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To

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

Monday, November 1, 1937.

PROCEEDINGS OF THE MEETING  
of the  
ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

November 1, 1937.

Washington, D. C.

The Advisory Committee on Rules for Civil Procedure met at 10 o'clock a.m., in the Conference Room of the Supreme Court of the United States, Honorable William D. Mitchell, Chairman, presiding.

PRESENT: William D. Mitchell  
Scott M. Loftin  
Wilbur H. Cherry  
Charles E. Clark  
Robert G. Dodge  
George Donworth  
Joseph G. Gamble  
Monte M. Lemann  
Edmund M. Morgan  
Warren Olney, Jr.  
Edson R. Sunderland  
Edgar H. Tolman.

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RULE 1.

SCOPE OF RULES.

Before the word "These" in line 1, insert the words "Subject to the limitations of Rule 83," and on line 5 strike out the words "so far as possible," so as to make the rule read:

"Subject to the limitations of Rule 83, these rules govern

the procedure in the district courts of the United States in all suits of a civil nature whether cognisable as cases at law or in equity. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

RULE 4.

PROCESS.

Amend by striking out subdivision (a) and inserting a new subdivision, as follows:

"Summons: Issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons and deliver it for service to the marshal, or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

Subdivision (d), paragraph (1), page 8, line 36, after the word "some" strike out the words "adult member of his household," and insert in lieu thereof the words "person of suitable age and discretion then residing therein."

On page 10, line 125, amend subdivision (g) by striking out the words "return it" after the word "shall," and insert in lieu thereof the words "make proof of service thereof."

On line 130, after the words "to make" strike out the word "return," and insert in lieu thereof the words "proof of service," so as to make the subdivision read:

"(g) RETURN. The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. If service is made by a person other than a United States marshal or his deputy, he shall make affidavit thereof. Failure to make proof of service

does not affect the validity of the service."

In subdivision (d), paragraph (4), page 9, lines 73 and 74, amend by striking out the words "whether or not the United States is a defendant, wherein," and insert in lieu thereof the words "attacking the validity of," and on line 76, strike out the words "is attacked," so as to make the paragraph read:

"(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency."

On page 9, line 86, strike out the comma and insert the word "or;" on line 87, after the word "corporation," strike out the comma; after the word "other," strike out the words "public or;" on line 88, after the word "organization" insert the word "thereof," so as to make the paragraph read:

"(6) Upon a state or municipal corporation or other governmental organization thereof subject to suit, by delivering

a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant."

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#### RULE 5.

##### SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

On page 15, line 30, after the words "with some" strike out the words "adult member of his household", and insert in lieu thereof the words "person of suitable age and discretion then residing therein."

On page 15, line 14, after the word "party" strike out the words "has appeared" and insert in lieu thereof the words "is represented."

On page 15, line 12, after the word "thereby" and the comma, strike out the words "but only upon those," and insert in lieu thereof the word "and."

On page 15, line 3, after "(a)" strike out "Service" and insert in lieu thereof "Service: When Required."

On page 15, strike out beginning with the word "If" on line 13, through the word "court" on line 17, and insert in lieu thereof the following:

"(b) Same: How Made. Wherever under these rules service is required or permitted to be made upon a party represented by

an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

On line 32, before the word "In" insert the designation "(c) Same: Numerous Defendants."

On page 16, strike out subdivision (b), and insert in lieu thereof the following:

"(d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter."

On line 55, strike out "(c)," and insert in lieu thereof "(e)".

RULE 6.

TIME.

On page 18, line 56, strike out subdivision (e), and on page 19, line 67, change "(f)" to "(e)".

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III. PLEADINGS AND MOTIONS.

RULE 7.

PLEADINGS DESIGNATED; MOTION DEFINED.

On page 20, line 1, after "PLEADINGS", strike out "DESIGNATED; MOTION DEFINED", and insert "ALLOWED; FORM OF MOTIONS."

On page 20, line 6, insert a semicolon after the word "such", and strike out "or if the court orders a reply to an affirmative defense in the answer"; on line 9, after the word "if", insert "leave is given under Rule 14 to summon"; on line 10, after the word "party", insert a semicolon and strike out "is summoned under Rule 14 to appear in the action"; on line 12, after the word "and", insert "there shall be"; and on line 14, after the word "allowed", insert "except that the court may order a reply to an answer or a third-party answer"; so as to make the subdivision read:

"(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply, if the answer contains a counterclaim denominated as such; an answer to a cross-claim,



if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

On line 15, after the word "MOTIONS", insert "AND OTHER PAPERS. (1)." Strike out "Any" and insert "An".

On line 21, after the word "if", strike out "the substance of".

On line 24, strike out "(c) OTHER PAPERS." and insert "(2)"; and on line 25, strike out "pleadings and relating to."

On line 26, after the word "form", insert "of pleadings", and on the same line, after the word "all", insert "motions and other"; so as to make these two subdivisions read:

"(b) MOTIONS AND OTHER PAPERS. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

"(2) The rules applicable to captions, signing, and other matters of form of pleadings shall apply to all motions and other papers provided for by these rules."

On line 28, strike out "(d)" and insert "(c)".

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## RULE 8.

### GENERAL RULES OF PLEADING.

On page 22, line 16, strike out "In pleading to a preceding pleading", and begin the words "a party" with a capital "A"; on line 18, after the word "his", strike out "defense or"; on line 20, at the beginning of the line, strike out "explain"; on line 26, after the word "pleader", strike out "desires" and insert "intends in good faith"; on line 28, after the word "averment", strike out "he shall not deny the averment generally or as averred, but"; on line 34, at the beginning of the line, strike out "shall" and insert "may"; in the same line, after the word "denials", strike out "only"; on page 23, line 35, after the word "of", strike out "distinct" and insert "designated"; on the same line, after the word "paragraphs", insert "or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits"; so as to make subdivision (b) read:

"(b) DEFENSES; FORM OF DENIALS. A party shall ~~shall~~ state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an aver-

ment, he shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, he may make his denials as specific denials of designated averments or paragraphs, or he may generally deny all the averments except such designated averments or paragraphs as he expressly admits; but, when he does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11."

On page 23, line 54, after the word "court", strike out "without requiring a reply may" and insert "on terms, if justice so requires, shall", so as to make the last sentence of subdivision (c) read:

"When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

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**RULE 10.**

**FORM OF PLEADINGS.**

On page 28, line 6, after the word "designation", strike out "of the pleading", and in the same line, strike out the word "provided", so as to make the sentence read: -

"Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7 (a).

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**RULE 11.**

**SIGNING OF PLEADINGS.**

On page 29, line 2, strike out "(a) By Attorney". On the same line, after "pleading" insert "of a party represented by an attorney".

On line 3, after the word "signed", insert "by at least one attorney of record"; and after the word "name" strike out "by at least one attorney of record", and insert "whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address."

So as to make lines 2, 3 and 4 of Rule 11 read as follows:

"Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his

address."

On page 29, strike out all of lines 21 to 24, both inclusive.

