

Notes to the Rules of Civil Procedure for the District Courts of the United States



As prepared
under the direction of the

Advisory Committee on Rules
for Civil Procedure

Supreme Court of the United States Building
Washington, D. C.

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Procedure for the District Courts
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CONCURRENT RESOLUTION NO. 47

Resolved by the House of Representatives (the Senate concurring), That the Notes to the Rules of Civil Procedure for the District Courts of the United States, prepared under the direction of the Advisory Committee on Rules for Civil Procedure, be printed as a House document; and that twenty-six thousand additional copies shall be printed, of which seventeen thousand copies shall be for the use of the House document room and nine thousand copies shall be for the use of the Senate document room.

Adopted April 7, 1938.

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INTRODUCTORY STATEMENT

Notes to the Federal Rules of Civil Procedure were prepared by the Reporter, Dean Clark, and his staff, in order to show the source of each rule, and to aid the Advisory Committee in framing their recommendations; to assist the members of the profession in their study of the Committee's preliminary drafts; and to aid the Supreme Court in its consideration of the Committee's report.

Notes were first published with the Committee's Preliminary Draft of May 1936. They were revised and published with the Committee's Report of April 1937, and have been revised again to conform to the Committee's Final Report of November 1937, and to the rules as approved by the Court, December 20, 1937, both of which included some rearrangement and renumbering of rules.

The notes in their revised form are now published by the Committee in order to preserve for the use of the profession material which the Reporter has so industriously gathered during the two and one-half years of the Committee's service. The notes show the background in Federal or State statutes and judicial decisions, in the Federal equity rules, or in the British system, of the procedure recommended by the Advisory Committee.

Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases.

ADVISORY COMMITTEE ON
RULES FOR CIVIL PROCEDURE.

**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.

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

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope of Rules.

1. Rule 81 states certain limitations in the application of these rules to enumerated special proceedings.

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. See *Mookini et al. v. United States*, 303 U. S. —, 58 S. Ct. 543, 82 L. ed. Adv. Op. 532 (1938).

3. These rules are drawn under the authority of the 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) and also other grants of rule making power to the Court. See Clark and Moore, *A New Federal Civil Procedure—I. The Background*, 44 Yale L. J. 387, 391 (1935). Under § 723b after the rules have taken effect all laws in conflict therewith are of no further force or effect. In accordance with § 723c the Court has united 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. See Rule 2 (One Form of Action). For the former practice in equity and at law see U. S. C., Title 28, §§ 723 and 730 (conferring power on the Supreme Court to make rules of practice in equity) and the Equity Rules promulgated thereunder; U. S. C., Title 28, § 724 (Conformity act); Equity Rule 22 (Action at Law Erroneously Begun as Suit in Equity—Transfer); Equity Rule 23 (Matters Ordinarily Determinable at Law

When Arising in Suit in Equity to be Disposed of Therein); U. S. C., Title 28, §§ 397 (Amendments to pleadings when case brought to wrong side of court), and 398 (Equitable defenses and equitable relief in actions at law).

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

Rule 2. One Form of Action.

1. This rule modifies U. S. C., Title 28, § 384 (Suits in equity, when not sustainable). 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 3 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 (Laws 1848, ch. 379) § 62; N. Y. C. P. A. (1937) § 8; Calif. Code Civ. Proc. (Deering, 1937) § 307; 2 Minn. Stat. (Mason, 1927) § 9164; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 153, 255.

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

Rule 3. Commencement of Action.

1. Rule 5 (e) 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 (a) this is to be followed forthwith by issuance of a summons and its delivery to an officer for service. Other rules providing for dismissal for failure to prosecute suggest a method available to attack unreasonable delay in prosecuting an action after it has been commenced. 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. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make rules of procedure without affecting substantive rights, to

vary the operation of statutes of limitations. The requirement of Rule 4 (a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising.

Rule 4. Process.

Note to Subdivision (a). With the provision permitting additional summons upon request of the plaintiff, compare Equity Rule 14 (Alias Subpoena) and the last sentence of Equity Rule 12 (Issue of Subpoena—Time for Answer).

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.

Note to Subdivision (c). This Rule does not affect U. S. C., Title 28, § 503, as amended June 15, 1935 (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). This enumerates the officers and agents of a corporation or of a partnership or other unincorporated

association upon whom service of process may be made, and permits service of process only upon the officers, managing or general agents, or agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought. See *Christian v. International Ass'n of Machinists*, 7 F. (2d) 481 (D. C. Ky., 1925) and *Singleton v. Order of Railway Conductors of America*, 9 F. Supp. 417 (D. C. Ill., 1935). Compare *Operative Plasterers' and Cement Finishers' International Ass'n of the United States and Canada v. Case*, 93 F. (2d) 56 (App. D. C., 1937).

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 certifi-

cates 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 the company found in such 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 in same 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).

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

Note to Subdivisions (a) and (b). Compare 2 Minn. Stat. (Mason, 1927) §§ 9240, 9241, 9242; N. Y. C. P. A. (1937) §§ 163, 164 and N. Y. R. C. P. (1937) Rules 20, 21; 2 Wash. Rev. Stat. Ann. (Remington, 1932) §§ 244-249.

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

Rule 6. Time.

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). See also Rule XIII, Rules and Forms in Criminal Cases, 292 U. S. 661, 666 (1934). Compare Ala. Code Ann. (Michie, 1928) § 13 and former Law Rule 8 of the Rules of the Supreme Court of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

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 not affected. 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. (1937) Rules 60 and 64.

III. PLEADINGS AND MOTIONS

Rule 7. Pleadings Allowed; Form of Motions.

1. A provision designating pleadings and defining a motion is common in the state practice acts. See Ill. Rev. Stat. (1937) ch. 110, § 156 (Designation and order of pleadings); 2 Minn. Stat. (Mason, 1927) § 9246 (Definition of motion); and N. Y. C. P. A. (1937) § 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 preserves the substance of Equity Rule 31 (Reply—When Required—When Cause at Issue). Compare the English practice, English Rules Under the Judicature Act (The Annual Practice, 1937) 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. 1 Colo. Stat. Ann. (1935) § 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 Ann. (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. (1935) §§ 263.20, 263.21. U. S. C., Title 28, § 45 (District courts; practice and procedure in certain cases) is modified in so far as it may dispense with a reply to a counterclaim.

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

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

Rule 8. General Rules of Pleading.

Note to Subdivision (a). See Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). 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 (The Annual Practice, 1937) O. 19, r. r. 17-20.

Note to Subdivision (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N. Y. C. P. A. (1937) § 242, with "surprise" omitted in this rule.

Note to Subdivision (d). The first sentence is similar to Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. r. 13, 18; 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. Compare also Equity Rule 18 (Pleadings—Technical Forms

Abrogated). 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. (1937) ch. 110, § 157 (3); 2 Minn. Stat. (Mason, 1927) § 9266; N. Y. C. P. A. (1937) § 275; 2 N. D. Comp. Laws Ann. (1913) § 7458.

Rule 9. Pleading Special Matters.

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. (1937) Rule 93; 2 N. D. Comp. Laws Ann. (1913) § 7981 et seq.

Note to Subdivision (b). See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 22.

Note to Subdivision (c). The codes generally have this or a similar provision. See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 14; 2 Minn. Stat. (Mason, 1927) § 9273; N. Y. R. C. P. (1937) 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. (1937) Rule 95; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 287.

Rule 10. Form of Pleadings.

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. (1937) ch. 110, § 157 (2); N. Y. R. C. P. (1937) Rule 90. For incorporation by reference, see N. Y. R. C. P.

(1937) Rule 90. For written instruments as exhibits, see Ill. Rev. Stat. (1937) ch. 110, § 160.

Rule 11. Signing of Pleadings.

This is substantially the content of Equity Rules 24 (Signature of Counsel) and 21 (Scandal and Impertinence) consolidated and unified. Compare Equity Rule 36 (Officers Before Whom Pleadings Verified). Compare to similar purposes, English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 4, and *Great Australian Gold 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. (1937) 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 65 (Injunctions).

For abolition of the rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, see Pa. Stat. Ann. (Purdon, 1931) tit. 12, § 1222; for the rule in equity itself, see *Greenfield v. Blumenthal*, 69 F. (2d) 294 (C. C. A. 3d, 1934).

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on Pleadings.

Note to Subdivision (a). 1. Compare Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont. Rev. Codes Ann. (1935) §§ 9107, 9158; N. Y. C. P. A. (1937) § 263; N. Y. R. C. P. (1937) 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 60 days 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 81 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. Compare the last sentence of Equity Rule 29 (Defenses—How Presented) and N. Y. C. P. A. (1937) § 283. See Rule 15 (a) for time within which to plead to an amended pleading.

