

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. SC19-1336**

WILSONART, LLC and SAMUEL  
ROSARIO,

Petitioners,

vs.

DCA Case No. 5D18-2907  
L.T. Case No. 2018-CA-000237

MIGUEL LOPEZ, as Personal  
Representative of the Estate of JON  
LOPEZ, deceased,

Respondent.

\_\_\_\_\_ /

**On Discretionary Review from the District Court of Appeal,  
Fifth District, State of Florida**

**APPENDIX TO ANSWER BRIEF OF  
RESPONDENT**

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

MIGUEL LOPEZ, AS PERSONAL  
REPRESENTATIVE OF THE  
ESTATE OF JON LOPEZ,

Appellant,

v.

Case No. 5D18-2907

WILSONART, LLC AND SAMUEL ROSARIO,

Appellees.

\_\_\_\_\_ /

Opinion filed July 12, 2019

Appeal from the Circuit Court  
for Osceola County,  
Mike Murphy, Judge.

Tony Bennett, of Hicks and Motto, P.A.,  
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Sean Michael McDonough, and Jacqueline  
M. Bertelsen, of Wilson Elser Moskowitz  
Edelman & Dicker LLP, Orlando, for  
Appellees.

HARRIS, J.

The Estate of Jon Lopez (the “Estate”) timely appeals the trial court’s entry of final summary judgment in favor of Wilsonart, LLC and Samuel Rosario (collectively, “Appellees”). Under Florida’s current summary judgment standard, we are compelled to conclude that conflicting evidence remained as to whether Rosario negligently operated

his vehicle, which could allow a jury to apportion fault between the drivers. We therefore reverse the summary judgment and remand for further proceedings.

On January 17, 2017, Rosario was driving a freightliner truck eastbound on a six lane highway towards an intersection in Osceola County, Florida. The highway was divided evenly with three lanes for westbound traffic and the other three lanes for eastbound traffic. Rosario drove in the center lane of the eastbound side. As the freightliner approached an intersection, Jon Lopez, driving a pickup truck, crashed into the rear of the freightliner, pushing the freightliner forward into another vehicle. Lopez died as a result of the injuries he sustained from the collision.

Rosario testified in his deposition that he traveled in the center of the three eastbound lanes and began to slow down as he approached the intersection when he felt an impact to the rear of the freightliner. He testified that he was coming close to a full stop, that his wheels were turned straight, and that he intended to continue travelling straight at the moment of the collision. In addition, Rosario's freightliner was equipped with a forward-facing dashboard camera. The footage from this dashcam shows the freightliner travelling in the center lane of the eastbound lanes. As the freightliner gradually came to a stop at a red light, it experienced a large impact, forcing it to veer to the left and crash into the car in front of it. It is undisputed that this impact was the result of being struck from behind by the pickup truck driven by Lopez and that this crash resulted in Lopez's death.

In response to Appellees' motion for summary judgment, the Estate presented the deposition of David Mendez, a witness to the collision, who testified that the freightliner suddenly changed lanes just prior to impact, swerving from the center lane to the left lane.

The Estate also presented the affidavit of its expert, who concluded that part of the freightliner was in the right lane of the eastbound side when the collision occurred. This conclusion was based, in large part, on the deposition testimony of Mendez, the independent eye witness.

In their motion for summary judgment, Appellees argued that because Lopez rear-ended the freightliner with his pickup truck, he is presumed negligent under Florida law and that Lopez was the sole cause of the collision. Appellees further argued that Rosario's testimony and the corroborating dashcam footage suggested that Lopez could not overcome the presumption of negligence because the video flatly contradicted Mendez's testimony, rendering it incompetent evidence. The Estate responded, arguing that its expert's affidavit created a genuine issue of material fact as to whether Rosario kept his vehicle in a single lane and that this conflicting evidence created a question of material fact as to Rosario's negligence in operating the freightliner. After a hearing on Appellees' motion, the trial court granted the summary judgment and this appeal followed.

In considering "an appeal from the entry of a summary final judgment, an appellate court should indulge all proper inferences in favor of the party against whom summary judgment was sought." Hervey v. Alfonso, 650 So. 2d 644, 646 (Fla. 2d DCA 1995) (citing Humphrys v. Jarrell, 104 So. 2d 404 (Fla. 2d DCA 1958)). "If the record reflects even the possibility of a material issue of fact, or if different inferences can be drawn reasonably from the facts, that doubt must be resolved against the moving party and summary judgment must be denied." Doe v. N. Okaloosa Med. Ctr., Inc., 802 So. 2d 1202, 1203 (Fla. 1st DCA 2002) (internal quotations removed).

“A summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law.” Moore v. Morris, 475 So. 2d 666, 668 (Fla. 1985). Succinctly put, “[w]hen acting upon a motion for summary judgment, if the record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied.” Jones v. Dirs. Guild of Am., Inc., 584 So. 2d 1057, 1059 (Fla. 1st DCA 1991).

In this case, the trial court erred when it concluded that the video evidence “blatantly contradicts the eye witness testimony and the opinion of plaintiff’s expert.” The court relied on Scott v. Harris, 127 S. Ct 1769, 1776 (2007) (applying the very different federal summary judgment standard and concluding that no genuine issue of material fact existed where video footage blatantly contradicted motorists’s version of events)<sup>1</sup> and Wiggins v. Florida Department of Highway Safety and Motor Vehicles, 209 So. 3d 1165 (Fla. 2017) (holding that in first-tier certiorari review of driver’s license suspension hearing— not summary judgment— circuit court does not err where it rejects police officer testimony, which is refuted by video evidence). Although both Scott and Wiggins stand for the proposition relied upon by the trial judge—that clear, objective, neutral video evidence can be so contradictory to the opposing party’s evidence so as to render that evidence incompetent—it was error to apply those holdings to a summary judgment proceeding under Florida’s much more restrictive standard. In fact, by finding that the

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<sup>1</sup> Under Rule 56, Federal Rules of Civil Procedure, the party opposing the motion for summary judgment must come forward with “specific facts showing that there is a genuine issue for trial.” Significantly, the trial court is allowed to assess the proof and “where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citing First Nat’l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)).

video evidence, as compelling as it was, completely negated both the independent eyewitness testimony as well as the Estate's expert's opinion, the trial court improperly weighed competing evidence on material facts. "In ruling on a motion for summary judgment, the court may neither adjudge the credibility of the witnesses nor weigh the evidence." Sierra v. Shevin, 767 So. 2d 524, 525 (Fla. 3d DCA 2000). "A trial court may not . . . consider the weight of conflicting evidence . . . in determining whether a genuine issue of material fact exists in a summary judgment proceeding." Juno Indus. Inc. v. Heery Int'l, 646 So. 2d 818, 822 (Fla. 5th DCA 1994).

Here, the video evidence<sup>2</sup> showing Rosario's driving pattern is both compelling that Appellees were not negligent and directly contradictory to the Estate's evidence in opposition to the summary judgment motion. However, in the event this case survives Appellees' inevitable motion for directed verdict at trial, then it would be the jury's job to assess the credibility of the Estate's witnesses as to the cause of the accident and to weigh and compare Appellees' conflicting evidence, including the videotape. By granting final summary judgment, the trial court completely negated the Estate's evidence based on the perceived strength of Appellees' video evidence and, thus, improperly encroached into the jury's province. As a result, we are compelled to reverse the final summary judgment and remand for further proceedings.

In light of the technological advancements in our society that increase the likelihood of video and digital evidence being more frequently used in both trial and pretrial

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<sup>2</sup> The video evidence is part of our appellate record and has been reviewed by the panel.

proceedings, we certify the following question to the Florida Supreme Court as one of great public importance:

Should there be an exception to the present summary judgment standards that are applied by state courts in Florida that would allow for the entry of final summary judgment in favor of the moving party when the movant's video evidence completely negates or refutes any conflicting evidence presented by the non-moving party in opposition to the summary judgment motion and there is no evidence or suggestion that the videotape evidence has been altered or doctored?

REVERSED and REMANDED for further proceedings; QUESTION CERTIFIED

WALLIS and LAMBERT, JJ., concur.

# LAW DICTIONARY

WITH

# PRONUNCIATIONS

BY

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Professor of Law in the University of California



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- the issues of one of the parties to an action; a finding by the jury in the terms of the issue or issues referred to them. The object of a general verdict is to respond to and decide the issues between the parties on the evidence adduced, and to declare the respective rights of the parties as involved in the issues with certainty, so that the judgment can be entered with like certainty, and the ministerial officers can carry it into execution, without determining additional facts. 53 Am Jur 695 et seq.
- See judgment on the verdict; separate-general verdict.
- general welfare (wel'fār). The term includes the public health, as well as other things which are the special wards of the police power of the state. See *Des Moines & Mississippi Levee District v. Chicago, Burlington & Quincy Railroad Co.*, 240 Mo. 614, 39 L.R.A.(N.S.) 543, 546, 145 S. W. Rep. 35.
- generation (jen-ĕ-rā'shŏn). A single succession of living beings in natural descent. The word has no technical meaning and hence it must be considered as used in the sense of succession, its ordinary import, rather than as meaning a degree of removal, in computing descents. See *McMillan v. School Committee of Croatan District*, 107 N. C. 609, 10 L.R.A. 823, 825, 12 S. E. Rep. 330.
- generis. See doctrine of ejusdem generis.
- generosi filius (je-ne-rō'sī fī'li-us). The son of a gentleman.
- generosus (je-ne-rō'sus). A gentleman.
- Geneva Award (jē-nē'vā ə-wārd'). See Alabama Claims.
- gens (jenz). A Roman tribe which was composed of families of the same name all of whom were descended from a common ancestor.
- gentes (jen'tēz). Plural of gens.
- gentiles (jen'tils or -tills). Members of the same gens.
- See gens.
- gentleman (jen'tl-mən). Any man who ranked above a yeoman; a man who had the right to use a crest or coat-of-arms.
- gentlewoman (jen'tl-wūm'ʌn). A woman of the same rank or status as that of a gentleman.
- gents (jents). People; persons.
- genuine (jen'ū-in). Real or original, as opposed to adulterated, false, fictitious, simulated, spurious, or counterfeit. See *Baldwin v. Van Deusen*, 37 N. Y. 487, 492.
- genus (jē'nus). A class embracing many species; the word species being defined as a sort, a kind, a class subordinate to a genus. A horse is a species of the genus equus. See *Smythe v. State*, 17 Tex. App. 244, 251.
- See species.
- geographical mile. See mile.
- geology. See aerial geology.
- George the First (jōrj the fērst). The king of England from August 1st, 1714, to June 11th, 1727.
- George the Second. The king of England from June 11th, 1727, to October 25th, 1760.
- George the Third. The king of England from October 25th, 1760, to January 29th, 1820.
- George the Fourth. The king of England from January 29th, 1820, to June 26th, 1830.
- George the Fifth. The king of England since the seventh day of May, 1910.
- gerefa (gě-rā'fah). A reeve; a shire-reeve; a sheriff.
- gerens (je'renz). Bearing; carrying on; engaging in.
- gerens datum (je'renz da'tum). Bearing date.
- gerere (je're-re). To act; to behave; to carry on; to engage in.
- gerere pro haerede (je're-re prō hē-rē'de). To act as heir.
- germain. Same as germane.
- german (jēr'mən). Germane; fully related, as brothers of the same parents.
- german cousin (kuz'n). A first cousin.
- See cousin-german.
- germane (jēr-mān'). Closely allied; relevant. It was held in a decision thus defining the term and quoting Webster, that a provision in a statute prohibiting the possession of machinery designed or intended to be used for the manufacture of intoxicating liquor was "germane" to the title of the act, "An act relating to intoxicating liquor," etc. See *Roark v. People*, — Colo. —, 244 Pac. Rep. 909.
- germanus (jer-mā'nus). Of the same parents; of the same stock.
- gerrymander (ger'i-man-dēr). An unfair method adopted by a political party in control of the legislature, whereby the boundaries of election districts are so altered and arranged as to prevent a majority vote in such districts in favor of the opposing political party, which, under a fair and normal apportionment, would represent a majority vote in those districts. See *State ex rel. Morris v. Wrightson*, 56 N. J. L. 126, 22 L.R.A. 548, 557, 28 Atl. Rep. 56.

Key to pronunciation: a in fat; ā in fate; ä in far; â in fall; ă in ask; ǎ in fare; ȃ in prelate; ą in errant; ǎ in Persia. e in met; ē in meet; é in her; ẹ in ablegate; ẹ in prudent. i in pin; î in pine; ï in charity.

# BLACK'S LAW DICTIONARY

Definitions of the Terms and Phrases of  
American and English Jurisprudence,  
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

Author of Treatises on Judgments, Tax Titles, Intoxicating Liquors,  
Bankruptcy, Mortgages, Constitutional Law, Interpretation  
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heard on appeal. *Mize v. Crail*, 29 C.A.3d 797, 106 Cal.Rptr. 34, 38. To be "party aggrieved" by judgment, appellant's interest must be immediate, pecuniary and substantial and not nominal or remote consequence of judgment. *Leoke v. San Bernardino County*, 249 C.A.2d 767, 57 Cal.Rptr. 770, 772, 773. See also **Aggrieved party**.

**Party to be charged.** A phrase used in the statute of frauds, meaning the party against whom the contract is sought to be enforced. The party to be charged in the action—that is, the defendant.

**Political party.** A body of voters organized for the purpose of influencing or controlling the policies and conduct of government through the nomination and election of its candidates to office.

**Real party in interest.** Fed.R. Civil P. 17(a) provides that every action shall be prosecuted by the "real party in interest." The adoption of this rule was intended to change the common law rule which permitted suit to be brought only in the name of the person having the legal title to the right of action, and thus precluded suit by persons who had only equitable or beneficial interests. Under the rule the "real party in interest" is the party who, by the substantive law, possesses the right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery. This is illustrated by the further language of the rule stating that executors, administrators, and other named representatives may sue in their own name without joining with them the party for whose benefit the action is brought.

**Third parties.** A term used to include all persons who are not parties to the contract, agreement, or instrument of writing by which their interest in the thing conveyed is sought to be affected. See also **Beneficiary**.

In civil actions, a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiffs' claim against him. A similar right is afforded to the plaintiff when a counterclaim is asserted against him. Fed.R. Civil P. 14. See **Third party complaint**; **Third-party practice**.

**Party wall.** A wall erected on a property boundary as a common support to structures on both sides, which are under different ownerships. A wall built partly on the land of one owner, and partly on the land of another, for the common benefit of both in supporting the construction of contiguous buildings. A division wall between two adjacent properties belonging to different persons and used for mutual benefit of both parties, but it is not necessary that the wall should stand part upon each of two adjoining lots, and it may stand wholly upon one lot. *Soma Realty Co. v. Romeo*, 31 Misc.2d 20, 220 N.Y.S.2d 752, 755.

In the primary and most ordinary meaning of the term, a party-wall is (1) a wall of which the two adjoining owners are tenants in common. But it may also mean (2) a wall divided longitudinally into two strips, one belonging to each of the neighboring owners; (3) a wall which belongs entirely to one of the adjoining owners, but is subject to an easement or right in the other to have it maintained as a dividing wall between the two tenements (the term is so used

in some of the English building acts); or (4) a wall divided longitudinally into two moieties, each moiety being subject to a cross-easement in favor of the owner of the other moiety.

**Parum** /pærəm/. Lat. Little; but little.

**Parum cavisse videtur** /pærəm kævısiy vädıydär/. Lat. Roman law. He seems to have taken too little care; he seems to have been incautious, or not sufficiently upon his guard. A form of expression used by the judge or magistrate in pronouncing sentence of death upon a criminal.

**Parum differunt quæ re concordant** /pærəm difərənt kwıy rıy kənkórdənt/. Things which agree in substance differ but little.

**Parum est latam esse sententiam nisi mandetur executioni** /pærəm ɛst léydəm ɛsiy səntəns(h)ıy)əm náysey mändéydär ɛksəkıyüwshıyównay/. It is little [or to little purpose] that judgment be given unless it be committed to execution.

**Parum proficit scire quid fieri debet, si non cognoscas quomodo sit facturum** /pærəm prófəsət sáyriy kwıd fáyray débət, sáy nón kəgnóskəs kwówmədow sıt fækt(y)úrəm/. It profits little to know what ought to be done, if you do not know how it is to be done.

**Par value.** As regards stock, the face value of a share of stock. With reference to mortgages or trust deeds, the value of the mortgage based on the balance owing, without discount.

In the case of a common share, par means a dollar amount assigned to the share by the company's charter. Par value may also be used to compute the dollar amount of the common shares on the balance sheet. Par value has little significance so far as market value of common stock is concerned. Many companies today issue no-par stock but give a stated per share value on the balance sheet. In the case of preferred shares and bonds, however, par is important. It often signifies the dollar value upon which dividends on preferred stocks, and interest on bonds, are figured. In the case of bonds and stock, the face value appearing on the certificate is the par value. Those stocks not containing such a statement have no par value.

**Parva serjeantia** /párvə sərjıyǎnsh(ıy)ə/. Petty serjeanty (*q.v.*).

**Parvum cape** /párvəm kéyp(ıy)/. See **Petit cape**.

**Pas** /pá/. In French. Precedence; right of going foremost.

**Pass, v.** To utter or pronounce, as when the court passes sentence upon a prisoner. Also to proceed; to be rendered or given, as when judgment is said to pass for the plaintiff in a suit.

In legislative parlance, a bill or resolution is said to pass when it is agreed to or enacted by the house, or when the body has sanctioned its adoption by the requisite majority of votes; in the same circumstances, the body is said to pass the bill or motion. See also **Passage**.

When an auditor appointed to examine into any accounts certifies to their correctness, he is said to

pass them; *i.e.*, they pass through the examination without being detained or sent back for inaccuracy or imperfection.

The term also means to examine into anything and then authoritatively determine the disputed questions which it involves. In this sense a jury is said to *pass upon* the rights or issues in litigation before them.

In the language of conveyancing, the term means to move from one person to another; *i.e.* to be transferred or conveyed from one owner to another.

To publish; utter; transfer; circulate; impose fraudulently. This is the meaning of the word when the offense of *passing* counterfeit money or a forged paper is spoken of.

"Pass," "utter," "publish," and "sell" are in some respects convertible terms, and, in a given case, "pass" may include utter, publish, and sell. The words "uttering" and "passing," used of notes, do not necessarily import that they are transferred as genuine. The words include any delivery of a note to another for value, with intent that it shall be put into circulation as money. Word "pass" when used in connection with negotiable instrument means to deliver, to circulate, to hand from one person to another. *State v. Beaver*, 266 N.C. 115, 145 S.E.2d 330, 331. See *Delivery*; *Negotiation*; *Transfer*; *Utter*.

**Pass, n.** Permission to pass; a license to go or come; a certificate, emanating from authority, wherein it is declared that a designated person is permitted to go beyond certain boundaries which, without such authority, he could not lawfully pass. Also a ticket issued by a railroad or other transportation company, authorizing a designated person to travel free on its lines, between certain points or for a limited time.

**Passage.** Act of passing; transit; transition. A way over water or land or through the air. An easement giving the right to pass over a piece of private water. Travel by sea; a voyage over water; the carriage of passengers by water; price paid for such carriage.

Enactment; the act of carrying a bill or resolution through a legislative or deliberative body in accordance with the prescribed forms and requisites. The emergence of the bill in the form of a law, or the motion in the form of a resolution. Passage may mean when bill has passed either or both houses of legislature or when it is signed by President or Governor.

**Passaglio** /pæsáj(iy)ow/. An ancient writ addressed to the keepers of the ports to permit a man who had the king's leave to pass over sea.

**Passator** /pæsájdar/. In old English law, he who has the interest or command of the passage of a river; or a lord to whom a duty is paid for passage.

**Passbook.** Document issued by a bank in which the customer's transactions (*i.e.* savings deposits and withdrawals) are recorded.

**Passenger.** In general, a passenger is one who gives compensation for a ride. *Shapiro v. Bookspan*, 155 Cal.App.2d 353, 318 P.2d 123, 126. The word passenger has however various meanings, depending upon the circumstances under which and the context in which the word is used; sometimes it is construed in a restricted legal sense as referring to one who is

being carried by another for hire; on other occasions, the word is interpreted as meaning any occupant of a vehicle other than the person operating it. *American Mercury Ins. Co. v. Bifulco*, 74 N.J.Super. 191, 181 A.2d 20, 22.

The essential elements of "passenger" as opposed to "guest" under guest statute are that driver must receive some benefit sufficiently real, tangible, and substantial to serve as the inducing cause of the transportation so as to completely overshadow mere hospitality or friendship; it may be easier to find compensation where the trip has commercial or business flavor. *Friedhoff v. Engberg*, 82 S.D. 522, 149 N.W.2d 759, 761, 762, 763.

A person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care either upon the means of conveyance, or at the point of departure of that means of conveyance.

**Passenger mile.** In statistics of transportation, a unit of measure equal to the transport of one passenger over one mile of route.

**Passim** /pæsəm/. Lat. Everywhere. Often used to indicate a very general reference to a book or legal authority.

**Passion.** In the definition of manslaughter as homicide committed without premeditation but under the influence of sudden "passion" or "heat of passion", this term means any of the emotions of the mind known as rage, anger, hatred, furious resentment, or terror, rendering the mind incapable of cool reflection.

**Passive.** As used in law, this term means inactive; permissive; consisting in endurance or submission, rather than action; and in some connections it carries the implication of being subjected to a burden or charge.

As to passive Debt; Negligence; Title; Trust; and Use; see those titles.

**Passport.** A document identifying a citizen, in effect requesting foreign powers to allow the bearer to enter and to pass freely and safely, recognizing the right of the bearer to the protection and good offices of American diplomatic and consular offices. *U. S. v. Laub*, U.S.N.Y., 385 U.S. 475, 87 S.Ct. 574, 578, 17 L.Ed.2d 526. A passport is evidence of permission from sovereign to its citizen to travel to foreign countries and to return to land of his allegiance, as well as request to foreign powers that such citizen be allowed to pass freely and safely. *Worthy v. U. S.*, C.A.Fla., 328 F.2d 386, 391.

*In international law.* A license or safe-conduct, issued during the progress of a war, authorizing a person to remove himself or his effects from the territory of one of the belligerent nations to another country, or to travel from country to country without arrest or detention on account of the war.

*Maritime.* A document issued to a neutral merchant vessel, by her own government, during the progress of a war, to be carried on the voyage, to evidence her nationality and protect her against the cruisers of the belligerent powers. This paper is otherwise called a "pass," "sea-pass," "sea-letter," "sea-brief." It usu-

REGULAR SESSION 1955

GENERAL  
ACTS AND RESOLUTIONS

ADOPTED BY THE  
LEGISLATURE OF FLORIDA

At its Thirty-fifth Regular Session

April 5th to and including June 3, 1955

UNDER THE CONSTITUTION OF A. D. 1885



PUBLISHED BY AUTHORITY OF LAW

VOLUME I, PART ONE

1955

LAWS OF FLORIDA

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COMMITTEE SUBSTITUTE FOR  
HOUSE JOINT RESOLUTION NO. 810

A JOINT RESOLUTION proposing the revision of Article V of the Constitution of the State of Florida relating to the Judicial Department of the Government.

*Be It Resolved by the Legislature of the State of Florida:*

That the following proposed revision of Article V of the Constitution of the State of Florida is hereby agreed to and shall be submitted to the electors of this state for ratification or rejection at the next general election to be held in November of 1956, that is to say:

ARTICLE V  
JUDICIAL DEPARTMENT

Section 1. *Courts.* The judicial power of the State of Florida is vested in a supreme court, district courts of appeal, circuit courts, Court of Record of Escambia County, criminal courts of record, county courts, county judge's courts, juvenile courts, courts of justices of the peace, and such other courts, including municipal courts, or commissions, as the legislature may from time to time ordain and establish.

Section 2. *Administration.* The chief justice of the supreme court is vested with, and shall exercise in accordance with rules of that court, authority temporarily to assign justices of the supreme court to district courts of appeal and circuit courts, judges of district courts of appeal and circuit judges to the supreme court, district courts of appeal, and circuit courts, and judges of other courts, except municipal courts, to judicial service in any court of the same or lesser jurisdiction. Any retired justice or judge may, with his consent, be likewise assigned to judicial service.

Section 3. *Practice and Procedure.* The practice and procedure in all courts shall be governed by rules adopted by the supreme court.

Section 4. *Supreme Court.*

(a) *Organization.* The supreme court shall consist of seven members, one of whom shall be the chief justice. Five justices

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shall constitute a quorum, but the concurrence of four shall be necessary to a decision.

(b) *Jurisdiction.* Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of

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habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

(c) *Chief Justice.* The chief justice of the supreme court shall be chosen by the members of the court and shall serve for a term of two years. In the event of a vacancy, a successor shall be chosen within sixty days for a like term. During a vacancy or whenever the chief justice is unable to act for any reason, the justice longest in continuous service and able to act shall act as chief justice.

(d) *Clerk and Marshal; Process.* The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

### Section 5. *District Courts of Appeal.*

(a) *Appellate Districts.* The state shall be divided into three appellate districts of contiguous counties as the legislature may prescribe.

(b) *Organization; number and selection of judges.* A district court of appeal shall be organized in each appellate district. There shall be three judges of each district court of appeal. Not less than three judges shall consider each case and the concurrence of a majority shall be necessary to a decision. The court shall hold at least one session every year in each judicial circuit within the district wherein there is ready business to transact.

The judges of the district courts of appeal organized hereunder shall be selected as follows: Between June first and July first, 1957, the governor shall appoint three persons to serve as judges of each district court of appeal until their successors are elected, as herein provided. The judges so appointed shall take office and assume their duties on July first, 1957, and shall serve for a term

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to be designated by the governor in accordance with the following schedule: The governor shall appoint one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which judges shall be identified as Group "A"; one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which judges shall be identified as Group "B"; and one judge in each district for a term expiring on the first Tuesday after the first Monday in January 1963, following the election of his successor at the general election in November 1962, which judges shall be identified as Group "C".

The successors of the original judges of the district courts of appeal shall be elected at the general election next preceding the expiration of their respective terms of office.

(c) *Jurisdiction.* Appeals from trial courts in each appellate district, and from final orders or decrees of county judge's courts pertaining to probate matters or to estates and interests of minors and incompetents, may be taken to the court of appeal of such district, as a matter of right, from all final judgments or decrees except those from which appeals may be taken direct to the supreme court or to a circuit court.

The supreme court shall provide for expeditious and inexpensive procedure in appeals to the district courts of appeal, and may provide for review by such courts of interlocutory orders or decrees in matters reviewable by the district courts of appeal.

The district courts of appeal shall have such powers of direct review of administrative action as may be provided by law.

A district court of appeal or any judge thereof may issue writs of habeas corpus returnable before that district court of appeal or any judge thereof, or before any circuit judge in that district. A district court of appeal may issue writs of mandamus, certiorari, prohibition, and quo warranto, and also all writs necessary or proper to the complete exercise of its jurisdiction.

(d) *Clerks and Marshals.* Each district court of appeal shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court may

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direct. Their compensation shall be fixed by law. The marshal shall have power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

### Section 6. *Circuit Courts.*

(a) *Judicial Circuits.* The legislature may establish not more than sixteen judicial circuits each composed of a county or contiguous counties and of not less than fifty thousand inhabitants according to the last census authorized by law, except that the county of Monroe shall constitute one of the circuits.

(b) *Circuit Judges.* The legislature shall provide for one circuit judge in each circuit for each fifty thousand inhabitants or major fraction thereof according to the last census authorized by law. In circuits having more than one judge the legislature may designate the place of residence of any such additional judge or judges.

(c) *Jurisdiction.* The circuit courts shall have exclusive original jurisdiction in all cases in equity except such equity jurisdiction as may be conferred on juvenile courts, in all cases at law not cognizable by subordinate courts, in all cases involving the legality of any tax, assessment, or toll, in the action of ejection, in all actions involving the titles or boundaries of real estate, and in all criminal cases not cognizable by subordinate courts. They shall have original jurisdiction of actions of forcible entry and unlawful detainer, and of such other matters as the legislature may provide. They shall have final appellate jurisdiction in all civil and criminal cases arising in the county court, or before county judges' courts, of all misdemeanors tried in criminal courts of record, and of all cases arising in municipal courts, small claims courts, and courts of justices of the peace. The circuit courts and judges shall have power to issue writs of mandamus, injunction, quo warranto, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of their jurisdiction.

The circuit courts and circuit judges shall have such extra-territorial jurisdiction in chancery cases as may be prescribed by law.

(d) *Court Commissioners.* A circuit judge may appoint in

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each county in his circuit one or more attorneys at law, to be court commissioners, who shall have power in the absence from the county of the circuit judge, to allow writs of injunction and to issue writs of habeas corpus, returnable before himself or the circuit judge. Their orders in such matters may be reviewed by the circuit judge, and confirmed, qualified or vacated. They may be removed by the circuit judge. The legislature may confer upon them further powers, not judicial, and shall fix their compensation.

(e) *Recommendation to Attorney General; Report to Legislature.* It shall be the duty of the judges of the circuit courts to report to the attorney general at least thirty days before each session of the legislature such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary. The attorney general shall report to the legislature at each session such legislation as he may deem advisable.

(f) *State Attorneys.* In each judicial circuit a state attorney shall be elected by the qualified electors of that circuit in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

(g) *Clerks of the Circuit Courts.* In each county a clerk of the circuit court, who shall also be clerk of the board of county commissioners, recorder, and ex officio auditor of the county, shall be elected by the qualified electors of that county in the same manner as other state and county officials, to serve a term of four years and to fulfill duties prescribed by law.

### Section 7. *County Judges' Courts.*

(a) *Establishment.* There shall be a county judges' court in each county.

(b) *County Judges.* There shall be in each county not less than one county judge who shall be elected by the qualified electors of said county at the time and places of voting for other county officers and shall hold his office for four years. His compensation shall be provided for by law.

In any county having a population in excess of one hundred and twenty-five thousand, and not more than two hundred and

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fifty thousand, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional county judge for such county, provided, that any law having for its purpose the creating of an additional county judge in such county shall not become effective unless ratified by a majority of the participating voters of such county at an election presenting the same for approval or rejection. In any county having a population of more than two hundred and fifty thousand according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(c) *Jurisdiction.* The county judge's courts shall have original jurisdiction in all cases at law in which the demand or value of property involved shall not exceed one hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements; and of such criminal cases as the legislature may prescribe. The county judge's courts shall have jurisdiction of the settlement of the estate of decedents and minors, to order the sale of real estate of decedents and minors, to take probate of wills, to grant letters testamentary and of administration and guardianship, and to discharge the duties usually pertaining to courts of probate. The county judges shall have the power of committing magistrates and shall issue all licenses required by law to be issued in the county.

Section 8. *County Courts; organization and officers.* The legislature may organize in such counties, as it may think proper, county courts which shall have jurisdiction of all cases at law in which the demand or value of the property involved shall not exceed five hundred dollars; of proceedings relating to the forcible entry or unlawful detention of lands and tenements, and of misdemeanors. The county judge shall be the judge of said court. There shall be elected by the qualified electors of said county at the time when the said judge is elected a prosecuting attorney for said county, who shall hold office for four years. His duties and compensation shall be prescribed by law. Such courts may be abolished at the pleasure of the legislature.

Section 9. *Criminal Courts of Record.*

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(a) *Organization and judges.* The legislature may provide for the establishment of a criminal court of record in any county. Judges of criminal courts of record shall be elected for a term of four years by the qualified electors of the county, in the same manner as other state and county officials. Their compensation shall be fixed by law and paid by the county.

In any county having a population in excess of 125,000, and not more than 250,000, according to the last decennial federal census, or census authorized by the legislature and paid for by the county, the legislature may provide for an additional judge of the criminal court of record for such county, provided that any law having for its purpose the creating of an additional judge of said court in such county shall not become effective unless ratified by a majority of the participating voters of such county in an election presenting the same for approval or rejection. In any county having a population of more than 250,000 according to such census, the legislature may, without referendum thereon, provide for one additional county judge for each additional 250,000 of population or major fraction thereof.

(b) *Jurisdiction.* The said courts shall have jurisdiction of all criminal cases not capital which shall arise in said counties respectively.

(c) *Terms.* There shall be six terms of said courts in each year.

(d) *Prosecuting Attorney; term.* There shall be for each of said courts a prosecuting attorney who shall be elected for a term of four years by the qualified electors of the county as other state and county officials are elected and whose compensation shall be fixed by law.

(e) *Indictment and information.* All offenses triable in said court shall be prosecuted upon information under oath, to be filed by the prosecuting attorney, but the grand jury of the circuit court for the county in which said criminal court is held may indict for offenses triable in the criminal court. Upon the finding of such indictment the circuit judge shall commit or bail the accused for trial in the criminal court, which trial shall be upon information.

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(f) *Criminal courts of record supersede criminal jurisdiction of county courts.* The county courts in counties where such criminal courts are established shall have no criminal jurisdiction and no prosecuting attorney.

(g) *Clerk.* The clerk of said court shall be elected by the electors of the county in which the court is held and shall hold office for four years, and his compensation shall be fixed by law. He shall also be clerk of the county court. The sheriff of the county shall be the executive officer of said court, and his duties and fees shall be fixed by law.

(h) *State attorney eligible for appointment as county solicitor.* The state attorney residing in the county where such court is held shall be eligible for appointment as county solicitor for said county.

(i) *Criminal courts of record may be abolished by legislature.* Such courts may be abolished by the legislature.

Section 10. *Court of Record of Escambia County.* In Escambia County there shall be a court of record with two or more judges as the legislature may provide, who shall be elected for a term of six years by the qualified electors of said county as other county officials are elected, and whose compensation shall be fixed by the legislature. Said court shall have exclusive jurisdiction of all criminal cases not capital and, concurrent with the circuit court of said county and the judges thereof, the same original jurisdiction of all cases and matters and the same power and authority to issue all writs as the circuit court of said county and the judges thereof, excepting the power to summon and empanel a grand jury, and jurisdiction of such other matters as the legislature may provide. The rules of procedure and practice applicable to the circuit court of said county shall obtain in the court of record.

The provisions of this constitution and all laws enacted in consonance therewith pertaining to circuit courts and the officers thereof and to appeals and writs of error from circuit courts, including the manner of the appointment or election and the terms of office and compensation of said officers, shall apply with like effect to the court of record of Escambia County and the officers

thereof except as otherwise provided in this section; provided that the compensation and expense allowances of said judges of said court of record shall be paid by Escambia County and shall be the same as paid to and received from all sources by judges of the circuit court of said county resident in said county.

At the request of a judge of the circuit court of Escambia County evidenced as now provided by law a judge of the court of record may assume and perform in every respect the jurisdiction and duties of the circuit court of Escambia County or a judge thereof, including the trial of capital cases and the power to summon and empanel a grand jury; and at the request of a judge of the court of record evidenced as now provided by law a judge of the circuit court of Escambia County may assume and perform in every respect the duties and jurisdiction of the court of record of Escambia County or a judge thereof.

Nothing herein contained shall operate to lengthen or shorten the term of any officer, nor alter the expiration date of such officer's commission, nor the date of any election.

Section 11. *Courts of Justices of the Peace.*

(a) *Districts and presiding officer.* There shall be not more than five justice districts in each county, and there shall be elected one justice of the peace for each justice district, who shall hold office for four years. Existing justice districts are hereby recognized, but the legislature may, by special act, from time to time change the boundaries of any such district now or hereafter established, and may establish new or abolish any such district now or hereafter existing. Provided, however, that any such changes shall be submitted to the people of any county so affected, by referendum at the next ensuing general election.

(b) *Jurisdiction.* The justices of the peace shall have jurisdiction in cases at law in which the demand or value of the property involved does not exceed \$100.00, and in which the cause of action accrued or the defendant resides in his district; and in such criminal cases, except felonies, as may be prescribed by law, and he shall have power to issue process for the arrest of all persons charged with felonies and misdemeanors not within his jurisdiction to try, and make the same returnable before himself or the county judge for examination, discharge, commitment or bail of the accused.

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Justices of the peace shall have the power to hold inquests of the dead. Appeal from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe.

(c) *Constables.* A constable shall be elected by the registered voters in each justice's district, who shall perform such duties, and under such regulations as may be prescribed by law.

**Section 12. *Juvenile Courts; establishment; jurisdiction; judge; officers; procedure.*** The legislature shall have power to create and establish juvenile courts in such county or counties or districts within the state as it may deem proper, and to define the jurisdiction and powers of such courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature from time to time are accused, including the right to define any or all offenses committed by any such persons as acts of delinquency instead of crimes; to provide for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine, and to fix their compensation and term of office; all in such manner, for such time, and according to such methods as the legislature may prescribe and determine, without being limited therein by the provisions in this constitution as to trial by jury in Sections 3 and 11 of the Declaration of Rights, as to the use of the terms "prosecuting attorney" and "information" in Section 10 of the Declaration of Rights, as to election or appointment of officers in Section 27 of Article 3, as to jurisdiction of criminal cases in Sections 6, 7, 9, and 11 of this Article, as to original jurisdiction of the interests of minors in Section 6 of this Article, and as to style of process and prosecuting in the the name of the state in Section 20 of this Article, or other existing conflicting provisions of this constitution.

**Section 13. *Eligibility requirements for justices and judges.*** No person shall be eligible for the office of justice of the supreme court or judge of a district court of appeal unless he is a citizen of this state, and unless he is, at the time, a member of the Florida Bar in good standing and for a period of at least ten years has been, a member of the bar of Florida; and no person shall be eligible for the office of judge of a circuit court or criminal court of

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record who is not twenty-five years of age and a member of the bar of Florida. Any senator or member of the house of representatives otherwise qualified shall be eligible for appointment or election to any judicial office which may have been created, or the emoluments whereof may have been increased, during the time for which he was elected.

Section 14. *Vacancies in office of judge, how filled.* When the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy.

Section 15. *Election of judges.* Circuit judges shall be elected by the qualified electors of their respective judicial circuits as other state and county officials are elected.

Judges of district courts of appeal shall be elected by the qualified electors of their respective districts as other state and county officials are elected.

Justices of the supreme court shall be elected by the qualified electors of the state as other state and county officials are elected.

The judges of district courts of appeal identified as belonging to Group "A" shall be elected in 1958 and every six years thereafter; those identified as belonging to Group "B" shall be elected in 1960 and every six years thereafter; and those identified as belonging to Group "C" shall be elected in 1962 and every six years thereafter.

Election of circuit judges shall be held in the year 1960 and every six years thereafter.

Two justices of the supreme court shall be elected in 1958 and every six years thereafter; three justices of the supreme court shall be elected in 1960 and every six years thereafter; two justices of the supreme court shall be elected in 1962 and every six years thereafter.

Such elected justices and judges shall take office on the first Tuesday after the first Monday in the following January.

Section 16. *Terms of office of certain judges.* The terms of

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office of justices of the supreme court, judges of district courts of appeal, and circuit judges shall be six years.

Section 17. *Retirement, suspension and removal of judges.* Notwithstanding the provisions of this Article relating to terms of office:

(a) All justices and judges shall automatically retire at age 70;

(b) Subject to rules of procedure to be established by the supreme court, and after notice and hearing, any justice or judge may be retired for disability at retirement pay to be fixed by law, which shall be not less than two-thirds of his then compensation if he has served for ten years or more, by a commission composed of one justice of the supreme court to be selected by that court, two judges of the district courts of appeal to be selected by the judges of said district courts of appeal, and two circuit judges and two county judges to be selected by the supreme court.

(c) Any justice of the supreme court, judge of the district court of appeal, or circuit judge shall be liable to impeachment for any misdemeanor in office.

Section 18. *Prohibited activities of judges.* Justices of the supreme court, judges of district courts of appeal and circuit judges shall devote full time to their judicial duties, shall not engage in the practice of law or hold any office or position of profit under this state or any office of profit under the United States, and shall not hold office in any political party.

Compensation for service in the state militia or the armed forces of the United States or other defense agencies recognized by the supreme court for such periods of time as may be determined by the supreme court shall not be deemed profit.

Section 19. *Judicial salaries and expenses.* Justices of the supreme court and judges of all other courts shall receive for their services salaries or compensation provided by law. A retired justice or judge assigned to active judicial service shall, while so serving, receive as additional compensation the difference between his retirement benefits and the compensation applicable to such service. Salaries of circuit judges may be supplemented in any county or counties when authorized by law. Judicial officers shall be paid

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such actual and necessary expenses as may be authorized by law.

Section 20. *Style of process.* The style of all process shall be "The State of Florida" and all prosecutions shall be conducted in the name and by the authority of the State.

Section 21. *Referees.* Any civil cause may be tried before a practicing attorney as referee upon the applications of the parties and an order from the court in whose jurisdiction the case may be, authorizing such trial and appointing such referee. The referee shall keep a complete record of the case, including the evidence taken, and such record shall be filed with the papers in the case in the office of the clerk; and the cause shall be subject to an appeal in the manner prescribed by law.

Section 22. *Juries.* The number of jurors for trial of causes in any court may be fixed by law but shall not be less than six in any case.

Section 23. *Admission and discipline of attorneys.* The supreme court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted. It may provide for an agency to handle admissions subject to its supervision. It may also provide for the handling of disciplinary matters in the circuit courts and the district courts of appeal, or by commissions consisting of members of the bar to be designated by it, the supreme court, subject to its supervision and review.

Section 24. *Effect of reduction of number of judges.* Any law reducing the number of judges of any court shall not shorten the term of any judge then in office.

Section 25. *Judicial Officers as conservators of the peace.* All judicial officers in this state shall be conservators of the peace.

Section 26. *Schedule.*

(1) This Article shall become effective on the first day of July 1957 and shall replace all of Article V, and shall supersede any other provisions of the present constitution of Florida in conflict herewith, which shall then stand repealed.

(2) Until changed by law as authorized in this Article, the appellate districts shall be composed as follows:

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**FIRST DISTRICT:** The 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, and 14th judicial circuits as presently constituted.

**SECOND DISTRICT:** The 6th, 9th, 10th, 12th, and 13th judicial circuits as presently constituted.

**THIRD DISTRICT:** The 11th, 15th and 16th judicial circuits as presently constituted.

(3) The provisions of the Article governing eligibility for office shall not affect the right of any incumbent to continue in office or to seek reelection.

(4) Except to the extent inconsistent with the provisions of this Article, all provisions of law and rules of court in force on the effective date of this Article shall continue in effect until superseded in a manner authorized by the constitution.

(5) Judges of the district courts of appeal appointed by the governor shall take office on the effective date of this Article.

(6) The supreme court may transfer to the respective district courts of appeal such causes, matters and proceedings as are pending in the supreme court on the effective date of this Article which are within the jurisdiction of such courts as the supreme court may see fit. No case that has been orally argued before the supreme court shall be so transferred. The supreme court shall have and retain jurisdiction and authority over all causes, matters and proceedings not so transferred to the district courts of appeal.

(7) All trial courts as organized and constituted on the effective date of this Article shall, except as otherwise provided herein, continue with their jurisdiction, judges and officers, including the manner of their election or appointment, until otherwise provided by the legislature.

(8) Until otherwise provided by law, there shall be an additional judge for the Fourth Judicial Circuit who shall reside in Duval County, and shall receive the same salary and allowances for expenses as other circuit judges in and for the circuit court of said county, which salary and expenses shall be paid by said county out of its general revenue. The additional judge of the circuit court of Duval County holding office on the effective date of this Article under former Section 42 of Article V shall become

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the additional judge here provided for until the expiration of his then term of office.

(9) There shall be an additional circuit judge for the circuit court of the judicial circuit wherein the state capital is located. Subsequent to the first Tuesday after the first Monday in January 1957, the governor shall appoint the first judge hereunder to serve for a term expiring on the first Tuesday after the first Monday in January 1959, following the election of his successor at the general election in November 1958, which successor shall serve for a term expiring on the first Tuesday after the first Monday in January 1961, following the election of his successor at the general election in November 1960, which successor shall serve for the full term and his successors chosen as otherwise provided for circuit judges.

(10) Until otherwise provided by the legislature, orders of the Florida Industrial Commission shall be subject to review only by petition to the district courts of appeal for writ of certiorari.

(11) All provisions of law pertaining to the State Board of Law Examiners shall continue in effect until superseded in a manner authorized by this Article.

(12) This Article shall not disturb the terms of incumbent judges.

(13) The provision for automatic retirement in Section 17 of this Article does not apply to any person now holding office.

(14) Upon the adoption of this Article, the legislature shall enact such laws and make such appropriations and the supreme court shall make such rules as may be necessary or proper to give effect to its provisions.

Filed in Office Secretary of State June 23, 1955.

<p><b>RULE 1.510. SUMMARY JUDGMENT</b></p> <p><b>(a) For Claimant.</b> A party seeking to recover on a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party’s favor on all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.</p> <p><b>(b) For Defending Party.</b> A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party’s favor as to all or any part thereof at any time with or without supporting affidavits.</p> <p><b>(c) Motion and Proceedings Thereon.</b> The motion must state with particularity the grounds upon which it is based and the substantial matters of law to be argued and must specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence (“summary judgment evidence”) on which the movant relies. The movant must serve the motion at least 20 days before the time fixed for the hearing, and must also serve at that time a copy of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party must identify, by notice served pursuant to Florida Rule of Judicial Administration 2.516 at least 5 days prior to the day of the hearing if service by mail is authorized, or delivered, electronically filed, or sent by e-mail no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent that summary judgment evidence has not already been filed with the court, the adverse party must serve a copy on the movant pursuant to Florida Rule of Judicial Administration 2.516 at least 5 days</p>	<p><b>RULE 56. SUMMARY JUDGMENT</b></p> <p><b>(a) Motion for Summary Judgment or Partial Summary Judgment.</b> A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.</p> <p><b>(b) Time to File a Motion.</b> Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.</p> <p><b>(c) Procedures.</b></p> <p><b>(1) Supporting Factual Positions.</b> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:</p> <p>(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or</p> <p>(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.</p> <p><b>(2) Objection That a Fact Is Not Supported by Admissible Evidence.</b> A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.</p> <p><b>(3) Materials Not Cited.</b> The court need consider only the cited materials, but it may consider other materials in the record.</p> <p><b>(4) Affidavits or Declarations.</b> An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in</p>
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COMPARISON OF 2020 VERSIONS, FLA. R. CIV. P. 1.510 AND FED. R. CIV. P. 56

<p>prior to the day of the hearing if service by mail is authorized, or by delivery, electronic filing, or sending by e-mail no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought must be rendered immediately if the pleadings and summary judgment evidence on file show that 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.</p> <p><b>(d) Case Not Fully Adjudicated on Motion.</b> On motion under this rule if judgment is not rendered on the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, must ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It must then make an order specifying the facts that appear without 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 are just. On the trial or final hearing of the action the facts so specified must be deemed established, and the trial or final hearing must be conducted accordingly.</p> <p><b>(e) Form of Affidavits; Further Testimony.</b> Supporting and opposing affidavits must be made on personal knowledge, must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in an affidavit must be attached thereto or served therewith. The court may permit affidavits to be supplemented or</p>	<p>evidence, and show that the affiant or declarant is competent to testify on the matters stated.</p> <p><b>(d) When Facts Are Unavailable to the Nonmovant.</b> If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:</p> <ol style="list-style-type: none"><li>(1) defer considering the motion or deny it;</li><li>(2) allow time to obtain affidavits or declarations or to take discovery; or</li><li>(3) issue any other appropriate order.</li></ol> <p><b>(e) Failing to Properly Support or Address a Fact.</b> If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:</p> <ol style="list-style-type: none"><li>(1) give an opportunity to properly support or address the fact;</li><li>(2) consider the fact undisputed for purposes of the motion;</li><li>(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or</li><li>(4) issue any other appropriate order.</li></ol> <p><b>(f) Judgment Independent of the Motion.</b> After giving notice and a reasonable time to respond, the court may:</p> <ol style="list-style-type: none"><li>(1) grant summary judgment for a nonmovant;</li><li>(2) grant the motion on grounds not raised by a party; or</li><li>(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.</li></ol> <p><b>(g) Failing to Grant All the Requested Relief.</b> If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.</p> <p><b>(h) Affidavit or Declaration Submitted in Bad Faith.</b> If satisfied that an affidavit or declaration under this rule is submitted in bad</p>
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COMPARISON OF 2020 VERSIONS, FLA. R. CIV. P. 1.510 AND FED. R. CIV. P. 56

<p>opposed by depositions, answers to interrogatories, or by further affidavits.</p> <p><b>(f) When Facts Are Unavailable to the Nonmovant.</b> If it appears from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.</p> <p><b>(g) Affidavits Made in Bad Faith.</b> If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court must immediately order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.</p>	<p>faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.</p>
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# FLORIDA STATUTES

## 1951

*Prepared by*  
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# FLORIDA COMMON LAW RULES

Effective January 1, 1950

## **RULE 1. COURT AND JUDGE SYNONYMOUS.**

Wherever in these rules reference is made to the court the same shall be construed to apply to a judge thereof whenever the context shall require or permit.

## **RULE 2. PRESIDING JUDGE.**

When there be more than one judge of a trial court, the judge longest in continuous service and able to act shall be the presiding judge for administrative purposes, and the judges of such court may provide by local rule for the distribution of the work of such court to the judges thereof.

## **RULE 3. TERM TIME AND VACATION—DISTINCTION ABOLISHED.**

The period of time provided for the doing of any act or the taking of any proceeding shall not be affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court shall in no way affect the power of a court to do any act or take any proceeding in any civil action which is or has been pending before it.

## **RULE 4. WHEN ACTION COMMENCED. DOCKET.**

(a) Every action at law shall be deemed as commenced when the complaint is filed; except that ancillary proceedings shall be deemed as commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed.

(b) The Clerk shall keep a common law docket in which he shall enter all cases as they are commenced that are not criminal or are not in equity. He shall also make memorandum entries showing the progress of the cause.

## **RULE 5. RULE DAYS ABOLISHED—PROCESS.**

(a) For the purpose of return date of process and filing of pleadings under these rules, Rule Days are hereby abolished.

(b) Upon the commencement of the action, summons shall be forthwith issued by the Clerk and delivered for service without praecipe.

(c) Service of process may be made by any officer authorized by law to serve process; but if such officer shall, for any reason, be disqualified or unable to act, the Court may appoint any competent person not interested in the case on trial to serve such process. 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 appointed by the court for such purpose, such person shall make and file in the cause an affidavit of the fact showing his competency to act. Failure to make proof of service as required by law shall not affect the validity of the service.

(d) If there be more than one defendant, the clerk shall issue as many writs of summons against the several defendants as may be directed by the plaintiff or his attorney. When any summons shall be returned not executed or returned improperly executed as to any defendant, the plaintiff shall be entitled to such additional summons against such defendant, or defendants, as may be required to effect service.

(e) Where suit is brought against two or more defendants and summons is served on one or more, but not on all, and the Sheriff returns that any defendants not served does not reside in the county, the plaintiff may proceed against the defendants served, noting the fact of non-service as to such defendants not served; or, the plaintiff may, at his option, order additional originals and copies of summons to be delivered to the sheriffs of the counties in which such defendants reside to be served and returned according to law. Nothing contained herein shall be construed to prevent the plaintiff from bringing suit thereafter against any defendant not served for the same claim or demand, but the plaintiff shall have satisfaction of only one judgment rendered for the same claim or demand.

(f) Service of process by publication may be made in appropriate cases as provided by statutes.

(g) At the time of personal service of summons there shall be delivered to the party upon whom service is made a copy of the complaint, affidavit, petition or other initial pleading. The date and hour of the service shall be endorsed by the person making the service, on the original summons and all copies of it.

(h) In cases of constructive service, copies of the plaintiff's initial pleadings shall be furnished to the clerk and by him mailed with the notice of suit to all parties whose addresses are stated in the initial pleading or affidavit.

(i) It shall be the duty of the plaintiff to furnish the person making service, or mailing notice of suit, with such copy, or copies, as may be necessary.

(j) The statutory compensation allowed for

entry of defaults, for want of proper pleading, may be entered on the same day that the default is entered, as well as any subsequent day. In cases where the action is upon an open account or other contract for the payment of money, not in writing, no judgment upon default shall be entered by the clerk until after filing of the proofs required by law, all of which shall be in writing and shall be filed with the papers in the case.

#### **RULE 43. SUMMARY JUDGMENT.**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed 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 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated

therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

#### **RULE 44. ATTACHMENT.**

(a) **When returnable, property seized.** A writ of attachment shall be returnable when fully executed; or shall be returned by the officer when he shall be convinced that no property can be found; and if property be seized under the writ, it shall be returned when the property seized shall have finally passed from the lien of said writ and control of the officer levying the attachment. At the time of each action taken under said writ, the officer shall endorse such action thereon.

(b) **Pleading, practice and procedure.** In so far as applicable and when not otherwise provided, the pleading, practice and procedure governing personal actions shall govern suits commenced by attachment.

#### **RULE 45. EJECTMENT.**

(a) **Landlord not a defendant.** When it shall be made to appear by answer before a trial that a party defendant in an action of ejectment is in possession as a tenant only and that his landlord is not a party to the cause, the landlord shall be made a party before further proceeding against said tenant, unless otherwise ordered by the court.

(b) (1) **Death of Co-plaintiff.** In case of the death of one or more of several plaintiffs in ejectment, where the right of the decedent does not survive to the remaining plaintiffs, the action may proceed at the suit of the surviving plaintiff for such share of the property as he claims, or the legal representative of the deceased plaintiff may upon the suggestion of the death and the filing of a certified copy of his letters testamentary or of administration be made a party plaintiff upon his own motion, after notice to all parties plaintiff and all defendants not in default.

# FLORIDA EQUITY RULES

EFFECTIVE JANUARY 1, 1950

## Rule 1. RULE DAYS ABOLISHED.

For the purposes of return date of process and filing of pleadings under these rules, rule days are hereby abolished.

## Rule 2. MOTIONS.

(a) **Motions Grantable as of Course by the Clerk.** All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for entering decrees pro confesso; and for other proceedings in the clerk's office, which do not require an allowance or order of the court, shall be deemed motions and applications grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by the court upon special cause shown.

(b) **Motions not Grantable as of Course.** All motions for rules or orders and other proceedings which may not be grantable as of course, may be made at any time before the judge of the court, due notice being given to the adverse party, and if the adverse party or his solicitor does not appear on the day named in the notice or order of the judge fixing the day, or shall not show good cause against the same, the motion may be heard by the judge and granted or refused, as the right of the matter may seem to him to require.

## Rule 3. PROCESS, MESNE AND FINAL.

**Form of Summons in Chancery.**—The summons in chancery shall constitute the proper mesne process in all suits in equity, in the first instance, to require the defendant to appear and answer the bill; and, unless otherwise provided by law or specifically ordered by the court, a writ of attachment and, if the defendant cannot be found, a writ of sequestration, or a writ of assistance, as the case may require, shall be the proper process to issue for the purpose of compelling obedience to any interlocutory or final order or decree of the court. The form of a summons in chancery shall be substantially as follows:

THE STATE OF FLORIDA to.....

You are hereby notified that a suit has been brought against you in the Circuit Court for ..... County, Florida, in Chancery, ..... and you are hereby required to file (personally or by attorney) with the Clerk of said Court your written defenses, if any, to the bill of complaint in said

suit within 20 days after the service of this summons upon you.

Herein fail not or judgment will be entered against you by default.

WITNESS my hand and the seal of said Court at.....Florida, this..... day of .....A.D. 19..... (Seal)

As Clerk of said Circuit Court

## Rule 4. WHEN ACTION COMMENCED. DOCKET.

(a) Every suit in equity shall be deemed as commenced when the bill of complaint is filed, except that ancillary proceedings shall be deemed as commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed.

(b) The Clerk shall keep an equity docket in which he shall enter all cases as they are commenced in equity. He shall also make memorandum entries showing the progress of the cause.

## Rule 5. PROCESS.

(a) Upon the commencement of the action, summons shall be forthwith issued by the Clerk and delivered for service without praecipe.

(b) Service of process may be made by any officer authorized by law to serve process; but if such officer shall, for any reason, be disqualified or unable to act, the Court may appoint any competent person not interested in the case on trial to serve such process. 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 appointed by the court for such purpose, such person shall make and file in the cause an affidavit of the fact showing his competency to act. Failure to make proof of service as required by law shall not affect the validity of the service.

(c) If there be more than one defendant, the clerk shall issue as many writs of summons against the several defendants as may be directed by the plaintiff or his attorney. When any summons shall be returned not executed or returned improperly executed as to any defendant, the plaintiff shall be entitled to such additional summons against such defendant, or defendants, as may be required to effect service.

parties as to whom the counterclaim and affirmative relief is asserted. In case the defendants, or any of them, shall by answer assert a counterclaim and pray affirmative relief requiring that persons not then parties to the suit be brought in as parties to the cause, or if the party or parties as to whom the counterclaim and affirmative relief is asserted have not been served with process, or have been served or have appeared but are not represented by a solicitor of record in the cause, the defendant or defendants so filing such counterclaim shall be entitled to process by way of summons in chancery or by publication, or otherwise as prescribed by law, to bring in such other persons as defendants thereto.

(4) **Court may order other parties to be brought in:** When in the determination of a counterclaim complete relief cannot be granted without the presence of parties other than those to the bill, the court may order them to be brought in as defendants.

(5) **Cross-bill in lieu of counterclaim:** In lieu of a counterclaim in an answer, a defendant may file a cross-bill and have process thereon as in a case of an original bill. Pleadings to the cross-bill shall be the same as to an original bill, so far as applicable.

