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ONE YEAR OF OUR FEDERAL RULES

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I

"The twelve jurors were all writing very busily on slates. 'What are they doing?' Alice whispered to the Gryphon. 'They can't have anything to put down yet, before the trial has begun.'

"'They're putting down their names,' the Gryphon whispered in reply, 'for fear they should forget them before the end of the trial.'"¹

Although the story doesn't tell us so, this dialogue between Alice and the Gryphon may have referred to a federal trial any time prior to September 16, 1939. Since then, however, the new federal rules have gone into effect.² There have been trials going on under them for over a year, and it is hoped that the Gryphon, if asked again, would give Alice a different view of federal procedure.

The history of the adoption of the rules, like that of every major achievement in the legal field, reveals a success gained only after a long and tedious fight. The spark that started this sustained drive resulted from Roscoe Pound's reading to an American Bar Association meeting his treatise on "The Causes of Uncertainty and Delay in the Administration of Justice."³ A committee was set up by that association to improve

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1. CARROLL, ALICE IN WONDERLAND.

2. The authority for the federal rules is contained in 48 STAT. 106' (1934), 28 U. S. C. § 723b (1935) (at law); 28 U. S. C. § 723c (1935) (union of law and equity). The United States Supreme Court had the equity rule making power from the beginning, I MOORE, FEDERAL PRACTICE (1938) 10. The authority for the United States Supreme Court to make rules for appellate practice is contained in existing federal statutes, which are collected in Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure* (1936) 49 HARV. L. REV. 1303.

3. (1936) 22 A. B. A. J. 784.

the situation revealed by Pound, and under the thirty year guidance of Thomas W. Shelton, of Virginia, it labored, seemingly in vain, in its campaign of education to induce Congress to pass an act authorizing the Supreme Court to promulgate Rules of Court to govern actions at law in the federal courts.

Just as this fight was about to be dropped for want of leadership, after Shelton's death, Attorney General Cummings, as part of his program for improving the administration of justice in the federal courts, espoused the cause. As a result of the efforts of these two men, and of many others, in June, 1934, Congress passed appropriate legislation, and the United States Supreme Court appointed a highly capable and distinguished advisory committee of fourteen members to draw up a set of proposed rules to be submitted to that court. This committee was composed of eminent practicing attorneys and law professors, each of whom was recognized as outstanding in his chosen field. Each brought to the committee the viewpoint of his particular part of the profession. This committee very wisely sought the suggestions and criticism of several thousands of leading attorneys and law groups. After many months of careful research, the committee submitted to the Supreme Court its proposed list of new federal rules.⁴ The Supreme Court, after making a few changes, referred its results to Congress which promptly gave approval. These rules, eighty-six in number, simply, clearly, and concisely written, superseded literally thousands of statutes, yet covered scarcely a hundred small pages. They had been derived largely from present English rules, federal statutes, federal equity rules, and from the best code rules of the code states. They reflected the long and careful study that had gone into their making and represented the best rules of each of the above mentioned groups. While no one jurisdiction had ever had a majority of them, all had been taken from some jurisdiction where they had been given a practical and thorough trial.

In Rule One the purpose of these new rules is stated to be "to secure the just, speedy, and inexpensive determination of every action." To this may be added another but unwritten purpose: to simplify procedure so that the ordinary practitioner, not a specialist in federal procedure, can use the federal courts without fear of technical pitfalls and as securely as he can use his own state courts. This meant the removal of the main obstacle,

4. The Advisory Committee considered and formulated approximately ten drafts over a course of two years. I MOORE, *op. cit. supra* note 2, at 3.

the Conformity Act.⁵ Enacted as a result of the feeling of the members of the bar that they preferred to follow as nearly as possible their local practice in the federal courts, the Conformity Act slowly turned into a boomerang for the state practitioner. As law and equity tended to unite, the ideal of pure conformity was necessarily gone.⁶ The act was held not to apply to such matters as jurisdiction. It was applied to pleading and procedure and not to matters of trial, thus leaving no conformity from the time of going to trial on up through appeal. Whenever particular federal statutes were passed, and thousands of them were passed, they, to that extent, repealed or cut off conformity, and made for more confusion. Practitioners remember that under the act there resulted as many distinct and different systems of federal practice as states in the union, and that there was a tendency to have as many systems as there were federal districts. Federal practice fell exclusively into the hands of federal specialists. If the everyday lawyer, in his everyday practice, got into a federal court and presented his case on its merits it was due to pure luck, or to a kindly judge. He could not possibly foresee the numerous technical pitfalls that awaited him. The desire for a usable common practice in state and federal courts as expressed in the Conformity Act was admittedly a dismal failure, and there was heavy pressure for some kind of reform.⁷ The desirability, however, of a *usable* common practice was stronger than ever. Modern traveling means had greatly enlarged the sphere of business of the judge and lawyer and lent impetus to their desire for a practical common procedure. The result of this demand was the new rules based upon a new idea of conformity, *viz*, that of having the state practice follow a uniform federal system.

Sired with such practicality and expert preparation much was and is to be expected of the new procedure. Yet the fate of these rules, their usefulness and adaptability, depends to a very great extent on just how sincerely the bar and bench co-operate to establish this desired uniformity and to get away from the complex and technical habits of our former procedure. History reminds us of the cold and unsympathetic treatment

5. REV. STAT. § 914 (1878), 28 U. S. C. § 724 (1935).

6. See *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235 (1922); Clark & Moore, *A New Federal Civil Procedure: I. The Background* (1935) 44 YALE L. J. 387; *II. Pleadings & Parties* (1935) 44 YALE L. J. 1291; Clark, *The Challenge of a New Federal Civil Procedure* (1935) 20 CORN. L. Q. 443.

7. The cases in which the United States Supreme Court declared that it was impossible for the federal courts to conform to the state procedure have been collected and cited in an article by Tolman in 23 A. B. A. J. 971.

of the Field Code by the New York courts and bar, and the resultant complexity and inadaptability of that code.⁸

It is the purpose of this article to point out the basic concepts embodied in the new procedure, and to review the cases for the early, formative period to see what treatment the bench and bar have accorded these rules. In doing this all of the relevant decisions handed down since the new rules became effective have been studied, and as many of the important ones as space permits will be specifically considered.⁹

The first new concept under the federal rules, and no doubt the most fundamental, is that expressed in Rules One and Two. Although new to federal practice, these two rules follow in substance the usual introductory sections to code practice which provide for a single action and mode of procedure for all suits of a civil nature whether cognizable as cases in law or equity. Thus we see the federal courts taking over the basic reform of the New York Field Code ninety years later. No longer does the federal system retain the antiquated common law theory of actions being watertight compartments, with no transfer from one to the other. No longer in federal courts will the orderly trial of a cause be delayed or defeated by a party misnaming his theory and bringing his action on the "wrong side" of the court. Today, if you show facts entitling you to relief you are to get that relief regardless of the question of form of action.

An early question raised concerning the new rules was whether or not the old equity rules were superseded by the Act of June, 1934, granting the rule-making power to the Supreme Court. The Act reads, "all laws in conflict therewith shall be of no further force or effect." This is best interpreted to mean that both equity and law claims in conflict therewith are of no further force or effect, and not just law claims alone. It would have been better expressed by stating that the united rules shall supersede inconsistent statutes, rules, and decisions, and the courts have so interpreted the act.

Rule One purports to set out the area in which the federal rules are operative and controlling. It states that the rules govern only procedure in suits of a civil nature. This provision brings forward no new question.

8. See Clark, *A Striking Feature of the Proposed New Rules, etc.* (1936) 22 A. B. A. J. 787, in which he describes the harsh reception of the Field Code. See also, I MOORE, *op. cit. supra* note 2, at 3.

9. The writer has received much help from the advance pamphlets of decisions on the federal rules furnished to the federal courts by the United States Attorney General's office.

There is much authority upon the question of what is procedure and what are suits of a civil nature, and new fact situations must rest upon such precedents.¹⁰

The next section of the rules to be considered is that titled generally "Commencement of Action." Under this classification come Rules Three, Four, Five and Six. As this section deals primarily with the mechanics of getting your case into court, of filing your papers, and of computation of time, an extended discussion of the background of each rule is not warranted. Rule Three states: "A civil action is commenced by filing a complaint with the court." Three reasons make it imperative that the precise moment of the commencement of the suit be known. First, you must know when jurisdiction vests in the tribunal; second, in certain cases it is necessary to determine priorities; third, and very important, is the effect of the Statute of Limitations. Almost all Statutes of Limitations require the suit to be "commenced" or "begun" within a prescribed number of years after the accrual of the right. Not every state defines commencement of the suit in the same way. The Advisory Committee, itself, concluded that Statutes of Limitations are matters of substantive law, and raised the question whether the Supreme Court, under its power to make rules of procedure, could make a rule defining what constitutes the beginning of a suit within the meaning of a state or federal Statute of Limitations. The Committee put a *caveat* in the notes to the bar on that point. However, it would seem that each forum should be able to define when an action begins as a part of its procedure and then look to the state Statute of Limitations to see what the time limitation is.

Rule Four, stating that process is to issue at once after the filing of the petition, creates close harmony with those states designating issuance and delivery of process to the server as the date of the beginning of the action. Provision is made for service by a specially appointed server when substantial savings in travel fees will result. Section (f) of Rule Four deals with the territorial limits of effective service. Prior to these rules some

10. For leading cases upon the questions of what is procedure, and what are civil proceedings, see, *Wayman v. Southard*, 10 Wheat. 1 (U. S. 1825); *Kohl v. United States*, 91 U. S. 367 (1875); *Poyser v. Minors*, 7 Q. B. D. 329 (1881); *Kring v. Missouri*, 107 U. S. 221 (1882); *Beers v. Haughton*, 9 Pet. 329 (U. S. 1835); *Gaines v. Fuentes*, 92 U. S. 10 (1875); *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U. S. 239 (1905); *Lever v. Kneale*, [1937] 2 K. B. 87. See also, *Sunderland, Character and Extent of the Rule-Making Power Granted United States Supreme Court and Methods of Effective Exercise* (1935) 21 A. B. A. J. 404.

federal statutes provided that process might be served anywhere within the limits of the particular state wherein the federal court sat, while other statutes allowed service only within the particular district, and not throughout the state. Some question has been raised as to whether this is merely a procedural change or one of substantive right. The Advisory Committee referred it to the Supreme Court in a note, and the Supreme Court accepted the rule. It does seem that the rule states only that when the court has jurisdiction and venue, its process reaches the confines of the state, and is thus procedural. With Rule Four, Rule Eighty-two must be considered. Rule Eighty-two states that jurisdiction and venue are unaffected by the new rules. Rule Eighty-Two is really surplusage, as jurisdiction and venue are matters of substantive right and not pleading, practice, or procedure, and thus are beyond the scope of the rule-making power of the Supreme Court. The remainder of Rule Four deals with how and upon whom service may be made.

Rule Five provides generally for the serving upon the opponent of practically all the ordinary papers that arise in the suit, including specifically motions, written notices, appearances, demands, offers of judgment, designation of record on appeal, and similar papers.

Rule Six is a general rule dealing with time computation and time enlargement. Its most important and new feature is that it provides that the expiration of the term of court does not affect the power of the court to do any act or take any proceeding in any action pending before it. This provision removes an old, technical provision with only historical justification, which resulted in so called "hard-law."

Highly important is the new philosophy underlying the pleading rules. As expressed by a member of the Advisory Committee, Rules Seven to Twenty-five inclusive are the quintessence of the whole system, and if you can agree with the principles expressed in them, you will probably agree with the principles declared in any of the other rules.¹¹ This philosophy calls for or allows very general pleading with recourse to the liberal discovery process for specific information or evidence. There can be no doubt but that Judge Charles E. Clark, reporter for the committee and then Dean of the Yale University Law School, greatly influenced the Advisory Com-

11. See the address of Judge Clark, reported in *PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES* (Am. Bar Ass'n 1938) 220 ff.; *Cf. CLARK, CODE PLEADING* (1928); Clark, *The Handmaid of Justice* (1938) 23 WASH. U. L. Q. 297; Clark, *The New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure* (1937) 23 A. B. A. J. 976.

mittee and the Supreme Court in the formation of these particular rules on pleading. Judge Clark has long declared his belief that the idea that you can pin the other party down by pleading that demands a specific, narrow, and technical issue is an idle dream as proved by practice. In his writings he clearly revealed that the trend has been away from specialized, detailed pleading. The beginning of this trend, Judge Clark stated, resulted from the reaction to the Hilary Rules, England's first step in procedural reform. Stephen, who wrote those rules, was imbued with the theory that the desirable thing was more, better, and harsher rules calling for highly particularized and technical pleadings. The result was such a miscarriage of justice that England turned toward more lenient pleading, culminating in the English Judicature Act and the union of law and equity. Furthermore, although there were a few parts of common law pleading where a narrow issue was called for, the most general and most used actions were fairly broad in their allegations. Every recent trend in pleading reform has been in this same general direction of simplicity, generality and flexibility of pleading. The federal rules carry still farther this philosophy. A study of the pleading and discovery provisions will bring the conclusion that the Advisory Committee and the Supreme Court accepted Clark's philosophy that it is not the function of the pleadings to prove your case or to supply the place of evidence, as by trapping your opponent into admissions, but that the primary functions are, first, to distinguish the case from all others so that it can be properly routed through the tribunal; and, secondly, to serve as a basis for the binding force of the judgment through the application of the principle of *res adjudicata*. For that purpose it is clear that general pleadings are sufficient.¹² If you need more information from your opponent in order to answer or to further develop your case, the new rules provide a more direct and simple way than by trying to force your opponent to say through pleadings that which he wishes to avoid.