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. (1937) §§ 277–280; N. Y. R. C. P. (1937) Rules 106–112; English Rules Under the Judicature Act (The Annual Practice, 1937) O. 25, r. r. 1–4; Clark, *Code Pleading* (1928) pp. 371–381.

2. For provisions authorizing defenses to be made in the answer or reply see English Rules Under the Judicature Act (The Annual Practice, 1937) 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, 1937) § 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, 1937) § 431; 4 Nev. Comp. Laws (Hillyer, 1929) § 8598.

3. Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing “at the discretion of the court.” 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., 1932) ch. 231, §§ 15–18; Kansas Gen. Stat. Ann. (1935) §§ 60–705, 60–706.

Note to Subdivision (c). Compare Equity Rule 33 (Testing Sufficiency of Defense); N. Y. R. C. P. (1937) 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 (The Annual Practice, 1937) O. 19, r. r. 7, 7a, 7b, 8; 4 Mont. Rev. Codes Ann. (1935) §§ 9166, 9167; N. Y. C. P. A. (1937) § 247; N. Y. R. C. P. (1937) Rules 103, 115, 116, 117; Wyo. Rev. Stat. Ann. (Courtright, 1931) §§ 89–1033, 89–1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N. M. Rules of Pleading, Practice and Procedure, 38 N. M. Rep. vii [105–408] (1934); Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p. 160, Rule VI (e) and (f).

Note to Subdivision (h). Compare Calif. Code Civ. Proc. (Deering, 1937) § 434; 2 Minn. Stat. (Mason, 1927) § 9252; N. Y. C. P. A. (1937) §§ 278 and 279; Wash. Gen. Rules of the Superior Courts, 1 Wash. Rev. Stat. Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U. S. C., Title 28, § 80 (Dismissal or remand) (of action over which district court lacks jurisdiction), while U. S. C., Title 28, § 399 (Amendments to show diverse citizenship) is continued by Rule 15.

Rule 13. Counterclaim and Cross-Claim.

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 (The Annual Practice, 1937) 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., (2 Cum. Supp. 1911–1924) tit. 163, § 288; N. Y. C. P. A. (1937) §§ 262, 266, 267 (all as amended, Laws of 1936, ch. 324), 268, 269, and 271; Wis. Stat. (1935) § 263.14 (1) (c).

4. Most codes do not expressly provide for a counterclaim in the reply. Clark, *Code Pleading* (1928), p. 486. Ky. Codes (Carroll, 1932) Civ. Pract. § 98 does provide, however, for such counterclaim.

5. The provisions of this rule respecting counterclaims are subject to Rule 82 (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. This rule does not affect such statutes of the United States 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.

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

8. For allowance of credits against the United States see U. S. C., Title 26, § 1672–1673 (Suits for refunds of internal revenue taxes—limitations); U. S. C., Title 28, §§ 774 (Suits

by United States against individuals; credits), 775 (Suits under postal laws; credits); U. S. C., Title 31, § 227 (Offsets against judgments and claims against United States).

Rule 14. Third-Party Practice.

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 (The Annual Practice, 1937) 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. (1935) §§ 260.19, 260.20; N. Y. C. P. A. (1937) §§ 193 (2), 211 (a). Compare La. Code Pract. (Dart, 1932) §§ 378-388. For the practice in Texas as developed by judicial decision, see *Lottman v. Cuilla*, 288 S. W. 123, 126 (Tex., 1926). For a treatment of this subject see Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936), 45 Yale L. J. 393, 417 *et seq.*

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

Rule 15. Amended and Supplemental Pleadings.

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 (The Annual Practice, 1937) 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 (The Annual Practice, 1937) 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), pp. 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. (1937) ch. 110, § 170 (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 Pleading).

Rule 16. Pre-Trial Procedure; Formulating Issues.

1. Similar rules of pre-trial procedure are now in force in Boston, Cleveland, Detroit, and Los Angeles, 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*, Third Annual Report of the Judicial Council of the State of New York (1937), pages 207-243; *Report of the Commission on the Administration of Justice in New York State* (1934), pp. (288)-(290). See also *Pre-trial Procedure in the Wayne Circuit Court, Detroit, Michigan*, Sixth Annual Report of the Judicial Council of Michigan (1936), pp. 63-75; and Sunderland, *The Theory and Practice of Pre-trial Procedure*

(Dec. 1937) 36 Mich. L. Rev. 215-226, 21 J. Am. Jud. Soc. 125. Compare the English procedure known as the "summons for directions", English Rules Under the Judicature Act (The Annual Practice, 1937) O. 38a; and a similar procedure in New Jersey, N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) tit. 163, § 293, (Supp. 1925-1930) tit. 163, § 347a, N. J. Supreme Court Rules, 2 N. J. Misc. Rep. (1924) 1230, Rules 94, 92, 93, 95 (the last three as amended 1933, 11 N. J. Misc. Rep. (1933) 955).

2. Compare the similar procedure under Rule 56 (d) (Summary Judgment—Case Not Fully Adjudicated on Motion). 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) (Master's Report: In Jury Actions).

IV. PARTIES

Rule 17. Parties Plaintiff and Defendant; Capacity.

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. (1937) § 210; Wyo. Rev. Stat. Ann. (1931) §§ 89-501, 89-502, 89-503; English Rules Under the Judicature Act (The Annual Practice, 1937) 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 the name of the United States for the use of the person suing”); and U. S. C., Title 25, § 201 (Penalties under laws relating to Indians—how recovered). Compare 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 Club 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 by suit against the association in its common name without naming all its members as parties). This rule follows the existing law as to such associations, as declared in the case last cited above. Compare *Moffat Tunnel League v. United States*, 289 U. S. 113 (1933). See note to Rule 23, clause (1).

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 (The Annual Practice, 1937) O. 16, r. r. 16-21.

Rule 18. Joinder of Claims and Remedies.

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. (1937) ch. 110, §168; N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) tit. 163, § 287 as modified by N. J. Sup. Ct. Rules, Rule 21, 2 N. J. Misc. 1208 (1924); N. Y. C. P. A. (1937) § 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 (The Annual Practice, 1937) 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. Gen. Stat. Ann. (1935) § 60-601; Wis. Stat. (1935) § 263.04 for the more liberal practice.

3. The provisions of this rule for the joinder of claims are subject to Rule 82 (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 separate trials of joined claims, see Rule 42 (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 regardless 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 (Decree for Deficiency in Foreclosures, Etc.). 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 Harv. L. Rev. 404, 444 (1933).

Rule 19. Necessary Joinder of Parties.

Note to Subdivision (a). The first sentence with verbal differences (e. g., "united" interest for "joint" interest) is to be found in Equity Rule 37 (Parties Generally—Intervention). Such compulsory joinder provisions are 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). For example of a proper case for involuntary plaintiff, see *Independent Wireless Telegraph Co. v. Radio Corp. of America*, 269 U. S. 459 (1926).

The joinder provisions of this rule are subject to Rule 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (b). For the substance of this rule See Equity Rule 39 (Absence of Persons who Would be Proper Parties) and U. S. C., Title 28, § 111 (When part of several defendants cannot be served); *Camp v. Gress*, 250 U. S. 308 (1919). See also the second and third sentences of Equity Rule 37 (Parties Generally—Intervention).

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

Rule 20. Permissive Joinder of Parties.

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 82 (Jurisdiction and Venue Unaffected).

Note to Subdivision (a). The first sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 1. Compare Calif. Code Civ. Proc.

(Deering, 1937) §§ 378, 379a; Ill. Rev. Stat. (1937) ch. 110, §§ 147-148; N. J. Comp. Stat., (2 Cum. Supp., 1911-1924) tit. 163, §§ 280, 282; N. Y. C. P. A. (1937) §§ 209, 211. The second sentence is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 4. The third sentence is derived from O. 16, r. 5, and the fourth from O. 16, r. r. 1 and 4.

Note to Subdivision (b). This is derived from English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. r. 1 and 5.

Rule 21. Misjoinder and Non-Joinder of Parties.

See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 16, r. 11. See also Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

For separate trials see Rules 13 (i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20 (b) (Permissive Joinder of Parties: Separate Trials), and 42 (b) (Separate Trials, generally) and the note to the latter rule.

Rule 22. Interpleader.

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.*, (D. C. Md., 1938) In Equity No. 2523, Baltimore Daily Record, Feb. 25, 1938, p. 3. It does not change the rules on service of process, jurisdiction, and 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 65 (e).