On page 29, line 7, after the word "affidavit." insert the following, "The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances, is abolished."

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## RULE 12.

### DEFENSES -- WHEN AND HOW PREPARED.

Change the caption to read as follows: "Rule 12. DEFENSES AND OBJECTIONS -- WHEN AND HOW PRESENTED -- BY PLEADING OR MOTION OR MOTION FOR JUDGMENT ON PLEADINGS."

On page 31, line 19, after the word "service" insert the following: "upon the United States attorney."

On page 31, line 20, after the word "asserted" and the period, strike out the balance of the paragraph, and insert in lieu thereof the following:

"The service of any motion provided for in this rule shall alter the time fixed by these rules for serving any required responsive pleading as follows, unless a different time is fixed by order of the court: (1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading may be served within 10 days after notice of the court's action. (2) If the court grants a motion for a more definite statement or for a bill of particulars, the responsive pleadings may be served within the time usually allowed by these

rules or within 10 days after service of the more definite pleading or bill of particulars."

On page 31, lines 33 and 34, strike out the subtitle "DEFENSES -- HOW PRESENTED BY PLEADING AND MOTION", and insert in lieu thereof the following: "HOW PRESENTED."

On page 31, line 36, change the first word "an" to "a", and strike out the word "original", making line 36, as amended, read: "a claim, counterclaim, cross-claim, or".

On page 32, lines 69 and 70, strike out the title to subdivision (e), and insert in lieu thereof the following: "MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS."

On page 33, line 89: beginning with the word "The" in line 89, strike out all of lines 90 to 96, inclusive, and insert in lieu thereof the following:

"Upon motion made by a party responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of pleading upon him, or upon the court's own initiative at any time, the court may order any redundant, immaterial, impertinent, or scandalous matter stricken from any pleading."

On pages 33 and 34, lines 113 to 131, inclusive: After the title, strike out all of subdivision (h) and insert in lieu thereof

the following:

"A party waives all defenses and objections if he does not present them either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, even though previously presented, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received."



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Tuesday, November 2, 1937.

## RULE 44.

## EVIDENCE.

At the end of line 67, on page 107, add a new subdivision as follows:

"(e) EVIDENCE ON MOTIONS. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter may be heard wholly or partly on oral testimony or depositions."

**RULE 12.**

**DEFENSES -- WHEN AND HOW PRESENTED --  
BY PLEADING OR MOTION -- MOTION FOR  
JUDGMENT ON PLEADINGS.**

On page 33, line 97, (g) CONSOLIDATION OF MOTIONS: On line 99, after the phrase "provided for" strike out the semicolon and add, "and then available to him."

Line 100: Strike out all of lines 100 to 112, both inclusive, and insert in lieu thereof the following:

"If a party makes a motion under this rule and does not include therein all grounds of motion which are then available to him, he shall not be permitted thereafter to make a motion based on any of the grounds so omitted, but prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered 1 to 5 in subdivision (b) of this rule which he cares to assert.

On pages 33 and 34 (h) WAIVER OF DEFENSES: Lines 113 to 131: Strike out all of subdivision (h) after the title, and insert the following:

"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if

one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall then be disposed of as provided in Rule 15(h) in the light of any evidence that may have been received."

## RULE 13.

## COUNTERCLAIM AND CROSS-CLAIM.

## (c) COUNTERCLAIM EXCEEDING OPPOSING CLAIM.

On page 37, line 20, after the word "party", change the comma to a period, and change the word "but" to "it" with a capital "I".

## RULE 13.

## COUNTERCLAIM AND CROSS-CLAIM.

On page 38, line 50, (h) ADDITIONAL PARTIES MAY BE BROUGHT IN.

In lines 50 to 54, strike out, "When the determination of a counterclaim or cross-claim requires for the granting of complete relief the presence of parties other than those to the original action," and insert in lieu thereof the following: "When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim", so as to make the subdivision read:

"When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action."

## RULE 15.

## AMENDED AND SUPPLEMENTAL PLEADINGS.

## (a) AMENDMENTS.

Page 42, lines 14 to 20: Strike out all of lines 14 to 20, both inclusive, and insert in lieu thereof the following:

"A party shall plead in response to an amended pleading or a pleading supplemented by a bill of particulars within the time for response to the original pleading or within 10 days after service of the amended pleading or bill of particulars, whichever period may be the longer, unless the court shall otherwise order."

## RULE 16.

## PRE-TRIAL PROCEDURE; FORMULATING ISSUES.

On page 45, line 28, after the word "action", strike out the period and insert the following:

"had unless modified at the trial to prevent manifest injustice."

On page 45, line 32, after the word "actions", insert: "or to non-jury actions".

These amendments make the paragraph beginning on line 20 read as follows:

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



IV. PARTIES

RULE 17.

PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

On page 47, line 14, change the word "may" to "shall".

Subdivision (b) CAPACITY TO SUE OR BE SUED.

On page 47, line 17, after the word "individual" insert the following:

"other than one acting in a representative capacity", making the sentence read as follows:

"The capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile."

## RULE 18.

## JOINDER OF CLAIMS AND REMEDIES.

## (b) JOINDER OF REMEDIES; FRAUDULENT CONVEYANCES.

On page 49, line 17, strike out "a prior proceeding" and insert the following: "another claim," so as to make the sentence read:

"Whenever a claim is one heretofore cognisable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties."

## RULE 19.

## NECESSARY JOINDER OF PARTIES.

## (b) EFFECT OF FAILURE TO JOIN.

On page 51, line 13, strike out the words "the original", and insert in lieu thereof the words "those already", so as to make the sentence read:

"When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action."

On page 52 (c) SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED.

In lines 35 and 36, strike out the words "the original", and insert in lieu thereof the words "those already", making the sentence read as follows:

"In any pleading in which relief is asked, the pleader shall set forth the names of persons, if known to him, who ought to be parties if complete relief is to be accorded between those already parties, but are not joined, and shall state why they are omitted."

RULE 23.

CLASS ACTIONS.

(a) REPRESENTATION.

On page 56, line 5, strike out the words "a number", and after the word "them" insert a comma, and the words "one or more,";

On page 56, lines 7 and 8, strike out the words "join as plaintiffs or be joined as defendants" and in lieu thereof the words "sue or be sued,".

These two amendments make the sentence read as follows:

"If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is --"

(c) DISMISSAL OR COMPROMISE. Strike out all of subdivision (c) after the title, and insert in lieu thereof the following:

"A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

## RULE 24.

## INTERVENTION.

## (c) PROCEDURE.

On page 61, at the end of line 33, add the following sentence:

"When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in the act of August 24, 1937."

**RULE 25.****SUBSTITUTION OF PARTIES.****(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE.**

On page 64, line 44, strike out the first "or" and after the word "city", insert the following: "or other governmental agency," so as to make the first part of this sentence read:

"When an officer of the United States, the District of Columbia, a State, county, city, or other governmental agency, or any other officer specified in the act of February 15, 1925" --

V. DEPOSITIONS, DISCOVERY, AND SUMMARY JUDGMENTS.

RULE 26.