12. Clark, *supra* note 11, 23 A. B. A. J. 976. For further evidence of the intended generality of pleading under the new rules, note the form drawn up and promulgated with the new rules. They illustrate the general simplicity expected in the pleading. For example, Form Nine is a complaint for negligence in an ordinary automobile case. The entire statement of the accident is: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." How different this is from the usual pleading of such cases wherein the attorney puts in several pages of set allegations covering everything from failure to sound horn to defective brakes. Form Nine is no radical innovation. It is copied directly from the official form in Massachusetts (MASS. GEN. LAWS (1932) c. 231, § 147, form 13). Massachusetts in turn got it from the common law form of the action of trespass from Chitty. See 2 CHITTY, PLEADING (9th Am. ed. 1844) 846 *et seq.*

This better way is to use the discovery process designed to give you information which you can use to prepare your case and which can be used as evidence in the trial of your case if relevant. All you need do is to send around a series of relevant questions to your opponent for him to answer, and he is expected to answer to the extent that the answers are not privileged. Appeals in the past have involved a far greater number of procedure points than questions of substantive law. Reversals and retrials for error of procedure have greatly outnumbered those for all other causes.¹³ The more rigid and precise these procedural requirements are, the more grounds they furnish counsel for appeal. The same is true of requirements in pleading. That the Committee and Court recognized this is shown by the brevity of statement allowed. Of course, just how explicit each particular pleading must be in each case depends upon the individual conception of the trial judge as to just how much detail he believes is called for under the new rules. It is here especially that the purpose of the rules can be greatly helped or hampered. Reference to the cases will reveal this individual treatment.

Another provision along the same line provides that the pleadings be cut short fairly soon.¹⁴ No reply is necessary unless the court orders it, or unless there is a counterclaim. Furthermore, the old belief that you are entitled to raise successively and *seriatim* all the objections you have, though they be only in abatement, has been softened a great deal. Certain objections must be included in one motion or they are waived. The demurrer, the time honored instrument of delay, has been abolished, and its place taken by a motion, which can be stripped of its dilatory effect by the court deferring it and certain like motions for hearing at the trial. This the court should do unless it thinks a preliminary hearing will terminate the case. Liberal provisions for amendment and correction of error are made.

Rule Thirteen governing compulsory and permissive counterclaims and cross-claims is substantially Equity Rule Thirty broadened to include legal as well as equitable claims.¹⁵ It carries out the modern tendency of very liberal provisions concerning both the subject matter of, and the parties to, a counterclaim or cross-claim. It is another move to limit the

13. See Tolman, *Historical Beginnings of Procedural Reform Movement in This Country* (1936) 23 A. B. A. J. 783.

14. See Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure* (1937) 47 YALE L. J. 50.

15. For a discussion of matter of federal jurisdiction and venue in regard to cross-claims and counterclaim, see Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393.

number of possible lawsuits to as few suits as practical. Remembering that any claim which a defendant has against the plaintiff, or any claim which a third-party defendant has against the third-party plaintiff is a counterclaim, and that a cross-claim is a claim by a party against a co-party, it is noteworthy that cross-claims are never compulsory but are governed solely by permissive provisions. There was some suggestion to the Advisory Committee that all counterclaims of whatever nature, whether arising out of the same transactions or not, be treated as compulsory. Since this would force a party to submit all his claims to a forum of his opponent's choosing, often complicate pleadings, and force a party to choose while he may still be in doubt as to the existence of certain claims and the advisability of litigating them at that time, it was decided best to allow him to use his own judgment as to whether unrelated claims should be pleaded.¹⁶

The rules governing joinder of claims aid in rounding out the picture of a simple, flexible system. Rule Eighteen provides for joinder in one action of all claims which a plaintiff or defendant has against the other. This allowance of unlimited joinder of actions does away with the narrow method of the common law and codes of breaking up a set of operative facts into causes of action with joinder of actions problems. Under the common law there was no sensible rationale as to what actions could be joined.¹⁷ An action in trespass and an action in case could not be joined although they involved the same underlying facts. Yet totally unrelated trespasses could be pleaded in the same action. This illogical result came from using as the joinder test the question of whether or not the actions came under the same writ. Trial convenience was disregarded. Equity courts were more practical and used a test based somewhat upon trial convenience with a view toward settling the entire controversy in one suit.¹⁸ Under the various state codes the rules and decisions as to what could be properly joined were narrow and often illogical.¹⁹ The federal rules, in recognizing that the problem of joinder of actions is solely one of trial convenience and that it does not matter how many causes of action are plead if the court can order a separate trial whenever practical, are to be greatly commended.

16. For discussion, see I MOORE, *op. cit. supra* note 2, at 669.

17. SHIPMAN, COMMON LAW PLEADING (3rd ed. 1923) § 202; 1 TIDD'S PRACTICE (2d Am. ed. from 8th London ed.) 10, wherein is discussed the impossibility of rationalizing the common law rule.

18. STORY, EQUITY PLEADINGS (8th ed. 1870) § 278 ff.

19. See 2 MOORE, *op. cit. supra* note 2, at 211ff; Sunderland, *Joinder of Actions* (1920) 18 MICH. L. REV. 571.

Rules Nineteen and Twenty deal with necessary and permissive joinder of parties. Under the common law, joinder of parties was allowed only if the parties had joint interests. The idea of a liberal allowance of joinder of parties in order to clear up an entire dispute came from the equity practice. In 1848, when the New York Code was adopted, the codifiers stated that they were attempting to apply the equity rule to all actions. They were unfortunate in stating that there could be joinder only when there was an "interest in the subject of the action *and* in the relief to be demanded." If instead of the word "and" the word "or" had been used the rule would have then approximated the equity rule. The courts have construed the rule to require both an interest in the subject of the action *and* in the relief demanded, although the courts have tried to soften this narrow result by liberalizing their conception of the two interests demanded. The new rules completely avoid the problems incurred under the Codes and premise the relevant rule upon whether or not there is a common question of law or fact, arising out of the same transaction, occurrence, or series of transactions of occurrences. A recent law review article²⁰ raised the question or whether or not the new rules should have provided for absolutely free joinder of parties as in joinder of claims. Such a provision would undoubtedly have carried to its ultimate conclusion the philosophy that all matters in litigation between the parties should be brought out for disposition at one time. Section (b) of Rule Forty-two gives the court the discretionary power to order separate trials, or to make any other order necessary to prevent delay or injustice. Rule Twenty-two concerns relief similar to that accorded by actions in the nature of a bill of interpleader. It provides that persons having claims against the plaintiff which do or may expose the plaintiff to double or multiple liability may be interpleaded. This does away with the old equitable interpleader requirements, as that of no interest in the stake, and seems to allow what could be done under the general joinder rule.²¹ The federal interpleader act with its process that may run throughout the country is specifically continued.

Rule Twenty-three concerns class suits. It is the equitable principle of class suits stated more clearly and in a more usable form.²²

20. Comment (1937) 37 COL. L. REV. 462.

21. Clark, *supra* note 11, CLEVELAND INSTITUTE, at 263.

22. See Moore & Cohn, *Federal Class Actions* (1939) 32 ILL. L. REV. 307, *Federal Class Actions—Jurisdiction and Effect of Judgment* (1938) 32 ILL. L. REV. 555; Lesar, *Class Suits and the Federal Rules* (1937) 22 MINN. L. REV. 34; Clark, *supra* note 11, CLEVELAND INSTITUTE, at 264.

Rule Twenty-three (a) is divided into three parts. Several law review articles²³ by eminent professors have appeared recently concerning this rule, and it is the opinion of these authors that as to the first and second subdivisions of the rule, matters of jurisdiction could be held to be settled by the representative, and his citizenship would be controlling, and the judgment rendered would be binding upon those whom he represents. As to the third subdivision, those writers believe that that provision amounts only to a kind of joinder, and that neither jurisdiction nor citizenship depends upon the representative alone, but upon all represented, and those not personally in the suit would not be bound by the judgment. Part (b) deals with secondary actions by shareholders. It is but a restatement of Equity Rule Twenty-seven. Although it might be considered as affecting substantive rights, if of first impression, the Supreme Court has regarded it otherwise in old Equity Rule Ninety-four, re-enacted in Equity Rule Twenty-seven.²⁴ Part (c) deals generally with dismissals or compromises. Rule Twenty-four concerns intervention. It is intended to be only a classification of the existing law on that subject.²⁵

Rule Twenty-five concerning substitution of parties, is but a carrying over of the provisions of the equity rules, and the statutory rules with a few additions.

Rule Fourteen, concerning Third Party Practice, brings to federal procedure a modern innovation in law and equity, although well known in admiralty practice.²⁶ Its main objective is to facilitate the complete disposition of the whole controversy between the parties to it in one proceeding. It brings another sensible shortcut to our system. It had been developed and used in England and in some American states in a restricted form, usually allowing the citing in by the defendant of some one liable over to the defendant for the judgment.²⁷ Under the new federal rule, patterned much after the admiralty rule, the practice is more liberal. The defendant may cite in a person liable to him or to the plaintiff. Thus, wherever joint and several liability exists the whole controversy can be

23. See note 22, *supra*.

24. See the address of the Hon. William D. Mitchell, Chairman of the Advisory Committee of the Supreme Court, reported in PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES (Am. Bar Assn. 1938) 184.

25. See Moore and Levi, *Federal Intervention: I. The Right to Intervene and Reorganization* (1936) 45 YALE L. J. 565; *Federal Intervention: II. The Procedure, Status, and Federal Jurisdictional Requirements* (1938) 47 YALE L. J. 898.

26. United States Supreme Court Admiralty Rules (1920) Rule 56.

27. See official notes to Rule 14, Federal Rules of Civil Procedure; See I MOORE, *op. cit. supra* note 2, at 741 ff.

settled between all the parties in one proceeding. The same result may be obtained in situations where contribution among the parties is allowed. Rule Fourteen does not, of course, abridge, enlarge, or modify substantive rights. Some substantive right, such as that of reimbursement, indemnity, or contribution, must exist. Then Rule Fourteen expedites the presentation, and in some cases accelerates, that right. It not only saves time and money that might be spent on a second trial, but also assures consistent results from identical or similar evidence. Whether or not one may implead rests in the discretion of the court. The third party defendant does not merely by the impleader become an original defendant. True, if the defendant impleads some one liable to the plaintiff, the plaintiff may amend his pleadings to assert a claim against the impleaded party, but he is not compelled to do so.²⁸

A serious question raised by Rule Fourteen is whether or not the third party claim requires independent jurisdictional grounds or whether it should be regarded as an ancillary claim and hence remove jurisdictional and venue difficulties. Commentators have urged the latter view.²⁹ This was probably the intent of the Advisory Committee, for official form twenty-two of the new rules, giving an example of third party complaint, unlike the form for original complaints, omits any allegation of jurisdiction. The question was raised at the Cleveland symposium, and others, as to how this rule would affect the liability insurance companies.³⁰ The opinion seemed to be that where the insurer appears for the defendant and takes charge of the defense, under the ordinary policy providing that the insurer must fully cooperate with the insured in the defense, and has not disclaimed his contingent liability to the defendant, it is not possible for the insurer to be made a party merely because of that liability over. On the other hand, if there is question as to the ultimate liability of the insurer for the claim, under his contract with defendant, he can be cited in. Of course, whether such citing in will be allowed rests in the sound discretion of the court, and it should act to prevent bias from entering needlessly into the trial.

Another very important section of the new rules is that dealing with discovery. At common law there was not very much opportunity for

28. I MOORE, *op. cit. supra* note 2, at 743.

29. Clark and Moore, *A New Federal Civil Procedure: II. Pleadings and Parties* (1935) 44 YALE L. J. 1291, 1322; Shulman and Jaegerman, *Some Jurisdictional Limitations on Federal Procedure* (1936) 45 YALE L. J. 393, 421.

30. See PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES (Am. Bar Assn. 1938) 252.

discovery. The common law system grew up in a "sporting" society, and much of this game theory of hiding each party's position from the other became a part of a lawsuit. One never knew what were the real and the false issues, or what diplomatic diversions were promulgated.³¹ Under many of our code practice acts with their restricted discovery provisions, this idea lingers on. Prior to the new rules there was practically no provision for discovery in federal practice. There was recourse to only four possible sources, and they were very limited. Two of these sources were statutes which were in part drafted solely to aid in obtaining proof, and that was the condition precedent to using them.³² Both were very limited in scope and use even for evidentiary purposes. The other two sources were equity rules. Equity Rule Forty-seven authorized the taking of deposition of named witnesses for use at trial "for good and exceptional cause for departing from the general rule." The purpose of this rule was not discovery but proof. It had practically no value as a discovery process. Equity Rule Fifty-eight was the only provision in the entire federal system that was intended primarily for discovery. It provided for general discovery, discovery of documents, and admissions. But it was a very restricted, inadequate, and ineffective rule. Written interrogatories were required, and there was no provision for oral examination. Evasive answers were easy to draft and were the vogue. Furthermore, the scope of the rule was extremely narrow. Its provisions were available only to ascertain facts relating to a party's own case, and not to that of his adversary. Only parties could be interrogated, and not witnesses. And the admissions section applied only to execution and genuineness of documents and not to the admission of facts in general. No resort was possible to state discovery statutes under the Conformity Act because the federal statutes were held to provide a complete system.³³

In keeping with the philosophy stated in the pleading discussion, the new rules purport to provide a systematic, complete, and liberal scheme of discovery before trial. All restrictions are removed on the right to take depositions, whether they are to be used for purpose of discovery or evidence. The party or witness may be examined regarding any matter

31. 3 WIGMORE, EVIDENCE (2d ed. 1923) § 1845 *et seq.*: McCash, *Discovery Before Trial* (1934) 20 IOWA L. REV. 68.

32. 17 STAT. 89 (1872), 28 U. S. C. § 644 (1934), concerning *dedimus potestatem* and perpetration of testimony. 17 STAT. 89 (1872), 28 U. S. C. § 639 (1934), concerning depositions *de bene esse*.

33. *Ex parte Fisk*, 113 U. S. 713, 723 (1885).

not privileged which is relevant to the suit. To protect the party to be examined, the court, upon motion of the party and for cause shown, may restrict the scope of the examination. The deposition may be taken after the answer is served, as of course; and before answer, by leave of court. Disclosure may be had as to the identity and location of persons having knowledge of relevant facts, or documents. Perpetuation of testimony is allowed. A very extensive and effective discovery by way of admissions of particular facts and documents is provided. Physical and mental examinations are authorized in certain circumstances. Effective methods of mechanics for taking the depositions either orally or by written interrogatories are provided. The parties themselves may stipulate in writing that the depositions can be taken before any person, at any time, or place, upon any notice, and in any manner. The admissibility of depositions as evidence is more liberal. Subpoenas may be employed in connection with the taking of depositions. The court has ample power to assess heavy penalties for failure to keep good faith with these discovery and evidentiary provisions. The result is an excellent method for an early disclosure of the real points of dispute between the parties, and of obtaining and making admissible evidence. The provisions abandon the supposition that the pleadings are the only or chief basis of preparation for trial. In turn this is in keeping with the view that the pleadings are only to notify the opposing party as to the general nature of the claim or defense, and to reveal enough to allow the case to be properly routed through the tribunal, and to allow the principle of *res adjudicata* to be applied.