This rule substantially continues such statutory provisions as U. S. C., Title 38, § 445 (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United

States where it acknowledges indebtedness under a contract of insurance with the United States; U. S. C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chafee, *The Federal Interpleader Act of 1936: I and II* (1936), 45 Yale L. J. 963, 1161.

Rule 23. Class Actions.

Note to Subdivision (a). This is a substantial restatement of Equity Rule 38 (Representatives of Class) 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); Moore and Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307 (1937); Moore and Cohn, *Federal Class Actions—Jurisdiction and Effect of Judgment*, 32 Ill. L. Rev. 555–567 (1938); Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. 34 (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); Georgia Code (1933) § 37–1002, and see English Rules Under the Judicature Act (The Annual Practice, 1937) 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; 2 Ind. Stat. Ann. (Burns, 1933) § 2–220; N. Y. C. P. A. (1937) § 195; Wis. Stat. (1935) § 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*, 97 Ind. App. 177, 179 N. E. 335 (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 sued 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. Swarmstedt*, 16 How. 288 (U. S., 1853). Compare *Christopher, et al. v. Brusselback*, 58 S. Ct. 350 (1938).

For an action to enforce 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. Roebeling's Sons Co. v. Kinnicut*, 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 Broward 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. See also *Hawes v. Oakland*, 104 U. S. 450 (1882) and former Equity Rule 94, promulgated January 23, 1882, 104 U. S. IX.

Note to Subdivision (c). See McLaughlin, *Capacity of Plaintiff-Stockholder to Terminate a Stockholder's Suit*, 46 Yale L. J. 421 (1937).

Rule 24. Intervention.

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)
- § 401 (Intervention by United States; constitutionality of federal statute)

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: I The Right to Intervene and Reorganization* (1936), 45 Yale L. J. 565. Under the codes two types of intervention are provided, one for the recovery of specific real or personal property (2 Ohio Gen. Code Ann. (Page, 1926) § 11263; Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-522), and the other allowing intervention generally when the applicant has an interest in the matter in litigation (1 Colo. Stat. Ann. (1935) Code Civ. Proc. § 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 (The Annual Practice, 1937) 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 Metropolitan Amalgamated Estates, Ltd.*, (1912) 2 Ch. 497 (receivership); *Wilson v. Church*, 9 Ch. D. 552 (1878) (representative action). For the discretionary right see O. 16, r. 11 (non-joinder) and *Re Fowler*, 142 L. T. Jo. 94 (Ch. 1916), *Vavas seur v. Krupp*, 9 Ch. D. 351 (1878) (persons out of the jurisdiction).

Rule 25. Substitution of Parties.

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 81 (b). Paragraph two states the content of U. S. C., Title 28, § 779 (Death of one of several plaintiffs or defendants). With these two para-

graphs compare generally English Rules Under the Judicature Act (The Annual Practice, 1937) 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. (1937) § 83 and Calif. Code Civ. Proc. (Deering, 1937) § 385; see also 4 Nev. Comp. Laws (Hillyer, 1929) § 8561.

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 AND DISCOVERY

Rule 26. Depositions Pending Action.

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. Civ. Code (Crawford, 1934) §§ 606-607; Calif. Code Civ. Proc. (Deering, 1937) § 2021; 1 Colo. Stat. Ann. (1935) Code Civ. Proc. § 376; Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1501, 2-1506; Ky. Codes (Carroll, 1932) Civ. Pract. § 557; 1 Mo. Rev. Stat. (1929) § 1753; 4 Mont. Rev. Codes Ann. (1935) § 10645; Neb. Comp. Stat. (1929) ch. 20, §§ 1246-7; 4 Nev. Comp. Laws (Hillyer, 1929) § 9001; 2 N. H. Pub. Laws (1926) ch. 337, § 1; N. C. Code Ann. (1935) § 1809; 2 N. D. Comp. Laws Ann. (1913) §§ 7889-7897; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11525-6; 1 Ore. Code Ann. (1930) tit. 9, § 1503; 1 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 Practice adopted by the Supreme Ct., Rule 8, 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308-8; W. Va. Code (1931) ch. 57, art. 4, § 1. Compare Equity Rules 47 (Depositions—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 court), 644 (Depositions under *dedimus potestatem* and *in perpetuam*), 646 (Deposition under *dedimus potestatem*; how taken). 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. Civ. Code (Crawford, 1934) §§ 606-607; 1 Idaho Code Ann. (1932) § 16-906; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) § 2-1501; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 554-558; 2 Md. Ann. Code (Bagby, 1924) Art. 35, § 21; 2 Minn. Stat. (Mason, 1927) § 9820; 1 Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) ch. 20, §§ 1246-7; 2 N. H. Pub. Laws (1926) ch. 337, § 1; 2 N. D. Comp. Laws Ann. (1913) § 7897; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11525-6; 1 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 Practice adopted by Supreme Ct., Rule 8, 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 308-8; 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, 1937) § 2031; 2 Fla. Comp. Gen. Laws Ann. (1927) §§ 4405-7; 1 Idaho Code Ann. (1932) § 16-902; Ill. Rules of Pract., Rule 19 (Ill. Rev. Stat. (1937) ch. 110, § 259.19); Ill. Rev. Stat. (1937) ch. 51, § 24; 2 Ind. Stat. Ann. (Burns, 1933) § 2-1502; Kan. Gen. Stat. Ann. (1935) § 60-2827; Ky. Codes (Carroll, 1932) Civ. Pract. § 565; 2 Minn. Stat. (Mason, 1927) § 9820; 1 Mo. Rev. Stat. (1929) § 1761; 4 Mont. Rev. Codes Ann. (1935) § 10651; Nev. Comp. Laws (Hillyer, 1929) § 9002; N. C. Code Ann. (1935) § 1809; 2 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; 2 Ind. Stat. Ann. (Burns, 1933) §§ 2-1028, 2-1506, 2-1728-2-1732; Iowa Code (1935) § 11185; Ky. Codes (Carroll, 1932) Civ. Pract. §§ 557, 606 (8); La. Code Pract. (Dart, 1932) arts. 347-356; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, §§ 61-67; 1 Mo. Rev. Stat. (1929) §§ 1753, 1759; Neb. Comp. Stat. (1929) §§ 20-1246, 20-1247; 2 N. H. Pub. Laws (1926) ch. 337, § 1; 2 Ohio Gen. Code Ann. (Page, 1926) §§ 11497, 11526; Tex. Stat. (Vernon, 1928) arts. 3738, 3753, 3769; Wis. Stat. (1935) § 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 (The Annual Practice, 1937) 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 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).

Rule 27. Depositions Before Action or Pending Appeal.

Note to Subdivision (a). This rule offers a simple method of perpetuating testimony in cases where it is usually allowed under equity practice or under modern statutes. See *Arizona v. California*, 292 U. S. 341 (1934); *Todd Engineering Dry Dock and Repair Co. v. United States*, 32 F. (2d) 734 (C. C. A. 5th, 1929); *Hall v. Stout*, 4 Del. Ch. 269 (1871). For comparable state statutes see Ark. Civ. Code (Crawford, 1934) §§ 666-670; Calif. Code Civ. Proc. (Deering, 1937) 2083-2089; Ill. Rev. Stat. (1937) ch. 51, §§ 39-46; Iowa Code (1935) §§ 11400-11407; 2 Mass. Gen. Laws (Ter. Ed., 1932)

ch. 233, § 46-63; N. Y. C. P. A. (1937) § 295; Ohio Gen. Code Ann. (Throckmorton, 1936) § 12216-12222; Va. Code Ann. (Michie, 1936) § 6235; Wis. Stat. (1935) §§ 326.27-326.29. The appointment of an attorney to represent absent parties or parties not personally notified, or a guardian ad litem to represent minors and incompetents, is provided for in several of the above statutes.

Note to Subdivision (b). This follows the practice approved in *Richter v. Union Trust Co.*, 115 U. S. 55 (1885), by extending the right to perpetuate testimony to cases pending an appeal.

Note to Subdivision (c). This preserves the right to employ a separate action to perpetuate testimony under U. S. C. Title 28, § 644 (Depositions under *dedimus potestatem* and *in perpetuam*) as an alternate method.

Rule 28. Persons Before Whom Depositions May Be Taken.

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) does not conflict with Subdivision (a).

Rule 30. Depositions Upon Oral Examination.

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; notice), the relevant provisions of which are incorporated in this rule; Calif. Code Civ. Proc. (Deering, 1937) § 2031; and statutes cited in respect to notice in the *Note* to Rule 26 (a). The provision for enlarging or shortening the time of notice has been added to give flexibility to the rule.