DEPOSITIONS PENDING ACTION.

(a) WHEN DEPOSITIONS MAY BE TAKEN.

On page 66, line 3: Strike out the sentence beginning with the words "At any time" in line 3 and ending with the words "both purposes" in line 12, and insert in lieu thereof the following:

"By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action, or without such leave after an answer has been filed, the testimony of any person, whether a party or not, may be taken, at the instance of any party, by deposition upon oral examination or written interrogatories for the purpose of discovery, or for use as evidence in the action, or for both purposes."

On page 66, lines 14 to 17: Strike out the following sentence: "Oral depositions shall be taken only in accordance with Rule 30 and written depositions only in accordance with Rule 31," and insert in lieu thereof the following:

"Depositions shall be taken only in accordance with these rules."

Page 67, subdivision (d) USE OF DEPOSITIONS.

On page 67, line 60: Strike out the words "out of the district," making the clause read as follows: "or 2, that the witness is at a greater distance than 100 miles from the place

"trial or hearing."

On page 68, line 67, after the word "age" and the comma, insert the word "sickness", making the clause read: "or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment;"



Tuesday, November 2, 1937.

2 o'clock p.m.

In Rule 26, page 68, strike out paragraph (4) of subdivision (d), beginning on line 78, and insert in lieu thereof the following:

"(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the part introduced, and any party may introduce any other parts."

On page 68, line 94, before the word "Objection", insert "Subject to the provisions of Rule 32(c)," and on line 95, after the word "made", insert the words "at the trial or hearing," so as to make the subdivision read:

"(c) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rule 32(c) objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying."

On page 69, subdivision (f), line 107, strike out the period and insert a comma and the words "but this shall not apply to the use by an adverse party of a deposition described in paragraph (2) of subdivision (d) of this rule."

RULE 27.

DEPOSITIONS BEFORE ACTION.

On page 72, line 7, subdivision (a), after the word "district", strike out the words "of his residence or."

On page 73, line 21, strike out the words "The court," and insert the words "If the court is satisfied that the perpetuation of the testimony is proper to prevent a failure or delay of justice, it," so as to make the sentence read:

"If the court is satisfied that the perpetuation of the testimony is proper to prevent a failure or delay of justice, it shall then make an order designating the persons whose depositions are to be taken and the subject matter regarding which they are to be examined and designating or describing the persons to be served with notice as prospective parties to the action."

On page 74, after line 58, insert a new subdivision, as follows:

"(--) Pending Appeal. If an appeal has been taken from a judgment of a district court, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending

in the district court. The motion shall show (1) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure of justice, it may make an order allowing the depositions to be taken, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court."

## RULE 28.

## PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

On page 75, line 10, strike out all of subdivision (b) and in lieu thereof insert the following:

"(b) IN FOREIGN COUNTRIES. In a foreign state or country depositions shall be taken (1) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent, of the United States, or (2) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued only when necessary or convenient, on application and notice, and on such terms and with such directions as are just and appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed 'To the Appropriate Judicial Authority in (here name the country)'."

## RULE 30.

## DEPOSITIONS UPON ORAL EXAMINATION.

On page 77, line 23, after the word "taken", insert the words "or that it may be taken only at some designated place other than that stated in the notice or that it may be taken only on written interrogatories."

On page 77, line 45, after the word "stenographically", insert the words "and transcribed," so as to make the sentence read:

"The testimony shall be taken stenographically and transcribed unless the parties agree otherwise."

On page 78, subdivision (d), line 60, amend the title by adding after the word "Terminate" the words "or Limit."

On line 64, after the word "or" strike out the words "for the purpose of annoying, embarrassing, or oppressing," and insert in lieu thereof the words "in such manner as unreasonably to annoy, embarrass, or oppress."

On line 71, strike out the period, insert a comma, and the words, "or limiting the scope and manner of the taking of the deposition as provided in subdivision (b)."

On line 71, strike out "If the order is made, the examination," and insert "If the order made terminates the examination, it."

On line 75, after the word "party", insert the words "or deponent."

On page 78, line 77, insert a new sentence, as follows, "In granting or refusing such order the court may impose upon either party or upon the witness the requirement to pay such costs or expenses as the court may deem reasonable."

So as to make the subdivision read:

"(d) MOTION TO TERMINATE OR LIMIT EXAMINATION. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may make an order directing the officer conducting the examination to cease forthwith from taking the deposition, or limiting the scope and manner of the taking of the deposition as provided in subdivision (b). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make possible a motion for an order. In granting or refusing such order the court may impose upon either party or upon the witness requirement to pay such costs or expenses as the court may deem reasonable."

On page 78, line 82, subdivision (e), strike out the word "over."

On page 80, line 137, paragraph (2), after the word "witness" strike out the words "by oral examination."

## RULE 31.

## DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.

On page 82, line 7, strike out, "re-direct-interrogatories" and insert, "redirect interrogatories."

On page 82, line 34, strike out subdivision (d) and insert in lieu thereof the following:

"(d) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After the service of interrogatories, and prior to the taking of the testimony of the deponent, the court in which the action is pending may, on motion promptly made by a party or a deponent, upon notice and good cause shown, make any order specified in Rule 30 which is appropriate and just, or an order that the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except upon oral examination."

## RULE 33.

## INTERROGATORIES TO PARTIES.

On page 84, line 2, after the word "any", strike out the word "other" and insert in lieu thereof the word "adverse."



## RULE 34.

PRODUCTION OF DOCUMENTS AND THINGS  
FOR INSPECTION, COPYING, OR PHOTOGRAPHING.

On page 85, line 1, amend the title by inserting before the word "Production" the words "Discovery And," so as to make the title read, "Discovery And Production of Documents and Things For Inspection, Copying, Or Photographing."

On page 86, line 17, after the word "inspecting", insert the words "measuring, surveying," and on line 19, after the word "object" insert the words "or operation," so as to make the clause read:

"or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated relevant object or operation thereon."

## RULE 35.

PHYSICAL AND MENTAL EXAMINATION  
OF PERSONS.

On page 86, line 5, subdivision (a), after the words "party is" strike out the word "involved" and insert the words "in controversy," so as to make the sentence read:

"In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician."

On page 87, beginning with line 15, strike out the words "A party causing the examination to be made shall deliver to the party examined, upon his request, a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such delivery," and insert in lieu thereof the words: "If requested by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery."

On line 24, after the word "made" strike out the words "in respect", and insert in lieu thereof the word "of."

On line 27, after the word "deliver" strike out the word "any."

So as to make the paragraph read:

"(1) If request<sup>ed</sup>/by the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party examined a like report of any examination, previously or thereafter made, of the same mental or physical condition. If the party examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial."

## RULE 36.

## ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

On page 89, line 20, subdivision (a), after the word "admission", strike out the words "a specific denial under oath of the matters of which an admission is requested", and insert "a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

On page 89, line 23, subdivision (b), after the word "request" strike out the words "shall be" and insert the word "is."

