The Preliminary Draft of Federal Rules of Civil Procedure

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On June 19, 1934, a statute was approved by the President of the United States which reads as follows:

"Rules in actions at law; Supreme Court authorized to make

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

2. "Union of equity and action at law rules; power of Supreme Court

"The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

A cursory reading discloses that while rules in actions at law "take effect six months after their promulgation" united rules of law and equity "shall not take effect until

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1 28 U. S. C. § 723b and § 723c.
they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session.

Although much has been written concerning this legislation, it does not seem amiss to give a short resumé of its history. It was more than two decades ago, in 1912 to be specific, that this bill was introduced in Congress, although at first it only applied to common-law actions. Perhaps it was for this reason that it failed of passage, since adoption of federal rules in common-law cases would have burdened the legal profession with the necessity of using two different systems of procedure in the state and federal courts in addition to the separate federal equity procedure without even the hesitant assistance in common-law cases of the Conformity Act.

In 1922, at the suggestion of William Howard Taft, then president of the American Bar Association which under the vigorous leadership of the late Thomas W. Shelton of Virginia had actively supported this measure since 1910, the bill was amended so as to include an additional section which would permit the Supreme Court of the United States to write rules unifying the common-law and equity principles of procedure so as to secure one form of civil action.

The bill, however, was not adopted possibly since it still retained Section 1, limiting the court to the formulating of uniform rules of common-law procedure, and it was not until this administration that the bill was revived and passed.

The question still remained whether the Supreme Court

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2 28 U. S. C. § 724: This statute provides that "the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in courts of record of the State within which said district courts are held, any rule of court to the contrary notwithstanding." Addresses at the Open Forum Session for Discussion of the Proposed Rules of Civil Procedure for the Federal Courts (1936) 22 A. B. A. J. 780 et seq.


of the United States would proceed only to formulate rules at common law or would assume the full power given it and "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." This question was answered on May 9, 1935, when the Chief Justice of the United States in an address before the American Law Institute announced that the Court had decided that there was no need for separate systems at law and in equity and that the Court would proceed to formulate one set of rules.\(^5\) Shortly thereafter the Supreme Court of the United States passed an order to this effect and appointed an advisory drafting committee consisting of fourteen lawyers and law professors from various parts of the country, with Hon. William D. Mitchell as chairman, to assist the Court in its undertaking and "subject to the instructions of the Court, to prepare and submit to the Court a draft of a unified system of rules".\(^6\)

In May, 1936, this Committee, with the authority of the Court, distributed to the bench and bar of the country the third draft of the Proposed Rules.\(^7\) Since the American Bar Association had had such an active part in the promulgation of this legislation it was but fitting that this draft was first sent to its members and that an open forum discussion of these rules was had at the annual meeting of the Association in Boston, Massachusetts, in August, 1936.\(^8\) Since that time changes have been made in this draft and the latest revise will shortly be sent to each member of the Advisory Committee and it will be further revised by a special subcommittee on form and style. It is expected that the final revision will be submitted to the Supreme Court of the United States in the spring of this year and that the Court will then determine whether and to what extent distribution of the latest revise will be made. Undoubtedly further revisions will be made and it is to be assumed that no hasty action will be

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\(^6\) Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U. S. 774 (June 3, 1935).

\(^7\) Foreword to Preliminary Draft of Rules of Civil Procedure, May, 1936; Address of Chief Justice Hughes to American Law Institute, May 7, 1936, 22 A. B. A. J. 374 (1936).

taken, since intensive study and particularly thorough criticism are essential. 9

In view of the revision which is now in process any detailed comment on the rules set forth in the Preliminary Draft of May, 1936, seems rather vain and will not be attempted. However, a discussion of the Proposed Rules from the point of view of a New York practitioner may be of some practical value.

Before considering some of the ninety-four rules found in the Preliminary Draft attention is called to what seems, in some respects, to be the most essential rule contained in this draft. It is the last rule and provides a standing committee on Rules of Civil Procedure. This rule reads as follows:

"Rule A. Standing Committee on Rules of Civil Procedure. There shall be a standing advisory committee on rules of civil procedure of the Supreme Court of the United States which shall be known as the Advisory Committee on Rules of Civil Procedure. The members of this Committee shall be appointed in such manner and with such qualifications as the Supreme Court shall determine and shall hold office at the pleasure of the Court. The Committee shall meet once each year and may meet at any time upon call of its chairman or the Chief Justice. All suggestions of modification or amendment of the Federal Rules of Civil Procedure shall be referred to such Committee for its report and recommendation to the Court and the Court may refer to it other matters concerning which its recommendations may be desired. The Committee shall, of its own initiative, make recommendations to the Court for amendments to the Federal Rules of Civil Procedure, and shall make and file an annual report to the Court at or before the beginning of each October Term."

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In effect, there will thus be an ever-present body to watch the federal procedural law in action, to recommend changes where mistakes have been made, and to recommend improvements whenever deemed necessary. As stated by Mr. Justice Cardozo, "The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged." 10 The Advisory Committee's Note on this very vital rule refers to additional treatises advocating the creation of a standing committee or ministry to supervise not only procedure but also all statutory matter.

The general spirit and characteristic of the rules are to obliterate the procedural distinction in the federal courts between law and equity. The first two Proposed Rules indicate the objective sought:

"Rule 1. Scope of Rules. These rules shall govern the procedure in the district courts of the United States and in the Supreme Court of the District of Columbia [District Court of the United States for the District of Columbia] in all civil cases wherein it is sought to obtain the relief previously obtainable by actions at law and suits in equity. They are to be construed in all particulars so as to further and secure as speedily, simply, and inexpensively as possible the just determination of every action.

"Rule 2. One Form of Action and One Mode of Procedure. Hereafter there shall be only one form of

10 CARDozo, LAW AND LITERATURE AND OTHER ESSAYS p. 41 et seq.; see also Clark, A Striking Feature of the Proposed New Rules (1936) 22 A. B. A. J. 787; 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; "While power to amend the rules is not explicitly given by the Act of 1934, yet it would seem that power initially to establish rules carries with it, by necessary implication, the power to make changes as occasion or necessity may require. ** Perhaps more question arises as to whether amendments of the 'united rules', or new rules supplementing them, must be reported to Congress. While caution might suggest that they be so reported, it seems possible to argue that under the statute only the 'uniting' of the rules need be reported, and that since such union be a single act accomplished at one time, later changes need not be so reported. This last construction would avoid delay; and delay in making some amendments or additions might be embarrassing." Clark, Power of the Supreme Court to make Rules of Appellate Procedure (1936) 49 Harv. L. Rev. 1303; Shientag, A Ministry of Justice in Action (1937) 22 Cornell L. Q. 183.
action and one mode of procedure. The form of action shall be known as 'civil action' and the procedure shall be known as 'civil procedure'."

To attorneys practicing in code states, these two rules have a familiar sound. No one can deny that a decidedly forward-looking step has been taken in federal procedural reform. Overridden are the rather sporadic and unsuccessful attempts towards unification to be found in the Equity Rules permitting the transfer to the law docket of law actions erroneously begun as suits in equity,\(^{11}\) permitting a court of equity to dispose of matters ordinarily determined at law in an equity suit,\(^{12}\) in the statute permitting amendments to pleadings when the case is brought to the wrong side of the court\(^{13}\) and in the statute permitting the interposition of equitable defenses and equitable relief in actions at law.\(^{14}\) Henceforth there will be only one civil action and one civil procedure. However, the Proposed Rules expressly provide that nothing therein contained shall be construed as extending the jurisdiction of the district courts of the United States as it is now or may hereafter be established. Each rule shall be taken as limited to actions and issues which are within such jurisdiction.\(^{15}\)

Colonel Wigmore in his address to the American Bar Association, at its annual meeting in Boston in August of last year, pointed out three preliminary defects which should be corrected in any subsequent draft.\(^{16}\) These are: (1) the draft fails in its numbering to make provision for additions and amendments. The expansive method which is now common in many states should be employed; (2) many of the sections are too long and separable propositions are not placed in separate sections; and (3) the failure to incorpo-

\(^{11}\) Equity Rule 22.
\(^{12}\) Equity Rule 23.
\(^{13}\) 28 U. S. C. § 397.
rate and assemble all the relevant procedural statutes in the rules. As the rules now stand frequent references of this sort are found "any existing statute shall here govern to the extent to which it is applicable". Every federal practitioner knows the difficulty in ascertaining whether he has found all the relevant statutes on the subject that he has under consideration. They are so scattered. Any set of rules should obviate this unnecessary labor. These objections are merely mentioned in passing, since it is assumed that they have already been covered in the latest draft which is now in preparation.

COMMENCEMENT OF ACTION, SERVICE OF PROCESS, PLEADINGS, MOTIONS AND ORDERS (ARTICLE II)

The first rule under this title (3) deals with the commencement of action and is the first of a number which have been prepared by the Committee in the alternative. One alternative provides that the action may be commenced by the service of the summons and complaint without the previous filing in court of the complaint. The other alternative requires the filing of the complaint in court as an essential requisite to jurisdiction. The second alternative is similar to Equity Rules 11 and 12 while the first sets forth the practice familiar to New York State practitioners although it does not seem to permit the commencement of an action without a complaint.\(^1\) Provision is also made that the action will abate as to any defendant upon whom the summons and complaint have not been served within sixty days after the commencement of the action without a court order extending the time for service. Special reference is made to this rule in the foreword of the Preliminary Draft commencing at page ix. This rule must be considered in conjunction with Rule 6(b), which deals with the service and filing of pleadings and other papers and provides for three alternatives: (1) filing of all papers; (2) no filing except after notice from the adverse party requiring such filing and in any event before the action is called for trial; and (3) filing within a specified time. It seems that

\(^1\) N. Y. Civ. Prac. Act §§ 16, 100, 218 et seq.
the second alternative which is similar to the New York rule is the more desirable.\textsuperscript{18} It avoids early publicity, lessens fees and lightens the burden of the district court clerk since a great number of cases are settled without trial or hearing under such circumstances that the papers need never have been filed. The formality, publicity and certainty which is claimed to exist when immediate filing is essential do not impress a New York State practitioner. It also seems unnecessary to provide that a summons and complaint abate after the action has been commenced unless served within sixty days thereafter. Why limit the life of the summons or at least why burden the court by requiring the signing of many additional orders? The provision that a complaint must accompany the summons is a proper one. A person who feels that he has a claim against another should at least have prepared a complaint before effecting service on his opponent. Some of the older practitioners in New York seemed to feel, and rightly so, that the plaintiff who does not go to the extent of serving his complaint with the summons indicates thereby that he has no great faith in his cause of action. Of course prompt filing in common-law cases has been the rule in the federal courts in the state of New York even under the Conformity Act,\textsuperscript{19} but there seems to be no real necessity for such a requirement. In connection with service of papers other than process it might be advantageous to provide for service through the attorney’s office letter drop or box in addition to leaving the paper at his dwelling.\textsuperscript{20}

The form of the summons and method of service is provided for by Rule 4. A uniform method of service is provided for, including actions against the United States, and there no longer is the requirement that the summons must be issued by the clerk of the Court, which in fact was always a mere formality. No change, of course, has been made as to the territorial jurisdiction of the district courts. However, it is provided that service is effected if made anywhere within the


\textsuperscript{19} U. S. D. C. S. D. N. Y. \textsc{Common Law Rules} 1, 2 and 4; U. S. D. C. E. D. N. Y. \textsc{Common Law Rules} 1 and 2.

state, even in those states which contain two or more districts, and service upon the United States is made uniform. The method of service on a natural person is similar to that provided for by the present Federal Equity Rules. There is no specific rule providing for service by publication.

Proposed Rule 7 seems to be a salutary one. First of all it provides that the period of time required for the doing of any act or the taking of any proceeding shall not be affected or limited by the expiration of a term of court, except (1) motions for a new trial, (2) relief against accident, fraud, material evidence newly discovered, etc. and (3) the time for taking an appeal. Somewhat similar to the Equity Rules, the rule provides that where the time prescribed by these rules or by rules of the court for doing any act, including the time for taking an appeal, expires on a Sunday or legal holiday, such time shall include the next succeeding day that is not a Sunday or legal holiday. It is assumed that this provision includes local state holidays.