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

Note to Subdivisions (c) and (e). These follow the general plan of Equity Rule 51 (Evidence Taken Before Examiners, Etc.) and U. S. C., Title 28, §§ 640 (Depositions *de bene esse*; mode of taking), and 641 (Same; transmission to court), but are more specific. They also permit the deponent to require the officer to make changes in the deposition if the

deponent is not satisfied with it. See also Equity Rule 50 (Stenographer—Appointment—Fees).

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

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

Rule 31. Depositions of Witnesses Upon Written Interrogatories.

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

Rule 32. Effect of Errors and Irregularities in Depositions.

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

Rule 33. Interrogatories to Parties.

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

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

In England orders are made for the inspection of documents, English Rules Under the Judicature Act (The Annual Practice, 1937) 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, p. 267, setting out the statutes.

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

Rule 35. Physical and Mental Examination of Persons.

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; 2 N. J. Comp. Stat. (1910) Evidence, § 19, p. 2226; N. Y. C. P. A. (1937) § 306; 1 S. D. Comp. Laws (1929) § 2716A; 3 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. Manhattan 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 (1891), it was held that the court could not order the physical examination of a party in the absence of statutory authority. But in *Camden and Suburban Ry. Co. v. Stetson*, 177 U. S. 172 (1900) where there was statutory authority for such examination, derived from a state statute made operative by the conformity act, the practice was sustained. Such authority is now found in the present rule made operative by the Act of June 19, 1934, c. 651, 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).

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

Compare similar rules: Equity Rule 58 (last paragraph, which provides for the admission of the execution and genuineness of documents); English Rules Under the Judiciary Act (The Annual Practice, 1937) O. 32; Ill. Rev. Stat. (1937) ch. 110, §182 and Rule 18 (Ill. Rev. Stat. (1937) ch. 110, § 259.18); 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231,

§ 69; Mich. Court Rules Ann. (Searl, 1933) Rule 42; N. J. Comp. Stat. (2 Cum. Supp. 1911-1924) ch. 163, § 294; N. Y. C. P. A. (1937) §§ 322, 323; Wis. Stat. (1935) § 327.22.

Rule 37. Refusal to Make Discovery: Consequences.

The provisions of this rule authorizing orders establishing facts or excluding evidence or striking pleadings, or authorizing judgments of dismissal or default, for refusal to answer questions or permit inspection or otherwise make discovery, are in accord with *Hammond Packing Co. v. Arkansas*, 212 U. S. 322 (1909), which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in *Hovey v. Elliott*, 167 U. S. 409 (1897), for the mere purpose of punishing for contempt.

VI. TRIALS

Rule 38. Jury Trial of Right.

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. (1937) ch. 110, § 188; 6 Tenn. Code Ann. (Williams, 1934) § 8734; compare Wyo. Rev. Stat. Ann. (1931) § 89-1320 (with answer or reply); within 10 days after the pleadings are completed or the case is at issue under 2 Conn. Gen. Stat. (1930) § 5624; Hawaii Rev. Laws (1935) § 4101; 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 60; 3 Mich. Comp. Laws (1929) § 14263, Mich. Court Rules Ann. (Searl, 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, 1937) § 631, par. 4; Iowa Code (1935) § 10724; 4 Nev. Comp. Laws. (Hillyer, 1929) § 8782; N. M. Stat. Ann. (Courtright, 1929) § 105-814; N. Y. C. P. A. (1937) § 426, subdivision 5 (applying to New York, Bronx, Richmond, Kings, and Queens counties); R. I. Pub. Laws 1929, ch. 1327, amending R. I. Gen. Laws (1923) ch. 337, § 6; Utah Rev. Stat. Ann. (1933) § 104-23-6; 2 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, (The Annual Practice, 1937) 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 81 (c) provides for claim for jury trial in removed actions.

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

Rule 39. Trial by Jury or by the Court.

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 38, 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, 1937) § 592; 1 Colo. Stat. Ann. (1935) Code Civ. Proc., ch. 12, § 191; Conn. Gen. Stat. (1930) § 5625; 2 Minn. Stat. (Mason, 1927) § 9288; 4 Mont. Rev. Codes Ann. (1935) § 9327; N. Y. C. P. A. (1937) § 430; 2 Ohio Gen. Code Ann. (Page, 1926) § 11380; 1 Okla. Stat. Ann. (Harlow, 1931) § 351; Utah Rev. Stat. Ann. (1933) § 104-23-5; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 315; Wis. Stat. (1935) § 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, 1925), cert. den. 270 U. S. 646 (1926); *Watt v. Starke*, 101 U. S. 247, 25 L. Ed. 826 (1879).

Rule 40. Assignment of Cases for Trial.

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 57 (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); § 380a (Same; Constitutionality of federal statute); § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

Rule 41. Dismissal of Actions.

Note to Subdivision (a). Compare Ill. Rev. Stat. (1937) ch. 110, § 176, and English Rules Under the Judicature Act (The Annual Practice, 1937) O. 26.

Provisions regarding dismissal in such statutes as U. S. C., Title 8, § 164 (Jurisdiction of district courts in immigration cases) and U. S. C., Title 31, § 232 (Liability of persons making false claims against United States; suits) are preserved by paragraph (1).

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. Also, for actions tried without a jury, it provides the equivalent of the directed verdict practice for jury actions which is regulated by Rule 50.

Rule 42. Consolidation; Separate Trials.

Subdivision (a) is based upon 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.

For comparable statutes dealing with consolidation see Ark. Dig. Stat. (Crawford & Moses, 1921) § 1081; Calif. Code Civ. Proc. (Deering, 1937) § 1048; N. M. Stat. Ann. (Courtright, 1929) § 105-828; N. Y. C. P. A. (1937) §§ 96,

96a, and 97; American Judicature Society, Bulletin XIV, (1919) Art. 26.

For severance or separate trials see Calif. Code Civ. Proc. (Deering, 1937) § 1048; N. Y. C. P. A. (1937) § 96; American Judicature Society, Bulletin XIV (1919) Art. 3, § 2 and Art. 10, § 10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12 (d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54 (b) (Judgment at Various Stages).

Rule 43. Evidence.

Note to Subdivision (a). The first sentence is a restatement of the substance of U. S. C., Title 28, § 635 (Proof in common-law actions), § 637 (Proof in equity and admiralty), and Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark 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*, 45 Yale L. J. 622 (1936), and *Same: 2*, 47 Yale L. J. 195 (1937). The last sentence modifies to the extent indicated U. S. C., Title 28, § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2nd ed., 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 (1876); *Nelson v. United States*, 201 U. S. 92, 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C. C. A. 8th, 1922).

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

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

Rule 44. Proof of Official Record.

This rule provides a simple and uniform method of proving public records, and entry or lack of entry therein, in all cases including those 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 those 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; admissibility)
- § 665 (Transcripts from books of Treasury in suits against delinquents; admissibility)
- § 666 (Same; certificate by Secretary or Assistant Secretary)
- § 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)

U. S. C., Title 28—Continued.

- § 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 clerks' offices, 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 (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; seal; reproduction 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, etc., 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)

§ 16 (13) (Copies of schedules, tariffs, etc. filed with Interstate Commerce Commission as evidence)

§ 19a (i) Valuation of property of carriers by Interstate Commerce Commission; final published valuations as evidence)

Rule 45. Subpoena.

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 270e (International Commissions, etc.)
- 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 Third. (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; subpoena; form; attendance under); 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. (1937) § 411.

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. (1937) §§ 220, 404, J. Ct. Act, § 191; 3 Wash. Rev. Stat. Ann. (Remington, 1932) § 1218. 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 (S. D. N. Y., 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. (1937) § 300; 1 N. J. Rev. Stat. (1937) 2:27-174.

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) (Veterans' insurance contracts).

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

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

Rule 46. Exceptions Unnecessary.

Abolition of formal exceptions is often provided by statute. See Ill. Rev. Stat. (1937) ch. 110, § 204; Neb. Comp. Stat. (1929) § 20-1139; N. M. Stat. Ann. (Courtright, 1929) § 105-830; 2 N. D. Comp. Laws Ann. (1913) § 7653; Ohio Code Ann. (Throckmorton, 1936) § 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. v, XII (1935); Wis. Stat. (1935) § 270.39. Compare N. Y. C. P. A. (1937) §§ 583, 445, and 446, all as amended by L. 1936, ch. 915. Rule 51 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 cases tried without a jury) are superseded in so far as they provide for formal exceptions, and a bill of exceptions.

Rule 47. Jurors.

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, 186 Minn. xxxiii (1932), 3 Minn. Stat. (Mason, supp. 1936) Appendix 4, p. 1062.

