See</i> Statutes.)		
Practice and procedure as to executions to be followed; exceptions.....	75 (a)	192
Rules of evidence, effect given to.....	44 (a)	105
Service of summons and complaint on.....	4 (d, 6)	9
Stays, when to be according to State practice.....	67 (f)	173

	Rule	Page
States—Continued.		
Suits by or against officers; procedure in case of death, resignation, etc.....	25 (d)	64
Term to include District of Columbia.....	83 (d, 2)	209
Statutes:		
Applicability of provisions as to, in District of Columbia.....	83 (d, 2)	209
as Basis for order summoning parties.....	4 (e)	10
as to Costs, effect of.....	54 (d)	135
Effect as to admissibility of evidence and competency of witnesses.....	44 (a)	105
Enforcement of allegedly unconstitutional laws, substitution of successors to officers in case of.....	25 (d)	64
Forfeiture of property for violation of, applicability of the rules restricted.....	83 (a, 2)	206
Intervention pursuant to.....	24	61
Modification of statutes using words "petition," "bill of complaint," "plea," "demurrer," etc....	7 (note)	21
Precedence to actions entitled thereto by.....	41	101
as to Proof of official records.....	45 (c)	109
Prosecution of actions by parties authorized by statute; actions in name of U. S. for use or benefit of another.....	17 (a)	47
References to actions at law or suits in equity, how construed.....	2 (note)	3
Right of trial by jury under.....	39, 55 (b, 2)	{ 97, 139
Service of process outside State when provided by statute of U. S.....	4 (f)	10
as to Service of subpoenas.....	46 (e)	116
of States as to special verdicts, etc., need not be followed.....	50 (note)	124
of States, effect on procedure in actions removed from State courts.....	83 (c)	208
of States or of United States, governing seizure of person or property, effect of.....	69	176
of States, term "law" to include statutes and judicial decisions construing them.....	83 (d, 2)	210
of States, when capacity of parties determined by....	17 (b)	47
of States, when followed in service of summons and complaint.....	4 (d; 2, 3, 6, 7)	8, 9
as to Stays pending appeals to Supreme Court not affected by Rule 67.....	67 (g)	173
Substantive rights under, enforcement by or against partnerships or unincorporated associations.....	17 (b)	47
Time prescribed in, how construed.....	6 (a)	17
providing for Trial without jury in actions against United States.....	40 (c)	100
of United States as to acquiring title and possession of property, not affected by Rule 74.....	74 (j)	188
of United States as to executions.....	75	193
Stay:		
of Proceedings to enforce judgments.....	54 (b) 67	{ 134, 171- 175
of Proceedings until compliance with order that plaintiff pay costs of previously dismissed action..	42 (d)	103
Stenographers—Appointment, duties, etc.....	82	204
Stipulations:		
to Correct record on appeal.....	65 (h)	164
for Dismissal of action.....	42 (a)	101
Filing of.....	5 (b)	16

	Rule	Page
Stipulations—Continued.		
as to Finality of master's findings, effect of.....	53 (e, 4)	132
for Jury of less than twelve or for majority verdict....	49	122
as to Record on appeal.....	65 (f, g)	{ 163, 164
as to Taking of depositions.....	29	76
for Trial of issues by court without jury.....	40 (a)	99
for Waiver of signing of depositions.....	30 (e)	79
Striking of Pleadings:		
on Failure to correct defects after notice of order to do so.....	12 (e)	32
Pleadings unsigned or signed with intent to violate Rule 11 may be stricken as sham and false.....	11 (a)	29
Redundant, impertinent, etc., matter.....	12 (f)	33
in case of Refusal to obey orders of court, etc. 37 (b, 2; d)		92, 94
Subpoenas:		
for Attendance before masters.....	53 (d, 2)	130
Issue as provided in U. S. C. 28:711.....	37 (e)	93
Provisions in general as to.....	46	{ 114- 119
Service of.....	4 (f), 46 (c)	{ 10, 114
for Taking of depositions pending action.....	26 (a)	66
Substitution of Parties.....	25, 26 (d)	{ 63- 65, 68
Suits. (<i>See</i> Civil Actions.)		
Summary Judgments.....	38	93-96
Summons (<i>see also</i> Process):		
in Condemnation proceedings.....	74 (c)	184
Issuance; form, service.....	4	7ff
Not required, on appeal from joint judgments.....	64	161
to Persons who ought to be parties.....	19 (b)	51
Service on third-party defendants.....	14 (a)	40
Sunday:		
Clerk's office not open on.....	79 (c)	200
How counted, in computation of time.....	6 (a)	17
Supersedeas Bonds.....	63 (c-f), 65 (j), 67 (d)	{ 155- 157, 165, 172
Supplemental Pleadings. (<i>See</i> Pleadings.)		
Supreme Court:		
Appeals from district courts to.....	62	152
District courts to furnish copies of additional rules upon their promulgation.....	85	214
Rules, applicability to bankruptcy or copyright proceedings.....	83 (a, 1)	206
Rules to govern printing of record on appeal in cir- cuit courts of appeals.....	65 (l)	166
Stays pending appeals to, Rule 67 not to affect cer- tain statutes relating to.....	67 (g)	173
Sureties:		
on Appeal or supersedeas bond, liability of.....	63 (f)	157
T		
Tangible Things:		
Orders for production for photographing, etc.....	34	85
Testimony as to, by deposition.....	26 (b)	66
Terms of Court:		
Expiration not to affect computation of time or power of court.....	6 (c)	18