PLEADINGS AND MOTIONS (ARTICLE III)

The pleadings contemplated are (a) a complaint, (b) an answer, (c) a reply, where provided by the rules, and “further pleadings as the court may order.” Demurrers, pleas, and exceptions for insufficiency of a pleading are not to be used. The rules also provide for a “cross-claim” which is a claim by one defendant against another, arising out of the transaction which is the subject matter of the action including a claim that such co-defendant is or may be liable to the cross-claimant for all or part of the claim made by the plaintiff against such cross-claimant. Provision is also

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22 Equity Rule 13.
23 Proposed Rule 65(b).
24 Proposed Rule 66(b).
25 Equity Rule 80.
27 Proposed Rules 9 and 20.
made for a "third-party-complaint" and for a "third-party-answer".\textsuperscript{29}

Considering the complaint, we find that "the complaint shall be sufficient if it contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, (2) a short and plain statement of the claim showing that the plaintiff is entitled to relief, and (3) a demand for the relief to which he deems himself entitled.\textsuperscript{30} Provision is also made for separately stating and numbering "whenever such separation facilitates the clear presentation or adequate understanding of the matters set forth".\textsuperscript{31} The tendency indicated is, therefore, against such separate statements. Is that wise? Surely, separate statements should always be required where a party is pleading legal and equitable causes of action in the same complaint. Changes in procedure do not alter the substantive differences between the common law and equity. The rules also accentuate "substantial justice" and permit alternative and hypothetical pleading, regardless of consistency.\textsuperscript{32}

Care has apparently been taken not to use the old phrases of code pleading such as "cause of action", "facts" or "material facts". It is interesting to compare these rules with Section 241 of the New York Civil Practice Act, which states:

"Every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence."

and with the comparatively new Illinois Civil Practice Act (Section 33) which provides that:

"All pleadings shall contain a plain and concise statement of the pleader's cause of action, counter-claim, defense, or reply."

\textsuperscript{29} Proposed Rules 9 and 19.
\textsuperscript{30} Proposed Rule 14.
\textsuperscript{31} Proposed Rule 11.
It seems that the Committee had in mind the explanation given by the late Professor Edward W. Hinton for leaving out of the new Illinois Civil Practice Act the words “facts” or “material facts”.

“The Committee *** decided to omit the word ‘facts’ in order to minimize so far as possible the controversy that has arisen in so many code states where pleadings have been constantly attacked as setting out conclusions rather than facts ***.

“All the earlier writers on Code Pleading emphasized that the new system was a fact system and that the pleader was to state facts, the whole facts, and nothing but the facts, and that has led to a great deal of useless controversy. No pleading was ever formulated that stated facts and nothing but facts. It is impracticable if not impossible to make a pure fact statement. The common-law system with which you are familiar made practically no attempt to require the statement of facts. Just consider for a moment. The common count in assumpsit alleged that the defendant was indebted to the plaintiff for goods, wares and merchandise sold [and] delivered to him, and, being so indebted, in consideration thereof underwrote and promised to pay—not a single fact. Absolutely not a single fact. What, in point of law, creates a debt? It is not stated. What, in point of law, constitutes a delivery? It is not stated. What, in point of law, constitutes a promise? It is not stated. The pleader simply states the legal result of unstated facts. Those are the common counts in assumpsit.”

The Committee, however, wisely included a further Section so that no contention can be made that the old common counts have been abolished by stating:

“Common Counts. A pleader may employ one or more of the appropriate so-called ‘common counts’ sub-

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ject to the power of the court to order a fuller statement under the provisions of Rule 17." 34

It is doubtful whether the provision that a complaint shall contain a "short and plain statement of the claim showing that the plaintiff is entitled to relief" is an improvement on the requirement that a complaint "shall contain a plain and concise statement of the pleader's cause of action". The objective sought seems to be the same. The phraseology does not seem to help.

Rule 17 deals with bills of particulars, and motions to make more definite and certain and to strike. It would seem that only bills of particulars are contemplated with respect to properly pleaded common counts, otherwise the privilege to use the common counts would be an empty one.

Joinder of causes of action called "claims", as previously noted, is provided for under the title of Parties. 35 A party is permitted to join in one pleading, in the alternative or otherwise, as many different claims, legal or equitable or both, as he may have against an opposing party. This rule is in harmony with the recent development both in code and common-law states toward unlimited joinder of actions and contains the usual condition that the court may in furtherance of justice or convenience or to avoid prejudice order a separate trial of any distinct issue or issues. 36

Provision is also made for a set of forms 37 which it is assumed will include sufficient pleading forms to guide the practitioner so as to avoid the many pitfalls which he has encountered whenever ancient landmarks were swept away. 38 These forms are not contained in this draft.

34 Proposed Rule 13(6).
35 Proposed Rule 25.
37 Proposed Rule 8.
The answer, reply or “other responsive pleading” need only set out in short and plain terms the denial or matter in avoidance of each claim asserted in the pleading to which it is responsive. These provisions are supplemented by a rule which deals with “Defenses” used in a broad sense and such defenses are not limited to the defendant. Furthermore, objections concerning the sufficiency of the service of process, venue, and “lack of the courts’ jurisdiction” are found under that heading but must be raised, as is the usual practice, by motion before answer. The condition, however, is imposed that such objections must be raised at one time. The usual technical requirement, particularly where the sufficiency of the service of process is raised, that the defendant specifically state that he is appearing “specially” is abolished, the rule providing that such a motion shall constitute a special appearance without being denominated as such. It is also provided that these objections cannot be raised by a defendant at any other time or in other manner. It does not seem clear why the contention of the court’s own lack of jurisdiction must be raised before answer. It is axiomatic that the parties cannot confer jurisdiction on a court that does not have it and in fact the rule continues by providing that the court of its own motion may at any time raise the objection of its own lack of jurisdiction. Perhaps the revisors intended a distinction between “lack of the court’s jurisdiction” and the court’s “own lack of jurisdiction”. In other words, the recognized difference between jurisdiction of the person and jurisdiction of the subject matter may have been intended. Some clarification would be helpful. These provisions are also made applicable to a third-party-defendant. Every defense in point of law or fact other than motions on the pleadings, summary judgment motions, and motions to


40 Proposed Rule 15.
40 Proposed Rule 16.
43 Proposed Rule 16(d).
44 Proposed Rules 42 and 43.
strike, to make more definite or for a bill of particulars,\textsuperscript{44} when addressed to the complaint must be made in the answer and when addressed to a claim or defense in the answer must be made in the reply.\textsuperscript{45} Provision is also made for the separate trial of a defense wherein the decision may finally dispose of the whole or a material part of the issues. This may include the entry of final judgment, with the privilege of amendment,\textsuperscript{46} however, upon good cause shown.

The rule also permits motions for judgment on the pleadings by either party within ten days after the pleadings are closed. This subdivision is not as broad as the judgment on the pleadings provisions in the New York Civil Practice Act which permit the motion to be made at any time if warranted by the pleadings or the admissions of the party.\textsuperscript{48} But in this connection reference should be made to Proposed Rule 43, which will be considered later.

The Proposed Rules, it seems, fail to provide for a motion to dismiss before answer, similar to that found in the Equity Rules\textsuperscript{47} or in the New York Civil Practice Act and Rules.\textsuperscript{48} This seems proper since there is no reason why an action should be delayed until the determination of such a motion. Affirmative defenses must be pleaded as such. Mistakenly designating a counterclaim as a defense or vice versa does not prevent the court from giving it its proper title.

The Proposed Rules make it mandatory upon a defendant to state in his answer any claim which he has at the time against a plaintiff, which arises out of the transaction that is the subject of the action \textit{provided} that the court has jurisdiction to entertain the claim and can, if the presence of third parties is essential for its adjudication, acquire jurisdiction of such parties.\textsuperscript{49} The present Equity Rules contain a similar provision which seems to have worked well and, because of its mandatory feature, has generally resulted in great liberality in the court's allowing the setting up of

\textsuperscript{44} Proposed Rule 17.
\textsuperscript{45} Proposed Rule 16(c).
\textsuperscript{47} Equity Rule 29.
\textsuperscript{49} Proposed Rule 18.
counterclaims. But the clause "provided the court has jurisdiction to entertain the claim and can, if the presence of third parties is essential for its adjudication, acquire jurisdiction of such parties" is new.

The Proposed Rule, however, will compel a party to interpose a legal counterclaim if it arises out of the subject matter of the action and provided it meets the other requirements above stated. This, of course, is not the rule under the Equity Rules which have been interpreted as mandatory only when the cross-demand is equitable. The new Rule because of its mandatory provision should not deprive the defendant of his right to trial by jury with respect to his legal counterclaim. That seems to be taken care of in the Proposed Rules dealing with jury demands. Clarification might be helpful. The interposition of other counterclaims against a plaintiff is optionable with the defendant but the counterclaim must be a claim which might be the subject of an independent action and a claim that the court has jurisdiction to entertain.

Under the mandatory counterclaim clause of Equity Rule 30, the federal courts have permitted the inclusion of counterclaims for unfair competition by threats in bad faith to bring patent suits against the defendant's customers in suits in equity against the defendant for infringement of a patent. Do the words above quoted, i.e., "provided the court has jurisdiction to entertain the claim", indicate an intention on the part of the drafters of the Proposed Rules that this class of counterclaim, too, is going to be subjected to the test of qualifying as a proper independent subject for federal jurisdiction?

This Rule also permits an answer to state a cross-claim against another defendant arising out of the transaction which is the subject of the action, including a claim that such co-defendant is or may be liable to the cross-claimant for all or part of the claim made by the plaintiff against such cross-

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60 Equity Rule 30; Hopkins, Federal Equity Rules (7th ed.) pp. 208-449.
62 Proposed Rules 45-47.
claimant; such an answer must be served upon the defendant against whom it is asserted who must reply to the cross-claim. Since provisions for a reply are set forth, it obviates the problem that arises under a somewhat similar section of the New York Civil Practice Act where no provision is made for a reply to the cross-claim.\textsuperscript{54}

Additional persons may be brought in by court order as parties defendant when the determination of a counterclaim or cross-claim requires their presence as parties and jurisdiction of such persons can be had and their presence will not oust the court of jurisdiction of the action. The court may, in its discretion, order severance of any counterclaim or cross-claim which does not go to diminish or defeat the recovery sought by the plaintiff,\textsuperscript{55} or may direct a separate trial thereof. Separate judgments are also permissible and in case separate judgments are rendered, the court may order a delay in the execution of a prior judgment until a subsequent judgment or subsequent judgments are rendered.

Third party impleader\textsuperscript{56} is permitted. This procedure has been successful in admiralty for many years\textsuperscript{57} and under the Conformity Act has been applied in actions at law in the federal courts.\textsuperscript{58} The Proposed Rule provides that with the service of the answer or within a reasonable time thereafter, a defendant may apply \textit{ex parte} for leave as a third-party-plaintiff, to serve a summons and complaint upon a person not a party to the action who is or may be liable to such defendant (thereafter to be called the third-party-defendant) for all or part of the claim made against him by the plaintiff. The rule sets forth in detail the method of service of the summons and pleadings and permits impleader by a party

\textsuperscript{54} N. Y. Civ. Prac. Act § 264 and cases cited thereunder.

\textsuperscript{55} What is the meaning of "does not go to diminish or defeat"? "A counterclaim 'must tend in some way to diminish or defeat the plaintiff's recovery,' and even though the counterclaim be otherwise sufficient, if under its allegations the defendant could recover only nominal damages, it does not tend to diminish or defeat the plaintiff's recovery." Lehman, J., in Stafford v. Mincor Trading Corporation, (Special Term Part IV, N. Y. County) N. Y. L. J., Jan. 25, 1922, p. 1450.