Note to Subdivision (b). The provision for an alternate juror is one often found in modern state codes. See N. C. Code (1935) § 2330 (a); Ohio Gen. Code Ann. (Page, Supp. 1926-1935) § 11419-47; Pa. Stat. Ann. (Purdon, supp. 1936) Title 17, § 1153; compare U. S. C., Title 28, § 417a (Alternate jurors in criminal trials); 1 N. J. Rev. Stat. (1937) 2:91A-1, 2:91A-2, 2:91A-3.

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 (Juries and Jury Commission) and Title 6, § 366 (Peremptory challenges).

Rule 48. Juries of Less Than Twelve—Majority Verdict.

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

Rule 49. Special Verdicts and Interrogatories.

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. (1935) §§ 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 (3) (Declaratory judgments authorized; procedure) permitting the submission of issues of fact to a jury are covered by this rule.

Rule 50. Motion for a Directed Verdict.

Note to Subdivision (a). The present federal rule is changed to the extent that the formality of an express reservation of rights against waiver is no longer necessary. See *Sampliner v. Motion Picture Patents Co.*, 254 U. S. 233 (1920); *Union Indemnity Co. v. United States*, 74 F. (2d) 645 (C. C. A. 6th, 1935). The requirement that specific grounds for the motion for a directed verdict must be stated settles a conflict in the federal cases. See Simkins, *Federal Practice* (1934) § 189.

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

See *Northern Ry. Co. v. Page*, 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); Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 685 (1918); Comment, 34 Mich. L. Rev. 93, 98 (1935).

Rule 51. Instructions to Jury: Objection.

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

Rule 52. Findings by the Court.

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. The rule stated in the third sentence of *Subdivision (a)* accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes

of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony. See *Silver King Coalition Mines Co. v. Silver King 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 (1888); *Kimberly v. Arms*, 129 U. S. 512, 524 (1889). Compare *Kaeser & Blair Inc. v. Merchants' Ass'n.*, 64 F. (2d) 575, 576 (C. C. A. 6th, 1933); *Dunn v. Trefry*, 260 Fed. 147, 148 (C. C. A. 1st, 1919).

In the following states findings of fact are required in all cases tried without a jury (waiver by the parties being permitted as indicated at the end of the listing): Arkansas, Civ. Code (Crawford, 1934) § 364; California, Code Civ. Proc. (Deering, 1937) §§ 632, 634; Colorado, 1 Stat. Ann. (1935) Code Civ. Proc. §§ 232, 291 (in actions before referees or for possession of and damages to land); Connecticut, Gen. Stats. §§ 5660, 5664; Idaho, 1 Code Ann. (1932) §§ 7-302 through 7-305; Massachusetts (equity cases), 2 Gen. Laws (Ter. Ed., 1932) ch. 214, § 23; Minnesota, 2 Stat. (Mason, 1927) § 9311; Nevada, 4 Comp. Laws (Hillyer, 1929) § 8783-8784; New Jersey, Sup. Ct. Rule 113, 2 N. J. Misc. 1197, 1239 (1924); New Mexico, Stat. Ann. (Courtright, 1929) § 105-813; North Carolina, Code (1935) § 569; North Dakota, 2 Comp. Laws Ann. (1913) § 7641; Oregon, 2 Code Ann. (1930) § 2-502; South Carolina, Code (Michie, 1932) § 649; South Dakota, 1 Comp. Laws (1929) §§ 2525-2526; Utah, Rev. Stat. Ann. (1933) § 104-26-2, 104-26-3; Vermont (where jury trial waived), Pub. Laws (1933) § 2069; Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 367; Wisconsin, Stat. (1935) § 270.33. The parties may waive this requirement for findings in California, Idaho, North Dakota, Nevada, New Mexico, Utah, and South Dakota.

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, 1937) § 956a; but see 20 Calif. Law Rev. 171 (1932); Colorado, *Johnson v. Kountze*, 21 Colo. 486, 43 Pac. 445 (1895), *semble*; Illinois, *Baker v. Hinricks*, 359 Ill. 138 (1934), *Weininger v.*

Metropolitan Fire Ins. Co., 359 Ill. 584 (1935); Minnesota, *State Bank of Gibbon v. Walter*, 167 Minn. 37, 38, 208 N. W. 423 (1926), *Waldron v. Page*, 191 Minn. 302, 253 N. W. 894 (1934); New Jersey, N. J. Comp. Stat. (2 Cum. Sup. 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, Comp. Laws Ann. (1913) § 7846, as amended by N. D. Laws 1933, ch. 208, *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. Burk 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, 2 Rev. Stat. Ann. (Remington, 1932) §§ 309-316; *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), *semble*; Wisconsin, Stat. (1935) § 251.09; *Campbell v. Sutliff*, 193 Wis. 370, 214 N. W. 374 (1927), *Gessler 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 as made in several states, see Clark and Stone, *Review of Findings of Fact*, 4 U. of Chi. L. Rev. 190, 215 (1937).

Rule 53. Masters.

Note to Subdivision (a). This is a modification of Equity Rule 68 (Appointment and Compensation of Masters).

Note to Subdivision (b). This is substantially the first sentence of Equity Rule 59 (Reference to Master—Exceptional, Not Usual) extended to actions formerly legal. See *Ex parte Peterson*, 253 U. S. 300, 40 S. 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). Compare Equity Rule 53 (Notice of Taking Testimony Before Examiner, Etc.).

(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 contains the substance of 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 as to the form and effect of the report and for inclusion of reports by auditors, referees, and examiners, and references in actions formerly legal. Compare Equity Rules 49 (Evidence Taken Before Examiners, Etc.) and 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 S. Ct. 543, 64 L. Ed. 919 (1920).

VII. JUDGMENT

Rule 54. Judgments; Costs.

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. (1935) § 270.54; Compare N. Y. C. P. A. (1937) § 476.

Note to Subdivision (c). For the limitation on default contained in the first sentence, see 2 N. D. Comp. Laws Ann. (1913) § 7680; N. Y. C. P. A. (1937) § 479. Compare English Rules Under the Judicature Act (The Annual Practice, 1937) 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 Foreclosures, Etc.).

Note to Subdivision (d). For the present rule in common law actions, see *Ex parte Peterson*, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920); Payne, *Costs in Common Law Actions in the Federal Courts* (1935), 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 under Stockyards Act)
 - U. S. C., Title 7, § 499g (c) (Appeals from reparations orders of Secretary of Agriculture under Perishable Commodities Act)
 - U. S. C., Title 8, § 45 (Action against district attorneys in certain cases)
 - U. S. C., Title 15, § 15 (Actions for injuries due to 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 (Similar to 78i (e))
 - U. S. C., Title 15, § 96 (Infringement of trade-mark—damages)
 - U. S. C., Title 15, § 99 (Infringement of trade-mark—injunctions)
 - U. S. C., Title 15, § 124 (Infringement of trade-mark—damages)

- 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, § 926 (Actions under Harbor Workers' Compensation Act)
- U. S. C., Title 35, § 67 (Infringement of patent—damages)
- U. S. C., Title 35, § 69 (Infringement of patent—pleading and proof)
- U. S. C., Title 35, § 71 (Infringement of patent—when specification too broad)
- 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 damages for violation of certain provisions of the Merchant Marine Act, 1936)
- U. S. C., Title 47, § 206 (Actions for certain violations of Communications Act of 1934)
- U. S. C., Title 49, § 16 (2) (Action based on non-compliance with an order of I. C. C. for payment of money)

Rule 55. Default.

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 U. S. C.,

Title 28, § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see Rule 41 (b).

Note to Subdivision (a). The provision for the entry of default comes from the Massachusetts practice, 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 57. For affidavit of default, see 2 Minn. Stat. (Mason, 1927) § 9256.

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. (1937) § 485, in Calif. Code Civ. Proc. (Deering, 1937) § 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. (1937) § 490; 2 Minn. Stat. (Mason, 1927) § 9256 (3); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 411 (2). U. S. C., Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

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

Rule 56. Summary Judgment.

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. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

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 (The Annual Practice, 1937) 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 (3 Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1937) Rule 113; 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) recommend 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). 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. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

Rule 57. Declaratory Judgments.

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 (Code Civ. Proc. (Deering, 1937) § 1062a), Michigan (3 Comp. Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ. Pract. § 639a-3).

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, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699 (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. 227, 57 S. Ct. 461 (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 F. Supp. 169 (S. D. Tex., 1935); Borchard, *Declaratory Judgments* (1934), *passim*.

Rule 58. Entry of Judgment.

See Wis. Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court),

§ 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 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 shall be entered by the clerk, subject to the court's direction.

Rule 59. New Trials.