## RULE 37.

## REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

On page 89, line 4, subdivision (a), after the word "other" strike out the word "witness" and insert in lieu thereof the word "deponent;" on page 90, line 13, strike out the word "witness" and insert the word "deponent"; on line 21, strike out the word "witness" and insert the word "deponent."

On page 90, line 40, paragraph (1), strike out the word "shall" and insert the word "may."

On page 91, line 47, paragraph (2), after the word "order", insert the word "made."

On page 92, subdivision (c), line 91, after the word "truth" strike out the word "or" and insert the word "of."

On page 91, line 73, paragraph (ii), after the word "testimony" strike out the semicolon and insert a comma and the words "or introducing evidence of physical or mental condition."

RULE 38.

SUMMARY JUDGMENT.

On page 93, subdivision (a), line 7, after the word "without" insert the word "supporting," and on line 13, after the word "without" insert the word "supporting."

On page 93, beginning with line 15, strike out all of subdivision (c) and insert in lieu thereof the following:

"(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that except as to the amount of damages there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Whereupon, a recess was taken, at 5 o'clock and 45 minutes p.m., until 7 o'clock p.m.)

EVENING SESSION.

Tuesday, November 2, 1937.

8 o'clock p.m.

RULE 39.

JURY TRIAL OF RIGHT.

On page 97, line 10, after the word "time", insert "after the commencement of the action and not later than 10", and strike out "within 5." In line 12, after the word "issue", insert "Such claim may be endorsed upon a pleading of the party."

So as to make subdivision (b) read:

"(b) DEMAND. Any party may demand a trial by jury of any issue triable by a jury of right by serving upon the other parties a claim therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such claim may be endorsed upon a pleading of the party."

## RULE 40.

## TRIAL BY JURY OR BY THE COURT.

On page 99, line 22, after the word "motion", strike out "of that party", and in the same line, after the word "order", strike out "any issue tried" and insert "a trial"; and in line 23, after the word "jury", insert "of any or all issues", so as to read:

"the court in its discretion upon motion may order a trial by a jury of any or all issues."



RULE 42.

DISMISSAL OF ACTIONS.

On page 102, line 10, after the word "who", insert "have",  
so as to read:

"a stipulation of dismissal signed by all the parties who  
have appeared generally in the action."

## RULE 43.

CONSOLIDATION; SEVERANCE  
AND SEPARATE TRIALS.

On page 104, line 3, after the word "actions", strike out "of a like nature or".

On page 104, line 13, after the word "order", strike out the rest of the subdivision down to the end of line 18, and insert in lieu thereof "a separate trial of any claim, cross-claim, counterclaim or third-party claim, or of any separate issue, or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

## RULE 44.

## EVIDENCE.

On page 105,  
/ strike out all of subdivision (b), beginning inline 21  
and going to line 45, and insert in lieu thereof the following:

"(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION. A party may show that any witness, whether called by him or by an adverse party, has previously made, under oath or otherwise, statements contradictory to his testimony without having first called them to his attention. A party may interrogate any unwilling or hostile witness by leading questions. He may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions, and contradict and impeach him in all respects as if he had been called by the adverse party. Such a witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. Any other witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action."

(Note: On the question of policy as to whether the rule should stand allowing a party to impeach a witness by showing his contradictory statements without first exhibiting them to him, the

vote stood 3 to 4 in favor of the rule.)

On page 107, after line 67, insert a new subdivision, as follows:

"(e) When a motion is <sup>based</sup> made on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions."

## RULE 45.

## PROOF OF OFFICIAL RECORD.

On page 109, line 41, after the word "statute", insert "or by the rules of evidence at common law."

## RULE 46.

## SUBPOENA.

On page 114, line 8, after the word "specified", strike out the remainder of line 8 down to the end of line 11, and insert in lieu thereof the following:

"The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed, but otherwise in blank, to a party requesting it, who shall fill it in before service."

On page 114, line 29, after the word "made", strike out "by exhibiting the original and by."

On page 115, strike out lines 46 to 49, both inclusive, and insert in lieu thereof the following:

"A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court."

On page 116, line 85, after the word "him", strike out "shall" and insert "may", so as to read:

"Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued."

(Thereupon, at 10:15 o'clock p.m., the Committee adjourned until tomorrow, Wednesday, November 3, 1937, at 9:30 o'clock a.m.)

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

Wednesday, November 3, 1937.

Wednesday, November 3, 1937.

The Committee met at 9:30 o'clock a.m.

In addition to the members previously present, George Wharton Pepper, of Pennsylvania, was present.

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RULE 47.

EXCEPTIONS ABOLISHED

On page 119, line 1, in the heading, strike out "ABOLISHED" and insert "UNNECESSARY".

After the heading, beginning in line 1, strike out "No formal exception to a ruling or an order of the court is necessary" and insert "Formal exceptions to rulings or orders of the court are unnecessary."

In line 5, after the word "that", strike out "an objecting" and insert "a".

In line 9, after the word "co rt", insert "and his grounds therefor."

In line 11, after the word "order", insert "at the time it is made."

So as to make the rule read:

"Rule 47. EXCEPTIONS UNNECESSARY. Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order



of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection shall not thereafter prejudice him. "

## RULE 48.

## JURORS.

On page 120, line 17, after the word "who", strike out "for any reason become unable to perform their duties prior to the final submission to the jury", and insert "prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties", so as to make the sentence read:

"Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties."

In line 26, after the word "discharged", strike out "upon the final submission to the jury", and insert "after the jury retires to consider its verdict", so as to make the sentence read:

"An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict."

## RULE 50.

## SPECIAL VERDICTS AND INTERROGATORIES.

On page 123, line 23, after the word "an" strike out "omitted issue" and insert "issue omitted without such demand", so as to read:

"As to an issue omitted without such demand the court may make a finding" --

And so forth.

## RULE 51.

## MOTION FOR A DIRECTED VERDICT.

On page 124, line 1, <sup>strike out</sup> "A party may move for a directed verdict at the close of the evidence offered by an opponent without thereby waiving his right to offer evidence in the event that the motion is not granted" and insert in lieu thereof the following:

"A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do, and to the same extent as if the motion had not been made."

## RULE 52.

## INSTRUCTIONS TO JURY: OBJECTION.

On page 127, line 3, after the word "time", insert "during the trial", so as to read:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests."

## RULE 53.

## MASTERS.

On page 128, line 2, after the words "(a) APPOINTMENT", insert "AND COMPENSATION."

On page 128, line 21, after the word "party", strike out "or the court in its discretion may hold the delinquent in contempt."

On page 129, line 37, after the word "the" where it first occurs, strike out "date" and insert "time and place".

On page 129, line 57, after the word "manner", insert "and subject to the same limitations"; and in line 58, after the word "court", insert "sitting without a jury", so as to make the sentence read:

"When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided for a court sitting without a jury in Rule 44(c)."