INDEX

247

	Rule	Page
Territories:		
District courts, applicability of the rules to.....	1 (note)	1
Testimony. (<i>See</i> Depositions; Evidence.)		
Third Parties (<i>see also</i> Parties):		
Claims, how set forth in pleading.....	8 (a)	22
Complaint and answer, when third parties summoned by defendant.....	7 (a)	20
Default provisions applicable in favor of third- party plaintiffs.....	55 (d)	139
Dismissal of third-party claims.....	42 (c)	103
How brought in by defendant; counterclaims and cross-claims; when plaintiff may bring in third parties.....	14	39-41
Interpleader.....	22	55
Intervention.....	24	61
Joinder of claims in third-party complaints.....	18 (a)	49
Objections to jurisdiction, etc., by third-party defendants.....	12 (b)	31
Three-Judge District Courts. (<i>See</i> Specially-Constituted District Courts.)		
Time:		
for Amending pleadings; for response to amended pleadings.....	15 (a)	41-42
for Answer, U. S. C. 8:405 to remain in effect.....	83 (a, 7)	208
for Answers and objections to interrogatories to parties.....	33	84-85
Averments of, in pleadings.....	9 (f)	27
Computation; enlargement in discretion of court; time for service of motions, etc.; additional time after service by mail.....	6	17-19
for Cross-interrogatories, etc., in connection with depositions.....	31 (a)	81
for Defenses in condemnation proceedings.....	74 (c)	185
for Demand for jury trial.....	39 (b)	97
for Denial of admissions as to genuineness of docu- ments, etc.....	36 (a)	88
for Designation of additional portions of record, etc., on appeal.....	65 (a)	162
for Docketing record on appeal.....	63 (g)	157
for Entering judgment.....	54 (b)	134
for Expiration of temporary restraining orders.....	70 (b)	179
for Filing appeal bond.....	63 (c, e)	{ 155, 156
for Filing of papers to be that prescribed for service..	5 (b)	16
for Issue of executions.....	67 (a)	171
for Meeting of parties before master.....	53 (d, 1)	130
for Motion for bill of particulars.....	12 (e)	32
for Motion for judgment in accordance with motion for directed verdict.....	51 (b)	125
for Motion for new trial.....	56 (b)	141
for Motion for summary judgment; for service of motion.....	38 (a, c)	93
for Motions to amend findings.....	59 (b)	146
for Objections to report of commissioner in condem- nation proceedings.....	74 (i)	188
for Offer of judgment, etc.....	73	183
for Ordering new trial, on initiative of court.....	56 (d)	142
for Pleadings, etc., in actions removed from State courts.....	83 (c)	{ 208- 209
for Proceedings, etc., before masters may be pre- scribed.....	53 (c)	129