\textsuperscript{56} Proposed Rule 19.


brought in by original impleader, a right which is also granted under the New York State practice. The third-party-defendant is bound by the adjudication of the third-party-plaintiff's liability to the plaintiff, as well as of his own to the third-party-plaintiff. If a third-party-defendant is brought in, the plaintiff may amend his pleadings so as to assert against him any claim which he (the plaintiff) might have asserted against such third-party-defendant had he been joined originally as a defendant. This runs contrary to the New York rule where the theory is zealously adhered to that the plaintiff has no claim against the party brought in; there, it remains a controversy between the plaintiff and the defendant and a separate and distinct controversy between the defendant and the third-party-defendant. The plaintiff is also given the right to implead if a counterclaim is asserted against him. Whether an impleader will be granted in negligence actions where there are joint tort feasors is a matter of speculation. The Proposed Rule is certainly broad enough to permit it.

One amendment of his pleading is allowed a party as a matter of course unless the action has already been placed on the trial calendar. Other amendments are by leave of court and "shall be freely given when the ends of justice so require." Pleadings shall be deemed amended to conform to all evidence that is received without objection and even if objection is made and the court is satisfied that the admission of such evidence would actually prejudice the objecting party, the court must (1) sustain the objection or (2) allow the pleadings to be amended and order a continuance on terms. The burden, however, is upon the objecting party. It is proper "that a party is not to be penalized by any error in any formal statement or allegation he has made," but does not

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Footnotes:
such liberality in amendments encourage slipshod pleading? Should not the burden be on the guilty party to show to the satisfaction of the court that such amendments are not prejudicial to the objecting party?

The same Proposed Rule contains a subdivision to the effect that amendments of the pleadings shall relate back to the date of the original pleading so amended “whenever the claim or defenses asserted in the amended pleading arose out of the conduct, transaction or occurrence specified, set up, or attempted or intended to be specified or set up in the original pleading.” It seems that the liberality of this provision would at times act extremely unfairly on a defendant in a case where the plaintiff amends and the plea of the Statute of Limitations, for instance, is involved. A defendant should be permitted to plead the statute in the case where the period has run between the date of the commencement of the action and the date of the order granting the amendment. Provision is, of course, made for supplemental pleadings.

Following to some extent the English Rules under the Judicature Act, the Proposed Rules provide that the court on motion of any party or sua sponte may order issues presented by the pleadings to be disregarded upon determining that there is no real and substantial dispute as to these issues and may formulate the issues as to which there is any real and substantial dispute between the parties. The court, however, may in its discretion refuse to entertain such a motion. This rule thus makes provision for a limited pre-trial hearing.

Motions may also be made within a specified time for a more definite statement or a bill of particulars. This rule requires the furnishing of a bill of particulars of the allegations of complaint before service of an answer and probably also of a bill of particulars of the denials of an answer or similar pleading since the rule provides that “a party may

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33 Harriss v. Tams, 258 N. Y. 229, 179 N. E. 476 (1932); but see note of the Committee to this Rule which states that “Relation back” is a well recognized doctrine of recent and now more frequent application.
34 ENGLISH RULES UNDER THE JUDICATURE ACT, O. 33, r. 1; O. 34, r. 9; O. 30, r. 1 (1935).
36 Proposed Rule 17.
move for * * * a bill of particulars of any matter set forth therein which is not averred with sufficient definiteness or particularity to enable him properly * * * to meet it at the trial." If this interpretation is correct the rule goes far beyond anything known in New York State procedure and seems to encourage "fishing expeditions". This should not be permitted. Failure to comply with an order to make more definite or for a bill of particulars subjects the offending party to the possible penalty of having the pleading to which the motion was addressed stricken out.

A bill of particulars is to be treated as a part of the pleading which it supplements. This is the rule in New York.

Provision is also made in the same rule permitting the court at any time on motion or sua sponte to order any redundant, immaterial, impertinent or scandalous matter stricken from any pleading upon terms. This is treated in most code states as a preliminary objection which must be raised by motion within a specified time after receipt of the offending pleading. This rule, however, is similar to Equity Rule 21 dealing with scandal and impertinence which does not prescribe the time within which such objection must be raised.

Following substantially the provisions of the Federal Equity Rules, every pleading must be personally signed by an attorney of record but it is not required to be sworn to or verified except as stated below. Such signature is considered a certificate by him that (1) he has read the pleading, (2) to the best of his knowledge, information and belief, there is good ground for supporting it, and (3) it is not interposed for delay. Wilful violation or failure to sign justifies the striking out of the offending pleading and for wilful violation of the rule an attorney may be held in contempt of court or subjected to other appropriate disciplinary action and simi-

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69 N. Y. CIV. PRAC. RULES 103, 104 and 105.
70 Equity Rules 21 and 24.
71 Proposed Rule 10.
lar action may be taken if scandalous or indecent matter or false allegations are inserted. If a party is not represented by attorney he must himself sign the pleading on the same conditions. This rule expressly continues any specific rule or statute which requires a pleading to be verified or accompanied by an affidavit.72

The requirements of Federal Equity Rule 27 with respect to a stockholders' bill are incorporated with a few verbal changes in Proposed Rule 21.

PARTIES INCLUDING JOINDER OF CAUSES OF ACTIONS
(ARTICLE IV)

The first provision found under this title is that defining the real party in interest and except for changing "person" to party (a questionable change of style), it is Section 210 of the New York Civil Practice Act and verbatim it is Equity Rule 37. It is questionable whether the concept of the real party in interest should be continued in this form in view of the confusion that this term has caused under code pleading and in view of the question raised in suits brought by assignees of patent claims.73 The same rule contains some helpful provisions with respect to capacity to sue and pleadings on behalf of natural persons under disability.

Persons who have a joint interest either as plaintiffs or defendants must be joined as parties except that when they are so numerous as to make it impracticable to include them all as parties, such number of them as will fairly insure the

72 Cf. 28 U. S. C. §§ 377a, 377b, 377c, 381 and 762; cf. It is hoped that the old equity rule that a sworn answer was admissible in evidence and required the testimony of two witnesses or one witness plus corroborating circumstances to overthrow it, is no longer the rule, 7 HUGHES, FEDERAL PRACTICE (1931) § 4588; but see Demarest v. Winchester Repeating Arms Co., 257 Fed. 162 (D. Conn. 1919) and Farrell v. Forest Investment Co., 73 Fla. 191, 74 So. 216 (1917).

adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants. The Proposed Rules also provide for liberal joinder of parties plaintiff and defendant jointly, severally or in the alternative provided any question of law or fact common to all such plaintiffs or defendants, as the case may be, will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief prayed for and judgment may be given according to the respective liability of the parties. The remainder of the rule on class suits provides that when the persons who might join or be joined are so numerous as to make it impracticable to include them all as parties, such a number of them as will fairly insure the adequate representation of all may, on behalf of all, join as plaintiffs or be joined as defendants. Substantially similar provisions are found in the more modern code states and represent only a moderate expansion of the present equity practice to cover both law and equity actions.

There is a further requirement that the names of parties who should have been joined and the reason for their omission be stated.

The practice of interpleader is carefully covered by the rules so that provision is made not only for strict interpleader and for actions in the nature of interpleader but also along the lines of joinder in the alternative. This Proposed Rule is much more liberal than the interpleader rules of New York State. The so-called Federal Interpleader Act of 1936 is not repealed nor are certain interpleader statutes which are applicable only to special cases.

The subject of intervention is also provided for and the

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75 Proposed Rule 27.
76 Cf. Notes of Advisory Committee to Proposed Rules 26 and 27.
77 Last paragraph of Proposed Rule 26; consider Gilman v. Rivis, 10 Pet. 298 (U. S. 1836) which upheld a demurrer to a declaration against Rivis upon a joint objection of Rivis and one Lyne where no reason was assigned in it, why Lyne was not a party to the action.
78 Proposed Rule 28.
81 Cf. Note of Advisory Committee to Proposed Rule 28.
application to intervene must be granted (1) in any action, so long as the court has control of it, in which the applicant is or may be bound through his representation by existing parties to the action and it appears that such representation is or may be inadequate; and (2) in an action where property is in custodia legis, if the applicant "is so situated that distribution or other disposition of the property would adversely affect him." Intervention may also be granted to anyone who could originally have been made a party plaintiff or defendant under Proposed Rules 26, 27 and 28.\textsuperscript{82} Again we find that this Rule is not all-inclusive and that various federal statutes have to be consulted to determine the rights and procedure of intervention in certain cases.\textsuperscript{83} Why not incorporate them in the Rule?\textsuperscript{84}

\textbf{DEPOSITIONS, DISCOVERY AND SUMMARY JUDGMENTS (Article V)}

The rules under this title are rather advanced steps in federal as well as in state procedure. \textit{Ex parte Fiske},\textsuperscript{85} is buried and the other extreme is reached so that an examination may be had at any time and used for almost any purpose. An examination before trial even before issue joined may be had orally or through written interrogatories not only of the party, but of his agents or employees, of the officials and employees of any public or private corporation, partnership or association, which is an adverse party, and of any witness who is unwilling or hostile. They all may be examined as if under cross-examination.\textsuperscript{86} Of course, adequate provision is made to perpetuate testimony under the provisions of Section 866, United States Revised Statutes, 28 U. S. C. § 644, or in accordance with the practice of any state wherein the deposition is taken (not wherein the action is pending).\textsuperscript{87} The

\textsuperscript{82} Proposed Rule 29.
\textsuperscript{83} Note of Advisory Committee to Proposed Rule 29.
\textsuperscript{84} Cf. supra pp. 217-218.
\textsuperscript{85} 113 U. S. 713, 5 Sup. Ct. 724 (1885).
\textsuperscript{86} Proposed Rule 31(a).
\textsuperscript{87} Proposed Rule 31(b).
provision as to the scope of the examination is also extremely liberal. The witness may be examined regarding any matter, not privileged, which is relevant to the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, subject-matter, custody, location and opportunity for inspection of any books, documents, or other tangible things. Limited safeguards have been incorporated in the rules, such as the appointment of a master before whom the testimony may be taken who is authorized to rule on the admission of evidence, and the stopping of an examination of a party at any time by the court when the examination is not conducted in good faith.

These limitations, it would seem, are not sufficient to protect the parties. No examination should be granted unless the good faith of the examining party is evident since the abuse of deposition machinery to harass adversaries is real and not fanciful, particularly in certain types of action. Furthermore, the examination should not be allowed until after issue joined and even then the examination should be limited to matters relevant to the issues in the cause. It is only after that time that the nature of the issues is defined and ordinarily no hardship is imposed if the right to examine is postponed until then. There is no objection to a special rule providing for an examination before issue joined if the court is satisfied that unusual circumstances exist. As stated by Judge Finch of the New York Court of Appeals: "The more examinations and applications to the Court a plaintiff may make, the greater is the nuisance value of the litigation and the expense thrust upon a defendant no matter how meritorious his defense." Since the examination is also open to the defendant as soon as the action has been commenced it is contended that the rule "will actually lessen the chance of perjured

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88 Proposed Rule 31(c).
89 Proposed Rule 32(b) and (c).
testimony” and that “in actual practice, if defendants avail themselves of the device it is more likely to discourage fishing expeditions than otherwise, an opinion which I find shared by defendant’s lawyers in Missouri where the rule has been found effective.” But it is pertinent to ask whether the defendant in a complicated stockholder’s action, for instance, is in a position to proceed at once on receipt of the complaint to conduct an efficient or productive examination before trial of the plaintiff before the plaintiff has commenced his examination of the defendant. Provision is, of course, made to compel the attendance of witnesses.

Proposed Rule 37 allows a party at any time after the commencement of the action to require his adversary to furnish him with a list of all documents, books, photographs or other tangible things which are relevant to any matter involved in the action and are or have been in his possession or control. No court order is required and the burden is placed upon the party served to apply for an order modifying it. It seems that the objections above enumerated as to the proposed rules on examinations before trial also apply as far as pertinent. There is no question that the purpose is a laudable one but since such a rule tends towards requiring his adversary to prepare his opponent’s case, at least an order of the court should be required to prevent abuse.