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, 1937) §§ 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 the effect of the motion for new trial upon the time for taking an appeal see *Morse v. United States*, 270 U. S. 151 (1926); *Aspen Mining and Smelting Co. v. Billings*, 150 U. S. 31 (1893).

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 (C. C. A. 4th, 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, 1937) §§ 657, 662; Ill. Rev. Stat. (1937) ch. 110, § 216 (par. (f)); Md. Ann. Code (Bagby, 1924) Art. 5, §§ 25, 26; Mich. Court Rules Ann. (Searl, 1933) Rule 47, § 2; Miss. Sup. Ct. Rule 12, 161 Miss. 903, 905

(1931); N. J. Sup. Ct. Rules 131, 132, 147, 2 N. J. Misc. 1197, 1246-1251, 1255 (1924); 2 N. D. Comp. Laws Ann. (1913) § 7844, as amended by N. D. Laws 1927, ch. 214.

Rule 60. Relief From Judgment or Order.

Note to Subdivision (a). See Equity Rule 72 (Correction of Clerical Mistakes in Orders and Decrees); Mich. Court Rules Ann. (Searl, 1933) Rule 48, § 3; 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 464 (3); Wyo. Rev. Stat. Ann. (Courtright, 1931) § 89-2301 (3). For an example of a very liberal provision for the correction of clerical errors and for amendment after judgment, see Va. Code Ann. (Michie, 1936) §§ 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, 1937) § 473. See also N. Y. C. P. A. (1937) § 108; 2 Minn. Stat. (Mason, 1927) § 9283.

For the independent action to relieve against mistake, etc. see Dobie, *Federal Procedure*, pages 760-765, compare 639; and Simkins, *Federal Practice*, ch. CXXI (pp. 820-830) and ch. CXXII (pp. 831-834), compare § 214.

Rule 61. Harmless Error.

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). For the last sentence see the last sentence of Equity Rule 19 (Amendments Generally).

Rule 62. Stay of Proceedings to Enforce a Judgment.

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 inventions; stay of proceedings for accounting), but extended to include final as well as interlocutory judgments.

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

Note to Subdivision (c). Compare Equity Rule 74 (Injunction Pending Appeal); and *Cumberland Telephone and Telegraph Co. v. Louisiana 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 (Official and Penal 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)

§ 380a (Same; constitutionality of federal statute)

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 73 (d), of these rules, which governs supersedeas bonds on appeals to a circuit court of appeals. The provisions governing super-

seedeas bonds in both kinds of appeals are substantially the same.

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

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

Rule 63. Disability of a Judge.

This rule adapts and extends the provisions of U. S. C., Title 28, § 776 (Bill of exceptions; authentication; signing of by 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

Rule 64. Seizure of Person or Property.

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

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 (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. Calcasieu 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 (Garnishees in suits by United States against a corporation)

§ 749 (Same; issue tendered on denial of indebtedness)

§ 750 (Same; garnishee failing to appear)

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

U. S. C., Title 28:

§ 376 (Writs of ne exeat)

§ 755 (Special bail in suits for duties and penalties)

§ 756 (Defendant giving bail in one district and committed in another)

§ 757 (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)

§ 758 (Bail and affidavits; taking by commissioners)

§ 759 (Calling of bail in Kentucky)

§ 760 (Clerks may take bail de bene esse)

§ 843 (Imprisonment for debt)

§ 844 (Imprisonment for debt; discharge according to State laws)

§ 845 (Imprisonment for debt; jail limits)

For Statutes of the United States on replevin, see, e. g.:

U. S. C., Title 28:

§ 747 (Replevy of property taken under revenue laws).

Rule 65. Injunctions.

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 (Official and Penal 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).

Note to Subdivision (e). The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

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:

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

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

§ 378 (Injunctions; when granted)

§ 379 (Injunctions; stay in State courts)

§ 380 (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)

§ 380a (Injunctions; constitutionality of federal statute; application for hearing; 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:

§ 4 (Jurisdiction of courts; duty of district attorney; procedure)

§ 25 (Restraining violations; procedure)

U. S. C., Title 15—Continued.

§ 26 (Injunctive relief for private parties; exceptions)

§ 77t (b) (Injunctions and prosecution of offenses)

Rule 67. Deposit in Court.

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 (1902); United States Supreme Court Admiralty Rules (1920), 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 (The Annual Practice, 1937) O. 22, r. 1 (1).

Rule 68. Offer of Judgment.

See 2 Minn. Stat (Mason, 1927) § 9323; 4 Mont. Rev. Codes Ann. (1935) § 9770; N. Y. C. P. A. (1937) § 177.

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

Rule 69. Execution.

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, as in the similar case of attachments (see note to Rule 64), the rule specifies the applicable state law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedes, local district court rules.

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 for customs duties, 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 62 (b)
- § 841 (Executions; stay of one term), as modified by Rule 62 (f)
- § 842 (Executions; against officers of revenue in cases of probable cause), as incorporated in *Subdivision (b)* of this rule
- § 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 73 (c)
- § 874 (Supersedeas), as modified by Rules 62 (d) and 73 (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 of railroads; 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 of Congress for official acts)

U. S. C., Title 5:

§ 729 (Federal employees retirement annuities not subject to assignment, execution, levy or other legal process)

U. S. C., Title 10:

§ 610 (Exemption of enlisted men from arrest on civil process)

U. S. C., Title 22:

§ 21 (h) (Foreign service 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) (Longshoremen's and Harbor-workers' Compensation Act)

U. S. C., Title 38:

§ 54 (Attachment, levy or seizure of moneys due pensioners prohibited)

§ 393 (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, § 365 (c) (Medal of Honor Roll; special pension to persons enrolled)

§ 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 (Panama canal and railroad retirement annuities, exemption from execution and so forth).

Rule 70. Judgment for Specific Acts; Vesting Title.

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, 6 Tenn. Ann. Code (Williams, 1934) § 10594; 2 Conn. Gen. Stat. (1930) § 5455; N. M. Stat. Ann. (Courtright, 1929) § 117-117; 2 Ohio Gen. Code Ann. (Page, 1926) § 11590; and England, Supreme Court of Judicature Act (1925) § 47.

Rule 71. Process in Behalf of and Against Persons Not Parties.

Compare Equity Rule 11 (Process in Behalf of and Against Persons Not Parties). Compare also *Terrell v. Allison*, 21 Wall. 289 (U. S., 1875); *Farmers' Loan and Trust Co. v. Chicago and A. Ry. 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 APPEALS

Rule 72. Appeal From a District Court to the Supreme Court.

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 73), 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 73 for an appeal from a district court to a circuit court of appeals.

Rule 72 applies to those cases prescribed in U. S. C., Title 28, § 345 (Appellate jurisdiction from decrees of United States district courts—giving references to other statutes), and in §§ 349a (Direct appeal to Supreme Court; constitutionality of federal statutes; time; precedence) and 380a (Injunctions; constitutionality of federal statute; application for hearing; appeal to Supreme Court). See United States Supreme Court Rule 46½ (Appeals Under the Act of August 24, 1937) promulgated January 10, 1938. 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)
- § 862 (Removal of causes by former writ of error)
- § 863 (Transcripts on appeal)
- § 864 (One record)
- § 868 (Citation on writ of error to district court by Supreme Court)
- § 869 (Bond in error and on appeal)

U. S. C., Title 28—Continued.

- § 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.

Rule 73. Appeal to a Circuit Court of Appeals.

1. This rule prescribes the method of appeal from a district court to a circuit court of appeals. Compare the system of appeals in criminal cases, 292 U. S. 661, 662–663 (1934). 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 courts 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).

See Clark, *Power of the Supreme Court to make Rules of Appellate Procedure* (1936), 49 Harv. L. Rev. 1303.

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 error 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, 1 Code Ann. (1932) § 11-202; Illinois, Rev. Stat. (1937) ch. 110, § 259.33; Michigan, Court Rules Ann. (Searl, 1933) Rule 56; Minnesota, 2 Stat. (Mason, 1927) § 9492; Montana, 4 Codes Ann. (1935) § 9733; New York, C. P. A. (1937) § 562; Ohio, Code Ann. (Throckmorton, 1936) § 12223-5; Washington, 4 Rev. Stat. Ann. (Remington, 1932) § 1719; Wisconsin, Stat. (1935) § 306.02. See also United States Supreme Court Rules for appeals in criminal cases, 292 U. S. 661, 662-663, Rule III.