#### **Rule 36. ANSWER TO AMENDED BILL.**

When a bill shall be amended after answer or motion filed or after a motion shall have been sustained with leave to amend, the defendant shall plead to the bill as amended within ten days after receipt of a copy of the amended bill or of the amendment, as the case may be, or within such time as may be fixed by the court; otherwise the original answer or motion shall be considered as pleaded to the bill as amended. The filing of an amended bill or of an amendment to a bill before answer or motion is filed shall not extend the defendant's time for pleading, unless such time shall be extended by the court on the defendant's ex parte application.

#### **Rule 37. GENERAL REPLICATIONS ABOLISHED.**

General replications to answers are hereby abolished. Unless the answer assert a counterclaim with a prayer for affirmative relief no reply shall be required without a special order of the court, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff. If the answer include a counterclaim with a prayer for affirmative relief, each party against whom it is asserted shall file his reply thereto within the time prescribed by law. The reply shall state the facts relied upon in answer to such counterclaim.

#### **Rule 38. TIME FOR ATTACK ON ANSWER, COUNTERCLAIM OR REPLY.**

In the absence of a special order of the court, ten days and no longer shall be allowed the complainant in which to move to strike the answer or any part thereof or to dismiss a counterclaim contained therein or to set down the cause on bill and answer; and the defendant shall have

a like period of ten days (unless the time be extended by special order of the court) in which to move to strike the whole or a part of the reply to a counterclaim. The period of ten days shall begin to run from the time the answer is required to be filed or the service of the counterclaim, as the case may be.

#### **Rule 39. WHEN CAUSE DEEMED AT ISSUE.**

At the expiration of ten days from the filing of the answer, if there be no counterclaim, or, if there shall be a counterclaim, then at the expiration of ten days from the filing of the reply thereto, the cause shall be deemed at issue. If, however, within such period of ten days a motion is filed to strike the whole of the answer or reply or to dismiss the counterclaim, or if the cause is set down for hearing on bill and answer, the cause shall not be deemed at issue until the points of law so presented shall have been ruled upon by the court.

#### **Rule 40. SUMMARY FINAL DECREE: MOTION FOR DECREE ON BILL AND ANSWER.**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory decree, may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary final decree by the adverse party, move with or without supporting affidavits for a summary final decree in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory decree is sought, may, at any time, move with or without supporting affidavits for a summary final decree in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The final decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a final decree as a matter of law. A summary final decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of the claim.

(d) **Case not fully Adjudicated on Motion.** If on motion under this rule final decree is not rendered upon the whole case or for all the relief asked and the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, includ-

ing the extent to which the relief is not in controversy, and directing such further proceedings in the action as are just. Upon final hearing of the action the facts so specified shall be deemed established, and the final hearing shall be conducted accordingly.

(e) **Form of Affidavits: Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The Court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for final decree or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorneys' fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) **Plaintiff's Motion for Decree on Bill and Answer.** The plaintiff may, within ten days after the filing of the answer, or within such further time as the court may allow, move for a decree on bill and answer, and if the motion be overruled the plaintiff shall have the right to proceed to trial, notwithstanding the motion or order thereon; and, if the answer be found insufficient as a defense, but amendable, the court may permit it to be amended on such terms and conditions as may be equitable.

**Rule 41. TESTING SUFFICIENCY OF AFFIRMATIVE DEFENSE: EXCEPTIONS FOR INSUFFICIENCY ABOLISHED.**

Exceptions for insufficiency of an answer are abolished. But if an answer asserts a counterclaim and prays affirmative relief any cross-defendant may, upon due notice, test the sufficiency of the same by motion to dismiss the counterclaim. If found insufficient but amendable the court may allow an amendment upon terms, or dismiss the counterclaim.

**Rule 42. DEFAULT: DECREE PRO CONFESSO.**

If the defendant shall fail to file his answer or other defense to the bill of complaint, within the time prescribed by law, or within such other time as shall have been fixed by the court, then

the plaintiff may at his election take an order to be entered by the clerk or the judge, as of course, that the bill be taken pro confesso; and thereupon the cause shall proceed ex parte, and the matter or the bill may be decreed by the court accordingly if the same can be done without an answer and is proper to be decreed.

If the cross-defendant shall fail to file his reply or other defense to an answer asserting a counterclaim and specially praying relief at the time prescribed by law, or within such other time as shall have been fixed by the court, a decree pro confesso may be taken and like proceedings had thereon as in case of failure of the defendant to answer or file defensive pleadings to the bill of complaint.

**Rule 43. DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE: SETTING ASIDE DEFAULT.**

When the bill in any cause is taken pro confesso, the court may proceed to a decree, and such a decree rendered shall be absolute unless the court shall set aside the same or enlarge the time for filing the answer for cause shown upon motion and affidavit of the defendant, made and filed within twenty days after the entry of the final decree; and no such motion shall be granted, except upon such conditions as to the court may seem equitable and just, and unless the defendant shall file his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.

**Rule 44. PROCEEDINGS IN LIEU OF DECREE PRO CONFESSO.**

The plaintiff may, instead of causing a decree pro confesso to be entered, if he requires any discovery or answer to enable him to obtain a proper decree, have process of attachment against the defendant to compel the answer; and the defendant shall not when arrested upon such process be discharged therefrom unless upon filing his answer or otherwise complying with such order as the court may direct as to pleading to or fully answering the bill within a period to be fixed by the court and undertaking to speed the cause.

**Rule 45. TRIALS AND EVIDENCE.**

Evidence shall be taken by depositions before or after issue, as provided by law or rules of court for actions at law or suits in chancery, or before an examiner or master to be appointed by the court, or orally before the court. Examiners or masters when appointed shall take the testimony orally, and unless otherwise directed by the court, shall cause the same to be reduced to writing and filed in the cause. When testimony is taken before the court, the testimony shall, upon motion of either party, or upon order of the court, be taken down in writing and filed in the cause. In interlocutory matters the court may accept affidavits.

**Rule 46. TIME FOR TAKING TESTIMONY.**

When any chancery cause shall be at issue and shall not have been set for trial before the

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

WITH  
**NOTES**

as prepared under the direction of  
The Advisory Committee

AND  
**PROCEEDINGS**  
OF THE  
**INSTITUTE ON FEDERAL RULES**

**Cleveland, Ohio**

**July 21, 22, 23, 1938**

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Western Reserve University  
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BALTIMORE, MD., U. S. A.

## FOREWORD

The Institute on Federal Rules is an achievement of which the American Bar Association and the School of Law of Western Reserve University may well be proud. There were those who doubted the possibility of attracting practicing lawyers to such an undertaking, particularly in the heart of the summer vacation period. Yet 488 lawyers from 41 states and the District of Columbia enrolled for the three-day course and substantially all of them attended the sessions. The interest of the practicing lawyer in advanced legal education has obviously been underestimated. The success of the Institute should demonstrate to state bar associations, singly or in groups, the desirability of similar institutes, if the new Federal Rules are to be given the reception they deserve.

It has been said so many times that lawyers cannot or will not cooperate that many people have unfortunately accepted the saying as truth. The history of the adoption of the Rules, like that of every major achievement of the American Bar Association, is a demonstration of the falsity of the saying. For thirty years the late Thomas W. Shelton of Virginia headed a committee of the Association which labored, seemingly in vain, in its campaign of education to induce the Congress to pass an act authorizing the Supreme Court to promulgate rules of court to govern actions at law in the federal courts. Though Mr. Shelton's efforts were frustrated during his lifetime by a single senator in a key position, posthumous success at length rewarded his devotion. In 1934 Attorney General Cummings, as part of his program for improving the administration of justice in

the federal courts, espoused the cause; Congress speedily passed appropriate legislation; the Supreme Court appointed a distinguished Advisory Committee, which sought the suggestions and criticisms of several thousands of lawyers. The eighty-six rules, covering scarcely over a hundred pages, and superseding literally thousands of pages of statutes, are a triumph of cooperation on the part of the Bar in which lawyers in each department of the federal government as well as practitioners generally may well take pride.

The Federal Rules, containing as they do the best experience of the several states in the realm of procedure, will doubtless become the inspiration for the adoption of similar rules in many jurisdictions to the great advantage both of litigants and lawyers. But whether this highly desirable result ensues must depend in large measure on the spirit in which these rules are applied in actual litigation. In some jurisdictions appeals on matters of procedure are all but unknown; there, procedure is truly adjective or subordinate law. In some other jurisdictions, however, there are more appeals on questions of practice than on matters of substantive law, to the disgust of litigants and the disgrace of the law. It is for the federal judges and the federal practitioners to determine the spirit in which the new Rules are to be applied. Upon their attitude in dealing with the Rules will depend the future of procedure and, perhaps, of the law itself in the United States. If wisely administered, the Rules should do much to eliminate the complaints of laymen and of lawyers alike as to the technicalities of the law, the subtleties of practice, and the involvements of procedure. Their object must at all times control—"to secure the just, speedy and inexpensive determination of every action."

It was to promote this spirit of justice that each of the six distinguished members of the Advisory Committee of the Supreme Court who acted as the lecturers at the Institute contributed his services. The Faculty of the Institute was unique in several respects: (1) the work of its members was a labor of love (and their wholehearted cooperation therefore is the more highly appreciated by the profession); (2) they represent the three branches of the legal profession—the judge, the lawyer, and the law school professor—each with its own particular approach to the problems of procedure: and (3) most important of all, not only were they selected from among the draftsmen of the Rules, but, insofar as possible, each was requested to lecture on those rules in which he was particularly interested as a result of his own professional experience and for which he was to a considerable degree personally responsible. The Proceedings of the Institute therefore constitute a record that cannot be duplicated by any other writings on the subject.

While according all possible praise to our Faculty, it is only fair to say that they have requested that attention again be directed to the statement set forth in the Notes to the Rules prepared under the direction of the Advisory Committee and that the statement therein made be applied to the Proceedings of the Institute as well:

“Statements in the notes about the present state of the law, or the extent to which existing statutes have been superseded by or incorporated in the rules, should be taken only as suggestions and guides to source material. Such statements, and any other statements in the notes as to the purpose or effect of the rules, can have no greater force than the reasons which may be adduced to support them. The notes are not part of

the rules, and the Supreme Court has not approved or otherwise assumed responsibility for them. They have no official sanction, and can have no controlling weight with the courts, when applying the rules in litigated cases.”

Notwithstanding the *caveat* of the members of the Faculty which must be respected, it is believed that not only those lawyers who were privileged to attend the Institute, but busy practitioners everywhere, will welcome the opportunity to have available in convenient form the Rules, with the Notes of the Advisory Committee following each rule, and also the informal expression and discussion concerning the views of the draftsmen of the Rules themselves.

For editing the Proceedings as well as for inspiring the Institute and acting as Chairman of the Special Committee of the Association in charge thereof, the Association and the profession generally is under great obligation to Professor William W. Dawson of the School of Law of Western Reserve University.

ARTHUR T. VANDERBILT,

*President, American Bar Association.*

July 29, 1938

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## THE ACT OF JUNE 19, 1934, CH. 651

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

Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. [Act of June 19, 1934, c. 651, §§ 1, 2 (48 Stat. 1064), U. S. C., Title 28, §§ 723b, 723c.]

## LETTER OF SUBMITTAL

---

SUPREME COURT OF THE UNITED STATES,  
*Washington, D. C., December 20, 1937.*

MY DEAR MR. ATTORNEY GENERAL:

By direction of the Supreme Court, I transmit to you herewith the Rules of Civil Procedure for the District Courts of the United States which have been adopted by the Supreme Court pursuant to the Act of June 19, 1934, chapter 651 (48 Stat. 1064).

In accordance with Section 2 of the Act, the Court has united 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. The Court requests you, as provided in that section, to report these rules to the Congress at the beginning of the regular session in January next.

I am requested to state that Mr. Justice Brandeis does not approve of the adoption of the rules.

I have the honor to remain,

Respectfully yours,

(Signed) CHARLES E. HUGHES,

*Chief Justice of the United States.*

Honorable HOMER CUMMINGS,

*Attorney General of the United States,*

*Washington, D. C.*

## LETTER OF TRANSMITTAL

---

OFFICE OF THE ATTORNEY GENERAL,

*Washington, D. C., January 3, 1938.*

*To the Senate and House of Representatives of the  
United States of America in Congress as-  
sembled:*

I have the honor to report to the Congress, under section 2 of the act of June 19, 1934 (c. 651, 48 Stat. 1064; U. S. C., title 28, sec. 723c), at the beginning of a regular session thereof commencing this 3d day of January 1938, the enclosed Rules of Civil Procedure for the District Courts of the United States.

By a letter of December 20, 1937, from the Chief Justice of the United States, a printed copy of which appears as a prefix to the rules transmitted herewith, I am advised that such rules have been adopted by the Supreme Court pursuant to the act of June 19, 1934, chapter 651 (48 Stat. 1064) and that, in accordance with section 2 of that act, the Court has united 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; and I am requested by the Supreme Court to report these rules to the Congress at the beginning of the regular session in January 1938.

Respectfully,

HOMER CUMMINGS,

*Attorney General.*

**Rule 56. Summary Judgment.**

(a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

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

(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.

(d) **CASE NOT FULLY ADJUDICATED ON MOTION.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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

are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **FORM OF AFFIDAVITS; FURTHER TESTIMONY.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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

(g) **AFFIDAVITS MADE IN BAD FAITH.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

#### NOTES

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (*The Annual Practice, 1937*) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L. J. 423.

*Note to Subdivision (d)*. See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

*Note to Subdivisions (e) and (f)*. These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

Rule discussed, pp. 224 f., 295 f., 299 f., 334, *infra*.

**Rule 57. Declaratory Judgments.** The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under

# UNITED STATES CODE

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on the Judiciary of the House of Representatives



VOLUME THREE

TITLE 27—INTOXICATING LIQUORS

TO

TITLE 42—THE PUBLIC HEALTH AND WELFARE

UNITED STATES  
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## RULE 55.—DEFAULT

## (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 and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

## (b) Judgment.

Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

## (c) Setting aside default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

## (d) Plaintiffs, counterclaimants, cross-claimants.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

## (e) Judgment against the United States.

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

## NOTES OF ADVISORY COMMITTEE ON RULES

This represents the joining of the equity decree *pro confesso* (Equity Rules 12 (Issue of Subpoena—Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 29 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U. S. C., Title 28, § 724 (Conformity act). For dis-

missal of an action for failure to comply with these rules or any order of the court, see Rule 41 (b).

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

*Note to Subdivision (b).* The provision in paragraph (1) for the entry of judgment by the clerk when plaintiff claims a sum certain is found in the N. Y. C. P. A. (1937) § 485, in Calif. Code Civ. Proc. (Deering, 1937) § 585 (1), and in Conn. Practice Book (1934) § 47. For provisions similar to paragraph (2), compare Calif. Code, *supra*, § 585 (2); N. Y. C. P. A. (1937) § 490; 2 Minn. Stat. (Mason, 1927) § 9256 (3); 2 Wash. Rev. Stat. Ann. (Remington, 1932) § 411 (2). U. S. C., Title 28, § 785 (Action to recover forfeiture in bond) and similar statutes are preserved by the last clause of paragraph (2).

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

## SUPPLEMENTARY NOTE OF ADVISORY COMMITTEE REGARDING THIS RULE

*Note.* The operation of Rule 55 (b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U. S. C. Appendix, § 501 et seq. Section 200 of the Act [50 U. S. C. Appendix, § 520] imposes specific requirements which must be fulfilled before a default judgment can be entered, e. g., *Ledwith v. Storkan*, D. Neb. 1942, 6 Fed. Rules Serv. (Jb.24, Case 2, 2 F. R. D. 539, and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, Effect of Conscription Legislation on the Federal Rules, 1940, 3 Fed. Rules Serv. 75; 3 Moore's Federal Practice, 1938, Cum. Supplement § 55.02.

## RULE 56.—SUMMARY JUDGMENT

## (a) For claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

## (b) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

## (c) Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed 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 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

## (d) Case not fully adjudicated on motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief

asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When affidavits are unavailable.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

NOTES OF ADVISORY COMMITTEE ON RULES

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Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State (1934)*, p. 383. See also *Third Annual Report of the Judicial Council of the State of New York (1937)*, p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (*The Annual Practice, 1937*) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32,

r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1937) Rule 113; see also Rule 107) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L. J. 423.

*Note to Subdivision (d)*. See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

*Note to Subdivisions (e) and (f)*. These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

*Note. Subdivision (a)*. The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco*, N. D. Cal. 1944, 58 F. Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12 (a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56 (c) means that under original Rule 56 (a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adie's Creamery, Inc.*, C. C. A. 2d, 1939, 107 F. 2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

*Subdivision (c)*. The amendment of Rule 56 (c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.*, 1944, 321 U. S. 620, 64 S. Ct. 724. See also *Commentary, Summary Judgment as to Damages*, 1944, 7 Fed. Rules Serv. 974; *Madeirenses Do Brasil S/A v. Stulman-Emrick Lumber Co.*, C. C. A. 2d, 1945, 147 F. 2d 399, cert. den., 1945, 325 U. S. 861, 65 S. Ct. 1201. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

*Subdivision (d)*. Rule 54 (a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.*, C. C. A. 7th, 1942, 130 F. 2d 535; *Biggins v. Oltmer Iron Works*, C. C. A. 7th, 1946, 154 F. 2d 214; 3 Moore's Federal Practice, 1938,

3100-3102. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155-3156, this interpretation is in line with that policy, *Leonard v. Socony-Vacuum Oil Co.*, supra. See also *Audi Vision, Inc., v. RCA Mfg. Co.*, C. C. A. 2d, 1043, 136 F. 2d 621; *Toomey v. Toomey*, App. D. C. 1945, 80 U. S. App. D. C. 77, 149 F. 2d 19; *Biggins v. Oltmer Iron Works*, supra; *Catlin v. United States*, 1945, 324 U. S. 229, 65 S. Ct. 631.

#### EFFECTIVE DATE OF AMENDMENT

Effective date of amendment to this rule see Rule 86 (b).

#### RULE 57.—DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended, U. S. C., Title 28, § 400, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

#### NOTES OF ADVISORY COMMITTEE ON RULES

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ. Proc. (Deering, 1937) § 1062a), Michigan (3 Comp. Laws (1929) § 13904), and Kentucky (Codes (Carroll, 1932) Civ. Pract. § 639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective affords no ground for declining declaratory relief. The demand for relief shall state with precision the declaratory judgment desired, to which may be joined a demand for coercive relief, cumulatively or in the alternative; but when coercive relief only is sought but is deemed ungrantable or inappropriate, the court may *sua sponte*, if it serves a useful purpose, grant instead a declaration of rights. *Hasselbring v. Koepke*, 263 Mich. 466, 248 N. W. 869, 93 A. L. R. 1170 (1933). Written instruments, including ordinances and statutes, may be construed before or after breach at the petition of a properly interested party, process being served on the private parties or public officials interested. In other respects the Uniform Declaratory Judgment Act affords a guide to the scope and function of the Federal act. Compare *Etna Life Insurance Co. v. Haworth*, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000 (1937); *Nashville, Chattanooga & St. Louis Ry. v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730, 87 A. L. R. 1191 (1933); *Gully, Tax Collector v.*

*Interstate Natural Gas Co.*, 82 F. 2d 145 (C. C. A. 5th, 1936); *Ohio Casualty Ins. Co. v. Plummer*, 13 F. Supp. 169 (S. D. Tex., 1935); Borchard, *Declaratory Judgments* (1934), *passim*.

#### RULE 58.—ENTRY OF JUDGMENT

Unless the court otherwise directs and subject to the provisions of Rule 54 (b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs.

#### NOTES OF ADVISORY COMMITTEE ON RULES

See Wis. Stat. (1935) § 270.31 (judgment entered forthwith on verdict of jury unless otherwise ordered), § 270.65 (where trial is by the court, entered by direction of the court), § 270.63 (entered by clerk on judgment on admitted claim for money). Compare 1 Idaho Code Ann. (1932) § 7-1101, and 4 Mont. Rev. Codes Ann. (1935) § 9403, which provide that judgment in jury cases be entered by clerk within 24 hours after verdict unless court otherwise directs. Conn. Practice Book (1934) § 200, provides that all judgments shall be entered within one week after rendition. In some States such as Washington, 2 Rev. Stat. Ann. (Remington, 1932) § 431, in jury cases the judgment is entered two days after the return of verdict to give time for making motion for new trial; § 435 (*ibid.*), provides that all judgments shall be entered by the clerk, subject to the court's direction.

#### NOTES OF ADVISORY COMMITTEE ON AMENDMENTS TO RULES

Note. The reference to Rule 54 (b) is made necessary by the amendment of that rule.

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

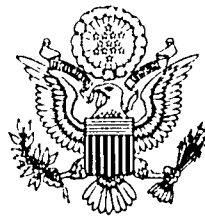
The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York—until its annulment Oct. 1, 1945, for conflict with this rule—and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler v. Hamill*, 1891, 139 U. S. 549, 11 S. Ct. 663; *Craig v. The Hartford*, C. C. Cal. 1856, Fed. Cas. No. 3,333; *Tuttle v. Clafin*, C. C. A. 2d, 1895, 60 Fed. 7, cert. den., 1897, 166 U. S. 721, 17 S. Ct. 992; *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, C. C. A. 2d, 1897, 84 Fed. 213; *Stallo v. Wagner*, C. C. A. 2d, 1917, 245 Fed. 636, 639-40; *Brown v. Parker*, C. C. A. 8th, 1899, 97 Fed. 446; *Allis-Chalmers v. United States*, C. C. A. 7th, 1908, 162 Fed. 679. And this applies even though state law is to the contrary. *United States v. Nordbye*, C. C. A. 8th, 1935, 75 F. 2d 744, 746, cert. den., 1935, 296 U. S. 572, 56 S. Ct. 103. Inasmuch as it has been held that failure

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VOLUME SEVEN  
TITLE 27—INTOXICATING LIQUORS  
TO  
TITLE 32—NATIONAL GUARD

UNITED STATES  
GOVERNMENT PRINTING OFFICE  
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## United States—Continued

Tort claims against judgment as bar to action against employee, see section 2876.

Vacation of judgment, errors not affecting substantial rights not ground for, see rule 61.

Verdict submitted on written interrogatories to jury, judgment on, see rule 49 (b).

Writs of coram nobis, coram vobis and audita querela abolished, see rule 60 (b).

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Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

## (c) Setting aside default.

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

## (d) Plaintiffs, counterclaimants, cross-claimants.

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c).

## (e) Judgment against the United States.

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

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This represents the joining of the equity decree *pro confesso* (former Equity Rules 12 (Issue of Subpœna—

Time for Answer), 16 (Defendant to Answer—Default—Decree *Pro Confesso*), 17 (Decree *Pro Confesso* to be Followed by Final Decree—Setting Aside Default), 20 (Defenses—How Presented), 31 (Reply—When Required—When Cause at Issue)) and the judgment by default now governed by U. S. C., Title 28, former § 724 (Conformity act). For dismissal of an action for failure to comply with these rules or any order of the court, see rule 41 (b).

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

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## CROSS REFERENCES

Demand for judgment, see rule 54 (c).

Failure to serve answers to interrogatories, entry of default judgment, see rule 37 (d).

Relief awarded on default, see rule 54 (c).

Summons as notice to defendant, judgment by default will be entered on failure to appear and defend, see rule 4 (b).

## RULE 56.—SUMMARY JUDGMENT

## (a) For claimant.

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

## (b) For defending party.

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

## (c) Motion and proceedings thereon.

The motion shall be served at least 10 days before the time fixed 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, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion.

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of

contempt. As amended Dec. 27, 1946, effective March 19, 1948; Jan. 21, 1963, effective July 1, 1963.

NOTES OF ADVISORY COMMITTEE ON RULES

This rule is applicable to all actions, including those against the United States or an officer or agency thereof.

Summary judgment procedure is a method for promptly disposing of actions in which there is no genuine issue as to any material fact. It has been extensively used in England for more than 50 years and has been adopted in a number of American states. New York, for example, has made great use of it. During the first nine years after its adoption there, the records of New York county alone show 5,600 applications for summary judgments. *Report of the Commission on the Administration of Justice in New York State* (1934), p. 383. See also Third Annual Report of the Judicial Council of the State of New York (1937), p. 30.

In England it was first employed only in cases of liquidated claims, but there has been a steady enlargement of the scope of the remedy until it is now used in actions to recover land or chattels and in all other actions at law, for liquidated or unliquidated claims, except for a few designated torts and breach of promise of marriage. English Rules Under the Judicature Act (The Annual Practice, 1937) O. 3, r. 6; Orders 14, 14A, and 15; see also O. 32, r. 6, authorizing an application for judgment at any time upon admissions. In Michigan (3 Comp. Laws (1929) § 14260) and Illinois (Ill. Rev. Stat. (1937) ch. 110, §§ 181, 259.15, 259.16), it is not limited to liquidated demands. New York (N. Y. R. C. P. (1937) Rule 113; see also Rule 197) has brought so many classes of actions under the operation of the rule that the Commission on Administration of Justice in New York State (1934) recommend that all restrictions be removed and that the remedy be available "in any action" (p. 287). For the history and nature of the summary judgment procedure and citations of state statutes, see Clark and Samenow, *The Summary Judgment* (1929), 38 Yale L. J. 423.

*Note to Subdivision (d).* See Rule 16 (Pre-Trial Procedure; Formulating Issues) and the *Note* thereto.

*Note to Subdivisions (e) and (f).* These are similar to rules in Michigan. Mich. Court Rules Ann. (Searl, 1933) Rule 30.

NOTES OF ADVISORY COMMITTEE ON 1946 AMENDMENTS TO RULES

*Note. Subdivision (a).* The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank v. Federal Reserve Bank of San Francisco*, N. D. Cal., 1944, 58 F. Supp. 25, the plaintiff's counter-motion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12 (a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56 (c) means that under original Rule 56 (a) a minimum period of 30 days necessarily has to elapse in every case before the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States v. Adler's Creamery, Inc.*, C. C. A. 2d, 1939, 107 F. 2d 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself makes a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

*Subdivision (c).* The amendment of Rule 56 (c), by the addition of the final sentence, resolves a doubt expressed in *Sartor v. Arkansas Natural Gas Corp.*, 1944, 321 U. S. 620, 64 S. Ct. 724. See also Commentary, Summary Judgment as to Damages, 1944, 7 Fed. Rules Serv. 974; *Madeirens*

*Do Brasil S/A v. Stulman-Emrick Lumber Co.*, C. C. A. 2d, 1945, 147 F. 2d 399, cert. den., 1945, 325 U. S. 861, 65 S. Ct. 1201. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

*Subdivision (d)*. Rule 54 (a) defines "judgment" as including a decree and "any order from which an appeal lies." *Subdivision (d)* of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pretrial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard v. Socony-Vacuum Oil Co.*, C. C. A. 7th, 1942, 130 F. 2d 535; *Biggins v. Oltmer Iron Works*, C. C. A. 7th, 1946, 154 F. 2d 214; 3 Moore's Federal Practice, 1938, 3190—3192. Since interlocutory appeals are not allowed, except where specifically provided by statute, see 3 Moore, op. cit. supra, 3155—3156, this interpretation is in line with that policy. *Leonard v. Socony-Vacuum Oil Co.*, supra. See also *Audi Vision, Inc., v. RCA Mfg. Co.*, C. C. A. 2d, 1943, 136 F. 2d 621; *Toomey v. Toomey*, App. D. C. 1945, 80 U. S. App. D. C. 77, 149 F. 2d 19; *Biggins v. Oltmer Iron Works*, supra; *Catlin v. United States*, 1945, 324 U. S. 229, 65 S. Ct. 631.

#### NOTES OF ADVISORY COMMITTEE ON 1963 AMENDMENTS TO RULES

*Subdivision (c)*. By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, Federal Practice and Procedure 159-60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R. 2d 984 (1960).

*Subdivision (e)*. The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matters sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not suppositious, conclusory, or ultimate. See *Fredrick Hart & Co., Inc. v. Recordgraph Corp.*, 169 F. 2d 580 (3d Cir. 1948); *United States ex rel. Kolton v. Halpern*, 260 F. 2d 590 (3d Cir. 1958); *United States ex rel. Nobles v. Ivey Bros. Constr. Co., Inc.*, 191 F. Supp. 383 (D. Del. 1961); *Jamison v. Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 238 (W.D. Pa. 1958); *Bunny Bear, Inc. v. Dennis Mitchell Industries*, 139 F. Supp. 542 (E.D. Pa. 1956); *Levy v. Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D. Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 Moore's Federal Practice 2069 (2d ed. 1953); 3 Barron & Holtzoff, supra, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

#### CROSS REFERENCES

Dismissal of action prior to service of motion for summary judgment, see rule 41 (a) (1).

Findings of fact and conclusions of law unnecessary, see rule 52 (a).

Injunctions, single judge not to enter summary judgment, see section 2284 (5) of this title.

Motions treated as for summary judgment—

Dismiss for failure of pleading to state a claim upon which relief can be granted, see rule 12 (b).

Judgment on the pleadings, see rule 12 (c).

#### RULE 57.—DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to Title 28, U. S. C., § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. As amended Dec. 29, 1948, effective Oct. 20, 1949.

#### NOTES OF ADVISORY COMMITTEE ON RULES

The fact that a declaratory judgment may be granted "whether or not further relief is or could be prayed" indicates that declaratory relief is alternative or cumulative and not exclusive or extraordinary. A declaratory judgment is appropriate when it will "terminate the controversy" giving rise to the proceeding. Inasmuch as it often involves only an issue of law on undisputed or relatively undisputed facts, it operates frequently as a summary proceeding, justifying docketing the case for early hearing as on a motion, as provided for in California (Code Civ. Proc. (Deering, 1937) § 1062a), Michigan (3 Comp. Laws (1929) § 13804), and Kentucky (Codes (Carroll, 1932) Civ. Prct. § 639a-3).

The "controversy" must necessarily be "of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts." *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 325, 56 S. Ct. 466, 473, 80 L. Ed. 688, 699 (1936). The existence or nonexistence of any right, duty, power, liability, privilege, disability, or immunity or of any fact upon which such legal relations depend, or of a status, may be declared. The petitioner must have a practical interest in the declaration sought and all parties having an interest therein or adversely affected must be made parties or be cited. A declaration may not be rendered if a special statutory proceeding has been provided for the adjudication of some special type of case, but general ordinary or extraordinary legal remedies, whether regulated by statute or not, are not deemed special statutory proceedings.

When declaratory relief will not be effective in settling the controversy, the court may decline to grant it. But the fact that another remedy would be equally effective

# 1954 FLORIDA RULES OF CIVIL PROCEDURE

## ORDER

Effective date June 1, 1954

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IN THE SUPREME COURT OF FLORIDA  
JANUARY TERM, A. D. 1954  
MONDAY, MARCH 15, 1954  
EN BANC.

ORDER ADOPTING AND PROMULGATING 1954 \*\*  
FLORIDA RULES OF CIVIL PROCEDURE TO \*\*  
GOVERN LITIGANTS IN SUITS OF A CIVIL \*\*  
NATURE AND ALL SPECIAL STATUTORY PRO- \*\*  
CEEDINGS IN THE COURTS THEREIN NAMED. \*\*

The Proposed Rules are before the Court on petition of the Committee on Civil Procedure of The Florida Bar to adopt and promulgate the Rules of Civil Procedure embodied in the report of the said Committee which were arrived at after numerous meetings of the Committee and two joint meetings of said Committee and the Committee on Rules of this Court. It appearing that said proposed Rules were seasonably published in the Florida Bar Journal, and, after due notice, a hearing before this Court was had on March 2nd, 1954, and it further appearing that only minor changes in said Proposed Rules not involving changes in substance were made by the Committee on Rules of this Court and by this Court after said hearing and that no member of the Bar appeared at said hearing opposing said Proposed Rules; and the members of the Court being of the opinion that said Proposed Rules, if adopted, will aid dispatch in litigation, lower the cost of litigation, simplify procedure and aid in the dispensation of justice, it is, therefore

ORDERED that the Proposed Rules numbered from Rule A to Rule 3.20 both inclusive, as they appear in the copy thereof attached hereto and designated as "1954 Florida Rules of Civil Procedure," be and the same are hereby adopted and shall have the scope and operation in the Courts of this State set out in said Rule A.

IT IS FURTHER ORDERED that all actions, suits or proceedings commenced or instituted on or after the 1st day of June 1954, shall be prosecuted under the "1954 Florida Rules of Civil Procedure," and that all actions, suits and proceedings commenced or instituted prior to the 1st day of June 1954, shall be prosecuted to conclusion under the Rules presently existing and governing procedure with respect to such actions, suits or proceedings.

ROBERTS, C. J., TERRELL, THOMAS, SEBRING, HOBSON, MATHEWS and DREW, JJ., concur.

# 1954 FLORIDA RULES OF CIVIL PROCEDURE

## **RULE A. SCOPE AND TITLE OF RULES.**

These rules are applicable to all suits of a civil nature and all special statutory proceedings in the Circuit Courts, County Judge's Courts, County Courts and Civil Courts of Record, whether recognizable as cases at law or in equity, with the exception that the form, content, procedure and time for pleading in all special statutory proceedings shall be as prescribed by the statutes providing for such proceedings, unless these rules shall specifically provide to the contrary. These rules shall be construed to secure the just, speedy and inexpensive determination of every action.

**RULE B.** The rules in Section I are applicable to both actions at law and suits in equity.

**RULE C.** The rules in Section II are applicable only to actions at law.

**RULE D.** The rules in Section III are applicable only to suits in equity.

**RULE E.** These rules shall be known and cited as the 1954 Rules of Civil Procedure.

**Committee Note:** See order of the Supreme Court of Florida effective January 1, 1950, adopting the existing common law and equity rules. For clarity, County Judge's Courts are included as some question has existed as to whether the rules are applicable thereto. See also former Common Law Rules 61 and 62 and former Equity Rule 79. This rule is somewhat adapted from Federal Rule 1. For convenience and to facilitate numbering of rules that may later be added, a decimal system of numbering sections and rules patterned after that in use in Florida Statutes is adopted.

## **LAW AND EQUITY**

### **SECTION I.**

#### **RULE 1.1. COURTS AND JUDGES.**

(a) Wherever in these rules reference is made to the court, the same shall be construed to apply to a judge thereof whenever the context shall require or permit.

(b) Where there is more than one judge of a trial court, the judge longest in continuous service and able to act shall be the presiding judge for administrative purposes, and the judges of such court may provide by local rule for the distribution of the work of such court to the judges thereof.

**Committee Note:** Combination of Common Law Rules 1 and 2.

#### **RULE 1.2. WHEN ACTION COMMENCED. DOCKET.**

(a) Every suit of a civil nature shall be

deemed as commenced when the complaint is filed; except that the ancillary proceedings shall be deemed as commenced when the writ is issued or the pleading setting forth the claim of the party initiating the action is filed.

(b) The Clerk shall keep both a common law docket and an equity docket. He shall enter all cases as they are commenced in the appropriate docket. He shall also make memorandum entries showing the progress of the cause.

(c) Unless otherwise specifically provided by statute, special statutory proceedings shall be entered in the common law docket.

**Committee Note:** Common Law Rule 4 and Equity Rule 4. Subsection (c) is new.

#### **RULE 1.3. RULE DAY ABOLISHED PRO- CESS.**

(a) For the purpose of return date of process and filing of pleadings under these rules, Rule Days are hereby abolished.

(b) Upon the commencement of the action, summons shall be forthwith issued by the Clerk and delivered for service without praecipe.

(c) Service of process may be made by any officer authorized by law to serve process; but if such officer shall, for any reason be disqualified or unable to act, the Court may appoint any competent person not interested in the case on trial to serve such process. 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 appointed by the court for such purpose, he shall make affidavit thereof. Failure to make proof of service shall not affect the validity of the service.

(d) If there is more than one defendant, the clerk shall issue as many writs of summons against the several defendants as may be directed by the plaintiff or his attorney. When any summons shall be returned not executed or returned improperly executed as to any defendant, the plaintiff shall be entitled to such additional summons against such defendant or defendants, as may be required to effect service.

(e) Where suit is brought against two or more defendants and summons is served on one or more, but not on all, and the Sheriff returns that any defendant not served does not reside in the county, the plaintiff may pro-

ceed against the defendants served, noting the fact of non-service as to such defendants not served; or, the plaintiff may, at his option, order additional originals and copies of summons to be delivered to the sheriffs of the counties in which such defendants reside to be served and returned according to law. Nothing contained herein shall be construed to prevent the plaintiff from bringing suit thereafter against any defendant not served for the same claim or demand, but the plaintiff shall have satisfaction of only one judgment or decree rendered for the same claim or demand.

(f) Service of process by publication may be made in appropriate cases as provided by statutes.

(g) At the time of personal service of summons there shall be delivered to the party upon whom service is made a copy of the complaint, affidavit, petition or other initial pleading. The date and hour of service shall be endorsed by the person making the service, on the original summons and all copies of it.

(h) In cases of constructive service, copies of the plaintiff's initial pleadings shall be furnished to the clerk and by him mailed with the notice of suit to all parties whose addresses are stated in the initial pleading or affidavit.

(i) It shall be the duty of the plaintiff to furnish the person making service, or mailing notice of suit, with such copy, or copies, as may be necessary.

(j) The statutory compensation allowed for making service shall not be increased by the simultaneous delivery or mailing of the copy of the initial pleading in conformity with the requirements of this rule.

**Committee Note:** Common Law Rule 5 and Equity Rule 5. (c) has been conformed in part to Federal Rule 4(g).

**RULE 1.4. SERVICE OF PLEADINGS AND PAPERS.**

(a) Every pleading subsequent to the initial pleadings, unless the court otherwise orders, and every order, judgment or decree not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized, and every written notice, demand and similar paper shall be served on each party affected thereby, but no service need be made on parties against whom a default or decree pro confesso has been entered except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided by law for service of summons.

(b) **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. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery

of a copy within this rule shall mean: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some person of his family above fifteen years of age and informing such person of the contents thereof. Service by mail shall be deemed complete upon mailing.

(c) In actions where the parties are unusually numerous the court may on motion or on its initiative, regulate the service contemplated by these rules in such manner as may be found to be just and reasonable.

(d) **Filing.** All original papers, copies of which are required to be served upon parties, shall be filed with the court either before service or immediately thereafter.

(e) **Filing With the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and transmit them to the office of the clerk.

(f) **Certificate of Service.**

(1) When any attorney shall in substance certify:

"I do certify that copy (copies) hereof have been furnished to (Here insert name or names) by (delivery) (mail) this \_\_\_\_\_ day of \_\_\_\_\_, 19 \_\_\_\_\_

Attorney"

the certificate shall be taken as prima facie proof of such service in compliance with all rules of court and law.

(2) Where practicable to do so, such certificate of counsel shall be endorsed on the face of such matter filed in any court.

**Committee Note:** Adaptation of Common Law Rule 6 and Equity Rule 6.

**RULE 1.5. ATTORNEYS.**

(a) 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 and who shall be duly licensed to practice law in Florida, and he may be required by an order of court to vouch for his authority to represent and give the address of such party. Except when otherwise specifically provided by these Rules, pleadings as such need not be verified or accompanied by affidavit. The signature of an attorney shall constitute a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed, or is signed with intent to defeat the purpose of this rule, it may be stricken as sham

and false and the action may proceed as though the pleading had not been served.

(b) A party who has no attorney but represents himself shall sign his pleading and state his address.

(c) No attorney or other officer of court shall enter himself or be taken as bail or surety in any proceeding in court on pain of being considered in contempt.

(d) No private agreement or consent between parties or their attorneys in respect to the proceedings in a cause shall be of any force before the court, unless the evidence thereof shall be in writing, subscribed by the party or his attorney, against whom it is alleged; provided, however, that parole agreements may be made before the court, if promptly made a part of the record, or incorporated in the stenographic notes of the proceedings.

**Committee Note:** Common Law Rule 12 and Equity Rule 7.

#### RULE 1.6. TIME.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run is not to be included. The last day of the period so computed shall be counted, unless it is a Sunday or a legal holiday, in which event the period shall run until the end of a next day which is neither a Sunday nor a legal holiday. When the period of time prescribed or allowed shall be less than 7 days, intermediate Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as any other day and not as a holiday.

(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 notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made and notice after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not, except as provided by law, extend the time for making a motion for new trial, for taking an appeal, or for making a motion for a directed verdict.

(c) **Unaffected by Expiration of Term.** The period of time provided for the doing of any act or the taking of any proceeding shall not be affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **For Motions.** A copy of any written motion which may not be heard ex parte and a copy of the notice of the hearing thereof, shall be served on the adverse party a reasonable time before the time specified for the hearing.

**Committee Note:** Common Law Rule 3. Conformed to Federal Rule 6(c).

(e) **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

**Committee Note:** Common Law Rule 7 and Equity Rule 32, with word "legal" inserted before "holiday" and "holidays" in subsection (a).

#### RULE 1.7. PLEADINGS.

(a) There shall be a complaint and an answer and there shall be a reply if the answer contains a counterclaim (set-off or recoupment) or a cross-claim. No additional pleadings, other than motions provided by these Rules, shall be allowed, except that the court may order a reply to an answer.

(b) 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.

(c) Every pleading shall contain a caption setting forth the name of the court, the title of the action, and a designation as in (a) of this rule. The caption of the pleading shall also state the name of the first party on each side with an appropriate indication of other parties.

(d) 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.

(e) Demurrers, pleas, replication, rejoinder, surrejoinder, rebutter, surrebutter, and other technical defensive pleadings except motions as provided herein, are abolished.

**Committee Note:** Adaptation of Federal Rule 7 (a), 10(a) and Common Law Rule 8.

The change in subsection (a) has been made to conform in part to Federal Rule 7(a). The Committee believes and intends this change will obviate the ruling of the Supreme Court in *Gulf Life Insurance Company vs. Ferguson*, 59 So. 2d 371. In this rule and throughout these rules "bill of complaint" as formerly used in equity is called simply "complaint". Subsection (c) is new. See Federal Rule 10(a).

#### RULE 1.8. GENERAL RULES OF PLEADING.

(a) **Forms of Pleadings.** Forms of action and technical forms for seeking relief and of pleas, pleadings or motions are abolished.

(b) **Claims for Relief.** A pleading which sets forth a claim for relief, whether an orig-

inal claim, counter-claim, or cross-claim, must state a cause of action, and must contain allegations of fact sufficient to show the jurisdiction of the court. It shall set forth a short and plain statement of the ultimate facts on which the pleader relies, and if it informs the defendant of the nature of the cause against him, it shall be held sufficient. It must contain a demand for judgment or decree for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded. Every complaint shall be considered to pray for general relief.

(c) **The Answer.** In his answer a pleader shall state in short and plain terms his defenses to each claim asserted, and shall admit or deny the averments on which the adverse party relies. Should the defendant be without knowledge, he shall so state, and such statement shall operate as a denial. Denial shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part of an averment, he shall specify so much of it as is true and material, and shall deny the remainder. Unless the pleader intends in good faith to controvert all of the averments of the preceding pleading, he may make his denials as specific denials of designated averments, or he may generally deny all of the averments except such designated averments as he expressly admits; but, when he does so intend to controvert all of its averments, including averments of the grounds upon which the Court's jurisdiction depends, he may do so by general denial.

(d) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. 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.

(e) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(f) **Separate Statements.** All averments of the complaint, answer and reply shall be made in numbered paragraphs the contents of each of which shall be limited, as far as practicable, to a statement of a single set of circumstances; and a paragraph may be referred to by num-

ber in all subsequent pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth. Repetition of counts is not permitted.

(g) **Joinder of Causes of Action; Consistency.** A pleader may set up in the same action as many claims or causes of action or defenses in the same right as he has, and claims for relief may be stated in the alternative if separate items make up the cause of action, or if two or more causes of action are joined. A party may also set forth two or more statements of a claim or defense alternatively, either in one count or defense, or in separate counts or defenses. When two or more statements are made in the alternative and one of them, if made independently, would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency, and whether a defense be based on legal or on equitable grounds, or on both. All pleadings shall be construed so as to do substantial justice.

**Committee Note:** Adaptation of Common Law Rule 9, Equity Rules 28 and 34, and Federal Rule 8(a).

Ad damnum clause is eliminated, but claimant must plead jurisdiction of the court.

Complaint seeking relief pendente lite need not be verified.

Former equity requirement that complaint show residence of parties and fact of disability is eliminated.

Pleader in law action may plead without knowledge, in conformity with equity practice.

Test for sufficiency of counter claim and cross-claim is provided.

Complaint in equity must state a cause of action.

#### RULE 1.9. PLEADING SPECIAL MATTERS.

(a) **Capacity.** It is not necessary to aver the capacity of a party to sue or to be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with such particularity as the circumstances may permit. Malice, intent, knowledge, mental attitude and other condition of mind of a person may be averred generally.

(c) **Conditions Precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **Official Document or Act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **Judgment or Decree.** In pleading a judgment or decree of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decree without setting forth matter showing jurisdiction to render it.

(f) **Time and Place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **Special Damage.** When items of special damage are claimed, they shall be specifically stated.

**Committee Note:** Common Law Rule 10.

#### **RULE 1.10. ATTACHING COPY OF CAUSE OF ACTION AND EXHIBITS.**

(a) All bonds, notes, bills of exchange, contracts, accounts or documents upon which suit may be brought, or a copy thereof, or a copy of the portions thereof material to the cause of action, shall be incorporated in or attached to the complaint or answer, but no papers shall be unnecessarily annexed as exhibits. The pleadings shall contain no unnecessary recitals of deeds, documents, contracts or other instruments in haec verba.

(b) Any exhibit attached to a pleading shall be considered a part thereof for all purposes.

**Committee Note:** Consolidation of Common Law Rule 11 and Equity Rule 22.

#### **RULE 1.11. DEFENSES.**

(a) **When presented.** A defendant shall serve his answer within twenty days after service of the summons and complaint upon him, or not later than the date fixed in a notice by publication, which date shall be not less than twenty-eight nor more than sixty days after the first publication of the notice. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim within twenty days after service of the counterclaim, or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule (except a motion for judgment or decree on the pleadings) alters these periods of time 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 shall be served within ten days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within ten days after the service of the more definite statement.

(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim or cross-claim, shall be asserted in the responsive pleading thereto if one is required; except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) **Motion for Judgment or Decree on the Pleadings.** After the pleadings are closed, but within such time as not to delay the trial any party may move for judgment or decree on the pleadings.

(d) **Preliminary Hearings.** The defenses 1 to 7, subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment or decree mentioned in subdivision (c) of this Rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof shall be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) **Consolidation of Defenses.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in subdivision (h) of this rule.

(h) **Waiver of Defenses.** A party shall be deemed to have waived 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 cause of action, the defense of failure to join an indispensable party, 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. See Rule 1.39. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 1.15(b) in the light of any evidence that may have been received.

**Committee Note:** Common Law Rule 13 and Equity Rule 33, except that, in subsection (b), (6) has been changed to read "failure to state a cause of action".

**RULE 1.12. MOTIONS.**

**Motions Grantable as of Course by the Clerk.** All motions and applications in the clerk's office for the issuance of mesne process and final process to enforce and execute judgments and decrees; for entering decrees pro confesso and default judgments; and for such other proceedings in the clerk's office as do not require an allowance or order of the court shall be deemed motions and applications grantable of course by the clerk of the court. But the clerk's action thereon may be suspended or altered or rescinded by the court upon special cause shown.

**Committee Note:** Adaptation of Equity Rule 2.

**RULE 1.13. COUNTERCLAIMS.**

(1) **Compulsory Counterclaim.** The defendant, at the time of the filing of his answer, shall state as a counterclaim, any claim, whether the subject of a pending action or not, which he has against the plaintiff, arising out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(2) **Permissive Counterclaim.** The defendant at the time of the serving of his answer may state as a counterclaim against the plaintiff, any claim, within the jurisdiction of the

court, not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim.

(3) **Counterclaim Exceeding Plaintiff's Claim.** A counterclaim may or may not diminish or defeat the recovery sought by the plaintiff, shall not be construed as admitting any part of the plaintiff's claim, and the defendant may claim relief exceeding in amount, or different in kind, from that sought in the pleading of the plaintiff.

(4) **Counterclaim against the State.** This rule shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credits against the State of Florida or any of its subdivisions or other governmental organization thereof subject to suit, or upon a municipal corporation, or upon an officer, agency, or administrative board of the State of Florida.

(5) **Counterclaim Maturing or Acquired After Pleading.** A claim which matured after the service of an answer, may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(6) **Omitted Counterclaim.** When a defendant fails to set up a counterclaim because of oversight, inadvertence, or excusable neglect, or when justice requires, the court may grant leave to set up the counterclaim by amendment.

(7) **Cross-Claim Against Co-Party.** Any party may state as a cross-claim any claim within the jurisdiction of the court, by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(8) **Additional Parties May Be Brought In.** 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 if jurisdiction of them can be obtained, and their joinder will not deprive the court of jurisdiction of the action.

(9) **Separate Trials; Separate Judgments.** When found necessary to the ends of justice, the court may order separate trials of the issues made by any counterclaim or cross-claim, and judgment or decree on a counterclaim or cross-claim may be rendered when the court has jurisdiction to do so, even if the claim of the opposing party has been dismissed or otherwise disposed of.

(10) **Demand Exceeding Jurisdiction; Transfer of Cause.** Should the demand of any counterclaim exceed the jurisdiction of the court wherein the suit is pending, the said suit shall be forthwith transferred to the

court of the same county having jurisdiction of the demand in the said counterclaim mentioned, with only such alterations in the pleadings as shall be essential. In such case, an order shall be made by the court for the transfer of the suit and the transmission of all papers therein to the proper court and thereupon the originals of all such papers shall be transmitted and filed, together with a certified or attested copy of the order of transfer and transmissal. The court to which transferred shall have full power and jurisdiction over the demands of both the defendant and the plaintiff in the said suit and may adjudicate the same and enter judgment or decree thereon.

**Committee Note:** Adaptation of Equity Rule 35, F.S. 52.11, and F.S. 52.12(1). Heretofore there has been no common law rule on counterclaims.

**RULE 1.14. SHAM PLEADINGS: EXCEPTIONS FOR IMPERTINENCE, ETC., ABOLISHED.**

(a) If a party deems any pleading or part thereof filed by the other party to be a sham, he may, before the cause is set for trial, move to strike said pleading or part thereof and the court shall hear said motion, taking evidence of the respective parties, and if the motion be sustained, the pleading to which the motion is directed shall be stricken. Default and summary judgment, decree, decree pro confesso, and summary decree, on the merits, may, in the discretion of the court, be entered, or the court may for good cause shown, permit additional pleadings to be filed.

(b) The motion to strike shall be sworn to and shall set forth fully the facts on which the movant relies and may be supported by affidavit. No traverse of the motion shall be required.

(c) Exceptions to pleadings for scandal, impertinence or irrelevancy are abolished but the court may, upon motion to strike or upon its own initiative, strike out any redundant, impertinent, irrelevant or scandalous matter which is prejudicial to the excepting party upon such terms as the court shall think fit.

**Committee Note:** Combination of Common Law Rule 14 and Equity Rule 23.

**RULE 1.15. AMENDED AND SUPPLEMENTAL PLEADINGS.**

(a) **Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading,

whichever period may be the longer, unless the court otherwise orders.

(b) **Amendments to Conform with the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment or decree; but failure so to amend shall not affect the result of the trial of these issues. If the evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings the court may allow the pleadings to be amended to conform with the evidence; and shall do so freely when the merits of the cause are more effectually presented thereby and the objecting party fails to satisfy the court that the admission of such evidence will prejudice him in maintaining his action or defense upon the merits.

(c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment shall relate back to the date of the original pleading.

(d) **Supplemental Pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

(e) **Amendments Generally.** The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceedings, must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.

**Committee Note:** Consolidation of Common Law Rule 15 and Equity Rule 26. Subsection (e) is new in law actions.

**RULE 1.16. PRE-TRIAL PROCEDURE.**

After all issues are settled the court may of its own motion or shall on motion of either party to the cause, direct and require the attorneys for the parties to appear before it for conference to consider and determine:

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings of fact for use by the court for pre-trial purposes;

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

The court shall make an order reciting 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 limiting 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, unless modified at the trial to prevent manifest injustice. The court shall establish by rule a pre-trial calendar on which such actions may be placed for trial or consideration.

**Committee Note:** Common Law Rule 16 and Equity Rule 77. (5) is new and is adapted from Federal Rule 16.

**RULE 1.17. PARTIES.**

(a) Every action may be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought. All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause. Persons having a united interest may be joined on the same side as plaintiffs or defendants, and when any one refuses to join, he may for such reason be made a defendant.

(b) **Infants or Incompetent Persons.** Whenever an infant or incompetent person has a representative, such as a guardian, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

**Committee Note:** Subsection (a) is same as Equity Rule 8 except that third word is changed from "shall" to "may". As changed it follows F.S. 45.01.

The entire rule is a new rule of practice, insofar as law actions are concerned

Subsection (b) is adapted from Equity Rule 15 and Federal Rule 17(c).

**RULE 1.18. MISJOINDER AND NON-JOINDER OF PARTIES.**

Misjoinder of parties shall not be ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

**Committee Note:** Common Law Rule 17.

**RULE 1.19. SURVIVOR. SUBSTITUTION OF PARTIES.**

(a) **Death.**

(1) If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any interested party and, together with the notice of hearing, shall be served on the parties as provided in Rule 1.4 and upon persons not parties in the manner provided by law.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action shall not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) When an officer of the United States, a State, County, City or other governmental agency is a party to an action in his official capacity, and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor.

**Committee Note:** Combination of Combination Law Rule 19 and Equity Rules 10 and 19, except that subsection (c) is new. The new subsection comes from Federal Rule 25(c).

**RULE 1.20. CONSOLIDATION OF CAUSES.**

Upon the motion of any interested party and after notice to all other parties affected, the court may order two or more causes to be

consolidated upon such terms and conditions as may be just, and to prescribe the time and method of pleading and procedure and the effect of the judgments or decrees to be rendered in the cause when so consolidated. Complete identity of parties or subject matter shall not be requisite to the consolidation of causes. In any judgment or decree of consolidation the court may order that the consolidated causes shall preserve their separate existence or be merged into a single suit.

**Committee Note:** Adaptation of Equity Rule 20.

**RULE 1.21. DEPOSITIONS PENDING ACTION.**

(a) **When depositions may be taken.** Any party may take the deposition of any person, including a 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. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within twenty (20) days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoenas as provided by law. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Scope of Examination.** Unless otherwise ordered by the court as provided herein, the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

(c) **Examination and Cross Examination.** Examination and cross examination of deponent may proceed as permitted at the trial.

(d) **Use of Depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

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

(2) The deposition of a party or of any one who at the time of taking the deposition was

an officer, director or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1. That the witness is dead; 2. that the witness is at a greater distance than one hundred miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness; or 5. upon application and notice, that such exceptional circumstances exist as to make it desirable in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only a 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.

(e) **Substitution of parties.** Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(f) **Objections to Admissibility.** Subject to the provisions of Rule 1.26(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.

(g) **Effect of Taking or Using Deposition.** A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of a deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

**Committee Note:** Common Law Rule 20 and Equity Rule 47(d), with subsection (e) changed to conform to Federal Rule 26.

**RULE 1.22. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.****(a) Before Action.**

(1) **Petition.** A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court of this state, may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the State of Florida, but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the deposition of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(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 herein, for an order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served either within or without the county in the manner provided by law 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 by law for service of summons, an attorney who shall represent them, and in case they are not otherwise represented, shall cross-examine the deponent.

(3) **Order and Examination.** If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the deposition shall be taken upon oral examination or written interrogatories. The deposition may then be taken in accordance with these rules; and the court may make orders in accordance with the requirements of these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) **Use of Deposition.** If a deposition to

perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought in any court of the State of Florida in accordance with the provisions of Rule 1.21(d).

(b) **Pending Appeal.** If an appeal has been taken from a judgment of a circuit court or before the taking of an appeal if the time therefor has not expired, the circuit 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 circuit court. In such case the party who desires to perpetuate the testimony may make a motion in the circuit court for leave to take the deposition upon the same notice and service thereof as if the action was pending in the circuit court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reason for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by these rules, 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 circuit court.

(c) **Perpetuation by Action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(d) If a person desires to perpetuate the testimony of himself or that of another person regarding any matter that may be cognizable in any court of this state, and there is an urgency for the taking of such testimony because the person is bound on a voyage at sea, or is about to leave the State of Florida, or to go out of the country in which the suit may be instituted before the time of trial or final hearing, or when he is old or infirm, the deposition may be taken before any notary public or judicial officer or before any officer authorized by the laws of the State of Florida to take acknowledgments, or proof of executions of deeds, without complying with the requirements of paragraph (a) of this rule. The officer before whom such deposition shall be taken shall not be of counsel to either of the parties, or interested in the event of the cause. Reasonable notice must first be given in writing by the party proposing to take such deposition to those whom he expects to be adverse party, as near as he can, which notice shall state the name of the witness or witnesses, the time and place of his deposition, the name of the officer to take the same and the reason for taking such deposition. Whenever, by reason of the absence from the jurisdiction of the court of the prospective adverse party, or for any other reason, the giving of such notice shall be impracticable, it shall be lawful to

take such deposition as there may be urgent necessity for taking, upon such notice as the judge of the court in which the action may be instituted shall think reasonable and have his order direct upon the application of the party desiring to take such deposition. Any person may be compelled to appear and depose as provided in this rule, in the same manner as witnesses may be compelled to appear and testify in court. Depositions to perpetuate testimony taken under this rule may be used in any action involving the same subject matter subsequently brought in any court of the State of Florida in accordance with and under the terms and conditions as provided in Rule 1.21(d).