Both physical and mental examinations of persons are permitted pursuant to court order on good cause shown. Provision is also made for furnishing a written statement of the findings of the examination. Physical examinations are permitted in a number of states and under the Conformity Act have been allowed in personal injury actions in the federal courts embracing New York State since the enact-

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94 Proposed Rule 51 (Subpoena).

95 Ill. Rules of Practice, rule 17 (1933); Conboy, loc. cit. supra note 93.

96 Proposed Rule 39(a).

97 Proposed Rule 39(b).
ment of the Civil Practice Act permitting a physical examination without oral testimony.\(^{98}\)

Proposed Rule 40 is similar to Sections 322 and 323 of the New York Civil Practice Act providing for requests by one party to the other for written admissions of the genuineness of documents and written admissions of specified relevant facts.

Provision is also made for the effective enforcement of answers to questions or of demands to give discovery.\(^{99}\)

There are two rules dealing with summary judgment. The first one might be called an enlarged motion for judgment on the pleadings and admissions, plus depositions.\(^{100}\) This is contrary to the motion known to New York practitioners, where depositions may not be used.\(^{101}\) The adverse party may file opposing affidavits and the court has discretion to permit either party to take and file depositions or to present oral testimony. When that is granted the New York Summary Judgment Rule 113 is approached except that in New York oral testimony is not permitted. In order to grant the motion the court must find that there is no substantial issue of fact affecting the right of the moving party to judgment. It seems unwise to permit the taking of oral testimony. A preliminary trial should not be permitted. When testimony is taken there is an unconscious tendency to weigh the evidence.

The other Proposed Rule permits any party seeking to recover upon, or any party seeking to defend against, a claim, counterclaim or cross-claim to move for summary judgment on affidavits. The affidavits must set forth facts which on their face would require a decision in his favor as a matter of law.\(^{102}\) The motion is available in any action and to that extent it is a departure from the existing English and American rules. In New York the relief is made


\(^{99}\) Proposed Rule 41.

\(^{100}\) Proposed Rule 42.

\(^{101}\) N. Y. CIV. PRAC. ACT § 476; N. Y. CIV. PRAC. RULE 112; The words "admissions of a party or parties" refers to admissions made in the action, and intended to be treated as a part of a pleading or made to avoid some question arising on the pleading, Lloyd v. R. S. M. Corp., 251 N. Y. 318, 167 N. E. 456 (1929).

\(^{102}\) Proposed Rule 43.
available only in certain enumerated cases but the class is so large that the Commission on Administration of Justice recommended some time ago that all restrictions be removed.\textsuperscript{103} Summary judgment has proved to be a very effective remedy. Its constitutionality has been upheld in New York,\textsuperscript{104} and under the Conformity Act it has been employed in the Federal Courts in New York in law cases.\textsuperscript{105} The Proposed Rule goes considerably beyond the existing New York rule with respect to the procedure on the motion since the court may, in its discretion, permit affidavits to be supplemented or opposed by depositions, oral testimony or other evidence or may permit further affidavits to be filed at any time, or may permit or require any affiant to be present in court for examination or cross-examination. The comment as to Proposed Rule 42 applies here even more emphatically. The taking of testimony upon such a motion may only be preliminary to an actual trial of the issues. Thus in cases where the court denies a motion after hearing testimony, there would in fact be a second trial when the case is actually reached for trial. Such procedure may have the effect of duplication or of slowing up rather than of expediting the administration of justice.\textsuperscript{106}

The probability of trial duplication has been foreseen in Proposed Rule 44 which is as follows:

"If, on motion under Rules 42 or 43, judgment shall not be rendered upon the whole case or for all the relief asked and a trial shall be necessary, the court, at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, so far as may be conveniently possible, ascertain what material facts exist without substantial controversy and what material facts are actually

\textsuperscript{104} General Investment Co. v. Interborough Rapid Transit Co., 235 N. Y. 133, 139 N. E. 216 (1923).  
\textsuperscript{105} Maslin v. Columbian Nat. Life Ins. Co., 3 F. Supp. 368 (S. D. N. Y. 1932) and cases cited therein.  
\textsuperscript{106} Conboy, Depositions, Discovery and Summary Judgments (1936) 22 A. B. A. J. 881."
and in good faith controverted. It shall thereupon
make an order specifying the facts that appear with-
out substantial controversy, including the extent to
which the amount of damages or other relief is not in
controversy, and directing such further proceedings in
the action as may be just. Upon the trial of the action
the facts so specified shall be deemed established, and
the trial shall be conducted accordingly, unless the
court, for good cause shown, sets aside its previous
order."

This provision seems to be an attempt to create machin-
ery for a pre-trial hearing in a rather backhanded way. If a
pre-trial hearing is desirable procedure it should not be pro-
vided for in this manner.\(^\text{107}\)

**TRIALS (ARTICLE VI)**

The ensuing eighteen Proposed Rules deal more particu-
larly with the trial procedure. The first Proposed Rule under
this title provides for the preservation of the constitutional
right of trial by jury as directed in the enabling act.\(^\text{108}\)

"In suits at common law, where the value in con-
troversy shall exceed §20, the right of trial by jury
shall be preserved, and no fact tried by the jury shall
be otherwise re-examined in any court of the United
States, than according to the rules of the common
law."

This is the mandate of the Seventh Amendment to the
Constitution. Accordingly the right to a jury trial is absolute
in law cases in the federal courts unless waived in writing
or by oral stipulation in open court.\(^\text{109}\) If waived in any other
manner the rights on appeal are considerably restricted. Un-

\(^\text{107}\) For a discussion of the Pre-Trial Hearing, see A Proposal for Minimiz-
ing Calendar Delay in Jury Cases (The New York Law Society, December,
1936); *cf. supra* p. 229.

\(^\text{108}\) Proposed Rule 45.

der the Proposed Rules the right to jury trial is preserved but the methods of waiver are greatly expanded. Thus if a jury trial is desired of all or some of the issues it must be affirmatively demanded. This rule is prepared in the alternative dependent upon the time of filing of pleadings. In either case, however, a written demand for a jury must be served upon the other parties to the cause within a specified time. Failure of any party to serve such a demand constitutes a waiver by him of all rights he may have to a jury trial. The claim or demand may specify the issues which the party wishes to have so tried, otherwise there will be a jury trial of all the issues. If a jury trial is demanded of only a part of the issues any other party may, within a specified time, claim a jury trial of any other or all of the issues of fact in the case. This method of jury waiver is common in many of the states and, to a limited degree, is the rule applicable to the counties comprising the city of New York.

Proposed Rule 46 prescribes that where a jury was duly demanded the action shall be entered on the docket as a jury case. It must be so tried unless the parties file a written stipulation consenting to trial by the court alone or so stipulate in open court. Of course, the court upon motion or of its own initiative may find that a right of jury trial of some or all of the issues does not exist under the Constitution or statutes of the United States in which event no jury trial may be had as to such issues although timely demand was made. In other words, the service of a demand for a jury trial under Proposed Rule 45 cannot create a right to jury trial not existing at common law. Furthermore, in all actions, the court may on motion or sua sponte order any issues to be tried by jury, although no right to trial by jury exists either because not originally "demandable" or because of waiver. A clarification of the meaning of "demandable" in this connection would be helpful. Provision is also made for an advisory jury. Contrary to the present federal equity practice of trying equitable issues first the proposed rule leaves to the court to determine the sequence in which the jury and non-jury issues shall be tried.

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110 Cf. Proposed Rule 6(b) and discussion supra pp. 218–219.
Proposed Rule 47 makes provision for the assignment of cases for trial. Two alternatives are proposed: (1) that the cause go on the trial calendar automatically after the pleadings are completed, and (2) that the cause go on the trial calendar upon motion of a party and notice to the other parties. In view of the suggestion made in respect of filing pleadings (Proposed Rule 6(b)) the second alternative should be adopted.

The Proposed Rules also prescribe generally the instances when an action may be dismissed without prejudice, and when actions may be consolidated or severed.

The next Proposed Rule deals with testimony and evidence. As is the rule at present, oral testimony in open court is prescribed and the competency of a witness to testify is determined by the law of the state in which the court is held. All evidence is admissible which would be admissible under the rules of evidence applied in the trial of federal equity cases and also all evidence which would be admissible in a state court of general jurisdiction under the statutes and decisions of that state wherein the United States court is held. Adverse parties or unwilling or hostile witnesses may be examined as if under cross-examination and contradictory statements of any witness may be shown. Errors in the admission or the exclusion of evidence shall not be a ground for setting aside a verdict or for reversing, modifying or otherwise disturbing a judgment on appeal in the absence of material prejudice to substantial rights.

The Proposed Rule, however, fails to bring about a reform of the federal rules of evidence. That reform is needed, is unquestionable. The law of evidence in our Federal Courts is in a most deplorable condition. It is inferior to that of any of the fifty States and Territories—I say, inferior to any of them, and not only inferior but far inferior. I for one have long ago given up hope of being able to state what is the Federal law on any rule of Evidence. I merely note the

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112 Pp. 218-219 supra.
113 Proposed Rule 48. That a motion to dismiss without prejudice, in every real sense, is a motion for non-suit, see Holdeman v. United States, 91 U. S. 584, 23 L. ed. 433 (1876); In re Skinner & Eddy Corp., 265 U. S. 86, 44 Sup. Ct. 446 (1924).
tenor of the new ruling and file it away where it seems to belong on top of the preceding mass of rulings." How far the enabling act includes the law of evidence remains in doubt since the tendency in the past has been to regard evidence as falling within the Rules of Decisions Act although the Competency of Witnesses Act and the Conformity Act have also been considered by the federal courts whenever evidence questions have arisen. Still some attempt at conformity could have been attempted without raising the question of whether the rules of evidence affect the substantive rights of the litigant. The Proposed Rule also prescribes that nothing in the rules shall limit or restrict the methods of proving documents and other public records provided by existing statutes of the United States. No attempt has been made to re-assemble them although it is a known fact that they are scattered throughout the code.

The suggestion made by Colonel Wigmore seems an excellent one, that is, to re-assemble in one Evidence chapter the chief rules now scattered elsewhere. “By 'chief rules' I mean not all of them, for there are scores and scores in all, but only the rules that are likely to be applicable in the general rule of cases. Thus the practitioner will be able to find collected in one place those principal rules. This does not mean to reform these rules. It does not even mean to repeal their statutory status. It means merely to repeat and re-assemble them in the place where they belong and where they are needed." Dean Wigmore has prepared in connection with his laudable criticism of this rule a memorandum and draft of rules consolidating and simplifying the federal statutes on proof of official records and filling some of the gaps in this field of evidence. It is to be hoped that the

116 Proposed Rule 50.
119 See note 116, supra.
120 Advisory Committee's Note to Proposed Rule 50.
Federal Rules when adopted will contain a few carefully drafted flexible rules in respect of evidence.

An important step in the right direction is the abolition of formal exceptions.\textsuperscript{120} This rule prescribes that it will be sufficient for all purposes for which an exception was heretofore necessary that an objecting party shall, at the time the ruling or order of the court was made or sought, make known to the court the action which he desires the court to take or his objection to the action of the court. If a ruling or order is made without a party having an opportunity to object, the necessity of objection is also obviated. It should, however, be noted that the provision in the New York Civil Practice Act that exceptions need not be taken to rulings of law made during the trial lasted only about two years.\textsuperscript{121} The federal statutes dealing with bills of exceptions\textsuperscript{122} and the review of findings in cases tried without a jury\textsuperscript{123} are superseded in so far as they provide for formal exceptions and a bill of exceptions. Precise objections to the court's charge to the jury, however, and perhaps exceptions to the charge are not abolished.\textsuperscript{124}

The examination of prospective jurors is limited in the court's discretion to such questions as the court itself may propound and the court may refuse to permit the parties or their attorneys to examine the jurors directly. This is now the general practice in the federal courts. It is also provided that in any action to be tried by a jury the court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors.\textsuperscript{125} The alternate juror shall replace a "juror who for any reason may become unable to perform his duties in the case." One addi-

\textsuperscript{120} Proposed Rule 52.
\textsuperscript{121} Cf. N. Y. Civ. Prac. Act §§ 445 and 446; the latter Section, under the 1936 amendment, restores the pre-1934 requirement that exceptions must be taken to rulings of law made during the trial. By the addition of a new subdivision 2 to C. P. A. § 583, it is provided, however, that the appellate court, in the interests of justice, may review a prejudicial ruling made during the trial though no exception was taken, provided there was an objection or there was a refusal or failure by the court to grant such a motion or request. The purpose of the amendment was to aid the trial justice by permitting him to know whether or not his rulings are acquiesced in; cf. Chesnut, Analysis of Proposed New Federal Rules of Civil Procedure, supra note 18.
\textsuperscript{122} 28 U. S. C. §776.
\textsuperscript{123} 28 U. S. C. §875.
\textsuperscript{125} Proposed Rule 53.
tional peremptory challenge is accorded in choosing an alter-
nate juror or jurors. This Proposed Rule is similar to that
now existing in federal criminal cases and in New York
cases.