On page 130, line 63, after the word "thereof", insert "unless the order of reference otherwise provides", and strike out the same words where they occur in line 67 after the word "reference".

On page 130, line 70, after the word "attorneys", strike out "In every reference", and begin the word "it" with a capital letter.

On page 130, line 79, after the word "the", strike out "examination and."

On page 130, line 81, after the word "party", strike out "or his attorney".

On page 130, line 86, after "46" strike out down to the end of line 92, and insert in lieu thereof the following:

"If, without adequate excuse, any witness fails to appear or give evidence, he may be punished as for a contempt and be subject to the consequences, penalties and remedies provided in Rules 37 and 46."

On page 132, line 131, after the word "parties", insert "Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 16."

On page 132, line 134, after the word "evidence", insert "or may recommit with instructions."

## RULE 54.

## JUDGMENTS: COSTS.

On page 134, line 2, after the word "FORM", insert quotation marks around the word "Judgment."

On page 134, line 5, strike out the word "any"; in line 6, strike out the word "any" where it first occurs, and insert "a"; and in the same line, strike out the word "any" where it occurs for the second time, so as to make the sentence read:

"A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

On page 135, line 41, after the word "law", insert:

"Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."



## RULE 55.

## DEFAULT.

On page 138, line 2, after the word "When", strike out "the court has obtained jurisdiction of", and in line 4, after the word "sought", strike out "and he", so as to make the subdivision read:

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

On page 138, line 27, after the word "such", strike out "fiduciary", and insert "representative."

## RULE 56.

## NEW TRIALS.

On page 141, line 13, after the word "action", strike out "which had been"; in line 14, after the word "court", strike out "has power to" and insert "may"; and in lines 15, 16, 17 and 18, strike out the word "to"; so as to make the sentence read:

"In ruling on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law, or make new findings and conclusions, and direct the entry of a new judgment."

On page 141, line 21, after the word "served", strike out "within" and insert "not later than", so as to read:

"A motion for a new trial shall be served not later than 10 days after the entry of the judgment" --

And so forth.

On page 142, line 39, strike out "At any time within", and insert "Not later than", so as to read:

"Not later than 10 days after entry of judgment the court of its own initiative may order a new trial" --

And so forth.

## RULE 57.

## RELIEF FROM JUDGMENT OR ORDER.

On page 143, line 9, after "(b)", strike out "FRAUD; ACCIDENT"; after the word "MISTAKE", insert "INADVERTENCE;" after the word "SURPRISE", insert "EXCUSABLE NEGLIGENCE", so as to make the heading read:

"(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE."

On page 143, beginning in line 10, strike out down to and including the words "Service of" in line 16, and insert in lieu thereof the following:

"On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken."

On page 143, line 16, before the word "motion", strike out "a" and insert "A".

On page 143, line 18, after the word "operation", strike out the remainder of line 18 down to the end of line 21, and insert in lieu thereof the following:

"This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in

Title 28, Sec. 118, U.S.C., a judgment obtained against a defendant not actually personally notified."

So as to make subdivision (b) read as follows:

"(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLIGENCE.

On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Title 28, Sec. 118, U.S.C., a judgment obtained against a defendant not actually personally notified."

(Note: At this point it became necessary to return to Rule 6, on page 17, as follows:)

RULE 6.

TIME.

On page 17, at the end of line 21, after the word "discretion", insert "(1)"; at the end of line 25, after the word "order", insert "or (2) upon motion permit the act to be done after the

expiration of the specified time wherethe failure to act earlier was the result of excusable neglect;" and in line 29, after the word "law", strike out the remainder of the line down to and including the end of <sup>line</sup> 32, page 18; so as to make subdivision (b) read:

"(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the time enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or (2) upon motion permit the act to be done after the expiration of the specified time where the failure to act earlier was the result of excusable neglect; but it may not enlarge the time for taking any action under Rule 56, except as stated in subdivision (c) thereof, or the time for taking an appeal as provided by law."

## RULE 59.

## FINDINGS BY THE COURT.

On page 146, line 10, after the word "action", strike out "No request for findings is necessary" and insert "Requests for findings are not necessary for purposes of review."

On page 146, line 19, after the word "made", strike out "within", and insert "not later than".

On page 146, line 22, after the word "accordingly", strike out "The pendency of the motion does not affect the finality of the judgment or suspend its operation; and", and begin the word "the" with a capital letter.

(Thereupon at 1:10 o'clock p.m., the Committee took a recess until 2 o'clock p.m.)

Wednesday, November 3, 1937.

2 o'clock p.m.

RULE 61.

HARMLESS ERROR.

On page 152, line 10: add at the end of line 10 a new sentence as follows:

"The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

## RULE 62.

APPEAL FROM A DISTRICT COURT TO THE  
SUPREME COURT OF THE UNITED STATES.

On page 152, line 2, strike out the words "OF THE UNITED STATES", making the title read: "RULE 62. APPEAL FROM A DISTRICT COURT TO THE SUPREME COURT."

On page 152, line 7, strike out the word "petition", and insert in lieu thereof the word "appeal", making the sentence read: "The appeal shall be allowed, a citation issued, a jurisdictional statement filed, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."



## RULE 63.

## APPEAL TO A CIRCUIT COURT OF APPEALS.

## (c) BOND ON APPEAL.

On page 155, line 50, strike out the words "to its form or sufficiency", and insert in lieu thereof: "to the form of the bond or to the sufficiency of the surety," making the sentence read:

"After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk."

On page 156, line 80, before the word "bond" insert the word "supersedeas", making the line read: "court, the amount of the supersedeas bond shall be fixed at".

## On page 157 (f) JUDGMENT AGAINST SURETY.

On line 106, strike out the period after the word "court", and add the following: "who shall forthwith mail copies to the surety if his address is known," making the sentence read:

"The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known."

## (g) DISCRETION AND RECORD ON APPEAL.

On page 158, line 124, change the period after the word "order" to a semicolon and add: "but the district court shall not extend the time to a day more than 90 days from the date of the

first notice of appeal," making the sentence read:

"In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal."

## RULE 64.

JOINT OR SEVERAL APPEALS; SUMMONS  
AND SEVERANCE ABOLISHED.

On page 161, line 1, after the word "APPEALS" strike out the semicolon and insert the following: "TO THE SUPREME COURT OR TO A CIRCUIT COURT OF APPEALS;" making the title read:

"Rule 64. JOINT OR SEVERAL APPEALS TO THE SUPREME COURT OR TO A CIRCUIT COURT OF APPEALS; SUMMONS AND SEVERANCE ABOLISHED."

On page 161, line 5, after the word "one", insert the words: "or more", making the sentence read as follows:

"Parties interested jointly, severally, or otherwise in a judgment may join in an appeal therefrom; or, without summons and severance, any one or more of them may appeal separately or any two or more of them may join in an appeal."

## RULE 65.

RECORD ON APPEAL TO A CIRCUIT  
COURT OF APPEALS.

## (b) TRANSCRIPT.

On page 162, line 20: after the word "designation" change the semicolon to a period; strike out the word "and" and the comma; begin the word "if" with a capital letter.