**Committee Note:** Common Law Rule 21 and Equity Rule 47(d).

**RULE 1.23. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.**

(a) Depositions may be taken before any notary public or judicial officer or before any officer authorized by the statutes of the State of Florida to take acknowledgments or proof of executions of deeds, or by any person appointed by the court in which the action is pending.

(b) If the parties so stipulate in writing, depositions may be taken before any person, at any time or place upon any notice, and in any manner and when so taken may be used like other depositions.

(c) Unless so stipulated by the parties, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

**Committee Note:** Common Law Rule 22 and Equity Rule 47(d).

**RULE 1.24. DEPOSITIONS UPON ORAL EXAMINATION.**

(a) **Notice of Examination: Time and Place.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time.

(b) **Orders for the Protection of Parties and Deponents.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, 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, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) **Record of Examination: Oath: Objections: Submitting Written Cross Questions.** The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be recorded verbatim stenographically or by mechanical means and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon, or attached to, the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer who shall propound them to the witness and record the answers verbatim.

(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 circuit where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in subdivision (b) of this rule. 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 a motion for an order. 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.

(e) **Submission to Witness: Changes; Signing.** When the testimony is fully transcribed the deposition shall be submitted to the witness

for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 1.26(d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

**(f) Certification and Filing by Officer: Copies: Notice of Filing.**

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

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

**(g) Failure to Attend or to Serve Subpoena: Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

**Committee Note:** Common Law Rule 23 and Equity Rule 47(d).

**RULE. 1.25. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.**

**(a) Serving Interrogatories; Notice.** A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within 10 days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within 5 days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within 3 days after being served with redirect interrogatories, a party may serve re-cross interrogatories upon the party proposing to take the deposition.

**(b) Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 1.24(c), (e) and (f) to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

**(c) Notice of Filing.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

**(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, on motion promptly made by a party or a deponent, upon notice and good cause shown, may make any order specified in Rule 1.27 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.

**Committee Note:** Common Law Rule 24 and Equity Rule 47(d).

**RULE 1.26. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.**

**(a) As to Notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

**(b) As to Disqualification of Officers.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

**(c) As to Taking of Deposition.**

(1) Objections to the competency of a

witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

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

(3) Objections to the form of written interrogatories submitted under Rule 1.27 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and with 3 days after service of the last interrogatories authorized.

(d) **As to Completion and Return of Deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 1.24 and 1.25 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

**Committee Note:** Common Law Rule 25, Equity Rule 47(d) and Equity Rule 53.

#### **RULE 1.27. INTERROGATORIES TO PARTIES.**

Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

Interrogatories may relate to any matters

which can be inquired into under Rule 1.21(b) and the answers may be used to the same extent as provided in Rule 1.21(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 1.24(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Answers made by a party shall not be binding on a co-party.

**Committee Note:** Common Law Rule 26 and Equity Rule 47(d).

#### **RULE 1.28. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING.**

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 1.24(b), the court in which an action is pending, may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 1.21(b) and which are in his possession, custody, or control; 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 object or operation thereon within the scope of the examinations permitted by Rule 1.21(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

**Committee Note:** Common Law Rule 27 and Equity Rule 47(d).

#### **RULE 1.29. EXAMINATION. PHYSICAL AND MENTAL EXAMINATION OF PARTIES AND EXAMINATION OF PROPERTY.**

(a) **Order for Examination.** In any action in which the mental or physical condition of a party or injury to property is in controversy, the court in which the action is pending may, in advance of the trial, order such party to submit to a physical or mental examination by a physician or other such qualified expert, or may order an examination of the property alleged to have been damaged or injured by the defendant or his agent, or of the party

alleged to have caused the damage or injury. The order may be made only upon good cause shown and upon notice to the party to be examined and to all other parties and to all persons in whose custody such property may then be, and shall specify the time, place, manner, condition and scope of the examination and the person or persons by whom it is to be made.

**(b) Report of Findings.**

(1) 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, or other such qualified expert, 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 or other such qualified expert fails or refuses to make such a report, the court may exclude his testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

**Committee Note:** Common Law Rule 28 and Equity Rule 47(d).

**RULE 1.30. ADMISSION OF FACTS AND GENUINENESS OF DOCUMENTS.**

(a) **Request for Admission.** After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truth-

fully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.

(b) **Effect of Admission.** Any admission made by a party pursuant to such request is for the purpose of the pending action only and neither constitutes an admission by him for any other purpose nor may be used against him in any other proceeding.

**Committee Note:** Common Law Rule 29 and Equity Rule 47(d).

**RULE 1.31. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.**

(a) **Refusal to Answer.** If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, the proponent of the question may apply to the circuit court in the county where the deposition is taken, if taken out of the county where the case is pending, or the court having jurisdiction of the cause if the deposition is taken in the county where the case is pending, for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 1.25 or upon the refusal of a party to answer any interrogatory submitted under Rule 1.27 the proponent of the question may on like notice make like application for such an order. If the motion is granted and the court hearing the motion finds that the refusal was without substantial justification, it may enforce its order by contempt. The court having original jurisdiction of the cause may require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied by the court hearing it and said court finds that the motion was made without substantial justification, the court having original jurisdiction of the cause may require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

**(b) Failure to Comply with Order.**

(1) **Contempt.** If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the circuit court in the county in which the deposition is being taken, the refusal shall be considered a contempt of that court.

(2) **Other Consequences.** If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 1.28 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 1.29 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order denying the disobedient party the privilege of supporting or opposing designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof or rendering a judgment by default against the disobedient party;

(iv) An order in lieu of any of the foregoing orders or in addition thereto directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) **Expenses on Refusal to Admit.** If a party, after being served with a request under Rule 1.30 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **Failure of Party to Attend or Serve Answers.** If a party or an officer or managing

agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 1.27 after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

**Committee Note:** Common Law Rule 30 and Equity Rule 47(d).

**RULE 1.32. DEPOSITIONS DE BENE ESSE.**

(a) **When Such Depositions May Be Taken: Notice.** The testimony of any witness may be taken by deposition de bene esse, either within or without the United States, when the witness resides out of the county in which the cause is pending, or is bound on a voyage at sea, or is about to leave the State of Florida, or to go out of the county in which the cause is pending before the time of trial or final hearing, or when he is old and infirm. The deposition may be taken before any notary public or judicial officer or before any officer authorized by the statutes of the State of Florida to take acknowledgments or proof of execution of deeds. The officer before whom such deposition shall be taken shall not be of counsel to either of the parties or interested in the event of the cause. Reasonable notice must first be given in writing by the party proposing to take such deposition to the opposite party of record, which notice shall state the name of the witness or witnesses, the time and place of taking his deposition, the name of the officer to take the same, and the reason for taking such deposition. Whenever, by reason of the absence from the jurisdiction of the court of the adverse party or his attorney of record or for any other reason, the giving of such notice herein required shall be impracticable, it shall be lawful to take such depositions as there may be urgent necessity for taking upon such notice as the judge of the court in which the action is pending shall think reasonable and shall by his order direct upon the application of the party desiring to take such depositions. Any person may be compelled to appear and depose as provided in this act in the same manner as witnesses may be compelled to appear and testify in court.

(b) **Oath of Witness: Committing Testimony in Writing.** Every person deposing as provided in the preceding paragraph shall be cautioned and sworn to testify the whole truth, and shall be carefully examined. Such testimony shall be reduced to writing or typewriting by the officer taking the deposition, or by some person under his personal supervision or by the deponent himself in the officer's presence; and shall, after being reduced to writing or typewriting, be subscribed by the witness, unless such subscription shall be waived by the parties.

(c) **Certification and Return.** Every such deposition, together with a certificate of the reasons aforesaid of taking such deposition and the notice, if any, given to the adverse party, shall be by such officer sealed up and directed to such court and shall remain under his seal until opened by the judge or the clerk of such court or by consent of the parties. The depositions sealed as aforesaid may be sent by United States mail by the officer taking the same to the clerk of the court in which such cause is pending, or may be delivered into the court or to the clerk of the court by such officer or by a party to the cause, his agent or solicitor; but if returned by private hand of a party or his agent or solicitor the person so returning it must make oath before the court or the clerk that he received the deposition sealed as aforesaid from the officer taking it and that it has been in his possession ever since, and has not been opened or altered.

(d) **Optional Procedure.** Nothing herein shall be taken to modify or repeal any other law or rule of court providing for other methods of taking depositions, but the method of taking depositions herein prescribed shall be an optional procedure for the taking of depositions in causes pending in courts of the State of Florida to which these rules apply.

**Committee Note:** Equity Rule 47. See also F.S. 90.23.

**RULE 1.33. DEPOSITION DEEMED PUBLISHED WHEN FILED.**

Upon the filing of any deposition or affidavit taken under any rule or statute it shall be deemed published, unless otherwise ordered by the court, and may be opened and examined by any party in the presence of the Clerk.

**Committee Note:** Adaptation of Equity Rule 52.

**RULE 1.34. SUBPOENA.**

(a) **For Attendance of Witnesses; Form; Issuance.** Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action or suit, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue 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.

(b) **For Production of Documentary Evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) **Service.** A subpoena may be served by any person authorized by law or by these rules to serve process. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law.

(d) **Subpoena for Taking Depositions; Place of Examination.**

(1) Proof of service of a notice to take a deposition as provided in Rules 1.24(a) and 1.25(a) constitutes a sufficient authorization for the issuance by the clerk of the court in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 1.21(b), but in that event the subpoena will be subject to the provisions of Rule 1.24(b) and subdivision (b) of this Rule.

(2) A person may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as may be fixed by an order of court.

(e) **Contempt.** 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.

**Committee Note:** New to our rules of practice, and an adaptation of Federal Rule 45.

**RULE 1.35. DISMISSAL OF ACTIONS.**

(a) **Voluntary Dismissal; Effect Thereof.**

(1) **By Plaintiff; By Stipulation.** Subject to the provisions hereof, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment or decree, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal shall be without prejudice, except that a dismissal shall operate as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this State an action based on or including the same claim.

(2) **By Order of Court.** Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been served by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified

in the order, a dismissal under this paragraph shall be without prejudice.

(b) **Involuntary Dismissal; Effect Thereof.** For failure of the plaintiff to comply with any order of court, a defendant may move for dismissal of any action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision, and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, shall operate as an adjudication upon the merits; except, however, that nothing stated herein shall preclude a non-suit from being taken pursuant to any applicable statute.

(c) **Dismissal of Counterclaim or Cross-Claim.** The provisions of this rule shall apply to the dismissal of any counterclaim or cross-claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **Costs of Previously Dismissed Action.** If a plaintiff who has once dismissed an action in any court of this state commences an action based upon or including the same claim against the same defendant, in any court in this State, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

**Committee Note:** Common Law Rule 35.

#### **RULE 1.36. SUMMARY JUDGMENT OR DECREE.**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment or decree may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment or decree by the adverse party, move with or without supporting affidavits for a summary judgment or decree in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment or decree is sought may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment or decree sought shall be rendered forthwith if the

pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If a motion under this rule judgment or decree is not rendered upon the whole case or for all the relief asked and a trial, or the taking of testimony and a final hearing, is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. Upon the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or decree or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**Committee Note:** Consolidation of Common Law Rule 43 and Equity Rule 40, with subsection (h) of Equity Rule 40 dropped.

**RULE 1.37. EVIDENCE.**

(a) **Adverse Witness.** 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.

(b) **Record of Excluded Evidence.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

**Committee Note:** Adaptation of Common Law Rule 37 and Federal Rule 43 (b) and (c). It is new as a rule of practice applicable to suits in equity.

**RULE 1.38. CORRECTION OF JUDGMENTS, DECREES AND PROCEEDINGS.**

Clerical mistakes in judgments, decrees, orders or other parts of the record and errors therein arising from oversight or omissions may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal,

such mistakes may be so corrected before the appeal is entered in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

**Committee Note:** Consolidation of Common Law Rule 53 and Equity Rule 68.

**RULE 1.39. TRANSFERS OF ACTIONS ERRONEOUSLY BEGUN.**

(a) If at any time it appears that an action has been commenced either in equity or at law when it should have been brought on the opposite side of the court it shall be forthwith transferred to the proper side and proceeded with without interruption. In such case the court, without notice, may enter an order noting that the case was brought on the wrong side of the court and further ordering the clerk to docket the case on the proper side. The case shall proceed thereafter as though it were originally instituted on the proper side of the court and no further amendments shall be necessary to change phraseology in the pleadings so far as this error is concerned. The case shall proceed as though originally instituted on the proper side of the court.

(b) If at any time it should appear that a suit is pending in the wrong court of any county it may be transferred to the proper court within said county upon the same conditions and by the same method, as provided in 1.39(a), except that a certified copy of the order entered by the original court shall be transmitted with the file to the proper court.

**Committee Note:** Adapted from Equity Rule 75.

**RULE 1.40. DISCOVERY IN AID OF EXECUTION.** In aid of a judgment, decree or execution, the judgment creditor or his successor in interest, when that interest appears of record may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions.

**Committee Note:** This is a new rule of practice. See Federal Rule 69 (a).

## ACTIONS AT LAW ONLY

## SECTION II

**RULE 2.1. DEMAND FOR JURY TRIAL—  
WAIVER.**

(a) **Right Preserved.** The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties in-violate.

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

(c) **Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action triable by jury.

(d) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by these rules shall constitute a waiver by him of trial by jury. If waived, a jury trial may not be granted without the consent of the parties. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

**Committee Note:** Common Law Rule 31.

**RULE 2.2. TRIAL DOCKET — WHAT  
CASES — WHEN SOUNDED.**

(a) **What Cases.** When a cause shall be ready for trial, either plaintiff or defendant may, at least fifteen (15) days before the commencement of a term of the court, serve on the opposing party a notice in writing that the case is ready for trial and will be placed on the trial calendar at the next ensuing term. If such notice is filed fifteen days before the commencement of such term the clerk shall enter the case upon the trial docket.

(b) **When Sounded.** The trial docket shall be sounded for the setting of cases for trial on the Tuesday before the opening day of said term, in the courtroom of said court at 2:00 P. M. or thereafter upon one week's notice by the clerk to the parties, which sounding and setting of causes shall be by the judge, or by the clerk of said court in the judge's absence.

(c) **Adding New Cases.** Any case ready for trial, whether arriving at issue before or during the term, after fifteen days' notice given by any attorney of record or the clerk of the court may at the discretion of the court be set for trial during said term.

**Committee Note:** Largely Common Law Rule 32.

**RULE 2.3. CASES WHEN SET — TRIED,  
CONTINUED OR DISMISSED.**

When a cause is duly set for trial and is called in its order, the same must be tried, continued, dismissed, or placed at the foot of the docket or trial calendar.

**Committee Note:** Common Law Rule 33.

**RULE 2.4. CONTINUANCES.**

(a) **Motion For.** A motion for continuance may be made only before or at the time the case is set for trial, unless good cause for failure so to move is shown or unless the ground for the motion arose after the cause was set for trial.

(b) **Contents.** The motion for continuance shall be in writing. It shall state fully and clearly all of the facts which the movant conceives may entitle him in law to such continuance. If continuance is sought on the ground of non-availability of a witness, the motion must show when it is believed the witness will be available.

(c) **Copy To Be Served.** A copy of the motion shall be served upon the attorneys of record for the opposing party together with a notice of the time, the place and the judge before whom said motion will be called for hearing.

(d) **For What Time.** No continuance shall be granted for any longer time than it shall affirmatively appear that the ends of justice require.

**Committee Note:** Adaptation of Common Law Rule 34.

**RULE 2.5. DOCUMENTARY EVIDENCE—  
TO BE FILED AND MARKED BY CLERK.**

When documentary evidence is introduced in a cause, the clerk shall indorse upon the same an identifying number or symbol, and when proffered or admitted in evidence, it shall be filed by him and considered in the custody of the court and not withdrawn except with written leave of court.

**Committee Note:** Adaptation of Common Law Rule 38.

**RULE 2.6. EXCEPTIONS UNNECESSARY.**

(a) **Adverse Ruling.** For appellate purposes, no exception shall be necessary to any adverse ruling, order, instruction or thing whatsoever said or done at the trial or prior thereto or after verdict, which thing was said or done after objection made and considered by the trial court, and which affected the substantial rights of the party complaining and which is assigned as error.

(b) Not later than at the close of the evidence, or at such earlier time during the trial as the court may reasonably direct, it shall be the duty of the parties to the cause to file written requests that the court charge the jury on the law as set forth in such requests. The court shall then require counsel to appear before it for the purpose of a conference to settle the charges to be given. At such conference

all objections shall be made and ruled upon and the court shall likewise inform counsel at said conference of such general charges as it will give. No party may assign as error the giving of any charge unless he objects thereto at such time, nor the failure to give any charge unless he shall have requested the same. The court shall charge the jury after the arguments are completed.

(c) **Orders on New Trial, Directed Verdicts, Non-Suits, etc.** In order to entitle the party against whom such ruling is made to have the same reviewed by the appellate court, it shall not be necessary to object or except to any order granting or denying motions for new trials, directed verdicts, non-suits, or judgments non obstante veredicto, or in arrest of judgment.

(d) **New Trials, Review of Order Granting.** In every case in which the trial court shall enter an order granting a motion for a new trial, the trial judge shall indicate in the order granting said motion the particular ground or grounds upon which said motion was granted.

**Committee Note:** Common Law Rule 39.

#### **RULE 2.7. MOTION FOR A DIRECTED VERDICT.**

(a) **Effect.** A party who moves for a directed verdict at the close of the evidence offered by the adverse party may offer evidence in the event the motion is denied without having reserved the right to do so and to the same extent as if the motion had not been made. The denial of a motion for a directed verdict shall not operate to discharge the jury.

A motion for a directed verdict shall state the specific grounds therefor.

(b) **Reservation of Decision on Motion.** Whenever a motion for a directed verdict made at the close of all of the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury at such time subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the motion for a directed verdict.

(c) A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

**Committee Note:** Common Law Rule 40.

#### **RULE 2.8. MOTIONS FOR NEW TRIAL.**

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or a part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in such cases. A new trial may be granted in an action tried without a jury on grounds that heretofore were grounds for a rehearing in a suit in equity; and in such cases the court may open the judgment, if one has been entered, take additional testimony, and direct the entry of a new judgment.

(b) **Time for Motion.** A motion for new trial shall be served not later than 10 days after the rendition of verdict.

(c) **On Initiative of Court.** Not later than 10 days after the rendition of a verdict, the court of its own initiative may order a new trial for any reason for which it might be granted a new trial on motion of a party, and in the order shall specify the specific grounds upon which the new trial is awarded.

(d) **Motion to Amend Judgment.** Within 10 days after the rendition of a verdict, either party may move the court to alter or amend the judgment to conform to the evidence and the law, where the same can be lawfully done without a new trial, or such motion may be served with a motion for new trial, in the alternative. The court may, within such time, alter or amend a judgment for like reasons of its own initiative.

(e) **Necessity for Motion.** Where an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be reviewed on appeal whether or not the party raising the question has made any objection thereto in the trial court, or made a motion for new trial or to alter or amend the judgment.

(f) **Matters of Record.** The grounds for a motion for new trial shall not be limited to matters in pais, and all errors in the record proper may be incorporated in a motion for new trial. If proper grounds exist therefor, the court may order a new trial, or correct the record, or alter or amend the judgment, as justice may require.

**Committee Note:** Common Law Rule 41.

#### **RULE 2.9. JUDGMENT—DEFAULT.**

(a) If a party fails to serve a pleading at any time provided by these rules or fixed by the court, an adverse party may cause a default to be entered by the court or by the clerk on a day subsequent to the day on which such default occurs. A party may plead at any time until such default be entered.

(b) Judgments final consequent upon the entry of defaults, for want of proper pleading, may be entered on the same day that the default is entered as well as any subsequent day. In cases where the action is upon an open account or other contract for the payment of money, not in writing, no final judgment upon default shall be entered by the clerk until

after the moving party has filed the proofs in support of his claim, all of which shall be in writing and shall be filed with the papers in the case.

**Committee Note:** Substantially Common Law Rule 42.

#### **RULE 2.10. ATTACHMENT.**

(a) **When Returnable, Property Seized.** A writ of attachment shall be returnable when fully executed; or shall be returned by the officer when he shall be convinced that no property can be found; and if property is seized under the writ, the writ shall be returned when the property seized shall have finally passed from the lien of said writ and control of the officer levying the attachment. At the time of each action taken under said writ, the officer shall endorse such action thereon.

(b) **Pleading, Practice and Procedure.** Insofar as applicable and when not otherwise provided, the pleading, practice and procedure governing personal actions shall govern suits commenced by attachment.

**Committee Note:** Common Law Rule 44.

#### **RULE 2.11. EJECTMENT.**

(a) **Landlord Not a Defendant.** When it shall be made to appear by answer before a trial that a party defendant in an action of ejectment is in possession as a tenant only and that his landlord is not a party to the cause, the landlord shall be made a party before further proceeding against said tenant, unless otherwise ordered by the court.

(b) **Death of Co-plaintiff.** In case of the death of one or more of several plaintiffs in ejectment, where the right of the decedent does not survive to the remaining plaintiffs, the action may proceed at the suit of the surviving plaintiff for such share of the property as he claims, or the legal representative of the deceased plaintiff may upon the suggestion of the death and the filing of a certified copy of his letters testamentary or of administration be made a party plaintiff upon his own motion, after notice to all parties plaintiff and all defendants not in default.

(c) **Heirs, etc., As Plaintiff.** In every case in which a party plaintiff to a suit in ejectment shall die, pending the suit, the heirs or devisees of his property interest may likewise be made parties plaintiff, after notice to all parties plaintiff and defendants not in default.

(d) **Death of Co-defendant.** In case of the death of one of several defendants in ejectment, a suggestion may be made of the death, and the action may proceed either as against the surviving defendants to judgment and execution, or be revived as against the legal representative and heirs or devisees of the deceased party.

(e) **Heirs, etc., As Defendant.** If the legal representative and heirs or devisees of a deceased co-defendant or sole defendant are proceeded against, such may be by amendment and original process or by order making them

a party and they shall be held to file the next pleading due, if any, after notice as provided by law, or pursuant to the requirements of original process.

(f) **Death of Personal Representative When Party.** In every case in which the personal representative of a decedent may be a party plaintiff to a suit in ejectment, and shall die, his successor in office may be made a party plaintiff in lieu of such deceased personal representative; and in every case in which the personal representative of a decedent may be a party defendant to such a suit, and shall die, his successor in office shall be made a party defendant in lieu of such personal representative.

(g) **Persons in Interest or Possession May Be Made Parties.** If there shall be a person in interest or possession other than the executor or administrator of the deceased plaintiff or defendant, who should be made a party plaintiff or defendant to the suit, he may be made a party after such notice, in such manner, and upon such terms as to pleading as the court may direct.

**Committee Note:** Common Law Rule 45.

(h) **Defense May Be Limited.** Any defendant in an action of ejectment shall be at liberty to limit his defense to a part of the property mentioned in the complaint describing such part with reasonable certainty.

**Committee Note:** Common Law Rule 46.

(i) **Writs of Possession of Execution to Be Joint or Several.** Where the plaintiff recovers in ejectment, he may have one writ of execution, embracing a habere facias possessionem for the possession, and a fieri facias for his damages and costs, or he may, if he so elects, have separate writs, one a writ of habere facias possessionem for the possession, and a separate writ of fieri facias for his damages.

**Committee Note:** Common Law Rule 47.

(j) **Chain of Title.** The plaintiff with his complaint and the defendant with his answer shall file as a part thereof a statement setting forth chronologically the chain of title upon which he will rely at the trial. If any part of the chain of title is recorded, the statement shall set forth the names of the grantors and the grantees, and the book and page of the record thereof; if an unrecorded instrument is relied upon, a copy thereof shall be attached. The court may require the original to be submitted to the opposite party for inspection. If the party relies upon a claim or right without color of title, such statement shall so specify how and when such claim originated and the facts upon which such claim is based. If the defendant and plaintiff claim under a common source the statement need not deraign title prior to such common source.

(k) **Testing Sufficiency.** If either party desire to test the legal sufficiency of any instrument or court proceeding in the chain of title of the opposite party, he shall do so before the trial day by a motion setting up his objec-

tions with a copy of such instrument or court proceedings attached and giving notice of hearing as otherwise provided in these rules. Such motion shall be disposed of prior to the trial. Upon the hearing the court shall make such order as shall be proper. If either party determine that he will be unable to maintain his cause by reason of such order he may so state in the record and final judgment shall thereupon be entered by the court for the opposite party.

**Committee Note:** Common Law Rule 48.

**RULE 2.12. TRAVERSE OF GARNISHEE'S ANSWER — TIME FOR—DEFAULT — SCIRE FACIAS AND FINAL JUDGMENT.**

(a) **Time for Traverse.** When any garnishee answers at the time required by law and the plaintiff is not satisfied with the answer of any such garnishee, he shall within 10 days thereafter file a statement traversing the allegations of the garnishee in such particulars as he desires, whereupon the cause shall proceed as provided by law. Upon failure of the plaintiff to file such traverse such answer shall be taken as true and upon proper disposition of the assets, if any disclosed thereby, the garnishee shall be entitled as of course to an order discharging him from further liability under the writ.

(b) **Default, Scire Facias, Judgment, etc.** Should the garnishee defendant fail to appear or answer as required a judgment by default shall be entered against him, which shall be for the amount of plaintiff's claim together with interest. Upon the entry of such judgment by default a scire facias shall issue against such garnishee returnable within 10 days and in the case of failure sufficiently to answer said scire facias, a final judgment shall be entered against said garnishee provided, however, that no final judgment against a garnishee shall be entered before the entry of, or in excess of the final judgment against the original defendant together with interest and costs.

**Committee Note:** Common Law Rule 49.

**RULE 2.13. EXECUTIONS.**

**When to Issue.** Writs of fieri facias upon judgment shall issue upon the request of the party entitled thereto, his agent or attorneys, provided no execution shall issue on any judgment until the time for filing a motion for new trial has expired, or, if a motion for new trial is filed, until after such motion shall have been disposed of by the court, except that execution may be issued upon special order of the court.

**Committee Note:** Common Law Rule 50.

**RULE 2.14. JUDGMENT AND EXECUTION DOCKET—TO BE KEPT BY CLERK.**

The clerk shall keep a judgment and execution docket. In this docket he shall enter the names of the parties (placing the names of the parties against whom judgments are rendered in alphabetical order), the character of

the action, the date of the judgment, the amount of the judgment, specifying the debt, or damages, and costs, the date of the execution issued and the date upon which it is delivered to the sheriff. Under the head of "remarks" he shall also state the proceedings had and the returns made thereon, and other matters of interest to the parties.

**Committee Note:** Common Law Rule 51.

**RULE 2.15. SCIRE FACIAS — WHEN RETURNABLE.**

All writs of scire facias authorized by law shall be returnable and served as other writs and summons issued on the institution of an action and the same rules in regard to the time and manner of pleading shall apply thereto as in other cases.

**Committee Note:** Common Law Rule 52.

**RULE 2.16. EXTRAORDINARY WRITS, MANDAMUS, CERTIORARI, PROHIBITION QUO WARRANTO, HABEAS CORPUS AND STAY WRITS.**

(1) The provisions of Rule 2.16 shall be applicable to Rules 2.17-2.22, both inclusive.

(2) **When Heard.** All applications for writs of certiorari, prohibition, mandamus, quo warranto, habeas corpus and other writs necessary to the complete exercise of the jurisdiction of the Court as authorized by law shall be made as herein provided.

**Committee Note:** Common Law Rule 54.

**RULE 2.17. CERTIORARI.**

(a) **Petition to be Supported by Transcript or Original Record and Brief.** An application for a writ of certiorari to the Circuit Court shall be by petition filed in the court within 60 days from the date of the proceeding, order, judgment or decree sought to be reviewed. It shall be accompanied by either the original record or a certified transcript of the record of the proceedings the petitioner seeks to have reviewed or so much thereof as is essential. Unless shown by opposing counsel to be necessary, no other record shall be required. The petition shall contain a concise statement of the cause and the reasons relied on for granting the writ, and shall be accompanied by a supporting brief.

(b) **Respondent to be Served with Petition and Transcript.** A copy of the petition, the supporting brief and the transcript, if made, shall be served upon the respondent, or his counsel, at the time notice of application for the writ is filed with the clerk of said court.

(c) **Respondent's Brief—When Filed.** The respondent shall file his brief in opposition to the writ, and serve the petitioner with a copy thereof, within 10 days after he had been served with petitioner's brief.

**Committee Note:** Common Law Rule 55.

**RULE 2.18. PROHIBITION.**

(a) **Petition For.** An application for writ of prohibition in the Circuit Court shall be by

suggestion stating the nature of the proceeding sought to be prohibited. The contents of the suggestion shall be substantially as required by statute.

(b) **Issuance of Rule.** If the suggestion makes a prima facie case, the court may issue a rule directed to the respondents, commanding them to show cause on a return day certain why the writ as prayed for should not be granted.

(c) **Respondents' Return.** On the return day so fixed or sooner if desired, the respondents shall file such appropriate pleadings as they may deem proper.

**Committee Note:** Common Law Rule 56.

#### **RULE 2.19. MANDAMUS.**

(a) **Petition For — Issuance of Alternative Writ or Rule.** Proceedings in mandamus in the Circuit Court shall be instituted by petition setting up as briefly as may be the basis for the relief prayed. If the petition makes a prima facie case, the court may either issue the alternative writ or a rule to show cause returnable to a day certain why an alternative writ should not be granted.

(b) **Respondent's Return—When.** After the alternative writ issues, the respondent shall plead thereto as he may deem proper, on or before the return day.

(c) **Amendments.** When any alternative writ of mandamus shall have been issued, the court shall allow such writ to be amended upon request of the petitioner without amending the petition.

(d) **Issuance of Peremptory Writ.** When any such writ is well founded a peremptory writ may issue without further amendments to the extent that the writ is well founded.

**Committee Note:** Common Law Rule 57.

#### **RULE 2.20. QUO WARRANTO.**

(a) **By Whom Instituted.** Proceedings in quo warranto including informations in the nature of quo warranto may be instituted in the Circuit Court by petition or information in the name of the State by the Attorney General, or by any person claiming title to the office or franchise on the refusal of the Attorney General.

(b) **Governed by Rules on Mandamus.** The

petition shall conform with controlling statutes governing quo warranto. The rule as to pleading and procedure heretofore prescribed with respect to mandamus shall apply to and govern as near as may be the pleadings and procedure in quo warranto.

(c) When any such petition or information is well founded a judgment of ouster may issue without further amendments, to the extent that such petition or information is well founded.

**Committee Note:** Common Law Rule 58.

#### **RULE 2.21. HABEAS CORPUS.**

(a) **Notice to Prosecuting Attorney.** If the validity of any statute, criminal law proceeding, or conviction is attacked by habeas corpus in the Circuit Court, notice of the application for the writ shall be given to the prosecuting attorney of the court wherein the statute under attack is being applied, the criminal law proceeding is being maintained, or the conviction has occurred.

(b) **Respondent's Return.** When the writ is issued the court shall set an early return date, at which time the formal return of the respondent shall be made. In the absence of a motion to quash or a motion for discharge notwithstanding the return, issue shall be deemed joined when the return is filed, and the cause shall be considered as ready for final disposition.

**Committee Note:** Common Law Rule 59.

#### **RULE 2.22. CONSTITUTIONAL STAY WRITS.**

(a) **After Appeal and Notice.** Application for constitutional or other writs necessary to the complete exercise of the jurisdiction of the circuit court may be entertained by said court only after reasonable notice of the application for such writ has been given to the adverse party.

(b) **Final Adjudication on Merits. When.** If it should develop on the application for the writ that the ends of justice will be best served by disposing of the merits of the cause as to which the application is directed, the court may deny the application and proceed accordingly.

**Committee Note:** Taken from Common Law Rule 60.

**SUITS IN EQUITY ONLY****SECTION III.****RULE 3.1. NOMINAL PARTIES.**

Where no account, payment, conveyance, or other direct relief is sought against a party to a suit, not being an infant, the party, upon service of the complaint in chancery upon him, need not answer the complaint, unless the plaintiff specially requires him to do so by the prayer; but he may answer at his option; and if he does not answer he shall be bound by all the proceedings in the cause. If the plaintiff shall require a party to answer, such party shall be entitled to the costs of all the proceedings against him unless the court shall otherwise direct.

**Committee Note:** Equity Rule 11.

**RULE 3.2. JOINT AND SEVERAL DEMANDS.**

In all cases in which the plaintiff has a joint and several demand against several persons, either as principals or as sureties, it shall not be necessary for the plaintiff to bring before the court as parties to a suit concerning such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

**Committee Note:** Equity Rule 16.

**RULE 3.3. TRUSTEES MAY REPRESENT BENEFICIARIES.**

In all suits concerning property which is vested in trustees, where such trustees are competent to sell and give discharges for the proceeds of the sale, or the rents, income or profits of the estate, all, or any of such trustees, shall represent the persons beneficially interested in the estate or the proceeds, or the rents, income or profits, and in such cases it shall not be necessary to make the persons beneficially interested in such property, or rents, income or profits, parties to the suit; but the court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons beneficially interested to be made parties.

**Committee Note:** Equity Rule 12.

**RULE 3.4. INTERVENTIONS.**

Anyone claiming an interest in pending litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

**Committee Note:** Equity Rule 9.

**RULE 3.5. SUIT TO EXECUTE TRUSTS OF WILL: HEIR AS PARTY.**

In suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty

to make the heir at law a party where he desires to have the will established against him.

**Committee Note:** Equity Rule 13.

**RULE 3.6. CLASS SUITS: EFFECT OF.**

When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

**Committee Note:** Equity Rule 14.

**RULE 3.7. JOINDER OF CAUSES OF ACTION.**

The Plaintiff may join in one complaint as many causes of action, cognizable in equity, as he may have against the defendant. But when there is more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appears that any such causes of action cannot be conveniently disposed of together, the court may order separate trials.

**Committee Note:** Equity Rule 31.

**RULE 3.8. WHEN CAUSE DEEMED AT ISSUE.**

If at the expiration of 20 days from the service of the answer no counterclaim has been filed or, if counterclaim has been filed, then at the expiration of 20 days from the service of the reply thereto, the cause shall be deemed at issue. If, however, within such period of 20 days a motion permitted by these rules is served, the cause shall not be deemed at issue until the points of law so presented shall be ruled upon by the court.

**Committee Note:** Equity Rule 39. Period has been enlarged from 10 to 20 days.

**RULE 3.9. DEFAULT: DECREE PRO CONFESSO.**

If the defendant shall fail to serve his answer or other defense to the complaint, within the time prescribed, or within such other time as shall have been fixed by the court, then the plaintiff may at his election take an order to be entered by the clerk or the judge, as of course, but the complaint be taken pro confesso; and thereupon the cause shall proceed ex parte, and the matter or the complaint may be decreed by the court accordingly if the same can be done without an answer and is proper to be decreed.

If the cross-defendant shall fail to serve his reply or other defense to an answer asserting a counterclaim and specially praying relief at the time prescribed, or within such other time as shall have been fixed by the court, a decree pro confesso may be taken and like proceedings had thereon as in case of failure of the defendant to serve defensive pleadings to the complaint.

**Committee Note:** Equity Rule 42.

**RULE 3.10. DECREE PRO CONFESSO TO BE FOLLOWED BY FINAL DECREE—SETTING ASIDE DEFAULT.**

When the complaint in any cause is taken pro confesso, the court may proceed to a decree, and such decree rendered shall be absolute unless the court shall set aside the same or enlarge the time for serving the answer for cause shown upon motion and affidavit of the defendant, made and served within ten days after the entry of the final decree; and no such motion shall be granted, except upon such conditions as to the court may seem equitable and just, and unless the defendant shall serve his answer within such time as the court shall direct, and submit to such other terms as the court shall direct for the purpose of speeding the cause.

**Committee Note:** Equity Rule 43. Time has been reduced from 20 to 10 days.

**RULE 3.11. PROCEEDINGS IN LIEU OF DECREE PRO CONFESSO.**

The plaintiff may have process of attachment against the defendant to compel the answer, instead of causing a decree pro confesso to be entered, if he requires any discovery or answer to enable him to obtain a proper decree; and the defendant shall not when arrested upon such process be discharged therefrom unless upon serving his answer or otherwise complying with such order as the court may direct as to pleading to or fully answering the complaint within a period to be fixed by the court and undertaking to speed the cause.

**Committee Note:** Equity Rule 44.

**RULE 3.12. TRIALS AND EVIDENCE.**

Evidence shall be taken by deposition before or after issue, as provided by law or rules of court for actions at law or suits in chancery, or before an examiner or master to be appointed by the court, or orally before the court. Examiners or masters when appointed shall take the testimony orally, and unless otherwise directed by the court, shall cause the same to be reduced to writing and filed in the cause. When testimony is taken before the court, the testimony shall, upon motion of either party, or upon order of the court, be taken down in writing and filed in the cause. In interlocutory matters the court may accept affidavits.

**Committee Note:** Equity Rule 45.

**RULE 3.13. TIME FOR TAKING TESTIMONY.**

When any chancery cause shall be at issue and shall not have been set for trial before the court, the court of its own motion or upon application of either party after due notice to the opposite party, shall enter an order fixing the time within which the testimony of the parties shall be taken. After the entry of such an order, the court may, upon good cause shown by either party, enlarge the time; and

no testimony taken after such period shall be allowed to be read in evidence at the hearing. In the absence of any order by the court extending or limiting the time otherwise, two months from the time a cause is at issue and no longer shall be allowed for the taking of testimony in any cause, unless the case has been set for trial before the court. The time for taking testimony may be extended by special order of the court in its discretion or by written stipulation of the parties filed in the cause, or by oral stipulation evidenced by the record.

The foregoing limitation of the time for taking testimony shall not apply to a cause proceeding ex parte consequent upon the entry of a decree pro confesso, or to a party against whom a decree pro confesso shall have been entered, but in such cases testimony may be taken any time.

**Committee Note:** Equity Rule 46. No change in rule, but time is really enlarged by 10 days because of change in rule as to when cause is deemed at issue.

**RULE 3.14. MASTERS.**

(a) **General Masters.** Judges of the Circuit Court may appoint in writing from among the members of the bar in such circuit as many general masters in chancery as such judges may find necessary, who shall continue in office until removed by the court. The appointment shall be recorded in the Chancery Order Book of the court. Every person appointed such general master in chancery shall, before he shall proceed to discharge any of the duties of his said office, take the oath required of officers by the Constitution and Laws of this State, and such oath shall be entered at full length in the Chancery Order Book.

(b) **Special Masters.** The court may appoint for any particular service required by it, from among the members of the Bar of Florida special masters in chancery who shall be governed by all the provisions of law and rules of court relating to masters in chancery, general and special, except that they shall not be required to make oath or give bond unless required by the court. In all cases upon a proper showing to the court that such appointment is advisable in the particular case, a person other than a member of the bar may be appointed as special master.

(c) **Reference.** Whenever any reference of any matter is made to a master to examine and report thereon, the party at whose instance or for whose benefit the reference is made shall cause the same to be presented to the master for a hearing with all reasonable dispatch. If he shall omit to do so, the adverse party shall be at liberty forthwith to cause proceedings to be had before the master, at the cost of the party procuring the reference.

(d) **General Powers and Duties.** Every master in chancery, general or special, shall perform, under the direction of the court, all the duties which, according to the practice in

chancery, appertain to the office. He shall have all the powers conferred on masters in chancery by the rules of practice prescribed by the Supreme Court of the United States for chancery courts of the United States not inconsistent with the laws and rules of practice of this State. Process issued by the master shall be directed to all and singular the sheriffs or any constables within the State. Hearings before any master, general or special, examiner or commissioner shall be held within the county in which the action is pending, except that by leave of court or stipulation of the parties affected hearings may be held at any place within or without the State in order to meet the convenience of the witnesses or the parties. All of the grounds of disqualification of a circuit judge shall apply to general and special masters.

(e) **Bond.** The court may require general or special masters in chancery when appointed to dispose of property, real or personal, or when appointed as receivers, or when the same is not otherwise provided by law, to give bond and surety in such manner and with such penalty for the payment over of all moneys which may come into their hands, and for the due performance of their duties, as the court may direct. Such bond shall be made payable to the State of Florida, and shall be for the benefit of all persons affected or aggrieved by any act or malconduct of the person required to give such bond.

(f) **Hearings.** Upon every such reference, it shall be the duty of the master, as soon as he reasonably can after the same is brought before him, to assign a time and place for proceedings in the same, and to give due notice thereof to each of the parties and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or in his discretion, to adjourn the examination and proceedings to a future day, giving notice to the absent party of such adjournment; and it shall be the duty of the master to proceed with all reasonable diligence in every such reference, and with the least practicable delay, and either party shall be at liberty to apply to the court for an order to the master to speed the proceedings and to make his report, and to certify to the court the reason for any delay. The evidence in all examinations shall be taken down in writing by the master or by some other person by his authority in his presence and filed with his report.

(g) **Procedure.** The master shall regulate all the proceedings in every hearing before him, upon every reference; and he shall have full authority to examine the parties in the cause, upon oath, touching all matters contained in the reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto; and also to examine on oath orally all witnesses produced by the parties before him,

or by deposition, or otherwise, and also to direct the mode in which the matters requiring evidence shall be proved before him; and generally to do all other acts, and direct all other inquiries and proceedings in the matters before him, which he may deem necessary and proper to the justice and merits thereof and the rights of the parties.

(h) **Form of Accounts.** All parties accounting before a master shall bring in their respective accounts in form of debtor and creditor; and any of the other parties who shall not be satisfied with the account so brought in shall be at liberty to examine the accounting party orally, or upon interrogatories, or by depositions, as the master shall direct.

(i) **Former Proofs May Be Used.** All affidavits, deposition and documents which have been previously made, read or used in the court upon any proceeding in the cause or matter may be used before the master of the court.

(j) **Claimants Examinable by Master.** The master shall be at liberty to examine any creditor or other person coming in to claim before him either upon written interrogatories, or in both modes, as the nature of the case may appear to him to require. The evidence upon such examination shall be taken down by the master, or by some other person by his order and in his presence, if either party requires it, in order that the same may be used by the court if necessary.

(k) **Master's Report.** In the reports made by the master to the court, no part of any statement of facts, account, charge, affidavit, deposition, examination or answer brought in or used before him shall be stated or recited. But such statement of facts, account, charge, affidavit, deposition, examination, or answer shall be identified, and referred to, so as to inform the court what statement of facts, account, charge, affidavit, deposition, examination or answer were so brought in or used.

(1) **Filing of Master's Report and Notice Thereof—Exceptions—Hearing.**

The master, as soon as his report is ready, shall return the same into the clerk's office, and the day of return shall be noted by the clerk in the progress docket. Immediately upon returning his report, the master shall give written notice of the filing thereof to counsel for the respective parties, and file a copy of such notice together with his certificate as to the service upon each counsel and the manner of such service. The parties shall have ten days from the time of the receipt of such notice within which to file exceptions of said report. The said time may be enlarged by the court for good cause shown upon application of either party and said application may be heard by the court ex parte. If no exceptions are filed within the said period by either party, the court shall take such action on the report as may be appropriate. If exceptions are filed

they shall stand for hearing before the court upon reasonable notice by either party.

**Committee Note:** Taken from Equity Rules 54 through 65.

#### **RULE 3.15. ENFORCEMENT OF FINAL DECREES.**

Final process to execute any decree may be by a writ of execution, or other appropriate process or proceedings if the decree be solely for the payment of money. Executions on decrees for money shall issue and be governed by the law relating to executions on judgments. If the decree be for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, the decree shall, in all cases, prescribe the time within which the act shall be done, of which the defendant shall be bound, without further service, to take notice; and upon affidavit of the plaintiff, filed in the clerk's office, that the same has not been complied with within the prescribed time, the clerk shall issue a writ of attachment against the delinquent party, from which, if attached thereon, he shall not be discharged, unless upon a full compliance with the decree and the payment of all costs, or upon a special order of the court, upon motion and affidavit, enlarging the time for the performance thereof. If the delinquent party cannot be found a writ of sequestration shall issue against his estate, upon the return of non est inventus, to compel obedience to the decree. Where a decree shall be made for a conveyance, release or acquittance of land, or any interest therein, and the party against whom the said decree shall pass shall not comply therewith by the time appointed, then such decree shall be considered and taken in all courts of law and equity to have the same operation and effect as if the conveyance, release or acquittance had been executed conformably to such decree, and this notwithstanding any disability of such parties by infancy, lunacy, coverture or otherwise; and if any other decree, injunction or mandatory order for the specific performance of any act or contract is not complied with, the court or judge, besides, or instead of, proceedings against the disobedient party for a contempt or by sequestration may by order direct that the act required to be done be done, so far as practicable, by some other person appointed by the court or judge, at the cost of the disobedient party, and the act, when so done, shall have like effect as if done by him.

**Committee Note:** Equity Rule 67.

#### **RULE 3.16. REHEARINGS.**

(a) Every petition for rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record shall be verified by the oath of the party, or by some other person having knowledge of the facts. No rehearing shall be granted unless the petition is served

within 10 days after the recording of the decree.

(b) No petition for rehearing shall operate to stay the proceedings unless so ordered by the court. The court, in granting any such stay of proceedings, may fix the terms and conditions of such stay. The court on ex parte application may grant a stay on such petition for a period not exceeding five days but no stay for a longer period shall be granted except on notice previously given to the opposing party.

**Committee Note:** Equity Rules 70 and 71. Time is reduced from 20 to 10 days.

#### **RULE 3.17. WRIT OF ASSISTANCE.**

When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance, to be issued by the clerk only on the order of the court.

**Committee Note:** Equity Rule 69.

#### **RULE 3.18. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.**

Every person, not being a party in any cause, who has obtained an order, or in whose favor an order shall have been made, may enforce obedience to such order by the same process as if he were a party; and every person, not being a party against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such orders as if he were a party.

**Committee Note:** Equity Rule 72.

#### **RULE 3.19. INJUNCTIONS: NOTICE: ALLEGATIONS OF COMPLAINT.**

In all cases of application for injunction, the judge to whom presented, before granting the same, shall be satisfied that sufficient notice of the application has been given to the party sought to be enjoined and of the time and place when the motion is to be made, and no order for such injunction shall be granted without such notice, unless it is manifest to such judge, from the sworn allegations in the complaint or the affidavit of the plaintiff or other competent person, that the injury apprehended will be done if an immediate remedy is not afforded, whereupon he may grant instant an order restraining the party complained of until the hearing or the further order of the court, which restraining order shall have all the force of an injunction until rescinded or modified by the court.

**Committee Note:** Equity Rule 73.

#### **RULE 3.20. RECEIVERS — APPOINTMENT AND REPORT OF.**

The provisions of the foregoing section as to notice shall apply to applications for the appointment of receiver or other extraordinary remedy in equity to the extent they may be applicable. Every receiver shall, within twenty days after his appointment, file in the clerk's office a just and true inventory under oath

of the whole real and personal estate coming under his control or to his possession under his order of appointment. The receiver shall, at the expiration of three months from the date of his appointment and every three months thereafter unless the court otherwise orders, file in the same office an inventory and account under oath of his trust and of any additional property or effects which he has discovered or which shall have come to his hands since his appointment and of the amount remaining in his hands or invested by him, and of the manner in which the same is secured or invested, stating the balance due from or to him at the time of rendering his last account, and his receipts and expenditures since that time, in the form of debtor and creditor. Whenever a receiver shall neglect to file the inventory and account above required, the court shall direct a special order to be entered requiring

the receiver within not more than twenty days after service of a copy of such order upon him personally, or at his place of residence in case of his absence, to file such inventory and account and to pay out of his own funds the expenses of the order and the proceedings thereon, or that an attachment issue against him, directing the clerk with whom the order may have been entered, to cause a copy of the same to be served on the delinquent and to certify his default to the court, if the terms of the order be not complied with. The court may grant leave to put the bond or recognizance of the receiver in suit against the sureties without notice to the sureties of the application for such leave.

**Committee Note:** Adaptation of Equity Rule 74. Grants Court more discretion on time for filing reports.

Adopted March 15, 1954 to become effective  
June 1st, 1954.

**FLORIDA**  
**RULES OF CIVIL PROCEDURE**  
1967 Revision

Effective after Midnight December 31, 1966

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*Analysis*

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Rule	Rule
1.010. Scope and Title of Rules.	1.090. Time. (a) Computation. (b) Enlargement. (c) Unaffected by Expiration of Term. (d) For Motions. (e) Additional Time After Service by Mail.
1.020. Courts and Judges. (a) Court and Judge Synonymous. (b) Presiding Judge. (c) Duties. (d) Local Rules.	1.100. Pleadings and Motions. (a) Pleadings. (b) Motions. (c) Contents. (d) Motion in Lieu of Scire Facias.
1.030. Attorneys. (a) Pleadings to be Signed by Attorney. (b) Party not Represented by Attorney to Sign. (c) Attorney not to be Surety. (d) Stipulations. (e) Substitution of Attorneys.	1.110. General Rules of Pleading. (a) Forms of Pleadings. (b) Claims for Relief. (c) The Answer. (d) Affirmative Defense. (e) Effect of Failure to Deny. (f) Separate Statements. (g) Joinder of Causes of Action; Consistency.
1.040. One Form of Action.	1.120. Pleading Special Matters. (a) Capacity. (b) Fraud, Mistake, Condition of the Mind. (c) Conditions Precedent. (d) Official Document or Act. (e) Judgment or Decree. (f) Time and Place. (g) Special Damages.
1.050. When Action Commenced.	1.130. Attaching Copy of Cause of Action and Exhibits. (a) Instruments Attached. (b) Part for all Purposes.
1.060. Transfers of Actions. (a) Transfers of Courts. (b) Wrong Venue.	1.140. Defenses. (a) When Presented (b) How Presented. (c) Motion for Judgment on the Pleadings. (d) Preliminary Hearings. (e) Motion for More Definite Statement.
1.070. Process. (a) Summons—Issuance. (b) Service—By Whom Made. (c) Same—Numerous Defendants. (d) Same—Proceed Against Those Served. (e) Service by Publication. (f) Copies of Complaint for Defendants. (g) Constructive Service—Notice and Copies of Pleadings. (h) Same—Plaintiff to Furnish Copies. (i) Fees—Service of Pleadings.	
1.080. Service of Pleadings and Papers. (a) Service; When Required. (b) Same; How Made. (c) Same; Numerous Defendants. (d) Filing. (e) Filing With the Court Defined. (f) Certificate of Service.	

cretion, may adjourn the proceedings to a future day, giving notice to the absent party of such adjournment. The master shall proceed with reasonable diligence in every reference and with the least practicable delay. Any party may apply to the court for an order to the master to speed the proceedings and to make his report and to certify to the court the reason for any delay. The evidence in all examinations shall be taken down in writing by the master or by some other person by his authority in his presence and shall be filed with his report.

(g) **Procedure.** The master shall regulate all the proceedings before him. He shall have full authority to examine the parties on oath upon all matters contained in the reference and to require production of all books, papers, writings, vouchers and other documents applicable thereto and to examine on oath orally all witnesses produced by the parties before him or by deposition or otherwise and to direct the manner in which the matters requiring evidence are proved before him and generally to do all other acts and direct all other inquiries and proceedings which he may deem necessary and proper.

(h) **Form of Accounts.** All parties accounting before a master shall bring in their accounts in the form of accounts payable and receivable and any other parties who are not satisfied with the account may examine the accounting party orally or upon interrogatories or by deposition as the master directs.

(i) **Former Proofs May Be Used.** All affidavits, depositions and documents which have been made, read or used previously in the action may be used before the master.

(j) **Claimants Examinable by Master.** The master may examine any creditor or other person claiming before him either on written interrogatories or orally or both.

(k) **Master's Report.** In the reports made by the master no part of any statement of facts, account, charge, affidavit, deposition, examination or answer used before him shall be recited. Such matters shall be identified to inform the court what items were used.

(l) **Filing of Master's Report; Notice; Exceptions; Hearing.** The master shall file his report in the clerk's office and serve copies on the parties. The parties may serve exceptions to the report within ten days from the time it is served on them. If no exceptions are filed within said period, the court shall take appropriate action on the report. If exceptions are filed, they shall be heard on reasonable notice by either party.

**Committee Note:** Taken from Equity Rules 54 through 65.

**Rule 1.500. DEFAULTS AND FINAL JUDGMENTS THEREON**

(a) **By the Clerk.** When a party against whom affirmative relief is sought has failed to file or serve any paper in the action, the party seeking relief may have the clerk enter a de-

fault against the party failing to serve or file such paper.

(b) **By the Court.** When a party against whom affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or any applicable statute or any order of court, the court may enter a default against such party; provided that if such party has filed or served any paper in the action, he shall be served with notice of the application for default.

(c) **Right to Plead.** A party may plead or otherwise defend at any time before default is entered.

(d) **Setting Aside Default.** The court may set aside a default and if a final judgment consequent thereon has been entered, the court may set it aside in accordance with Rule 1.540(b).

(e) **Final Judgment.** Final judgments after default may be entered by the court at any time but no such judgment may be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator or other representative who has appeared therein. If it is necessary to take an account or to determine the amount of damage or to establish the truth of any averment by evidence or to make an investigation of any other matter to enable the court to enter judgment or to effectuate it, the court may receive affidavits, make references or conduct hearings as it deems necessary and proper and shall accord a right of trial by jury to the parties when required by the Constitution or any statute.

**Committee Note:** Adapted from Federal Rule 55.

**Rule 1.510. SUMMARY JUDGMENT**

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, cross-claim or third party claim or to obtain a declaratory judgment may move for a summary judgment in his favor upon all or any part thereof with or without supporting affidavits at any time after the expiration of twenty days from the commencement of the action or after service of a motion for summary judgment by the adverse party.

(b) **For Defending Party.** A party against whom a claim, counterclaim, cross-claim or third party claim is asserted or a declaratory judgment is sought may move for a summary judgment in his favor as to all or any part thereof at any time with or without supporting affidavits.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least twenty days before the time fixed for the hearing. The adverse party may serve opposing affidavits prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. On the trial or final hearing of the action the facts so specified shall be deemed established and the trial or final hearing shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or by further affidavits.

(f) **When Affidavits Are Unavailable.** If it appears from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** If it appears to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**Committee Note:** Consolidation of Common Law Rule 43 and Equity Rule 40, with subsection (h) of Equity Rule 40 dropped.

**Rule 1.520. VIEW**

Upon motion of either party the jury may be taken to view the premises or place in question or any property, matter or thing relating to the controversy between the parties when it appears that view is necessary to a just decision

but the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officer who attends them in taking the view, which expense shall be taxed as costs if the party who advanced it prevails.

**Rule 1.530. MOTIONS FOR NEW TRIALS AND REHEARING; AMENDMENTS OF JUDGMENTS**

(a) **Jury and Non-Jury Actions.** A new trial may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony and enter a new judgment.

(b) **Time for Motion.** A motion for a new trial or for rehearing shall be served not later than ten days after the rendition of verdict or the entry of judgment. A timely motion may be amended to state new grounds in the discretion of the court at any time before the motion is determined.

(c) **Time for Serving Affidavits.** When a motion for a new trial is based on affidavits, they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than ten days after entry of judgment or within the time of ruling on a timely motion for a rehearing or a new trial made by a party, the court of its own initiative may order a rehearing or a new trial for any reason for which it might have granted a rehearing or a new trial on motion of a party.

(e) **When Motion for Unnecessary; Non-Jury Case.** When an action has been tried by the court without a jury, the sufficiency of the evidence to support the judgment may be raised on appeal by an assignment of error whether or not the party raising the question has made any objection thereto in the trial court or made a motion for rehearing, new trial or to alter or amend the judgment.

(f) **Order Granting to Specify Grounds.** All orders granting a new trial shall specify the particular and specific grounds therefor.

(g) **Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than ten days after entry of the judgment except that this rule does not affect the remedies in Rule 1.540(b).

**Committee Note:** See Federal Rules 59 and 52(b).

**Rule 1.540. RELIEF FROM JUDGMENT, DECREES OR ORDERS**

(a) **Clerical Mistakes.** Clerical mistakes in judgments, decrees or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any

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## SHOULD FLORIDA ADOPT THE FEDERAL RULES OF CIVIL PROCEDURE BY RULE OF COURT?

By *GILBERT B. NEWKERK*, University of Miami  
Winner of D. H. Redfearn Award

Many authorities divide the history of adjective law into three periods: (1) the period of the common law when procedure was regulated by the court, (2) the period when the fever of codification seized the legislatures of the various States, and (3) the present period demonstrated by the tendency to return to procedure governed and determined by rule of Court. Civil procedure in Florida does not properly fit in any of these divisions; that is, to the exclusion of any two other divisions. Rather, our procedure represents and exemplifies all three periods. Florida procedure is governed by the common law, subject to such alterations, modifications and additions as the legislature has seen fit to enact, and subject to rules of Court not inconsistent with law. Leaving Florida in this curious state of affairs, let's glance back through the pages of history to the year of the Norman Conquest.

William the Conqueror subdued the Saxons in the year 1066, and by 1071, the feudal system was almost fully installed in England. All power was in the King; there was not the separation of powers that we know today. As the King became overburdened with his executive and judicial functions—the King was the “fountain of justice”—he delegated to members of his “Curia Regis” certain executive and judicial functions. These officials, “Justiciars”, were charged with the duty of collecting the royal revenues, and the duty of hearing matters of a civil nature which the King had been wont to hear. As the justiciars increased in prestige, the pre-Conquest Saxon County Courts decreased in prestige and were soon supplanted by the King's representatives. As complaints became more numerous, and the use of the King's Court became the established practise, regular circuits were established, the justiciar faded from the picture, and by the time of the reign of Henry II, the system of itinerant justices—twelve justices in circuit from the King's Court—was fully established. Thus, Courts were established, and procedure therein defined to a certain degree fully one hundred years prior to the advent of the first real and regular Parliament in 1265.<sup>1</sup> Historically, the rule-making power; the power to define procedure is either executive or judicial. It is not legislative!