As previously stated, in the ordinary case upon the pleadings as usually drawn there are many matters apparently in issue which are not actually in issue at all. Much waste of time and money results, and confusion abounds in preparing to meet such issues. We have seen that the pleading and discovery provisions of the new rules are designed primarily to remedy this situation. The third, and perhaps the most practical, of the provisions designed to alleviate such dilatory and camouflaging methods is that providing for pretrial procedure, which creates a machinery whereby the court as well as the parties may participate in a thorough pretrial investigation and sifting of the issues and evidence, with a view toward the trial thereof, if necessary. The parties, if left alone, may not arrive at any agreements as to the real issues and the expedition of the trial of the case, even with the aid of the liberal discovery and evidentiary provisions found in Rules Twenty-six to Thirty-seven. The origin of this pretrial procedure was in England, where a similar system of preliminary

hearings for discovery and identification of the actual issues was developed.³⁴ Several American jurisdictions, notably Boston, Cleveland, Detroit, and Los Angeles, had already demonstrated its success by actual use.³⁵ The federal rule provides that in any action the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider, first, the simplification of the issues and the elimination of those not really in dispute; second, the necessity or desirability of amendments to the pleadings; third, the possibility of obtaining admissions of facts and documents which will avoid unnecessary proof; fourth, the necessity of and the limitation of the number of expert witnesses; fifth, the advisability of a preliminary reference to a master; and lastly, other matters that may aid in the disposition of the action. At the conclusion of the conference the court is required to enter an order reciting the action taken at the conference, the agreements effected, and other such matter which is to govern the trial to come. The success of this rule depends to a very great extent upon the use put it by the trial judges and the cooperation of the attorneys. It is already proving very successful in federal practice.³⁶ It should go far to remove sham, surprise, delay, expense, and confusion from the preparation and trial of a case. It should not only expedite litigation but also encourage settlements by revealing the real value of claims.

Rules Thirty-eight to Fifty-three, inclusive, in keeping with the previous rules, provide for the doing away with technicalities during trial, and make for a fair, thorough, and speedy trial. Some of the more notable of these provisions are: First, the constitutional right to trial by jury remains inviolate, but in order to remove confusion Rule Thirty-eight provides that you must serve in writing a demand for a jury trial or you waive your right to one. Even though you have waived the right to a jury trial, the court in its discretion, upon motion, may grant one. Further, no longer when both parties move for a directed verdict is the right to a jury

34. See official notes to Rule 27, Federal Rules of Civil Procedure.

35. Detroit, faced with a docket of 4965 cases in 1935, disposed of 40.6 percent at pretrial hearings. In 1936 Detroit was faced with a docket of 5834 cases and 49.4 percent were disposed of at pretrial hearings. In 1937 Detroit disposed of 55.1 percent of its docket in the same way. For a discussion of the data and the pretrial procedure administration see Sunderland, *The Theory and Practice of Pre-trial Procedure* (1937) 36 MICH. L. REV. 215.

36. See discussion by Judge Sweeney of the United States District Court for the Eastern District of Mass., entitled *Expert Use of Pretrial Docket in Federal Court*, in (1939) 23 JOUR. OF THE AMERICAN JUDICATURE SOCIETY 11, wherein Judge Sweeney reports that 55 percent of his jury docket disappeared after pretrial conference.

trial waived. No longer does a party waive his right to offer further evidence by moving for a dismissal on the ground that upon the law and the facts the plaintiff has shown no right to relief. Second, the voluntary non-suit, so unfair and overused in many states is sensibly restricted in Rule Forty-one. The right to a voluntary non-suit and its effect is clearly defined. Third, proof of official documents is made easy. Dean Wigmore had written the Advisory Committee disclosing the confusion resultant from the innumerable federal statutes upon the subject. Rule Forty-four is a codification of the statutes, and clearly states what need be and can be done. Fourth, Rule Forty-two declares the broad power of the court to order consolidation for trial of cases involving the same question of law or fact, and the power to order separate trial in cases where there are too many issues in one suit. Fifth, provision is made for the selection of alternate jurors before trial, thus removing fear of mistrial because of the loss of incapacity of a juror. Sixth, there is now a check, by use of interrogatories, on the illogicality or unreasonableness of the verdict, with provision for granting of partial new trials in certain circumstances. Seventh, the clearing up of the problem left by the cases of *Slocum v. New York Life Insurance Company*³⁷ and *Baltimore & Caroline Line v. Redman*.³⁸ Those two cases left it doubtful whether or not the trial judge could, after verdict, go back and grant a motion for a directed verdict previously made. The *Redman* case seemed to indicate that there was no violation of the right to a jury trial by granting the motion in the form of a motion for judgment not withstanding the verdict, if the trial judge had taken the original motion under advisement. The new rules provide that the motion for a directed verdict is automatically reserved, and a party can move for the entry of a judgment *non obstante* verdict any time within ten days after verdict. The trial judge can grant that motion, and if he is wrong in granting or refusing it the appellate court can correct his ruling. Eighth, the requirement for taking formal exception to rulings is abolished. One need only make a clear objection and state his reason therefor. Ninth, and lastly, the rules contain a very liberal evidence rule, under which the evidence is admissible in federal courts if it would be admissible either under a federal statute, under federal decisions in equity practice, or under state statutes or decisions. The Advisory Committee in formulating this rule stated that they believed that there should

37. 228 U. S. 364 (1913).

38. 295 U. S. 654 (1935).

be drawn up in code form a single set of evidence rules, but that some other committee should do that work.³⁹ It is interesting to note that the American Law Institute has recently announced it is undertaking to formulate a Modern Code of Evidence with Professor Edmund M. Morgan of Harvard Law School, as reporter.⁴⁰ He will have the help of Dean John H. Wigmore, and others. This code is being formulated for the purpose of adoption by the federal or state jurisdictions if they wish to do so.

Rule Forty-three (b) allows a party to call on an adverse party and interrogate him by leading questions and contradict and impeach him as though he had been called by the adverse party. Rule Forty-three also specifically limits the scope of cross-examination to the subject matter in chief when a party calls an adverse party or an unwilling or hostile witness. There is no mention as to what the rule would be in other situations, yet there is little doubt but that the former federal practice of limiting cross-examination to the subject matter of the direct examination is continued. When the Advisory Committee was drafting the final report it inserted a rule allowing cross-examination on any question material to the case, and the Supreme Court struck that rule out. It could only have intended by such action to retain the former rule.

Equity Rule Forty-six, providing that if evidence was offered and refused by the court, a record must be made of it so that the appellate court could look to it and enter whatever decree or order the lower court ought to have entered on that evidence, is now Rule Forty-three (c). Rule Fifty-two states that findings of fact shall not be set aside unless clearly erroneous and that the court must make findings of fact and state them and the conclusions of law. This is in substance the former equity rule.⁴¹ The former rule at law provided that the findings of the court had the effect of a verdict and on review the findings could not be set aside if there was substantial evidence to support them.⁴² The appellate court could not decide the findings were wholly against the weight of the evidence. Certainly the rule should be the same when the judge finds the facts regardless of whether it is in an action at law or in equity. This new federal rule removes that difference. It further provides that the findings of a master so far as adopted by the court shall be considered as the findings of the

39. Mitchell, *supra* note 24, at 186.

40. (1939) 25 A. B. A. J. 380.

41. See Equity Rule 70½, as amended Nov. 25, 1935, and 24 STAT. 506 (1887), 28 U. S. C. § 764 (1934).

42. 13 STAT. 501 (1865), 28 U. S. C. §§ 773, 875 (1934).

court. Rule Fifty-two, also concerning masters, is based largely on the equity rules.⁴³ The master, like the judge in jury cases must also report all evidence offered, with his grounds of exclusion. In non-jury cases he must file the evidence with his report. In jury trial cases the evidence is never reported, and the findings are only evidence for the jury to consider.⁴⁴

Under the sections concerning judgments the majority of the provisions will be found to be patterned after the usual code practice. Most noticeable are the provisions concerning summary judgments and declaratory judgments.

Summary judgments have been used extensively in England for over half a century and in many of our states.⁴⁵ Our federal courts under the Conformity Act had recognized the state summary judgment acts. Most of those state acts were much too limited in scope and did not apply to all actions. Summary judgment procedure under the new rules is just a simple method for promptly disposing of *any* action in which there is no genuine issue as to any material fact. It cares for those situations wherein the pleadings show the existence of a formal dispute, which may not be an actual dispute because it may be an assertion or denial which the pleader knows he cannot prove, or which has no substance. Under the present federal procedure, upon application, the court looks at the pleadings, depositions on file, if any; admissions on file, if any; and affidavits, if any, on file either in support or in opposition to the motion. If no genuine issue is found and the moving party is entitled to judgment as a matter of law, such judgment will be rendered. The constitutional right to a jury trial is not violated, for if there is no issue to go to the jury there is no right to a jury trial. Rule Fifty-six (d) provides that in case the summary judgment is not rendered the hearing shall serve as a pre-trial hearing in accordance with Rule Sixteen.

Rule Fifty-seven is the Declaratory Judgment rule, and carries over into our new federal practice the provisions of the fairly recent federal statute for declaratory judgments.⁴⁶ Rule Fifty-seven adds to the avail-

43. See notes 41 and 42, *supra*.

44. For constitutionality of rule see *Ex parte Peterson*, 253 U. S. 300 (1920); *Graffis v. Woodward*, 96 F. (2d) 329 (1938).

45. See official notes to Rule 56, Federal Rules of Civil Procedure. 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.

46. 48 STAT. 955, 28 U. S. C. § 400 (1934); Judicial Code § 274d (1915).

ability of that declaratory judgment act which has already proven very effective in practice. The rule was worked out in collaboration with Professor Borchard of the Yale Law School, who had aided in the drafting of the federal statute on the subject.⁴⁷ Inasmuch as a controversy often involves only an issue of law or undisputed or relatively undisputed facts, the declaratory judgment practice frequently operates in the nature of a summary judgment proceeding.⁴⁸ Both the summary judgment proceeding and the declaratory judgment proceeding are of great value in expediting litigation and saving needless cost.⁴⁹

Rule Fifty-nine, concerning new trials, incorporates those provisions for new trials that exist at common law and for hearings in equity. The Advisory Committee wisely recognized the practical impossibility of attempting to set out the results of the many statutes and decisions that affect the granting of new trials, or to formulate specific rules.

Rule Sixty deals with relief from judgments or orders. Rule Sixty-one states the effect of harmless error and specifically orders the court to disregard at all stages of the proceeding all errors not affecting the substantial rights of the parties. Rule Sixty-two deals with the stay of proceedings. Prior to this rule the subject was in a very confused state because of several federal statutes that together failed to make up any consistent system. The Advisory Committee took the provisions of all these federal statutes, incorporated them, and added to them so as to fill in the former gaps.⁵⁰

Rules Sixty-four and Sixty-nine concerning seizure of person or property, and executions, adopt the federal law which provided that if there are existing United States Statutes they are to be applied; if not, local practice is to govern. The applicable state law is specifically stated to be that of the time when the remedy is sought. Rules Sixty-five and Sixty-six are largely re-enactments of the previous practice. Rule Sixty-seven is designed to continue in effect various scattered statutory provisions for deposit in court of moneys in certain cases. Rule Sixty-eight, on offer of judgment, is new to the federal practice except to the extent

47. Clark, *supra* note 11, CLEVELAND INSTITUTE, at 323.

48. See official Notes to Rule 57, Federal Rules of Civil Procedure.

49. For a discussion of the practice of declaratory judgment, see BORCHARD, DECLARATORY JUDGMENTS (1934), pertinent cases on the declaratory judgment statute are: *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227 (1937); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288 (1936).

50. Clark, *supra* note 11, CLEVELAND INSTITUTE, at 325; see official notes to Rule 62, Federal Rules of Civil Procedure.

the federal courts in certain states followed the state practice. It is based upon those state statutes and affords a means of stopping the running-up of costs when the defendant admits that part of the claim of the plaintiff is good, but intends to contest the balance claimed. By making an offer of judgment of the amount he admits is due he relieves himself of costs as to such admitted amount which would otherwise ordinarily accrue thereafter, unless the plaintiff recovers more than the offer. If the plaintiff recovers more than the offer of the defendant, the defendant must pay all costs just as though he had not made any offer. If the offer of judgment is not accepted it is not admissible at the trial as an admission by the offeror, and he is free to contest the whole claim.

Rule Seventy, entitled "Judgment for Specific Acts; Vesting Title," is important and contains much that is new to federal practice. It concerns situations where the defendant is ordered to do something and does not do it, and perhaps removes himself from the jurisdiction of the court. Rule Seventy provides that if a writ of attachment or sequestration against his property or adjudging him in contempt does not accomplish the ordered act, the court may, when the property is in its jurisdiction, divest him of the title and vest it in the plaintiff by virtue of its own order. The court may also appoint some officer to do the act in behalf of the recalcitrant defendant. Thus two methods are provided by which the court may pass title to either real or personal property without participation of the owner. There was much controversy among the Advisory Committee as to whether or not a federal court judgment could pass title to property, that ordinarily being a state question.⁵¹ After much study the Advisory Committee sent the rule to the Supreme Court, which adopted it.⁵²

Rules Seventy-two to Seventy-six, inclusive, concern appeals. Prior to these new rules in order to take an appeal to a federal court of appeals you had to file a petition for leave to appeal, including with it an assignment of errors, and obtain an order from the district judge allowing the appeal. Then a citation had to be issued and served on the respondent advising him to appear in the appellate court within forty days. Under the

51. See the address of Mr. Robert G. Dodge, also a member of the Advisory Committee, reported in *PROCEEDINGS OF THE CLEVELAND INSTITUTE ON FEDERAL RULES* (Am. Bar Assn. 1938) 328, 329.