Note to Subdivision (b). No assignments of error need be filed in the district court, but see Rule 75 (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). The first sentence leaves unaffected the bond provisions 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. This rule supersedes all such provisions of circuit court rules in the cases to which it applies. 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. (1937) § 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 provisions 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 busi-

ness, § 8 (Deposit of charter); for quarterly statements to be filed with Secretary of the Treasury, § 9 (Quarterly Statements); for jurisdiction of actions on bonds (Jurisdiction of suits on bonds); and various other provisions, §§ 11-15.

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

Rule 74. Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished.

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 state procedures; see *Doty v. Strong*, 1 Pinney 165, 168 (Wis., 1842).

Rule 75. Record on Appeal to a Circuit Court of Appeals.

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 72. 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 supercedes 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 Subdivision (c). 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; Stone, *The Record on Appeal in Civil Cases*, 23 Va. L. Rev. 766 (1937); 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, (limited to bills of exception) Cir. Court Rule 32 (Ala. Code Ann. (Michie, 1928) p. 1939), *Turner v. Thornton*, 192 Ala. 98, 68 So. 813 (1915), *Lone Star Cement Co. of La. v. Wilson*, 231 Ala. 83, 163 So. 601 (1935); Arizona, Supreme Court Rule iv (1), (7) (1928) (bills of exception, depositions, statements of facts; but with alternative provision for reporter's transcript, Supreme Court Rule iv (1), (13); Ariz. Rev. Code Ann. (Struckmeyer, 1928) §§ 3863-3869); Florida, Special Rule 1, Circuit Court Rules at Law, 5 Comp. Gen. Laws (1927) p. 4645-6 (with discretion to trial court to order otherwise); 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, (parol evidence in equity cases) Sup. Ct. Rule 7 (1934); Montana, Sup. Ct. Rule vii (1931); North Carolina, Supreme Ct. Rule 19 (4) (N. C. Code Ann. (1935) Appendix VII, p. 2668). Minnesota (Rule 8 (2) Sup. Ct., 2 Minn. Stat. (Mason, 1927) p. 2118) 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. (1937) § 576; Ohio, Code Ann. (Throckmorton, 1936) § 12223-8, 12223-32; Wyoming, Rev. Stat. (1931) § 89-4905, 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, 1937) § 953a; Illinois, Rev. Stat. (1937) ch. 110, § 259.36 (1) (c), (d); Missouri, 1 Rev. Stat. (1929) § 1033; South Carolina, Code (Michie, 1932), Sup. Ct. Rule 2, p. 1272.

Note to Subdivision (l). 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 (c. 47, 36 Stat. 901; U. S. C., Title 28, §§ 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. The Advisory Committee concluded 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 75 that this subject

shall be governed by the rules of the court to which the appeal is taken.

If the rule had stopped there the result would have been to supersede the provision in the Act of February 13, 1911 which provides that printed records in the circuit courts of appeals from *final* judgments of district courts shall be "in such form as the Supreme Court of the United States shall by rule prescribe". The desire to preserve this authority in the Supreme Court explains the presence in *Subdivision (l)* of the provision to that effect. This power in the Supreme Court does not seem to have been exercised. Its purpose was to enable the Supreme Court to prescribe the form of type and dimensions of printed matter in printed records in the circuit courts of appeals so that extra copies of those records might be used in the Supreme Court without reprinting. Rules of the Supreme Court (13 and 26) now provide that in cases of *appeals* to the Supreme Court or where the record below is reprinted for the use of the Supreme Court, the work shall be done under the supervision of the clerk and the size of type and dimensions of printed matter are specified. On the other hand, Supreme Court Rule 38, relating to review on certiorari provides in paragraph 7, that when certiorari is granted, it is permissible to use printed copies of the record "as printed below". Printed records in the respective United States circuit courts of appeals are not uniform and do not always conform to the rules of the Supreme Court respecting the dimensions of printed matter or of size of type or spacing between lines.

It will be noted that there is nothing in this rule or in the present rules of the Supreme Court which prevent the use of printed exhibits. It is customary in patent cases to insert in the record printed copies of patents, as they come from the government printing office and that practice may be continued.

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 this rule is drawn any United States circuit court of appeals which is willing to hear an appeal on a typewritten record may do so by requiring appellant to furnish sufficient typewritten copies of the record on appeal.

Rule 76. Record on Appeal to a Circuit Court of Appeals; Agreed Statement.

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

X. DISTRICT COURTS AND CLERKS

Rule 77. District Courts and Clerks.

This rule states the substance of U. S. C., Title 28, § 13 (Courts open as courts of admiralty and equity). Compare Equity Rules 1 (District Court Always Open For Certain Purposes—Orders at Chambers), 2 (Clerk's Office Always Open, Except, Etc.), 4 (Notice of Orders), and 5 (Motions Grantable of Course by Clerk).

Rule 78. Motion Day.

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. See Rule 43 (e) of these rules dealing with evidence on motions. Compare Civil Practice Rules of the Municipal Court of Chicago (1935), Rules 269, 270, 271.

Rule 79. Books Kept by the Clerk and Entries Therein.

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 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 (Same: accounts)

§ 568 (Same; reports and accounts of moneys received; dockets)

§ 813 (Indices of judgment debtors to be kept by clerks)

And see "Instructions to United States Attorneys, Marshals, Clerks and Commissioners" issued by the Attorney General of the United States.

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence.

Note to Subdivision (a). This follows substantially Equity Rule 50 (Stenographer—Appointment—Fees).

Note to Subdivision (b). See Reports of Conferences of Senior Circuit Judges with the Chief Justice of the United States (1936), 22 A. B. A. J. 818, 819; (1937), 24 A. B. A. J. 75, 77.

Note to Subdivision (c). Compare Iowa Code (1935) § 11353.

XI. GENERAL PROVISIONS

Rule 81. Applicability in General.

Note to Subdivision (a). Paragraph (1): 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 Practice and Procedure under § 25 of the copyright act, Act of March 4, 1909, U. S. C., Title 17, § 25 (Infringement and rules of procedure).

For examples of statutes which are preserved by paragraph (2) see: U. S. C., Title 8, ch. 9 (Naturalization); Title 28, ch. 14 (Habeas corpus); Title 28, §§ 377a-377c (Quo warranto); and such forfeiture statutes as U. S. C., Title 7, § 116 (Misbranded seeds, confiscation), and Title 21, § 14 (Pure Food and Drug Act—condemnation of adulterated or misbranded Food; procedure). See also *443 Cans of Frozen Eggs Product v. U. S.*, 226 U. S. 172 (1912).

For examples of statutes which under paragraph (7) will continue to govern procedure in condemnation cases, see U. S. C., Title 40, § 258 (Condemnation of realty for sites for public building, etc., procedure); 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); Title 40, ch. 7 (Acquisition of lands in District of Columbia for use of United States; condemnation).

Note to Subdivision (b). Some statutes which will be affected by this subdivision 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 28:

- § 377 (Power to issue writs)
- § 572 (Fees, attorneys, solicitors and proctors)
- § 778 (Death of parties; substitution of executor or administrator). Compare Rule 25 (a) (Substitution of parties; death), and the note thereto.

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)

For comparable provisions in state practice see Ill. Rev. Stat. (1937), ch. 110, § 179; Calif. Code Civ. Proc. (Deering, 1937) § 802.

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 (e). 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.

Rule 82. Jurisdiction and Venue Unaffected.

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 (1936).

Rule 83. Rules by District Courts.

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 United States Supreme Court Admiralty Rules (1920), Rule 44 (Right of Trial Courts to Make Rules of Practice) (originally promulgated in 1842).

Rule 84. Forms.

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 2 Mass. Gen. Laws (Ter. Ed., 1932) ch. 231, § 147, Forms 1-47; English Annual Practice (1937) Appendix A to M, inclusive; Conn. Practice Book (1934) Rules, 47-68, pp. 123-427.

Rule 86. Effective Date.