Parliament in its fight for dominance, however, did attempt to interfere and force on the Courts procedure concocted in Parliament. Francis Bacon advocated such a course in 1592, but the attempt failed. Yet, all through the years, form and technical niceties of pleading became of increasing importance; at least in the eyes of the Court. Conditions became intolerable and Parliament forced the Court to take action to alleviate the harshness, and to remedy the burdensome technicalities of the common law procedure. This coercion and pressure resulted in the Hilary Rules of 1834. These rules did not truly correct the abuses of the adjective law. Yet, the Hilary Rules marks the transition to the second period in the growth of procedural law. This initial attempt at reform led finally to the Judicature Act of 1873. For the background of this Act, we must return to the United States.

Administration of justice in New York in the 19th century was bogged down in a mire of technicalities. There were many, many forms of action—sixty in all. Delay pervaded the administration. Litigants were honking the horns of impatience and disgust. The Legislature of New York appointed David Dudley Field to head a commission to revamp the civil procedure. In 1848, the Field Code was presented to the Legislature and adopted. The Field Code marks the transition from the period of the

<sup>1</sup> 9 Rocky Mt. Law R. 122; 1 Wash. L. R. 163.

common law to the period of codification in America; that is, the assumption by the Legislatures of the various States of the power to determine procedure in the Courts.<sup>2</sup>

The code reduced the multitude of actions to one—a civil action; abolished the distinction between law and equity, and simplified pleadings. However, the code proved to be a dismal failure. There is a difference of opinion as to whom was at fault—the Legislature or the Courts. The Courts blamed the failure on the Legislature, and the Legislators on the Courts and lawyers. Possibly, both views are correct. Nevertheless, the code took the rigid form of statutory law, and the rules could not be clarified without actual controversy. In 1910, 53.32 per cent of the cases turned on points of practise.<sup>3</sup> Many people, especially lawyers, concluded that the Legislature was not the proper body to pass on the procedure in the Courts. They reasoned that the Legislature could not properly pass on details of practise, that political matters occupied the Legislator's time, and that when the procedure was considered, the result was piecemeal and sometimes inconsistent legislation. Matters came to a head when a Board of Statutory Consolidation was created to recommend revision of practise in the Courts. In 1912, the board reported and said, "The present code system of regulating details of practise by statute has been tried and so lamentably failed and has been condemned in such unmeasured terms that it may be passed by without further comment." Thus, the fate of the Field Code. Despite the failure of the Code, it is a landmark, and it has had tremendous effect both at home and abroad. This Code started the swing to unification and simplification of procedure. The method—by legislation—however, has not really solved the problem. Though the fever of codification swept the country and swept across the ocean and seized reformers in England, the method of accomplishing the reform in England was quite different from the method employed in this country.

Jeremy Bentham did not live to see or witness the passage of the Judicature Act of 1873. This act effectively abolished the distinction between law and equity; it abolished all technical objections; it abolished forms of action, terms of Court, and most important of all, it created a rules committee. The effect of the Field Code is quite evident in the Judicature Act of 1873, but it must be remembered that the substance of the act was not concocted in Parliament. The committee was composed of members of the Bench and Bar, and the act was the result of their deliberations, not the result of deliberations in Parliament. Parliament merely put its stamp of approval on the rules promulgated by the committee, a committee composed of members of the Bench and Bar. Parliament has the right of veto, but the right has not yet, as far as I can determine, been exercised. Technically, the right to promulgate rules of procedure is now a statutory right of the English Courts. But, the Lord High Chancellor said in a report to His Majesty and Parliament, "The powers given by modern statutes are often essential, similar to the powers which were assumed by many organs of the government at an earlier period. One illustration is the right of the Court to make rules of procedure. This authority, which was assumed by the Courts in the eighteenth and earlier centuries, now rests upon a statutory basis and is exercised by a Joint Committee of Judges, Barristers and Solicitors known as the Rules Committee".<sup>5</sup> Thus, the Courts have never, in England, been divested of their power to determine the procedure in those Courts, and this is the essential difference between reform of procedure in England and in the United States. Procedure in England may thus be confined to the first two periods of growth of adjective law, and from a practical standpoint, the method of determining the procedure has never changed.

These highlights from the history of the growth of the adjective law demonstrate that the common law system of procedure was found to be unfit for use under present day conditions both at home and abroad. As a reform in procedure, various States

<sup>2</sup> 1 Wash. L. R. 163.

<sup>3</sup> 10 Ill. L. R. 171; 2 Minn. L. R. 92.

<sup>5</sup> Report of Lord High Chancellor to Parliament, April, 1932.

adopted codes of procedure. While these codes represented an improvement, yet, they could not stand the test of time. Two periods of growth have thus been passed. The period of the common law, and the period of codification. Let us now inspect the latest evidence of the transition to the third period—regulating and defining procedure by rule of court.

In 1934, Congress passed an act giving to the Supreme Court the power to promulgate rules of civil procedure; also, the power to unite law and equity. Mr. Chief Justice Hughes speaking before the American Law Institute said, "It is manifest that the goal we seek is a simplified practise which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decisions on their merits with a minimum of procedural encumbrances. It is true that in certain jurisdictions \* \* \* the simplified forms of unified procedure originally adopted came to be overlaid with procedural monstrosities due to legislative tinkering and elaboration. Such experiences have taught a lesson \* \* \* we shall have the advantage of the simplicity and flexibility made possible by the exercise on the part of the Court of its rule-making power". These words sum up the reason for, and the foundation on which the new rules rest.

The new rules do abolish the distinction between law and equity, and do unify the procedure. Today, there is the single cause of action; rather, single form of action. Technical pleadings were done away with, and the emphasis is on the speedy, inexpensive determination of the case on the merits. The new rules are the result of intensive study, and exemplify the best thought on the proper civil procedure. The wealth of experience of other states and countries was drawn on, and the result should be a great improvement in the disposition of cases. The main feature is the ability of the Court to adapt the rules to meet changing conditions. Flexibility! This does away with the most objectionable feature of the Field Code—rigidity! A commendable innovation in the Federal practise is the adoption of the pre-trial procedure. Rule 16 provides that in any action, the Court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider: (1) the simplification of the issues, (2) the necessity or desirability of amendments to the pleadings, (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, (4) the limitation of the number of expert witnesses, (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury, and (6) such other matters as may aid in the disposition of the action. The Court shall enter an order reciting the action taken at the conference. A pre-trial calendar may be established. Such is the gist of Rule 16 of the Federal Rules of Civil Procedure. For the full text and import of Rule 16, I could refer the reader to an order entered by the Supreme Court of Florida.<sup>6</sup> Yes, the Supreme Court has seen fit to adopt the rule! Could this be prophetic? Can this action signal a more progressive attitude as to the proper function of the adjective law?

Civil procedure in Florida is still governed by the common law, subject to such changes and modifications as the Legislature has seen fit to enact, and subject to rules of Court not inconsistent with law. Florida still clings to the unsound division between law and equity, though the division has been relaxed by statute allowing the interposition of an equitable defense to an action at law.<sup>7</sup> There have been other more minor changes. Conditions precedent may now be alleged generally.<sup>8</sup> But, we retain forms of action, all manner of pleadings, and these coupled with rule days make the procedure in the State of Florida rather a slow-moving, costly affair. Quite frankly, I think our procedure rules the "little fellow" out of Court. I have tremendous faith in the future of

6 In re: Petition of Jacksonville Bar Ass'n for Rule Permitting the Establishment of Pre-Trial Procedure. Rule ordered entered Jan. 12, 1940. Effective Feb. 1, 1940.

7 C. G. L. of 1927, Section 4301.

8 C. G. L. of 1927, Section 4299.

the State of Florida and it is my belief that the Courts should prepare for an increase in population and the consequent increase in litigation. With our present cumbersome machinery—machinery discarded in England, machinery discarded in the majority of States—I cannot see how the Courts can discharge their duty to the public to handle cases swiftly, inexpensively and on the merits. In the interest of the public good, I think the present procedure should be scrapped. In its place I would adopt the Federal Rules of Civil Procedure. A procedure combining the best of both, and embodying the wealth of experience accruing in other jurisdictions. The result would be a single system of procedure for Florida attorneys applicable in both the local State Courts and in the Federal Courts. A consequent increase in justified litigation when the little fellow asserts his rights. From the selfish viewpoint of the attorney, if I may term it selfish, and from the viewpoint of the public interest, the adoption of the new rules would best serve the attorney and the public.

The Supreme Court of Florida has said that it has inherent power to make rules of procedure. The latest evidence of the exercise of the rule-making power is, of course, the adoption of the pre-trial procedure by rule of Court. Yet, the Court has said that the rules so promulgated must not be inconsistent with law; that is, statutory enactment.<sup>9</sup> The pre-trial procedure rule does not seem inconsistent with the law, and evidences the submission of the Court to the Legislature in matters of procedure. Historically, the rule-making power is inherently judicial and is not legislative. Yet, the Legislature does exercise the rule-making power. It would seem that the Court has either acquiesced, submitted or is indifferent to the exercise by the Legislature of the rule-making power. Yet, experience with legislative codes has shown that the Legislature is not the proper body to exercise the power. It is interesting to note that Mr. Wigmore contends that legislative interference is a "usurpation of judicial power" and that all legislative rules are therefore void.<sup>10</sup> Historically, Mr. Wigmore has ample foundation for this conclusion. I can find no provision in the Constitution of Florida conferring the rule-making power on the Legislature. The power must, by implication, remain in the Court, though the Constitution does not confer the power on the Court. That is why the power remains by implication in the Court. However, a statute confers on the Court the power to make rules of procedure.<sup>11</sup> It is difficult to see how a statute could grant or confer power which the Court already inherently possessed. A statute of similar type was under consideration in a Colorado case.

In the case of *Kolkman v. People*, the Supreme Court of Colorado was considering the section which conferred on the Court the power to make rules of procedure not inconsistent with law.<sup>12</sup> The statute is thus similar to the Florida statute. The Colorado Court said, "We wish it to be understood that our right to make rules of procedure is not granted or limited by this section. Aside from any common law right or statutory grant, the power to make rules of procedure is our Constitutional right". Yet, as far as I can determine, the Constitution of Colorado does not expressly confer the rule-making power on the Court. Mr. Wigmore calls the legislators "usurpers" and the Supreme Court of Colorado administers a "verbal spanking" to the Legislature (much to the delight of the Bench and Bar).

I believe the Supreme Court of Florida should exercise its inherent power and adopt the Federal Rules of Civil Procedure. Leaving aside questions of political expediency, I believe the Court should take full responsibility for the proper performance of the functions of the Courts. The Court is under a duty to make such changes necessary to expedite efficiency of administration, and thus aim for the goal of "simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decisions on their merits with a minimum of procedural encumbrances".

9 In re: Petition of Jacksonville Bar Ass'n, 169 So. 574.

10 23 Ill. L. R. 276.

11 C. G. L. of 1927, Section 4692.

12 *Kolkman v. People*, 300 p. 575; Comp. L. Colo., 1921, p. 164, Section 444.

## STATUS OF THE RULES OF CIVIL PROCEDURE

*By JUSTICE GLENN TERRELL of the Supreme Court of Florida*

The Legislature of 1943 enacted Chapter 21995, authorizing the "Supreme Court of Florida to prescribe Rules, Forms of Process, Writs, Pleadings, Motions and the practice and procedure in actions either at law or in equity and in statutory and extraordinary proceedings in the Circuit Courts and in Civil Courts of Record and County Courts of the State of Florida."

Pursuant to this act, the State Bar Association petitioned the Supreme Court to promulgate rules of civil procedure for the government of the circuit courts, civil courts of record and the county courts, patterned after the Federal Rules of Civil Procedure, the gist of the petition being that our system of common law and equity procedure be abandoned and that the Federal Rules of Civil Procedure be modified or adjusted to Florida practice and substituted for it.

On thorough consideration of the Bar Association's petition, the Court, on March 9, 1945, filed its opinion wherein it declined to abandon our system of common law and equity procedure but found that both needed modernizing and amending in order that litigants may "achieve justice by the most direct, simple, speedy and inexpensive means possible." By direction of the Court, the Chief Justice appointed a committee composed of two justices of the Supreme Court, two Circuit Judges and seven practitioners, to draft and integrate such changes and amendments into the common law and equity rules as would accomplish this purpose and submit said amendments to the Court for approval. The committee: Glenn Terrell, Chairman, Elwyn Thomas, Paul D. Barnes, Geo. W. Whitehurst, Giles J. Patterson, Warren L. Jones, O. K. Reaves, J. Tom Gurney, J. N. Daniels, Dan Redfearn, and Selden Waldo. The Bar Association's Standing Committee on Rules: Messrs. Lawrence A. Truett, D. H. Redfearn, W. H. Poe, Neil McMullen, and Allen Grazier, were invited to collaborate with the Court's committee in this work.

The Committee gathered all the available material on Court rule revision and did a great deal of work. The result of this work was published in the December, 1945, Florida Law Journal, under the heading "Volume 1," which was transmitted to the last session of the Legislature, for information, as Chapter 21995 directs. "Volume 2," was also printed in the same Journal, but this volume had merely been submitted to the Committee for consideration, and has not yet been considered and approved by it. It probably should not have been published, as it apparently served no purpose but to confuse the question.

At the 1946 meeting of the Bar Association, April 25 to 27, a resolution was adopted which some construed as calling on the Court to adopt the Federal Rules or nothing. Others construed it as requesting the Court to approve as near an approach to the Federal Rules as possible, and still others gave it a different interpretation from either of these. I was not present and did not hear the discussion. On Friday, June 7, a committee representing the Bar Association appeared before the Court and urged it to approve a single code of rules for both law and equity. This petition was presented informally, was thoroughly argued *ex parte*, but I could not see that anything new was added to what had been presented when the original petition to adopt the Federal Rules was argued. It was to all intents and purposes a rehearing on the original petition.

The purpose of the foregoing statement is to bring each member of the bar up-to-date on this question, and, with what follows, give a complete picture of the situation as I see it. It is a matter that each member of the bar is entitled to be informed about.

In the Court's opinion of March 9, 1945, it was found that good reason was

shown for amendment and modernization of the Rules of Procedure, but the Court unanimously declined to scrap or abandon our system of common law and equity procedure and substitute in its place the Federal Rules of Civil Procedure; the reason for this action being that the Federal Rules of Civil Procedure are geared to a system that is materially different from our state system, that common law and equity are both recognized by the Constitution and that the confusion resulting from the proposed change would more than equate the good that might be accomplished. The primary reason for this article is to discuss more fully the historical and legal differences between the two systems, to show why the Federal system is geared to a system different from the State system, and give the bar a better understanding of what I conceive to be the reason for the Court's conclusion.

The Federal Rules of Civil Procedure were prepared by a committee of the best lawyers in this country and became effective September 16, 1938. They were designed to provide a uniform system of practice in the Federal District Courts for which they have grown in favor, despite the fact that in May, 1944, a proposed draft of amendments consisting of more than 100 pages was submitted by the Advisory Committee for the Supreme Court's approval. Again in May, 1945, a second preliminary draft of proposed amendments was submitted to the Court for approval and in June, 1946, a third proposed draft was prepared and submitted to the Supreme Court for approval. The third proposed draft of amendments reached me in August and is a crystallization of the Advisory Committee's study of the first and second drafts, including the third draft additions. Amendments are proposed to thirty-five of the eighty-six rules originally adopted, some of them material and others not so material.

Prior to the adoption of the Federal Rules of Civil Procedure, there had been no uniform practice in the Federal District Courts. Under what is known to the older lawyers as the Uniformity Act, passed by Congress in the early history of the country, the practice in the Federal Courts was required to conform to the State practice, as a result of which the Federal practice varied in every state as the rules of state practice varied. In my early experience as a law student, I remember reading a very learned thesis by a procedural expert in which he contended that we had fifteen different methods of procedure in the country. I have before me the rules of every state in the Union which has attempted a revision since the Federal Rules of Civil Procedure were adopted, and Arizona and New Mexico are the only states that have attempted a revision with the idea of requiring the State practice to conform to the Federal practice. In their revision, Colorado, Missouri and Texas adopted some provisions from the Federal Rules, but no other state has drawn materially from them.

The reason for this is obvious. Any system of practice must respond to the factors that precipitate litigation. Florida has more of these factors than most of the states. We have been brought up to a system of common law and equity practice that is more than one hundred years old. We recognize certain fundamental distinctions between common law and equity which have been integrated into the statute law and would create confusion for years to attempt to obliterate them by rule of procedure. If we had never known this distinction a different situation would be presented. The Chief Justice of Texas writes me that they had never known but one system in their state and that the lawyers did not know the difference between an action at law and a suit in equity. This is easily explained because their system stemmed from the Spanish and the civil law, while ours stems from the common law. In Florida by statute, Constitution and decisions the law is saturated with the distinction between law and equity.

Historically common law and equity procedure differ in the mode of trying

issues of fact and in the mode of appellate review. Equity procedure derived from the Canon and Roman law and allowed a hearing de novo on appeal. The appellate court not only determined whether error had been committed but it determined what decree should have been entered. In chancery, the appellate court reviewed questions of law and fact. There was a period when issues of fact at common law were tried by the court, on the basis of written evidence under oath, but traditionally the trier of fact was the jury, who had seen the witnesses testify. In the code states attempt has been made to abolish the distinction between common law and equity but even in these it has been retained by constitutional or statutory reference. The distinction was also retained under the English Judicature acts, though the practice was liberalized in other respects. Under the English appellate practice in equity the court could take new evidence. So long as the statute or the Constitution retains jury trial in civil cases and trial by the court in equity cases the distinction between law and equity abides. It is utterly futile to talk about fusing law and equity so long as the law retains a distinction between an action for specific performance and one for damages. Much has been done to encourage waiver of jury trial and there is a tendency in some quarters to adopt a system more in keeping with the English system, which is said to be more flexible than ours, but we are conscious of no signs of an innovation that would obliterate these differences between law and equity.

We cannot lose sight of the fact that the great bulk of the law practice must continue to be done in the state courts. They touch the citizen infinitely more often than do the Federal Courts and they affect his interests in ways that the Federal Courts can never reach. It was easy for Arizona and New Mexico to pattern their practice on the Federal system, because they are new states, sparsely populated, have not had time to develop a well defined system of procedure, both are states of limited resources and other factors that bring about litigation. Neither of them have had time to develop any well defined traditions that settle the course of litigation. The Federal Government is said to be one of delegated or limited power, while the State Government is said to be one of unlimited power. The courts in each instance must be bound by the same limitations.

The Rules of Civil Procedure were the first attempt to adopt a uniform system for the governance of the Federal District Courts. Having been required by the Uniformity Act to follow the State practice no attempt at uniformity was possible and, being so, they had no line of decisions or traditions to guide them. Increase in the business of the Federal Courts and difficulties incident to litigation relating to diversity of citizenship necessitated a system of procedure uniform throughout the country. In drafting such a system it was not difficult to provide for a single form of action and abolish the distinction between law and equity, because the Federal Courts were courts of limited equity litigation. Examine any Federal docket in Florida, remove the O. P. A. injunction suits and see how many equity suits will remain, if demonstrable proof of this is desired. To facilitate this study I addressed a letter to each of the Federal District Judges in Florida, requesting them to furnish me on percentage basis the number of cases filed in their courts that could properly be classified under the head of "Criminal," "Common Law," and "Equity." In the Northern District of Florida the response to this request showed that from July 1, 1941, to June 30, 1946, sixty-two per cent of the cases filed were criminal, twenty-eight per cent were common law and ten per cent were in equity. In the Southern District of Florida, Miami area, the percentages were approximately the same. In the Tampa area, the percentage of equity cases ran higher, due to a larger number of O. P. A. injunction cases over the period furnished. In the Jacksonville area for the period furnished, July, 1945, to

April, 1946, there were 460 criminal cases filed and 561 civil cases, the latter including both common law and equity.

I have before me late copies of the Annual and Quarterly Reports of the "Director of the Administrative Office of the United States Courts." These reports give the number and nature of cases filed in each of the ten U. S. Circuit Courts and the eighty-four U. S. District Courts, condition of the docket, case load, effects of the war on litigation, and much other information about Federal litigation and its trends. This report shows that the docketings throughout the country are generally not materially different from what they are in Florida. Civil docketings, bankruptcy and Admiralty cases vary the figures seasonably in some areas. In some Districts criminal and civil dockets vary. It also shows that the great bulk of Federal litigation derives from "Fraud and Theft," "Liquor Internal Revenue," "Juvenile Delinquency," "Narcotic," "National Motor Vehicle Theft Act," Violations of the Immigration Laws, O. P. A. and Selective Service violations, and other "war offenses." Violations of the "White Slave Act," the "Marine Act," "Motor Carrier Act," "Anti-Trust Violations," "Migratory Bird Act," "Food and Drug Act," and a few others are shown as secondary producers of litigation in the Federal Courts.

This report also shows a decided decline in cases involving violations of the Jones Act, tax suits, suits on negotiable instruments, Fair Labor Standards Act, liquor prosecutions and land condemnation suits, while for the same period it shows a marked increase in O. P. A. cases, Habeas Corpus cases, and violations of the Employer Liability Act. This report also shows a marked decline in cases involving individuals and a decided increase in government cases. More than twenty-two per cent of all civil cases were brought by the Office of Price Administrator. The same seasonal variations are reflected in a study of some phases of litigation in State Courts, but are not so material here.

At the time I requested this information from the Judges of the Federal District Courts, I also requested the Circuit Judges and Clerks of the Circuit Courts in Duval, Dade, Hillsborough, Orange, Alachua, Leon, Jackson and Escambia Counties to give me the similar information from these counties. In Duval County this response for the year 1945 showed that 371 Law Cases, 4491 Chancery cases, and 101 Criminal cases were docketed; Dade County showed: Law cases 300, Chancery cases 7,536, and 60 Criminal cases, same period. For Hillsborough County the docketing showed 210 Law cases, 2864 Chancery cases, and 23 Criminal cases, same period; for Orange County the docketing showed 96 Law cases, 552 Chancery cases, and 8 Criminal cases; for Alachua County the docketings showed 44 Law cases, 548 Chancery cases, and 108 Criminal cases; for Leon County the docketing showed 81 Law cases, 602 Chancery cases, and 76 Criminal cases; for Jackson County the docketings showed 43 Law cases, 324 Chancery cases, and 48 Criminal cases. For Escambia County the docketings show 108 Law cases, 516 Chancery cases, and 4 Criminal cases.

These figures do not reflect the correct results as to Criminal cases except in Alachua, Leon and Jackson counties. The other counties have criminal courts of record which have jurisdiction of all criminal cases below capital ones. The purpose of these figures is to point out one of the main reasons for the Court's judgment that the Federal Rules of Civil Procedure are geared to a system that is materially different from our State System, which is easily revealed by cross analysis of the figures. In the matter of civil procedure the criminal docket is not material because it is disposed of under the criminal code; only the common law and equity cases have to do with the rules of civil procedure. In the State the Criminal Procedure Act governs the disposition of criminal cases and in the Federal Courts the Federal Rules of Criminal Procedure govern the disposition of criminal cases.

A casual glance at the heads shown herein from which the bulk of the litigation in the Federal Courts arises will easily reveal that the major portion of it arises from the violation of criminal acts and the actual figures show that as to Federal litigation in Florida two-thirds of it is criminal and one-third common law and equity. In the circuit courts of the State the situation is reversed, the major portion of the litigation is in common law and equity, the larger portion being in equity. In other words, in the Federal Court in Florida every time you file one case in equity you file two in law and six criminal, while in the State Court every time you file one case in law you file fifteen in equity, and the fraction of one criminal case as to circuit courts.

Analyzed from another point of view, when the O. P. A. cases and other cases arising incident to "war offenses" are removed, equity cases in the Federal Courts will be materially reduced. This was the case when the Federal Rules of Civil Procedure were promulgated, all of which goes to show that they were not much concerned with the equity side of the docket, because Federal equity jurisdiction contemplated such a small per cent of the litigated matters. It follows that when the Federal Rules provided for a single form of action they disturbed no settled procedure and provided a means of dispatch that comprehended at best approximately one-third of the cases arising in the Federal Courts. When conditions revert to normal it is a safe wager that equity suits in some of the Federal District Courts will be as rare as divorce among the clergy.

In the State practice the situation is quite different. The Constitution recognized the distinction between common law and equity from the outset. Hundreds of statutes recognize the distinction. For more than one hundred years procedural precedents and traditions have matured around that concept. Rules of civil procedure in the state courts contemplate disposition of from 85 to 90 per cent of the cases. In the Federal Courts rules of civil procedure govern little more than thirty per cent of the litigated cases. The major portion of the litigation in the State courts arises in equity; in fact the cases disposed of by the Supreme Court for the past ten years have been approximately 65 per cent equity, 20 per cent law, and 15 per cent criminal. Contrast these figures with 62 per cent criminal, 28 per cent law, and 10 per cent equity, as contemplated by the Federal Rules.

What has been said would seem ample to demonstrate the unwisdom of abandoning our system of common law and equity procedure and substituting in its stead the Federal Rules of Civil Procedure, but I think there are other reasons equally as convincing. Rule 81 of the Federal Rules, as proposed to be applied to Florida practice in terms provides: "These rules shall not apply to mandamus, prohibition, quo warranto, habeas corpus and other constitutional writs, nor to certiorari, nor to special statutory proceedings relating to adoption of children, changing the names of persons, removal of disabilities of married women and minors, restoration of lunatics, curatorships, statutory landlord and tenant proceedings, forcible entry, unlawful entry, and unlawful detainer, eminent domain, guardianship and bastardy; but these rules shall apply to appellate procedure in all such proceedings. In probate proceedings, only the rules relating to discovery, witnesses and witness subpoenas, exceptions, pre-trial procedure and appeals shall govern."

"In actions involving attachment, garnishment or replevin, these rules shall apply to the conduct of the main suit, but not to the proceedings of an ancillary nature, which shall be governed as now or hereafter otherwise provided by statute or by decision of the Supreme Court of Florida."

The quoted exempted constitutional and statutory remedies account for a large per cent of the litigation that arises in the circuit courts and the Supreme Court of the State. They are designed to meet conditions arising in the State,

the most of which can have no relation whatever to Federal litigation because of the jurisdiction of the Federal Courts, the very nature of the two systems of litigation and the circumstances that give life to them. These remedies were appropriately exempted from the petition to apply the Federal Rules to state practice, but when this class of litigation is exempted the disparity between the system actually covered by the Federal Rules and the system attempted to be covered would be all the more disconcerting.

In addition to the remedies exempted by Rule 81, from the operation of the proposed substituted procedure, it is pertinent to state that another large volume of litigation arises in the State courts, from divorce cases, alimony and support cases, accounting, will contests and cases arising from different phases of domestic relations, review of the decisions of Administrative Boards, cases involving the application of the State Constitution to municipal ordinances, and acts of the Legislature, homestead exemption cases, bond validation suits, suits for specific performance, ejectment, damage for torts, suits on contracts, administration of estates, and others not essential to recite, the most of which have no place whatever in Federal Jurisdiction. Casual examination of the sources of litigation deriving from the State and Federal entity must disclose that while they are akin in some respects, they are total strangers in many others, and that any system of procedure governing them must in many respects be individual to the remedy or class of remedies applied. As to Florida, the sources from which State and Federal litigation accrue are enough at variance that any attempt to adjust Federal procedure to Florida litigation would be like dressing five year old Jimmie in Daddy's hat, shoes and suit. We could blunder along some way, but it would take us about as long to become adjusted as it would take Jimmie to grow up and feel natural in his Daddy's clothes.

The purpose of abolishing the distinction between law and equity and requiring a single form of action as in the Federal Rules contemplates that both law and equity cases be instituted by a "complaint" or some kind of pleading that would be a cross between a declaration and a bill of complaint. This is the practice in the code states, but I am told that no such practice exists in Florida Federal practice. On the contrary, when a suit in equity is instituted in the Federal Courts it is done by bill in equity, as if brought in the state courts, and as to pleading it is conducted as if it were an equity suit in the State Court. If this is true, the very purpose of the attempted fusion of the two systems is destroyed, but, whether true or false, it is a safe bet that it creates less confusion than it would to leave it to every lawyer to draw the appropriate "complaint" without a form to guide him.

It is significant that none of the older states with a settled practice have adopted the Federal Rules of Civil Procedure. In fact some of the best features in the Federal Rules were adopted from the rules of the states. I do not discount the contention that improvement in our practice is overdue, but I think it the part of wisdom to graft improved features on what we have than to substitute something new that is geared to a different system that is now only eight years old, but is on the way to generate a system of procedural law that rivals the case law of the state, a system that in the short span of its life requires four large volumes to record its interpretations, and the fifth volume is about ready for publication.

The primary reason for any change in procedure is to "enable the litigant to achieve justice by the most direct, simple, speedy, and inexpensive means possible." Anyone who has practiced law knows that it takes more than rules of procedure to do this. It makes no difference how perfect the rule, it will not work perfectly except it be manipulated by a bar that is sensitive to its trusteeship to the public. Any system that permits a rational settlement of

legal controversies and reaches a just judgment will suffice; when it falls short of this it needs doctoring, and when any member of the bar fails to take into account that any system employed must inspire public confidence, his precepts need to be doctored.

The Constitution of Florida in at least four instances recognizes both common law and equity jurisdiction. (Article 5, Sections 5, 11 and 12; Article 11, Section 2). There are literally hundreds of statutes that have to do with one or both. A few years ago the Bar Association spent more than two years drafting the 1931 Chancery Act, which has proven very satisfactory. The two systems are so thoroughly imbedded in our procedural philosophy by the Constitution, the statutes, the decisions of the courts, and tradition that I do not think they can be changed by court rule and, even if they could, the confusion resulting would require years to correct and overcome.

In Georgia and Texas and other code states the law practice in the beginning was predicated on a single form of action called a "civil action," as in the Federal Rules, and appears to be satisfactory. They try divorce and other equity cases before juries. The lawyers do not know the difference between a law action and a suit in equity, but that is not the case here. We recognized the distinction in the beginning and shaped the practice that way. In its last analysis equity did nothing more than add morals and justice to the law. To now say that we are going to have a single system and leave it to the discretion of every lawyer who brings an action to frame the "complaint" or similar pleading to suit the facts presented will require years of experiment to settle the practice, while if we adhere to the practice now said to prevail in the Federal Courts, of filing a declaration in a law action and a bill of complaint in a chancery suit, we have a single system in name only.

I am thoroughly in accord with the idea of keeping the practice up-to-date. Certainly it should be kept flexible enough to meet the demands of new technique and changing conditions. It must at the same time be kept stable and dependable. Change that leaves these factors out of the picture throws the system into confusion. In the work that the committee has attempted it has kept these factors in mind. The committee has expressed no purpose to recommend to the court that it abolish or attempt to abolish the distinction between law and equity. I do not think it can be done under the Constitution, and I would not favor it if it could be. I think we can appropriately abolish rule days, commence the common law action with the filing of the declaration, abolish all dilatory pleas and require pleading days in the same manner as required in the Federal Rules. In their original inception Rule Days were employed for the purpose of settling pleadings and formulating the issues, but that practice no longer exists, so they are now nothing more than a source of delay. They are obsolete, and no rule revision in this country in twenty-five years has included them.

The committee has agreed to recommend these changes to the Court for adoption. It has also agreed to require service of a copy of the declaration with the service of process on defendant and counsel are required to serve copy of each subsequent pleading filed on the opposing party or his counsel. The time for pleading may be required to follow the Federal practice. I think these requirements should run through the chancery practice and when done the common law, equity and Federal practice will conform on these and other essential points. I think these changes should also include a more adequate and flexible rule for transferring from law to equity, and vice versa.

The committee has also agreed to recommend the adoption of a rule providing for appeals from interlocutory judgments in law actions. It has agreed to recommend the adoption from the Federal rules, with minor modifications, of the pre-trial practice procedure, the rule for the consolidation of causes of action

and for summary judgments. A number of other changes of less importance have been recommended, none of which will be finally approved before they are published in the bar journal and the bar given ample opportunity to criticize them.

I do not think changes or additions to the practice should be finally adopted till the bar has a chance to criticize them and offer amendments. My experience has been that valuable improvements often come from such sources. Some of the amendments that the committee has agreed to recommend came from members of the bar. The phrase "members of the bar" is not restricted to those who belong to the Bar Association. The Bar Association is to be commended for the splendid work it has accomplished over the years, but it includes about fifty per cent of the bar membership. Rule revision affects those without the Association as much as it does those within it, and the judgment of both should be taken into account. Any reasonable lawyer with pride in his profession favors such revision and amendment from time to time as will keep the practice current and permit the orderly dispatch of business, but no one likes abrupt changes that serve no useful purpose.

Nine-tenths of the Federal litigation in Florida originates in the counties of Escambia, Jackson, Leon, Duval, Alachua, Orange, Dade and Hillsborough. These are the counties where the information with reference to docketings in the circuit courts referred to early in this article were secured. By volume more than three-fourths of the litigation in the State courts originates in these counties, though the other counties are greater in area, have a large volume of litigation, and so far as any representation here shows are in sympathy with no movement to discard State procedure and substitute Federal procedure in its place. Less than two hundred lawyers in the State are known to handle more than three-fourths of the Federal practice. The most of the 2500 other lawyers devote their energies to State practice, and many of them are only incidentally interested in Federal litigation, but they are vitally interested in the procedure we adopt, and should be taken into account whether they are in the Association or not.

Nothing said here should be construed as in criticism of the Federal Rules. I think they are serving a very useful purpose, and the proposed amendments now pending before the Supreme Court for adoption will strengthen them very much, but they were conceived in the light of factors that actuate Federal litigation rather than in the light of those which actuate State litigation. I think it has been demonstrated that some of these factors are materially different and that some of them which actuate litigation in the State courts are absent in the Federal Courts. The main complaint about State procedure is that it is slow and tedious. I think this assault is well grounded, but to what extent it is true we as a bar are responsible. It may be of the same vintage as Buffalo Bill and the pony express, but, if so, we have not taken the time and pains to keep it modernized. The abandonment of rule days and technical pleadings will remedy this charge. A few other amendments will give it wings and make a 1946 Model of it.

To me these considerations demonstrate conclusively that it is better to improve State practice than to cast it to the discard, take on a new system and spend years improving that. I do not think we would experience any procedural cataclysm to do the latter, but in sound logic I can see no reason for it. No system of procedure was ever brought forth perfect; perfection is attained, if it ever existed, by constant improvement. The very nature of our democracy and the changing circumstances that precipitate litigation require frequent changes in procedural laws to keep it current.

Summarized, the substitution of Federal practice for Florida practice necessitates the fusing of two systems with some materially different aspects. Federal litigation is predominantly criminal, secondarily civil, and slightly equitable, while Florida litigation is predominantly equitable and secondarily civil or criminal. To substitute the Federal system or any single system for what we have in Florida necessitates the fusing of law and equity, which has been the practice in Florida for more than one hundred years. Both are recognized in the Constitution, are dealt with in over four hundred statutes and numerous decisions. Any attempt at a unified system should start with a constitutional amendment, the effect of which would be to obliterate these statutes and decisions and embark on a new procedure. I do not think it can be successfully done by rule of court. I have attempted to point out some of the difficulties that present themselves to me; I do not think they are all illusions. It sounds easy and simple to talk about a single system, but to comprehend it in historical perspective and reduce the practical difficulties that arise to Arcadian simplicity is a different matter.

This conclusion is the product of such thought and research as I am capable of giving the question. I submit it for the consideration of the bar. I am aware that it does not square with the action of the Bar Association, but it is so convincing to me that I am persuaded to wonder to what extent the Association's action was seasoned with deliberation and study before it was taken. The mere fact that our system is old is no reason to discard it. "Thou shalt not steal" is just as current as it was when Moses brought it down from Sinai. Certainly the dominant thought of the bar should control the course of the matter. If the bar wants to scrap what we have and experiment with something that is still in the experimental stage, that is what should control. I am not willing to be a party to it, but I am willing to and feel that it is my duty to retire from the Committee if I am in the minority.



## THE RULES OF CIVIL PROCEDURE

*By GLENN TERRELL, Justice of the Supreme Court of Florida*

This is a supplement to the article published in the November Florida Law Journal under the heading, "Status of the Rules of Civil Procedure." The source material for that article was detailed therein and will not be repeated here but the article will be referred to as the November Article. Since we are to have a referendum on what course rule revision should take I offer these articles in the hope that they may be of aid to the bar in reaching its conclusion.

After I prepared the November Article I addressed a letter to the Chief Justice of each State in the United States, propounding the following question: Has there been any effort on the part of the Bar or the legislature to apply the Federal Rules of Civil Procedure to the law practice in your State or to in any wise conform the State practice to Federal practice and if so, what was the result? I have had responses from all these letters but three. They give some very pertinent additional information which I think the bar should have the advantage of since there is an apparent division among us on that point. That information is the basis of this article.

The states from which this information comes may appropriately be divided into five classes, as follows: (1) Those which have a system of common law and equity practice similar to ours and the course rule revision has taken. (2) Those which have the code practice and effort was made to substitute the Federal practice. (3) Those which have the code practice and no effort has been made to substitute Federal practice. (4) Those which have patterned their practice on the Federal practice. (5) Those from which the Federal practice was in part drawn.

The states of the first class that have a system of common law and equity practice similar to ours, are, Maryland, Illinois, Alabama, Mississippi, Vermont, New Jersey, Virginia, Maine, Michigan, Rhode Island and Pennsylvania. In Vermont, New Jersey and Virginia no effort has been made to substitute the Federal rules in place of present practice. In Mississippi a bill has twice failed to pass the legislature, applying Federal Rules to law actions, but no attempt was made to apply them to equity practice. In all the other states in this category rule revision in whole or part has taken place or is in process, the Federal Rules have been considered but the state practice has not been abandoned for them in a single case. It is quite true that in some of these states one or more of the Federal Rules have been revised and integrated into the state system but after giving the State and Federal system of practice thorough consideration, the bench and bar have without exception turned to the State practice as the safe basis for improving procedure. I quote herewith the pertinent part of the letter from the Chief Justice of one of these states in response to my inquiry. It is all the more pertinent because it is typical of the reaction of our committee after giving both Federal and Florida systems thorough consideration.

"Answering your inquiry of December 5, a movement in this state was begun, some two years ago, to revise our rules of practice so that they would conform to the new Federal rules of civil procedure. Apparently, however, a majority of the lawyers in this state were not persuaded that there was need to import any code of new rules of pleading and practice in such wholesale fashion, because there was

no pronounced weakness in or complaint about our existing rules; nor did there appear to be any corresponding advantage to be gained by such a drastic dislocation.

"The problems and lack of uniformity which confronted the Federal courts were understood but they were not at all applicable to the conditions in this state. Like Florida, we distinguish between law and equity. Our practice is based upon the common law as brought to date by statute in order to suit current needs. Practice and procedure in this state have been found to be simple, prompt, effective and inexpensive. Few cases now turn on matters of procedure.

"The movement in question also considered whether some of the rules might improve our procedure. However, little had been heard of original demands for adoption of new rules, doubtless because it was found that no necessity required them; and that no real advantage was to be gained by scrapping the existing body of adjudicated law and settled practice just to import proposed rules that have not lived up to claims of simplification, if we can rely on countless opinions in all of the Federal courts."

In the State of Alabama one of the Federal District Judges lectured the Bar Association on procedure and did not suggest that more than three of the Federal rules would improve the procedure of that State.

The states of the second class where effort was made to adopt the Federal practice in whole or in part, includes such states as Texas, Iowa, Nebraska, Missouri, Wyoming, Indiana, North Carolina, Kansas, South Dakota, California, Colorado, Michigan, Oregon, and West Virginia. In these states the question of adopting the Federal rules to state practice, or some portion of them, has been thrashed out and in some of them very thoroughly considered. In none of them has the Federal system been approved or adopted bodily. Texas and Missouri drew considerably from the Federal system in their revision. Some of the other states in this category drew slightly from the Federal system, that is to say, they took the pretrial conference rule and one or more other features of the Federal rules and integrated them into the state system.

A letter from the Chief Justice of one of these states in reply to my inquiry summarizes what took place in that state and it is such a logical deduction I cannot refrain from quoting it.

"Replying to your letter of November 1st, I beg to advise that in adopting the rules of procedure for our state we did not attempt to take the Federal rules and apply them to our practice. We took our prevailing rules and selected such of the Federal rules as we thought would be applicable in our State.

"At one time we had quite a clamor from lawyers in a certain section of the State to adopt the Federal rules. However, when we got around to discussing the Federal rules in particular these lawyers found that they were not in favor of adopting the Federal rules. For example, they were not in favor of permitting the court to give an oral charge after the case had been argued, with the right of the judge to comment on the weight of the evidence. As a matter of fact, the local bar associations which had passed resolutions for

the adoption of the Federal rules turned out to be the ones who were strongest against the Federal rules."

In another of these states on recommendation of its judicial Council in 1942, the Supreme Court promulgated a complete revision of the rules of procedure, and the following is the pertinent part of the reply of the Chief Justice in response to my inquiry.

"In preparing our Rules of Civil Procedure, we did not attempt to apply the Federal Rules bodily to our practice, but on the other hand, selected such provisions from the Federal Rules as appeared to be beneficial and integrated them into our practice. One reason for so doing was that the lawyers were apprehensive in some respect regarding the Federal Rules. We endeavored therefore to make our practice by progressive evolution rather than sudden revolutionary measures. Even so, we had considerable opposition to our Rules of Procedure but from the reports I now have, it seems quite evident that they are meeting with general approval and have in many instances improved our practice."

Another Chief Justice in the second category of States, summarizing the experience of his Court wrote me as follows:

"The question has been up a number of times whether to adopt the Federal Rules laid down by the Supreme Court but questions of process and service, discovery and a number of other questions, in addition to those which might arise under our own Civil Practice have impelled us to adopt our own rules. In times past we have substantially adopted some of the rules, but upon application and practice we found it necessary to devise our own to properly follow our own Practice Act."

States of the third class where no appreciable effort has been made to adopt the Federal Practice, includes such states as Wisconsin, Massachusetts, Louisiana, Nevada, Tennessee, Minnesota, Kentucky, Montana, Oklahoma, Utah, Georgia and West Virginia. I include West Virginia in this category because the Chief Justice wrote me that while no attempt had been made to adopt the Federal practice, he did say that they had pretrial procedure in their system. I assume that it was likely a part of their system of practice before the Federal rules were promulgated. The Chief Justice of Oklahoma wrote me that he favored the Federal rules though there had been no movement in that state to adopt them. He did not indicate that he had given the matter serious consideration or that it had been considered by the bar.

In two or three of the states in this category the Chief Justice wrote me that the question of adopting the Federal rules had been raised at some time but that the bar had not thought enough of it to push it. In Utah revision of the rules is now in progress and while some features of the Federal rules may be integrated into the state practice, there is no inclination to take it bodily. In this and in the preceding category of states where rule revision has been considered, bench and bar have invariably reached the conclusion that the state practice was preferable and have used that to revise by. The State of Georgia recently had a complete revision and hardly gave passing notice to the Federal Rules. Georgia has a very strong bar and we have some mighty good lawyers in Florida from Georgia.

The States of the fourth class which have patterned their practice on the Federal rules include the States of Arizona and New Mexico, so I am

advised, but New Mexico is one of the three States from which I have had no response to my inquiry. I am satisfied however, from what I have read in the law publications that New Mexico has used the Federal Rules as a predicate for its revision. The Chief Justice of Arizona sent me copy of their revised rules which I examined. It shows a complete rule revision in 1940, that the Federal Rules were used as a basis for revision but that a good many changes were made and features were added to adjust them to state conditions.

It was not difficult for Arizona and New Mexico to revise their practice by the Federal rules. They are two of the latest states admitted to the Union, they had a code procedure in which common law and equity were blended and were not hampered by a multitude of statutory proceedings and precedents establishing many points of practice. As compared with Florida and many other states, they do not begin to have the factors that precipitate litigation. In the November Article it was pointed out that any system of procedure must respond to the factors that precipitate litigation. I have motored across Arizona and New Mexico from North to South and from East to West, and have talked with their people. They have some mining resources, in the river valleys and in a few irrigated areas they produce splendid fruits, vegetables and other crops, but more than nine tenths of the land area is given over to grazing. I was told by several cattle raisers that not more than 20 to 25 cows or sheep could be grazed on each section of land. This is not to disparage Arizona or New Mexico but to reveal the simplicity of legal procedure required in states like these as compared to Florida and other states where agricultural, social and industrial conditions are much more complex and require a much more complex practice to meet conditions. This situation is further accentuated by the fact that the latest figures I have show that the Supreme Court of Florida decides twelve cases every time the Supreme Court of Arizona and New Mexico decides one, though both of these states are much larger than Florida.

As previously pointed out, Colorado, Mississippi and Texas took a number of features from the Federal rules, in making their revision, but found it inadvisable to take them bodily because of different conditions the state practice must respond to, so they took such as were helpful and after revision and refinement integrated them into the state practice. These differences in State and Federal practice were enlarged on in the November Article and will not be repeated here. It is rather significant that most of the states in all the classes discussed have had partial or complete rule revision since the Federal rules were adopted, and none of them save Arizona and New Mexico saw fit to pattern their revision after the Federal rules though the reasons for doing so were thoroughly mooted. Many of these reasons were pointed out and discussed in the November Article, one of the main ones being the fundamental inadequacy of the Federal rules to meet the conditions that precipitate state practice.

States of the fifth class, or those from whose practice the Federal Rules were in part drawn, include the states of New York and Connecticut. I have copies of the rules of both of these states and have examined them carefully. As to New York, law and equity are not in all respects fused, though we have generally understood that New York was the pioneer code state and that from it all the other state codes of practice were largely drawn. It is a fact that most of the States West of the Mississippi River were being organized about the time the New York Code was adopted and their practice was patterned after it. It is true that some of the features of the Federal rules

were apparently drawn from the New York rules, but New York has made no attempt to conform its practice to the Federal practice. It has a judicial council that devotes much time to precedural study and seems to be the instrumentality through which its rules are kept current. There are many features in the New York rules that have no relation whatever to the Federal rules.

As to the situation in Connecticut, the Chief Justice wrote me as follows:

"Your inquiry concerning the adoption of the Federal Rules of Civil Procedure interested me. As a matter of fact, those rules to a considerable extent have their basis in, and, to some extent, are founded upon our own rules of procedure. Judge Charles E. Clark of the Second Circuit Court who is Chairman of the Committee of Federal Procedure, grew up under our practice, and in a note to the preliminary draft, reference was made to the forms in our Practice Book as illustrating the application of the new Federal Rules.

"Some of us feel that they are in certain respects an improvement upon ours, particularly in the much broader scope of disclosure, but, except for some matters of that kind, the new Federal Rules and our procedure, which was established some sixty years ago, run quite parallel. In 1879 our code of practice was adopted and has remained practically unchanged to this day. With the experience of some of the other states, notably New York, a definite effort was made to seek simplicity and brevity and it was accomplished to a remarkable degree. At that time there was a merger of law and equity and we today have few procedural distinctions between the two.

"As far as our statutes are concerned, the code of practice is found in a relatively few brief sections and, except for special proceedings, our rules also are short and to the point. It is very rare indeed, to have a case in this Court turn upon the matters of procedure.

"Under the very broad power to make rules granted to judges, amendments are not infrequently made. They have accumulated since the last printing of our Practice Book to such an extent that the Rules Committee of the Court in 1944 reprinted them in pamphlet. The edition was, however, so small that copies are not readily available. However, if you would be interested, I will see if I can find a copy to send down to you."

The only reasonable deduction from this letter is that "to a considerable extent" the Federal rules were drawn from the Connecticut rules, and as to "scope of disclosure" and some other respects they are an improvement on the Connecticut rules, but statutory and other features of the Connecticut rules are retained, there had been no attempt at conformity and that the judges are the essential rule making power. The fact that there has been no revision for sixty years would seem to indicate that the judges have kept the practice current.

In this Article I have quoted from only a few letters received from Chief Justices of other States. Others are to like effect and many of them accompanied their letter with the latest revision of their rules which I have examined. I shall be glad to make them available to any member of the bar on request. The net result may be summarized as follows: Many features of the Federal rules were taken from the rules of New York and Connecticut

but both states have many other features in their rules and neither has attempted to conform its procedure to the Federal practice; that Arizona and New Mexico are the only states that have used the Federal practice as a basis to pattern their procedure, but they required other features to respond to the needs of state practice, that in a few states there has been no rule revision since the Federal rules were adopted (Sept. 1938) and no expressed sentiment to conform State to Federal practice, but in most of the states there has been partial or complete revisions since the Federal rules were adopted. In many of these states the matter of following the Federal rules was thoroughly considered, but in every case the effort was abandoned and revision was predicated on the state practice. In a number of states one or more features of the Federal practice were integrated into the state practice and have proven helpful.

In the November Article some fundamental differences between the State and Federal practice were pointed out and reference to them will reveal conclusively why one will reach the conclusion that the state can more profitably travel its own way in matters pertaining to procedure. In fact, local conditions will sometimes dictate procedural requirements in one locality not needed in another. It was also pointed out that there was pending before the Advisory Committee proposals to amend 35 of the 86 Federal Rules. The Committee made its report to the Supreme Court August 23, 1944, recommending many of these changes, some of which were for the purpose of clarifying ambiguities and misprisions, while others made material changes in the substance of the rules, particularly with reference to broadening the scope of discovery and shortening the time for taking appeals. The Supreme Court on Dec. 27, 1946, adopted the amendments recommended by the Advisory Committee and transmitted them to the Attorney General. They are effective after the adjournment of the present session of Congress or on September 1, 1947, if Congress adjourns prior to that date.

The November Article also called attention to the volume of case law that has accumulated from interpretations of the Federal Rules. I recently received a letter from the publisher (Callaghan Co.) advising that there were now nine of these volumes and that they could be secured for ninety dollars. If we should decide to pattern state practice on the Federal rules, it would then be necessary for every lawyer to subscribe for this service. We would then be expected to follow the decisions of the Federal Courts when it came to rule interpretation. The Federal Courts necessarily follow the principles controlling Federal law and practice and they are in many respects different from ours. As an example see *Reid vs. Nelson*, 154 Fed. (2) 724, decided April 10, 1946, and *Sanders vs. Leech*, 158 Fed. (2) 486, decided Dec. 2, 1946. These cases both hold that a Federal appellate court cannot disturb the verdict of a jury on the ground that it is excessive, but they say the case must be remanded for a new trial. This is directly contrary to Florida practice. This is merely one case in which the substitution of the Federal rules would throw the legal machinery out of gear. Since we have about 400 statutes affecting procedure many others would arise. I think State Courts are better qualified to cast procedural patterns than the Federal District Courts from the four corners of the compass.

Practice and pleading have a very definite place in procedural law. Some one has pointed out that the purpose of pleading is to clarify the issues, to inform the Court of the nature of the case and to suggest the material facts from which the applicable law is drawn. These elements being settled the admissible evidence and the determinable law becomes obvious. Any rule

for the simplification of pleading must bear these consideration in mind. I think there is still an art in good pleading and it requires skill if the rights and duties of litigants are to be predicated on it. The main purpose of revision then is not to make it possible for incompetents, morons, psycopaths and nincompoops to practice law, but to remove snags and snarls that make for delay and sometimes defeat the administration of justice. This is simplification as I understand it.

So if precedent or the experience of others is any guide there certainly is nothing in either to support the theory that our State practice be scrapped and the Federal rules substituted. The facts are that all our practice needs is a few new spark plugs, some nuts tightened, a good tuning, a thorough lubrication, a new coat of paint and a bar sensitive to the idea that in a democracy like ours the law practice is the business of the public and must be conducted so as to inspire public confidence. Rules are of course important but they do not matter near so much as a bar fired with responsibility to dispatch legal business in a way to meet public approval at the same time with fidelity to client.

The overall picture might be more succinctly stated this way: Since the Federal Rules were promulgated, at least 30 states have made complete or partial revisions or are now in the process of revising or have considered revising their practice. In Arizona and New Mexico revision was patterned on the Federal Rules. In twenty-eight states the Federal Rules were considered and rejected as a pattern for revision, though some provisions of these rules were integrated into the State practice. In a few states revision has not been considered, while in a few others, revision has been considered but no positive step taken. With ninety dollars worth of law books interpreting the Federal Rules now on the market and more coming and approximately half the Federal Rules recently amended, one would hardly contend that they had attained simplicity or were even out of the experimental stage.

If we are to have rule revision I think we should follow the example of the twenty-eight states. I am still of the view however, as stated in the November Article, that if the majority of the bar wants revision by the Federal Rules they are entitled to have it. I think we can eventually recover from the dislocation, the uncertainty and the mystery it will cause, but I do not think it worth the price. It would be directly in the teeth of the decided weight of present trends and should be initiated by constitutional amendment. Certainly there should be reconciliation in the conflicting views of the bar before any system is promulgated.

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## From Common Law Rules to Rules of Court

Laurance M. Hyde  
*Missouri Supreme Court*

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## FROM COMMON LAW RULES TO RULES OF COURT

LAURANCE M. HYDE†

After almost a century of practice and procedure fixed by statutory codes, this country is about to witness an experiment of nation-wide scope in regulation of these matters by court made rules. The Supreme Court of the United States has assumed responsibility, upon request and authorization of Congress,<sup>1</sup> for making rules of practice and procedure in civil cases for all federal courts. The committee, appointed by the court to prepare these rules, presented its preliminary draft for discussion at the 1936 session of the American Bar Association.<sup>2</sup> This great undertaking makes it worthwhile to consider how these matters came to be so minutely regulated by legislative codes; and what attempts have been heretofore made to regulate them by court made rules.

Our practice and procedure, as well as our substantive law, came to us as a part of the common law of England. It seems to be the popular impression that common law procedure was judge made procedure. It was, in fact, neither a set of rules made by courts nor a code adopted by a legislative body. Instead, it was a conglomeration of legislative enactments, rules and orders of courts, ancient usages, and judicial decisions; the haphazard growth of six centuries. Because it was a patchwork which had been patched until it could not be made suitable for modern conditions by more patching, it was finally superseded, about the middle of the last century in most American jurisdictions, by statutory codes fundamentally changing the whole system. Because the legislatures in this country, which enacted these new codes, retained the exclusive right to make any changes therein, our codes have remained to this time substantially the same as then enacted. In England, although agitation for law reform had been going on since the beginning of the century, the same fundamental changes did not come until about twenty-

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† Commissioner, Supreme Court of Missouri.

1. 48 Stat. 1064, 28 U. S. C. A. secs. 723 b and c (1934).

2. See 22 A. B. A. Journal 730 (1936).

five years after the first procedural codes had been adopted here. A statutory code of procedure was finally adopted there, as part of the Judicature Acts of 1873 and 1875<sup>3</sup> but these acts gave to the Supreme Court of Judicature the power to change this code, and the result is that the original codes have been greatly changed and improved.<sup>4</sup>

It is now being urged that our courts may change our procedural codes without legislative authority. Whether this is true or not, consideration of the English governmental system makes it immediately apparent why an act of Parliament was necessary before English courts could have power to change statutory rules of practice and procedure. Under our state and federal Constitutions providing for separation of governmental functions into three coordinate branches, whether the judicial department has this power, without the consent of the legislative department, is at least a different question. Following the precedent of the English Parliament, American legislatures have always exercised authority to make or change procedural rules, and it is not the purpose of this article to discuss its constitutional basis.<sup>5</sup> The history of English procedure does, nevertheless, give us some light both upon inherent powers of courts in this field and the advisability of having them assume this responsibility.<sup>6</sup>

## I

The governmental theory of the early Norman kings of England was very simple. "The will of the Prince was the law of the land."<sup>7</sup> Prior to Magna Charta, all governmental powers, executive, legislative, and judicial, could be directly exercised by the King. He was the final court of justice and, of course, his power to prescribe rules of practice and procedure in his courts was unquestioned. He appointed justices to act in his name because it was too great a burden for him to hear all cases. Magna Charta was partly due to dissatisfaction with the way King John conducted his courts, and it contained several provi-

3. 36 & 37 Vict. chap. 66 (1873); 38 & 39 Vict. chap. 77 (1875).

4. Higgins, *English Courts and Procedure* (1923) 7 *Amer. Judicature Soc. Journal* 185.

5. For a recent discussion see 1 *U. of Mo. L. Rev.* 261 (1936).

6. For a recent discussion see Tyler, *Origin of the Rule Making Power* (1936) 22 *A. B. A. Journal* 772.

7. 3 Green, *History of England* (1900) chap. 1.

sions concerning that subject.<sup>8</sup> Magna Charta limited the King's powers by bringing another body into the picture; a council, which the King agreed should be asked to give its consent to certain measures (the principal one mentioned was taxation) before they could become effective. This was the origin of that historic legislative body, the Parliament of England. Magna Charta did not grant the King's legislative power to Parliament (as does section 1, article I, of the Constitution of the United States); but the King only agreed not to exercise certain of his legislative powers without its consent. The distinction between governmental powers was probably not even thought of at the time of Magna Charta. However, through intervening centuries "the King in Parliament was established by the English common law as the English Legislature."<sup>9</sup> That is still the theory, if not the actual practice, of the exercise of legislative power in England.<sup>10</sup> Parliament is now perhaps more like a continuous constitutional convention than it is like our legislatures. Parliament also gained the right to require that the King obtain its consent, or the consent of its representatives (which it came to appoint as the King's advisors), in the exercise of his executive and judicial powers, so that finally all government powers were, in fact, exercised only with the advice and consent of Parliament. One House of Parliament still is the court of last resort to settle all questions of law, so naturally the courts get their authority from this source.