On page 162, line 25, after the word "added" change the period to a comma, and add the following: "and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed," making the sentence read as follows:

"if the designation includes only part of the reporter's transcript, the appellant shall file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed."

## (g) RECORD TO BE PREPARED BY CLERK -- NECESSARY PARTS.

On page 164, line 77, after the word "thereon;", insert the following: "and in an action tried without a jury the master's report, if any;" making the sentence read as follows:

"The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include,

whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; and in an action tried without a jury the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statements by the appellant of the points on which he intends to rely."

## RULE 67.

## STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

On page 172, strike out all of lines 43 to 50 both inclusive, and insert in lieu thereof the following:

"If the judgment appealed from is rendered by a district court of three judges specially constituted pursuant to a statute of the United States, no such order shall be made except (1) by such court sitting in open court or (2) by the assent of all the judges of such court evidenced by their signatures to the order."

## RULE 68.

## DISABILITY OF A JUDGE.

On page 175, line 4, strike out the words "by him";

On page 175, line 5, after the word "performed", insert:  
"by the court"; these two changes making the sentence read as follows:

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

## VIII.

PROVISIONAL AND FINAL REMEDIES AND  
SPECIAL PROCEEDINGS.

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## RULE 69.

## SEIZURE OF PERSON OR PROPERTY.

On page 176, line 2, change the word "or" to "and".

On page 176, lines 8 and 9, strike out: "then existing law of the state in which the district court is held," and insert in lieu thereof the following: "the law of the state in which the district court is held existing at the time the remedy is sought."

These two amendments make the first part of this sentence read as follows:

"At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action shall be available under the circumstances and in the manner provided by the law of the state in which the district court is held existing at the time the remedy is sought, subject to the following qualifications:"



## RULE 70.

## INJUNCTIONS.

(e) EMPLOYER AND EMPLOYEE; INTERPLEADER.

On page 180, line 70, after the word "INTERPLEADER" change the period to a semicolon, and add the following: "CONSTITUTION CASES.", making the subtitle read as follows:

"(e) EMPLOYER AND EMPLOYEE; INTERPLEADER; CONSTITUTION CASES."

On page 181, line 80: At the end of line 80, after the word "interpleader", change the period to a semicolon, and add the following: "or the act of August 24, 1937, relating to actions to enjoin the enforcement of acts of Congress."

## RULE 73.

## OFFER OF JUDGMENT.

On page 183, line 10, strike out the words "the defending", and insert in lieu thereof the word "either", making the sentence read as follows:

"If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment."

On page 183, line 18, after the word "costs" insert the words "in the district court", making the sentence read as follows:

"If the adverse party fails to obtain a judgment more  
shall  
favorable than that offered, he/not recover costs in the district court from the time of the offer but shall pay costs from that time."

## RULE 74.

## CONDEMNATION OF PROPERTY FOR PUBLIC USE.

Rule 74 is stricken, report to contain a note of explanation.

## RULE 75.

## EXECUTION.

On page 192, line 9, strike out the words "then existing".

On page 193, line 1, after the word "held," insert the words "existing at the time the remedy is sought."

These two changes make the sentence read as follows:

"The practice and procedure relative to execution, to proceedings supplementary to and in aid of a judgment, and to proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States shall govern to the extent that it is applicable."

## RULE 77.

## REGISTRATION OF JUDGMENTS IN OTHER DISTRICT COURTS.

On page 197, line 3, after the word "court" insert the following: "and which has become final through expiration of the time for appeal or by mandate on appeal", making the sentence read as follows:

"A judgment entered in any district court and which has become final through expiration of the time for appeal or by mandate on appeal may be registered in any other district court by filing therein an authenticated copy of the judgment."

On page 197, line 13, strike out the word "if".

## IX. DISTRICT COURTS AND CLERKS.

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## RULE 79.

## DISTRICT COURTS AND CLERKS.

## (d) NOTICE OF ORDERS OR JUDGMENTS.

On page 201, line 33, strike out the words "noting in the civil docket";

On line 34, strike out the words "of the" and the words "made in".

Strike out all of lines 35 and 36;

On line 37, strike out the words "raised by him";

On line 39, strike out "(a)" and the semicolon, and insert the following: "upon every party affected thereby who is not in default for failure to appear";

On line 40, strike out the words "Thereafter a party";

Strike out all of lines 41 and 42, and all of line 43 to the word "notice."

On line 45, strike out the words "or judgment must be given", and insert in lieu thereof: "is required by these rules;"

On line 48, strike out "(a)" and the words "The entry of";

Strike out all of lines 50, 51 and 52."

As amended, this subdivision reads as follows:

"(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party

...thereby who is not in default for failure to appear;  
...make a note in the docket of the mailing. Such mailing  
...sufficient notice for all purposes for which notice of the  
...entry or order is required by these rules; but any party may  
...additionally serve a notice of such entry in the manner provided in  
...for the service of papers."

## RULE 81.

## BOOKS KEPT BY THE CLERK AND ENTRIES THEREIN.

## (a) CIVIL DOCKET.

On page 203, line 18, strike out the word "this" and insert in lieu thereof: "the civil docket", making the sentence read as follows:

"All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket book on the folio assigned to the action and shall be marked with its file number."

On page 203, line 24, after the word "process" and the period, add a new sentence, as follows: "The notation of an order or judgment shall show the date the notation is made."

(Thereupon, at 6 o'clock p.m., the Committee stood in recess until 8 o'clock p.m.)



## EVENING SESSION.

Wednesday, November 3, 1937.

## RULE 82.

STENOGRAPHY; STENOGRAPHIC REPORT OR  
TRANSCRIPT AS EVIDENCE.

On page 204, line 7, after the words "court and", insert the words "may be," and after the word "costs" strike out the period and insert a comma and the words "in the discretion of the court."

After line 9, insert a new subdivision, as follows:

"(b) Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of motions for new trial, for amended findings, or for appeals."

On line 10, in the parentheses, strike "b" and insert "c".

## RULE 83.

## APPLICABILITY IN GENERAL.

On page 206, line 28, after "Title 9", insert the words "relating to arbitration," and on page 207, line 30, after the numerals "159", insert the words "relating to boards of arbitration of railway labor disputes."

On page 207, line 53, strike out the word "with" and insert "to."

On page 208, strike out lines 66 to 71, inclusive.

On line 72, in the parentheses, strike out "7" and insert "6."

On line 75, after the numerals "282" strike out the word "nor" and insert "relating to deportation of Chinese, or."

On page 208, line 85, after the words "SCIRE FACIAS" insert the words "AND MANDAMUS." Strike out the word "writ" and insert the words "writs" and after the word "facias" insert the words "and mandamus." On line 86, strike out the word "is" and insert the word "are," so as to make the sentence read:

"The writs of scire facias and mandamus are abolished."

At the end of the sentence just inserted, insert a new sentence, as follows:

"Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

On page 209, line 108, strike out "(d) DEFINITIONS."