Time—Continued.	Rule	Page
for Remedies providing for seizure of person or property	69	176
for Requesting instructions to the jury	52	127
for Service of answer, reply, etc.	12 (a)	30-31
for Service of notice of application for judgment by default	55 (b, 2)	138
for Service of objections to form of written interrogatories	32 (c, 3)	84
for Service of objections to master's report	53 (e, 2)	132
for Serving opposing affidavits, on motion for new trial	56 (c)	141
for Substitution of parties	25 (a, d)	63, 64
for Taking appeal, not extended by Rule 57 (b)	57 (b), (note)	144
for Taking depositions, notice to state; change of time	30 (a)	76
of Taking effect of rules	88	216
for Taking testimony by deposition	26 (a)	66
Transcripts:		
Cost paid in first instance by party ordering	82 (a)	204
of Proceedings, etc., before master, filing of	53 (e, 1)	131
of Record on appeal	65	161ff
Trials:		
Assignment of cases for	41	101
Conducted in open court	79 (b)	200
Defenses which may be asserted at, if no responsive pleading required	12 (b)	32
Joint or separate trials of issues between same parties	43	104
by Jury or by court; issues	39, 40	97- 101
(See also Juries.)		
Separate trials may be ordered, in case of several plaintiffs or defendants	20 (b)	53
Testimony of witnesses, how taken, etc.	44	105- 108
Trustees. (See Fiduciaries.)		
U		
Union of Law and Equity:		
Civil actions in district courts governed by the rules	1	1
Effect in relation to findings	59 (note)	148- 150
Effect on construction of statutes	2 (note)	3
Legal and equitable claims or defenses may be stated in one complaint, etc.	8 (e, 2), 18 (a)	24, 49
United States:		
Actions against, governed by Rule 3	3 (note)	4
Actions against, statutory provisions for trial without jury	40 (c)	100
Actions in name of, for use or benefit of another	17 (a)	47
Answer, time for serving	12 (a)	30
Appeals by, no security, etc., required	67 (e)	172
Costs against, only as provided by law	54 (d)	135
Counterclaims against	13 (d)	37
Expenses and attorney's fees not to be imposed on, under Rule 37	37 (f)	93
Intervention by	24 (note)	62
Judgments by default against, when permitted	55 (e)	139
No security required of, before issue of restraining order or preliminary injunction	70 (c)	180

	Rule	Page
United States—Continued.		
Service of summons and complaint on United States or a Federal officer or agency.....	4 (d; 4, 5)	8-9
Subpoenas issued by, tender of fees not required....	46 (c)	114
Suits by or against officers, procedure in case of death, resignation, etc.....	25 (d)	64
Summary judgment in actions against, Rule applicable.....	38 38 (note)	95
United States Attorney:		
Service of summons and complaint against United States on.....	4 (d, 4)	8

V

Vacating of Judgments. (See Judgments.)

Venue:

Dismissal for improper venue not to have effect of adjudication on the merits.....	42 (b)	103
Not extended or limited by the rules.....	84	213
Objections to, raising by motion.....	12 (b)	31

Verdicts:

Copy to be included in record on appeal.....	65 (g)	164
Directed verdict, motions for.....	51	124- 127
Judgment on, entry of.....	60	151
by Majority of jury, when permitted.....	49	122
Noting in "civil docket".....	81 (a)	203
Setting aside for error, etc., when permitted.....	61	152
Special verdicts; general verdict accompanied by answers to interrogatories.....	50	122- 124

Verification:

of Complaint in secondary actions by shareholders..	23 (b)	57
of Complaints seeking temporary restraining orders..	70 (b)	178
of Petition for perpetuation of testimony by deposition.....	27 (a)	72
Pleadings need not be verified; exception.....	11 (a)	29

W

Waiver:

of Defenses.....	12 (h)	33
of Objections and defenses in condemnation proceedings.....	74 (e)	186
of Objections in connection with depositions.....	32	83-84
of Right of trial by jury.....	39 (d), 40 (note), 50 (a)	97, 100, 122
of Right to offer evidence, motion for directed verdict not to constitute.....	51 (a)	124
of Signature of depositions.....	30 (e)	78

Witnesses (see also Evidence):

Competency, determination of; impeachment, etc..	44	105- 107
Competency to take depositions, when objection allowable.....	32 (c, 1)	83
Contradiction or impeachment, use of depositions for purpose of.....	26 (d, 1)	67
Examination on written interrogatories, in connection with depositions; oral examination.....	31	81-82

	Rule	Page
Witnesses—Continued.		
before Masters, provisions as to-----	53 (c; d 2)	{ 129, 130
Party not to be deemed to make witness his own by taking his deposition unless deposition intro- duced in evidence-----	26 (f)	69
Refusal to answer questions, effect of; procedure----	37	89-90
Signature of depositions-----	30 (e)	78
Subpoenas. (<i>See</i> Subpoenas.)		
Written interrogatories. (<i>See</i> Interrogatories.)		