Perhaps the worst of the complications of the common law system were the numerous forms of actions. These originated from the ancient requirement of obtaining an original writ out of Chancery stating the nature of the plaintiff's claim, before any suit could be commenced. Blackstone says this was deemed

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8. Section 17 provided that common pleas should not follow the king but could be held at a certain place so that people would know where to find the court (pursuant to this provision it was established at Westminster); sections 18 and 19 required regular holding of Assizes in every county four times a year and provided that the session should not end until the business was disposed of; and section 40 contained the famous provisions which prohibited selling, denying, or delaying justice to any man.

9. Dixon, *The Law and the Constitution* (1935) 51 *Law Quarterly Rev.* 590.

10. Acts of Parliament still recite: "*Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by authority of the same.*"

necessary since "it was a maxim introduced by the Normans, that there should be no proceeding in common pleas before the King's justices without his original writ; because they held it unfit that those justices, being only the substitutes of the Crown, should take cognizance of anything but what was thus expressly referred to their judgment."<sup>11</sup> Therefore, plaintiff's declaration had to be based upon the statement in the original writ. Westminster II<sup>12</sup> made provision for framing new writs to provide for new situations, and the number of forms of action continued to grow. It is said that the early judges were not interested in preventing the increase of forms because in those days they were paid fees according to the number of suits, and by technical construction preventing joinder of similar or related claims into one action they increased their compensation. This demonstrates the necessity of intelligent and faithful administration to make any system work.

In spite of the constantly increasing influence of Parliament, the King's power to appoint judges and remove them at his pleasure lasted until after the overthrow of James II in 1688. During that period, we might have expected to find the courts making all procedural rules. While many such rules were established by court orders and decisions, it is really surprising to find how much of common law procedure was statutory and how early Parliament did enter this field. Chronological Tables of Statutes, Rules and Orders, and cases, which made up common law procedure,<sup>13</sup> show that very soon after Magna Charta, Parliament began to provide rules of practice and procedure by statute. It was soon established that no rule or custom of procedure could prevail against a specific Act of Parliament. "After 1688, no claim was made that any rules of the common law were too fundamental to admit of change."<sup>14</sup> Some procedural statutes were even passed during the reign of King John's successor (his son Henry III); and during the reign of his grandson Edward I, Parliament enacted important procedural statutes, which have remained basic rules of procedure even in America down to our day. Westminster II,<sup>15</sup> among other things, provided for

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11. 3 Blackstone's, *Commentaries* (1872) 274.

12. 13 Edw. 1 (1285).

13. See Tidd's *Practice*.

14. *Supra*, note 9, at p. 593.

15. 13 Edw. 1 (1285).

bills of exceptions as a means to bring matters, not shown by the record proper, before an appellate court, thus making it possible for the first time to obtain appellate review of errors occurring in the course of a trial. Although with modern methods of court reporting, this ancient method is an unnecessarily cumbersome way to make up a record bringing up the trial court's rulings for appellate review, it is interesting to note that Missouri still uses this method of 1279 as the only way to complete the record for appeal.<sup>16</sup> Section 1008, R. S. Mo. 1929, is strikingly similar in language to that passed more than six centuries ago when Edward I ruled England.<sup>17</sup>

The technical rules of bills of exceptions have many times resulted in failure to obtain appellate consideration of important matters on their merits. Especially was this true before 1911 when the present section 1009, R. S. 1929, was amended to permit the allowance of bills of exceptions in vacation at any time prior to the time required by appellate court rules for service of abstracts.<sup>18</sup> When this amendment was made the Legislature declared an emergency to exist due to the fact "that many judgments are affirmed from time to time because the bill of exceptions in the actions in which such judgments are rendered are not filed within the time allowed by the trial court and are not considered upon the merits." It would seem that this emergency might have justified the more drastic remedy of abolishing bills of exceptions. They had, long prior to that time, been abolished in England by the Judicature Act, and the simpler method employed there of appeal by merely giving notice and filing in the appellate court copies of pleadings, documents and evidence. Order 58,<sup>19</sup> provides: "Evidence taken in the court below (orally) \* \* \* shall, subject to any special order, be brought before the Court of Appeal \* \* \* by the production of the judge's notes, or such other materials as the court may deem expedient." Writs

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16. *Spotts v. Spotts*, 331 Mo. 917, 55 S. W. (2d) 977 (1932).

17. 13 Edw. 1: "If the party write the exceptions, and pray that the justices may put their seals to it for a testimony, the justices shall put their seals etc." 2 Tidd's, *Practice* 852. R. S. Mo. 1929 sec. 1008: "Whenever either party shall write his exception and pray the court to allow and sign the same, the person composing the court shall, if such bill be true, sign the same"; as first enacted almost the identical language of the Statute of Westminster II was used, see Vol. 2, R. S. Mo. 1825, p. 631.

18. *Law of Mo.* 1911, p. 139.

19. *Statutory Rules and Orders*, Rev. vol. 7.

of error, the only common law method of obtaining appellate review, were likewise abolished in England in 1873. This is another even more ancient relic, still authorized by the laws of Missouri, which has now little but historical reasons for continued existence. Nevertheless, our status continue to carry an elaborate code of rules for the use of writs of error.<sup>20</sup> Surely a party should be able to decide whether he desires to appeal, within a month after final judgment is rendered, but, under our practice (because of the right to commence further proceedings by writ of error), actual finality of all judgments is delayed for a year, even though no appeal is ever taken.

The vitality of old methods to continue existence, and their resistance to change by legislation is remarkable. Procedural rules come to be looked upon as vested rights for purposes of delay and strategy, instead of means for facilitating the dispatch of business. The personnel of a legislature changes with every session; time is short and there are many problems before them which seem to require more immediate consideration; so it is not difficult to postpone action on such matters as procedure. We should, therefore, be able to understand to some extent why the struggle for law reform, in England, began earlier and took longer than it did in this country. No doubt because England became a great commercial and industrial nation before we did, the inconvenience of delay due to inadequate procedure was noticed sooner, but forces in opposition were well organized and had been long entrenched.<sup>21</sup> We started with a new system of courts in a new country and they were not immediately congested.

Our own state was the second in America to adopt a legislative code of procedure. Some idea of the inconvenience and delay resulting from the adherence to common law forms of actions, both in England and America, may be gained from a statement made in 1848 by Judge R. W. Wells in his successful effort to urge the Missouri Legislature to adopt the New York code. It was, as follows:

“The old system of actions at law abounds in contradictions and absurdities. Thus you have a promissory note; it

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20. R. S. Mo. 1929, secs. 1034-1053.

21. See Sunderland, *English Struggle for Law Reform* (1926) 39 *Harv. Law Rev.* 725.

has something like a scroll, by way of seal. You sue in *assumpsit*, and allege what is always required to be alleged in *assumpsit*, that the defendant *promised* to pay you the amount of the note. Now every word of your declaration may be *true* and present an undeniable cause of action; yet the court will tell you this flourish near the signature is a scroll by way of seal. You cannot sue in *assumpsit*; it must be *debt*. You should not have said that the defendant *promised* to pay you, which to be sure is the exact truth, but that he was *indebted* to you. \* \* \* Let me amend my declarations and put it right. O no! the system will not permit it; you must go out of court, pay all the costs and begin anew. In many actions, if you tell nothing but the truth, you cannot recover, although you have an undoubted cause of action. You must tell a falsehood or your declaration will be bad! Thus, in *assumpsit*, you must state a *promise* to pay, although there was none: In *Trover*, that you lost the property, and it came to the possession of the defendant by *finding*, none of which is true. In *trespass*, that the injury was committed with *force and arms*; although there was nothing of the kind used. In these cases, the truth would not answer at all. \* \* \* Then come the distinctions between law and equity. If you mistake here, either as plaintiff or defendant, nothing can save you. If you are sued at law, and have an equitable defence, you must let judgment go against you and pay all the costs, and then bring a suit in Chancery. \* \* \* Almost every suit of any importance has to go through both law and equity."<sup>22</sup>

Whatever may be said about our code it is far better than the common law system. Perhaps the earliest legislative attempts to allow the merits to prevail over the technicalities of common law procedure were the Statutes of Jeofails. By one of the first of such statutes (18 Eliz.), the want of an original writ was aided after verdict. By 21 Jac. I, a reversal was not required for variance in form only between original writ and declaration.<sup>23</sup> Early in the nineteenth century, the efforts of Bentham, Brougham, Dickens and many others gradually produced results in England. The pressure for improvement came from the public rather than from the bar.<sup>23a</sup> The first attempt brought about the Hillary Rules of 1834 providing for simplification of pleading.

22. Wells, *Law Reforms, Pleadings and Practice*, 90-91.

23. For a History of these and later statutes see 2 Tidd's *Practice* 823; as to recognition of right to amend see 1 Tidd's, *Practice* 697.

23a. *Supra*, note 21.

These rules were made by the judges of the Superior Courts and laid before Parliament, but, after receiving its sanction, they were considered statutory.<sup>24</sup> Further progress was made by the common law procedure acts of 1852 and 1860.<sup>25</sup> But a real remedy was not found until the Judicature Act of 1873 consolidated Chancery, Queen's Bench, Common Pleas, Exchequer, Admiralty, Probate, Divorce, Bankruptcy and other courts into the Supreme Court of Judicature with both trial and appellate divisions. This act also adopted a code of procedure which like our American codes abolished forms of actions and the distinctions between actions at law and suits in equity. But this code of procedure instead of regulating every detail of procedure left much to be filled in by court rules. More important still, it provided that the rules of practice enacted could be "annulled or altered" by the new court. Limitations on making rules by the court were that "any rule made in the exercise of this power, whether for altering or annulling any then existing rule, or for any other purpose shall be laid before both Houses of Parliament"; that either House by majority vote within 40 days could have any rule annulled; and that no rule should change the mode of oral examination of witnesses, rules of evidence or the laws concerning juries.<sup>26</sup> The court was likewise authorized to make rules for "practice and procedure in all criminal causes."<sup>27</sup>

In 1875 the Judicature Act was amended and a new and much more comprehensive code of procedural rules, with model forms for pleadings, was adopted. It was, however, clearly stated that these rules and all others whether made before or after the act might "be annulled or altered" by the court, but concurrences of the Lord Chancellor, Chief Justice, other designated presiding judges of divisions, and Justices of Appeal were required rather than only a majority of the judges, as provided by the 1873 Act. It was evidently soon found that it was not satisfactory to place the function of rule making entirely upon judges. Rules are now made by a Rules Committee composed of the Lord Chancellor, Chief Justice, Master of the Rolls, President of the Probate Division (which also has jurisdiction of Divorce and Admiralty)

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24. 1 Tidd's, *Practice* 675, note 1.

25. 2 *Blackstone* (Cooley's ed. 1872) 1194-5 note.

26. Secs. 68-74 Judicature Act.

27. Sec. 71, Judicature Act.

four other judges of the Supreme Court, two practicing barristers who are members of the Bar Council, and two practicing solicitors. The last eight are appointed by the Lord Chancellor, who with four other members may make rules. Rules must still be laid before Parliament and may be annulled as provided in the original act.<sup>28</sup> It is said that no rule has ever been so annulled.

The first complete code promulgated as Rules of Court was completed in 1883. They have been amended and added to by subsequent sets of rules, but many of them are still in force as then written. The Consolidation Act of 1925 (15 and 16 Geo. V) brought all legislation since 1873 into one act with such changes as were deemed necessary. The Criminal Justice Act of 1925<sup>29</sup> provided similar improvements in the organization and functions of the criminal courts. It is significant that not only was the rule making power, both for civil and criminal cases, continued in the Rules Committee, as above composed, but provision was also made for a council of judges to meet and report annually "on what amendments and additions they think expedient for the better administration of justice." This council is charged "to consider the operation of the Supreme Court of Judicature Consolidation Act, 1925, and the rules of court and the working of the offices of the Supreme Court, and to inquire into any defects which may appear to exist in the procedure of or administration of law in the High Court or the Court of Appeal, or in any inferior court."<sup>30</sup> Thus England not only has provided means for promptly making needed changes in procedure but has now required also regular and frequent investigation to determine such need. Who should be better qualified to perform these functions than lawyers and judges who work by these rules all the time?

It must not be assumed that the method of regulating practice by rules of court was immediately satisfactory to everyone in England, or that all evils were cured at once. It takes time and lessons from experience to make any system work well. The reason that this method will work well is not that courts make no mistakes in regulating procedure by rules but that they have the means of knowing when they have done so, by daily contact with

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28. Supreme Court of Judicature Consolidation Act of 1925 (15 & 16 Geo. V); 8 Halsbury's, *Laws of England* (2nd ed. 1933) 595.

29. 15 & 16 Geo. V. c. 86.

30. 8 Halsbury's, *Laws of England* (2nd ed. 1933) 594.

the working of the rules, and they have the power to correct mistakes, as soon as they are observed, by changing rules. After the new system was established, many felt as did one English lawyer, who said: "The only thing I ever knew was special pleading, and the moment I had learned that, the law reformers went and abolished it."<sup>31</sup> In an English work on evidence in 1884, Taylor, a former English Judge, said: "The fusion of law and equity, which was to overthrow such a phalanx of abuses, and to frustrate so many knavish tricks, has resulted not only in confusion, but, to use the vigorous language of our blind bard, in 'confusion worse confounded'."<sup>32</sup> Cooley even quotes Sir Frederick Pollock, the great English law writer, as saying in the early nineties "that for several years (after fusion of law and equity) the latter state of the suitor was worse than the former"; and that "repeated revision of the rules of court and some fresh legislation was needed before the reconstructed machine would work smoothly."<sup>33</sup> The thing that should not be overlooked is that when these conditions developed there was the means at hand to do something about it, *and it was done*.

How well this was done can be better judged now, after sixty years' trial, than was possible in the nineties when it had been in operation for only one-third of that time. Certainly it can now be said that much has been done to eliminate delay and to save judicial time, from construction of procedural technicalities, for the consideration of the merits of cases. It is not possible, without making this discussion too long, to go into the details of the code now in operation there, but the following outstanding features, which show how this is done, might well be mentioned.

First: Trial judges are not required to waste court time for attacks on pleadings, default judgments, or for proof of formal matters, and other details that tend to delay and prolong trials. This is accomplished by proceedings before masters who dispose of cases in which no trial is necessary and narrow the issues to be heard in cases which must go to trial. Some of the methods employed are:

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31. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 17.

32. 2 *Blackstone* (Cooley's ed. 1872) 1196 n.

33. For a failure of judges to agree upon what some of the early rules meant, which was at first not unusual, see *Haunay v. Smwithwaite*, 69 L. T. N. S. 677 (1893).

(a) *Simplification of Pleadings.* While pleadings must state sufficient ultimate facts to make a case, or a defense, simple forms are provided to eliminate unnecessary details, and prolixity or other violation of the rules may be penalized by assessment of costs. General denials are not permitted and a party "must deal specifically with each allegation of fact of which he does not admit the truth."<sup>34</sup> Demurrers are not allowed, but a case may, by leave, be set down for trial on the pleadings.<sup>35</sup> These rules of pleading are very effective in eliminating dilatory pleas or concealment of real issues, and tend to materially reduce the disputed issues to be tried. Rules authorizing imposition of costs upon a party who either asserts or denies a fact without any reasonable basis therefor, go far to prevent smoke screens of false issues for strategic purposes.

(b) *Disclosure and Discovery.* Orders specifying the disclosures required are made by a master, after a conference with counsel on what is known as Summons for Directions. These include admission of facts, formally in issue, but not actually disputed (unreasonable refusal to admit them will be penalized by assessment of costs of proof); production of documents for inspection; information as to documents not in the possession of the parties; and examination of witnesses as to material facts (similar to our Missouri deposition practice).<sup>36</sup> As to the results of these preliminary preparations for trial, Professor Sunderland of Michigan University, after a study of English procedure, said: "With the facts on each side mutually understood by both parties when the trial opens, leading questions no longer become objectionable on many features of the case and the witness is brought at once to the point in controversy \* \* \* the necessity for cross examination is greatly reduced, \* \* \* formal admissions of facts, and answers to interrogatories, eliminate many features of the case which with us would call for extensive proof, \* \* \* there is no occasion for that elaborate maneuvering for advantage, that vigilant and tireless eagerness to insist on every objection, \* \* \* which not only prolongs and complicates the

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34. Higgins, *English Courts and Procedure* (1923) 7 *Amer. Judicature Soc. Journal* 185 at 209-217.

35. *Practice and Procedure* (1935) 51 *Law Quarterly Rev.* 13, 17.

36. 23 *Halsbury's, Laws of England* (1st ed. 1912) 143, 145; 7 *Amer. Judicature Soc. Journal* 217-220 (1923).

trial, but helps to make the outcome of an American lawsuit turn as much upon the skill of counsel as upon the merits of the case."<sup>37</sup>

(c) *Summons for Directions*. An ordinary action in King's Bench or Chancery is commenced by writ of summons, prepared by plaintiff's solicitor, sealed by the proper officer, and indorsed with a statement of the nature of the claim made or relief sought.<sup>38</sup> After service or acceptance, defendant makes appearance, which may be conditional or unconditional, usually within eight days although more time may be given.<sup>39</sup> At one time a Summons for Directions could be had before pleadings, but since 1932 plaintiff usually delivers his statement either with the writ or within ten days after appearance thereto, and defendant delivers his defense within fourteen days after appearance or receipt of plaintiff's statement. Plaintiff may within seven days thereafter deliver a reply.<sup>40</sup> The Summons for Directions is usually the next step, and by it the parties are notified to appear before a master who may then make orders in the case concerning the following matters: Pleadings, particulars, admissions, discovery, interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial, and any other interlocutory matter.<sup>41</sup> The parties informally come before the Master, talk over the nature of the case and the procedural steps they think necessary to bring it to an issue. He makes the required orders. How much time in court can be thus saved is apparent.

Second: Great benefits accrue to the commercial community, as well as a saving of judicial time, from having machinery for prompt collection of debts in cases where the claim is not actually controverted. The means is provided for getting an immediate judgment on such a claim without delay or expense. When there is no appearance this is done by allowing default judgment to be entered by a master. If defendant does appear, plaintiff may file affidavit stating the facts of his claim and his belief that there is

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37. Sunderland, *An Appraisal of the English Procedure* (1925) 50 A. B. A. Reports 242, 248.

38. 23 Halsbury's, *Laws of England* (1st ed. 1912) 109-110.

39. 23 Halsbury's, *Laws of England* (1st ed. 1912) 124.

40. *Supra*, note 31, at p. 18-19.

41. 23 Halsbury's, *Laws of England* (1st ed. 1912) 136; 7 Amer. Judicature Soc. Journal 204 (1923).

no defense. He may then have summary judgment unless defendant can make affidavit showing a fair probability of a real defense. Generalities, conclusions and sham defenses for delay are of no avail. However, if a master refuses leave to defend, defendant is protected by the right to appeal to a judge in Chambers. If the judge grants leave, plaintiff cannot appeal and the case proceeds for trial, but if he refuses it, defendant can still appeal to the Court of Appeals. Those appeals are immediately decided.<sup>42</sup> This speedily disposes of a great number of cases seeking only to put in operation the legal machinery for collecting debts.

Third: A remedy is provided for immediately determining rights dependent upon the construction of deeds, wills, contracts, and statutes by Declaratory Judgments settling the rights of parties before they have acted thereunder and before any damage has been sustained from such action. Concerning this practice, Professor Sunderland has said: "The service rendered by the courts under the declaratory judgment practice is quite analogous to that rendered by modern hospitals which diagnose and treat diseases in their incipient stages and thereby prevent the development of more dangerous conditions. So useful and effective has this practice become in England that several judges of the High Court are frequently engaged simultaneously in making declarations of rights, and the size of the dockets which they dispose of is eloquent testimony of the speed with which the work can be done."<sup>43</sup> Since our last Legislature adopted a Declaratory Judgments Act<sup>44</sup> precedents and procedure therefore under the English practice should now be of particular interest to Missouri lawyers.

Fourth: The conduct of a trial is under the control of a judge, who has life tenure, and who, although chosen by the leaders of his political party in control of Parliament, is selected only if he has really demonstrated legal ability. Englishmen believe the judge's control is impartially exercised for the purpose of finding

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42. 23 Halsbury's, *Laws of England* (1st ed. 1912) 134; Sunderland, *supra*, note 37, at 244; 7 *Amer. Judicature Soc. Journal* 223; 51 *Law Quarterly Rev.* 15 (1935).

43. *Supra*, note 37, at p. 246.

44. *Laws of Mo.* 1935, p. 218. See for discussion Note, *Declaratory Judgments with Recent Missouri Developments* (1935) 21 *ST. LOUIS LAW REVIEW* 49.

the truth of the controversy so that the merits may prevail. This belief is shown by the fact that most civil cases there are now tried before the court without a jury.<sup>45</sup>

Fifth: The rules of procedure are flexible. They not only can be changed by the method authorized by Parliament, but they are meant to be applied according to the circumstances of the case. Discretionary powers are granted to the judges throughout the rules to give special leave for additional time and to allow amendments; and it is provided that "non-compliance \* \* \* with any rule of practice \* \* \* shall not render any proceedings void unless the court or judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge shall think fit."<sup>46</sup> Violation of procedural rules does not prevent a consideration on the merits but may bring assessment of costs as a penalty. Costs do not follow the result of the case, but are awarded as the court deems to be proper.

Sixth: Appeals are promptly heard and decided. New trials are few and can be granted only by the court of appeal and they may be limited to specific issues instead of a retrial of the whole case. Writs of error, bills of exceptions, and assignments of error have been abolished. Written or printed briefs are not required and appeals are heard, on copies of the records of the trial divisions, upon oral argument and the decision is usually announced then and there. The trial and appellate divisions are part of the same court and sit in the same court house, except where cases are heard in assizes or county courts, but since there is no local venue of actions, most important civil cases are tried in London. Order 58<sup>47</sup> provides that all appeals "shall be by way of rehearing" on "the whole or any part of any judgment or order \* \* \* whether final or interlocutory"; that the appellate court has "discretionary power to receive further evidence upon questions of fact"; ("without special leave upon interlocutory applications" but "upon appeals from a judgment after trial \* \* \* on special grounds only and not without special leave"); that the court of appeal shall have power to draw inference of

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45. See secs. 99-101 Consolidated Act of 1925, 15 & 16 Geo. V.

46. Order 70, 7 Statutory Rules and Orders Rev. 179.

47. 7 Statutory Rules and Orders Rev. 142.

fact and to give any judgment and to make any order which ought to have been made"; and that "such powers may also be exercised in favor of all or any of the respondents or parties although such respondents or parties may not have appealed." The court of appeal, therefore, has supervisory power over the trial divisions at all stages of the case and this provides safeguards against arbitrary or erroneous action before rights are prejudiced thereby. Furthermore, the purpose of appellate review after judgment is to afford a full rehearing on the merits and end the case. A complete new trial of a case once tried is very unusual. Of course a system of appeals from all interlocutory orders grafted onto our present system would result here in endless delay. It does not do so under the English system because such appeals are quickly decided on summary hearing and because unreasonable appeals are penalized by assessment of costs. The English bar has been educated not to attempt to gain advantage by mere delay.

An idea of the kind of procedural system, that the English method may ultimately make possible, can be gained from a statement, which the writer heard made by Lord Wright, Master of the Rolls (as such he is presiding judge of the Chancery Division of the Supreme Court of England, and a member of the Rules Committee), at the Harvard University Law School's recent conference on the Future of the Common Law. He said, in substance, that it was now hoped that the rules could soon be further simplified and rewritten; that the courts could then stop taking any space in opinions to discuss the construction and application of procedural rules; and that they would work smoothly enough so that it would only be necessary for members of the bar to become familiar with how the court applied them, through experience in their practice. Thus procedural rules would truly become working tools of lawyers to bring controversies to prompt decision on the merits, rather than (as some of ours have become) obstacles to overcome before they can get their cases decided. It seems to an American lawyer that much progress has already been made toward this goal. A comparison of points of law decided in recent English cases, with those ruled in cases in any jurisdiction in this country, very strikingly shows that procedure is now rarely discussed in English decisions, but that

our books are filled with rulings upon how our statutory procedural rules are to be construed and applied.

## II

The writer does not hold the opinion that the English system is perfect, or that everything which works well there would necessarily do as well here. Nevertheless, a system of procedure which does work well in a great commercial and industrial nation, where the fundamental principles of our laws and institutions were developed, is worthy of our examination and study, especially in view of increasing dissatisfaction with our own. We may justly say that England did not have satisfactory procedure for modern times until she came to us for the idea of abolishing common law forms of action and removing the distinctions between law and equity. We may now well consider whether the method adopted there, of procedural rules made by courts (or councils or committees under their guidance and control), will better enable our system of code pleading to be brought up to date and to continue in the future to keep pace with the times, so that it will function efficiently in the increasingly intricate and changing conditions, created in business and industry by modern science and invention. The English people, during the last six centuries, have perhaps endured about as much bad government as any other people, but they have to their credit much worthwhile accomplishment, in modern good government, due to ability to learn from their experience, and we could profit by it too. A recent English review of their own system points out these results: "That of every hundred actions commenced by a writ in the Supreme Court only one comes to trial"; that "the other ninety-nine" by means of the interlocutory administration of details by masters "undergo a process of elimination"; and that this method usually disposes of cases without a trial in one of the following ways: "The defendant \* \* \* may pay out on the writ"; the case may end because disclosure may reveal that "defendent may have no defence" or "plaintiff no real case"; or "parties may come to terms" because "Master or Judge suggests a *via media* which leads to the amicable settlement of the action."<sup>48</sup> To waste judicial time by dilatory tactics intended

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48. Practice and Procedure (1935) 51 Law Quarterly Rev. 13, 23.

only to delay action, in cases which could be thus disposed of, in an economic loss to everybody.

It cannot be fairly denied that during the last quarter of a century, many new problems arising from modern industrial and urban conditions have been unable to get quick and efficient treatment in our courts. Because of popular demand for a forum for prompt settlement of these new questions, new administrative tribunals have been created. It is indicative, of the popular attitude toward the ability of lawyers and courts to dispatch business promptly by the methods they have been using, that members of these new tribunals are not usually required to be learned in the law, and that they are allowed to determine their own procedure. Laymen are authorized to decide questions of law and determine facts without requiring that they be guided by knowledge or instructions concerning the law. Usually their determination of facts is made binding upon courts in whatever judicial review is provided, so that there is no appeal from or review of decisions of these laymen as to many ultimate facts, in the determination of which the application of rules of substantive law are necessarily involved. Many relations of employer and employee, public utilities and their customers, railroads and shippers, and rights and duties of other agencies of transportation have been largely removed from the courts. Measures are being proposed to also place in the hands of law administrative bodies such matters as injuries caused by operation of motor vehicles, labor relations, insurance, and many other problems of commerce, industry and agriculture. This development has only begun. Where it will lead to we cannot know.

It is especially worthy of notice, that acts creating such administrative tribunals usually emphasize the provisions that hearings shall be simple and summary and that these bodies shall have the power to make their own rules of practice and procedure. In our Workmen's Compensation Commission Act,<sup>49</sup> provides: "All proceedings before the Commission or any commissioner shall be simple, informal and summary. \* \* \* Except as herein otherwise provided, all such proceedings shall be according to such rules and regulations as may be adopted by the Commission." In our Public Service Commission Act,<sup>50</sup> provides:

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49. R. S. Mo. 1929, sec. 3349.

50. R. S. Mo. 1929, sec. 5144.

"All hearings before the Commission shall be governed by rules to be adopted and prescribed by the Commission." Similar examples will be found in other states and in Federal legislation.

Why do not legislatures, in creating administrative tribunals, provide them with a complete statutory code of practice and procedure? Undoubtedly it is because they do not want to hamstring and delay their action, impair their efficiency, and limit their ability to promptly determine the merits of questions entrusted to them for solution. Why then are the courts kept in strait-jackets of strict statutory procedural codes which provide so many means for delaying and evading a determination of the merits of cases? Surely lawyers and judges are not less capable than laymen of making rules of procedure, which will make possible prompt determination of cases on the merits. At least they have shown, in England, that they can do so when given the opportunity and responsibility.

Let it be recognized that the adoption of our statutory codes marked a tremendous advance, although they carried over and continued many ancient common law practices. Their great defect was that, in failing to provide adequate means for improvement, they froze the rules of practice and thereby lost the opportunity to continue that advance so well begun. Procedural codes made for conditions of the times of circuit riders of the eighteen forties could not be expected to function, in all respects, for prompt and efficient dispatch of business under modern urban industrial conditions. Rules of substantive law, which establish fundamental rights and determine the principles upon which they are based, determine *what rights* an individual shall have. They should not be changed without most careful and extended deliberation and then only when such a change is a vital necessity to prevent future injustice to others. Rules of procedure only determine *how and when* a dispute about such rights shall be brought to an issue. Whenever a rule operates to prevent bringing such a dispute promptly to an issue it ought to be abolished. Whenever a rule can be improved to bring the disputed question to definite issues in a clearer way within a more reasonable time it ought to be amended. It is often a complete denial of the benefit of a substantial right to unduly delay a decision concerning it, because changed conditions may make the right valueless before it can be established.

New means of communication and transportation have speeded up all business, and new procedural methods are required to promptly transact the great volume of judicial business arising from these new relations and new conditions of today. There would be more legal business for lawyers to transact if this could be done, because unquestionably the surest way for lawyers to have more business is for courts and lawyers to handle business that comes to them promptly and efficiently. People will not tolerate forever any system which delays unreasonably the determination of questions they seek to have decided. If courts do not function without vexatious delay, they will find means to have them decided outside of the courts. Surely, lawyers ought to see that what is in the public interest is in their own interest. Surely, if this matter is given intelligent consideration, both lawyers and laymen would see, from its results in England and its adoption in our federal courts, that regulation of practice and procedure by rules of court is worth a trial in our state courts. Of course the details of a system fitted to our needs would differ from those of England where ten times the population of this state live in an area little more than half its size. If both lawyers and laymen desire that it be tried, it will not be difficult to devise either the means of putting it into operation or the broad outlines to be followed in its development. Will our bar lead such a movement for improvement, or will it overlook this great opportunity for leadership toward worthwhile accomplishment to fulfill a pressing public need?

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# THE MOTION FOR SUMMARY JUDGMENT AND ITS EXTENSION TO ALL CLASSES OF ACTIONS

LOUIS C. RITTER AND EVERT H. MAGNUSON

MUCH criticism is directed against the courts for the long delays in the administration of justice. Particularly is this true in the large metropolitan centers where the court calendars are so crowded that frequently it takes from two to four years before the trial of a case. This dissatisfaction, both in and out of the legal profession, with the law's delay has long been manifested. Criticism is directed not so much against the substantive law as against what is called the business of the courts, their organization and procedure, their method of handling litigation, the expense involved, and the delay, often the unconscionable delay, in disposing of pending cases.<sup>1</sup>

To remedy these long delays and to alleviate the criticisms against the courts and their procedure, the summary judgment procedure was introduced. This procedure has become an important feature in our modern practice of law. Its benefits are numerous. It does more than to prevent delays and secure speedy justice. It aids in the prompt disposition of bona fide issues of law as well as of sham defenses. It causes the whole judicial process to function more speedily and with less complexity. It tends to discourage litigation and the interposition of sham defenses, to effectuate settlements, to expedite judgments, to simplify court procedure and to lessen court congestion—in short, it has contributed to the cause of speedy justice and has alleviated the economic waste of unnecessary and protracted litigation.<sup>2</sup>

The Wisconsin Supreme Court realized the possibilities of the motion for summary judgment in remedying the long delays in the court calendar. In *Sullivan v. State* it said that the purpose of providing for summary judgments was to avoid delay and to cut down the frequent contributions to injustice which proceeded from technicalities of pleading and practice.<sup>3</sup> Other courts have also indicated that the motion for summary judgment was to stamp out the practice of delaying judgment by the interposition of defenses which could not be substantiated by evidence.<sup>4</sup>

<sup>1</sup> Shientag, *Summary Judgments in the Supreme Court of New York* (1932) 32 COL. L. REV. 825.

<sup>2</sup> Clark and Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 423; Saxe, *Summary Judgment in New York, A Statistical Study* (1933) 19 CORN. L. Q. 237.

<sup>3</sup> 213 Wis. 185, 195, 251 N.W. 251 (1933).

<sup>4</sup> *McAnsh v. Blauner*, 222 App. Div. 381, 226 N.Y. Supp. 379 (1928).

The purpose of this article is to show the effect of the summary judgment in relieving the courts from undue criticisms by the long delays in the trial of cases, the development of the summary judgment, its procedure and application, with special stress being laid on Wisconsin law and procedure, criticisms directed against the motion for summary judgment, and the advisability and possibility of extending it to all actions, regardless of type, equally on behalf of defendants and plaintiffs.

#### DEVELOPMENT AND EXTENT OF USE OF THE SUMMARY JUDGMENT

The summary judgment provision was introduced into England in 1855. It was restricted at that time to actions on bills and notes. Its objective was to expedite court procedure. Thus it insured litigants' economy in obtaining a judgment where the circumstances of the case lent themselves to a shortened procedure. The preamble to the Summary Procedure on Bills of Exchange Act of 1855 clearly sets forth the objects and purposes of the summary judgment, stating as follows:<sup>5</sup> "Whereas bona fide holders of dishonored Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous and fictitious Defenses to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes . . ."

By the Judicature Act of 1873 the scope of the summary judgment was increased, embracing additional classes of cases.<sup>6</sup> A plaintiff could make the motion in actions on contract, express or implied, where there was a liquidated demand for money. This included bills of exchange, promissory notes, negotiable and non-negotiable, and other simple contract debts. By decision this also included "common law" assumpsit actions for labor and services performed<sup>7</sup> and for goods sold and delivered<sup>8</sup> and other actions of a like nature. These latter actions were not necessarily for a definite and certain sum of money; it was sufficient if the plaintiff state a cause of action and produce an affidavit upon the hearing of the motion setting forth the basis for the asserted liability of the defendant. A plaintiff could also make the motion in actions on a bond or contract under seal for the payment of a liquidated amount in money. Likewise a plaintiff could make the motion in an action on a statute where the sum sought to be recovered was a fixed

<sup>5</sup> THE SUMMARY PROCEDURE ON BILLS OF EXCHANGE ACT, 18 & 19 VICT. c. 67 (1855).

<sup>6</sup> Annual Practice, Order III, Rule 6, Order XIV, Rule 1.

<sup>7</sup> *Lagos v. Grunwoldt*, [1910] K.B. 41; *Stephenson v. Weir*, L. R. 4 Ir. 369 (1879).

<sup>8</sup> *M'Cawley Co. v. Campbell*, L. R. 4 Ir. 410 (1879).

sum or in the nature of a debt other than a penalty, in actions on a guaranty, whether under a seal or not, where the claim against the principal was in respect of a debt or liquidated demand only, and in actions involving a trust where the plaintiff sought to recover only a debt or liquidated demand in money, payable by the defendant, with or without interest. Thereafter a section which did not appear among the Rules of 1873 was added. This section permitted plaintiffs to make the motion for summary judgment in actions between landlords and tenants for the recovery of land where the tenancy was determinable under the terms of a contract.<sup>9</sup> However, the courts in England have refused to grant motions for summary judgment under this class of cases where there is any dispute as to the title to the land or where there are any complicated questions as to the relations of the parties.

The actions under the laws of England within the scope of the summary judgment procedure are actions for the recovery of debts or liquidated demands in money, and actions between landlords and tenants with respect to repossession. There are some jurisdictions in the United States in which the summary judgment procedure is more extensively used than in England where it was first introduced.<sup>10</sup> The adoption and use of the summary judgment in New York is especially interesting to attorneys in Wisconsin because not only has Wisconsin originally adopted the summary judgment rule from New York, but also the Wisconsin Supreme Court has said that it accepts and adopts the interpretation of the New York statute given by the New York courts.<sup>11</sup> Prior to the adoption of the summary judgment rule in New York, a defendant who wished to delay trial and prevent a judgment for which he had no bona fide defense could interpose a general denial in his answer. This general denial frequently was a sham defense, but the court was powerless to strike it.<sup>12</sup> As a result a movement was started in New York to do away with these sham defenses and thus avoid the long delays which were becoming prevalent in the New York courts.

When an investigation for a method to speed up the court calendars was made, it was discovered that a great many sham pleas were being interposed. Upon further inquiry, it was discovered that the procedure of the summary judgment which had been used extensively in England since 1855 and less extensively in New Jersey since 1873 had been exceedingly instrumental in reducing the number of these pleas. Because of its great possibilities in eliminating the evils aforementioned,

<sup>9</sup> Keating v. Mulcaly, [1926] Ir. R. 214.

<sup>10</sup> See Clark and Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 423.

<sup>11</sup> Jefferson Gardens Inc. v. Terzan, 216 Wis. 230, 257 N.W. 154 (1934).

<sup>12</sup> Cf. Wayland v. Tysen, 45 N.Y. 281 (1871); Farmers' National Bank v. Leland, 50 N.Y. 673 (1872); and Neuberger v. Wild, 24 Hun. 347 (N.Y. 1881).

the summary judgment procedure was adopted and became effective in October, 1921.<sup>13</sup>

The New York procedure in regard to the summary judgment was of much narrower compass than that adopted in England and in several states in the United States. In New York, at first, it was limited to actions on contracts, express or implied, and to actions on a judgment for a stated sum where there was a definite and absolute debt or liquidated demand.<sup>14</sup> As compared with the English rule, it could not be applied to actions on statutes where the sum sought to be recovered was a fixed sum or in the nature of a debt other than a penalty,<sup>15</sup> or to actions for the recovery of land,<sup>16</sup> or to suits on trusts.<sup>17</sup> The New York courts have also refused to permit its use in a suit for an injunction.<sup>18</sup> It was held by the New York court that one could move for summary judgment in a case involving liquidated damages and on a contract, but not in a case to foreclose a mortgage.<sup>19</sup>

The New York courts did express approval of the general scheme<sup>20</sup> and on April 16, 1932, the scope of the motion for summary judgment was extended by an amendment adopted by the joint order of the presiding justices of the Appellate Division of the Supreme Court in the four judicial departments. The amended rule<sup>21</sup> not only permitted the motion for summary judgment to be made in an action to recover a debt or liquidated demand arising on a contract, express or implied, or on a judgment for a stated sum, but also permitted the motion to be made in an action on a statute where the sum sought to be recovered is a sum of money other than a penalty; it likewise permitted the motion to be made in actions to recover an unliquidated debt or demand for a sum of money only arising on a contract, express or implied, other than for breach of promise to marry, in actions to recover possession of specific chattels, with or without claim for the hire thereof, or for damages for the taking or detention thereof, in actions to enforce or foreclose liens or mortgages in actions for the specific performance of a contract in writing for the sale or purchase of property, and in actions for an accounting arising on a written contract. This recent change and the recent decisions of the court indicate a decided tendency to extend the motion for summary judgment to other classes of cases. Of course, as may well be expected, a remedy newly adopted, will not gain mo-

<sup>13</sup> N. Y. CIVIL PRACTICE RULES, Rule 113 and Rule 114 (1921).

<sup>14</sup> *Op. cit. supra*, note 13.

<sup>15</sup> *Cf.* Annual Practice, Order III, Rule 6, Order XIV, Rule 1.

<sup>16</sup> *Op. cit. supra*, note 15.

<sup>17</sup> *Op. cit. supra*, note 15.

<sup>18</sup> *Op. cit. supra*, note 15.

<sup>19</sup> *Toner v. Ehergott*, 226 App. Div. 244, 235 N.Y. Supp. 17 (1929).

<sup>20</sup> *Saunders v. Delario*, 135 Misc. Rep. 455, 238 N.Y. Supp. 337 (1930).

<sup>21</sup> Cahill, N. Y. CIVIL PRACTICE ACT, Rule 113 (1932).

mentum until the legal profession has become acquainted with it, its objects and its effects. It is suggested that the courts and the lawyers are not sufficiently acquainted with the summary judgment so that the time is ripe for extending it to other classes of actions not mentioned in this recent statute of New York.

Until the extension of the summary judgment in New York in 1932, Connecticut had used the most comprehensive and extensive summary judgment scheme known in the United States. It was adopted by order of the judges of the Superior Court to be effective in February, 1929. Whereas in New York by 1921 motions for summary judgments could be made only in actions on contracts and actions on judgments, in Connecticut such motions could be made also in actions on negotiable instruments, actions on statutes, actions on guaranties, actions for the recovery of specific chattels, actions to quiet title, actions to enforce or foreclose liens or mortgages and any action to discharge an invalid mortgage, lien *caveat* or *lis pendens*.<sup>22</sup> It is interesting to note, that in 1932, New York followed Connecticut. The procedure was allowed in actions for specific performance of written contracts for the sale or purchase of property and in actions for an accounting arising on a written contract.<sup>23</sup> The history of its adoption along with the favorable judicial attitude toward the rule augurs well for its future.

Illinois, the most recent state to adopt a code of civil procedure, has had a long and uninterrupted experience with the summary judgment procedure. Cook County has enforced the rule since 1853.<sup>24</sup> The rule which provided for default judgments was applicable to nearly the same class of cases as in the early English procedure.<sup>25</sup> In 1872, because of "delay in the administration of justice," the rule which had been enforced in Cook County was adopted in Illinois generally.<sup>26</sup> Just prior to the enactment of the code of January 1, 1934, in Illinois, the motion was limited to actions on contracts, express or implied, for the payment of money.<sup>27</sup> When the code was adopted the remedy as to summary judgments was extended to other types of actions, comparable to what had been done in New York and Connecticut.

The current provision in the Illinois Code<sup>28</sup> extends the motion for summary judgment not only to actions on contracts and actions on judgments, but also to include actions to recover possession of land,

<sup>22</sup> Cf. CONN. RULES OF CIVIL PRACTICE, § 14A (1); see also sections 14A (2), (3), (4), (5) and (6). See also CONN. GEN. STAT. (1932) Title LVIII, c. 317, §§ 5971-5981.

<sup>23</sup> NEW YORK CIVIL PRACTICE ACT (Cahill, 1932) Rule 113.

<sup>24</sup> COMMON LAW PROCEDURE ACT, 1853.

<sup>25</sup> Rules under the JUDICATURE ACT, Order III, Rule 6 (1873).

<sup>26</sup> ILL. LAWS (1872), c. 332, § 36.

<sup>27</sup> ILL. REV. STAT. (Cahill, 1929) c. 110, § 55.

<sup>28</sup> ILL. REV. STAT. (1935) c. 110, § 57.

with or without rent or mesne profits and to include actions for the recovery of chattels. Only the plaintiff in Illinois can make the motion. But a defendant may employ the summary judgment procedure where he has filed a counterclaim.<sup>29</sup>

Many states have adopted the summary judgment procedure. Some states have extended its scope. Others have held it applicable only to a few special types of actions. In addition to England, New York, Connecticut and Illinois, the following states have also adopted the summary judgment, in some form or another: New Jersey,<sup>29a</sup> District of Columbia,<sup>30</sup> Delaware,<sup>31</sup> Pennsylvania,<sup>32</sup> Indiana,<sup>33</sup> Virginia,<sup>34</sup> West Virginia,<sup>35</sup> South Carolina,<sup>36</sup> Kentucky,<sup>37</sup> Alabama,<sup>38</sup> Arkansas,<sup>39</sup> Tennessee,<sup>40</sup> Missouri,<sup>41</sup> Louisiana,<sup>42</sup> Massachusetts,<sup>43</sup> Michigan,<sup>44</sup> Minnesota,<sup>45</sup> Rhode Island,<sup>46</sup> and Wisconsin.<sup>46a</sup>

#### MOTION FOR SUMMARY JUDGMENT IN WISCONSIN

After a careful and comprehensive study the advisory committee on rules of pleading, practice and procedure, created by the Wisconsin legislature in 1929, recommended to the Supreme Court of Wisconsin the adoption of the summary judgment as it existed in New York at this time.<sup>47</sup> As a result the rule was adopted, identical in language with Rule 113 of the New York Rules of Civil Practice as it existed in 1921. The only difference between the New York rule of 1921 and the Wisconsin rule of 1929 is that the New York rule includes the following words, "by the judge hearing the motion," and the Wisconsin rule,

<sup>29</sup> ILL. REV. STAT. (1935) c. 110, Rule 16.

<sup>29a</sup> New Jersey was one of the first states to introduce the summary judgment into the United States. N. J. Laws (1912) c. 223, Schedule A, Sec. 57; N. J. Laws (1928) c. 151, p. 306; see also 1925-1930 Supp. to N. J. COMP. STAT. (1931) §§ 163-291, 163-292.

<sup>30</sup> Rules of the Supreme Court of the Dist. of Col., Rule 73, § 1.

<sup>31</sup> DEL. REV. CODE (1915) c. 128, § 6.

<sup>32</sup> PENN. STAT. (Purdon, 1936) Title VII, §§ 735 and 737.

<sup>33</sup> IND. STAT. (Burns, 1933) § 409.

<sup>34</sup> VA. CODE (1924) c. 251, § 6046, includes all actions.

<sup>35</sup> W. VA. CODE (1931) c. 56, § 6, limited to contracts.

<sup>36</sup> S. C. CODE (1932) c. 29, § 587.

<sup>37</sup> KY. STAT. (Carroll, 1927) Title X, c. 5, § 444, applies only to actions by or against sureties.

<sup>38</sup> ALA. CODE (1923) c. 346, art. I-VI.

<sup>39</sup> ARK. DIG. STAT. (Crawford & Moses, 1921) c. 102, §§ 6250-6258.

<sup>40</sup> TENN. CODE (Williams, 1934) c. 14, § 2941, arts. 1-7.

<sup>41</sup> MO. STAT. (1932) § 2941, applies only to action by and against sureties.

<sup>42</sup> LA. PRAC. CODE (1932, 1936) arts. 97 and 98.

<sup>43</sup> ANNO. LAWS, MASS. (1933) Vol. 8, c. 239, § 1.

<sup>44</sup> MICH. COMP. LAWS (1929) c. 266, §§ 14260, 14261.

<sup>45</sup> MINN. STAT. (Mason, 1927) § 909, applicable only to sheriffs.

<sup>46</sup> R. I. LAWS (1932) c. 1893.

<sup>46a</sup> WIS. STAT. (1935) § 270.635.

<sup>47</sup> Boesel, *The Summary Judgment* (1930) 6 WIS. L. REV. 5.

"by the court hearing the motion." This difference in language makes it certain that under the Wisconsin procedure the motion must be heard by the judge in open court whereas in New York there might be the possibility of the judge hearing the motion in his chambers.

The rule as adopted by Wisconsin in 1929<sup>48</sup> provides that the answer may be stricken if the action is to recover a debt or liquidated demand arising on contract, or on judgment for a sum stated, and judgment may be entered upon the motion and the affidavit of the plaintiff or someone familiar with the facts. The cause of action, the amount claimed, and a statement of the belief that there is no defense must be verified. The defendant may, however, defend upon a showing by affidavit, or other proof, that he has a bona fide defense.

This statute, being patterned after the New York Rule of 1921, was of much narrower scope than that adopted in England and in several of the states in the United States at that time (1929). It was limited to actions on contracts and actions on judgments for a stated sum where there is a definite and absolute debt or liquidated demand. The Wisconsin court has indicated that it looks upon the summary judgment as harsh even in its limited field.<sup>49</sup> Nevertheless the court has also indicated that it will do as other courts have done—give full consideration to the legislative intent and purpose.<sup>50</sup>

It is interesting to note that at the time of the adoption of the summary judgment statute, the Wisconsin legislature refused to include actions under a statute where the sum sought to be recovered was a fixed sum or in the nature of a debt, or actions on guaranties, sealed or unsealed, when the claim against the principal was in respect of a debt or liquidated demand only, or in actions for the recovery of specific chattels, or in actions to quiet and settle the title to real estate or any interest therein or in actions to enforce or foreclose a lien or a mortgage, or in actions to discharge any allegedly invalid mortgage, lien or *caveat* or *lis pendens*. All of these had been covered by the Connecticut statute,<sup>51</sup> and the legislature in New York followed Connecticut a few years later. In New York it was also provided that the motion could be made in actions for the specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the cases might require, and in suits for accountings arising on written contracts, sealed or unsealed.<sup>52</sup>

<sup>48</sup> WIS. STAT. (1931) § 270.635.

<sup>49</sup> *Sullivan v. State*, 213 Wis. 185, 251 N.W. 251 (1933).

<sup>50</sup> *Jefferson Gardens, Inc. v. Terzan*, 216 Wis. 230, 257 N.W. 154.

<sup>51</sup> CONN. RULES OF CIVIL PRACTICE, § 14A (1).

<sup>52</sup> NEW YORK CIVIL PRACTICE ACT (Cahill, 1932) 540.

The summary judgment statute has been expanded in Wisconsin. The statute permits, in part, the entry of summary judgment in an action to recover on a debt or demand arising on an express or implied contract other than for breach of promise to marry, or on a judgment for a sum stated, or on a statute where the sum sought to be recovered is fixed or in the nature of a debt. Similarly judgment may be entered to recover possession of specific real or personal property, with or without claim for damages for the use thereof, also to enforce or foreclose a lien or mortgage, or to enforce specific performance of a written contract (including alternative and incidental relief), or to compel an accounting under a written contract.<sup>53</sup> The motion may be made by either plaintiff or defendant. Thus, the possibility of sham or frivolous denials in the answer is diminished, and likewise the possibility of plaintiff's going to trial without sufficient proof to overcome the denials or defenses of the defendant is diminished. Hence the calendars can be cleared of cases where the plaintiff should not have started action. The motion for summary judgment is primarily a plaintiff's remedy. An order denying application for summary judgment is now appealable.<sup>54</sup>

The constitutionality of the summary judgment procedure has not been raised in Wisconsin. It has been contended in New York that this procedure affected the litigant's right to a trial by jury.<sup>55</sup> But an intermediate appellate court in New York met this contention by pointing out that the court does not try any issues of fact under this scheme of procedure but does determine whether there is an issue of fact to be tried. These observations are pertinent with respect to any of the types of actions within any of the statutory schemes.

#### PROCEDURAL PROBLEMS

The word "motion" as used in a motion for summary judgment, is like any other motion, an application for an order, and may be made either upon notice of motion or upon order to show cause. However, there are certain distinctions between the motion for summary judgment and other motions. As between the motion for summary judgment and a motion to strike sham pleas, the latter applies to all actions, whereas the motion for summary judgment applies only to those classes of action mentioned in the statute; also in

<sup>53</sup> WIS. STAT. (1935) § 270.635.

<sup>54</sup> WIS. STAT. (1935) § 274.33 (3); *Loehr v. Steng*, 219 Wis. 361, 263 N.W. 373 (1935).

<sup>55</sup> *Dwan v. Masserene*, 199 App. Div. 872, 192 N.Y. Supp. 577 (1922); *cf. General Investment Co. v. Interborough Transit Co.*, 235 N.Y. 133, 139 N.E. 216 (1923) and *People's Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 230 N.W. 170 (1930).

a motion to strike sham pleadings, the plaintiff must first establish the falsity of the pleading, whereas in a motion for a summary judgment, the defendant must show that he has a bona fide defense. In a motion for judgment on the pleadings, the moving party contends that there is no cause of action, whereas in a motion for summary judgment, the moving party does not claim that the pleadings do not raise an issue, but does claim that the adverse party has no evidence to support his claim or defense. In a motion for judgment on the pleadings, there will be only the answer and the complaint. In a motion for summary judgment, the moving party must also have affidavits. Further, a "good denial" may be sufficient to prevent a motion for judgment on the pleadings, but a "good denial" may not be sufficient in a summary case.

The affidavit is the important and distinguishing feature of the summary judgment. The Wisconsin statute in regard thereto<sup>56</sup> provides that there shall be at least two affidavits accompanying the notice of motion. First, there shall be the affidavit of the moving party, wherein he states that he believes that there is no defense to the action, or that the action has no merit, as the case may be. Evidentiary facts showing a cause of action must be stated. Secondly, there must be an affidavit by some person having knowledge of the facts, and containing evidentiary facts, not ultimate facts or mere conclusions of law.<sup>57</sup> In the case of *In re Littleton's Estate*<sup>58</sup> the court held that the affidavit must set forth the evidentiary facts with such particularity that the court shall be satisfied therefrom of the plaintiff's actual right to recover. In *Dwan v. Massarene*<sup>59</sup> it was said that the plaintiff's affidavit must state "such facts as are necessary to establish a good cause of action, and that it will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part thereof."

In a Michigan case, *La Prise v. Wayne*,<sup>60</sup> an affidavit in support of the plaintiff stated "that plaintiffs have a good and meritorious cause of action against said defendant and that the amount claimed by the plaintiff is as follows . . ." This affidavit was held to be clearly insufficient. The plaintiff's affidavit should be strictly construed, and if it is insufficient to support his cause of action, the motion should be denied, although the defendant fails to file an opposing affidavit, or to show any facts sufficiently to entitle him to defend.<sup>61</sup>

<sup>56</sup> WIS. STAT. (1935) § 270.635 (2).

<sup>57</sup> *Kellogg v. Berkshire Bldg. Corp.*, 125 Misc. Rep. 818, 211 N.Y. Supp. 623 (1925); *Sher v. Rodkin*, 198 N.Y. Supp. 597 (1923).

<sup>58</sup> 129 Misc. Rep. 845, 223 N.Y. Supp. 470 (1927).

<sup>59</sup> 199 App. Div. 872, 192 N.Y. Supp. 572 (1922).

<sup>60</sup> 234 Mich. 371, 208 N.W. 449 (1926).

<sup>61</sup> 36 C. J. 205.

The Wisconsin court has pointed out that the affidavits of plaintiff must disclose a cause of action. In *Sullivan v. State*,<sup>62</sup> Justice Wickham said: "If, however, the real spirit and purpose of the summary judgment law are to be given effect, the search of the record should include the affidavits in support of the complaint, and where these affidavits disclose no cause of action, the complaint should be dismissed even though, without the affidavits and solely upon the pleadings, a demurrer would have to be overruled as to all or part of it. The purpose of providing for summary judgments is to avoid delay and to cut down the frequent contributions to injustice which proceed from technicalities of pleading and practice. It seems quite as important to us that the plaintiff's cause of action should be summarily dismissed when no cause of action is shown by the pleading and affidavits, as it is that the defendant's formally sufficient pleadings should be disregarded when the plaintiff has satisfied the terms of the statute and the defendant has failed to convince the court that there exists a genuine issue." Moreover, the sufficiency of the affidavits of both parties is to be determined by rules of evidence. In other words, the affidavits must state facts which would be admissible in evidence, and must affirmatively show that the affiant would, if sworn as a witness, be competent to testify to the facts contained in his affidavit.<sup>63</sup>

What has been said heretofore as to the plaintiff is also applicable to the defendant. In making the motion for summary judgment his affidavit should allege that the action has no merit. He must also state evidentiary facts showing that his denials are sufficient to defeat the plaintiff's case. In addition there may be the affidavit of some person who has knowledge of the facts. This latter affidavit must contain such evidentiary facts, including documents or copies thereof, as shall show that the defendant's denials or defenses are sufficient to defeat the plaintiff's contentions.

Thus the preliminary skirmish resolves itself into a battle of affidavits, in which evidentiary facts are the principal weapons.<sup>64</sup> The motion will be granted or overruled depending upon whether or not the affidavits disclose an issue. The opposing party must set up a bona fide defense to the motion, supported by affidavits, in order to bar the motion,<sup>65</sup> and failure to present an affidavit of defense to the motion

<sup>62</sup> 213 Wis. 185, 251 N.W. 251 (1933).

<sup>63</sup> *Schempt v. New Era Life Ass'n.*, 253 Mich. 152, 234 N.W. 177 (1931).

<sup>64</sup> WIS. STAT. (1935) § 270.635.

<sup>65</sup> *Hongkong Banking Corp. v. Lazard-Godchaux Co.*, 207 App. Div. 174, 201 N.Y. Supp. 771 (1923), *aff'd* in 239 N.Y. 610 (1925); *Spiegel Realty Co. v. Gotham Nat. Bk.*, 121 Misc. Rep. 547, 201 N.Y. Supp. 599 (1923), *aff'd* in 204 N.Y. Supp. 927 (1924); *Cogswell v. Cogswell*, 130 Misc. Rep. 541, 224 N.Y. Supp. 59 (1927); *Evalenko v. Colts*, 125 Misc. Rep. 726, 210 N.Y. Supp. 35 (1925), *aff'd* in 213 N.Y. Supp. 796 (1926).

for summary judgment is usually fatal to the opposing party's case.<sup>66</sup> In *Jefferson Gardens, Inc. v. Terzan*<sup>67</sup> it was held that where the defendant does not deny the allegations of the affidavits presented by the plaintiff in support of his motion, the allegation of that affidavit is taken as true. Despite the intimation, in an early case,<sup>68</sup> the matter has not been conclusively determined. In all probability, the courts will tend to limit the number, in order to avoid opportunity for delay.