In line 109, strike out "(1)" and insert "(d) District of Columbia;" so as to read:

"(d) District of Columbia; Courts and Judges."

On line 120, strike out in the parentheses "2" and insert "e."

On page 210, line 134, after the word "Congress" strike out the words "or law."

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In page 208, after line 84, insert the following:

"(7) In proceedings for condemnation of property under the power of eminent domain appeals shall be governed by these rules, but they shall not be applicable otherwise than on appeal."

## RULE 85.

## RULES BY DISTRICT COURTS.

On page 214, line 1, strike out the words "Each district court by action of a majority of the judges thereof may make for its district rules and regulations governing pleading, practice, and procedure not inconsistent with these rules, and may from time to time alter and amend them," and insert in lieu thereof:

"Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules."

On line 7, after the word "amendments", strike out the comma and the words "if any."

Strike out lines 14 to 17, inclusive.

## RULE 86.

## USE OF FORMS.

Page 215, line 4, strike out all after the word "require", as follows: "shall be considered sufficient under these rules," and insert in lieu thereof the words "may serve as guides subject to the provisions of these rules," so as to read:

"Rule 86. USE OF FORMS. The forms attached to these rules in the Appendix of Forms, with appropriate changes as circumstances may require, may serve as guides subject to the provisions of these rules."

## RULE 88.

## EFFECTIVE DATE.

On line 10, page 216, after the word "pending", strike out the words "except to the extent that in the opinion of the court their application to pending actions would not be feasible or would work injustice, in which event the former procedure shall apply," and insert, "except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice."

## RULE 44.

## EVIDENCE.

On line 5 of the mimeograph copy, strike out the word "He" and insert "A party;" on line 10, after the word "party" strike out the period and the words "Such a", and insert a comma and the words "and the;" and on line 13, strike out the words "Any other witness" and insert the words "Except as stated in the last preceding sentence, any witness," so as to make the rule read:

"Rule 44. EVIDENCE

"(b) Scope of Examination and Cross-Examination.

"A party may show that any witness, whether called by him or by an adverse party, has previously made, under oath or otherwise, statements contradictory to his testimony without having first called them to his attention. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation, or of a partnership or association which is an adverse party, and interrogate him by leading questions, and contradict and impeach him in all respects as if he had been called by the adverse party and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination



in chief. Except as stated in the last preceding sentence, any witness called by a party and examined as to any matter material to any issue may be cross-examined by the adverse party upon all matters material to every issue of the action."

RULE 4.

PROCESS.

On page 10, lines 108 and 109, strike out "or Rule 74(d) of these rules."

(Thereupon, at 10 o'clock and 5 minutes p.m., the Committee adjourned to meet tomorrow, Thursday, November 4, 1937, at 9:30 o'clock a.m.)

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

THURSDAY, NOVEMBER 4, 1937.

Thursday, November 4, 1937.

The Committee met at 9:30 o'clock a.m.

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#### RULE 5.

#### SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

On page 15, line 12, after the word "thereby", strike out the words " but only upon those not in default for failure to appear."

On line 12, after the word "thereby" strike out the comma and insert a semicolon and the words "but no service need be made on parties in default for failure to appear except of pleadings asserting new and additional claims for relief against them, which shall be served upon them in the manner provided for service of summons in Rule 4."

On page 15, line 9, strike out the word "claim."

Change "claim" to "demand" in Rule 39, lines 10, 12, 13, 19, 21, 24, 26; in Rule 40, lines 19, 20, and in Rule 83(c), line 104.

Change "claimed" to "demanded" in Rule 39, lines 16, 17; in Rule 58, line 6; in Rule 40, lines 3, 6, 16, and in Rule 81, line 25.

**RULE 81.****BOOKS KEPT BY THE CLERK AND ENTRIES THEREIN.**

On page 203, line 25, strike out lines 25 to 28, inclusive, and insert:

"When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action."

RULE 27.

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.

On line 12, after the word "testimony", insert the words "and his reasons for desiring to perpetuate it."

On line 23, before the word "The" insert the words "At least 20 days before the date of hearing"; on line 24, after the numeral "4", insert "(b)"; on line 25, before the word "service", strike out the word "personal" and insert the word "such;" on line 28, before the word "appoint" strike out the word "may", and insert the word "shall;" on line 28, before the word "served", strike out the word "personally", and after the word "served" insert the words "in the manner provided in Rule 4(b);" on page 2 of the mimeograph copy, line 29, strike out the words "appear and" and insert the words "represent them, and in case they are not otherwise represented shall;" in the same line, strike out the word "deponents", and insert the word "deponent."; strike out the last sentence on lines 30 to 32, page 2, so as to make the subdivision read:

"(2) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the

notice shall be served either within or without the district or state in the manner provided in Rule 4(b) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(b), an attorney who shall represent them, and in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply."

On page 3, after line 63, add a new subdivision, as follows:

"(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony."

On page 2, paragraph "3", line 34, after the word "testimony", strike out the words "is proper to", and insert the word "may."

## RULE 1.

## SCOPE OF RULES.

Strike out at the beginning of the rule the words "Subject to the limitations of Rule 83," and amend the rule so as to read:

"Rule 1. Scope of Rules. These rules govern the procedure in the district courts of the United States in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 83. They shall be construed to secure the just, speedy, and inexpensive determination of every action."



Senator Pepper. I move the transposition of Rule 59 bodily, with the same caption, "Findings by the Court," so that it shall become Rule 53, subsequent rules to be renumbered accordingly.

(The motion was agreed to.)

Mr. Mitchell. I suggest that Rules 62 to 66, inclusive, be placed in a new chapter, to be numbered "IX", entitled "Appeals," to come before what is now Chapter IX, and to strike the words "AND APPEAL" out of what is now the title to Chapter VII, the present Chapter IX to become Chapter X.

(The motion was agreed to.)

Mr. Tolman. I move that Rules 56 and 57 be transposed to follow what is now Rule 60.

Mr. Pepper. The order then would be 54, 55, 58, 60, 56, 57, 61, 67, 68.

(The motion was agreed to.)

Mr. Sunderland. I move that Rule 38 be transposed to precede what is now Rule 58.

(The motion was agreed to.)

On page 66, change the heading by striking out "AND SUMMARY JUDGMENTS", so that it would read:

"V. DEPOSITIONS, DISCOVERY."

Mr. Pepper. I move that the application of Mr. Velde's suggestions to the revised rules be referred with power to Major Tolman and Dean Clark, the understanding being that they will so

use their discretion as to secure uniformity of treatment in matters already discussed and not introduce new reforms.

(The motion was agreed to.)

FORMS.

In the introductory statement, paragraph "2", strike out the last sentence, "For special and different provisions as to naming parties in a summons and in a complaint in a condemnation action, see Rule 74(b) and (c)."

On page 3, under the title "Notes", paragraph "2", line 3, after the word "See", insert the words "for example" and a comma.

On page 4, strike out the first four lines in parentheses.