52. *Ibid.* For authority that should aid in sustaining Rule 70, see *HUSTON, ENFORCEMENT OF DECREES IN EQUITY* (1915) cc. 1, 5; 1 *CHAFEE and SIMPSON, CASES ON EQUITY* (1934) 70; *Langdon v. Sherwood*, 124 U. S. 74 (1888); *Clark v. Smith*, 13 Pet. 195 (U. S. 1839); *Clarke v. Chicago, B. & Q. R. R.*, 62 F. (2d) 440 (C. C. A. 10th, 1932) *cert. denied*, 290 U. S. 629 (1933). The problem is discussed at length by Evans, *Problems in the Enforcement of Federal Judgments* (1939) 4 Mo. L. REV. 19.

new rules the mechanics of taking an appeal are much more simple. The idea that an appeal is entirely a new case is gone. No longer need a citation be issued and served. You merely file with the clerk of the district court a notice of appeal. This is the only jurisdictional act. The clerk then notifies the other parties. The manner of making up the record also has been greatly simplified. Rule Seventy-five does not require the narrative form of record nor forbid its use. It allows a party to offer a narrative statement and permits his adversary to reject it and substitute the question and answer form. If such rejection is unreasonable and causes added expense, such expense may be placed by the court upon the rejecting party. Inasmuch as the virtues of the narrative form of testimony have long been questioned by the bar and bench alike, this provision should be most welcome.⁵³

In considering the rules governing appeal to the Supreme Court the Advisory Committee wanted to use the same system as that used in taking appeals to the circuit courts of appeal. However, the Committee was a bit diffident about suggesting to the Supreme Court that it did not like its system, so the Committee prescribed the existing system on appeals from the district court to the Supreme Court, hoping that the Supreme Court would ask it to revise that and adopt the method of appeals to the circuit court of appeals. However, the Supreme Court did not do it, and to take a direct appeal to the Supreme Court you must follow the old practice, codified in Rule Seventy-two, of filing your petition, your assignment of errors, getting an order allowing you to appeal, having a citation issued, and so on.⁵⁴ Rule Eighty-one sets out those civil proceedings to which the new rules do not apply, or apply only in part. That rule also abolishes the writs of *scire facias* and *mandamus*, but in the appropriate cases relief by motion or other proper action is provided for. Section (c) provides that these rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders.

Rule Eighty-two states that which has often already been referred to and discussed in connection with other rules. It provides that the new rules are not to extend or limit jurisdiction or venue.

Rule Eighty-three provides that in all cases not provided for by rule

53. Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals* (1929) 42 HARV. L. REV. 483; Stone, *The Record on Appeal in Civil Cases* (1937) 23 VA. L. REV. 766.

54. Mitchell, *supra* note 24, at 359.

the district courts may regulate their practice in any manner not inconsistent with these rules. This provision closes all gaps in the rules. It prevents any part of the Conformity Act from surviving. It permits judges to decide the unusual or minor procedural problems that arise, and cares for situations that can't be forecast. However, it was the intention of the Advisory Committee and the Supreme Court that this power not be used to add to or complicate the simple procedure by the rules. In line with this, Chief Justice Hughes' report of the 1938 conference of the senior circuit judges of the federal courts, discloses that each senior circuit judge is to communicate with his respective district judges to secure uniformity of local rules and to keep them in line and in spirit with these new federal rules.⁵⁵ With such a step being taken there is little fear that local court rules will subvert the spirit and purpose of this new code. In conclusion, it can be justly said that these new rules have given to federal practice an efficient and highly practical turn. They have been met with good faith and generous co-operation by the bench and bar. Their formation, reception, and use is an achievement of which the bench and bar alike may well be proud. It proves the previous underestimation of the interest of those groups in advanced legal education, and shows that they are more alive to their responsibilities and opportunities than ever before. Unlike the days of the adoption of the David Dudley Field Code, this reform movement has not been found to be too far advanced for the bench and bar.

Yet more remains to be done. One of the most important reasons for the formation of a uniform federal procedure was to give an ideal procedure which, on its merits, would persuade the states to assimilate their practice to that of the federal courts and thus to that of all other states. The benefits of a uniform practice among state and federal courts are obvious and it must be recognized that the present federal system is not only superior to ours, but that it is a fit model for us to pattern after.⁵⁶ One year's practice under the new federal rules reveals that the "show-me" state has been shown. Serious consideration of the possibility of our state adopting the new federal procedure is called for. Definite action should be taken in the near future to assure such conformity.

55. *Reports of the Judicial Conference of Senior Circuit Judges (1938)* 24 A. B. A. J. 905.

56. For a detailed discussion of the superiority of the federal system and the need for uniformity, see Gavit, *The New Federal Rules and State Procedure (1939)* 25 A. B. A. J. 367. See also recent detailed study revealing that sixteen states have a broad rule-making power, while the remainder have it in a limited degree. Harris, *The Extent and Use of Rule-Making Authority (1938)* 22 JOUR. AMER. JUD. SOC. 27.

II

The following cases have been selected from the hundreds applying the new rules as especially illustrative of new practices, or as significant answers to important questions arising under them. In many instances the statement of the holding has been adapted from the head notes of the Department of Justice Bulletins to government officials.

RULE ONE

Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co., 25 F. Supp. 598 (D. Del. 1938). The provisions of Rule One that the rules should be construed to secure the just, speedy and inexpensive determination of actions does not authorize the use of a bill of particulars to secure disclosure of proof to amplify pleading.

Cities Service Oil Co. v. Dunlap, 101 F. (2d) 314 (C. C. A. 5th, 1939). The question as to which party has the burden of proof on an issue of *bona fide* purchase for value without notice, is a matter of practice and procedure and not a matter of substantive law. This question, therefore, is not governed by the decisions of state courts in accordance with the ruling in *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

RULE TWO

Thermex Co. v. Lawson, 25 F. Supp. 414 (E. D. Ill. 1938). A suit is not subject to dismissal on the ground that it is in form a suit in equity whereas it should have been brought as an action at law, as now there is only one form of civil action.

Williamson v. Columbia Gas & Electric Corp., 27 F. Supp. 198 (D. Del. 1939). The fact that the new rules substituted a single form of civil action for old forms of actions at law and in equity did not abrogate the Statute of Limitations applicable to the several forms of actions theretofore existing. An action to recover treble damages or violation of anti-trust laws is an action on the case and is governed by the state Statute of Limitations applicable to actions on the case. See also *City of El Paso v. West*, 104 F. (2d) 96 (C. C. A. 5th, 1939).

Gallagher v. Carroll, 27 F. Supp. 568 (E. D. N. Y. 1939). Filing of the complaint with the court tolls the Statute of Limitations irrespective of the fact that the period of limitation expired before service of summons and complaint on the defendant although the New York State Act provided that the action was commenced by the serving of the summons. The court re-

ferred to the question as raised in the Cleveland and Washington institutes and Moore's *Federal Practice* and decided the question is one of procedure, and should not be determined by the New York rule under *Eric R. R. v. Tompkins*.

C. E. Partridge v. Ainley, 24 F. Supp. 43 (S. D. N. Y. 1938). In an action by creditors to enforce the double liability of bank stockholders, commenced prior to the effective date of the new Rules, only the doctrine of laches, rather than the state Statute of Limitations, is applicable, since to apply the state Statute of Limitations would impose a different and probably shorter limitation on a pending case than that existing when the action was commenced.

McGrath v. Helena Rubinstein, Inc., 29 F. Supp. 822 (S. D. N. Y. 1939). In the absence of a Federal Statute of Limitations, the applicable state statute controls.

RULE FOUR

(4b) *Utility Mfg. Co. v. Elgin Laboratories*, U. S. Dist. Ct., S. D. N. Y., Jan. 24, 1939. D's motion to set aside service of the summons should be granted if it appears that since the service of the process the complaint has been amended by asserting a new claim for relief and service of such amended complaint has not been made on D.

(4c) *Modric v. Oregon & North Western R. R.*, 25 F. Supp. 79 (D. Ore. 1938). The court is permitted to designate only one person to serve a summons. It is proper for the attorney to file a motion designating a particular individual and setting forth his qualifications.

(3) *Pioneer Utilities Corp. v. Scott-Newcomb, Inc.*, 26 F. Supp. 616 (E. D. N. Y. 1939). Service of summons and complaint upon a foreign corporation by delivering a copy thereof to an officer of the corporation is not effective unless the corporation is doing business within the state.

Cohen v. Physical Culture Shoe Co., 28 F. Supp. 679 (S. D. N. Y. 1938). Service of process on an agent of a foreign corporation who is denominated "general manager" for purposes of business negotiations is valid service on the corporation, even though the latter claims that the person served was in fact only a "sales representative." The court found he came within the meaning of the rule.

(7) *Clancy v. Balacier*, 27 F. Supp. 867 (S. D. N. Y. 1939). Action was brought in the southern district of New York by a resident of that state against citizens of West Virginia for personal injuries resulting from

an automobile accident occurring in New York City. Copies of the summons and complaint were served on the Secretary of State of New York, who was an agent authorized by a New York Statute to receive service of process of non-residents operating motor vehicles within the state, and also on the defendants by delivering copies to them personally in West Virginia in accordance with the New York Statute and Rule 4d (7). Held, such service fully complied with that rule.

(4f) *F. & M. Skirt Co. v. Wimpfheimer & Bros.*, 27 F. Supp. 239 (D. Mass. 1939). Third party process may not be served outside of the state in which the action is pending.

Devier v. Cole Motor, 27 F. Supp. 978 (W. D. Va. 1939). In an action for personal injuries resulting from an automobile accident, service of process on a non-resident defendant by serving the state commissioner of motor vehicles under a state statute is valid even though the latter resided in another judicial district of the state.

Gibbs v. The Emerson Electric Mfg. Co., 29 F. Supp. 810 (W. D. Mo. 1939). The rule that process may run anywhere within the territorial limits of the state in which the district court is held is limited by the venue requirements. Hence, in a patent suit, in view of U. S. Code, Title 28, Sec. 109, jurisdiction over a defendant may be obtained only in the district of which he is an inhabitant or in which he committed acts of infringement and has a regular, established business.

RULE FIVE

(5a) See *Utility Mfg. Co. v. Elgin Laboratories Co.*, U. S. Dist. Ct., S. D. N. Y., Jan. 24, 1939.

The Ohio Casualty Insurance Co. v. Perry Murphy, 28 F. Supp. 252 (W. D. Ky. 1939). If the answer in substance amounts to a cross-action against a co-defendant, it should be served on the co-defendant.

RULE SIX

Buggelin & Smith, Inc. v. Standard Brands, Inc., 27 F. Supp. 399 (S. D. N. Y. 1939). Efforts to file a demand for a jury trial later than ten days after service of the last pleading may be regarded as an application under Rule 6b for leave to enlarge such period and should be granted if it appears that the failure to demand a jury was excusable.

Kohloff v. Ford Motor Co., 27 F. Supp. 803 (S. D. N. Y. 1939). During the pendency of a motion to quash service of summons as to one of two

claims for relief, plaintiff's motion for judgment by default as to the other claim should be denied, even though time to answer has expired.

Ainsworth v. Gill Glass & Fixture Co., 104 F. (2d) 83 (C. C. A. 3rd, 1939). An order of the district court extending the time to file the record on appeal, which is entered after expiration of time subscribed by rules, is invalid if it does not set forth that it was made upon motion after notice and that failure to file such record within the forty day period was the result of excusable neglect.

RULE SEVEN

(7a) *Fried v. Warner Bros. Circuit Management Corp.*, 26 F. Supp. 603 (E. D. Pa. 1939). Motion by defendant for a bill of particulars will not be granted before answer if it does not aid the expeditious disposition of the case and if the complaint states the facts with sufficient particularity to enable the defendant to answer. The court points out that the discovery procedure under the new rules makes much of this motion call for duplication.

Central Trust Co. v. Second National Bank, U. S. Dist. Ct., W. D. Pa., Feb. 23, 1939. No reply is required except to a court claim or when ordered by the court. Hence, plaintiff need not deny allegations contained in the answer and the defendant's motion for judgment on pleadings on ground of insufficient denial of allegations of the answer should be denied.

(7b) *Hammond-Knowlton v. Hartford Conn. Trust Co.*, 26 F. Supp. 292 (D. Conn. 1939). A motion to dismiss may not be made orally during the argument on another motion, but must be made in writing. Rule 7 (b) 1 saying "hearing or trial" held not to mean oral argument of motion, when the motion to dismiss is not connected or related to the motion being argued. It must be incidental to the hearing.

(7b) *Crim v. Lumbermen's Mutual Casualty Co.*, 26 F. Supp. 715 (D. C. D. of C. 1939). If a third party defendant is brought in by an *ex parte* order, the better practice for contesting the sufficiency of the third party complaint is by a motion to vacate the order granting leave to file it and to strike the complaint, rather than by a motion to dismiss the third party complaint.

(7c) *Equitable Life Assurance Society v. Kit*, 26 F. Supp. 880 (E. D. Pa. 1939). A demurrer may be treated as a motion to dismiss, *Murphy v. Puget Sound Mortgage Co.*, or as a motion for judgment on the pleadings.

Shell Petroleum Corp. v. Stueve, 25 F. Supp. 879 (D. Minn. 1938).

Defendant filed a demurrer to complaint against government which did not show consent of sovereign nor that it was brought within the statutory time. Held, demurrer treated as a motion to dismiss and is sustained. Other cases also treat demurrer as a motion.

RULE EIGHT

Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302 (D. Ore. 1939). A motion to strike was allowed as to matter relating to immaterial details, as violating Rule 8a. The immaterial facts disclosed defendant was a large operator, and probably was meant to be read to the jury to influence them. The court states that the new rules didn't call for a reading of the pleading to the jury.

(8a) *Bobrecker v. Denebeim*, 25 F. Supp. 208 (W. D. Mo. 1938). The statement that plaintiff is the owner and proprietor of a registered label and that it has been infringed by defendants is a proper short and plain statement of the claim. And this "short-form" complaint was held sufficient against defendant's motion to dismiss on grounds of

1. Failure to show derivation of plaintiff's ownership.
2. Absence of averments as to originality and copyright ability.
3. Neglect to include in the complaint a copy of the label.

Defendant was further denied a bill of particulars to show the derivation of plaintiff's title, or the copyright ability of his label.

Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Cal. 1938). Complaint in action on implied contract insufficient in not stating facts to support the conclusion of implied promise. Forms in Appendix to Rules merely indicate simplicity and brevity of statement expected and verbatim use does not obviate requirement that claim for relief shall contain a statement of the claim showing pleader is entitled to relief.

Hardin v. Interstate Motor Freight System, 26 F. Supp. 97 (S. D. Ohio 1939). In a complaint for negligence, a mere general charge of negligence is sufficient, without specification, as indicated by Rule 8a and Form 9 in the Appendix to the Rules.

Nester v. Western Union Telegraph Co., 25 F. Supp. 478 (S. D. Cal. 1936). Although plaintiff in an action sounding in tort may not be able to prove special damages pleaded by him, he may, nevertheless, recover for breach of the contract if he is shown by the evidence to be entitled to such

recovery. Plaintiff should be denied relief only when the facts show him entitled to none.

Gay v. E. H. Moore, Inc., 26 F. Supp. 749 (E. D. Okla. 1939). If, under the facts alleged, the plaintiff is entitled to relief, a complaint will not be dismissed merely because the plaintiff requested relief to which he was not entitled.

Sun Oil Co. v. Pfeiffer, U. S. Dist. Ct., W. D. Okla., April 29, 1939. A motion to dismiss on the ground that the amount in controversy is less than \$3,000 should be denied if the complaint alleges that the amount involved, exclusive of interest and costs, is in excess of \$3,000 and nothing else appears in the record with respect to the amount in controversy. Cf. *Martin & Martin v. Moery*, U. S. Dist. Ct., E. D. Ill., March 13, 1939, holding that the amount in controversy is more than \$3,000 is an insufficient allegation of jurisdictional amount unless supported by other allegations of definite and concrete facts. See also *Kros v. Assoc. Press*, 299 U. S. 269 (1936); 272 Fed. 456; 47 F. (2d) 826, 828.

Sierocinski v. E. I. Dupont De Nemours & Co., 103 F. (2d) 843 (C. C. A. 3rd, 1939). A complaint in an action on a contract, which alleges the contract performance by plaintiff and failure to perform on the part of defendant, is good as against a motion to dismiss for insufficiency. In an action against the manufacturer of dynamite caps to recover for personal injuries resulting from the exploding of one of the caps during the process of crimping it, plaintiff alleged the negligent manufacture and distribution of the cap in such fashion as to make it explode when crimped. The circuit court of appeals, in reversing order dismissing complaint for failure to set forth any specific act of negligence, held that plaintiff need not plead evidence, that "a short and plain statement of the claim showing that the pleader is entitled to relief" is sufficient as a pleading and that further information, if needed to prepare a defense, can be obtained by interrogatories. Form 9 was approved.

(8b) *Nordman v. City of Johnson City*, U. S. Dist. Ct., E. D. Ill., Jan. 11, 1939. Averments in answer that defendant is without information sufficient to form a belief as to the truth of certain allegations in the complaint will be given the effect of a denial and should not be stricken out even if the facts are seemingly within his knowledge.

(8c) *Francis v. Humphrey*, 25 F. Supp. 1 (E. D. Ill. 1938). The court held that the question as to the burden of proof as to contributory negligence is not a matter of procedure, but of substantive law, and that on the authority of the decision in *Erie R. R. v. Tompkins*, 104 U. S. 64 (1938),

the law of the state wherein the court is located or in which the cause of action arose must be followed on this point. The provision of Rule 8e that a party shall plead contributory negligence as an affirmative defense was held not applicable to a personal injury action in a federal court located in a state the laws of which require the plaintiff in such actions, to allege and prove freedom from contributory negligence. The new rules cannot affect substantive rights. Petition dismissed for lack of statement of freedom from contributory negligence as required by Illinois law.

Baker v. Sisk, U. S. Dist. Ct., D. Okla., Dec. 17, 1938. In view of the fact that the Statute of Limitations is an affirmative defense to be asserted in pleading rather than a motion, defendant's motion to dismiss for failure to state a claim which raises the issue of the statute may therefore be treated as an answer.

Piest v. Tide Water Oil Co., 26 F. Supp. 295 (S. D. N. Y. 1938). In an action for commissions on sales, the defense of the Statute of Frauds should be pleaded as an affirmative defense and may not be raised by motion to dismiss for insufficiency.

(8e) *Catanzaritti v. Bianco*, 25 F. Supp. 457 (M. D. Pa. 1938). A pleading which contains many evidentiary allegations and inconsistent allegations not properly separated does not meet the requirements that pleadings shall be simple, concise, and direct, and should be stricken off. A claim in the nature of ejectment and a claim to impress a trust may be joined alternatively in spite of the fact that they may be inconsistent.

Wheeler Corp. v. American Surety Co., 25 F. Supp. 645 (E. D. N. Y. 1938). The fact that a counterclaim and a third party claim interposed by the same defendant are inconsistent with each other, is no objection to bringing in the third party defendant.

Shultz v. Manufacturers & Traders Trust Co., 29 F. Supp. 38 (W. D. N. Y. 1939). Objections to the complaint on the ground that it does not conform to the provisions of 8e should be presented by motion to strike rather than by a motion to strike the entire complaint (the objectionable provisions).

Kraus v. General Motors Corp., 27 F. Supp. 537 (S. D. N. Y. 1939). The complaint in an action on a contract for exclusive use of a patent may joint a claim for failure to pay royalties and a claim for failure to use plaintiff's alleged patent, even if they are inconsistent. The complaint may contain inconsistent claims in the alternative and plaintiff should not be required to elect upon which theory he intends to rely.

RULE NINE

(9a) *Jewell v. United States*, 27 F. Supp. 836 (W. D. Ky. 1939). In an action against United States on War Risk Insurance Policy, plaintiff must allege capacity to sue to the extent required to show the jurisdiction of the court.

(9b) *E. I. Dupont De Nemours & Co. v. Dupont Textile Mills, Inc.*, 26 F. Supp. 236 (M. D. Pa. 1939). Although fraud may not be alleged generally, intent may be so alleged and the defendant is not entitled to further particulars as to its own fraudulent intent.

RULE ELEVEN

United States v. American Surety Co., 25 F. Supp. 225 (E. D. N. Y. 1938). A complaint signed "Bingham, Englarain & Houston, by W. J. Nunnally" is sufficient, and there is no need to sign in the individual capacity though his only signature is in the firm character of which he is a member.

RULE TWELVE

(12a) *Food Machinery Corp. v. Guignard*, 26 F. Supp. 1002 (D. Ore. 1938). The court has no power to shorten the time for answer prescribed by Rule 12a.

(12b) *McConville v. District of Columbia*, 26 F. Supp. 295 (D. C. D. of C. 1938). A motion to dismiss which requires consideration of matter not appearing in the complaint is analogous to a speaking demurrer under the early equity practice, and should be overruled.

Pesci v. Vieser & Son, U. S. Dist. Ct., D. N. J., 1938. In a patent suit, a motion to dismiss the complaint was considered timely, although filed subsequently to the filing of the answer, in view of the fact that the right to make such a motion was reserved in the answer. The court did not refer to latter part of 12b, which would seem contrary, but result may be sustained in that he could have asked for judgment on pleadings after answer.

American-Mexican Claims Bureau v. Morganthau, 26 F. Supp. 904 (D. C. D. of C. 1939). By the joinder of a motion to dismiss for lack of jurisdiction over the person with a motion to dismiss for want of equity and for failure to join indispensable parties, defendant does not waive the jurisdictional defense.

Whccler v. Lientz, 25 F. Supp. 939 (W. D. Mo. 1939). Rule 12b

does not contain an exhaustive enumeration of motions permitted under the new rules, and the fact it does not mention motions for security for costs does not prevent use of such motions under proper circumstances. A motion for security of costs is not a "defense" nor an "objection" under Rule 12h, and is, therefore, not waived if not presented by one of the motions enumerated in Rule 12b.

Molesphini v. Bruno, 26 F. Supp. 595 (E. D. N. Y. 1939). After the defense of insufficiency of service of process has been disposed of on motion to quash, such defense may not again be interposed in the answer. Failure to again interpose it in the answer does not constitute a waiver of the objection.

Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941 (D. Mass. 1939). A motion to dismiss is the proper method of raising the objection of lack of jurisdiction.

Hamilton Watch Co. v. G. W. Borg Co., 27 F. Supp. 215 (E. D. Ill. 1939). In an action by a non-resident against a foreign corporation which, in compliance with state law, had consented to suit in that state for the purpose of securing a license to do business therein, a motion to dismiss for lack of jurisdiction over the defendant should be granted since compliance with the state statute does not constitute consent to be sued in a district other than that of a state in which the corporation was organized or in a district other than that of the plaintiff, if service can be had on defendant in that district.

Duarte Screw Corp. v. City of New York, 27 F. Supp. 894 (S. D. N. Y. 1939). A third party may obtain dismissal for insufficiency, as against it, of both plaintiff's complaint and defendant's third party complaint.

Interstate Commerce Commission v. Daley, 26 F. Supp. 421 (D. Mass. 1939). After defendant notifies clerk that he does not desire to contest the action, plaintiff's motion for judgment on the pleadings should not be granted, but a default may be entered under 55b upon application therefor by plaintiff.

Phoenix Hardware Co. v. Paragon Paint & Hardware Co., U. S. Dist. Ct., E. D. N. Y., April 18, 1939. Plaintiff is not entitled to summary judgment or to judgment on the pleadings, if a material issue of fact is raised by the answer. A defense of *res judicata* is insufficient and does not warrant summary judgment or judgment on pleadings if the claim is based on facts transpiring subsequently to the prior judgment.

(12d) *Hawn v. American Steamship Co.*, 26 F. Supp. 428 (W. D. N. Y. 1939). In an action for negligence by a seaman against a steam-

ship company defendant moved to dismiss for lack of jurisdiction over the subject matter and submitted affidavits directed to show that plaintiff was not engaged as a seaman. Held, under its discretion under Rule 12d the court should defer the hearing and determination of the motion until the trial herein.

Welty v Clute, 29 F. Supp. 2 (W. D. N. Y. 1939). Under the circumstances of the case, determination of motion to dismiss on ground that the cause of action was not one to enforce lien on or claim to real or personal property located within the district, deferred until trial.

(12e) *Tarbet v. Thorpe*, 25 F. Supp. 222 (W. D. Pa. 1938). Plaintiff alleged defendant's automobile on U. S. Route #5 at an intersection negligently changed direction and struck plaintiff's automobile. On motion for bill of particulars, held, plaintiff's complaint is sufficiently specific.

Graham v. New York & Cuba Mail S. S. Co., 25 F. Supp. 224 (E. D. N. Y. 1938). On motion for bill of particulars to find what hoisting equipment defendant's agents were using, what acts were negligent, age and names of next of kin of deceased, his age and amount of earnings, held, motion granted even though parties are not yet at issue.

Newcomb v. Universal Match Corp., 25 F. Supp. 169 (E. D. N. Y. 1938). Failure to obey order to furnish bill of particulars may preclude that party from presenting evidence at the trial on the question involved.

Schmidt v. Going, 25 F. Supp. 412 (W. D. Mo. 1938). In an action for personal injuries resulting from automobile collision and for compensation for death of plaintiff's daughter upon whom she depended for support, in which plaintiff alleged negligence generally, defendant's motion for more definite statement, asking in what manner the defendants were negligent and the age of the daughter killed, was granted.

Wurlitzer Company v. Filben, U. S. Dist. Ct., D. Minn., Nov. 3, 1938. Bill of particulars requesting title, furnishing access to local models and literature thereon, license agreements, and extension of time to answer, granted in patent case.

Jessup & Moore Paper Co. v. West Virginia Pulp & Paper Co., 25 F. Supp. 598 (D. Del. 1938). In patent suit defendant moved for bill of particulars as to patentable part in plaintiff's estimation, and strength of certain chemical, and acts constituting and authorizing of one defendant by co-defendant. Held motion denied because it would require either a judicial construction of the claims of the patent or the production of proof. Court suggested defendant use interrogatory method. Rule One's

“just, speedy,” etc., does not authorize use of bill of particulars to secure disclosure of proof to amplify pleading.

Mulloney v. Federal Reserve Bank of Boston, 26 F. Supp. 148 (D. Mass. 1938). In an action for conspiracy to cause the failure of a bank, plaintiff may be directed to furnish bill of particulars naming specific defendants or their agents who participated in the wrongful acts; specifying times and places of events alleged; and naming persons to whom defamatory statements were made, in spite of fact the last mentioned item may incidentally involve a disclosure of witnesses. Plaintiff also in bill should disclose if the alleged defamatory statements were oral or in writing, and if the latter, to attach copies of the writings, since such discovery may be had under Rule 34 providing for production of documents for inspection.

Mendola v. Carborundum Co., 26 F. Supp. 359 (W. D. N. Y. 1938). In an action under workmen's compensation law, plaintiff was required to make complaint more definite and certain by setting forth pertinent dates, from which it may be determined whether or not the claim is barred by the Statute of Limitations.

Bicknell v. Lloyd-Smith, 25 F. Supp. 57 (E. D. N. Y. 1938). In an action against a guarantor of corporate bonds, defendant should not be permitted by motion for more definite statement or for a bill of particulars to obtain the names of the original vendees of the bonds, the consideration paid therefor, the name of the seller of the bonds to plaintiff and the consideration paid, and a statement as to whether the plaintiffs knew of the guarantee at the time of their purchase. Such information should be sought under the discovery provisions of the rules.

Nordman v. City of Johnson City, U. S. Dist. Ct., E. D. Ill., Jan. 11, 1939. A motion to make a pleading more definite and certain by setting forth precise dates of payment alleged therein, should be denied, if the information is not essential to the sufficiency of the pleading. If needed before the adverse party can safely plead, the information may be obtained by a bill of particulars.

McKenna v. United States Lines, Inc., 26 F. Supp. 558 (S. D. N. Y. 1939). It rests in the discretion of the court to determine whether a bill of particulars will be ordered and to what extent. 12c was designed to avoid any distinction between a motion to make a pleading more definite and certain and a motion for a bill of particulars.