Remembering, then, that the motion will be denied unless an issue of fact is presented by the pleadings, cognizance must be taken of the fact that the court does not decide on the truth of the affidavits, but takes them as being absolutely true. Nor does it decide on the reputation of the affiants as to truth and veracity, for the purpose of the motion for summary judgment is merely to determine whether or not a defense worthy of trial exists, or whether the action has sufficient merit to entitle the plaintiff to go to trial. The test used in determining the propriety of a summary judgment has been variously stated by the different courts.

Prior to April 25, 1935, an order denying a motion for summary judgment was held not be an appealable order because it did not, in effect, determine the action and prevent a judgment from which an appeal could be taken, as was required of appealable orders under the Wisconsin statutes,<sup>69</sup> even though it may have affected a substantial right.<sup>70</sup> However, after April 25, 1935, by virtue of an amendment to the Wisconsin statute, an order denying a motion for summary judgment is now an appealable order.<sup>71</sup> See also *Loehr v. Steng*<sup>72</sup> where it was held that such an order is now appealable.

#### CRITICISMS ANSWERED

At the time the summary judgment procedure was first proposed several criticisms other than constitutional objections were directed against it. Opponents of the remedy have contended that the motion for summary judgment presents the means for embarking upon a "fishing expedition," in other words, that the motion will be used to determine what evidence the adverse party will present at the trial. The cry is that in the vast majority of cases the defendant will be able to show, by hook or crook, some reason or some evidence sufficient to convince

<sup>66</sup> *Hoof v. Hunter Corp.*, 193 N.Y. Supp. 91 (1922); *Maetz v. Daly*, 120 Misc. Rep. 466, 198 N.Y. Supp. 690 (1923); *Saunders v. Delario*, 135 Misc. Rep. 455, 238 N.Y. Supp. 337 (1930).

<sup>67</sup> 216 Wis. 230, 257 N.W. 154 (1934).

<sup>68</sup> *Twiff v. Twigg*, 117 Misc. Rep. 154, 191 N.Y. Supp. 781 (1921).

<sup>69</sup> WIS. STAT. (1935) § 274.33 (1).

<sup>70</sup> *Schlesinger v. Schroeder*, 210 Wis. 403, 245 N.W. 666 (1933).

<sup>71</sup> WIS. STAT. (1935) § 274.33 (3).

<sup>72</sup> 219 Wis. 361, 263 N.W. 373 (1935).

the court that there is an issue to be tried. On the other hand, it would seem to be well worth while for the plaintiff in almost every action within the classes allowed by statute, to make such a motion upon the chance that the defendant may not be able to convince the court that there is an issue to be tried, or, at least, with a view toward obtaining considerable details with reference to the defendant's defenses, which would doubtless be of great value for the purpose of cross-examination at the trial and general preparation for trial.<sup>73</sup>

In answering this objection it must be remembered that the party making the motion must state or present evidentiary facts in his affidavit showing that he has a good cause of action or that he has a meritorious defense. In a Wisconsin case, *Sullivan v. State*,<sup>74</sup> Justice Wickham pointed out that to give effect to the real spirit and purpose of the summary judgment law the search of the record should include the affidavits in support of the complaint, and where these affidavits disclose no cause of action the complaint should be dismissed even though, without affidavits, and solely upon the pleadings, a demurrer would have to be overruled as to all or part of it. The New York Court of Appeals answered the defendant's contention that the plaintiff's affidavits, upon a motion for summary judgment, do not establish the defendant's default with technical precision by pointing out that the very object of a motion for summary judgment is to separate what is formal or pretended in denial from that which is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. In short, it has been repeatedly held by the courts that if the plaintiff's affidavit is insufficient to support his cause of action, the motion should be denied, and this despite the fact that the defendant fails to file an opposing affidavit, or to show any facts sufficient to entitle him to defend.<sup>75</sup>

Hence, it follows, that since the party making the motion must also state facts, he is showing his hand and evidence as well as exposing the facts available to the person against whom the motion is directed. Thus, no undue advantage can be taken of either party. Then, too, this procedure will result in any event in a clarification of the issue in dispute which should tend to promote an adjustment of the dispute between the parties or a simpler trial of the issues. The speed of the procedure is desirable, but still more to be emphasized is its simplicity and

<sup>73</sup> MEDINA, PLEADING AND PRACTICE UNDER THE NEW YORK CIVIL PRACTICE ACT (1922) pp. 79, 80.

<sup>74</sup> 213 Wis. 185, 251 N.W. 251 (1933).

<sup>75</sup> In re Littleton's Estate, 129 Misc. Rep. 865, 223 N.Y. Supp. 870 (1927); *La Prise v. Wayne*, 234 Mich. 371, 208 N.W. 449 (1926); 34 C.J. 205; *A. Sidney Davison Coal Co., Inc. v. Interstate Coal Co.*, 193 N.Y. Supp. 883 (1921); *Tidewater Oil Sales Corp. v. Pierce*, 213 App. Div. 796, 210 N.Y. Supp. 759 (1925).

directness in bringing out the real dispute. Like the summons for direction before the masters in chancery in England, the procedure leads to a discovery of the issues under the direct control of the court and with the penalty of a final disposition of the case if the issues are not disclosed. We may all prophesy for it a more important position in future practice than merely that of a prod for delinquent debtors. It is apparent, then, that the objection that the motion may be used as a means to embark upon a "fishing expedition" is groundless. Moreover, the remedy not only furnishes a simple, easy, and direct way of disposing of litigation in which there is no real cause of action or defense, but the procedure also aids in bringing out the real dispute and established justice in its true sense. After all, the trial of an action should not be a battle of wits, but it should have as its sole aim and purpose the establishment and the furtherance of justice.

Another objection to the summary judgment, occasionally raised, is that the motion, from a practical viewpoint, has a direct tendency to lessen the fees of attorneys inasmuch as an attorney is not likely to recover as large a fee in making the motion as he would if he appeared in open court and examined and cross-examined witnesses. This argument has strength—and weakness. Its strength lies in the fact that attorneys must earn a living, and as a practical proposition, the use of the motion does reduce the fee of the attorney. On the other hand, the motion will enable the lawyer to recover his fee within a much shorter time, since it eliminates the necessity of waiting from two to four years before the trial of a "cause" and the final disposition of the case. The objection that the motion tends to reduce the fee of the attorney is inherently weak in that the practice of law is a profession and not a business. As was pointed out in a Massachusetts case, *In re Bergeron*,<sup>76</sup> the practice of law is not a craft or trade, but is a profession whose main purpose is to aid in the doing of justice according to law, between the state and the individual, and between man and man. The respect for the courts must be upheld, and if an attorney acts contrary to the ethics of the profession the courts will be lowered in the estimation of the people. In *Ellis v. Frawley*<sup>77</sup> the court points out that the attorney who looks only to the fee he is getting soon forgets his high duties as a minister at the altar of justice, and becomes a mere grubber for money in the muck heaps of the world. Lastly, the attorney must not forget that although he owes a duty to his client, he also owes a duty to the court. As stated by Justice Magruder, in *People v. Beattie*,<sup>78</sup> "The lawyer's duty is of a double character; he owes to his

<sup>76</sup> 220 Mass. 472, 107 N.E. 1007 (1915).

<sup>77</sup> 165 Wis. 381, 161 N.W. 364 (1917).

<sup>78</sup> 137 Ill. 553, 27 N.E. 1096 (1891).

client the duty of fidelity, but he also owes the duty of good faith and honorable dealing to the judicial tribunals before whom he practices his profession."

The opponents of the remedy further say that it seems to be forgotten that the judicial system is made up not merely of judges and courts, but also of lawyers, and that the efforts of all are futile, if the litigants who furnish the causes in litigation are not satisfied that they have had the benefit of deliberate consideration by a court, which has heard them and their witnesses, and not merely read the affidavits prepared by their attorneys. A "day in court" has a literal significance which is the guarantee against loss of confidence in the judicial process.<sup>79</sup>

This objection is not a serious one. From the outset, it must be remembered that the court is not trying the issues when a motion for summary judgment is made, but rather it merely determines whether or not a defense worthy of trial exists, or whether the action has any merit to entitle a plaintiff to a trial, and to dispose of the case summarily only when such defense or meritorious action is lacking.<sup>80</sup> Further, most of the cases in our courts of general jurisdiction, which go to judgment, eventually result in judgment for the plaintiff. It results, therefore, that the delay is, for the most part at the expense of the one who, by the law of probabilities, is the more deserving of the parties. To the extent that our courts are permitting avoidable delay, to that extent are they denying justice.<sup>81</sup> Moreover, litigants have no vested rights in delays in litigation.

The last objection to the motion for summary judgment, as advanced by many opponents of the remedy, is that it is too revolutionary. These opponents forget that the remedy has been used with great effectiveness in England since 1855. Moreover, it is necessary that the court keep pace with the times not only in its application of substantive law but also in its procedure. In *Ex Parte Peterson*<sup>82</sup> Mr. Justice Brandeis lauded the introduction of new devices which were properly adaptable to the "ancient institution." In *Cropley v. Vogeler*<sup>83</sup> cognizance was taken of the fact the trend in the United States is to cast aside ancient processes in favor of more modern procedure. Although it has been truly said that it takes time, and often a long time, to make

<sup>79</sup> ROTHSCHILD, SUMMARY JUDICIAL POWER (1934) 361, 362.

<sup>80</sup> *Dwan v. Massarene*, 199 App. Div. 872, 192 N.Y. Supp. 572 (1922); *Peoples Wayne County Bank v. Wolverine Box Co.*, 250 Mich. 273, 230 N.W. 170; *Edw. F. Dibble, Seedgrower v. Jones*, 130 Misc. Rep. 359, 223 N.Y. Supp. 785 (1927); *Curry v. Mackenzie*, 238 N.Y. 267, 146 N.E. 375 (1935); 60 West Fifty Third St. Corp. v. Haskell, 231 App. Div. 62, 246 N.Y. Supp. 360 (1930).

<sup>81</sup> Clark and Samenow, *The Summary Judgment* (1929) 38 YALE L. J. 423.

<sup>82</sup> 253 U.S. 300, 40 Sup. Ct. 543, 64 L.ed. 919 (1920).

<sup>83</sup> 2 D.C. App. 28 (1893).

a new remedy thoroughly operative, still, as early as January, 1924, the procedure was recognized in this country as avoiding much unrighteous delay.<sup>84</sup> Since that time the motion for summary judgment in the United States, as well as in England, has thoroughly demonstrated its effectiveness in avoiding delays and in establishing justice.

Experience during the last fifteen years in New York, and more recently in Wisconsin, has indicated that the procedure has generally accomplished its avowed objective of reducing the delays in litigation, that it has not given use to the abuses that were once feared.<sup>85</sup> That the motion, at first, was limited to a few classes of actions, was to be expected in view of the fact that any change must be gradually developed lest those who are prone to conservatism object too vigorously. The adoption of the narrower rule was solely due to the desire that at least an entering wedge for the new procedure should be made. And there are many indications that the procedure, at least in Wisconsin, will be extended to all classes of actions. The stimulus of more crowded dockets will certainly lead to its extension along more liberal lines. Then, too, the bench and bar have not, as yet, fully appreciated and utilized its present potentialities. As soon as attorneys become acquainted with its procedure and application, its simplicity, and its benefits in not only avoiding delays but also in the clarification of issues which will result in simpler trials, its use will be more general.

It can be readily understood that a sham answer in an action on a contract is just as false as in an answer in a quasi contract action. An unreal defense in a suit to enforce or foreclose a mortgage or in a suit to enforce specific performance of a contract is just as sham as a defense in a suit for injunction. A false denial in an answer in any one of the classes of actions mentioned by the statute<sup>86</sup> is just as unreal as in a tort action. In short, a false denial in an answer is without merit regardless of the kind of action in which it is interposed. Moreover, the motion may be used in those cases where there is no dispute as to the facts, thus avoiding costly jury trial and compelling a person to wait two or four years, only to have the court direct a verdict. From these and other cases, where a verdict has been directed, it can be seen that the delay and the cost of a trial might have been avoided had the court known that there was no issue to try. Of course, it is not contended that the court should direct a verdict. This would be carrying the motion too far and would result in the serious abuse of having the court "try" actions on affidavits without having the opportunity of seeing the

<sup>84</sup> Saxe, *Summary Judgment in New York, A Statistical Study* (1933) 19 CORN. L. Q. 237.

<sup>85</sup> Shientag, *Summary Judgments in the Supreme Court of New York* (1932) 32 COL. L. REV. 824, 856.

<sup>86</sup> WIS. STAT. (1935) § 270.635.

witnesses, their demeanor on the stand, and without being given the assistance of counsel in determining the reputation of the witnesses for truth and veracity. Nor is it contended that the use of the motion could not be subjected to any abuse at all. However, under the surveillance of the court its abuses can be limited to a small number. Under the present system of regulating practice and procedure in Wisconsin, the extension and enlargement of the scope of the rule can be readily made by the supreme court, without the difficulties and delays of legislative enactment.<sup>87</sup>

APPENDIX\*

ORDER TO SHOW CAUSE

CIRCUIT COURT    MILWAUKEE COUNTY    STATE OF WISCONSIN

---

John Doe,  
                        Plaintiff.

vs.

Richard Roe,  
                        Defendant.

ORDER TO SHOW CAUSE

To:-----  
                        Attorney for Defendant

Upon the attached affidavits of-----and-----  
and on motion of-----, attorney for the plaintiff;

IT IS ORDERED, that the defendant, Richard Roe, show cause before the court in the branch thereof presided over by Hon.-----  
at the court house in the City of Milwaukee, Wisconsin, on the-----day  
of-----, 10-----, at ----- o'clock, A.M., or as soon there-  
after as counsel can be heard, why the answer of said defendant heretofore  
filed in this action should not be stricken from the records in this action and  
judgment entered for the plaintiff and against the defendant, Richard Roe, pur-  
suant to Supreme Court Rule, Sec. 270.635, in the sum of-----  
Dollars (\$-----) with interest according to the demand of the  
complaint.

IT IS ORDERED FURTHER that a copy of this order be served upon  
the attorney for the defendant on or before-----, 19-----  
Dated:-----

-----  
Circuit Judge.

<sup>87</sup> Boesel, *The Summary Judgment* (1930) 6 Wis. L. Rev. 5.

\* The following forms should be used by the plaintiff in making the motion for summary judgment. The forms used by a defendant in making the motion for summary judgment are much the same as those used by the plaintiff except that the defendant must state that he believes that the action has no merit. However, the defendant, in making the motion, must by affidavit show that his denials or defenses are sufficient to defeat the plaintiff. Otherwise, the forms are alike, the plaintiff making an affidavit to the effect that he has a good and meritorious cause of action, and supported by affidavits of the evidentiary facts showing that he has such a meritorious action.

NOTICE OF MOTION<sup>1</sup>

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

vs.

NOTICE OF MOTION<sup>2</sup>

Richard Roe,  
Defendant.

To:-----  
Attorney for Defendant.

PLEASE TAKE NOTICE that on the ---- day of ----, 19--, at the opening of court on said day or as soon thereafter as counsel can be heard, and at the court room of the court above named in the courthouse of the City of Milwaukee, Wisconsin, the undersigned, as attorney for the plaintiff in the above entitled action, will move said court to strike from the records in this action, defendant's answer and for summary judgment in favor of the plaintiff and against the defendant, Richard Roe, pursuant to Supreme Court Rule, Sec. 270.635, in the principal sum of -----Dollars (\$-----), together with interest thereon in the sum of -----Dollars (\$-----), and for costs and disbursements of this action. Said motion will be based on the complaint and answer in this action, heretofore filed herein, and the affidavits of -----and -----, true and correct copies of which are hereunto attached.  
Dated:-----

-----  
Attorney for Plaintiff.

AFFIDAVIT OF MOVING PARTY

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

vs.

AFFIDAVIT

Richard Roe,  
Defendant.

STATE OF WISCONSIN }  
MILWAUKEE COUNTY } ss.

John Doe, being first duly sworn, on oath deposes and says:

1. That he is the plaintiff above named and makes this affidavit in support of his motion for summary judgment, as provided in Sec. 270.635 of Wisconsin Statutes 1935.

2. That the above entitled action is an original action in the above named court against the defendant, Richard Roe; that said action is brought to recover the sum of -----Dollars (\$-----) which amount is alleged to be due upon (here state the character of the action so as to make it fall within the class of actions named in Sec. 270.635 of Wisconsin Statutes, such as: an action to recover a debt or demand arising on a contract, express or implied—other than for breach of promise to marry.)

3. That the facts and circumstances under which the cause of action alleged in the complaint arose are as follows: (here set forth briefly the evidentiary

<sup>1</sup> 5 BRYANT, PLEADING AND PRACTICE (1930) § 945.

<sup>2</sup> Either the notice of motion or the order to show cause can be used in this motion.

facts establishing the existence of a cause of action, attacking the original of any writings referred to, or stating that they will be presented to the court on the hearing of the motion; such as: that on or about the 12th day of March, 1934, in the presence of John Smith, an employee of the plaintiff, and at the latter's place of business, the defendant, Richard Roe, accepted from the plaintiff, the sum of three thousand dollars in United States currency; that at the same time, the defendant executed and delivered his promissory note of which a copy marked Exhibit "A" is appended to the complaint; that the said note was made payable to the order of the plaintiff; that on the date when the note became due and payable, the plaintiff sent John Smith his employee, to demand payment of the note from the defendant; that the defendant refused payment; and that the plaintiff was at all times heretofore and now is the owner and holder of the note, no part of which has been paid).

4. That by reason of the facts aforesaid, the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_) is now due and owing from the defendant to the plaintiff, this affiant, together with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

5. That affiant verily believes that there is no defense to this action.

WHEREFORE, affiant prays that the answer of the defendant heretofore filed herein be stricken out, and that judgment be ordered for the plaintiff and against the defendant for the sum of \_\_\_\_\_, as aforesaid, and the costs of this action and this motion.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, A.D.

\_\_\_\_\_  
Notary Public—Milwaukee County, Wis.  
(My commission expires: \_\_\_\_\_)

AFFIDAVIT OF PERSON WHO HAS KNOWLEDGE  
OF THE EVIDENTIARY FACTS

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

vs.

Richard Roe,  
Defendant.

AFFIDAVIT

STATE OF WISCONSIN }  
MILWAUKEE COUNTY } ss.

John Smith, being first duly sworn, on oath says that he is employed by John Doe, the plaintiff in this action; that he has read the complaint in the above entitled action and the attached affidavit of John Doe, and has personal knowledge of all the facts and transactions therein referred to, and that all of the statements contained in the complaint and in said affidavit are true; that on or about the 12th day of March, 1934, he was present when the plaintiff gave to the defendant, Richard Roe, the sum of Three Thousand Dollars in United States currency, in return for which the defendant executed and delivered to the plaintiff his promissory note, of which a copy marked Exhibit "A" is appended to the complaint. Affiant further says that he personally presented the promissory note, mentioned in said affidavit and in the complaint to the maker of said note on the date when the same became payable and demanded payment according to the tenor of the instrument, and that payment was refused, and that the amount due thereon is as stated in the complaint.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, A.D.

\_\_\_\_\_  
Notary Public—Milwaukee County, Wis.  
(My commission expires: \_\_\_\_\_)

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT  
CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

AFFIDAVIT IN OPPOSITION TO MOTION

vs.

FOR SUMMARY JUDGMENT

Richard Roe,  
Defendant.

STATE OF WISCONSIN }  
MILWAUKEE COUNTY } ss.

Richard Roe, being first duly sworn, on oath deposes and says: That he is the defendant in the above entitled action; that he makes this affidavit for the purpose of showing unto the court, facts sufficient to convince the court that the defendant, in the above entitled matter, has a good, sufficient and meritorious defense to the claim set up in the complaint; and for the further purpose of showing unto the court that some of the facts stated in plaintiff's affidavit and the affidavit of-----, are erroneous and false.

(Here state evidentiary facts showing that the defendant has a meritorious defense such as: Your affiant further deposes and says, that neither on the 12th day of March, 1934, nor at any other time has the defendant received Three Thousand Dollars or any other amount from the plaintiff; that the defendant executed his promissory note to the plaintiff on the promise of plaintiff that he would send the money therefor to defendant within two days after the execution of the note; that the defendant has never received any money, as aforesaid from the plaintiff; that plaintiff on or about the 13th day of March, 1934, called the defendant by telephone and told him that he (the plaintiff) could not get the money and that he would tear up defendant's note; that the note was, therefore, given without consideration and plaintiff is not a holder in due course.)

WHEREFORE, affiant believes that the defendant has a good, sufficient and meritorious defense to the claim set up by the plaintiff in his complaint and prays that plaintiff's motion for summary judgment be dismissed and that plaintiff pay the costs of this motion.

Subscribed and sworn to before me this  
this-----day of-----, 19--, A.D.

Notary Public—Milwaukee County, Wis.  
(My commission expires:-----)

ORDER GRANTING SUMMARY JUDGMENT  
CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

ORDER GRANTING SUMMARY JUDGMENT<sup>3</sup>

vs.

Richard Roe,  
Defendant.

The above entitled action having this day come on regularly to be heard upon motion of-----, attorney for plaintiff, to strike out the answer of the defendant and for summary judgment for the plaintiff; and -----appearing for-----in support of said motion, and-----appearing for-----in opposition to said motion (recite other matter considered):

IT IS ORDERED THAT the motion of the plaintiff for summary judgment pursuant to Supreme Court Rule, Sec. 270.635, be, and the same hereby

<sup>3</sup> 5 BRYANT, WISCONSIN PLEADING AND PRACTICE (1930) § 945.

is, granted; that defendant's answer be, and the same hereby is, stricken out; and that judgment be entered for the plaintiff against the defendant for \_\_\_\_\_ Dollars, and interest thereon from \_\_\_\_\_, 19\_\_\_\_, and costs of this action and Ten Dollars (\$10.00) costs of motion.  
Dated: \_\_\_\_\_

By the court: \_\_\_\_\_  
Circuit Judge.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT  
CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

vs.

ORDER DENYING PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT

Richard Roe,  
Defendant.

The above entitled action having this day come on regularly to be heard upon motion of \_\_\_\_\_, attorney for plaintiff, to strike out the answer of the defendant and for summary judgment for the plaintiff; and \_\_\_\_\_ appearing for \_\_\_\_\_ in opposition thereto; and the court having heard the arguments of counsel and having read and considered the affidavits of \_\_\_\_\_ and \_\_\_\_\_ in support of said motion, and the affidavit of \_\_\_\_\_ in opposition to the motion, and the court being fully advised,

IT IS ORDERED THAT the motion of the plaintiff to strike the answer and for judgment against the defendant, Richard Roe, pursuant to Sec. 270.635, Wisconsin Statutes, 1935, be denied; and that the defendant, Richard Roe, have of the plaintiff, Ten Dollars (\$10.00) costs of this motion.

Dated: \_\_\_\_\_  
By the court: \_\_\_\_\_  
Circuit Judge.

JUDGMENT

CIRCUIT COURT MILWAUKEE COUNTY STATE OF WISCONSIN

John Doe,  
Plaintiff.

vs.

JUDGMENT<sup>4</sup>

Richard Roe,  
Defendant.

The motion of the plaintiff in the above entitled action to have stricken out the answer of the defendant and for summary judgment for the plaintiff and against the defendant, pursuant to Supreme Court Rule, Sec. 270.635, having been duly heard and considered, and said motion having been granted by the court and entry of the judgment directed accordingly, now, on motion of \_\_\_\_\_, attorney for the plaintiff;

IT IS ADJUDGED, that the plaintiff, John Doe, (here state the relief granted, such as: do have and recover of the defendant, Richard Roe, the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), together with interest in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), making in all the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_), and costs of this action, including motion costs, hereby taxed in the sum of \_\_\_\_\_ Dollars (\$ \_\_\_\_\_).

By the court: \_\_\_\_\_  
Circuit Judge.

(Date)

<sup>4</sup> 5 BRYANT, PLEADING AND PRACTICE (1930) § 945.

A REPUBLIC,  
IF YOU CAN  
KEEP IT

NEIL M. GORSUCH

*with*

JANE NITZE *and*  
DAVID FEDER



CROWN  
FORUM

NEW YORK

## 2.

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# OUR CONSTITUTION AND ITS SEPARATED POWERS

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**H**OW DOES THIS CONSTITUTION SOUND? IN lengthy and exacting detail it provides every right you could possibly hope for. It promises the “inviolability of the person” and the “privacy of correspondence,” the rights to vote and run for office, and freedom of religion, “speech, the press, assembly demonstration and association.” It even guarantees the right to an education, free medical care, and “relaxation.” I’m not kidding. Sounds great, right? Maybe even a big improvement over our own comparatively stingy Constitution?

Well, the Constitution I’m quoting from is North Korea’s. I could easily recite similar passages from the Constitution of most any communist country: They all sound about the same. But everyone knows

that the promises found in these documents aren't worth the paper they're written on. What would someone dragged from his bed in the middle of the night at the behest of the latest "Dear Leader" think about the right to "inviolability of the person"?

Our founders never knew the Kim family of North Korea, but they had plenty of experience with a tyrannical ruler. More than a few in the founding generation suffered at the hands of a capricious king, thrown in jail (or worse) without a fair trial. From their own experience and understanding of history, the framers knew that to prevent the rule of law from becoming the rule of men more is required than a Constitution full of nice promises. What's needed is a Constitution that counteracts the instinct to seek and misuse power, one that secures individual rights not so much by their enumeration as by real structural limits on the power of government and those who run it.

To this end, the framers divided the powers of the federal government into three branches. It was a radical innovation at the time, and it may be one of their most important contributions to human liberty. In Congress, the framers vested only certain enumerated "legislative Powers"—and to the framers that term had a distinct meaning. It meant the power to create new rules of general applicability with prospective application: a forward-looking function aimed at responding to new social and economic problems as they arise. To exercise that kind of power, the framers knew, required the collective wisdom of the people and their representatives. But the framers also understood that this awesome power could be used by majorities to invade the liberty of minority groups. So the framers divided the legislative power even further between a Senate and a House of Representatives. The result: Before Congress can impose new legal limits or obligations on the people, it must secure the concurrence of many different actors, answering to many different electorates, in many different elections. It is a process deliberately calculated to protect minority interests by effectively imposing a supermajority requirement for any new law.

Meanwhile, to the president the framers assigned the distinct authority to "execute[]" the law. The deliberative pace appropriate to the legislative branch, the framers believed, holds less purchase once

a law survives the legislative process. If a law can pass both houses of Congress (and receive presidential approval or survive a veto override), the framers thought it should be executed with “energy.” So the framers entrusted the executive power not to a committee, but to a single individual chosen by the nation as a whole. At the same time, the framers knew, separating the authority to *write* the law from the authority to *execute* it is essential to keep the executive branch from engaging in the sort of tyranny they experienced before the Revolution and that we see today in authoritarian regimes around the world.

Finally, the framers assigned the federal “judicial Power” to a Supreme Court and other lower courts. If the legislative power involves deciding what the law *should be* for everyone in the future, the framers conceived the judicial power as the task of applying that law as it *is* to specific disputes over past events. To exercise that particular kind of power, another and still different kind of decision-maker was needed: a neutral and impartial actor. To ensure what Hamilton called the “steady, upright, and impartial administration of the laws” to all persons regardless of their passing popularity, the founders guaranteed judges life tenure and salary protections. These protections make no sense, of course, for lawmakers in a republic where lawmaking is supposed to be responsive to the will of the people. But they are essential when the job description calls for the consistent application of the law even and especially for vulnerable and unpopular persons. And then, much as the framers divided Congress into two houses, they balanced the judiciary between independent and life-tenured judges responsible for deciding questions of law and juries drawn from the community responsible for deciding questions of fact; once more, power was checked and counterbalanced.

The separation of powers and its role in protecting individual liberty and the rule of law can sound pretty abstract. I confess it seemed that way to me in my high school civics class. I came to appreciate the genius of the founders’ design more fully only years later, when as a judge I saw what happens to real people in real cases when the separation of powers goes unattended. Let me share with you a few of their stories, some of which you will see laid out more fully later.

They’re just a sampling of so many that came across my desk as a

## OF LIONS AND BEARS, JUDGES AND LEGISLATORS

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*In this speech, I focus on the differences between legislators and judges and what happens when we muddle those roles—the dangers that follow when judges assert the right to make new laws and when legislators claim the power to decide past disputes between the people. When I was first asked to give this talk as the Sumner Canary Memorial Lecture at Case Western Reserve University, I had a different topic in mind—I planned to talk about some of the access to justice challenges that concern me and are discussed later in the book. But then Justice Scalia died and, knowing how much he cared about this aspect of our separation of powers, I decided to dedicate this speech as a tribute to him and his legacy.*

SOMETIMES PEOPLE ARE DESCRIBED AS LIONS OF THEIR PROFESSION and I have trouble understanding what exactly that means. Not so with Justice Scalia. He really was a lion of the law: docile in private life but a ferocious fighter when at work, with a roar that could echo for miles. Volumes will be rightly written about his contributions to American law, on the bench and off. Indeed, I have a hard time thinking of another justice who has written so many articles and books about the law even while serving on the Court. Writings like *A Matter of Interpretation* or *Reading Law* that are sure to influence generations of law students and lawyers.

But tonight I want to touch on a more thematic point and suggest that perhaps the great project of Justice Scalia's career was to remind

us of the differences between judges and legislators. To remind us that legislators may appeal to their own moral convictions and to claims about social utility to reshape the law as they think it should be in the future. But that judges should do none of these things in a democratic society. That judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward, and looking to text, structure, and history—not to their own moral convictions or the policy consequences they believe might serve society best. As Justice Scalia put it, “If you’re going to be a good and faithful judge, you have to resign yourself to the fact that you’re not always going to like the conclusions you reach. If you like them all the time, you’re probably doing something wrong.”

It seems to me that there can be little doubt about the success of this great project. We live in an age when the job of the federal judge is not so much to expound upon the common law as it is to interpret text—constitutional, statutory, regulatory, or contractual. And as Justice Kagan acknowledged in her Scalia Lecture at Harvard Law School in 2015, “we’re all textualists now.” Capturing the spirit of law school back when she and I attended, Justice Kagan went on to relate how professors and students often used to approach reading a statute with the question “[G]osh, what should this statute be[?]” rather than “[W]hat do the words in the statute say?” That much has changed and, as Justice Kagan said, “Justice Scalia had more to do with this [change] than anybody” because he “taught everyone to do statutory interpretation differently.”

I don’t think there is any better illustration of Justice Kagan’s point than the very first opinion the Supreme Court issued after Justice Scalia’s passing. That case—*Lockhart v. United States*—involved the question of how best to interpret a statute imposing heightened penalties for three types of offenses—“[1] aggravated sexual abuse, [2] sexual abuse,” and “[3] abusive sexual conduct involving a minor or ward.” The majority opinion by Justice Sotomayor relied on the rule of the last antecedent and argued that the phrase at the end of the sentence—“involving a minor or ward”—modifies only the last offense listed. So the statute’s penalties apply whenever there is aggravated sexual abuse, or whenever there is sexual abuse, or whenever there is abusive sexual conduct involving a minor or ward. In

creation and from the burden of having to decide “the policy of public measures.” In place of a system that mixed legislative and judicial powers, the framers chose one that carefully separated those powers. The Constitution reflects this design, devoting distinct articles to the “legislative Power[.]” and the “judicial Power,” creating separate institutions for each, and treating those powers in contradistinction.

Neither were these separate categories empty ones to the founding generation. Informed by a hard-earned intellectual inheritance—one perhaps equal parts English common law experience and Enlightenment philosophy—the founders understood the legislative power as the power to prescribe new rules of general applicability for the future. A power properly guided by the will of the people acting through their representatives, a task avowedly political in nature, and one unbound by the past except to the extent that any law must conform to the higher law of the Constitution itself.

Meanwhile, the founders understood the judicial power as a very different kind of power. Not a forward-looking but a backward-looking authority. Not a way for making new rules of general applicability but a means for resolving disputes about what existing law is and how it applies to discrete cases and controversies. Itself a necessary incident to civil society but a distinct one. One that calls for neutral arbiters, not elected representatives. One that is further bound to the past by its respect for precedent and analogy, its use of past cases as a tool for resolving current ones. And by its general rule limiting the court’s focus to the arguments the parties have chosen to present for decision. To an adherent of this traditional view of judging, the task in any case is to interpret and apply the law as a reasonable and reasonably well-informed citizen might have understood when it engaged in the activity at issue in the case or controversy—not to amend or revise the law in some novel way.

So many specific features of the Constitution confirm what its larger structure suggests. For example, if the founders really thought legislators free to judge and judges free to legislate, why would they have gone to such trouble to limit the sweep of legislative authority—insisting that any new law must survive the arduous process of bicameralism and presentment (passage through two separate houses

TO BE SURE, the practical benefits that flow from enforcing the separation of powers in an individual case can sometimes seem hard to see—maybe especially when compared (like apples vs. oranges) against the systemic efficiencies that fusing powers in executive agencies can provide. So what if a Caring Hearts, an Oil States, a De Niz Robles, or a Mathis suffers an injustice? That may be regrettable, but accommodating their individual concerns would be costly. What matters more, some might claim, is justice-in-gross; government must be allowed to work efficiently. But the founders saw virtue in the separation of powers and a government that is deliberately deliberate. Where others see inefficiency in the separation of powers, they saw fair notice; protection for the inherent value of every individual person, including especially dissenting voices; democratic accountability; and the rule of law as administered by independent judges and juries. By transferring more and more power from the legislature and judiciary to the executive, we alter piece by piece the framers’ work and risk the underlying values it was designed to serve. Like a tower in the game of Jenga, pull out this block or that one and the tower may seem largely unaffected, especially if you do it with a bit of finesse—and the lawyers who come up with justifications for the blending of powers have plenty of that. But keep pulling out blocks, and eventually what started out as a strong and stable tower will begin to teeter.

Madison and the founders held the view that “[n]o political truth is” more important to “liberty” than the separation of powers because the “accumulation of” power “in the same hands” inevitably leads to “tyranny.” We might ask ourselves today: Do we still agree? And if we do, how would we grade ourselves in bearing witness to that truth?

Alexis de Tocqueville was one of the keenest students of our new republic. He offered us this insight, which I leave with you tonight:

After having thus successively taken each member of the community in its powerful grasp, and fashioned them at will, the

supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided: men are seldom forced by it to act, but they are constantly restrained from acting: such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, till each nation is reduced to be nothing better than a flock of timid and industrious animals, of which the government is the shepherd.

I have always thought that servitude of the regular, quiet, and gentle kind which I have just described, might be combined more easily than is commonly believed with some of the outward forms of freedom; and that it might even establish itself under the wing of the sovereignty of the people.

Pretty plainly, lawmaking is supposed to be a very public and very hard business, not something that can be accomplished in the privacy of chambers or by the flick of a pen.

Third, when new laws do emerge they must be honored. All people deserve their benefit, not just the popular or powerful. For that reason, Article III assigns the resolution of “cases” and “controversies,” including those involving the application of federal statutes, not to popularly accountable politicians but to independent judges with life tenure. Nor may judges play any part in the legislative process. When it comes to statutes, Article III authorizes judges only to ensure that the laws Congress adopts are applied neutrally—“without respect to persons,” as our federal judicial oath says.

Collectively, this separation of powers seeks to foster the rule of law. The vesting clause of Article I ensures that the legislature alone may make law and that it usually must do so only with prospective application and only in terms applicable to all persons. The demand that all legislation must survive two separate houses and presidential review guarantees that these laws will be debated in public and by electorally accountable representatives so the people will know and have a chance to shape the rules they must live by. And an insulated judiciary exists so these new rules will be neutrally applied to all persons without regard to their present popularity. In a society governed by the rule of law, the people can expect to come upon the law in the books; the law does not come upon the people out of nowhere.

Given all this, it seems to me that any theory of interpretation seeking to comply with the Constitution and the values it seeks to serve must respect the divide between making legislation and interpreting it; honor the grueling legislative process, not seek to invent new shortcuts; and protect the people from political pressures when it comes to the application of the laws in their cases and controversies.

Textualism does all this. When interpreting statutes, it tasks judges with discerning (only) what an ordinary English speaker familiar with the law’s usages would have understood the statutory text to mean at the time of its enactment. Rather than beginning with legislative history or making economic hypotheses about social consequences, a textualist starts with dictionary definitions, rules of grammar, and the historical context in which a law was adopted to

whether or not a statute applies to certain conduct, then the party bearing the burden of persuasion must lose.

IF AT THIS POINT you still harbor doubts about textualism, I'd ask you to consider the old truism that you can't beat something with nothing. For if you're inclined to abandon textualism, it falls to you to offer the judge something else in return. And when you try, I wonder if you might just find yourself wishing you hadn't started down that road in the first place. Take two of the leading contenders we've already encountered: "purposivism" and "consequentialism." While views diverge within these schools of thought, I think we can safely summarize their basics this way.

Purposivists seek to give primacy to the perceived spirit of a statute—to further its primary purpose—even at the expense of the letter of the law. What evil was this statute aimed at? The proper interpretation of the statute, purposivists say, should seek to eradicate that evil. In construing a statute, purposivists sometimes hypothesize a reasonable legislator and ask what he would have wanted it to mean if he had faced the facts at hand. Perhaps an especially defining characteristic of purposivist theories is their reliance on legislative history—the committee reports, floor statements, and other papers Congress produces as it considers a bill—all in an effort to discover the hidden intention lurking behind the law. Sometimes, too, purposivists seek guidance about a statute's purpose from administrative agencies charged with superintending the law at issue.

Similarly but distinctly, consequentialists believe that judges should interpret legal texts to produce the best outcome for society. Some seek to maximize overall social welfare; others to protect favored persons or interests; still others to produce the equitable result in the case at hand. But whatever their particular stripe, consequentialists differ from purposivists in that they seek to select the outcome calculated to produce optimal policy results along some metric regardless what those in Congress might have intended.

As I see it, though, purposivism and consequentialism quickly begin to run into problems when measured against our constitutional

ing society. The clever judge has every incentive to wrest himself from that chain—to find the liberating ambiguities necessary to become a benevolent social engineer.

Of course, there are some truly hard cases, plenty of them. And judging is more of an art than some mechanical science always yielding a single obviously right answer. So, one might ask, what are judges supposed to do when faced with, say, a cryptic congressional statute whose meaning is genuinely ambiguous? *Federalist No. 78* long ago put its finger on the essential attribute of the good appellate judge when it called on members of the judicial branch to bear in mind the distinction between what it called the exercise of political will and the exercise of legal judgment, noting that judges in our constitutional system do well to avoid “the substitution of their pleasure to that of the legislative body.” It is, in other words, the judge’s job to employ not his own will but the traditional tools of legal analysis—the various canons of statutory construction, rules of grammar, analogies to precedent, and the like—in an effort to discern the meaning of Congress’s commands. Of course, judges sometimes disagree about which tools of legal analysis are most helpful in the art of ascertaining Congress’s meaning in hard cases. They also sometimes disagree over the order of priority we should assign to these competing tools. And they sometimes even disagree over the results these tools yield in particular cases. But debates like these reflect a genuine concern with how we can best reach or approximate Congress’s will, not our own.

Many other features of our legal system do much to encourage this view of the good judge. One of them is the adversarial process. When I was his law clerk many years ago, Judge David Sentelle of the D.C. Circuit liked to remind me, in his North Carolina drawl, that “in this country, Neeeiilll, we have a little thing called party control of litigation.” It seems to me that the good judge recognizes that, in our adversarial process, many of the lawyers in the cases before us have lived with and thought deeply about the legal issues for months or years before the judge ever comes on the scene. Unlike continental Europe, where the judge often charts the course of litigation in an inquisitorial search for the truth, our common law system generally affords litigants the opportunity and duty to choose which arguments

to advance and how to develop the record. We usually depend on the parties rather than a judicial bureaucracy to identify, limit, and sharpen the issues for our decision. The judges I have come to know generally have a healthy dose of skepticism about their capacities to arrive at the optimal legal answer in complex cases purely by self-direction. Instead, they rely heavily on members of the bar as partners in the process of identifying the issues and arguments for decision.

Another constraint on the judicial function lies in the collegial process of deciding appeals. We do not sit alone, but work in panels—or, as a veteran appellate attorney might put it, in packs. This process rewards efforts to reach consensus. To be sure, consensus isn't always possible, or even necessarily desirable. After all, who would have wanted Justice Harlan to forgo his dissent in *Plessy* calling on the Court to recognize the true meaning of the constitutional promise of equal protection of the laws due all persons? One of the most important aspects of the judge's role is to bear faith to the meaning of the Constitution or a statute in the face of criticism and majoritarian opposition. Ours is often a counter-majoritarian function, aimed at protecting the constitutional rights of every person, even (and perhaps especially) in the face of strong opposition.

At the same time, the process of at least trying to obtain consensus within the court often serves to illuminate the more subtle issues, sharpen the analysis, and help guard against individual biases, temptations, and willful preferences. It also means that a nuance one colleague may miss might be captured and corrected by another. The model here for me is again my first boss out of law school, David Sentelle. During the time I clerked for him, he first issued a panel opinion going one way but, later, changed his mind and wrote an *en banc* opinion (for the full court) reversing his own panel opinion. I admired the humility he showed, and the careful consideration he gave to his colleagues' views. In this respect, the Tenth Circuit may be particularly blessed. Even when we do not agree, our interactions and opinions are usually collegial and we do not hesitate to change our minds when a colleague sees something we may have missed. I think that serves the people of this part of the country well, and it is surely the envy of many of our appellate court colleagues elsewhere.

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## IN THE SUPREME COURT OF THE STATE OF FLORIDA

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### NOTICE

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TO ALL THE ATTORNEYS AT LAW IN FLORIDA:

You are hereby notified that the Florida State Bar Association will present to the Supreme Court of Florida a petition to promulgate the new Florida Rules of Civil Procedure prepared by a committee of the Florida State Bar Association. This petition will be presented on the 17th day of September, 1940, in the Supreme Court room in Tallahassee, at ten o'clock A. M. A copy of said petition and a copy of the Florida Rules of Civil Procedure, to be presented at the time and place aforesaid, are set forth in the Florida State Bar Association Journal in which this notice is published.

You are invited to attend the hearing and express your views with reference to said proposed rules.

This 24th day of June, 1940.

FLORIDA STATE BAR ASSOCIATION

By J. VELMA KEEN, *President.*

JOHN DICKINSON, *Secretary.*

J. LANCE LAZONBY, *President Junior Section.*

CHARLES C. HOWELL, JR., *Sec'y Junior Section.*

D. H. REDFEARN, *Chairman*

WM. H. ROGERS

E. DIXIE BEGGS

JAMES WHITEHURST

JOHN M. MURRELL

F. M. BURNS

*Committee.*

IN THE SUPREME COURT OF THE  
STATE OF FLORIDA

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PETITION OF FLORIDA STATE BAR ASSOCIATION  
FOR PROMULGATION OF NEW  
FLORIDA RULES OF CIVIL PROCEDURE

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TO THE HONORABLE SUPREME COURT OF FLORIDA AND THE JUSTICES  
THEREOF:

The petition of the Florida State Bar Association, an unincorporated association, not for profit, respectfully shows:

1.

That the Florida State Bar Association has a membership of approximately seventeen hundred members admitted to practice law in the State of Florida.

2.

That, under the authority of a resolution adopted on April 19, 1940, at the annual meeting of the Florida State Bar Association held at Jacksonville, Florida, a committee was appointed to adapt the Federal Rules of Civil Procedure to Florida practice; that said committee has prepared the new Florida Rules of Civil Procedure in accordance with said instructions.

3.

That said Florida Rules of Civil Procedure have been printed in the July issue of the Florida Law Journal; that, in the same Law Journal, a copy of this petition and of a notice of this hearing were also published; that a copy of said Law Journal was mailed by the Florida State Bar Association to every lawyer in Florida who is listed in Martindale-Hubbell Law Directory, so as to give notice to all attorneys of the time and place of the presentation of this petition, and that said Florida Rules of Civil Procedure are made a part of this petition by reference.

4.

That the Federal Rules of Civil Procedure were adopted in federal practice in September, 1938, and that, in actual operation, they have been found to promote the prompt and efficient administration of justice; that it is the belief of petitioners that benefits similar to those accomplished by the Federal Rules will be produced in the courts of the State of Florida by the adoption of the new Florida Rules of Civil Procedure herewith submitted to the court.

5.

That at present there are three different methods of practice and procedure in Florida—common law, chancery, and federal; that the appellate practice under each method is different; that the attorneys of Florida are thus burdened with numerous details and extra work which could be obviated by having one form of practice in the state; that this would result in making it possible for attorneys to give their clients more efficient service, and that the adoption of the proposed rules would doubtless result in fewer appeals to the Supreme Court of Florida, as many of the former technicalities would be abolished.

## 6.

That, as a result of the delays in court caused by the present procedure in Florida, the courts are being criticised and businessmen are turning more to other methods of settling their business differences; that it will not only be beneficial to the legal profession to adopt the proposed rules, but it will greatly aid the businessmen and other citizens of the State of Florida by giving to them the possibility of speedier and more efficient service in court.

WHEREFORE, petitioners pray that the proposed rules be adopted by this court and promulgated immediately, to become effective on January 1, 1941.

## FLORIDA STATE BAR ASSOCIATION

By J. VELMA KEEN, *President*.

JOHN DICKINSON, *Secretary*.

J. LANCE LAZONBY, *President Junior Section*.

CHARLES C. HOWELL, JR., *Sec'y Junior Section*.

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JAMES WHITEHURST

JOHN M. MURRELL

F. M. BURNS

Committee appointed to adapt Federal Rules of  
Civil Procedure to Florida Practice.



## FLORIDA RULES OF CIVIL PROCEDURE \*

### 1. SCOPE OF RULES — ONE FORM OF ACTION

#### *RULE 1. SCOPE OF RULES.*

These rules govern the procedure in the courts of the State of Florida in all suits of a civil nature, whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

**Comment:** Same as Federal Rule 1, except that the words "the District Courts of the United States" are changed to read "the courts of the State of Florida".  
See Rule 77 (e) for rule pertaining to clerks of courts and to courts having no clerks.

#### *RULE 2. ONE FORM OF ACTION.*

There shall be one form of action to be known as "civil action".

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

#### *RULE 3. COMMENCEMENT OF ACTION.*

A civil action is commenced by filing a complaint with the court.

#### *RULE 4. PROCESS.*

(a) **SUMMONS: ISSUANCE.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to an officer authorized by law to serve process or to a person especially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

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

(c) **BY WHOM SERVED.** Service of all process shall be made by an officer authorized by law to serve process or by some person especially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special

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\* Comments appear only under rules which have been changed from the form of the Federal Rules. When no comment appears under a rule, this shows that the Florida Rule is the same as the Federal Rule. The comments indicate the changes made in the Federal Rules to create the Florida Rules.

Reference in any comment to a certain line or paragraph in a Federal Rule indicates the Federal Rules as printed by the Government Printing Office. These rules as thus printed may be obtained for fifteen cents from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C.

appointments to serve process shall be made freely when substantial savings in travel fees will result.

Comment: Same as federal rule except that the words "a United States marshal, by his deputy", are changed to read "an officer authorized by law to serve process". Same change made in (a) above.

(d) **SUMMONS: PERSONAL SERVICE.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) Upon an infant or an incompetent person, by delivering a copy of the summons and of the complaint to such infant or incompetent person, and to his guardian or other person in whose care or custody such infant or incompetent person may be, and, unless the guardian ad litem voluntarily appears and answers, by further serving a copy of the summons and of the complaint upon the guardian ad litem appointed by the court.

Comment: Federal Rule (d) (2) is stricken and the foregoing rule substituted to comply with section 4273 C. G. L.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a partner, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Comment: Same as federal rule except that the words "a partner" are added.

(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.

(5) Upon an officer or agency of the United States, by serving the United States and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation, the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

(6) Upon the State of Florida or any of its subdivisions or other governmental organization thereof subject to suit or upon a municipal corporation, by delivering a copy of the summons and of the complaint to the chief executive officer, secretary, clerk, or recording officer thereof, or to a member of its board or governing body.

Comment: Federal Rule (d) (6) is stricken and the above substituted in lieu thereof.

(7) Upon an officer, agency, or administrative board of the State of Florida, by delivering a copy of the summons and of the complaint to such officer,

agency, or administrative board or to a member thereof. If the agency or administrative board is a corporation, a copy shall be delivered as provided in paragraph (3) of this subdivision of this rule. Service shall be made in the same manner upon an officer, agency, or administrative board of any subdivision of the state or other governmental agency thereof, including municipal corporations.

**Comment:** This is new, and is designed to meet Florida practice.

(8) It is also sufficient if the summons and complaint are served in the manner prescribed by the law of the State of Florida.

**Comment:** New, but modeled after (d) (7) of the Federal Rules.

(c) **SAME: OTHER SERVICE.** Whenever a statute of the state or an order of court provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order.

**Comment:** Same as federal rule, except that "United States" is changed to "state".

(f) **TERRITORIAL LIMITS OF EFFECTIVE SERVICE.** All process other than a subpoena may be served anywhere within the territorial limits of the state except process from the courts of justices of the peace and process from the county judges courts in actions at law, which may be served anywhere within the territorial limits of the county in which the court of the justice of the peace or county judge's court in which the action pending is located. A subpoena may be served within the territorial limits provided in Rule 45.

**Comment:** This is new, but modeled after (f) of the Federal Rule 4.

(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 an officer as specified in paragraph (c) of this rule, he shall make affidavit thereof. Failure to make proof of service does not affect the validity of the service.

**Comment:** Same as federal rule except that the words "a United States marshal or his deputy" are stricken and in lieu thereof the words "an officer as specified in paragraph (c) of this rule" are substituted.

(h) **AMENDMENT.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

#### **RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.**

(a) **SERVICE: WHEN REQUIRED.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties affected thereby, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(b) **SAME: HOW MADE.** Whenever 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. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with

the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

(c) **SAME: NUMEROUS DEFENDANTS.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(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.

(e) **FILING WITH THE COURT DEFINED.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

#### **RULE 6. TIME.**

(a) **COMPUTATION.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(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 period 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 period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by these rules.

(c) **UNAFFECTED BY EXPIRATION OF TERM.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) **FOR MOTIONS—AFFIDAVITS.** A written motion, other than one which may be heard *ex parte*, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing

affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

(e) **ADDITIONAL TIME AFTER SERVICE BY MAIL.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period.

Comment: Same as federal rule except that the word "law" in the last line of paragraph (b) is changed to "these rules".

### III. PLEADINGS AND MOTIONS

#### *RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.*

(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.

#### (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 apply to all motions and other papers provided for by these rules.

(c) **DEMURRERS, PLEAS, ETC., ABOLISHED.** Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

#### *RULE 8. GENERAL RULES OF PLEADING.*

(a) **CLAIMS FOR RELIEF.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

(b) **DEFENSES; FORM OF DENIALS.** A party 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 averment, 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 juris-

diction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

(c) **AFFIRMATIVE DEFENSES.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. 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.

(d) **EFFECT OF FAILURE TO DENY.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

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

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has, regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

(f) **CONSTRUCTION OF PLEADINGS.** All pleadings shall be so construed as to do substantial justice.

**Comment:** This rule is same as federal rule except that the words "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it" are deleted from paragraph (a) of the federal rule; "(2)" is changed to "(1)", and "(3)" is changed to "(2)" in the same paragraph.

**RULE 9. PLEADING SPECIAL MATTERS.**

(a) **CAPACITY.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

(b) **FRAUD, MISTAKE, CONDITION OF THE MIND.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

(c) **CONDITIONS PRECEDENT.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

(d) **OFFICIAL DOCUMENT OR ACT.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) **JUDGMENT.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

(f) **TIME AND PLACE.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

(g) **SPECIAL DAMAGE.** When items of special damage are claimed, they shall be specifically stated.

#### **RULE 10. FORM OF PLEADINGS.**

(a) **CAPTION; NAMES OF PARTIES.** 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). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

(b) **PARAGRAPHS; SEPARATE STATEMENTS.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) **ADOPTION BY REFERENCE; EXHIBITS.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

#### **RULE 11. SIGNING OF PLEADINGS.**

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, and who shall be duly licensed to practice law in the State of Florida. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcomer by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false, and the action may proceed as though the pleadings had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

**Comment:** The words "and who shall be duly licensed to practice law in the State of Florida" at the end of the first sentence are not in the federal rule.

#### **RULE 12. DEFENSES AND OBJECTIONS — WHEN AND HOW PRESENTED — BY PLEADINGS OR MOTION — ACTION FOR JUDGMENT ON PLEADINGS.**

(a) **WHEN PRESENTED.** A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs other-

wise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of any motion provided for in this rule alters 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 ten 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 pleading may be served within ten days after the service of the more definite statement or bill of particulars. In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made.

(b) **HOW PRESENTED.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, not exceeding in amount the jurisdiction of the court, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief.

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(d) **PRELIMINARY HEARINGS.** The defenses specifically enumerated (1)-(6) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule, shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS.** Before responding to a pleading, or if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. A bill of particulars becomes a part of the pleading which it supplements.

(f) **MOTION TO STRIKE.** Upon motion made by a party before 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 the 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.

(g) **CONSOLIDATION OF MOTIONS.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except that 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.

(h) **WAIVER OF DEFENSES.** 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 (b) in the light of any evidence that may have been received.

Comment: Same as federal rule except that the words "not exceeding in amount the jurisdiction of the court" are inserted in the fourth line, after the word "claim" in paragraph (b).

### ***RULE 13. COUNTERCLAIM AND CROSS-CLAIM.***

(a) **COMPULSORY COUNTERCLAIMS.** A pleading shall state as a counterclaim any claim, not the subject of a pending action, which at the time of filing the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence if it is the subject matter of the opposing party's claim and does not exceed in amount the jurisdiction of the court and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

(b) **PERMISSIVE COUNTERCLAIMS.** A pleading may state as a counterclaim any claim against an opposing party not exceeding in amount the jurisdiction of the court and not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) **COUNTERCLAIM EXCEEDING OPPOSING CLAIM.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) **COUNTERCLAIM AGAINST THE STATE.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or claim credits against the State of Florida or any of its subdivisions or other governmental organization thereof subject to suit, or upon a municipal corporation, or upon an officer, agency, or administrative board of the State of Florida.

(e) **COUNTERCLAIM MATURING OR ACQUIRED AFTER PLEADING.** A claim, not exceeding in amount the jurisdiction of the court, which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

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

(g) **CROSS-CLAIM AGAINST CO-PARTY.** A pleading may state as a cross-claim any claim by one party against a co-party, not exceeding in amount the jurisdiction of the court, arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(h) **ADDITIONAL PARTIES MAY BE BROUGHT IN.** 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.

(i) **SEPARATE TRIALS; SEPARATE JUDGMENTS.** If the court orders separate trial as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

**Comment:** In the seventh line of paragraph (a) the words "does not exceed in amount the jurisdiction of the court and" are added after the words "claim and". Similar words are added in paragraphs (b) and (e).

In paragraph (d) the words "United States" in first line are changed to "State", and in the last line the words "United States or an officer or agency thereof" are changed to read: "the State of Florida or any of its subdivisions or other governmental organization thereof subject to suit, or upon a municipal corporation, or upon an officer, agency, or administrative board of the State of Florida".

In paragraph (g) the words "not exceeding in amount the jurisdiction of the court" are added after the word "co-party".

#### **RULE 14. THIRD-PARTY PRACTICE.**

(a) **WHEN DEFENDANT MAY BRING IN THIRD PARTY.** Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, 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 him or to the plaintiff for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses as provided in Rule 12 and his counterclaims and cross-claims against the plaintiff, the third-party plaintiff, or any other party as provided in Rule 13. The third-party defendant may assert any defenses which the third-party plaintiff has to the plaintiff's claim. 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 plaintiff or to the third-party plaintiff. The plaintiff may amend his pleadings to assert against the third-party defendant any claim which the plaintiff might have asserted against the third-party defendant had he been joined originally as a defendant. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him or to the third-party plaintiff for all or part of the claim made in the action against the third-party defendant.

(b) **WHEN PLAINTIFF MAY BRING IN THIRD PARTY.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

#### **RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS.**

(a) **AMENDMENTS.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of

the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(b) **AMENDMENTS TO CONFORM TO THE EVIDENCE.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(c) **RELATION BACK OF AMENDMENTS.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(d) **SUPPLEMENTAL PLEADINGS.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

#### ***RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES.***

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

- (1) The simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings;
- (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (4) The limitation of the number of expert witnesses;
- (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
- (6) Such other matters as may aid in the disposition of the action.

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 controls the subsequent course of the action, 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.*

(a) **REAL PARTY IN INTEREST.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the State of Florida so provides, an action for the use or benefit of another shall be brought in the name of the State of Florida.

(b) **INFANTS OR INCOMPETENT PERSONS.** Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian *ad litem*. The court shall appoint a guardian *ad litem* for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Comment: The only change made in paragraph (a) of the federal rule is the substitution of the words "State of Florida" for the words "United States".

Paragraph (b) is stricken, and paragraph (c) is changed to paragraph (b).

### *RULE 18. JOINDER OF CLAIMS AND REMEDIES.*

(a) **JOINDER OF CLAIMS.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both, not exceeding in amount the jurisdiction of the court, as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

(b) **JOINDER OF REMEDIES; FRAUDULENT CONVEYANCES.** Whenever a claim is one heretofore cognizable 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. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

Comment: Same as federal rule, except that the words "not exceeding in amount the jurisdiction of the court" are added in the sixth line, after the word "both".

### *RULE 19. NECESSARY JOINDER OF PARTIES.*

(a) **NECESSARY JOINDER.** Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) **EFFECT OF FAILURE TO JOIN.** 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, the court shall order them summoned to appear in

th action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance, but the judgment rendered therein does not affect the rights or liabilities of absent person.