The Proposed Rule, however, is
broader in that it permits alternate jurors in any case since
the court does not have to find that the trial is likely to be
a protracted one. The contingency for the replacing of a
juror is not limited to the situation where "a juror die, or
become ill, so as to be unable to perform his duty."

The parties may also stipulate in any action to be tried
by jury that the jury may consist of less than twelve and
that a verdict or a finding of a stated majority of the jurors
shall be taken as the verdict or finding of the jury. The
rule does not prescribe the form of the stipulation but it is
assumed that the stipulation must either be in writing and
filed or be oral and made in open court. The Proposed Rule
merely recognizes what already has been a common practice
in civil causes. The Proposed Rules further provide that in
jury cases the court, with the consent of the parties, or sua
sponte in cases not triable of right by the jury, may require
the jury to return only a special verdict in the form of a
special written finding, upon each issue of fact. This is
similar to the procedure in New York. Provision is also
made in any action tried before a jury for the court in its
discretion to submit to the jury written interrogatories upon
one or more matters of facts involved in the action and to
direct the jury both to make written answers to such inter-
rogatories and to render a general verdict. This procedure has
long been recognized in federal practice. The Proposed
Rule prescribes further that when the answers are consistent
with each other but one or more is inconsistent with the gen-
eral verdict, the court may enter judgment in accordance
with such answers notwithstanding the general verdict, or

§ 358-a (1933).
129 Proposed Rule 54.
130 Proposed Rule 55(a).
132 Proposed Rule 55(b); 3 Foster, Federal Practice (6th ed.) p. 2431
et seq.; Morgan, A Brief History of Special Verdicts and Special Interroga-
tories (1923) 32 Yale L. J. 575.
may return the jury for further consideration of its answers and verdict, or may order a new trial. Answers inconsistent with each other and one or more likewise inconsistent with the general verdict, prevent the court from entering judgment but permit it to return the jury for further consideration of its answers and verdict and to order a new trial.

The next subject treated by the Proposed Rules is that of motions for a directed verdict. It is first provided that such a motion must state the specific grounds therefor and that in any jury case, a party may so move at the close of the evidence offered by an opponent without thereby waiving his right to offer evidence in the event of the denial of the motion. Furthermore, a motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. These are desirable provisions since they do away with the present unnecessary technicalities familiar to all trial lawyers.

The second portion of this rule deals with the right of a trial judge in a jury case to take verdicts subject to the ultimate ruling on the questions reserved—the reservation carrying with it authority to make such ultimate disposition of the case as might be essential to the ruling under the reservation, such as entering a verdict or judgment for a party where the jury has given a verdict for the other, or ordering a new trial. The Proposed Rule also contains a suggested proviso to the effect that where there is a right to a trial by jury under the Seventh Amendment to the Constitution, the court shall not, without the express consent of the jury, reserve the question of the sufficiency of evidence to support a verdict in favor of any party who shall object to such reservation. The Committee expresses the hope in its Foreword to the Proposed Rules that the inclusion of this proviso will not be found necessary by the Court in the light of Slocum v. New York Life Ins. Co., and Baltimore and Carolina Line, Inc. v. Redman. At common

132 Proposed Rule 56.
law, as stated by the Supreme Court in the *Slocum* case, there were two well-recognized instances in which the verdict of a jury could be disregarded and the case disposed of without a new trial. One was where the defendant's plea confessed plaintiff's cause of action and set up matter in avoidance which, even if true, was insufficient in law to constitute a bar or defense; and the other was where the plaintiff's pleadings, even if its allegations were true, disclosed no right of recovery. If in either instance a verdict was taken, the court nevertheless could make such disposition of the case as was required by the state of the pleadings, and this because the issues settled by the verdict of the jury were wholly immaterial. In the first instance the court's action was invoked by a motion for judgment *non obstante veredicto*, and in the latter by a motion to arrest judgment on the verdict.

"A motion for judgment *non obstante veredicto* is one which is only made by a plaintiff * * *. It is given when, upon examination of the whole pleadings, it appears to the court that the defendant has admitted himself to be in the wrong, and has taken issue on some point, which, though decided in his favor by the jury, still does not at all better his case. A motion 'in arrest of judgment' is the exact reverse of that for judgment *non obstante veredicto*. The applicant in the one case insists that the plaintiff is entitled to the judgment of the court, although a verdict has been found against him. In the other case, that he is not entitled to the judgment of the court, although a verdict has been delivered in his favor. Like the motion for judgment *non obstante veredicto*, that in arrest of judgment must always be ground upon something apparently on the face of the pleadings." 135

Thus in the *Slocum* case where the pleadings presented an issue of fact and the jury returned a verdict for the plaintiff, the Supreme Court in a five-to-four decision held that neither the trial court nor the appellate court could thereafter direct a verdict for the defendant on the ground

135 SMITH, ACTION AT LAW (12th ed.) 147.
that the evidence was insufficient to support the jury's verdict, but must order a new trial. The theory expounded by the Court was that when the court rejects the jury's findings of fact, it reopening the issues of fact and if it enters a judgment contrary to that of the jury by itself determining those issues it contravenes the provisions of the Seventh Amendment to the Constitution that no fact in a common-law action where the controversy exceeds twenty dollars, tried by a jury "shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." This decision, of course, did not bind the state courts and many state courts refused to reach the same conclusion. In the federal courts means were found to escape the effect of this decision by falling back on the common-law method of reservation by the court of decision of a question of law until after the jury had rendered its verdict. Then in 1935 the Supreme Court decided the case of Baltimore and Carolina Line, Inc. v. Redman, supra, where an action had been brought in the federal court in New York to recover damages for personal injuries allegedly sustained by the plaintiff through the defendant's negligence. The issues were tried before the court and a jury. At the conclusion of the evidence the defendant moved to dismiss the complaint on the ground that the evidence was insufficient to support a verdict for the plaintiff, and for a directed verdict in its favor for the same reason. The Court reserved decision on both motions, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or this mode of procedure. Thereafter the Court held the evidence sufficient and the motions ill-grounded and accordingly entered judgment for the plaintiff on the verdict. On appeal to the Circuit Court of Appeals the court held the evidence


insufficient and reversed the judgment with a direction for a new trial. The defendant contended that the direction be for a dismissal of the complaint. The Court of Appeals held that under the decision of the Slocum case the direction had to be for a new trial. The Supreme Court, having granted certiorari, held that in reversing because as a matter of law the evidence was insufficient to sustain the verdict, the judgment of the Circuit Court of Appeals should embody a direction for a judgment of dismissal on the merits, and not for a new trial, and that such judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor. The Supreme Court distinguished the Slocum case on the ground that there the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence, while in the present case the trial court expressly reserved its ruling on defendant's motion, the verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings, and no objection was made to the reservation or this mode of proceeding. The Court accordingly stated that the parties must be regarded as having tacitly acceded to them. The basis of this later decision was that at common law there was an established practice of reserving law questions arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; "and under this practice," the Court held, "the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments." Since this rule was well established when the Seventh Amendment was adopted, the Court states it must be regarded as a part of the common-law rules to which resort must be had in testing the right of trial by jury as protected by the Amendment. Such was the holding of the Court.
Thus it appears that the common-law theory that where a reservation had been taken, the jury in fact consented that the court's ultimate ruling on questions of law would be a part of the verdict, was relied upon in the *Baltimore and Carolina Line* case. Accordingly, in such a case, if the court ruled that the evidence was insufficient as a matter of law to support the verdict of the jury in favor of the plaintiff, and that judgment should be entered in favor of the defendant, the verdict was not overruled or the jury's province trespassed upon, since the jury had consented to such procedure. In early days the consent of the jury was actually obtained, but later on the consent was merely presumed. If the Court had solely rested its opinion on this ground, it is submitted there would be little doubt of the propriety of such procedure. The Court, however, also emphasized the fact that the plaintiff's counsel had made no objection to the reservation of the court. Does that mean that if the plaintiff had made a timely objection that the holding would have been different? The weight of authority seems to be that the consent of the parties is not needed to reserve a question of law, but the doubt remains. Still, it is submitted that the real basis of the decision is the holding of the Court that at common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved and "whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted and therefore must be regarded as a part of the common-law rules to which resort must be had in testing the meaning of the right of trial by jury as preserved and protected by that Amendment." A finding that no objection was made to the reservation was not necessary in order to support the Court's conclusion. Indeed the aim of the Seventh Amendment is not to preserve mere matters of form and procedure but to preserve substantive rights. The question of reserva-

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138 Note (1935) 45 Yale L. J. 166; cf. N. Y. Civ. Prac. Act § 457-a providing that the jury may direct a verdict when he would set aside a contrary verdict as against the weight of evidence.

tion seems merely a matter of form and procedure. Furthermore, it is submitted that the matter contained in the proviso above set forth, need not be included in the Proposed Rule since, as previously stated, the consent of the jury to the reservation was at common law merely presumed except during the early years of its application. However, the provision that wherever a motion for directed verdict is made at the close of the case, "the court shall be deemed to have reserved thereon and to have taken the verdict subject to a later determination of the question involved," seems improperly phrased. Why not provide that in such a case the trial court must state on the minutes that the judgment will be entered non obstante verdicto? Thus we have a situation similar to that existing under the common law as stated in the Baltimore and Carolina Line case and also an express indication by the court of its intention.

The next rule deals with the matter of instructions to jury and objections. This rule provides that in any jury case a party at or before the close of the evidence may request the court in writing to instruct the jury on the law as set forth in such request. The court must, so far as practicable, inform counsel of its proposed action upon such requests prior to their arguments before the jury. The court, however, is required to instruct the jury after the arguments are completed. It is also prescribed that the giving or the failure to give an instruction cannot be assigned as error unless the objecting party objected thereto before retirement of the jury, such assignment stating distinctly the objectionable matter and the grounds of the objection. So that the jury may not hear arguments as to the law of the case the rule provides that opportunity must be given to make such objections out of the hearing of the jury.\footnote{Proposed Rule 57.} There does not seem to be anything unusual in this rule. The fear expressed by some writers that the jury may be influenced by argument of counsel has not presented any difficulty in the State of New York. The jury has been either excused or, as is more usual, has been advised by the court that such discussion must not influence their verdict.\footnote{Cf. Chesnut, \textit{Analysis of Proposed New Federal Rules of Civil Procedure} (1936) 22 A. B. A. J. 533.}
Provision is also made for a reference to a master but such reference shall only be made in exceptional cases.\(^{142}\) In actions which are to be tried by a jury, a reference may only be made when the issues are complicated. In New York it is provided that in jury cases a compulsory reference may only be had in a limited class of cases.\(^{143}\) The rule further prescribes that in actions without a jury, save in matters of account, a reference shall be made only in case it appears that the court cannot otherwise give to its other business the attention and dispatch required. In other words, in non-jury cases a reference is also the exception. This, it is submitted, is the proper rule.\(^{144}\)

Proposed Rules 60 to 62 inclusive deal with the powers of a master, his report, objections thereto, the judgment to be entered on his report and also his appointment and compensation. In cases tried by a jury the findings of the master on the issues are \textit{prima facie} evidence of the matters therein contained. In all other cases his findings and conclusions are presumptively correct. The rules express to some extent the principle laid down in \textit{Ex Parte Peterson}, where the Supreme Court held that a court rule providing for the appointment of an auditor whose findings were to be treated as \textit{prima facie} correct was not in violation of the Seventh Amendment.\(^{145}\) Provision is also made that the entire action or an issue may be referred by consent to a master as an arbitrator and in such case the master's report may only be reviewed in accordance with the principles governing a review of an award and decision by an arbitrator.