Tully v. Howard, 27 F. Supp. 6 (S. D. N. Y. 1939). A motion for bill of particulars may be made only within twenty days after service of
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the pleading to which the motion is directed, and no such motion, directed to the complaint, is permitted after issue joined. The scope of a bill of particulars should be limited to matters necessary to enable the moving party to prepare his responsive pleading and parties should be required to employ other procedure provided by the rules to obtain additional information necessary to help them prepare for trial. If a motion for a bill of particulars requests information to assist the moving party to prepare for trial as well as that necessary to enable to prepare his responsive pleadings, the court may direct that only those particulars of the latter class need be supplied.

Norton v. Cooper-Jarrett, Inc., 27 F. Supp. 806 (N. D. N. Y. 1939). The "contention" of a party is made by pleadings and is not a proper subject of examination by deposition. It may, however, be obtained by a motion for a bill of particulars.

Southern Grocery Stores v. Zoller Brewing Co., 26 F. Supp. 858 (S. D. Iowa 1939). A motion for more definite statement and for a bill of particulars should be overruled if the complaint sets forth a cause of action and the information requested can be easily ascertained by interrogatories under Rule 33, except that if the matters relate to jurisdiction, the motion should be sustained.

Gregory v. Royal Typewriter Co., 27 F. Supp. 160 (S. D. N. Y. 1939). In an action for patent infringement, plaintiff's motion to strike a counterclaim for declaratory judgment, which alleged non-infringement and invalidity, should be denied, since without such counterclaim, plaintiff could dismiss his action and thus leave undetermined the issue of validity.

(12h) *Wheeler v. Lientz*, 25 F. Supp. 939 (W. D. Mo. 1939). A motion for security of costs is not a "defense" nor an "objection" under Rule 12h and is, therefore, not waived if not presented by one of the motions enumerated in Rule 12b.

RULE THIRTEEN

Wheeler Corp. v. American Surety Co., 25 F. Supp. 225 (E. D. N. Y. 1938). In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor may intervene as a defendant and file a counterclaim against the subcontractor if the general contractor is subject to recovery over. And when a counterclaim arises out of the same transaction as the main action, it must be set up, and the court has jurisdiction even

though it would not have had jurisdiction if the counterclaim were set forth in an independent suit.

(13c) *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper; Dewey & Almy Chemical Co. v. Andrew Weston Co.*, 25 F. Supp. 1021 (E. D. N. Y. 1939). In a patent suit it is proper to counterclaim for a declaratory judgment to have the patent held invalid and non-infringed.

Kuenzel v. Universal Carloading & Distributing Co., U. S. Dist. Ct., E. D. Pa., Aug. 30, 1939. The defendant in an action for libel may counterclaim for goods sold and delivered.

RULE FOURTEEN

(14a) *Crum v. Appalachian Electric Power Co.*, 27 F. Supp. 138 (S. D. W. Va. 1939). In an action for negligence brought in the Southern District of West Virginia by a resident of that state against a citizen of Virginia, defendant brought in a citizen of West Virginia by a third party complaint. The third party defendant moved to dismiss for lack of jurisdiction on the ground that there was no diversity of citizenship between the original plaintiff and the third party defendant. Held, that if there is requisite diversity of citizenship between the original plaintiff and the defendant, the latter may bring in a third party defendant who is a resident of the same state as the plaintiff and the motion was overruled.

Crim v. Lumbermen's Mutual Casualty Co., 26 F. Supp. 715 (D. C. D. of C. 1939). The complaint, in an action against an insurance company, alleged in one count that plaintiff abandoned a cause of action growing out of a collision with an automobile belonging to defendant's insured in consideration of defendant's promise to pay plaintiff's damages, and in a second count that plaintiff was induced by fraudulent representations to abandon her cause of action against the estate of the driver of the car who was killed in the accident. The defendant brought in plaintiff's attorney by third party proceedings, alleging that the latter was liable to the plaintiff because he negligently failed to sue the driver's estate before such claim became barred by the Statute of Limitations. Third party defendant moved to dismiss third party complaint on the ground that the claim set forth therein was "different" from that asserted in plaintiff's complaint. Held, that the third party proceeding was properly brought since it met the test under Rule 14; that is, that the claim against the third party defendant could have been originally

asserted by plaintiff. The purpose of third party practice is to avoid two actions which should be tried together. Third party practice permits the defendant to bring in a third party defendant who is liable to either the plaintiff or the defendant. If the claim set out in the third party complaint might have been asserted against the third party defendant had he been joined originally as a defendant, he may be brought in as a third party defendant. Plaintiff may state two alternative causes of action, one against the defendant and the other against the third party defendant, a judgment for plaintiff against one cannot be collected from the other. Parties may be joined as defendants against whom the right to relief exists in the alternative. *Dictum*: "If the plaintiff declines to amend the complaint and assert a claim for relief against the third party defendant, the court is inclined to believe that judgment cannot be awarded against the third party defendant in favor of the plaintiff."

(14a-b) *Tullgren v. Jasper*, 27 F. Supp. 413 (D. Md. 1939). In a personal injury action brought jointly against the owner of the taxicab in which plaintiff was a passenger at the time of the accident and the owner of the truck in which the taxicab collided, the owner of the truck may not bring in the insurer of his co-defendant as a third party defendant. The defendant in a personal injury action may bring in his own liability insurer as a third party defendant. By way of *dictum*, the court observed that third party procedure is probably ancillary to the main action and if jurisdiction of the court on the ground of diversity of citizenship has properly attached to the action between the original parties, diversity of citizenship between the third party plaintiff and the third party defendant is not necessary.

RULE FIFTEEN

(15a) *Rhode v. Dighton*, 27 F. Supp. 149 (W. D. Mo. 1939). Although the court lacks jurisdiction to issue a preliminary injunction in a labor dispute, if it appears from the complaint that the Norris-LaGuardia Act bars such a remedy, nevertheless a motion to dismiss should be denied if it also appears that plaintiff can amend his pleading so as to show the necessary jurisdiction.

Moore v. Illinois Central R. R., 24 F. Supp. 731 (S. D. Miss. 1938). In a contract action removed from a state into a federal court, plaintiff's motion for judgment declining defendant permission to plead further on the grounds that such further pleading was prohibited by state statute, was denied, the court holding the federal rules were controlling and

that leave to amend pleadings should be freely given when justice so requires.

(15c) *Garvy v. Allborg*, U. S. Dist. Ct., N. D. Ill., Aug. 24, 1939. If an amended complaint merely remedies a defective pleading without setting forth a new claim, the Statute of Limitations is not applicable, even if the statutory period expired between the institution of the action and the service of the amended pleading; but if additional defendants are joined after the expiration of the period fixed by the Statute of Limitations, the claim is barred as to them, even though the action was timely brought as against the original defendants.

Columbia River Packers Ass'n v. Hinton, U. S. Dist. Ct., D. Ore., Aug. 9, 1939. A plaintiff in an action for equitable relief should not be permitted to amend his complaint at the trial by including a claim of a legal nature, as he would thereby deprive the defendant of the right to demand trial by jury.

RULE SIXTEEN

Penn v. Automobile Insurance Co., 27 F. Supp. 336 (D. Ore. 1939). In view of the provisions for pre-trial procedure, the court may, in advance of a second trial of an action, make rulings as to the use of testimony given by a witness at the first trial.

Wisdom v. Texas Co., 27 F. Supp. 992 (N. D. Ala. 1939). Plaintiff's failure to appear at a pre-trial conference ordered by the court, advance notice of which was given to the attorneys for both parties, constitutes a failure to prosecute and failure to comply with the rules, and defendant's motion to dismiss the action on the merits should be granted.

Fink v. United States, 28 F. Supp. 556 (W. D. Wash. 1939). At a pre-trial conference, the court may take evidence on the question of jurisdiction, and if it is found that jurisdiction is lacking, the action may be dismissed with prejudice.

RULE SEVENTEEN

Lloyd Moore, Inc. v. Schwartz, 26 F. Supp. 188 (E. D. Pa. 1938). In an action in which there is a nominal plaintiff and a "use" plaintiff, the residence of the former is determinative of the question whether the requisite diversity of citizenship exists for jurisdictional purposes. The requirement that every action be prosecuted in the name of the real party in interest does not necessarily preclude the bringing of an action

by one party "to the use of" another, in cases in which actions were heretofore brought in that manner.

(17a) *National Association of Industrial Ins. Agents v. C. I. O.*, U. S. Dist. Ct., District of Columbia, Nov. 18, 1938. An unincorporated labor organization is subject to suit in its common name. The court cited 93 F. (2d) 56, as authority.

Southern Ohio Sav. B. & T. Co. v. Guaranty Trust Co. of N. Y., 27 F. Supp. 485 (S. D. N. Y. 1939). A guardian appointed in one state may not bring suit in a federal court in another state, if by the laws of the latter state such guardian does not have capacity to sue.

RULE EIGHTEEN

(18a) *Federal Housing Administrator v. Christianson*, 26 F. Supp. 419 (D. Conn. 1939). A claim on a promissory note against three defendants may not be joined with a claim on another promissory note against two defendants, as they do not present a common question of law or fact. When causes are improperly joined, the remedy is not by motion to dismiss, but by permitting the claims to be severed and proceeded with separately.

Michelson v. Shell Union Oil Corp., 26 F. Supp. 594 (D. Mass. 1939). Although the rules do not apply to proceedings in copyright, it is within the spirit of the rules to permit the joinder of two counts in tort under the copyright statute with a count in contract even though under the Conformity Act such joinder would not have been permitted.

Columbia River Packers Ass'n v. Hinton, U. S. Dist. Ct., D. Ore., Aug. 9, 1939. A claim for money damages may be joined with a claim for injunctive relief in an action under the anti-trust laws.

RULE NINETEEN

(19b) *Wyoga Gas & Oil Corp. v. Schrack*, 27 F. Supp. 35 (M. D. Pa. 1939). A Delaware corporation brought action against twenty-six former officers and directors to recover damages for various acts of fraud, negligence, and misconduct, jurisdiction being based solely on diversity of citizenship. Twenty-four of the defendants were residents of the district in which suit was brought, some of whom moved to dismiss for improper venue on ground that some of the other defendants were non-residents. Held, since liability of the defendants was joint and several, the non-resident defendants were not indispensable parties and therefore the motion should be denied. If several of a number of joint

tort-feasors are subject to the jurisdiction of the court, the action may proceed without joining other tort-feasors, as they are not indispensable parties. Separate trials may be had.

RULE TWENTY

McNally v. Simons, U. S. Dist. Ct., S. D. N. Y., July 19, 1939. Joinder of parties defendant is permissible if such joinder results in no substantial prejudice to a defendant, and if delay, expense and inconvenience to witnesses will be lessened by such joinder.

(20a) *Whitley v. Missouri Pacific R. R.*, 27 F. Supp. 919 (W. D. La. 1939); *Crim v. Lumbermen's Mutual Casualty Co.*, 26 F. Supp. 715 (D. C. D. of C. 1939). In an action to recover for personal injuries sustained while unloading a freight car, plaintiff may join as parties defendant the resident delivering carrier and the non-resident initial carrier, if both of them were responsible for the accident. Hence, a motion to remand to the state court after the latter had removed the case on the grounds of a separable controversy as to it, should be denied. Parties may be joined as defendants against whom the right to relief exists in the alternative.

(20a) *Alabama Independent Service Station Ass'n v. Shell Petroleum Corp.*, U. S. Dist. Ct., N. D. Ala., Aug. 1, 1939. Parties defendant may be joined only if the rights to relief against them arise out of the same transaction or series of transactions, and if there is a common question of law or fact. Both conditions must exist.

RULE TWENTY-ONE

Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939). When causes of action are improperly joined, the remedy is not by motion to dismiss but by permitting the claims to be severed and proceeded with separately.

Berke v. United Paperboard Co., 26 F. Supp. 412 (S. D. N. Y. 1938). A motion to dismiss as to one of the plaintiffs on the ground that he is not a proper party will be denied if it raises an issue of fact.

Holmberg v. Hannaford, 28 F. Supp. 216 (S. D. Ohio 1939). Neither the misjoinder of parties plaintiff nor misjoinder of parties defendant is a ground for dismissal.

RULE TWENTY-TWO

Standard Surety & Casualty Co. of New York v. Baker, 26 F. Supp. 956 (W. D. Mo. 1939). A complaint in interpleader cannot be maintained by the surety on a bond given to protect those dealing with the principal against loss on account of wrongful acts, for the purpose of determining the respective rights of the surety and multiple claimants under the bond, since the multiple liability is not on the same obligation. The court thought that Rule 22 has no application where there is no double exposure on the *same obligation*.

RULE TWENTY-THREE

(23b) *Rinn v. Asbestos Mfg. Co.*, 101 F. (2d) 344 (C. C. A. 7th, 1939). Plaintiffs in a representative stockholders suit against the company and its directors for an accounting for mismanagement and conspiracy to defraud the company and its stockholders must allege and prove that plaintiffs were shareholders at the time of the transactions of which complaint is made or that their holdings have since come to them by operation of law.

(23c) *Sauer v. Newhouse*, 26 F. Supp. 326 (D. N. J. 1939). In a representative stockholders suit against officers of the corporation the mailing to all stockholders, pursuant to the order of the court, of a copy of a rule to show cause why the suit should not be dismissed with prejudice, constitutes the notice of the proposed dismissal required by Rule 23c.

Alice P. Hutchinson v. The Fidelity Investment Ass'n, 106 F. (2d) 431 (C. C. A. 4th, 1939). The requirement that in a class action, notice of a proposed voluntary dismissal or compromise should be given to all members of the class, is limited to an attempted dismissal by the plaintiff, and such a notice is not a condition precedent to dismissal by the court after hearing on the merits.

RULE TWENTY-FOUR

United States v. Columbia Gas & Electric Corp., 27 F. Supp. 116 (D. Del. 1939). In an action by the United States under the anti-trust laws to compel defendant to divest itself of stock of another corporation another shareholder of the latter corporation will not be so adversely affected by the disposition of defendant's shares as to entitle it to intervene of right; nor to have such an interest as to entitle to intervene of right. In order to entitle a person to intervene of right, his interest in

the property in the custody of the court should be a legal interest. Intervention of right may not be allowed if the applicant would not be bound by a judgment in the main action.

United States v. Lane Life Boat Co., 25 F. Supp. 410 (E. D. N. Y. 1938). In an action by the United States to recover on a bond to hold the government harmless of liability for the use of any patent embodied in certain life boats purchased by the government, the president of the vendor company who had agreed to indemnify the defendant surety company is a proper person to intervene. The court found counsel for present defendant was not friendly to interests of intervenor, and allowed intervention though intervenor could not have been forced in as defendant, and though only indirectly would the judgment against the existing parties have affected him.