(c) **SAME: NAMES OF OMITTED PERSONS AND REASONS FOR NON-JOINDER TO BE PLEADED.** In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.

**Comment:** Same as federal rule, except that in paragraph (b), in the sixth and seventh lines of the federal rule, the words "and can be made parties without depriving the court of jurisdiction of the parties before it", and in the thirteenth to sixteenth lines the words "or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it"; are deleted.

### ***RULE 20. PERMISSIVE JOINDER OF PARTIES.***

(a) **PERMISSIVE JOINDER.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) **SEPARATE TRIALS.** The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

### ***RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES.***

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

### ***RULE 22. INTERPLEADER.***

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

**Comment:** Same as federal rule, except that figur. (1) is stricken, and all of paragraph (?), pertaining to remedies prescribed by Judicial Code, is omitted.

### ***RULE 23. CLASS ACTIONS.***

(1) **REPRESENTATION.** 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

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

(b) **DISMISSAL OR COMPROMISE.** 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.

**Comment:** Paragraph (b) of the federal rule, pertaining to secondary action by shareholders, is deleted, and paragraph (c) is changed to paragraph (b).

#### **RULE 24. INTERVENTION.**

(a) **INTERVENTION OF RIGHT.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof.

(b) **PERMISSIVE INTERVENTION.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **PROCEDURE.** A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

**Comment:** In paragraphs (a) and (b) of the federal rule the words "of the United States" are deleted.

In paragraph (c) the sentences pertaining to intervention by the United States and to constitutionality of the Acts of Congress are deleted.

#### **RULE 25. SUBSTITUTION OF PARTIES.**

(a) **DEATH.**

(1) If a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **INCOMPETENCY.** If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his representative.

(c) **TRANSFER OF INTEREST.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

(d) **PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE.** When an officer of the United States, or the state, county, city, governmental agency, or political subdivision thereof, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within six months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

**Comment:** The words "and may be served in any judicial district" at the end of paragraph (a) (1) of the federal rule are deleted.

In paragraph (d) the first five lines are omitted and the following words substituted therefor: "When an officer of the United States, of the state, county, city, governmental agency, or political subdivision thereof, is a party".

Also, in the fifth, sixth, and seventh lines from the end of paragraph (d), these words are deleted: "in enforcing a law averred to be in violation of the Constitution of the United States".

## V. DEPOSITIONS AND DISCOVERY

### *RULE 26. DEPOSITIONS PENDING ACTION.*

(a) **WHEN DEPOSITIONS MAY BE TAKEN.** 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 served, 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. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **SCOPE OF EXAMINATION.** Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in 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, nature, custody, condition, and

location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts.

(c) **EXAMINATION AND CROSS-EXAMINATION.** Examination and cross-examination of deponents may proceed as permitted at the trial under the provisions of Rule 43 (b).

(d) **USE OF DEPOSITIONS.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

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

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: 1, that the witness is dead; or 2, that the witness resides out of the county where the trial or hearing is being held, or is out of the State of Florida, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(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.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterwards brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

(e) **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.

(f) **EFFECT OF TAKING OR USING DEPOSITIONS.** A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in paragraph (2) of subdivision (d) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party.

**Comment:** In the fourth, fifth, and sixth lines of paragraph (d) (3) the words "is at a greater distance than 100 miles from the place of trial or hearing or is out of the United States" are stricken from the federal rule,

and in lieu thereof the following words substituted: "resides out of the county where the trial or hearing is being held, or is out of the State of Florida".

### **RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.**

#### **(a) BEFORE ACTION.**

(1) *Petition.* A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the State of Florida, but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(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 state in the manner provided in Rule 4 (d) 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 (d), 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 (b) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a court of the State of Florida, in accordance with the provisions of Rule 26 (d).

(b) **PENDING APPEAL.** If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the 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 court. In such case the

party who desires to perpetuate the testimony may make a motion in the court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the 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 or delay 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 the taking of depositions in pending cases.

(c) **PERPETUATION BY OTHER METHODS.** This rule is not intended to limit the right to perpetuate testimony by any other method allowed by law.

**Comment:** In paragraph (a) (1) of the federal rule the words "of the United States" in the fourth, fifth, and tenth lines are stricken, and the word "district" in the fifth line is changed to "circuit". The word "district" in the sixth line is changed to "county", and in the tenth line the words "of the State of Florida" are added.

In paragraph (a) (2) the words "district or" in the ninth line are deleted. At the end of this paragraph "Rule 17 (c)" is changed to "Rule 17 (b)".

At the end of paragraph (a) (4) the words "in a district court of the United States" are stricken and the words "in a court of the State of Florida" are added.

In paragraph (b), in the second line, the words "of a district court" are stricken and the word "district" in the fourth, seventh, ninth, and twelfth lines is stricken. In the last two lines the words "depositions taken in actions pending in the district court" are stricken, and in lieu thereof the words "the taking of depositions in pending cases" are substituted.

Paragraph (c) is changed to read as follows: "(c) **PERPETUATION BY OTHER METHODS.** This rule is not intended to limit the right to perpetuate testimony by any other method allowed by law".

#### ***RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.***

(a) **WITHIN THE UNITED STATES.** Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held

(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]".

(c) **DISQUALIFICATION FOR INTEREST.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

#### ***RULE 29. STIPULATIONS REGARDING THE TAKING OF DEPOSITIONS.***

If the parties so stipulate in writing, depositions may be taken before any person, at

any time or place, upon any notice, and in any manner and when so taken may be used like other depositions.

**RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.**

(a) **NOTICE OF EXAMINATION; TIME AND PLACE.** A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court in which the action is pending may for cause shown enlarge or shorten the time.

(b) **ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS.** After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, 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, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

(c) **RECORD OF EXAMINATION; OATH; OBJECTIONS.** The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

(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 circuit court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit 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 a motion for an order. 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.

(e) **SUBMISSION TO WITNESS; CHANGES; SIGNING.** When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the

witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress under Rule 32 (d) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

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

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered mail to the clerk thereof for filing.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

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

**(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in so attending, including reasonable attorney's fees.

Comment: "The words "in which the action is pending" are inserted after the word "court" in the last line of paragraph (a) of the federal rule.

The word "district" is changed to "county" in the eighth line of paragraph (d) and the word "circuit" added before the word "court".

**RULE 31. DEPOSITIONS OF WITNESSES UPON WRITTEN INTERROGATORIES.**

(a) **SERVING INTERROGATORIES; NOTICE.** A party desiring to take the deposition of any person upon written interrogatories shall serve them upon every other party with a notice stating the name and address of the person who is to answer them and the name or descriptive title and address of the officer before whom the deposition is to be taken. Within ten days thereafter a party so served may serve cross interrogatories upon the party proposing to take the deposition. Within five days thereafter the latter may serve redirect interrogatories upon a party who has served cross interrogatories. Within three days after being served with redirect interrogatories, a party may serve recross interrogatories upon the party proposing to take the deposition.

(b) **OFFICER TO TAKE RESPONSES AND PREPARE RECORD.** A copy of the notice and copies of all interrogatories served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30 (e), (c), and (f), to take the testimony of the witness in response to the interrogatories and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the interrogatories received by him.

(c) **NOTICE OF FILING.** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

(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 on motion promptly made by a party or a deponent, upon notice and good cause shown, may 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 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS.**

(a) **AS TO NOTICE.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

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

(c) **AS TO TAKING OF DEPOSITION**

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objections is one which might have been obviated or removed if presented at that time.

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

(3) Objections to the form of written interrogatories submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

(d) **AS TO COMPLETION AND RETURN OF DEPOSITION.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sworn to, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

**RULE 33. INTERROGATORIES TO PARTIES.**

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. The

interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the delivery of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Objections to any interrogatories may be presented to the court within ten days after service thereof, with notice as in case of a motion; and answers shall be deferred until the objections are determined, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.

***RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.***

Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying, photographing, by or on behalf of the moving party, of any designated documents, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control; 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. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

***RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSON.***

(a) **ORDER FOR EXAMINATION.** 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. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) **REPORT OF FINDINGS.**

(1) 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 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.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

***RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.***

(a) **REQUEST FOR ADMISSION.** At any time after the pleadings are closed,

may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein. Copies of the documents shall be delivered with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than ten days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission 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.

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

### *RULE 37. REFUSAL TO MAKE DISCOVERY; CONSEQUENCES.*

(a) **REFUSAL TO ANSWER.** If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the circuit court in the county where the deposition is taken, or, if the cause is pending in any court in said county, then to such court, for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

#### (b) **FAILURE TO COMPLY WITH ORDER.**

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court as provided in subdivision (a) of this rule, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) **EXPENSES ON REFUSAL TO ADMIT.** If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **FAILURE OF A PARTY TO ATTEND OR SERVE ANSWERS.** If a party or an officer or managing agent of a party willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

Comment: The following changes are made in the federal rule:

In the second sentence of paragraph (a), in the seventh and eighth lines, the words "the court in the district where the deposition is taken for an order compelling an answer" are changed to read: "the circuit court in the county where the deposition is taken, or, if the cause is pending in any court in said county, then to such court, for an order compelling an answer".

In paragraph (f) (1), in the fourth line, the words "in the district in which the deposition is being taken" are stricken and the words "as provided in subdivision (a) of this rule" are substituted.

Paragraphs (e) and (f) of the federal rule, pertaining to United States statutes, are deleted.

## VI. TRIALS

### *RULE 38. JURY TRIAL OF RIGHT.*

(a) **RIGHT PRESERVED.** The right of trial by jury as declared by Section 3 of the Declaration of Rights of the Constitution of Florida, shall be preserved to the parties inviolate.

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

(c) **SAME: SPECIFICATION OF ISSUES.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within ten days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) **WAIVER.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

**Comment:** In paragraph (a) the second and third lines reading "as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States" are stricken, and in lieu thereof the words "as declared by section 3 of the Declaration of Rights of the Constitution of Florida" are substituted.

### **RULE 39. TRIAL BY JURY OR BY THE COURT.**

(a) **BY JURY.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the State of Florida.

(b) **BY THE COURT.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **ADVISORY JURY AND TRIAL BY CONSENT.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

**Comment:** The following changes are made in the federal rule:

In paragraph (a) the words "United States" are changed to "State of Florida".

In paragraph (c) the words "except in actions against the United States when a statute of the United States provides for trial without a jury" are stricken.

### **RULE 40. ASSIGNMENT OF CASES FOR TRIAL.**

The trial courts may provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the courts deem expedient. Precedence shall be given to actions entitled thereto by any statute of the State of Florida.

**Comment:** In the second line the word "trial" is substituted for the word "district" and the word "may" is substituted for the word "shall". In the last line the words "State of Florida" are substituted for the words "United States" in the federal rule.

### **RULE 41. DISMISSAL OF ACTIONS.**

(a) **VOLUNTARY DISMISSAL: EFFECT THEREOF.**

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (b) and of any statute of the State of Florida, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal

signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

(b) **INVOLUNTARY DISMISSAL: EFFECT THEREOF.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

(c) **DISMISSAL OF COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) **COSTS OF PREVIOUSLY-DISMISSED ACTION.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

*Comment:* Same as the federal rule except that the words "United States" in the third line of paragraph (a) (1) are changed to "State of Florida" and the words "23 (c)" in the second line are changed to "23 (b)".

#### **RULE 42. CONSOLIDATION; SEPARATE TRIALS.**

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

(b) **SEPARATE TRIALS.** The court in furtherance of convenience or to avoid prejudice may order 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, counter-claims, third-party claims, or issues.

#### **RULE 43. EVIDENCE.**

(a) **FORM AND ADMISSIBILITY.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the State of Florida, or under the rules of evidence heretofore applied in the courts of the State of Florida. In any

case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) **SCOPE OF EXAMINATION AND CROSS-EXAMINATION.** 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.

(c) **RECORD OF EXCLUDED EVIDENCE.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) **AFFIRMATION IN LIEU OF OATH.** Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(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 be heard wholly or partly on oral testimony or depositions.

*Comment:* The words "United States" in paragraph (a) are changed to "State of Florida" in two instances, and the words in the seventh line beginning "on the hearing" and ending "court is held" are stricken, as they are obviously not applicable to Florida practice.

#### **RULE 44. PROOF OF OFFICIAL RECORD.**

(a) **AUTHENTICATION OF COPY.** An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. If the office in which the record is kept is within the United States or within a territory or insular possession subject to the dominion of the United States, the certificate may be made by a judge of a court of record of the county, parish, or other political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the county, parish, or other political subdivision in which the record is kept, authenticated by the seal of his office. If the office in which the record is kept is in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice consul, consular agent, or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office.

(b) **PROOF OF LACK OF RECORD.** A written statement signed by an officer having the custody of an official record or by his deputy that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, accompanied by a certificate as above provided, is admissible as evidence that the records of his office contain no such record or entry.

(c) **OTHER PROOF.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any method authorized by any applicable statute or by the rules of evidence at common law.

Comment: In the eleventh and fifth lines of the federal rule the words "district or" are changed to "county, parish, or other".

#### **RULE 45. SUBPOENA.**

(a) **FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE.** Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. 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.

(b) **FOR PRODUCTION OF DOCUMENTARY EVIDENCE.** A subpoena may also command the person to whom it is directed to produce the books, papers, or documents designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, or documents.

(c) **SERVICE.** A subpoena may be served by an officer authorized by law to serve process, or by any other person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state or any of its subdivisions or other governmental organizations, or an officer or agency thereof, fees and mileage need not be tendered.

#### (d) **SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.**

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the circuit court of the county in which the deposition is to be taken of subpoenas for the persons named or described therein. The clerk of the court in which a case is pending shall issue subpoenas for witnesses whose depositions are to be taken in the county in which the case is pending. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court issuing the subpoena.

(2) A resident of the county in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person. A nonresident of the county may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other place as is fixed by an order of court.

(e) **SUBPOENA FOR A HEARING OR TRIAL.** At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(f) **CONTEMPT.** 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.

Comment: The federal rule is followed, except as follows: The words in the first

and second lines of paragraph (c) reading "the marshal, by his deputy", are changed to "an officer authorized by law to serve process", and the words "United States" in the last sentence of paragraph (c) are stricken, and in lieu thereof the words "state or any of its subdivisions or other governmental organizations" are substituted.

In paragraph (d) (1), in the fourth and fifth lines, the words "district court for the district in which the deposition is to be taken" are stricken, and the words "circuit court of the county in which the deposition is to be taken" are substituted.

At the end of the first sentence in paragraph (d) (1) after the word "wherein" a new sentence is added, reading as follows: "the clerk of the court in which a case is pending shall issue subpoenas for witnesses whose depositions are to be taken in the county in which the case is pending".

Also, at the end of the last sentence of paragraph (d) (1), the words "issuing the subpoena" are added.

In paragraph (d) (2) the word "district" is changed to "county" in two places.

In paragraph (e) (1) the (1) is stricken, and in the third line the words "district court for the district" are stricken and the word "court" substituted. At the end of the first clause of the second sentence the word "district" is changed to "state" and the remainder of the sentence and paragraph (2) are stricken.

#### ***RULE 46. 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 does not thereafter prejudice him.

#### ***RULE 47. JURORS.***

(a) **EXAMINATION OF JURORS.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

(b) **ALTERNATE JURORS.** The court may direct that one or two jurors in addition to the regular panel be called and impanelled to sit as alternate jurors. 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. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. If one or two alternate jurors are called, each party is entitled to one peremptory challenge in addition to those otherwise allowed by law. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

Comment: Chapter 19030 of the 1939 Laws of Florida as to alternate jurors does not conflict with this rule.

#### ***RULE 48. JURIES OF LESS THAN SIX — MAJORITY VERDICT.***

The parties may stipulate that the jury shall consist of any number less than six or

that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

**Comment:** The word "Twelve" is changed to "Six" in the caption and also in this rule. Section 4361 C. G. L. provides for six jurors instead of twelve.

#### ***RULE 49. SPECIAL VERDICTS AND INTERROGATORIES.***

(a) **SPECIAL VERDICTS.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) **GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

#### ***RULE 50. MOTION FOR A DIRECTED VERDICT.***

(a) **WHEN MADE: EFFECT.** 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. 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. A motion for a directed verdict shall state the specific grounds therefor.

(b) **RESERVATION OF DECISION ON MOTION.** Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within ten days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict

was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

**Comment:** Under section 4497 C. G. L. motions for new trial must be made within four days; under the Chancery Act, section 70, petitions for rehearing must be filed within 20 days after decree is recorded; under Supreme Court Rule 25, petition for rehearing in the Supreme Court of Florida must be filed within 15 days. Since proceedings in law and in equity are the same under the federal rules, the committee adopted the ten-day period both for motions for new trial and for rehearings.

#### ***RULE 51. INSTRUCTIONS TO JURY: OBJECTION.***

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. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

#### ***RULE 52. FINDINGS BY THE COURT.***

(a) **EFFECT.** In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.

(b) **AMENDMENT.** Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

**Comment:** The word "district" in the second line from the end of paragraph (b) of the federal rule is changed to "trial".

#### ***RULE 53. MASTERS.***

(a) **APPOINTMENT AND COMPENSATION.** The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but, when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) **REFERENCE.** A reference to a master shall be the exception and not the

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

(c) **POWERS.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine upon oath. 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 in Rule 43 (c) for a court sitting without a jury.

(d) **PROCEEDINGS.**

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed *ex parte* or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

(e) **REPORT.**

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and, in an action to be tried without a jury, unless otherwise directed by the order of reference,

shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) *In Non-jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6 (d). The court after hearing may adopt the report, or may modify it, or may reject it in whole or in part, or may receive further evidence, or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

Comment: In paragraph (a) that part of the first sentence of the federal rule reading: "Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and" is deleted.

## VII. JUDGMENT

### *RULE 54. JUDGMENTS; COSTS.*

(a) **DEFINITION; FORM.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) **JUDGMENT AT VARIOUS STAGES.** When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of, and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

(c) **DEMAND FOR JUDGMENT.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) **COSTS.** Except when express provision therefor is made either in a statute of the State of Florida, or in these rules, costs shall be allowed as of court to the prevailing party unless the court otherwise directs. Costs may be taxed by the clerk on one

day's notice. On motion served within five days thereafter, the action of the clerk may be reviewed by the court.

Comment: In the second line of paragraph (d) of the federal rule the words "of the United States" are changed to "of the State of Florida". The words in the third, fourth, and fifth lines from the bottom of the paragraph (d), reading "but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law" are deleted.

#### **RULE 55. DEFAULT.**

(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 and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

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

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the State of Florida.

(c) **SETTING ASIDE DEFAULT.** For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

(d) **PLAINTIFFS, COUNTERCLAIMANTS, CROSS-CLAIMANTS.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (e).

Comment: At the end of paragraph (b) (2) of the federal rule the words "United States" are changed to "State of Florida".

Paragraph (e), pertaining to judgments by default against the United States or officer or agency thereof, is deleted.

#### **RULE 56. SUMMARY JUDGMENT.**

(a) **FOR CLAIMANT.** A party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the pleading in answer thereto has been served, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **FOR DEFENDING PARTY.** A party against whom a claim, counterclaim,

or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **MOTION AND PROCEEDINGS THEREON.** The motion shall be served at least ten 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.

(d) **CASE NOT FULLY ADJUDICATED ON MOTION.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without 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 are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **FORM OF AFFIDAVITS; FURTHER TESTIMONY.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

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

(g) **AFFIDAVITS MADE IN BAD FAITH.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party making them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

#### ***RULE 57. DECLARATORY JUDGMENTS.***

The procedure for obtaining a declaratory judgment pursuant to Chapter 7857, Acts of 1919, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

**Comment:** The words in the third line of the federal rule beginning "Section 274 (d) of the Judicial Code" and ending with the words "in the manner provided in Rules 38 and 39" are deleted, and the words "Chapter 7857, Acts of 1919, shall be in accordance with these rules" are substituted.

Section 4954 C. G. L. authorizes the Supreme Court of Florida to prescribe rules pertaining to declaratory decrees.

**RULE 58. ENTRY OF JUDGMENT.**

Unless the court otherwise directs, judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs the entry of a judgment that a party recover only money or costs or that there be no recovery, the clerk shall enter judgment forthwith upon receipt by him of the direction; but, when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry.

**RULE 59. NEW TRIALS.**

(a) **GROUND.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted, and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. 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.

(b) **TIME FOR MOTION.** A motion for a new trial shall be served not later than ten days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

(c) **TIME FOR SERVING AFFIDAVITS.** When a motion for new trial is based upon affidavits, they shall be served with the motion. The opposing party has ten days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **ON INITIATIVE OF COURT.** Not later than ten days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

**Comment:** The words in paragraph (a) reading "in actions at law in the courts of the United States" and the words at the end of the first sentence reading "in the courts of the United States" are deleted.

See also comment under Rule 50.

**RULE 60. RELIEF FROM JUDGMENT OR ORDER.**

(a) **CLERICAL MISTAKES.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

(b) **MISTAKE; INADVERTANCE; SURPRISE; EXCUSABLE NEGLECT.** 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 two 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, as provided by law, a judgment obtained against a defendant not actually personally notified.

**Comment:** In paragraph (b) of the federal rule the words "within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, sec. 118" are changed to read: "as provided by law". The words "six months", are changed to read "two months".

#### **RULE 61. HARMLESS ERROR.**

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. 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.

**Comment:** This rule is the substance of section 4499 of C. G. L.

#### **RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.**

(a) **AUTOMATIC STAY; EXCEPTIONS — INJUNCTIONS, RECEIVERSHIPS.** Except as stated herein, no execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of ten days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subdivision (e) of this rule govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) **STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(c) **INJUNCTION PENDING APPEAL.** When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) **STAY UPON APPEAL.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

(e) **STAY IN FORCE OF THE STATE OR GOVERNMENTAL AGENCY THEREOF.** When an appeal is taken by the State of Florida or by any county, municipality, board of public instruction, or any constitutional officer, and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) **POWER OF APPELLATE COURT NOT LIMITED.** The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to

stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

**Comment:** The federal rule is changed in the following respects:

In the title to paragraph (a) the words "AND PATENT ACCOUNTINGS" are deleted.

Also, in paragraph (a), in the seventh, eighth, and ninth lines, the words "or a judgment or order directing an accounting in an action for infringement of letters patent" are deleted.

The last sentence of paragraph (c), pertaining to judgments rendered by three district judges, is deleted.

From paragraph (e) the words "United States or an officer or agency thereof or by direction of any department of the Government of the United States" are deleted, and the words "State of Florida or by any county, municipality, board of public instruction, or any constitutional officer" are substituted. Also, in the title to paragraph (e), the words "United States" are deleted and the word "state" substituted, and the word "governmental" inserted after the word "or".

Paragraph (f) is stricken and paragraph (g) is made paragraph (f), and the last six lines, pertaining to the U. S. Judicial Code, are stricken.

### ***RULE 63. DISABILITY OF A JUDGE.***

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**

### ***RULE 64. SEIZURE OF PERSON OR PROPERTY.***

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 are available under the circumstances and in the manner provided by the law of the State of Florida. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

**Comment:** The words "of Florida" are inserted after the word "state" in the seventh line, and the words following the word "state", pertaining to United States procedure and continuing to the words "these rules" in the seventh line from the bottom of the paragraph, are deleted. Also, the words "by state procedure" in the second line from the bottom of the rule are omitted.

### ***RULE 65. INJUNCTIONS.***

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

(b) **TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.** No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified

complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance, shall be specific in terms, shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

Comment: The last sentence of paragraph (c) reading "No such security shall be required of the United States or of an officer or agency thereof" is deleted.

Paragraph (e), pertaining to certain acts of Congress, is likewise deleted.

#### **RULE 66. RECEIVERS.**

The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the State of Florida, but all appeals in receivership proceedings are subject to these rules.

Comment: The words in the fifth line reading "United States or as provided in rules promulgated by the district courts" are changed to read "State of Florida".

#### **RULE 67. DEPOSIT IN COURT.**

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Chapter 15996, Laws of Florida, 1933.

Comment: The last four lines of this rule, pertaining to federal statutes and providing for the withdrawal of money deposited in court, are deleted, and the words "Chapter 15996, Laws of Florida, 1933" are added after the words "provisions of".

#### ***RULE 68. OFFER OF JUDGMENT.***

At any time more than ten days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within ten 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. If the offer is not so accepted, it shall be deemed withdrawn, and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the court from the time of the offer but shall pay costs from that time.

Comment: The words "district court" in the second line from the end of the Federal Rule are changed to "court".

#### ***RULE 69. EXECUTION.***

**IN GENERAL.** Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution, shall be in accordance with the practice and procedure of the State of Florida. In aid of the judgment or execution, the judgment creditor or his successor in interest, when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions or in the manner provided by Chapter 7842, Acts of 1919.

Comment: The federal rule is changed as follows: The letter "(a)" preceding the first paragraph is deleted, and paragraph (b), pertaining to collectors of internal revenue and statutes of the United States, is also deleted. The word "state" in the seventh line of paragraph (a) is changed to "State of Florida", and the words immediately following, "in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable" are deleted. The words "the practice of the state in which the district court is held" are deleted, and the words "Chapter 7842, Acts of 1919" are substituted.

#### ***RULE 70. JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE.***

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others, and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

#### ***RULE 71. PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES.***

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party, and, when

obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

## IX. APPEALS

### *RULE 72. APPEALS TO THE CIRCUIT COURT.*

(a) **RIGHT OF APPEAL.** Any final judgment of a civil court of record, or of a court of a justice of the peace, or of any other inferior court, as well as any final determination by a county judge of the rights of any party in any particular proceeding in probate or in any particular proceeding with reference to the estates and interests of minors, may be appealed to the circuit court, except as follows:

(1) In every county in the state having a county court, appeals from courts of justices of the peace shall be to the county court, and this rule shall govern such appeals; provided that, at the option of appellant, such cases thus appealed may be tried de novo in the county court, in accordance with Article V, Section 18, of the Constitution of Florida.

(2) In appellate proceedings, by certiorari or otherwise, from any judgment or order of any of the administrative boards or commissions of the State of Florida, the procedure shall be that prescribed by statute.

(b) **NOTICE OF APPEAL.** A party may appeal from a final judgment of an inferior court by filing in the court from which the appeal is taken, within 30 days from the date of the entry of the judgment, a notice of appeal. The notice of appeal shall specify the parties taking the appeal, shall designate the judgment or part thereof appealed from, shall name the court to which the appeal is taken, and shall include a concise statement of the points upon which the appellant intends to rely.

The notice of appeal shall be served upon all parties who have appeared in the particular proceedings in the trial court, or upon their attorneys of record, and the affidavit of service or written acknowledgement thereof shall be considered a part of the notice. Such service shall be made before the notice of appeal is filed, or within such reasonable time thereafter as the judge from whose order the appeal is taken may allow.

Upon application of any party to the appeal, the circuit judge in whose court the appeal is pending shall set a date and a place for hearing the appeal. Such appeal shall be heard within 60 days from the date of the appeal unless such circuit judge, because of the condition of his docket or other cause satisfactory to him, shall enlarge such time by an order entered either before or after the expiration of the 60 days. Such order shall be filed and recorded in the office of the clerk of the circuit court.

Written notice of the hearing of the appeal shall be served at least 15 days before the hearing, unless such notice shall be waived by the interested parties. The hearing may be held at such place and at such time within the circuit as the circuit judge may determine. The filing of briefs shall be optional with attorneys, unless required by the circuit judge. The notice of hearing, with proof or acceptance of service, shall be filed in the court where the appeal is pending.

Before the hearing on the appeal, or before the hearing on a motion to dismiss it shall be the duty of the judge of the trial court, or the clerk thereof, to deliver to the clerk of the circuit court the complete original file in the case, or such portions thereof as may be designated by the parties in writing, and to take a receipt therefor. The evidence introduced in the trial court may be shown by the transcript of the evidence, or by a statement of the evidence certified by the trial judge, or by an agreed statement of facts signed by the parties or their attorneys.

The orders of the circuit judge upon the appeal shall be recorded in the office of the clerk of the circuit court. The original file, together with the original recorded orders, shall be returned to the court from which the appeal was taken, but, in a probate matter or in a case involving the estates and interest of minors, the file and the orders shall be retained by the clerk of the circuit court until the expiration of the time for taking an appeal to the Supreme Court of Florida, and, if such an appeal is taken, then until the completion of the record upon such appeal.

(c) **APPEALS TO CIRCUIT COURT AMENDABLE.** Appellate proceedings shall be amendable, and no appeal shall be dismissed for any defect or omission not insisted upon by the adverse party. An order of dismissal because of an alleged defect or omission shall give to the appellant a reasonable time in which to amend. If the amendment is not made in such reasonable time, the order of dismissal shall then become final.

(d) **DISMISSAL OF APPEALS TO CIRCUIT COURT.** Any appeal taken to the circuit court may be dismissed by the circuit court on the motion of any appellee, on five days' notice to appellant, upon one or more of the following grounds:

- (1) That the appeal was not taken within the time limited for taking appeals
- (2) That the said 60 day period for the hearing of the appeal, or the enlargement thereof if any was granted, has expired.
- (3) That such appeal, upon an inspection of the file, appears to have been taken against good faith or merely for delay.

(e) **NATURE OF APPEAL.** An appeal shall be merely a step in the case in the nature of a rehearing upon the existing record, with the exception stated in paragraph (a) (1) of this rule.

(f) **SUPERSEDEAS.** Supersedeas upon appeal shall be governed by the provisions of Rule 73 (d), (e), and (f).

**Comment:** Rule 72 of the federal rules deals with appeals from the district court to the Supreme Court of the United States. The foregoing rule takes the place of the federal rule. No assignments of error are necessary as the notice of appeal contains a concise statement of the points involved. "Et al" may be used in designating appellees. C. G. L. 4636.

### **RULE 73. APPEALS TO THE SUPREME COURT OF FLORIDA.**

(a) **WHEN PERMITTED.** Appeals from final judgments of the circuit courts and of the Court of Record in and for Escambia County, and from interlocutory orders of said courts granting, continuing, modifying, refusing, or dissolving an injunction, or refusing to dissolve or modify an injunction, or appointing a receiver, or refusing to appoint or discharge a receiver, or ordering or refusing to terminate a pending receivership, or refusing to take appropriate steps to accomplish the purposes of the receivership, may be taken to the Supreme Court of Florida, as prescribed in this rule.

No appeal to the Supreme Court may be taken from a judgment entered by a county court, or by a circuit court on an appeal from an inferior court, except that appeals may be taken from judgments entered by circuit courts on appeals from the judgments and orders of county judges in matters pertaining to their probate jurisdiction and to the management of the estates of infants.

(b) **HOW TAKEN—NOTICE OF APPEAL.** Every appeal to the Supreme Court of Florida shall be taken within 60 days from the entry of the judgment or order appealed. The appeal to the Supreme Court is perfected when a notice of appeal is filed in the court from which the appeal is taken. The clerk of the court from which the appeal is taken shall record the notice of appeal. The notice of appeal shall specify

the parties taking the appeal, shall designate the judgment or part thereof appealed from, and shall name the court to which the appeal is taken.

The failure of the appellant to take any of the further steps to secure the review of the judgment or order appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule, or, when no remedy is specified, for such action as the Supreme Court deems appropriate, which may include the dismissal of the appeal.

**Comment:** The Federal Rules do not prescribe the time for taking appeal, as the appellate period is prescribed by federal statute. The time prescribed in the Florida Rules reduces the time for taking appeals from six months to 60 days.

The provision in paragraph (a) permitting appeals to the Supreme Court from judgments of the circuit courts on appeals from county courts pertaining to probate jurisdiction and the management of infants' estates is taken from Article V, Section 5, of the Constitution. It would seem from our Constitution that the only method of reaching the Supreme Court from a judgment of the circuit court on appeal from an inferior court in other matters would be by certiorari. The same applies to a judgment of a county court on an appeal from a judgment of a justice of the peace.

No assignments of error and no statement in the notice of appeal of the points involved are necessary as the Supreme Court requires the questions involved to be stated in the brief of appellant. "Et al" may be used in designating appellees. C. G. L. 4635.

(c) **CERTIORARI.**

(1) *When Permitted.* Review of final judgments of circuit courts and of county courts, not appealable under subdivision (a) of this rule, shall be by certiorari to the Supreme Court.

(2) *How Taken.* Application for writ of certiorari shall be by petition which shall be accompanied by a certified transcript of the record of the proceedings which the petitioner seeks to have reviewed, or so much thereof as is essential. Unless shown by opposing counsel to be necessary, no other record shall be required. The petition shall contain a concise statement of the case and the reasons relied on for granting the writ. It shall also be accompanied by a supporting brief prepared in compliance with the rules of the Supreme Court. A copy of the petition, transcript, and brief shall be furnished to respondent or his counsel before filing with the clerk of the Supreme Court. The respondent may file his brief in opposition to the writ within 20 days after he is furnished with a copy of petitioner's brief. Unless further proceedings are ordered by the court, the cause shall then be finally disposed of without oral argument.

**Comment:** Rule 73 (c) of the Federal Rules, providing for a \$250.00 cost bond on appeal, is purely a federal court proceeding. It is deleted, and the above rule as to certiorari substituted.

This rule as to certiorari was included so as to provide for judgments from which certiorari has heretofore been recognized.

(d) **SUPERSEDEAS BOND.** Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When

the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property or the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.

**Comment:** Same as federal rule, except that the words "is in the custody of the marshal" and "when" are deleted.

(e) **FAILURE TO FILE OR INSUFFICIENCY OF BOND.** If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the lower court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

**Comment:** Same as federal rule except that the words "bond on appeal or a" in the first line are stricken, as they refer to cost bonds in federal cases mentioned in the comment under (c) above. The word "district" is changed to "lower".

(f) **JUDGMENT AGAINST SURETY.** By entering into a supersedeas bond given pursuant to subdivision (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. 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.

**Comment:** The words "an appeal or" in the first sentence are stricken and "a" is inserted in lieu thereof.

The words "subdivisions (c) and" in the third line are stricken, and the word "subdivision" substituted. The parts stricken refer to bond on appeal mentioned in the comment under Rule 73 (c).

(g) **DOCKETING AND RECORD ON APPEAL.** The record on appeal as provided for in Rules 75 and 76 shall be filed with the Supreme Court and the action there docketed within 40 days from the date of the filing of the notice of appeal; except that, when more than one appeal is taken from the same judgment, the lower court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of the filing of the first notice of appeal. In all cases the lower 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 lower court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.

**Comment:** The federal rule is changed as follows: The word "district" in the seventh, tenth, and sixteenth lines is changed to "lower". The word "appellate" in the third line is changed to "Supreme". The words "filing of the" are inserted before the word "notice" in the fifth line, and in the ninth line the words "the filing" are added after the word "of". In the sixth line the words "to the same appellate court" are deleted.

#### **RULE 74. JOINT OR SEVERAL APPEALS TO THE SUPREME COURT; SUMMONS AND SEVERANCE ABOLISHED.**

Parties interest 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.

**Comment:** The words "or to a Circuit Court of Appeals" are deleted from the caption.

**RULE 75. RECORD ON APPEAL TO THE SUPREME COURT OF FLORIDA.**

(a) **DESIGNATION OF CONTENTS OF RECORD ON APPEAL.** Promptly after an appeal to the Supreme Court of Florida is taken, the appellant shall serve upon the appellee and file with the court from which the appeal is taken a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal. Within ten days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included.

(b) **TRANSCRIPT.** If there is designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file a copy 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. The appellant need not file such copy if the reporter has already filed one.

(c) **FORM OF TESTIMONY.** Testimony of witnesses designated for inclusion need not be in narrative form but may be in question and answer form. A party may prepare and file with his designation a condensed statement in narrative form of all or part of the testimony, and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted for all or part thereof.

(d) **STATEMENT OF POINTS.** If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(e) **RECORD TO BE ABBREVIATED.** All matter not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties.

(f) **STIPULATIONS AS TO RECORD.** Instead of serving designations as above provided, the parties by written stipulation filed with the clerk of the court from which the appeal is taken may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

(g) **RECORD TO BE PREPARED BY CLERK—NECESSARY PARTS.** The clerk of the court from which the appeal is taken, 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; 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 statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal.

(h) **POWER OF COURT TO CORRECT RECORD.** It is not necessary for the record on appeal to be approved by the court from which the appeal is taken, or judge thereof, but, if any difference arises as to whether the record truly discloses what occurred

in the lower court, the difference shall be submitted to and settled by that court, and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the lower court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the lower court.

(i) **ORDER AS TO ORIGINAL PAPERS OR EXHIBITS.** Whenever the court from which the appeal is taken or the Supreme Court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper.

(j) **RECORD FOR PRELIMINARY HEARING IN APPELLATE COURT.** If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the supersedeas bond, or for any intermediate order, the clerk of the court from which the appeal is taken at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

(k) **SEVERAL APPEALS.** When more than one appeal is taken to the Supreme Court of Florida from the same judgment, a single record on appeal shall be prepared containing all the matter designated or agreed upon by the parties, without duplication.

**Comment:** Paragraph (a) is the same as federal rule except that the words "circuit court of appeals" are changed to "the Supreme Court of Florida" in the caption, and in the second and third lines of paragraph (a) of the federal rule the words "a circuit court of appeals" are changed to "the Supreme Court of Florida". In the fourth line the words "district court" are changed to "court from which the appeal is taken".

In paragraph (b) the words "two copies" appearing in the fourth and eighth lines are changed to "a copy". The last sentence of paragraph (b), relating to furnishing a copy of the transcript to the appellate court for printing the record, is stricken, and the following sentence substituted: "The appellant need not file such a copy if the reporter has already filed one".

In paragraph (f) the word "district" is stricken and the words "from which the appeal is taken" are inserted after the word "court".

In paragraph (g) the word "district" is stricken and the words "from which the appeal is taken" are inserted after the word "court". The last sentence of paragraph (g) relating to printing the record is deleted.

In paragraph (h) the word "district" in the third line is stricken, and the words "from which the appeal is taken" are inserted after the word "court". The word "district" in the fifth and eleventh lines and in the last line is changed to "lower".

In paragraph (i) the word "district" in the first line is stricken and the words "from which the appeal is taken or the Supreme Court" inserted after the word "court".

In paragraph (j) the word "district" in the third line from the bottom is stricken and the words "from which the appeal is taken" inserted after the word "court". The words "on the bond on appeal or" in the seventh line are also deleted.

In paragraph (k) the words "same court" are changed to "Supreme Court of Florida".

Paragraph (l), relating to printing the record, is deleted.

**RULE 76. RECORD ON APPEAL TO THE SUPREME COURT OF FLORIDA; AGREED STATEMENT.**

When the questions presented by an appeal to the Supreme Court of Florida can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the lower court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the appellate court. The statement shall include a copy of the judgment appealed from, a copy of the notice of appeal with its filing date, and a concise statement of the points to be relied on by the appellant. If the statement conforms to the rath, it, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, shall be approved by the lower court and shall then be certified to the appellate court as the record on appeal.

Comment: The words "to a Circuit Court of Appeals" in the caption and in the first sentence are changed to read: "to the Supreme Court of Florida". The word "district" in the eighth line and the next to the last line is changed to the word "lower".

## X. COURTS AND CLERKS

**RULE 77. COURTS AND CLERKS.**

(a) **COURTS ALWAYS OPEN.** All courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders and rules.

(b) **TRIALS AND HEARINGS; ORDERS IN CHAMBERS.** All trials upon the merits shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place within the state; but no hearing, other than one *ex parte*, shall be conducted outside the geographical jurisdiction of the court without the consent of all parties affected thereby.

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

(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 affected thereby who is not in default for failure to appear and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

(e) **COURTS WITHOUT CLERKS.** Judges may perform all functions and duties of the clerks of their respective courts, and, in courts having no clerks, the judges shall perform the functions and duties which these rules prescribe for clerks.

Comment: The word "District" is stricken from the chapter caption and from the captions of Rule 77 and paragraph (a). The words "The district" in the first line of (a) are changed to "All".

In paragraph (b) the words "either within or without the district" are changed to read "within the state". The word "district" in the second line from the bottom of paragraph (b) is changed to read "geographical jurisdiction of the court".

Paragraph (c), relating to courts without clerks, is new.

#### **RULE 78. MOTION DAY.**

Unless local conditions make it impracticable, each court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Comment: The word "district" in the first paragraph is deleted.

#### **RULE 79. BOOKS KEPT BY THE CLERK AND ENTRIES THEREIN.**

(a) **CIVIL DOCKET.** In lieu of the dockets heretofore kept, the clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Supreme Court of Florida and shall enter therein each civil action to which these rules are made applicable, as well as all other civil proceedings. Civil actions and other civil proceedings shall be assigned consecutive file numbers. The file number shall be noted on the folio of the docket whereon the first entry of the action or proceeding is made. 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 on the folio assigned to the action or proceeding and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. 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.

(b) **CIVIL ORDER BOOK.** The clerk shall also keep a book for civil actions and civil proceedings entitled "civil order book", in which shall be kept in the sequence of their making exact copies of all orders and judgments.

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

Comment: This rule modeled after Federal Rule 79. It permits the Supreme Court of Florida to designate the form and style of the dockets to be kept. This is not in conflict with C. G. L. 4857.

#### **RULE 80. STENOGRAPHER; STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE.**

(a) **STENOGRAPHER.** A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.

(b) **STENOGRAPHIC REPORT OR TRANSCRIPT AS EVIDENCE.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported

is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

**Comment:** Paragraph (b) is deleted, and paragraph (c) becomes paragraph (b) in the Florida rule. Paragraph (b) of the federal rule provides for the appointment of one or more official court stenographers. This conflicts with C. G. L. 4872, which permits the governor to appoint one official reporter. For this reason the committee thought best to delete paragraph (b) of Federal Rule 80.

## XI. GENERAL PROVISIONS

### **RULE 81. APPLICABILITY IN GENERAL.**

These rules shall not apply to mandamus, prohibition, quo warrants; habeas corpus and other constitutional writs, nor to certiorari except as herein specifically provided; nor shall they apply to statutory proceedings relating to adoption of children; changing names of persons; removal of disabilities of married women and minors; restoration of unatics; persons under disability and their estates, landlord and tenant; forcible entry, unlawful entry, and unlawful detainer, eminent domain; validation of bonds; seque facia; reestablishment of lost papers and records, invalidation of tax assessments; guardianship, and bastardy but these rules shall apply to appellate procedure in all such proceedings. In probate proceedings, only the rules relating to discovery, witnesses and witness subpoenas, exceptions, pre-trial procedure, and appeals shall govern.

**Comment:** This rule is adapted from Federal Rule 81, and it is designed to preserve certain constitutional remedies as well as certain simplified statutory procedural methods in Florida.

### **RULE 82. JURISDICTION AND VENUE UNAFFECTED.**

These rules shall not be construed to extend or limit the jurisdiction or venue of the courts of Florida, or the venue of actions therein.

**Comment:** The words "the district courts of the United States" are stricken, and the words "any of the courts of Florida" are substituted.

### **RULE 83. REGULATION OF PRACTICE.**

In all matters not provided for by these rules, the courts may regulate their practice in any manner not inconsistent with these rules.

**Comment:** Adapted from Federal Rule 83.

### **RULE 84. FORMS.**

The forms contained in the Appendix of Forms to the Federal Rules of Civil Procedure illustrate the simplicity and brevity of statement which these Florida Rules contemplate.

**Comment:** Adapted from Federal Rule 84.

### **RULE 85. TITLE**

These rules may be known and cited as the Florida Rules of Civil Procedure.

**Comment:** The word "Federal" is changed to "Florida".

### **RULE 86. EFFECTIVE DATE.**

The rules will take effect on January 1, 1941. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, 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, in which event the former procedure applies.

**Comment:** Same as federal rule except as to effective date.

**NOTE:** Every attorney in Florida is requested to read these rules carefully and to submit criticisms and suggestions to D. H. Redfearn, Chairman of the Florida State Bar Association committee which prepared these rules. His address is 1206 DuPont Building, Miami, Fla.

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## *Florida State Bar Association*

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## PRESIDENT'S ANNUAL ADDRESS

*By* JULIUS F. PARKER

Members of the Florida Bar Association—  
Distinguished Guests:

It is refreshing to see the Florida State Bar Association convened in a normal annual convention. For four years we have been unable, because of travel difficulties and the lack of sufficient accommodations and the absence of our veteran members to hold a convention in the style to which we had before the war become accustomed. It is a pleasure to see among you the faces of so many of our members who have been away in the armed services for the last several years.

It would be a matter of great pride to me if I could report to you that during the past year we had been able to accomplish any one of our several major objectives. That unfortunately, I cannot do. I shall refer to the progress made on each of them specifically in detail, but I think that all that can be safely said is that we have been able to do is to make a few faltering steps forward. It would seem that in an enlightened civilization and in dealing with men of superior training and intelligence that the improvement of the administration of justice would be a simple and easy matter, particularly where on six or seven distinct occasions an unusually representative group of those interested in the improvement of the administration of justice have met and affirmed and re-affirmed their desires to improve that administration within our state. Unfortunately, however, the technicalities encountered and the time involved in allowing every viewpoint to be heard has delayed a final consideration of our long-fought battle to revise and modernize the rules of civil procedure. The Legislature of 1943 authorized the Supreme Court to adopt rules for the governance of the courts of the State of Florida. Because of this the Supreme Court appointed a committee which has completed one

draft of the proposed new rules. You will hear shortly a report from Judge Elwyn Thomas of the Supreme Court relative to what has been accomplished along that line. It is my understanding that the committee has had within it considerable differences of opinion. It will be recalled by the Bar Association that on several separate occasions the Bar adopted as a project the formulation of new rules of civil procedure, based as nearly as possible upon the Federal rules. This idea received support for several reasons, first, it was thought it would be well, in the interest of uniformity, to have the procedure in the courts of Florida as nearly like the procedure in the Federal courts as possible, provided this could be done without involving a surrender of our traditions and an abrogation of our substantive law; secondly: We would get the advantage of the work of many of the best lawyers of America who have and are working to improve the administration of justice by unwrinking the impediments to justice found in the technicalities of procedure.

The Bar Association, on several occasions and after several heated debates by goodly majorities supported recommendations that whenever the rules were adopted they should cover both equity and common law. When the Bar Association finally petitioned the Supreme Court to adopt a modification of the rules of civil procedure the Supreme Court agreed that it had the authority under the 1943 acts to adopt rules for the common law side of the court but it determined that it would be unwise to make the rules applicable likewise to equity, thus insofar as the opinion of the Supreme Court was concerned, we lost one-half of our fight there. The Supreme Court concluded in its opinion, after holding that it would not adopt any rules covering both equity and law, that it also would not bodily adopt the Federal rules of civil procedure since they were not by the court deemed adaptable to practice in Florida. Many, I believe a majority, of the members of the Bar violently disagreed with this conclusion but since it was the final authority to which we could appeal, we have accepted it and have cooperated with the Supreme Court Committee for the adoption of a set of rules which the Supreme Court considered fitted to the history, tradition, and public policy of the State of Florida.

I have been informed that when the Supreme Court committee has met it has attempted to take what it considered best from the rules of various states, revising them so as to be suited to Florida's law and make them the vehicle by which we proceed in the common law courts of Florida. It thus appears that while many very fine features might be embodied in the rules, that the value of uniformity will probably be lost and a difficult situation may arise toward reconciling the procedure in equity and at law and the procedure which we must perforce follow in the Federal courts, thus creating a situation where we will have to keep constantly abreast of three separate rules of procedure, namely, the common law, equity, and the Federal.

In view of the fact that we will have until the 1947 Legislature to advise and consult with the Supreme Court and its committee, it is my recommendation that this convention express itself on this matter after full debate to determine the following questions:

1. Whether it is the desire of the Florida State Bar Association to represent to the Supreme Court a petition, again praying that whatever rules are adopted be made applicable to equity and common law alike, and
2. That when those rules are in process of final formulation the Bar Association state whether or not it would like for the Supreme Court and its committee to follow, as nearly as possible, in the interest of uniformity, the Federal rules.

As your president, I believe it to be my duty to call these things to the attention of the Bar Association for an expression of its wishes, particularly since there seems to have been a considerable departure by the Supreme Court committee from the expressed wishes and desires of this group. I say this fully realizing that our powers in the matter are extremely limited and all we have the power to do is to consult and suggest. Nonetheless, I think it would be extremely unsatisfactory if rules of procedure are adopted in Florida which do not meet with the general approval of the active lawyers in this state.

Let me state here that Mr. Justice Terrell of the Supreme Court and Mr. Justice Elwyn Thomas and the members of the Supreme Court committee have spent many hours in an attempt to secure for us within the limits of the Supreme Court's opinion a set of rules which has some fine features. Mr. Justice Terrell of the Court has informed me that it is the hope of the committee that it will eventually be able to work out a set of rules which can be contained in one volume and which a lawyer can pick up and examine and know that he has before him all of the rules covering the procedure in both the courts of equity and of law. Mr. Justice Thomas will present to you a resume of the activities of the committee so far and of its plans. It is my impression that a large number of the lawyers in Florida have been disturbed by the impression they have received that the Supreme Court's opinion as it presently stands possibly does not authorize the Supreme Court committee in its activities to prepare rules covering both equity and law. If it is the desire of this convention, a new petition can be presented to the Supreme Court specifically requesting that equity and law both be covered in one set of rules. The reasons for and against this measure will no doubt be covered in the debate and discussion which will follow the address of Lawrence Truett who has been serving as chairman of the Bar Association's committee on civil procedure. Whenever we finally get a set of rules which covers the problems today, it will require constant vigilance to keep it in step with the future progress and business methods and activities of the people of this state.

The problem of procedure is one which will always be with us. We have allowed it, over the past one hundred years, to fall several decades behind the pace of modern business and the conflicts of civilized living. I construe it to be the responsibility of this organization, therefore, to acquaint the Supreme Court from time to time with the problems which we as lawyers constantly face in carrying litigation through the courts of this state. It has been said that all great things are achieved as a result of compromise, and while many of us may have very definite views which are contrary to both the opinion of the Supreme Court limiting its rule-making only to the common law we must, unless we desire a re-examination of it, accept that as one step forward rather than to try to persuade the court while the rules are being made to cover both equity and law.

A second, and equally vital problem, which has, and still continues to face the lawyers of this state, is the inefficiency of its internal organizations. We are a voluntary group, standing alone among all the other professions which are practiced in Florida. We have no powers of coercion and yet each of us as lawyers must accept and bear the brunt of the wrongdoing of our brethren without being vested with any power to correct such wrongdoing. In addition to that, inroads of every sort are made upon the field which is generally considered to be the practice of law. We have had and dallied a long time with the question of the permanent organization of the lawyers of the State of Florida into a group, subject to the control of the Supreme Court of the State of Florida. Because many of us have had divergent views, either as to whether it should be done, or, if it should be done, how it should be done, thus so far nothing has been accomplished.

# FLORIDA LAW JOURNAL

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## *Florida State Bar Association*

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## *President's Message*

There has been considerable activity on the part of the Board of Governors, the Committees on Integration and Rules of Civil Procedure, and your President, since the last issue of the Law Journal.

Limitations of space and time requiring brevity of report, the members of the Bar are advised as follows:

- 1) The Committee on Integration Rule met in Jacksonville on August 4th and 5th, and worked out a tentative draft of Integration Rule to be submitted to the Board of Governors.
- 2) On August 10th the President of the Association, in the capacity of Notary Public, was honored to administer the oath of office to Justice B. K. Roberts the freshman member of the Supreme Court. The ceremony was held in the Governor's office.
- 3) The Board of Governors met in the Lawyers Study (NOT LOUNGE) of the Supreme Court on September 13th, and adopted, modified, and tentatively amended portions of the proposed integration rule and by-laws supplementing the rule. A Committee of the Board is now working on the revisions agreed to at the meeting and same are to be typed and furnished by the Secretary to all Board members as soon as possible. Upon final approval of the Board of Governors, the integration rule and by-laws will be submitted to the Supreme Court.
- 4) The Committee on Rules of Civil Procedure met in Tallahassee on the evening of September 12th and on the following day engaged in an all-day presentation before the Supreme Court (en banc) of the revised rules of common law and equity procedure, which previously had been submitted to and approved by the Supreme Court and transmitted to the Legislature. Only four members of the Bar appeared in opposition to the rules or to propose amendments or modifications. The matter now rests with the Court.
- 5) The President met with the Public Relations Director and the Secretary on September 12th for the purpose of preparing the ground-work for public service radio broadcasts on behalf of the Association. The President also participated in the Board, Court, and Committee meetings above set forth.

The mid-winter conference of delegates will be held in Jacksonville on December 17th. Full details will be later announced by the Secretary.

RICHARD H. HUNT  
President

Ollie Edmonds  
Stetson University  
DeLand, Florida

Frank H. Elmore, Jr.  
Graham Bldg.  
Jacksonville, Florida

C. Clyde Atkins  
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#### **Committee on Organization of the Bar Association**

Thomas Jean Ellis, Chairman  
Tallahassee, Florida

William A. Lane, Vice-Chairman  
First Federal Bldg.  
Miami, Florida

Richard Merritt  
Pensacola, Florida

Frank L. Watson  
Buckman Bldg.  
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Hugh L. McArthur  
Wallace S. Bldg.  
Tampa, Florida

Wareing T. Miller  
Guaranty Bldg.  
West Palm Beach, Florida

Hewen A. Lasseter  
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First National Bank Bldg.  
Miami, Florida

Thomas F. Fleming  
Broward National Bank Bldg.  
Fort Lauderdale, Florida



## PROCEEDINGS CONFERENCE BAR DELEGATES APRIL 15, 1948

MR. BEGGS: The Conference of Bar Delegates, preceding the 41st Annual Convention of the Florida State Bar Association, will please come to order. We are dispensing with any formalities in connection with the Conference of Bar Delegates and you will be appropriately welcomed at the formal opening of the Convention proper on tomorrow morning. This session, as you know, is devoted to the consideration of the real problem of the Association, which is a meeting of the Delegates from Local Bar Associations all over the State. The Bar Delegates have been apportioned in accordance with the size of the Local Association. This assembly has no power to bind the Association. But its recommendations to the Association carry great weight, because of the opportunity for deliberation and consideration of the matters that are referred to at these meetings.

The proceedings today are being wire recorded. Those speakers who will have something to say, will please come forward and speak in front of the microphone on the desk here in front of the platform.

The principal matter of business for today is one of the most important undertakings, in recent years, by the Bar Association. That is, the revision of the Rules of Civil Procedure. The proposed revision has received wide publicity by appearances in a supplement to a recent Advance Sheet of the Southern Reporter, and in the April issue of the Florida Law Journal. Any persons who do not have a copy of the proposed rules before them may borrow a copy of the Bar Journal on the Secretary's desk. I will ask that they be distributed around, to those who do not have copies.

Prior to our deliberations, the Secretary will call the roll of the Local Bar Associations. Each chairman of each delegation will please stand and state the attendance of your delegation upon this Association.

... A roll call of delegates attending the Association meeting was had.

MR. BEGGS: We will now begin our deliberations. I read from the Constitution of the Conference of Bar Delegates:

"The purpose of this Conference is to create a better understanding between the members of the Florida Bar and a fair exchange of ideas among the delegates to the meetings to the State Bar Association; to encourage and maintain proper standards of professional conduct and to co-operate with the Florida State Bar Association in its program and purposes. The Conference shall have no power to make any decision binding upon the Association; but, after approved by a majority of the Conference, it shall be reported to the Association for such action as said Association may deem proper. Propositions discussed in and disapproved by the Conference, shall, upon a majority vote of the Conference, be reported to the Association with a brief statement of the grounds urged and opposed."

We will, of course, be governed by those regulations, in our deliberations this morning, and throughout the day.

As I have already indicated, the principal item of business that will occupy most of the day will be the consideration of the proposed Rules of Civil Procedure. These rules have actually been framed as a revision of the Common Law Rules of Florida. It is to be hoped that if adopted and promulgated by the Supreme Court, that at the same time there will be a companion revision of the Rules in Chancery Cases. With that end in mind, Mr. Edward McCarthy, of Jacksonville, Chairman of the Chancery Practice Committee, is present this morning with members of his Committee.

After the rules have been discussed, if anyone has any thought in connection with the application of the rules to Chancery Practice, your suggestions will be welcomed by Mr. McCarthy and his Committee.

Mr. John T. Wigginton, of the Tallahassee Bar, has served very ably on this Committee, as its chairman. He and the eminent lawyers that constitute this Committee have devoted a great deal of their time and personal expense to a formulation of these rules, having held meetings about the State, and having met at length at Tallahassee with members of the Supreme Court and its Advisory Committee in the preparation of the rules.

I will call Mr. Wigginton to the platform and turn the meeting over to him, for a presentation of the proposed rules.

MR. WIGGINTON: Mr. President and members of the Conference:

This subject of rules is one which on its face appears to be rather dry and technical, and one, which, to say the least, is not very interesting. But I am sure that we will all agree that it is one that is vital to the practice of law and in which we all, generally, do, and most certainly should, have a very keen interest.

In order that you might know the situation in which this Committee found itself upon being constituted, I would like, with your permission, for a moment,

to go just briefly into the background of this question of rules for the Association.