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-----	77	26-----	18, 20, 82
2-----	77	27-----	23
3-----	79	28-----	15
4-----	77	29-----	7, 12, 42, 55
5-----	77	30-----	8, 13, 82
6-----	78	31-----	7, 8, 12, 55
7-----	4, 70	32-----	15
8-----	6, 70	33-----	7, 12
9-----	70	34-----	15
10-----	18, 54	35-----	15
11-----	71	36-----	11
12-----	3, 4, 5, 12, 55	37-----	17, 19, 20, 24
13-----	4	38-----	23
14-----	4	39-----	19
15-----	4, 45	40-----	20
16-----	6, 55	41-----	17
17-----	55	42-----	19, 20
18-----	7, 8	43-----	12, 21
19-----	1, 15, 61	44-----	12, 21
20-----	12	45-----	25
21-----	11, 12	46-----	43, 61
22-----	1	47-----	26
23-----	1, 39	48-----	43
24-----	11	49-----	53
25-----	8, 9, 10, 19	50-----	30, 80

Equity Rules	Federal Rules of Civil Procedure	Equity Rules	Federal Rules of Civil Procedure
51.....	30, 53	67.....	53
52.....	45, 53	68.....	53
53.....	53	69.....	59
54.....	26	70.....	17
55.....	30	70½.....	52
56.....	40	71.....	54
57.....	40	72.....	60, 61
58.....	26, 33, 34, 36	73.....	65
59.....	53	74.....	62
60.....	53	75.....	75
61.....	53	76.....	75
61½.....	53	77.....	76
62.....	53	78.....	43
63.....	53	79.....	83
64.....	26	80.....	6
65.....	53	81.....	86
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-----	17 (T), 25 (T), 39 (T)	Tit. 7, § 210 (f)-----	54
7th Amendment-----	38 (T)	216-----	65
		217-----	4, 62, 65
		222-----	45, 81
		292-----	81 (T)
		499g (c)-----	54, 81 (T)
		499k-----	4, 62
		511n-----	45
		608c (15) (B)-----	4
		855-----	4
		Tit. 8, § 9a-----	44
		45-----	54
		164-----	41
		282-----	81 (T)
		c. 9-----	81
		§ 356-----	44
		399b (d)-----	44
		405-----	4, 81 (T)
		Tit. 9-----	81 (T)
		Tit. 10, § 610-----	69
		Tit. 11, § 44 (d)-----	44
		44 (e)-----	44
		44 (f)-----	44
		44 (g)-----	44
		69-----	45
		204-----	44
		207 (j)-----	44
		Tit. 12, § 91-----	69
		632-----	69
		Tit. 15, § 4-----	65
		5-----	4
U. S. Code	Federal Rules of Civil Procedure		
Tit. 1, § 1-----	43		
30-----	44		
30a-----	44		
54-----	44		
55-----	44		
Tit. 2, § 118-----	69 (T), 69		
Tit. 5, § 301-----	79		
318-----	79		
490-----	44		
729-----	69		
Tit. 6-----	62, 65, 73		
§ 6-----	73		
7-----	4, 44, 73		
8-----	73		
9-----	73		
11-----	73		
12-----	73		
13-----	73		
14-----	73		
15-----	73		
116-----	81		

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 15, § 10	4	Tit. 22, § 21 (h)	69
15	54	240	40
23	45	268	45
25	4, 65	270d	45
26	65	270e	45
28	40, 62	Tit. 25, § 6	44
49	45, 81	201	17
72	54	Tit. 26, § 614	45
77k	54	619 (b)	45
77t (b)	65	1523 (a)	45
77t (c)	81	1569	4
77v (a)	54	1569 (d)	54
77v (b)	45	1610 (a)	69
78i (e)	54	1645 (c)	17
78r	54	1645 (d)	54
78u (c)	45	1670 (b) (2)	54
78u (e)	65	1672-1673	13
78u (f)	81	Tit. 28, § 12	6
78aa	54	13	77
79r (d)	45	41 (1)	13
79r (f)	65	41 (26)	22 (T), 65 (T), 67
79r (g)	81	44	4
79y	54	45	3, 4, 7, 12, 55
96	54	45a	24
99	54	46	65
124	54	47	40, 62, 65
127	44	47a	62 (T)
522	81 (T)	48	24
715d (c)	81 (T)	71	81
Tit. 16, § 797 (g)	45	72	81
820	81	73	81
825f	45	74	81
825m (b)	81	75	81
825p	54	76	81
831x	81	77	81
Tit. 17, § 25	81 (T), 81	78	81
Tit. 19, § 199	69	79	81
274	54	80	12, 81
508	8	81	81
1333 (b)	45	82	81
1333 (c)	81	83	81
Tit. 20, § 52	44		
Tit. 21, § 14	81		

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 109	4	Tit. 28, § 415	47
111	19	416	47
113	4	417	47
115	4	417a	47
116	4	418	47
117	4	423	47
118	4, 60(T)	424	47
122	69	c.14	81
225	73	§ 489	69
226	73	503	4
227	62, 73	556	79
227a	62, 73	567	79
228	73	568	79(T), 79
228a	73	572	81
230	73	574	69
345	72	600a	45
349a	72	600c	45
350	69	600d	45
376	64	601	45
377	81	602	45
377a	81	603	45
377b	81	631	43
377c	81	635	43
378	65	636	45
379	65	637	43
380	40, 62, 65	639	26, 28, 30
380a	40, 62, 65(T), 65, 72	640	26, 30
381	11, 65	641	26, 30
382	65	642	28
383	65	643	26
384	2	644	26, 27
391	59, 61	646	26
397	1, 2	647	45
398	1, 2	648	45
399	12, 15	654	45
400	57(T)	655	45
400(3)	49	661	44
401	24(T), 24	662	44
411	47	663	44
412	47	664	44
413	47	665	44
		666	44
		670	44

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 671	44	Tit. 28, § 744	64
672	44	745	64
673	44	746	64
674	44	747	64
675	44	748	64
676	44	749	64
677	44	750	64
678	44	755	64
679	44	756	64
680	44	757	64
681	44	758	64
682	44	759	64
685	44	760	64
687	44	762	3, 11
688	44	763	4, 12, 55
689	44	764	52, 75
695	44	766	3, 4
695e	44	767	1, 4
711	37 (T), 45 (T),45	768	40
713	45 (T),45	769	40
721	4	770	38
722	4	772	39
723	1, 2	773	38, 39, 52
723b	1, 2, 35, 81	774	13
723c	1, 2, 35, 38, 81	775	13
724	1, 2, 55	776	46, 63, 75
725	43, 81	777	1, 15, 61
726	64	778	25, 81
727	69	779	25
729	69	780	25 (T),25
730	1, 2	785	55
731	83	786	69
734	42	811	69
737	64	813	79
738	64	815	54
739	64	817	54
740	64	821	54
741	64	825	54
742	64	829	11, 54
743	64	830	54
		832	54, 72, 73
		833	54
		834	54

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 28, § 835	54	Tit. 29, § 160(g)	81 (T)
836	54	160(i)	81 (T)
838	4, 69	161	45
839	4, 69	Tit. 30, § 32	54
840	59, 62, 69	Tit. 31, § 46	44
841	62, 69	195	69
842	54, 69 (T), 69	227	13
843	64, 69	232	41, 54
844	64, 69	234	54
845	64, 69	725v	67 (T)
846	69	Tit. 33, § 495	81
847	69	506	45
848	69	916	69
849	69	918	69
850	69	921	81 (T)
851	67 (T)	926	54
852	67 (T)	Tit. 34, § 365(c)	69
861a	72, 73	Tit. 35, § 40d	8
861b	72, 73	54	45
862	72, 73, 75	55	45
863	72, 75	56	45
864	72, 75	67	54
865	75	69	8, 54
866	75	71	54
867	73	72a	4
868	72	Tit. 38, § 11g	44
869	69, 72, 73	54	69
870	54, 62, 72, 73	133	45
872	72, 73	393	69
873	72	445	4, 22, 45
874	62, 69, 72, 73	618	69
875	46, 52	Tit. 40, § 120	81
902	4	238	44
906	54	258	81
Tit. 29, c. 6	65 (T)	270b	17
§ 52	65 (T)	270c	44
53	65 (T)	276a-2(b)	24
107	73	c. 7	81
159	81 (T)	Tit. 41, § 39	45
160(e)	81 (T)	Tit. 43, § 57	44
		58	44
		59	44
		83	44

U. S. Code	Federal Rules of Civil Procedure	U. S. Code	Federal Rules of Civil Procedure
Tit. 43, § 175-----	69	Tit. 47, § 406-----	81
Tit. 45, § 88-----	81	409 (c)-----	45
153p-----	54, 81	409 (d)-----	45
157 3d (h)-----	45	412-----	44
159-----	81 (T)	Tit. 48, § 1371o-----	69
185-----	81	Tit. 49, § 12 (2)-----	45
222 (b)-----	45	12 (3)-----	45
Tit. 46, § 38-----	54	14 (3)-----	44
823-----	44	16 (2)-----	54
829-----	54	16 (13)-----	44
941-----	54	19a (i)-----	44
1124 (b)-----	45	19a (l)-----	81
1227-----	54	20 (9)-----	81
Tit. 47, § 11-----	81	44-----	40, 62
13-----	4	74 (g)-----	69
154 (m)-----	44	97-----	22
206-----	54	173a-----	45
401-----	54	321 (c)-----	4
401 (a)-----	81		

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