(24b) *Sloan v. Appalachian Electric Power Co.*, 27 F. Supp. 108 (S. D. W. Va. 1939). An injured employee receiving compensation under an Employees' Compensation Act brought suit for negligence against third party. The applicable state law accorded a right of subrogation to the compensation insurance carrier. Held, insurance carrier should be permitted to intervene as party plaintiff in the action for negligence.

United States v. Columbia Gas & Electric Corp., 28 F. Supp. 168 (D. Del. 1939). Intervention will not be permitted when the issues sought to be raised are outside the scope of the main action, for such intervention would delay and prejudice the adjudication of the rights of the parties.

RULE TWENTY-SIX

Saviolis v. National Bank of Greece & Hellenic Bank Trust Co., 25 F. Supp. 966 (S. D. N. Y. 1938). Notice to take depositions given by plaintiff after answer has been filed should not be set aside on assertion that defendant intends to file an amended answer.

White v. Reach, 26 F. Supp. 77 (S. D. N. Y. 1939). Rule 26 regarding examination before trial held applicable in copyright cases on the ground that Rule One of the copyright rules provides that existing rules of equity practice, which are now contained in the federal rules of civil procedure, shall be enforced so far as they may be applicable in copyright suits.

Bennett v. The Westover, Inc., 27 F. Supp. 10 (S. D. N. Y. 1938). A notice to take depositions need not state upon what matters the examination is sought.

Whitaker v. MacFadden Publications, U. S. Dist. Ct., S. D. N. Y., Jan. 9, 1939. If the deposition of a party to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage. Indication is for same rule on written examination.

(26b) *Norton v. Jarrett-Wilson*, U. S. Dist. Ct., N. D. N. Y., Dec. 28, 1938. A party is not entitled to examination before trial on matters within his own knowledge nor on matters admitted in adversary's pleadings.

Benevento v. A. & P. Food Stores, 26 F. Supp. 424 (E. D. N. Y. 1939). On an examination before trial defendant should be required to give any testimony which would be admissible upon the trial of the action, notwithstanding the fact that the information sought is within the knowledge of the plaintiff, the test being: "whether or not the testimony would be admissible upon the trial of the action."

Nickols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938). Discovery can be obtained on facts or matters that are within the knowledge of both parties. And the distinction between evidentiary facts and ultimate or material facts is abolished. (Note that in view of the broad language of Rule 26b and because one of the purposes of an examination before trial is to secure evidence in support of the examining party's case, and another is to ascertain the claims and assertions of the adverse party, this holding allowing examination of facts within the knowledge of the examining party seems sound. See the address of Professor Sunderland, reported in *Proceedings of the Cleveland Institute on Federal Rules* (Am. Bar. Ass'n, 1938)).

McCarthy v. Palmer, U. S. Dist. Ct., E. D. N. Y., Oct. 16, 1930. A party should not be permitted to examine affidavits and similar material secured by another party by independent investigation incident to the preparation of the latter's case for trial, except in the most unusual circumstances.

Kulich v. Murray, U. S. Dist. Ct., S. D. N. Y., June 13, 1939. In an action for personal injuries and property damage resulting from an automobile accident, plaintiff may take the depositions of representatives of defendants insurance company concerning investigations made and statements obtained by them. Information obtained by defendant's insurer in an automobile collision case is not privileged.

Nachod & United States Signal Co. v. Automatic Signal Corp., 26 F. Supp. 418 (D. Conn. 1939). In an action to obtain the issue of letters patent, the plaintiff may, by use of depositions, examine the person previously held to have been the prior inventor, to ascertain whether he has granted

an exclusive license, since an exclusive licensee is an indispensable party to such an action. After ascertaining the facts in this manner, the licensee may be brought in as an additional party defendant, if the court has jurisdiction over him.

RULE TWENTY-SEVEN

Egan v. Morgan Towing & Transportation Co., 26 F. Supp. 621 (S. D. N. Y. 1939). Petitioner in a proceeding to perpetuate testimony in anticipation of an action for damages for wrongful death which occurred on board a tug, may not be permitted to inspect and survey the tug. Discovery by deposition before action under Rule 27 should be limited to the taking of testimony of persons.

RULE TWENTY-NINE

Laverett v. Continental Briar Pipe Co., 25 F. Supp. 790 (E. D. N. Y. 1939). Defendant's attorneys stipulated that plaintiff's attorney's stenographer might take the depositions. Defendant now wants suppression of such testimony. Held, defendant by so stipulating must be taken to have waived the objection. However, the court will relieve defendant's attorney of further taking of depositions under his stipulation if it has misgivings as to the fidelity of the stenographer. That testimony already taken will be admitted.

RULE THIRTY

Bennett v. The Westover, Inc., 27 F. Supp. 10 (S. D. N. Y. 1938). In a damage suit, held notice to take deposition need not state the matters upon which the examination is sought. The only requirement is that the examination be limited to any matter that is relevant to the subject matter involved in the pending action and that such matter is not privileged.

Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Supp. 303 (S. D. N. Y. 1939). A notice of examination before trial must state the name and address of each person to be examined, if known, and if not known, a general description sufficient to identify him or the particular class or group to which he belongs, and it is not sufficient if the notice merely states that it is to examine a corporate party "by the officers, directors, managing agents or employees having knowledge thereof." Such notice need not particularize the matter on which the examination is sought.

Bough v. Lee, 26 F. Supp. 1000 (S. D. N. Y. 1939). When both parties serve notice to take depositions, the one who first serves his notice should

ordinarily be permitted to complete his examinations before the other begins.

Barrezueta v. Sword Steamship Line, 27 F. Supp. 935 (S. D. N. Y. 1939). A party proceeding to take depositions may not move to limit the scope of the examination.

RULE THIRTY-ONE

(31a) *Rowe v. Union Central Life Insurance Co.*, U. S. Dist. Ct., District of Columbia, Jan. 25, 1939. Defendant's attorney may refuse to answer questions as to the identity and location of witnesses if the only information he has was obtained from the defendant and hence is confidential and privileged.

(31d) *Fall Corp. v. Yount-Lee Oil Co.*, 24 F. Supp. 765 (E. D. Texas 1938). Court's discretion to require that a deposition be taken on oral examination should be exercised when direct interrogatories are so numerous and involved as to make it practically impossible to frame cross-interrogatories.

RULE THIRTY-THREE

American La France-Foamite Corp. v. American Oil Co., 25 F. Supp. 386 (D. Mass. 1938). Interrogatories to parties under Rule 33 may be used to elicit information broader in scope than that which may be elicited by a motion for a bill of particulars under Rule 12e.

Penn v. Automobile Insurance Co., 27 F. Supp. 336 (D. Ore. 1939). Interrogatories requesting the names and address of persons having information or knowledge supporting the cause of the adverse party, are proper.

Caggiano v. Socony Vacuum Oil Co., 27 F. Supp. 240 (D. Mass. 1939). Interrogatories requiring a party to state his contentions or legal conclusions are improper.

Dixon v. Sunshine Bus Lines, 27 F. Supp. 797 (W. D. La. 1939). Interrogatories to parties are not limited to a development of ultimate facts but may extend to merely evidentiary details.

Stanley Works & Gueneau v. Mersick & Co., U. S. Dist. Ct., D. Conn., Feb. 15, 1939. Interrogatories should be limited to matters of fact as distinguished from matters of opinion.

O'Rourke v. R. K. O. Radio Pictures, 27 F. Supp. 996 (D. Mass. 1939). In a non-jury action interrogatories addressed to the amount of damages are premature prior to the determination of liability.

Ferry-Hallock Co. v. Frost, 29 F. Supp. 43 (E. D. N. Y. 1939). Motion for bill of particulars is not proper as to matters which are proper subjects for interrogatories.

RULE THIRTY-FOUR

Apex Hosiery Co. v. Leader, 102 F. (2d) 702 (C. C. A. 3rd, 1939). An order of the district court under Rule 34 for the discovery and production of documents for inspection, etc., is an interlocutory order and therefore not appealable.

United States v. Aluminum Company of America, 26 F. Supp. 711 (S. D. N. Y. 1939). Documents produced by defendant in response to *subpoena duces tecum* may not be inspected by plaintiff under Rule 34 in advance of an inspection and determination by the court that they contain evidence material to the issues. The question of materiality is not to be determined by mere examination of the *subpoena*.

Piest v. Tide Water Oil Co., 26 F. Supp. 295 (S. D. N. Y. 1938). Discovery of documents should not be permitted until answer is filed since until issue is joined it cannot be determined whether or not the requested documents contain evidence material to any issue.

Mulloney v. Federal Reserve Bank of Boston, 26 F. Supp. 148 (D. Mass. 1938). Plaintiff in an action for conspiracy should be required, on defendant's motion for further particulars, to specify whether alleged defamatory statements were oral or in writing and, if the latter, to attach copies of the writings, since such discovery may be had under Rule 34.

Orange County Theatres v. Levy, 26 F. Supp. 416 (S. D. N. Y. 1938). A party may be compelled to produce only such papers, etc., as are in his possession or under his control.

Belser v. Savarona Ship Corp., 26 F. Supp. 599 (E. D. N. Y. 1939). A party seeking a discovery of documents need not prove their materiality, but need only establish that it is reasonably probable that the documents constitute or contain material evidence. Stipulation by the parties, requiring the production, etc., of certain documents constitute waiver of requirement of showing reasonable probability of materiality.

Teller v. Montgomery Ward, 27 F. Supp. 938 (E. D. Pa. 1939). Production of records of articles for inspection should, technically, be sought under Rule 34, but if such discovery has been attempted by motion for a bill of particulars no useful purpose would be served by denying it.

Slydell v. Capital Transit Co., U. S. Dist. Ct., D. C., Oct. 6, 1939.

Production of documents which are not admissible in evidence, except possibly as a means of contradicting a witness at the trial, should be denied. A motion of the production of documents is too late if made at the pre-trial hearing. Interrogatories to parties are too late if served at the pre-trial hearing, except as to some¹² newly developed situation.

RULE THIRTY-FIVE

(a) *Wadlow v. Humbert*, 27 F. Supp. 210 (W. D. Mo. 1939). A motion for an order to require plaintiff to submit to a physical and mental examination should be overruled, in an action for libel stating that plaintiff was suffering from various physical and mental conditions. Court held that mental or physical condition was not *immediately or directly in controversy*, and thus not in the meaning of 35a. Court seems to restrict the application of 35a to damage suits.

Gitto v. The Italia, Societa Anomina Di Navigazione, Genova, 27 F. Supp. 785 (E. D. N. Y. 1939). Selection of the physician to conduct physical examination rests in sound discretion of the court.

RULE THIRTY-SIX

Walsh v. Connecticut Mutual Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939). A party served with a request for admissions of fact is deemed to have admitted all relevant facts if he does not within the time allowed by the rules specifically deny them or set forth reasons why he cannot truthfully admit or deny them. The word "therein" in the first sentence of Rule 36a refers to matters of fact relevant to the pleadings and contained in the request for admissions and does not refer merely to matters of fact set forth in documents concerning which an admission of genuineness is requested.

Treasure Imports v. Adur & Sons, U. S. Dist. Ct., S. D. N. Y., Jan. 23, 1939. A party need not comply with a request under Rule 36 which seeks to obtain an admission as to evidence which it is claimed certain persons would give if called as witnesses.

Booth Fisheries Corp. v. General Foods Corp., 27 F. Supp. 268 (D. Del. 1939). A party should not be required to admit or deny facts which are not within his knowledge but which are probable by testimony of third parties.

RULE THIRTY-SEVEN

Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Supp. 303 (S. D. N. Y. 1939). The remedy provided in 37d for wilful failure to appear after

being served with notice to take depositions, applies only to parties or officers or managing agents of parties and not to other persons.

RULE THIRTY-EIGHT

Buggelin & Smith v. Standard Brands, 27 F. Supp. 399 (S. D. N. Y. 1939). The time within which a party may demand a trial by jury as of right terminates at the expiration of ten days after the service of the last original pleading and the subsequent service of amended pleadings does not extend such period.

Pacific Indemnity Company v. McDonald, 25 F. Supp. 522 (D. Ore. 1938), aff'd U. S. C. C. A. 9th, Nov. 6, 1939. Questions that would be triable by a jury in an action for money damages are also triable by jury in an action for a declaratory judgment.

Columbia River Packers Ass'n v. Hinton, U. S. Dist. Ct., D. Ore., Aug. 9, 1939. A plaintiff should not in an action for equitable relief be permitted to amend his complaint at the trial to include a legal claim as he would thereby deprive the defendant of the right to demand trial by jury on that claim.

RULE FORTY-ONE

Culmerville Coal Co. v. Downing, U. S. Dist. Ct., N. D. Ohio, Nov. 25, 1938. Attorney under a contingent fee agreement does not have sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all the parties.

Stanley Works & Geneau v. Mersick & Co., U. S. Dist. Ct., D. Ore., Feb. 15, 1939. In view of 41a, which prohibits voluntary dismissals after answer is filed, a counterclaim seeking declaratory relief on the issues involved in the main action is redundant and should be stricken.

Gregory v. Royal Typewriter Co., 27 F. Supp. 160 (S. D. N. Y. 1939). In an action for patent infringement, plaintiff's motion to strike a counterclaim for declaratory judgment, which alleged non-infringement and invalidity, should be denied since, without such counterclaim, plaintiff could dismiss his action and thus leave undetermined the issue of validity.

Cincinnati Traction Bldg. Co. v. Pullman-Standard Car Manufacturing Co., 25 F. Supp. 322 (D. Del. 1938). After defendant in a patent suit filed answer and prepared for trial at great expense, plaintiff's motion to dismiss without prejudice should be denied. Such refusal is within the discretion of the court.

Cleveland Trust Co. v. Osher & Reiss, Inc., U. S. Dist. Ct., E. D. N. Y., April 17, 1939. Filing notice of second voluntary dismissal of a claim operates as an adjudication upon the merits although the previous dismissal was secured before the effective date of rules, provided second is after such date.