\(^{142}\) Proposed Rule 58.

\(^{143}\) \textit{Cf.} N. Y. Civ. Prac. Act \S 466 which reads in part: "\textit{Compulsory reference.} The court, of its own motion, or upon the application of either party, without the consent of the other, may direct a trial of the issues of fact, by a referee, where the trial will require the examination of a long account on either side and will not require the decision of difficult questions of law. \textit{\S} \textit{\S} 46-49"; \textit{cf.} Schaffer v. City Bank Farmer's Trust Co., 269 N. Y. 336, 199 N. E. 503 (1936) as to possible constitutional problems.

\(^{144}\) See balance of N. Y. Civ. Prac. Act \S 466 providing: "In an action triable by the court without a jury, a reference may be made as prescribed in this section to decide the whole issue or any of the issues or to report the referee's finding upon one or more specific questions of fact involved in the issue." \textit{Cf.} Comments on appointment of special masters in Lane, \textit{Twenty Years under the Federal Equity Rules} (1933) 46 Harv. L. Rev. 638.

The trial is now ended and provision is accordingly made for the judgment and the appeal. Proposed Rules 63 and 64 make provision for judgments both after trial and by default and for costs. In the spirit of joinder of law and equity the Proposed Rules provide only for the "judgment"; the decree has disappeared. The form of the judgment or order, however, has been modelled after the Equity Rules since Proposed Rule 63 prescribes that "a judgment or order shall not contain a recital of any pleading, the report of any master, or the record of any prior proceeding." Similar to the New York statute, a judgment or final order may be entered by the court upon any issues determined in favor of or against any party at any stage of action and the action may proceed as to the remaining issues or parties as justice may require. But to what extent may a split-judgment be entered?

The New York Court of Appeals had the following case before it recently. The plaintiff had brought a suit in equity for a declaratory judgment that a divorce obtained by her husband in another state without personal jurisdiction was void, that she was his lawful wife and that the marriage entered into by the defendants (plaintiff's husband and the woman whom he married after the foreign divorce) was invalid. As "further or consequential relief" plaintiff asked an injunction restraining the defendants from holding themselves out as husband and wife, and restraining the female defendant from using the name of Mrs. Lowe. A motion was made by the defendants to dismiss the complaint. On the argument of the motion it was conceded by the defendants that the foreign decree of divorce was void and that the plaintiff was entitled to a declaratory judgment as prayed for in the complaint. After that admission the motion proceeded, without objection, as an attack upon plaintiff's cause of action for injunctive relief. The court of first instance denied the motion on the ground that "whether plaintiff is entitled

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246 Equity Rule 71.
247 Proposed Rule 63(b).
to the further and consequential relief which she demands cannot be determined on a motion of this nature." By a divided court the Appellate Division affirmed the order but granted permission to appeal on certified questions, the one applicable to this discussion being:

"Under section 476 of the Civil Practice Act and rule 112 of the Rules of Civil Practice, after the defendants have admitted to the extent shown by the record plaintiff's right to have a declaratory judgment rendered in her favor, should defendants' motion for judgment on the pleadings dismissing the complaint have been granted on the ground that the complaint fails to state facts sufficient to constitute a cause of action for the injunctive relief sought therein?"

The Court of Appeals held that the provisions of the section "that judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require," did not mean that where all allegations of a pleading are directed towards the establishment of a single cause, and the relief asked is appropriate to such cause of action, a motion may be granted for a judgment which merely adjudicates selected issues, and leaves adjudication of whether a cause of action is established and appropriate relief should be granted, until the determination of the remaining issues. "The Civil Practice Act should not be so construed as to authorize a judgment upon a 'part of a cause of action' where the part is an incomplete fragment of an entire claim which cannot be thus divided without mutilation." The court, however, in reversing and granting the motion, said:

"* * * It [Section 476] expressly authorizes a judgment upon a 'part of a cause of action.' The only test that can be applied without thwarting the legislative intent is a practical test. Is it possible to divide the claims or cause of action so that an effective judgment can be rendered as to part, without mutilation of the whole?"
“Judged by that test, it is clear that a judgment dismissing that part of the complaint which makes claim for injunctive relief may be granted where the complaint contains no allegations which would entitle the plaintiff to such relief, especially where the right to a declaratory judgment is established by the pleadings or by admissions made for the purpose of permitting the entry of appropriate judgment. A judgment which dismisses that ‘part of a cause of action’ which claims injunctive relief constitutes a complete adjudication of a separate part of the complaint. The cause of action for a declaratory judgment remains complete and no cause of action for other relief has been effectively pleaded.”

The holding is a proper one and, it is submitted, the principle there laid down should be applied to the Proposed Rule even though “cause of action” and “a part of a cause of action” are not found in it but only the words “any issue or issues”. To permit judgments on issues which are incomplete fragments of an entire claim which cannot be divided without mutilation would surely not tend towards simplicity but rather towards confusion.

It is provided that a judgment or order entered pursuant to the rule shall be treated as final for all purposes including an appeal. Costs are allowed, as in equity, in the discretion of the court except that where express provision therefor is made either by federal statute or by the Proposed Rules the two latter, as the case may be, control.\textsuperscript{140}

In order to make it clear that a judgment shall give both legal and equitable relief if a party is entitled to such upon the merits, special provision is made therefor and the right to enter a deficiency judgment in foreclosure cases is also taken care of.\textsuperscript{150}

Default judgments for want of a proper pleading may be entered by the court clerk upon proof of due jurisdiction where the plaintiff’s claim against the defendant is for a sum


\textsuperscript{150} Proposed Rule 63(c); \textit{cf.} Equity Rule 10.
certain or for a sum which to be made certain requires nothing more than computation, eliminating, of course, the cases where the defendant is an infant or an incompetent. In other cases of default application for judgment must be made to the court. This rule is made applicable also to a third-party-plaintiff, or a defendant who has pleaded a cross-claim or a counterclaim.

Motions for new trials are also provided for under this title. The rules permit the granting of a new trial on all or part of the issues (1) in actions where there has been a jury trial for any of the reasons for which new trials are granted in actions at law and (2) in other actions for any of the reasons for which rehearings are granted in equity suits. Why was the distinction between law and equity preserved in this instance? It does not seem necessary. The moving papers must set forth the grounds for the motion. The rule further provides that in an action tried without a jury the court may open the judgment, if entered, to take additional testimony, to amend or to make new findings of fact and conclusions of law and to enter a new judgment. It would thus appear that even in jury cases triable as of right by jury if the jury is waived the rules at present applicable to equity would apply. The court at any time within ten days after the entry of an order for judgment or the reception of a verdict may order a new trial for any reason for which it might grant a new trial upon motion of a party.

Provision is also made that where an issue to be retried is so distinct and separable from the other issues in the action that a trial of that issue alone may be had without injustice, the court may order a partial new trial specifying clearly those issues to be retried. This provision is permissive, not mandatory, and should be of assistance particularly in cases where the court questions merely the amount of the damages suffered by the complaining party. However, this practice may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from

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251 Proposed Rule 64(1); cf. N. Y. CIV. PRAC. ACT §§ 483-487.
252 Proposed Rule 64(2); cf. N. Y. CIV. PRAC. ACT §§ 488-490.
253 Proposed Rule 65.
the others that a trial of it alone may be had without injustice.154

The next Proposed Rule provides for the relief at any
time from clerical mistakes in judgments, orders or other
parts of the record and from errors arising from oversight
or omission.155 It is also provided that on prompt motion
and before the appeal time has expired the court on terms
may relieve a party or his legal representative from a judg-
ment, order or other proceedings upon any of the following
grounds: (1) accidental mistake, surprise or inadvertence;
(2) fraud, misrepresentation or other misconduct of an ad-
verse party; (3) material evidence newly discovered which
the moving party could not with reasonable diligence have
discovered and produced at the trial. If such grounds for
relief against a judgment are known to exist during the
period within which he could move for a new trial, then he
must resort to a motion for a new trial.156 It is specifically
stated that nothing in the rule shall limit the power of the
court to entertain an independent action to relieve a party
or his legal representative from a judgment, order or other
proceeding.

The Federal Declaratory Judgment is continued.157 As
recently stated by the United States Supreme Court,158 "The
act of June 14, 1934, providing for declaratory judgments,
does not attempt to change the essential requisites for the
exercise of judicial power. By its terms it applies to 'cases
of actual controversy,' a phrase which must be taken to con-
note a controversy of a justiciable nature, thus excluding an
advisory decree upon a hypothetical state of facts." The rule
adds a further provision to the effect that the existence of

154 Gasoline Prods. Co. v. Champlin Co., 283 U. S. 494 (1930); see also
Dimick v. Schredt, 293 U. S. 474, 55 Sup. Ct. 296 (1935) (5 to 4 decision) re
power of court conditionally to decrease or increase a verdict, where power to
decrease is recognized and power to increase is denied; Matter of MacKenzie,
Jr., 272 N. Y. 403, — N. E. (2d) — (1936).
155 Proposed Rule 66(a); cf. Equity Rule 72 which limits period for cor-
rection to the time at which final decree is rendered, and N. Y. Civ. Prac. Act
§§ 105-112.
156 Proposed Rule 66(b).
157 Proposed Rule 67.
466 (1936) (citing Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288
U. S. 249 [1932]).
another adequate remedy shall not preclude a judgment for declaratory relief in cases where it is appropriate.\textsuperscript{169} The next Proposed Rule prescribes that in all actions tried without a jury, the court shall find the facts specially and state separately its conclusions of law thereon.\textsuperscript{160} This is an extension of Equity Rule 70\frac{1}{2} in so far as it includes jury-waived cases in addition to suits in equity and supersedes the present statutory provisions as to the trial of issues of fact by the court and the review in cases tried without a jury in so far as they provide a different method of finding facts. It might be well to provide that the court must only "state the facts which it deems essential" in order to avoid voluminous findings.\textsuperscript{161} Provision is also made for findings and conclusions where the court refuses or grants interlocutory judgments.\textsuperscript{162} Similar to the present Equity Rule such findings and conclusions must be included in the record on appeal. These provisions are common in many jurisdictions and cannot be objected to despite the fact that an additional burden is thereby placed upon judges in jury-waived cases to pass on findings and conclusions. Uniformity is advisable and, furthermore, a total absence of findings or any statement of the grounds either in fact or law for the court's decision in law cases, it is submitted, complicates the work of both counsel and the appellate court.

A very important and vital change from the present practice to be found in this Proposed Rule is that the findings of the court in such cases shall have the same effect as that now given to findings in suits in equity. What is the effect of this provision? First, it involves the question whether the enabling act confers power upon the Supreme Court to prescribe rules of appellate procedure. It is submitted that it does.\textsuperscript{163} Secondly, it means that in law cases

\textsuperscript{160} Cf. N. Y. Civ. Prac. Rule 212. "If, in the opinion of the court, the parties should be left to relief by existing forms of action, or for other reasons, it may decline to pronounce a declaratory judgment, stating the grounds on which its discretion is so exercised."

\textsuperscript{161} Proposed Rule 68.

\textsuperscript{162} Cf. N. Y. Civ. Prac. Act §§ 439 and 440, as amended in 1936; there is a practice, in some districts, for the judge to direct that his opinion stand as the findings of fact and conclusions of law required under this rule, cf. Lewys v. O'Neill, 49 F. (2d) 603 (S. D. N. Y. 1931).

\textsuperscript{163} Cf. Equity Rule 70\frac{1}{2}; 28 U. S. C. § 383.