On page 5, strike out the name "Daniel Webster" and on line 6 "1 Wall Street", and "New York City", so that it would read:

"Signed: \_\_\_\_\_  
Attorney for Plaintiff

"Address: \_\_\_\_\_"

On page 5, under the heading "Notes", paragraph "2", after the word "other," strike out the words "wherever appropriate to the matters in dispute between the parties."

With these changes, the forms were agreed to through Form 4, page 5.

(Discussion ensued.)

Mr. Pepper. I move that there be no note on the subject of the common counts.

(The motion was agreed to.)

(A recess was taken at 1:20 p.m. until 2 o'clock p.m.)

Thursday, November 4, 1937.

2 o'clock p.m.

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## FORM 7 -- COMPLAINT FOR MONEY PAID BY MISTAKE.

On page 9, in paragraph 2, after "1936", add: "under the following circumstances: (here state the circumstances with particularity. See Rule 9(b))."

## FORM 9 -- COMPLAINT FOR NEGLIGENCE.

In paragraph 2, second line, strike out "into and over" and insert "against", so as to read:

"negligently drove a motor vehicle against plaintiff."

FORM 9-a - COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C.D. OR E.F. OR WHETHER BOTH ARE RESPONSIBLE, AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS, OR OF RECKLESSNESS OR OF NEGLIGENCE.

On page 10, in paragraph 2, third line, after the word "drove", insert "or caused to be driven", and in the fourth line, before the word "plaintiff", strike out "into and over" and insert "against", so as to read:

"wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff".

On pages 10 and 11, strike out the note to Forms 9 and 9-a.

**FORM 11 - COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT.**

On page 12, change the title of Form 11 to read:

**"COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND."**

**FORM 12 \* COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b).**

After the title, insert:

"A. B., )  
Plaintiff )  
vs. )  
C.D. and E.F., )  
Defendants. )

**FORM 13 - COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYER'S LIABILITY ACT.**

On page 14, in paragraph 4, third line, after the word "had", strike out "negligently", so as to read:

**"in a portion of the tunnel which defendant had left unprotected and unsupported."**

**FORM 15 - COMPLAINT TO ENJOIN ENFORCEMENT OF A STATUTE, ~~COVERED UNITED STATES~~.**

Strike out Form 15 in its entirety, and renumber all subsequent forms accordingly.

**FORM 17 - COMPLAINT FOR INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITION.**

On pages 19 and 20, strike out the notes, 1 and 2.

FORM 18 - COMPLAINT FOR INTERPLEADER AND DECLARATORY  
RELIEF.

On page 20, paragraph 5, second and third lines, strike out in each case the word "estate" and insert "will", in lieu thereof.

FORM 19 - MOTION TO DISMISS PRESENTING DEFENSES OF  
FAILURE TO STATE A CLAIM, OF LACK OF SERVICE  
OF PROCESS, OF IMPROPER VENUE, AND OF LACK OF  
JURISDICTION UNDER RULE 12(b).

In the title, first line, insert a comma after the word "DISMISS."

On page 22, paragraph 1, second line, after the word "granted", strike out the comma, insert a period, and strike out the remainder of the second and third lines.

On page 22, in paragraph 3, first line, after the word "action", strike out "or in lieu thereof to quash the return of service of summons"; and in the second line, after the word "that", strike out "the action", and insert "it", so as to read:

"3. To dismiss the action on the ground that it is brought in the wrong district" --

And so forth.

On page 22, at the end of paragraph 4, strike out "James Otis", "15 Broad Street, New York City"; and after "NOTICE OF MOTION" and the word "To", strike out "Daniel Webster"; and after "Attorney for Plaintiff, strike out "1 Wall Street, New York City;" and at the bottom of the page, strike out "James Otis", "15 Broad Street, New York City."

On page 23, at the top of the page, strike out the letter

"s" in the word "Notes"; strike out the number "1" at the beginning of the note; and in the second line of the note, after the words "Notice of Motion", insert a period, and strike out the remainder of that sentence. In the third line, after the word "See", strike out "the second paragraph of", and after "7" in the next line insert "(b)", so as to make the note read:

"Note.

"The above motion and notice of motion may be combined and denominated Notice of Motion. See Rule 7(b)".

On page 23, following the note above set out, strike out all of note 2.

**FORM 20 - ANSWER PRESENTING DEFENSES UNDER RULE 12(b).**

In the second line of the form, after the word "granted", insert a period, and strike out the remainder of that line and all of the next line.

On page 24, in the note, second line, after the word "defense", strike out the comma and the words "of course".

**FORM 22 - MOTION TO BRING IN THIRD-PARTY DEFENDANT.**

At the end of the form, strike out "James Otis", "15 Broad Street, New York City."

On page 26, last line, strike out "Daniel Webster" and "1 Wall Street"; on page 27, first line, strike out "New York City" and "James Otis"; in the second line, strike out "15 Broad Street"; <sup>New York City</sup> and on page 28, at the end of the form, strike out

"James Otis", "15 Broad Street, New York City."

FORM 23 - MOTION TO INTERVENE AS A DEFENDANT UNDER  
RULE 24.

At the end of the form, strike out "William Wirt", "20 Wall Street, New York City."

On page 29, at the end of the form, strike out "William Wirt", "20 Wall Street, New York City."

FORM 24 - MOTION FOR PRODUCTION OF DOCUMENTS ETC.  
UNDER RULE 34.

On page 30, second line, after the word "each", strike out "one"; and in the fifth line, after the word "each", strike out "one".

At the end of the form, strike out "Daniel Webster", "1 Wall Street, New York City."

FORM 25 - REQUEST FOR ADMISSIONS UNDER RULE 36.

On page 31, at the bottom of the page, strike out the paragraph beginning "For the purposes of this action", and ending with the words "or of the truth of the statement"; and at the end of the form, strike out "Daniel Webster", "1 Wall Street, New York City."

FORM 27 - NOTICE OF APPEAL TO CIRCUIT COURT OF  
APPEALS UNDER RULE 63(b).

On page 32, after the title, strike out "To the Clerk of the Court. Please take notice", and insert "Notice is hereby given"; and at the end of the form, strike out "William Wirt,"



"20 Wall Street, New York City".

In the note, second line, strike out the parenthesis before the word "If", and in the third line, strike out the parenthesis after the word "specified."

At the end of the note, strike out the sentence reading:  
"Hence the notice should be directed to the Clerk of the District Court."

(Note: The Committee then returned to Rules 63 and 86, and made the following changes therein:)

#### RULE 63.

##### APPEAL TO A CIRCUIT COURT OF APPEALS.

On page 155, line 33, after the word "notification", insert:  
"The clerk shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing."

#### RULE 86.

##### USE OF FORMS.

On page 215, line 1, in the title, strike out the words "Use Of"; strike out the rule as printed and as heretofore modified, and insert in lieu thereof the following:

"The forms contained in the Appendix of Forms are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate."

(Thereupon, at 4:15 o'clock p.m., the Advisory Committee adjourned sine die.)

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