Russo-Asiatic Bank v. Guaranty Trust Co. of N. Y., 27 F. Supp. 382 (S. D. N. Y. 1939). Defendant filed an answer to intervenor's cross-claim and then a motion for leave to serve an amended answer setting up a counterclaim against the intervenor. By consent, hearing on the motion was delayed although parties stipulated it should be deemed made and heard as of date filed, and in meantime intervenor moved to withdraw from the case. Held, since the counterclaim had, for all practical purposes, been pleaded before intervenor's motion for voluntary dismissal, the latter motion should be denied.

Martin, etc. v. Southern Ry., U. S. Dist. Ct., E. D. Tenn., April 4, 1939. Plaintiff may be required to reimburse defendant for costs paid by latter in previous action which was voluntarily nonsuited, and pending action may be dismissed if such payment is not made.

Botkins v. Sorter, U. S. Dist. Ct., W. D. La., Sept. 15, 1939. Failure to serve a bill of particulars as directed is ground for dismissal of the action on motion of adverse party.

RULE FORTY-TWO

Klager v. Inland Power & Light Co., U. S. Dist. Ct., W. D. Wash., April 7, 1939. When numerous parties bring separate actions for negligence against the same defendant to recover damages for increased flow of water, the defense being that the damages were caused by an act of God, such actions should not be consolidated for the trial of issues as to whether the negligence was the proximate cause of each party's injury or as to the amount of damages. The court reserved for future determination the question of whether such actions should be consolidated for the trial of the issues bearing on defendant's negligence.

Karolkiewicz v. City of Schenectady, U. S. Dist. Ct., N. D. N. Y., March 3, 1939. In an action for personal injuries in which defendant alleged failure to file notice of claim within statutory time but conceded that the running of the statute would be tolled during the incapacity of the plaintiff and for a reasonable time thereafter, a motion for a separate trial of the issue of incapacity was granted, as a matter of discretion, on condition that the defendant pay plaintiff's expenses in connection with

such trial, in order to protect plaintiff if he had to twice present his evidence.

Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S. D. N. Y. 1939). When a legal counterclaim is set up in an equity action, the equitable issue should be disposed of first, after which the trial of the legal issue may proceed.

Wyatt D. Shultz v. Manufacturers & Traders Trust Co., 29 F. Supp. 37 (W. D. N. Y. 1939). Actions between the same parties, and based upon the same allegations of fraud and conspiracy may be consolidated even before joinder of issue, if it appears that they involve a common question of law or fact.

Cecil, etc. v. Missouri Public Corporation, 28 F. Supp. 649 (W. D. Mo. 1939). Four actions for personal injuries against the same defendant, in which the injuries are alleged to have been caused at the same time by the same negligence, all issues being identical except the extent of each plaintiff's injuries, should be consolidated notwithstanding objection by plaintiffs. Consolidation of cases for trial does not deprive parties of their constitutional right of trial by jury.

RULE FORTY-THREE

United States v. Aluminum Company of America, 26 F. Supp. 711 (S. D. N. Y. 1939). Rule 43 determines admissibility of evidence and is intended to liberalize it. If under the state rule, evidence is inadmissible and there is no federal rule on the subject, the question is an open one for the court's determination. In the instant case the federal rule was against admissibility and there was no state rule, and the court rejected the evidence.

Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S. D. N. Y. 1939). Examinations before trial should conform to rules of evidence.

John J. McCarthy v. Howard S. Palmer, 29 F. Supp. 585 (E. D. N. Y. 1939). Documents produced for inspection become admissible on behalf of the producing party even if the demanding party refuses to place them in evidence, although the state rule may be to the contrary.

RULE FORTY-FIVE

United States v. Aluminum Co. of America, 26 F. Supp. 711 (S. D. N. Y. 1939). A *subpoena duces tecum* under 45b may be invoked only for production of documents for use as evidence and not documents to be

used to refresh a witness' recollection. In respect of the character of documents, the production of which may be required, Rules 34 and 45b must be interpreted as in *pari materia*.

Whitaker v. MacFadden Publications, U. S. Dist. Ct., S. D. N. Y., Jan. 9, 1939. Documents produced in response to a *subpoena* should be examined first by the court before submission to opposing counsel, and a hearing granted on materiality. If the deposition of a party to the action is to be taken orally, it is not necessary to serve a *subpoena* or to pay fees or mileage.

Laverett v. Continental Briar Pipe Co., 25 F. Supp. 80 (E. D. N. Y. 1938). A resident of the district in which the deposition is to be taken who resides and transacts his business in person in one county cannot be required to attend an examination in another county.

Lester R. Bachner v. Eickhoff & Co., Inc., 27 F. Supp. 105 (S. D. N. Y. 1939). The court, after reserving decision on plaintiff's motion for directed verdict, has the power, on plaintiff's motion, to set aside verdict for the defendant and to enter judgment for the plaintiff.

RULE FIFTY-TWO

United States-v. Bethlehem Steel Corp., 26 F. Supp. 259 (E. D. Pa. 1938). The court need not make findings of fact and conclusions of law in passing on the report of a referee, which contains findings.

Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., 27 F. Supp. 86 (S. D. N. Y. 1939). Findings of fact and conclusions of law in injury cases should not be a part of the opinion of the court but should be separately stated and numbered. Findings should contain only essential facts and should not include evidence. Counterfindings need not be submitted by defeated party.

United States Trust Co. of N. Y. v. Mary Pauch Sears, 29 I. Supp. 643 (D. Conn. 1939). Formal findings of facts are not required if all statements of fact made on behalf of either party are admitted in the pleadings.

RULE FIFTY-FOUR

Tri-Plex Shoe Co. v. Cantor, U. S. Dist. Ct., E. D. Pa., March 6, 1939. A judgment in a civil action which would have been a suit in equity under the old procedure must comply with Equity Rule 71. It appears the judge took the position that the old equity rules have not been superseded by the new rules and both are in effect. This is opposed to the view of the

Advisory Committee and of Professor Moore. See Moore's *Federal Practice* (1938) 36.

Gay v. E. H. Moore, 26 F. Supp. 749 (E. D. Okla. 1939). If under the facts alleged plaintiff is entitled to relief, a complaint will not be dismissed merely because the plaintiff has requested relief to which he was not entitled.

Borton v. Conn. General Life Ins. Co., 25 F. Supp. 579 (D. Neb. 1938). Amendment to complaint in order to pray for alternative relief is not indispensable in view of Rule 54c which provides for granting the relief to which a party is entitled even if he has not demanded it.

RULE FIFTY-FIVE

New Jersey Federation of Young Men's and Young Women's Hebrew Associations v. Richard J. Hoffman, 26 F. Supp. 556 (M. D. Pa. 1939). Default judgment should not be entered against a party who has appeared in the action unless he has been served with notice or the application for judgment at least three days prior to the hearing.

RULE FIFTY-SIX

Walsh v. Conn. Mutual Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939). Summary judgment may be granted if the facts which stand admitted by reason of a party's failure to deny statements contained in a request for admissions show that no material issue of fact exists.

Whiteman v. Federal Life Ins. Co., U. S. Dist. Ct., W. D. Mo., Feb. 16, 1939. A motion for summary judgment should be granted only in a very clear case and only if under the conceded facts, or facts indubitably established by the pleadings and affidavits, the case could not be submitted to the jury if it went to trial.

Boerner v. United States, 26 F. Supp. 769 (E. D. N. Y. 1939). On a motion for a summary judgment the court should disregard all statements based upon hearsay in the supporting and opposing affidavits.

Saunders v. Higgins, 29 F. Supp. 326 (S. D. N. Y. 1939). Motion for summary judgment should be denied if the court upon the entire record is able to find a trial would not be a useless form. Supporting affidavits should contain only statements which should be admissible in evidence.

RULE FIFTY-SEVEN

Pacific Indemnity Co. v. McDonald, 25 F. Supp. 522 (D. Ore. 1938). Action to recover damages caused by auto collision was brought in state

court. Insurance company which insured that defendant against liability, brought suit in federal court for a declaratory judgment adjudicating that it was not liable because of breach of policy by insured. Held, the pendency of action in state court did not bar the action for declaratory judgment. And questions that would be triable by jury in an action for money damages are also triable by jury in an action for a declaratory judgment.

Ohio Casualty Co. v. Richards, 27 F. Supp. 18 (D. Ore. 1939). An insurance company which was defending a negligence suit brought in state court against a person for whom it carried liability insurance filed action in federal court for declaratory judgment adjudicating its non-liability on policy. The defendants moved to dismiss the complaint on ground of pendency of prior action. The court, after expressing some doubt, tentatively denied motion to dismiss.

RULE FIFTY-NINE

Chescvski v. Strawbridge & Clothier, 25 F. Supp. 325 (D. N. J. 1938). A new trial may be granted as to the element of damage only.

United States v. Colangelo, 27 F. Supp. 921 (E. D. N. Y. 1939). Before entry of judgment in an action tried without a jury, the court may, on motion for new trial on ground of newly discovered evidence, allow the opening of the case for the reception of such evidence.

RULE SIXTY-ONE

Cerrin v. Grant Co., 100 F. (2d) 153 (C. C. A. 5th, 1939). In an action for wrongful death, the erroneous refusal of the trial court to admit the deposition of the deceased is not a harmless error and judgment was reversed on appeal.

RULE SIXTY-FIVE

Thermex Co. v. Lawson, 25 F. Supp. 414 (E. D. Ill. 1938). Should the court be asked to grant interlocutory relief in form of injunction, the plaintiff cannot rely on its unverified complaint but must adduce sworn proof. No indemnity bond need be given until the preliminary injunction is ready to be granted.

RULE SIXTY-SIX

Donald Bicknell v. Lloyd-Smith, 25 F. Supp. 657 (E. D. N. Y. 1938).

A receiver appointed by a state authority in a state other than that in

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which the federal court is held, may not sue in a federal court, but an ancillary receiver must be appointed for that purpose. This principle has not been modified by the new rules.

RULE SEVENTY-THREE

Ainsworth v. Gill Glass & Fixture Co., 104 F. (2d) 83 (C. C. A. 3rd, 1939). *McCrone v. United States*, 59 Sup. Ct. (1939) 685. After notice of appeal has been timely filed, the circuit court of appeals may permit the record on appeal to be filed at any time. An order of the district court extending the time to file the record on appeal, which is entered after the expiration of the time prescribed by the rules, is invalid if it does not set forth that it was made upon motion after notice and that failure to file such record within the forty-day period was the result of excusable neglect.

Rule 81a which makes the rules applicable to appeals in *habeas corpus* proceedings does not extend to such proceedings the provisions of Rule 73d relating to *supersedeas* bonds.

Crump v. Hill, 104 F. (2d) 36 (C. C. A. 5th, 1939). The timely filing of a waiver of service of notice of appeal and entry of an appearance to an appeal, together with a designation of the record on appeal by both parties, is sufficient to give the appellate court jurisdiction of the appeal, although no notice of appeal was actually filed in time, and though the party admits that the filing is jurisdictional. The method used is the equivalent.

RULE SEVENTY-FOUR

Schaffer v. Pennsylvania Ry., 101 F. (2d) 369 (C. C. A. 7th, 1939). *Tighe v. Maryland Casualty Co.*, 99 F. (2d) 727 (C. C. A. 9th, 1938). In an action against two joint tort-feasors, a verdict was directed in favor of one defendant, and a verdict was rendered by the jury against the other defendant. The plaintiff appealed, assigning as error the direction of the verdict in favor of the first defendant. Held, the rendition of judgment against the second defendant does not bar the right to prosecute appeal as against the first, especially as Rule 74 abolishes summons and severance.

RULE SEVENTY-FIVE

Speer v. Rural Special School District No. 50, 100 F. (2d) 202 (C. C. A. 8th, 1938). *Cloud v. McLean-Arkansas Lumber Co.*, U. S. Dist. Ct.,

E. D. Ark., Aug. 3, 1939. Whether a party on appeal has requested the incorporation in the record of matter which is not essential to the appeal should be decided by the appellate court, which can discourage such conduct by withholding or imposing costs.

RULE EIGHTY-ONE

United States v. Certain Land, 25 F. Supp. 52 (W. D. Ky. 1938). The rules do not apply to condemnation proceedings, except on appeal.

Angel v. McLellan Stores, 27 F. Supp. 893 (E. D. Tenn. 1939). In an action removed from a state to a federal court, a demand for trial by jury made in the state court before removal is sufficient reservation to entitle the party to trial by jury in the federal court.

On June 5, 1939, the United States Supreme Court amended Copyright Rule I to include the new federal rules, effective Sept. 1, 1939.

RULE EIGHTY-TWO

King v. Shepherd, 26 F. Supp. 351 (W. D. Ark. 1938). In an action brought by resident of Western District of Arkansas against a Missouri citizen to recover damages caused by auto accident, defendant brought in his insurer, a citizen of Oklahoma, by a third party complaint. Third party defendant moved to dismiss third party complaint for improper venue. Held. that the third party complaint presented a severable controversy, and, therefore, in the light of Rule 82, prohibiting construction of the rules so as to extend the venue of actions, the Western District of Arkansas was not the proper venue for the third party proceedings, and the motion was granted.

Bossard v. McGwinn, 27 F. Supp. 412 (W. D. Pa. 1939). A third party claim is merely ancillary to the original action and the fact that the third party defendant and the plaintiff are citizens of the same state and residents also (of same district) does not deprive the court of jurisdiction or create improper venue.

F. & M. Skirt Co. v. Wimpfheimer & Bro., 27 F. Supp. 239 (D. Mass. 1939). Third party process may not be served outside of the state in which the action is pending.

RULE EIGHTY-THREE

Whceler v. Lientz, 25 F. Supp. 939 (W. D. Mo. 1939). Rule 83 constitutes authority for the continuation in effect of rules previously estab-

lished by the district courts and which are not inconsistent with the Federal Rules.

Wells v. Equitable Life Assurance Soc., 29 F. Supp. 144 (W. D. Ky. 1939). On matters not covered by the new rules the courts may continue to follow local state practice under which the closing argument to the jury is made by plaintiff's attorney.

RULE EIGHTY-FOUR

Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Cal. 1938). The forms contained in the appendix to the Rules merely indicate the simplicity and brevity of statement which the rules contemplate, and verbatim use of one of the forms of complaint does not obviate the requirement that claims for relief shall contain a statement of the claim showing that the pleader is entitled to relief.