\textsuperscript{164} For a discussion of this question see Clark, Power of Supreme Court to Make Rules of Appellate Procedure (1936) 49 Harv. L. Rev. 1303.
where a jury has been waived, the parties are entitled, at least theoretically, to equity review, i.e., a re-examination of the entire record and not to the limited review in law cases, i.e., a consideration of the legal errors which may have been committed by the trial court. Thirdly, it means that in law cases where a jury trial has not been waived, the limited review will continue since the Seventh Amendment to the Constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common-law." Thus, there will persist under this Proposed Rule a different scope of review in jury cases on the one hand and non-jury and jury-waived cases on the other hand. Furthermore, the parties in a law case who have waived a jury trial will be entitled potentially to a more extensive review on appeal than they would have been entitled to, if they had not waived a jury and also to a more extensive review on appeal than they are entitled to at present.\footnote{Clark and Stone, \textit{Review of Findings of Fact} (1937) 4 U. of Chi. L. Rev. 190; Sunderland, \textit{Findings of Fact and Conclusions of Law in Cases Where Juries Are Waived} (1937) 4 U. of Chi. L. Rev. 218; Chesnut, \textit{Analysis of Proposed New Federal Rules of Procedure} (1936) 22 A. B. A. J. 533; 28 U. S. C. §773 providing that the findings of the court in law cases tried without a jury may be either general or special and shall have the same effect as the verdict of the jury.}

As stated above, the equity review on appeal is deemed to be a re-examination of the entire record. This right of a hearing \textit{de novo} in equity suits was due to a large extent to the old practice under which testimony was taken by deposition and not orally in open court. These depositions, of course, were in written form and could be examined without difficulty as well by an appellate court as by the trial court, so that the review really proceeded on written documents and did not involve questions of credibility and the behavior on the stand of the witness.\footnote{Clark and Stone, \textit{Review of Findings of Fact}, loc. cit. supra note 164.} When the Federal Equity Rules were promulgated in 1912 providing that in all trials in equity, with a limited exception, the testimony of witnesses must be taken orally in open court and that the court had to pass upon the admissibility of all evidence offered as in actions at law,\footnote{Equity Rule 46; the effective date of the Rules was February 1, 1913.} the basis for the greater liberality in equity...
appeals was no longer existent. It would seem, therefore, that there was then no reason why the appellate court should have greater powers of review in equity suits than in law actions, except for the possible contention that a verdict after a trial by a judge and a jury is entitled to more weight than the holding of a judge alone. This contention seems unfounded, and apparently that has been the thought of the appellate courts in equity suits in stating that the findings of the court of primary jurisdiction on the facts would be upheld unless clearly erroneous since a trial judge who sees and hears the witnesses is in a better position to determine issues of fact than an appellate court which is limited to the printed record. Furthermore, the appellate courts have held that the trial courts' findings in equity suits are presumptively correct, and will be upheld on appeal except where there is a clear showing of obvious error or mistake.167

It is suggested, therefore, that this rule be changed so that the second sentence thereof provide that the findings of the court in such cases shall have the same effect as that heretofore given to the verdict, general or special, as the case may be, of a jury in an action at law, or, “that the review by the circuit court shall be limited to questions of law and that findings of fact by the district court, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the district court are arbitrary or capricious.” 168 The tendency today is against indiscriminate appeals, and properly so, and it is submitted that there remains

167 Cf. Clark and Stone, Review of Findings of Fact, loc. cit. supra note 164; Joyce v. Humbird, 78 F. (2d) 386 (C. C. A. 7th, 1935); in Johnson v. Winsted, 64 F. (2d) 316 (C. C. A. 8th, 1933) the court held: “In determining what the facts are from the evidence which we regard as relevant and competent, we have not lost sight of the established rule that the findings of the trial court in suits in equity are presumptively correct, and unless clearly against the weight of evidence or induced by an erroneous view of the law, will not be disturbed. United States v. United Shoe Machinery Co. of New Jersey, 246 U. S. 32, 41, 38 S. Ct. 473, 62 L. Ed. 968; Butte & Superior Copper Co., Ltd., v. Clark-Montana Realty Co., 249 U. S. 12, 30, 39 S. Ct. 231. 63 L. Ed. 447; Unkle v. Wills (C. C. A. 8) 281 F. 29, 36, supra; Lion Oil Refining Co. v. Albritton (C. C. A. 8) 21 F. (2d) 280, 282; Nave-McCord Merc. Co. v. Ranney (C. C. A. 8) 29 F. (2d) 383, 389; Karn v. Andresen (C. C. A. 8) 60 F. (2d) 427, 429.”

no reason why appeals in equity or non-jury cases should have to be reviewed more carefully or extensively than appeals in law cases tried before a court and jury. A judge can try a case at least as well as a judge and jury—perhaps better.¹⁶⁹

The next Proposed Rule provides that no error or defect or omission in any ruling, order or other action shall be ground for a new trial or rehearing, or for setting aside a verdict or reversing, annulling or otherwise disturbing a judgment or order unless it clearly appears that material prejudice to the substantial rights of the objecting party has resulted therefrom.¹⁷⁰ This rule is a combination of certain provisions of the Equity Rules and certain federal statutes and presents the current tendency to prevent a miscarriage of justice because of technical errors.¹⁷¹

We now come to the Proposed Rules intended to regulate appellate procedure.¹⁷² Provision is first made that in cases in which an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal must be sought, allowed and perfected within the time prescribed by law and in accordance with the Rules of the Supreme Court of the United States governing such an appeal.¹⁷³ No change, therefore, has been made in the procedure to be followed in direct appeals.¹⁷⁴ It is to be noted that this rule makes the Rules of the Supreme Court of the United States applicable to this class of cases as to the method of appealing directly to the Supreme Court, but that it does not make such rules applicable in preparing the record on appeal in such cases. The preparation and contents of the record on

¹⁶⁹ But see Foreword to Preliminary Draft of Rules of Civil Procedure on p. xiv: "It is obvious that the method of obtaining conformity by limiting the power of reviewing the findings in equity cases must be rejected"; Blume, Review of Facts in Non-Jury Cases (1936) 20 J. Am. Jud. Soc. 68.
¹⁷⁰ Proposed Rule 70.
¹⁷² Proposed Rules 71 to 77.
¹⁷³ Proposed Rule 71.
¹⁷⁴ Cf. Clark, The Proposed Federal Rules of Civil Procedure (1936) 22 A. B. A. J. 447, at 450: "A difficulty arises in that in some cases a direct appeal lies from district courts to the Supreme Court, which also receives cases from the state courts, though the more general appeal in federal cases is to the Circuit Court of Appeals. Our Committee felt that it could not properly recommend rules affecting direct appeals, and complete simplification of federal appellate procedure must await action by that Court in connection with its own rules of procedure."
appeal in all cases is covered by a separate rule which will be considered later.

With the exception of bankruptcy appeals under Section 24(b) of the Bankruptcy Act, an entirely new procedure is provided for in appeals from the district court to the Circuit Court of Appeals. Petition for appeal, allowance of appeal, and citation are abolished. In their place the Proposed Rule prescribes that a party may appeal from an order or judgment by serving upon each appellee and filing with the district court a notice of appeal. This notice must specify the parties to the appeal and must be directed to each appellee; it must designate the judgment or order, or part thereof, appealed from; must contain appellant's assignments of error; must specify the amount and surety of the bond on appeal, or of the supersedeas bond, if any; and must specify the court to which the appeal is taken and state that the record will be docketed within forty days. The costs bond must be in the sum of two hundred and fifty dollars unless the court fixes a different amount or unless a supersedeas bond is filed. If the bond is for two hundred and fifty dollars, no court approval is necessary. A supersedeas bond, however, must be approved by the court, and the court is given rather wide discretion in fixing the amount of the bond and may even order security other than by way of bond.

This proposed method of taking an appeal is a decided improvement over the present cumbersome procedure, but why require the incorporation of an assignment of errors in the notice of appeal? The abolishment of assignments of errors would do no harm.

The antiquated method of summons and severance is

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375 Proposed Rule 72(a) and (b).
376 Proposed Rule 72(c).
377 Proposed Rule 72(d).
378 Cf. N. Y. Civ. Prac. Act § 562 which reads in part: "An appeal may be taken by serving upon the attorney for the adverse party and upon the clerk with whom the judgment or order appealed from is entered, by filing it in his office, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. * * *"
379 Cf. Masterson v. Herndon, 10 Wall. 416 (U. S. 1870), where the court said: "It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to
abolished, but notice must be given to the other joint parties that a separate appeal is being taken so that such other joint parties may appeal in like manner.\textsuperscript{180}

The process of making up the record on appeal has been simplified, and provision is made for the abolishment of the requirement of reducing the testimony to narrative form.\textsuperscript{181} The duty is imposed upon the party who first appeals to serve and file within ten days after service of notice of his appeal a written request designating the portions of the record to be incorporated into the record on appeal. Any other party within ten days thereafter may indicate additional portions of the record to be included. Thus, the ancient rule, if it ever existed in the federal courts, that a party waives his bill of exceptions if he brings a writ of error before he has procured the judge's signature to such bill \textsuperscript{182} is definitely renounced. Whenever error is assigned relative to testimony, the appellant must state in writing what parts of the transcript of testimony he desires included in the record and must furnish the clerk and the appellee with a complete transcript of the testimony unless otherwise stipulated. The appellee must then state what parts of the transcript of the testimony he wishes included. The rule specifically prescribes that the testimony to be included in the record shall be set 'out in question and answer form, except when the parties stipulate that it be reduced to narrative form. Thus the pendulum has swung back again. The narrative form is the exception and not the rule. The proposed change is a salutary one. Some time after the enactment of the present Equity Rules providing for the narrative form of record,\textsuperscript{183} the late Circuit Judge Mayer said as follows:

proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the Appellate tribunal shall not be required to decide a second or third time the same question on the same record \textsuperscript{180} One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature\textsuperscript{9}; see also Hartford Accident & Indemnity Co. v. Bunn, 285 U. S. 169, 52 Sup. Ct. 354 (1932).

\textsuperscript{181} Proposed Rule 73.

\textsuperscript{182} Proposed Rule 74.

\textsuperscript{183} Cf. Hunnicutt v. Peyton, 102 U. S. 333 (1880).

\textsuperscript{180} As to the present provisions, see Equity Rules 75 and 76; U. S. Sup. Cr. Gen. Rules rule VIII; Barber Asphalt Paving Co. v. Standard Asphalt &
"Equity Rule 75. The provision as to 'narrative form' is in my opinion undesirable. It puts an unnecessary and heavy burden upon counsel and where counsel do not agree, the court also is burdened in respect of a case the details of which may have escaped it. Thus, the court may be compelled to read part of the record in order to determine whether the narrative is correct or to determine whether the testimony shall be reproduced in the exact words of the witness. In the first place, the narrative form rarely, if ever, gives a true picture of the trial. Where a witness has been evasive, the exact reproduction of his testimony is the only method of displaying to the appellate court what occurred below and sometimes even that is not effective in a cold record. I am very strongly in favor of that part of the rule which provides for 'all parts not essential to the decision or the questions presented by the appeal being omitted.' This responsibility, however, shall rest upon counsel and I think counsel are not sufficiently alive to this responsibility." 184

There should be no doubt as to the correctness of these observations. The narrative form requirement merely created, both for the appellant and for the appellee, added burdens and expense without compensating advantages.

The Proposed Rule further provides that when the clerk has assembled the material for the record on appeal in accordance with the requests of the parties, the record must be submitted to the trial judge (or upon a finding of his inability to act) to any other district judge for settlement upon notice to the parties. The judge may revise the record so as to set forth what he deems essential for the adequate presentation of the errors to the appellate court. When the record

is finally approved, the court must certify it and it will then be the record on appeal and must be printed as provided by law. If anything material to either party is omitted by accident or error in the transcript, the appellate court on a proper suggestion or on its own motion, may direct that the omission be corrected by a supplemental transcript. The Committee has also proposed an alternative rule which provides that a printed record is not required and three typewritten transcripts, certified by the court of the proceedings below, are all that is transmitted to the appellate court. It is provided that the parties may stipulate to omit portions of the proposed record. Provision is further made for the appellate court by standing rule to require that the printed briefs of the parties shall reproduce those portions of the record which may be necessary to the understanding of the parties' respective assignment of errors. It is doubtful whether the alternative rule would work well in practice. A few typewritten copies in the appellate court and parts of the record in the briefs of the parties seem a rather unsatisfactory way of handling an appeal. The record should be printed and contain so much of the evidence and other proceedings upon the trial as are material to the questions to be raised upon the appeal and no more.185

The Committee in its Note to this rule suggests another method providing simply for the transmission to the reviewed court of the original papers and report of proceedings had at the trial. However, under this method the parties must also print in their briefs such parts of the record as they desire to call to the court's attention.186 Such procedure is too informal and too loose to be adopted generally.

Provision is also made for an abbreviated record on appeal where the questions presented by an appeal can be determined by the appellate court without an examination of all the pleadings and evidence. In such a case the parties, with the approval of the district court, may prepare and sign a statement of the case showing how the questions arose and were decided by the trial court and setting forth so much only of the facts alleged and proved, or sought to be proved, as is

186 Preliminary Draft of Rules of Civil Procedure (May, 1936) at p. 137.
essential to a decision of such question by the reviewing court.\textsuperscript{187} This is Equity Rule 77 with minor changes. Why a separate rule on this point? Why not combine these provisions with Proposed Rule 72?

The next two rules deal generally with stay of execution as of right and in the discretion of the court and with injunction pending appeal.\textsuperscript{188} Both refer to certain statutes and also "to any like statute"; as to form, they properly fall within the condemnation of Dean Wigmore.\textsuperscript{189}

PROVISIONAL AND FINAL REMEDIES AND OTHER SPECIAL PROCEEDINGS (ARTICLE VIII)

The first rule under this title deals with provisional and final remedies and other special remedies, including arrest, attachment, garnishment, replevin, sequestration, "and other corresponding or equivalent remedies, however designated" and provides that such remedies shall be available under the then existing law of the state in which the district court is held, subject to the following qualifications: (1) Any existing statute of the United States shall govern to the extent to which it is applicable; (2) the process for such remedies must be issued by the clerk of the court and be served by the marshal unless some other person is specially designated by the court; (3) the action in which any of these remedies are used shall be commenced and prosecuted, or, if removed from a state court, shall be prosecuted after such removal pursuant to the proposed rules.\textsuperscript{190} This rule, so states the Committee, adopts the existing federal law, making it clear, however, that the applicable state law is that law existing at the time of bringing suit. A similar practice is laid down for execution and proceedings in aid of the execution or judgment.\textsuperscript{191} Thus, in these important matters, the Committee has turned away completely from the express purpose of the Proposed Rules—to provide for a unified procedure for ac-

\textsuperscript{187} Proposed Rule 75.
\textsuperscript{188} Proposed Rules 76 and 77.
\textsuperscript{189} Cf. note 16 and \textit{supra} pp. 217–218.
\textsuperscript{190} Proposed Rule 78.
\textsuperscript{191} Proposed Rule 83.
tions in the federal courts. The result is a new conformity act for these particular remedies. This is most unfortunate. Adequate provision should be made for uniformity in these vital branches of practice. A federal statute provides that in common-law causes in the district courts the plaintiff is entitled to similar remedies, by attachment or other process, against the property of the defendant, which were at the effective date of the statute provided by the laws of the state in which such district court is held. But the United States Supreme Court has held that in order to issue an attachment, the defendant must be subject to personal service or voluntarily appear in the action and accordingly an attachment is still but an incident to a suit, and unless jurisdiction can be obtained over the defendant, his estate cannot be attached in the federal court. Would this decision still be the law under the Proposed Rule? The answer should be in the affirmative since no provision has been made by statute or by the Proposed Rules for service by publication except in a limited class of cases and there naturally has been no attempt to enlarge the jurisdiction of the district courts. It is, however, held that if property is attached on a writ issued out of a state court and the statutes of the state authorized the attachment, upon removal of the cause to the federal court, jurisdiction over the property will be retained, notwithstanding the attachment would not confer jurisdiction had it been made on a writ issued out of the federal court and no personal service had been obtained. Would this holding be followed under the Proposed Rule? There are at present also federal statutes making the state laws relating to arrest and executions, etc., applicable to the federal courts in common-law causes; the statutes, however, usually limit the conformity to the law existing in the states at the effective date of the respective statutes. Furthermore, the Committee, in its note to Rule 83, dealing with execution, cites numerous federal statutes.

bearing on the subject of execution which it is the intention of the rule to continue in force. It is submitted that further consideration be given to this Proposed Rule with the thought in mind that the uniformity in federal procedure should certainly not fail in these important particulars.

No substantial innovation in the present procedure has been introduced by the Proposed Rule dealing with temporary restraining orders and preliminary injunctions. The rule, however, continues certain statutes dealing with injunctions and expressly states that there is no intention to modify the Act relating to temporary restraining orders and preliminary injunctions in cases affecting employer and employee.

With respect to receivers the Proposed Rules are very brief, stating merely that the practice relating to the appointment of receivers and the administration of estates by receivers shall be in accordance with the principles of equity as now administered in the federal courts. All statutes applicable to receivers are, therefore, continued in effect. Comment on this method of procedure is unnecessary.

Proposed Rules 81 and 82 deal with the matter of deposit in court and offer of judgment and require no comment.

Provision is also made for the enforcement of judgments for specific acts permitting such acts to be done by a person appointed by the court where the party who was directed to do so has failed to comply with the court order. The rule provides that the act, when so done, shall have like effect as if done by such party, and also provides that the judgment may itself vest title without the intervention of a third person. Punishment as for a contempt is also prescribed.

A highly desirable rule is the one which provides for the registration of judgments with other district courts of the United States. A judgment so registered shall, for the purpose of enforcement, have the same effect, and like proceed-

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198 Last paragraph of Proposed Rule 79 and Committee’s note to this rule.
199 Proposed Rule 80.
200 Proposed Rule 84; cf. Equity Rules 7-9; ENGLAND, SUPREME COURT OF JUDICATURE ACT (1925) § 47.
201 Proposed Rule 85.
ings may be taken thereon, as if the judgment had been originally rendered by the court in which such registration is had. The rule is presented in alternative form, one in rather detail form, the other similar to the statement given. The latter seems decidedly preferable. There is some question whether this matter comes within the province of procedure and whether it does not affect substantive rights. It is hoped that the Supreme Court will decide that it is within the province of procedure.

DISTRICT COURTS AND CLERKS (ARTICLE IX)

Under this title it is prescribed, in the usual manner, that the courts are always deemed open for the purpose of filing papers and issuing process. All trials or hearings on the merits must be conducted in open court, but all other acts or proceedings may be conducted or done by the court in chambers, provided that no hearing may be conducted outside the district without the consent of all parties affected. Provision is also made to the effect that the entry of an order or judgment shall not of itself be deemed notice to the parties or their attorneys. Notice of entry must be mailed by the clerk to the parties involved, such mailing to be sufficient notice for all purposes for which notice of the entry of an order or judgment must be given. It would seem, however, that the time to appeal is not enlarged by this provision.

APPLICABILITY OF THE RULES (ARTICLE X)

Under this title it is provided that the rules shall apply in all civil actions in the district courts and in the District Court of the United States for the District of Columbia, but shall not apply to proceedings in admiralty or proceedings in probate in

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203 Proposed Rule 87.
204 Cf. 28 U. S. C. §§ 230 and 350 providing that no appeal to the Circuit Court of Appeals and no appeal or writ of certiorari to the Supreme Court shall be allowed or entertained unless application therefor be made within three months after the entry of the judgment or decree sought to be reviewed.
the District of Columbia, nor shall they apply to proceedings in bankruptcy or copyright, except insofar as they may be made applicable by rules promulgated by the Supreme Court of the United States. In the latter two cases the Committee calls attention to the desirability of changes in the bankruptcy and copyright rules so as to make the practice conform to these rules in other civil cases. This rule also shortens the time within which a defendant removing a cause to a federal court must plead after removal from thirty days to five days, unless the state practice fixes a longer period, in which event the law of the state will apply. In a removed case if a jury trial has not been already waived prior to removal (presumably under the state law), any party may demand a jury trial if demand is served and filed within ten days after the record is filed in the district court.

The Proposed Rules specifically provide that the jurisdiction of the district courts is not extended and "each rule shall be taken as limited to actions and issues which are within such jurisdiction." The district courts are given the right to make supplementary rules. The question may be asked whether this is advisable when uniformity is the objective sought. It might be well to limit this right solely to mechanical matters such as calendar practice and the like or at least prescribe that the approval of the circuit court embracing the district is essential before the amendment shall become effective.

This ends the consideration of the rules as presently proposed. There is, however, an important matter which does not seem to be covered by the Proposed Rules. No provision is made as to what shall be the source of the principles which shall govern matters not covered by the rules. Is it the Conformity Act in law cases, and is it the Equity Rules in equity cases? If the answer to the foregoing question is in the affirmative it would be unfortunate. Conformity to state

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206 Proposed Rule 91.
207 Proposed Rule 92.
practice in so-called law cases on matters omitted by the
rules would open the way to serious perversion of the spirit
of the rules in reactionary districts. This danger has already
been emphasized in respect of the proposed provisional reme-
dies and execution rules where conformity to state laws
has again been made the talisman. There is no specific objec-
tion to conforming matters in so-called equity omitted, by
the rules, to the present Federal Equity Rules. They have
worked well in general and are, of course, uniform through-
out the districts, but that, does not solve the problem.

Complete uniformity is without doubt a utopia but
nothing should be done or left undone which will lend
encouragement to anyone or any district court to ignore the
Rules of Civil Procedure in order to favor the state practice.
All that is needed is a general clause on this subject. It is
submitted that the rules should contain a provision setting
forth a general method of legal thought stating that the
practice in all cases not expressly prescribed by the rules
shall be the practice now existing in the federal courts in
equity, and that if the particular matters not covered by the
rules are not susceptible of regulation by the practice in
equity, the practice and procedure with respect thereto shall
be conducted according to the common law, in contra-distinc-
tion to the common law of any particular state. In con-
ceding that the common law as thus limited is somewhat hard
to define, also sometimes hard to discover, but at least
there is the advantage of prescribing that uniformity must
be adhered to among the various districts.

208 In considering the meaning of the "common law" contained in the
Seventh Amendment the United States Supreme Court held that it meant the
rules of the common law of England, and not the rules of that law as modified
by local statute or usage in any of the states (Capital Traction Co. v. Hof,
174 U. S. 1, 19 Sup. Ct. 580 (1898).

(1913), and Baltimore and Carolina Line v. Redman, 295 U. S. 654, 55 Sup. Ct.
890 (1935).

210 Proceedings of Assembly (1935) 22 A. B. A. J. 685, at 726, where
Mr. Edward J. Dimock of New York suggested that a rule be added on this
subject reading somewhat as follows: "With respect to the matters not covered
by these rules the practice and procedure shall be conducted according to the
present practice of the United States district courts in equity in so far as such
matters are susceptible of regulation by the practice in equity. In so far as
such matters are not susceptible of regulation by the practice in equity, the
practice and procedure with respect thereto shall be conducted according to the
common law."
In conclusion another point should be mentioned. The original section of the rule-making statute which provides merely for uniform rules in actions at law contains a specific provision that such rules "shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect." No such provision is found in the second section providing for uniform rules in law and in equity, under which the Committee has been acting. It is only prescribed that "such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session." The situation is accordingly presented that a single rule applying both in cases formerly cognizable in equity and in cases formerly cognizable at law, might be declared invalid as to equity suits at least, if contrary to an existing statute. It is suggested that the act be amended to include a provision similar to that now found in section one or that this matter be presented to Congress for action at the same time that the rules are reported to Congress by the Attorney General.

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