Those of you who have been in this Association and have been more active in it than I have, remember that this work has been going on, by the Association now, for perhaps nine or ten years. The lawyers of the State, with the cooperation of the members of the bench, have been trying that long to effect some reforms in our procedure at Common Law. The first problem that was presented was, who had the right to promulgate rules. The question arose as to whether the Court, itself, could do it or whether it had to be done by the Legislature. I think a committee of this Association went before the Court by petition and was advised at one time that they considered it, primarily, a legislative matter. So our Committee worked on a draft of a bill and tried, I think, for two or three sessions, to get it adopted in the Legislature, giving the Supreme Court the authority to promulgate rules of procedure at Common Law. After much opposition and a very hard fight over the years, such a bill was enacted. It gave the Supreme Court the right to promulgate such Common Law Rules as it saw fit, which, when promulgated, would be final, but with the condition, however, that that report of those rules be sent back to the Legislature as a matter of information. When that hurdle was passed, the Association felt then that it could go directly before the Supreme Court with suggestions and with a proposed draft that would be acceptable and would be adopted by the Court. I think, under the instructions of this Association, this Committee prepared a draft of rules modeled almost exclusively after our Federal Rules of Procedure. That draft, that was prepared after many meetings and much hard work, you might say, adopted the Federal Rules of Procedure for the Florida Practice. The net effect of them was to abolish the distinction between law and equity and to repeal all of our existing rules. We had, under those rules, as we do in the Federal Court, only one form of action. Your Committee filed that report with the Supreme Court by petition and asked that it be adopted. At that time the Court did not feel that it was wise, either to abolish the distinction between law and equity, or to adopt, in toto, the Federal Rules of Procedure as the Rules of Practice in Florida. So the Committee's recommendations and the report was rejected. I think it was rejected in such way that this Association was given to understand very clearly that the Court did not consider that now was the time or that this was the time to abolish our old rules or to adopt the Federal system in the State of Florida. I think, for the purpose of this discussion today, that it would serve no useful purpose for us to go back and try to determine if they were wise in that action. I think it can be said that was the action and I do not believe that any different opinion is entertained by the Court today. Nor was it at the time this Committee was constituted. The Supreme Court, itself, appointed its own committee to work on this matter, and a committee of very able lawyers, and some members of the bench, met from time to time with members of the Supreme Court in an effort to suggest certain rules that might improve our practice at Common Law. That Committee drew up a tentative draft and presented it to the Court and the Court, I think, had it published. That was done shortly prior, I think, to the convention of this Association at Palm Beach. Most of you who were at the Palm Beach Convention, remember what happened there. Some rather strong words were used on the convention floor, expressing opinions as to the Court's action in rejecting the Association's recommendations, and as a result, the Supreme Court Committee, while not being disbanded, at least ceased, temporarily, doing any work at all. They called the dogs off, so to speak, and the matter stood in status quo. The Committee from this Association attempted, from time to time, to get the matter again revived and some more work done

on it to see if we could get together. But I do not think that those efforts met with great success either. Therefore, when President Beggs came in and appointed this present Committee to try to work on our Common Law Rules, that, which I have briefly related, was the background of this question that we were faced with when we were brought around to consider what could be done. Your Committee has met three times since it was appointed; twice in Jacksonville and once in Tallahassee. At our first Jacksonville meeting, we thought that it was important and necessary that the first act we do was to determine what course of procedure we would take. As we saw it, we had three alternatives. First, we could still insist that all of our Common Law Rules and our Equity Rules be junked, and that we go back to the Supreme Court again, insisting on the Federal Rules or nothing. That was one course that we could take. It would not have taken much work on our part, because we could have re-adopted the formal report that was filed and go back and ask that it be considered. However, a discussion with some members of the Court convinced me that this course of procedure would be futile; that we would be butting our heads against a stone wall; that no useful purpose would be served; it would just tend to further aggravate the situation that had theretofore existed, and nothing could be accomplished. The other course that we could have taken was to assume the attitude that some members, some respectable members of our bar had taken, and that some respectable members of our bench had taken, and that is that no changes were necessary. That would have also been a very easy course to have taken. We could have filed that report with the convention at this meeting and have been discharged. However, the members of the Committee did feel that a certain number of changes were highly desirable to improve the Common Law Practice in Florida, and we also felt that some of those changes could be made acceptable to the Supreme Court. We approached our duties with the attitude that the responsibility, after all, for the adoption of rules, was not the State Bar Association's, nor our Committee's. I have found it very easy to make suggestions to the man in the responsible position, who has to answer for his acts, but when you are in that position, it is a little more difficult to deal with a subject and you go a lot more slowly because the responsibility rests on you. Therefore, this Committee realized that we were in a position of trying to be helpful and working in co-operating with the Supreme Court and its committee; realizing all the while that the ultimate responsibility for any changes that are made, lies with the Court itself. So the last course was the one that we adopted. We decided at that first meeting that we would use, as a basis for our work, for the basis of any changes that we might suggest, the work that had heretofore been done by the Supreme Court Committee, itself, because they had made a number of very good suggestions in the form of rules, and we would take that and the Rules of Federal Procedure and we would work from there on out, retaining, if possible, as many of our existing Common Law Rules as we felt were desirable and were still capable of being used in the practice; those that were not, we would try to amend them to make them usable, and then we would also incorporate into this draft, new rules, patterned, as I say, primarily, after the Federal Practice. After two meetings we developed a draft of rules that we thought could be used as a working basis. We then asked the Supreme Court to call its committee together. I might say here that from the very outset of this Committee's work, Judge Glenn Terrell, who was Chairman of the Supreme Court Committee, has been extremely helpful and co-operative in everything that we have done. I have consulted and co-operated with him before our first meeting and since. I might say that he attended our second meeting in Jacksonville, and sat in with us and gave us the benefit of the suggestions that he had. After our

draft was gotten up and we went over it and were satisfied with it, Judge Terrell promptly called a meeting of his Committee. On that Committee were two Supreme Court Justices, in addition to Judge Terrell, as well as the other very able outstanding lawyers of the States who comprised his Committee. Judge Thomas, one of the members of that Committee, could not be present, and Judge Wisehart, who was serving in Tallahassee, then, as an Associate Justice sat in our meeting with us that day. We took the draft that this Committee had gotten up and went over it rule by rule with the Supreme Court Committee in joint meeting. The meeting was very harmonious; there were naturally, differences of views, which were frankly expressed, but after the end of that day and half of the next, we had succeeded in going through our entire draft of rules, making such additional changes and alterations as appeared to be desirable and necessary, and finally wound up with the completed and final draft which has been published, as President Beggs said, in the Advance Sheet of the Southern Reporter and the Bar Journal, which is now before you for your consideration.

Judge Terrell told me before I came down, and, by the way, I am very sorry that he could not be here, but he could not. He asked me to speak for him, however, in this respect. That between the time this convention closes and your Committee goes back before the Supreme Court with the formal petition for the adoption of these rules, we expect to get, and hope to get from the members of the bar and the bench, as many suggestions as you might have concerning these rules. And when we feel that all of the suggestions that we are going to get, are in, we will again call a joint committee meeting and take your suggestions one by one and go over them and give them the very best that we have in the way of consideration. The spirit on those two committees, I think, is splendid. There is no one on the Committee who is dogmatic, particularly, or who has formed or advanced any fixed ideas about them; we are all striving to give the bar and bench something that will be helpful. So I want you to know that I will valuably welcome all of your suggestions, and I want you to know that before we get through with our work, that every suggestion that you, or anyone else makes, will have the very best consideration that we can give it. And when we get through considering these suggestions, we will make such alterations or amendments as may be necessary to conform these thoughts and ideas of yours in a draft, and that, then, will be the final form of the rules that we will propose by our petition to the Supreme Court. So, there is no pride of authorship in this set of rules that we are now considering. Many people have worked hard. We are proud of the work that we have done, naturally, but we are not too proud that we close our eyes to the thought that they cannot still be further improved. So with that in mind, and assuring you that we do welcome, and will welcome your suggestions, we will now hear from the floor on a discussion of the rules, individually. Or, if you have any thoughts about the general purpose, we will be glad to discuss those too. As you speak, come right up here, because we are wire recording these proceedings.

MR. DeJARNETT: Mr. Wigginton, you left the inference, I think, that the Supreme Court Committee has given their blessing and their approval to these rules. I happen to know that a good many members of that committee are violently opposed to them. Did you intend to leave that impression?

MR. WIGGINTON: Mr. DeJarnett, I did not intend to leave that impression. I meant to state it as a fact. And, it is a fact. Now I do not say that every member of the Supreme Court Committee was in Tallahassee when we acted on this. I do not think all of them were. However, a quorum of the Committee was present. All came that wanted to, or could, because they were all invited

and given, to my knowledge, three weeks notice of the meeting. At that meeting we took these rules one by one, and I would say ninety percent of the Supreme Court Committee, as well as ninety percent or more of our Committee, approved, unequivocally, every rule in this compilation. I would not doubt but what there are some members of the Supreme Court Committee, violently opposed to these rules. If you know anything about the composition of that Committee,—and I wish Judge Terrell was here, because he appointed it—he purposely and intentionally appointed on this Committee, men whom he pretty well knew did not want any changes in the rules. On the other hand he appointed on this Committee, men who wanted the old rules thrown out of the window and the complete Federal Practice installed in Florida. He also appointed on this Committee, men in between those two extremes, hoping, as he told me, to get a very fair cross section of thought on the subject, believing that when that Committee so constituted, came out and adopted a set of rules or approved them, that they would be very good rules and had been looked at from every angle. So I do not question your statement that there are some members on the Supreme Court Committee who do not like the rules. However, I will say again, as a fact and not an inference, that at least ninety percent of the Supreme Court Committee present in Tallahassee, in response to the chairman's call, approved, unequivocally, every rule in this compilation.

Does that answer your question?

MR. DeJARNETT: Yes.

MR. WIGGINTON: Are there any other questions, gentlemen?

MR. GETZEN: May I ask if the Committee has given thought, upon the final adoption of these rules, as to when the effective date will take place, as to the adoption? Of the practice?

MR. WIGGINTON: Mr. Getzen, I will state that that question has been informally discussed in our Committee meetings, and I will say that in conference with Judge Terrell, he raised that question and I told him that from talking to my Committee—"I say my Committee"—our Committee, it was our feeling and our desire that as soon as we could get a set of rules, that we could agree on, that we were going to propose them to the Court and ask that they be immediately adopted and put into effect as soon as they possibly could be, taking into consideration all factors that should be considered as to the time. We felt that as time goes on, there would be no real purpose served by any unnecessary delay in getting a workable set of rules adopted. Judge Terrell indicated to me, however, that he thought he would like to delay any final action on the rules until at or about the time of the 1949 Legislature, so that they could then promulgate these rules and pass them over to the Legislature for its inspection, thereby giving the Legislature any opportunity it might want, to do anything in its power toward making any changes. I think the Court wants to be fair with the Legislature, the legislative branch of the government, and not usurp any of its prerogatives. Now I do not know that Judge Terrell was speaking for the Court. I am inclined to think that he was not. I believe that was his own individual feeling about it. It may be that it was a feeling sponsored by the desire to protect the Court in anything it saw fit to do, after the Legislature adjourned and try them for two more years, and then the Legislature could make the changes. Now I would like to have expressions from the floor as when these rules should become effective in the event we can finally come out with a set of rules, after all suggestions have been considered, that are acceptable to the Court. I was only acting as the spokesman of our Committee. I would be glad to hear your suggestions from the floor.

MR. RAILEY: If I may be permitted, as you went over these rules, I found some in which I found some contradictions and inconsistencies. If I

might point out, not speaking of just one rule, but, there are one or two things at this point. And, by the way, I am one who thinks that there should be some revision of our rules. I have practiced under the old rules some forty years. So, it doesn't make a whole lot of difference. However, I do think the practice could be improved.

Now take Rule 5, for instance. It abolishes rule days and process. Now, if you turn over to Rule 50, Time for Traverse. When any garnishee answers at the time required by law and so forth, he shall have until the next succeeding rule day to file a statement traversing the allegations of the garnishment. Also, in Section (b) of that same Rule 50, reference is made that scira facias shall issue against such garnishee, returnable to the next rule day. Now that may have been an oversight on the part of the Committee.

MR. WIGGINTON: If you will note there, Mr. Railey, in Rule 50 of these rules, you will find that we have excluded from the operation of these rules, the statutory forms of procedure where the procedure in accomplishing the purpose of those statutes, is fully set out. In other words we have a number of statutory procedures. We have a number of statutory remedies. The procedure for getting those remedies is set out in the statute and it is felt that the procedure set forth in those statutes is excellent, considering the type of action you are filing. So we have excluded from the operation of these rules, those various statutory remedies where the procedure is set out in the statute itself. We felt within the time limited, it would be impossible to go through all of those statutory remedies and try to suggest rules that would amend the statute and eliminate rule days and make all of those forms of procedure conform to these rules. Now these Common Law Rules apply especially to your Common Law forms of action and not your statutory form of procedure. Is that right, Mr. Pleus?

MR. PLEUS: That is correct.

MR. WIGGINTON: And that is the reason you find that in there. Now we considered eliminating that rule entirely on garnishment. But, we turned to our statutes and found that the provision of that rule is not covered in the statute and therefore we felt that it should be included and retained in our rules. You will find that is one of our old Common Law Rules. Rather than abolish it and leave nothing there to cover the situation, we carried it forward into our rules as we have on several other matters. But we tried to make it clear, and I did mention that in the beginning—or I should have—and I thank you for calling it to our attention—that these rules will not apply to any of your statutory remedies, where the procedure for getting that relief is fully set forth in the statute.

MR. RAILEY: Referring to the same Rule 5, and then referring to Rule 13, paragraph (a), it says, "a defendant shall serve his answer within twenty days after the service of the summons upon him, or not later than the Appearance day fixed in the notice". Now there is no Appearance day fixed in the summons. Does that refer to the summons or does that refer to some other notice? It refers to an Appearance day. Well, the summons doesn't fix any Appearance day, except twenty days after the service. Now what reference does that "Appearance" have? To what does it refer? "Not later than the Appearance date".

MR. WIGGINTON: Yes, sir.

MR. RAILEY: Now there is no provision in this rule, as I see, for any appearance.

MR. WIGGINTON: No, sir.

MR. RAILEY: Well—.

MR. WIGGINTON: There is a return date only as set forth in the summons,

or, if it is a notice, then it is the day that you are to appear and file your pleading. As in publications.

MR. RAILEY: That "appearance" refers to that?

MR. WIGGINTON: Yes, sir.

MR. RAILEY: It seems to me that that could be made a little clearer.

MR. WIGGINTON: Yes, sir. That was taken almost verbatim from the Federal Rules, and I am sure that you are familiar with how that is done in the Federal Practice. It is taken almost exclusively from the Federal Rule on the subject, and that is what it refers to. There is no provision for appearances under these rules, as it is now. You come in in twenty days and file your defensive pleading, either motion or answer.

MR. RAILEY: In referring to Rule 9, paragraph (g). "A pleader shall set up in the same action as many claims or causes of action in the same right as he has". Then in the next sentence, "A party may also set up two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense, or in separate counts or defenses." Then further down,—in the last sentence, "A party may also state as many separate claims or defenses as he has, regardless of consistency, and whether based on legal or on equitable grounds". Now it seems, in the first place, this hypothetical proposition—I am opposed to that. The alternative is all right but I don't think there should be any hypothesis. You deal in hypotheticals. But in the last paragraph, particularly, is the objection, that you may set up claims, legal or equitable. You are combining there, law and equity in one; in your Common Law suit. We are supposed, and as I said, the intention was, to separate them. Under our present Common Law system we set up equitable defenses, which I think is not proper. But I don't think we should try to combine them; try to combine equity and common law in setting up that claim. Then you might just as well do away with your equity branch of the Court.

Now referring to Rule 13.

MR. WIGGINTON: Before you leave that, do you want to finish discussing that matter?

MR. RAILEY: That is all right.

MR. WIGGINTON: I think you have a very good thought there. Of course, under our Common Law practice, at present, the defendant can file equitable pleas. You have no objection to that phase, here, where it says a defendant may file separate equitable defenses.

MR. RAILEY. I have no objection to that. But I am talking about the equitable claims that a plaintiff might file.

MR. WIGGINTON: Well, I think that is something we could give some thought to. That, again, is modeled after the Federal Practice, but you can understand why it would apply there, because there is no distinction between law and equity and it is not present. Here we are preserving the distinction. But, that is a very good thought and one that your Committee will give some consideration to. In other words we will stay in the Common Law side of the Court all the time in filing our claims. That is, it would be a Common Law claim throughout and no Equity claim. As to defenses, they can still file the equity defenses. We were perhaps led off there by patterning it after the Federal Practice and that was overlooked. I thank you for calling it to our attention.

MR. RAILEY: Now referring to Rule 13 again, paragraph (b) as to presenting these defenses, in connection with paragraph (h) in the same rule. "That the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party", and so forth, and also "(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 party waives all defenses except he knows. Now why the repetition in paragraph (h), setting up those defenses, or why that exception? In paragraph (h).

MR. WIGGINTON: Mr. Pleus, that is one of the rules, I believe, that you worked on. Will you answer it?

MR. PLEUS: I am not certain that I understand your exact question, sir, and I wish you would re-state it.

MR. RAILEY: That paragraph (b) sets forth the defenses that may be set up by motion.

MR. PLEUS: Yes. That is correct.

MR. RAILEY: Paragraph (h) of that rule says a party waives all defenses and objections which he does not present, either by motion as heretofore provided. That is, I am referring back to (b). Or, if he has made no motion in answer to a reply, except—now the exception is what I am referring to. "That the defense of failure to state a claim"—. Well, in (b) you can set up that defense. Under (b). Why doesn't he waive that, if he don't set it up here. Why this exception, is what I am getting at. Why the exception from (b)?

MR. PLEUS: Well, the point is that you set those defenses up by motion, but, you waive those defenses which you do not present by motion. Provided that you have made no motion, you cannot set them up in your reply, or answer. Now, is that part clear?

MR. RAILEY: No, because (b) provides that you set them up in your claim.

MR. PLEUS: That is right. Now, then, these exceptions are that you can set those up at a later time, because if your pleading does not set up a cause of action, you are not entitled to recovery, regardless of when that is made.

MR. RAILEY: Why set them up later? Why not compel them to set them up all at once and get through with it? You insist on these two things.

MR. PLEUS: Suppose you did not set up the lack of an indispensable party, and then the matter came on for final hearing or final judgment and it was determined that there was an indispensable party. That was not the way. But, can the court proceed to grant relief? It might not be developed until a later time. That is the theory of the Federal Rules. The same as jurisdiction. Whenever it appears that the court lacks jurisdiction, it makes no difference whether you have ever raised it or not. And that is the purpose of those exceptions right there.

MR. RAILEY: Referring to Rules 19,—this is probably—maybe—just a typographical error. But, it refers to the judicial districts. It probably occurred from copying the Federal Rule. "And may be served in any judicial district". Now in Rule 20, as to depositions, paragraph (a) in the second sentence, "after the commencement of the action, the deposition may be taken without leave of court, except that leave, granted with or without notice must be obtained if notice of the taking is served by the plaintiff within twenty days after commencement of the action". Why the exception there? Rule 20 paragraph (a)? Second sentence. I am just calling your attention in order to get a more clearer explanation of these things.

MR. PLEUS: Yes, sir. The purpose is that the defendant is not required to file his defensive plea until twenty days after the commencement of the action. He, as a matter of fact, has not submitted himself to the jurisdiction or responded to the process until that time. If, within that time, you want to take the deposition, you must have leave of court. That situation might present itself.

MR. RAILEY: Now Rule 30, (b) 1.—

MR. PLEUS: I think you will find, as you go along, other typographical errors, and, if you do, we will appreciate it if you will call them to our attention.

MR. RAILEY: Thank you very much.

MR. McCARTHY: Mr. President, I have an observation to make regarding Rule 11, considering it a correction of Rule 4, requiring copies of contracts to be attached to and made a part of the pleadings. I think that we might have some consideration of our efforts to simplify the practice, as far as possible, without placing on us the burden of unnecessary paper work. If I were to require a copy of a simple promissory note or some such contract as that, attached to a declaration. It is conceivable could be brought on a lot of things, such as contracts. I think it would be best to require the plaintiff to set out a complete copy of a long contract and make it a part of his declaration, and then make copies of that to be filed in the clerk's office, to be served on a party. These rules are to apply exclusively to common law practice, and I suggest that the Committee take into consideration some limitation of this requirement, that every contract upon which a pleading is based, must be copied, because I think we can save a good deal of unnecessary paper work in that way.

MR. WIGGINTON: Thank you very much for that suggestion. In order that you might not have to copy all of the voluminous documents and attach them to your cause of action, sir, this rule contains this language which I am sure you saw:

"All bonds, notes, bills of exchange, contracts and accounts upon which suit may be brought, or a copy thereof, or a copy of the portion thereof material to plaintiff's cause of action, shall be incorporated in"—and so forth.

Now under that rule, if you have a voluminous document and your cause of action depends on only certain material portions of it, of course the rule itself excuses you from copying the whole thing. And, you attach copies of only that portion affecting your suit. I think in fairness to the court, he is entitled to see that, and when you start to serve, or leave with the clerk, under these rules, a copy of your complaint for the defendant to pick up and take to his lawyer, in order that he may know, properly, what you are suing him for, I think, in all fairness, he is entitled to a copy. I do not know how you would eliminate the necessity of furnishing the defendant with a copy of your cause of action upon which you are suing, if the purpose of the rule to be accomplished. That is, if you are to serve with the summons, or leave with the clerk, for him to pick up, a copy of your complaint or declaration. This is the same language, almost, that is used in our existing Common Law Rules. Rule No. 16. The one we are now practicing under provides that all bonds, notes, bills of exchange, covenants, contracts and accounts upon which suit may be brought, or a copy thereof, or a copy of the portions thereof material to plaintiff's cause of action—the same wording as we have here—shall be filed with the declaration and shall be taken and considered a part thereof. We have followed, almost entirely, that language. So I think it is clear under the rule that if your cause of action depends only upon a portion of a written document, all you have to copy and attach to your complaint or your declaration is that portion material to your cause. I do not see how we could get around, however, furnishing the defendant with a copy of the same. If you are going to attach the original, then I think the burden would be upon you, under the rule, to make a copy of that portion you are suing on and attach it to your declaration and leave it with the clerk for the defendant to pick up. However, we will give some thought to your suggestion on that and appreciate it.

MR. HILL: I have two or three observations in the nature of an inquiry rather than a constructive suggestion, because, admittedly most of us, or at least I probably should confine my declaration to my own experience, have

had a scant opportunity to give studied consideration to these rules. Or these proposed rules. I would like to inquire, however, under rule 14, which has to do with sham pleadings. On page 127 of the Bar Journal, where it says under "comment", it is "similar to Common Law Rule 22, except that it extends the sham plea rule to all pleadings or portions thereof filed in the cause". I merely inquire if that statement is meant in the same way or to the same extent that apparently the English indicates. —"all pleadings". In other words may be attacked as sham, all pleadings, including the complaint as well as the answer.

MR. WIGGINTON: We had this feeling about that and here is what the discussion developed. Under the present Common Law Rule 21, on Sham Pleas, it was only the plaintiff's prerogative to attack the defendant's defense, if he considered it a sham, and it was incorporated as a plea in the suit. However, under the form of pleading that will be followed in these rules, pleas are abolished and you will file your defense in the form of an answer, to which, or in which you can incorporate your counter-claim. Now the counter-claim can be incorporated in the answer and the plaintiff then has his right under the rules to file his reply to the counter-claim. Now, if his reply is merely a sham, the defendant should have the same right to have that reply to his counter-claim stricken as the plaintiff has the right to have the defendant's plea stricken or his answer stricken. Now that is what we had in mind, that if any pleading filed is a sham, whether it is filed by the plaintiff or the defendant, the opposing party should have the right to call it to the court's attention and have it stricken, if it is essentially a sham, and not to confine that right and let it lie only in the hands of the plaintiff, as does our present Common Law Rule 22. Now, that is what was meant by the language in the comment.

MR. HILL: Then that language, as clarified by your comment, Mr. Wigginton, would make it entirely in order to raise the question of a sham pleading in the original complaint. That is, the defendant might then, very properly, in his answer or by motion to strike, raise the question of the sham nature of the original complaint.

MR. WIGGINTON: I think perhaps he could, although he has other means of attacking a complaint that does not state a cause of action. If it does state a cause of action and is entirely a sham, I think that defense would be available to him and I think that it should be.

MR. HILL: The next question that occurs to me is one which is not at all stated, but, under our Common Law Rules and our Procedure, whether governed by statute or rule, pleas must be sworn to.

MR. WIGGINTON: Yes, sir.

MR. HILL: It has long been my modest opinion that that is archaic and I know on many occasions clients inquire with regard to fact that an attorney or party may swear that the plea or number of pleas are true, when in fact he knows that they are not true. He is just merely urging it as a defense. Now under these proposed rules the pleas are abolished and in lieu thereof the answer will constitute a defense.

MR. WIGGINTON: Yes, sir.

MR. HILL: Nothing is said here that I have found, in the proposed rules, but it is contemplated or would it be required that they have to be sworn to.

MR. WIGGINTON: I believe that is taken care of in Rule 12, under "Attorneys". It reads this way:

"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 and who shall be duly licensed to practice law in Florida, and he may be required by order of court to vouch for his authority to represent and give

the address of the party. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleadings and to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay”.

I think that would perhaps answer the question of whether or not it would have to be verified.

MR. HILL: But the statute provides that the plea must be sworn to.

MR. WIGGINTON: That is right.

MR. HILL: Then we have the exception there.

MR. WIGGINTON: Yes.

MR. HILL: That is why I raised the question. If it is provided by a rule as distinguished from statute, then these rules, if they should go into effect, supersede any prior rules but they would not supersede the statutory requirements.

MR. WIGGINTON: Well, it is our thought, and it is our opinion, and it is the opinion of the Supreme Court, sir, that these rules will have the force and effect of statute and repeal everything inconsistent with it.

MR. HILL: I think that answers the question.

MR. WIGGINTON: And so, similarly, as these rules abolish pleas, the statute that requires pleas to be verified would fall in deference to these rules.

MR. HILL: Well, that would answer the question. Although the exception in Rule 12 says “except where controlled by statute” or words to that effect.

MR. WIGGINTON: If the statute required that an affidavit in replevin, you might say, or a garnishment answer must be sworn to, then you see that would not be affected by these rules, because we have excepted those from it.

MR. HILL: Then you mean, unless a special statutory action requires it, and procedure outlined under the statute, rather than a specific statute providing that the plea shall be sworn to—

MR. WIGGINTON: Yes.

MR. HILL: There is just one other observation. It is apparent that a number of these rules, if not a great majority of them have either been a verbatim, or practically so, a re-statement of the Federal Rules, or a slight modification or change in phraseology, and we might cautiously regard what might be permitted under Federal Procedure and what under our Florida Statutory procedure would not be harmonized with them. For instance in special matters it is not necessary to aver the capacity of the party to sue or to be sued, or the authority of the party to sue or be sued in a representative capacity. For instance a person or an association of persons. Perhaps I should stop right there and make this inquiry. The Federal Statutes don't have some provisions that we do in the Florida Statutes. It comes to mind, now, this fictitious name statute. By virtue of this rule would it be considered necessary, or would it not, to, in the complaint allege the compliance with the fictitious name statute. Where the organization has taken a fictitious name. Our Florida Statute provides that before a party may sue or defend he or they must comply with the fictitious name statute. Before he can sue or be sued. I take it that rule is a condition precedent. Would the effect of this rule be to place the burden upon the defendant to raise that question?

MR. WIGGINTON: Will you answer that Bob?

MR. HILL: There is one thing that has been called to my attention, that I would like to inquire into before I sit down. Rule 8, paragraph (a). The last sentence, or, the last line thereof. “—except that the court may order a reply to an answer or a third-party answer”. To what does that refer? We have no provision for bringing in any third party that I know of.

MR. WIGGINTON: Yes, sir. Thank you very much for that thought. We

had adopted in our original draft, a rule relative to third-party practice. When we met with the Supreme Court Committee and went over the matter and discussed it, we decided that was one matter of Federal Practice that would not apply to our State Practice so we eliminated the third-party practice rule, which came along after this rule, and we did go back and take that out.

MR. HILL: Now in connection with Rule 20, paragraph (a). The provision that I mentioned and called attention to before. Rule 20, paragraph (a), as to depositions. My attention has been called to the fact that this provision, "served by the plaintiff within twenty days after commencement of the action". My attention has been called to the fact that under the Federal Rule it is twenty days after the service on the defendant. Now did you intend to follow the Federal Practice or intend to do that this way. Now for instance you might have an action and it might be commenced and the plaintiff might not be served forty days, after you commenced your suit.

MR. WIGGINTON: Well, I will say this. Under the Federal practice, as you know, when you file your declaration, you file a copy of it and process forthwith issues and a copy of that declaration and the summons is served on the defendant. Under the Federal Rules you have twenty days then to accomplish the taking of the deposition. Under the rules that we have adopted or that we propose here, rather, we do not serve copies of the declaration, and I guess you have noticed that. The first rule that we got up on this followed the Federal Practice and required the serving of the declaration or a copy of the declaration with the summons. However, in debating that rule, it was found out that would materially, in many respects, increase court costs. The sheriff would be entitled to his mileage for serving a copy of the declaration just like he is entitled to mileage for serving a copy of the summons. He is entitled to a charge for copying the declaration, even though you copy it and attach it. So there are a number of fees the sheriff would be entitled to by statute if we followed the Federal Practice by having a copy of the declaration served. We talked to the Supreme Court about that and the Supreme Court Members of the Committee, to see if there was some way we could get around that feature. They thought it highly desirable that a copy of the declaration be served with the summons, but they hesitated to impose upon the litigants, or their attorneys, additional court costs. We made the suggestion that the Court, itself, expand this rule and provide in the rule, the requirement of the service of a copy of the declaration, but that the sheriff should not be entitled to any mileage for serving it along with the summons. You gentlemen are familiar with the way sheriffs operate and I think they are fair but they want the fee that the law allows them, and they have a very strong organization in the State. The Supreme Court—and I am only speaking for myself; I haven't talked to any of the members about it—would be very reluctant to adopt a rule to compel a sheriff to take any lesser fee. And we thought it might be a little unfair to ask that they adopt such a rule because I do not believe they would do it any way. So we left that out and provided that a copy of the declaration should be left with the clerk and the summons shall issue immediately. Now I think that answers one of the queries we had about the twenty days after the suit was commenced.

MR. HILL: The rules provide that as soon as the declaration is filed, the action is commenced.

MR. WIGGINTON: Yes.

MR. HILL: It provides that the court cannot delay the issuance of process. It has to issue the very minute the declaration is filed. You cannot hold it up with the clerk. The sheriff does that, or a special person appointed by the court. The rule requires that it be served and not lay around thirty days.

MR. WIGGINTON: I do not think that you could delay notifying the defendant, if the suit was filed, for twenty or thirty days. The action commences upon the filing of the declaration. You leave a copy of it with the clerk for the defendant, process forthwith issues immediately to the litigant, just like any other process, unless there is a multiplicity of parties—.

MR. HILL: Yes, but Mr. Wigginton, there is just one question that occurred to me while I am on my feet. It occurred to me, in adopting a number of the Federal Rules here. What position, or, if this was discussed with the Supreme Court, did they take on the construction of this rule, or would they feel bound, generally, as they are when any statute of another state is enacted and we feel bound by the construction of that state on that statute.

MR. WIGGINTON: Yes, sir. I am sure I cannot speak for what the court would think about that.

MR. HILL: Was it discussed at all?

MR. WIGGINTON: Yes, sir, and it was generally considered that the Supreme Court would look to the interpretation of these rules by the various Federal Courts in arriving at what they thought the proper operation of them should be. But I submit, they are not bound by it, as they have decreed in past instances when they felt that it wasn't right or just, and I think perhaps we will have our own idea and interpretation of them.

Let us go back to this question of the service of the copy of the declaration. One very able and outstanding lawyer here in the State, after these rules were published, raised this question. He said that he doubted the wisdom of merely filing with the clerk, for the defendant, a copy of the declaration, when process issues. He said that it was his opinion that when a layman got a summons in a civil action, that he did not consider it, usually, with great necessity for speed in disposing of it, because of the way we have practiced in the past, if he gets it to his lawyer in a week, it is all right, because his lawyer can go down and file an appearance if the rule day is right on him, or he can have thirty days or more in which to do it. Therefore he felt that the defendant getting a copy of the summons served on him without a copy of the declaration attached, might create a real hardship for his lawyer when he finally got the summons down there and the lawyer would find that although he had twenty days to answer, he really has only about five or ten, because the client had been a long time getting to him. He thought, therefore, that it was very important that if we speed it up, the time for filing our pleadings, as under the Federal Practice, that we should also insist that a copy of the declaration be attached to the summons and served on the defendant himself. He said his experience was that when the layman got a summons and attached to it was the declaration, and he read that and saw what the man was saying about it, and how much he was suing him for, and what it was about, he would be more inclined to rush down to the lawyer than he would if he got just a summons himself.

MR. HILL: Might I make this suggestion. That in order to take care of that you might make a rule requiring the plaintiff to mail a copy to the defendant. —of declaration. Within that twenty days.

MR. WIGGINTON: Yes.

MR. HILL: By registered mail, if necessary. That would avoid all of that expense and would give him a copy of the declaration.

MR. WIGGINTON: We might consider doing that. I think that this observation made by this gentleman, has some merit to it. But I thought we might do this. Members of this committee, if the convention approves this draft of rules, might ask for a meeting with the Executive Committee of the Sheriff's Association, and explain to them what we are trying to do in the way of rules revision and convince them that it isn't going to cost them any more to take

a copy of the declaration along with the summons and serve it on the man than if they just carried the summons, and try to get an agreement out of them that if the rule provides that they are not entitled to any additional fees for serving the copy of the declaration with the summons, which, under the rule, could be made a part of it and considered as one instrument, it would be entirely satisfactory with their organization, and I believe there is a strong likelihood that the Executive Committee of that Association would be willing to agree to that. I find that they are reasonable men and want to co-operate with the members of the Bar and with the Court. If we can do that, then I think perhaps the Supreme Court would have no reluctance to provide in the rule that a copy of the declaration should be attached to the copy of the summons and made a part of it and served on the defendant and the sheriff would be entitled to only his regular fee for serving the summons and nothing else. I believe there is a chance of getting that by, and if so, I, for one, feel that it is highly advisable that a copy of that declaration be served along with the summons on the defendant. Because, if we are going to speed up the time to answer, that the defendant should know, as soon as he is served, what the cause of action is about so he will hurry on down and hire himself a lawyer. After all, we are interested in that too. And that would give the lawyer the full twenty days, if possible, in which to prepare his defensive pleadings. That is something that we had in mind, gentlemen, that arose after the rules were published and before this convention. We are glad to have those kinds of suggestions, in fact all of them that we are getting today, and those that we get later, and I want to assure you that we will handle them the best way we can. That is at least one man's thought on the subject.

MR. DeJARNETT: Before you get away from Rule 20, I do not believe that Mr. Railey made it quite clear, the point that he had in mind. That Rule as now drawn would permit the taking of depositions after the commencement of the suit. It might be that a person is out of town on vacation for thirty days and is not served. When he gets back he is served and he finds that the plaintiff has taken the testimony of all of the witnesses before he even knew that he was sued. I think it should be changed so that—let us see. On the seventh line, where you say, “after commencement of the action” you should say “twenty days after service of the summons.”

MR. WIGGINTON: Thank you very much. Bob, do you wish to say anything about that?

MR. PLEUS: No.

MR. WIGGINTON: I just wanted to make this clear in response to the last few questions. First, with reference to any right to withhold the service of process. I think such is clearly a violation of Rule 5-(a), because that requires the summons, ad respondendum, shall be forthwith issued by the clerk and delivered for service. I do not think there is any question but that immediately upon the commencement of the action you have to deliver that process for service. Now with reference to the twenty day period that we are discussing, within which time—that is, twenty days from the commencement of the action—you have to get an order of court to take depositions, the original Federal Rule provided that 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 served. The testimony of any person, whether a party or not, may be taken at the instance of any party by deposition, upon oral examination and so forth. Now we understand that notice of the taking of that deposition has to be given in any event. So, you could not take the deposition unless you would comply with the provisions in regard to notice. That rule was found to be unworkable, and the revision of the Federal Rules,

which took effect the 19th of last month, provide that any party may take the testimony of any person, including a party, by deposition, upon oral examination or written interrogatories for the purpose of discovery or for evidence in an action or for use in both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within twenty days after commencement of the action. Now the comment of the Committee of the Supreme Court of the United States on why they were making that change, was this. The retention of the requirement where a deposition is sought by a plaintiff, within twenty days of the commencement of the action, protects the defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit. The plaintiff, of course, needs no such protection. The present rule permits the plaintiff to take depositions without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than twenty days, but, as twenty days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave of court before the answer is served. In our opinion, Rule 30 (a) empowers the court, for cause shown, to alter the time of taking of depositions, and Rule 30 (b) contains provisions, giving ample protection to persons who are unreasonably pressed. In addition to that, of course, in the taking of the deposition, you have got to give the notice to the other party. So it occurs to me that having adopting the present provision, we have fully safeguarded the party's rights in the matter and in no way would a delay be permitted by the delay of the defendant in not filing his answer or serving his answer within the twenty days and serving some dilatory motion and therefore forestalling the right of the plaintiff to take the deposition.

MR. DeJARNETT: Let me make this observation. We still do not get away from the proposition that a man can be out of town and on the twenty first day after the suit is commenced before he is told that he has been served, the plaintiff can come in and commence taking his testimony. Now they say that he would have to be given notice of it. That is true. But that notice can be given by mail, and even though he might not be at his mailing address and might not get it, it would not stop the taking of the testimony, and the taking of the testimony would go on. You could cure the whole thing by striking the language, "the commencement of the action", and inserting "the service of the process".

MR. PLEUS: Yes.

MR. LASSITER: On the point of the matter just mentioned, may I suggest that the Committee consider that if the words "service of process", or other similar words are used there, you may not be able to take the deposition until the process has been served, and the lawsuit may go on and should go on, without regard to the service of all defendants.

MR. WIGGINTON: I think there is ample protection under the other provisions of the rule, for the court to use its discretion. And that is the very reason that the problem that they ran into under the original rule, and they have recently amended the rule, and revised the rule which we have in our compilation. To get away from just such delays and obstacles as that.

MR. NORWOOD: This rule as it is now, works a definite disadvantage. I will give you a sample of the experience that I had on it the other day. An attorney filed a suit against one of my clients and I filed a motion to dismiss. I did not file an answer. He served me with a notice that he was going to take deposition of a witness out in San Francisco. Before the case had ever gotten at issue. I went before the court and objected to him taking the deposition,

because he had not read the rule and gotten leave of the court under the Federal Rules. Then he went over to the court and the court let him take the deposition any way. I had to hire a lawyer out there and pay him \$250.00 to appear at the taking of that deposition, and when the court finally got around to my motion to dismiss, he dismissed the action. I think that this rule should be changed so that the plaintiff cannot take the deposition until after the case is at issue, because it may never get at issue, and there would certainly be no necessity for ever taking a deposition. And that is just the one-sided application of this rule and it certainly did work an injustice on my client.

There is one other matter here that I would like to refer to. This is Rule 8, paragraph (b).

MR. WIGGINTON: It is taken from the Federal Rules.

MR. NORWOOD: I filed a suit on an insurance policy and the defendant came in and plead that I had not served him with proof of interest as well as proof of loss. Well, I started looking around trying to determine how in the world I could file some replication to that because the defendant insurance company had waived, certainly, the filing of the proof of interest on the marine policy. And I found out there was no provision in the Federal Rules allowing me to file it in the case or set that defense up at all. Now that rule, it seems to me, does not allow the issues in the case to be settled, or the proper matters to be raised. Such as the statute of limitations that you could file on a claim. You come in and plead the statute of limitations and you say, "well, it has been waived". So, under this rule as it is at the present time, you would have no opportunity to plead those things. And, if you construe that rule in connection with paragraph (b) of Rule 10, it says, "in pleading the performance or occurrence of all conditions precedent, it is sufficient", why you find yourself out on a limb. Now, there is another matter and that is on this Rule 31, about when the docket is sounded. The purpose of this is to speed up the trial of cases, because that is what you are striving for, to get a decision. This practice that we have, of sounding the docket only twice a year works a great delay. I think that is one of the greatest delays in the administration of justice that occurs. We all recognize that. I realize that in these small country circuits where they have only two terms of court a year, and they don't have a jury but twice a year there, that probably it is a good thing. That is a different aspect. But in a county where there is a large population, the docket should be sounded every month by the court. Then the matters on the docket could be disposed of right away.

MR. WIGGINTON: I would like to reply to the last observation first, because it is fresh in my mind, with regard to sounding of the docket. The Rule that we have here, provides that as soon as a cause of action is at issue and ready for trial, it can, by leave of court, immediately have a place on the trial docket. If it is ready for trial. Now, the more I have worked with these rules, the more I have been impressed with the futility of getting any rules for this purpose. So much depends upon the judge who is working with them. You have had the experience that I have had of going before the court and making a motion because the mere wording of the rule has been violated. And the court would smile at you and say "yes, I know that is the rule, but in my discretion, I am not going to invoke it. I am going to give him a chance". There is no way that you can devise a set of rules for the iron-clad binding of all of the courts, where the discretion lies with the court to determine what is right and just. I do not know what we can do unless we devise a set of rules that are perfect, so far as we can make them, with the hope that the courts will enforce them in such way as will do substantial justice between the parties, and I have the confidence that our courts will do that, although sometimes we

are not inclined to agree that what they are doing, is justice, at least not to our clients. But I believe under the rules here, when a case arrives at issue, no matter if the term has already commenced and is in progress, and the docket has been sounded the week before, we can still go in and get the case on the trial calendar and get it lined up and disposed of as soon as it can be reached, and I do not see why that would delay the disposition of your cause. Now a few minutes ago you made some reference to the fact that the rules worked a hardship in certain instances where you had a defense where there is no way of showing it under these rules, since replications and rebutters and sur-rebutters and rejoinders and so forth have been abolished. And you gave the illustration of where the defendant plead the statute of limitations and you had no way to show that he waived it. Well, we felt that the rule that adequately covered that situation was Rule 9 (e), which provided that averment in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted, shall be taken as denied or avoided. Now, as a matter of proof, I think, on trial you can show that waiver and you are fully protected because you denied that the statute of limitations has run by him having plead it and you having no other way to answer it. The burden is on him and you can show that in your proof. Or you could amend your complaint, if you cared to, after he raised it by his answer. But I know of no situation,—I know of none; there may be some—where you cannot get before the court, every issue to which you are entitled, under our present practice.

MR. NORWOOD: Mr. Wigginton, how would you get before the court, the waiver of that insurance company on that proof of interest that I just told you about. Under these rules or under the Federal Rules, either one.

MR. WIGGINTON: Well, he has plead that and you denied it.

MR. NORWOOD: No, I haven't denied it.

MR. WIGGINTON: Well, the rule denies it for you.

MR. NORWOOD: A waiver is an affirmative defense, though. That is the point that I am making. It is not a denial.

MR. WIGGINTON: It is an avoidance under the rule. It is an avoidance under the rule and you are protected in it. That is as I see the rule. Now, I am not the man sitting on the bench ruling on it. But that is the interpretation of it and that is the way it operates in Federal Practice, so I am told.

MR. NORWOOD: What is the difference in filing a replication rather than going back to amending your complaint. Allowing you to plead over. You are just delaying the cause that much, it seems to me.

MR. WIGGINTON: Thank you very much for your comments, Ty.

MR. KELLY: I would like to make a suggestion here in so far as the changes of rule days are concerned. All of the attorneys in Florida, here, have been used to relying upon the summons, returnable on May Rule Day or June Rule Day. Under the rules as suggested here, the summons will issue and will be served upon your client. We discussed this several times, and again, this morning, also. For those who live away from the county seat, it will be necessary to get the client and ask him immediately, when were you served. There is nothing on the summons to tell you. The client will say it was Tuesday, Monday, or Saturday of last week. That will throw a burden upon the attorney to immediately contract the sheriff's office to find out when that summons was served on the client. For the benefit of the attorneys, I think there should be some provision in here that that summons would carry a notation by the sheriff as to the date when it was served. We have many sheriff's offices who will serve a summons outside of the county seat and the deputy will send it

on through and the sheriff will finally get it to the clerk's office in two or three days. I think the Florida lawyers have always depended upon the notation in the summons when the return should be made, and that thereafter, on the rule day. We should substitute and have in there that the summons served on a certain date and then we could put it on our calendars to return it twenty days from a certain time, rather than groping around and trying to ask and ascertain when that twenty days is. I offer this suggestion, that the rule should be set up and the summons should be set forth and when it is served, the clerk notes right on there, so that when the client brings you that summons, you can set it right down on your calendar as to your dead line date for your pleadings.

MR. WIGGINTON: Mr. Kelly, I think that is a very good suggestion, and a helpful one to the attorneys practicing at the bar. There is no provision in the Federal Practice, which this follows, for doing what you say. And, for the attorneys living away from the seat of the court it does provide an annoyance and a little trouble. The only thing you can do is go back to the court file and find out when it has been served and sometimes it causes delay and some expense, maybe, on a telephone call or a trip. It may be very helpful to have this rule require that upon service of the summons, the sheriff note on the copy, the date of service, so that when it is brought to the attorney, he will not have to go and make an investigation to ascertain that fact. And, your Committee will give full consideration to that suggestion. I think it is a good one.

MR. GRAY: In connection with Rule 20, referring to Rule 20. In the practical situation, this rule differentiates, if closely read, and so does the present Federal Rule, with a party that you seek to examine orally as a plaintiff, and a witness. In the case of a witness you must serve the witness with a subpoena and tender him mileage and so forth to get him in, just as examining witnesses prior to the rules. But you will find in a practical case that sometimes these rules and the Federal Rules work an undue hardship. In this connection I will cite you a specific case. The summons was issued against two joint tort feors arising out of an automobile accident. The son, who owned the car, came in and retained our firm as counsel. He delivered both summonses to us. Prior to the return date when pleadings were to be filed, on April Rule Day, they served us with a notice to the effect that they wanted to examine the defendant orally. We called the son and wanted to know if his father was still in Florida. We have these tourists that come here and they get sued while in Florida,—thank goodness for all of us—but we must protect them any way. In that situation the son said "father left Sebring on March 7th", and the notice was served on us on March 11th. I filed an objection because he was a party in the case, and on the grounds that he was in Fairlee, Vermont, and was not within the jurisdiction, and no travel expense or hotel expense had been tendered him by the plaintiff, and in addition to that that he was an elderly man and had been sick. When I came before the judge, the attorney for the other side presented an affidavit to the effect that they had contacted the room clerk in Sebring, Florida, and one of my clients, the father, hadn't left until March 14th. Well, he knew more about my client than I did. But at the same time I was working with the son who was a local resident. Now, then, we took affidavits and that happened to be the truth, that he didn't get out of Sebring on March 7th, because of railway accommodations. I did not know it and he did not know that he had been served. His son thought he was going on March 7th but the court understood there was good faith in every respect, but at the same time he said since the old man had entrusted the son to look after the suit, then we must, mind you, before we had the return date of the summons, bring this man back at our cost and expense, from

Fairlee, Vermont, which brings up the question as to whether notice on an attorney is notice on your client. None of you know where your son is right now, or your wife. You think you know. Now, then, it is all right to speed up the thing. It is all right for the plaintiff to have a good chance. But we, as attorneys, after receiving a summons in a case, are not only morally bound, we are legally bound, we are ethically bound and sometimes financially bound in connection with the handling of the defendant's case. Whether you be a plaintiff's lawyer or a defendant's lawyer. You are going to be on each side of the fence one time or another. And I say that when they make you bring a man back from Fairlee, Vermont, in a Common Law case, what method of appeal would you take from that. If I fail to bring him back, they strike the defensive pleading and enter judgment by default. Then you go to the Supreme Court on the slim grounds of whether the particular circuit judge exercised arbitrary and unreasonable discretion, which is very, very dangerous. On the other hand, if the plaintiff is out of town and fails to come in for oral examination, what happens in his case? The court cannot punish him for contempt because he isn't there. He might not ever come back. In his case, the plaintiff, as long as the statute of limitations has not run, can come back and probably get it before some other judge, and that is the extent of the punishment he is given. I say to you that it is going to hit each and every one of you between the eyes, whether you are a defense lawyer or a plaintiff's lawyer, in connection with these rules. I would like an explanation on that. Now I am not talking about a witness. I am talking about parties. And I am talking about notice on the attorney in connection with the parties. What about the proposition of the man who was in Sebring at the time, the son thought he was in Vermont, and so did I. There is another thing in there that I do not quite understand. I want to call your attention to Rule 15 (a). All of these rules sound good on paper but when you get before the court they might be good, very good, if the court is with you but they certainly are bad if he happens not to be with you on the thing. Now where you are in a circuit where you have five or six judges, I will venture to say that amendment during trial of a case is a discretionary matter, because we have a statute on that. I say you would get, if you had seven circuit judges, seven different rights to amend during trial. On the other hand, let us say, on a negligence or some other such action, you might wind up and find your client has been convicted of bastardy.

MR. WIGGINTON: Just a moment. Let us try to handle this a little different as we go along, and try to iron out some of the real difficulties that we all have from time to time in our practice. We are endeavoring to protect the rights of our clients and keep the cost of litigation at a minimum. I recognize the truth and the seriousness of the objections that have been brought out in the operation of these rules on depositions. Sometimes we are set down, and we don't like it a bit. We would like to get out of it. The only answers that we can make to a lot of these objections is this: They are already a part of our Common Law Practice. This rule that Mr. Gray has discussed, is already a part of our Common Law Practice. It has been made so by statute and affirmed by the Supreme Court by a recent decision. Of course it does not mean that it is a good rule, necessarily, but it does mean that it is now a part of our practice. We have incorporated it in our draft, and when we got through, we felt that our draft would contain all of the rules on the subject. I might call attention to the rule that is being followed in the Federal Courts. It is aggravating at times when you are on the small end but it is a mighty fine rule to have in order to keep your client from losing a cause of action. It is working, and it is working well, and it is well thought of by most of the parties who are using it. Especially if it is of vital importance to them at the time. With

regard to the hardships in the operation of this rule on depositions, may I come back to the statement that these rules are merely tools in our hands and the hands of the court to try to see that justice is done and that our cases get to issue as quickly and cheaply as possible. Our rules provide for the entry of orders by the court for the protection of parties in a cause. Of course you have to go back to your court. If you are served with the notice of the taking of a deposition under circumstances that are unduly burdensome, or expensive, again, your court is your only protection. You go to your judge. You go before him and state your reasons and he has authority under these rules to prevent the taking of the deposition, or, have it done under circumstances that are just and fair. Now I know of no one we can trust for the proper administration of these rules other than our judges. Now and then they will make a mistake, but, they are human. They do not make as many as could be made. But again I say these rules on depositions are of vital importance in the practice of law in getting your cause of action before the jury as quickly as possible, and in fact they may save a cause of action that otherwise might be lost. They are highly valued by those attorneys that use them, and while they are not rules to which you cannot find some objections, either from the standpoint of convenience or for getting into court quicker than you want to get there, and having to meet the jury quicker than you think it is time to meet it, or it is costing you something that you would not like to have to pay, nevertheless, I think that they are excellent rules; they are already a part of our practice and will be an indispensable part of our practice.

That is about all that I can say, I think, in answer to what Mr. Gray has had to say about it. These rules are going to be handled by our judges and I think we are going to have to rely on them to enter an order to protect you and your client.

MR. GRAY: Just one other matter. Personal notice on the client and personal notice on the attorney, on every one of his clients and knowing where they were at one time. I don't think any of us keep up with our clients after the case is over. Now I think if we are going to have these rules of practice, there should be something to protect the client and the attorney in connection with notice if they go out of town without your knowing they are out of town.

MR. WIGGINTON: Well, I think that is a serious matter to which we should give some concern. I, personally, have long followed the practice of being no more interested in my client's law suit than he was. And when he is sued in an important case and runs out of town on me and does not let me know where I can get in touch with him, and as a result, some of his rights are sacrificed, I think that it is his funeral and not mine. And I think when a man is being sued and it is a matter in which depositions might be taken at any time, he ought to exhibit at least the degree of interest in his own welfare to keep his lawyer posted as to where he can be gotten hold of so he can answer interrogatories when they are propounded. I realize that some of them do not do that and they are perhaps not interested in the case, and we might have a good case and might have it on a contingent fee and are more interested in it than he is, maybe, but it is one of those things that will come up, I think, from time to time and we are just going to have to bear the gaff here and if he runs out from under us and we cannot put our finger on him to answer a court order, service, the burden nevertheless, is going to be on him, and he will have to answer the consequences.

MR. BRADFORD: Mr. Wigginton, are these rules to take into consideration, service on non-resident owners of automobiles? Does it follow that section of the statute providing for that service, or is that service to be returnable at rule day, or how are we going to get around that?

MR. WIGGINTON: Are you speaking of the statute, now, that provides for service on the Secretary of State?

MR. BRADFORD: Yes, sir.

MR. WIGGINTON: I do not see anything in these rules that would bear on that.

MR. BRADFORD: We can't tell from the rules, whether or not service on the Secretary of State under non-resident ownership is still effective under the twenty days return date, or what.

MR. WIGGINTON: Well, suit on a non-resident would be classed as any other suit at common law under these rules, and the method of getting service on him by statute would be followed just as is the method followed in these rules in service on the defendants.

MR. WIGGINTON: Do you agree with that, Bob?

MR. PLEUS: Yes.

MR. WIGGINTON: It might be advisable, if the convention feels that it is, to write an exception to take care of that class of case. Frankly I do not think that question arose during our discussions. We will be glad to make a note of that and go into it at our next committee meeting. It may be wise and we would like to hear from others on that point, as to whether you think it is wise to write an exception in the rule in those cases where service is made on the Secretary of State allowing them a longer time for answering.

MR. BRADFORD: Rule 20 seems to be a popular rule and everybody has taken a shot at it. What happens under that rule in the event you do not get service or the service is no good? And then you go take a deposition of a man and go to all that trouble and you may not have good service on him. You are assuming in here when you file the suit, if you leave the rule as it is, he is bound, he is in court. He may not be in court and he may never be in court.

MR. WIGGINTON: Your question is, what happens to him?

MR. BRADFORD: Yes. You serve a deposition notice on him and he hasn't been served and you cannot get legal service on him.

MR. WIGGINTON: Well, if you do not have service on him, and you may never get it, you will not go to the trouble of taking a deposition and giving him notice on the chance that you might catch him later, then he can appear on the chance that he might be caught later, but if you cannot get service on him and he is apparently out of the state—

MR. BRADFORD: This says on deposition thought, you may have him in court. And you may not have proper service. This says from the time of the commencement of the suit you can serve the notice.

MR. WIGGINTON: That is right.

MR. BRADFORD: Then he has to gamble on appearing or not appearing. You may not have service and you may not be able to get proper service.

MR. WIGGINTON: Well, that is a chance that he can take and that you can take, if you care to take a chance on disregarding it or if you care to take a chance on finally catching him.

MR. BRADFORD: Going back to these pleas that do not have to be sworn to, you say that it is the interpretation of the committee that a plea of not guilty,— I mean while we had pleas—had to be sworn to, and under these new rules you don't have to swear to them, but that in practically all instances they had to be sworn to because the statute required it. Such as replevin. Who is going to decide which one of the statutes in a proceeding where an affidavit is required, should be followed and which one is not?

MR. WIGGINTON: The judge would be the logical man, I think, to make that decision. The rules provide they shall not operate in those certain statutory proceedings or remedies where the procedure for the litigation of that

matter is fully set forth. And your judge would pass on whether or not the method that you are pursuing, the procedure for that is set forth in the statute, or whether it is not. It is either there or it is not there. If it is not there, these rules would apply, if it is, why they would not.

MR. BRADFORD: The judge would not have a chance to pass on that until after you had filed your pleadings. And a plea of not guilty is a statutory proceeding the same as an answer in replevin.

MR. WIGGINTON: Statutory proceeding in what kind of cases?

MR. BRADFORD: A common law suit. You have a statute in each instance prescribing that certain things must be sworn to. Now if you leave it to the lawyer to take it upon himself to tell which one of those he shall follow and which one he shall not follow, you don't get a chance to consult the judge about it until the other side has already attacked it. And maybe you have lost, then, the property that you are trying to preserve for your litigation.

MR. WIGGINTON: Well, now, let me say this. In case of that, perhaps you had better swear to it, but I don't think any cause of action would be dismissed by the court because you should of sworn to something that you did not. I do not think the court would ever abuse its discretion in that matter.

MR. BRADFORD: You have a lot more faith in some of the judges than I do.

MR. WIGGINTON: Are there any judges in the audience? Now our President calls to your attention that we will adjourn for lunch at 12:30 but we will proceed with the discussion if there is any more, until that time.

... To which inquiry there was no response.

MR. WIGGINTON: There are some members present, I believe, of the old committees on rules, that have worked on this subject down through the years and who I hope have had an opportunity of examining this draft. They have a wealth of knowledge and experience in connection with this subject that I think, perhaps, would be very helpful to this conference in determining whether these rules are acceptable. I hope and wish that they would feel free to take the floor and express their views. I haven't talked to them so I might be sticking my neck pretty far out. But I do respect their opinions on the subject because they have been through the mill, so to speak, and have had a lot more experience with this than I have had. Would any of you gentlemen like to be heard on it?

MR. GRIFFIS: In connection with the service of pleadings it seems to me in view of the fact that defaults are to be entered for want of service of pleadings that there should be some provision made for proof of service. There does not seem to be. I realize that is true in the Federal Rules, but in our Chancery Practice, we have prescribed nothing for proof of service of proceedings, or notices and so on. Now, again, I notice here in Rule 8 and again in Rule 13, we have references to cross-claims. I do not believe that we have such a thing in our practice as a cross-claim. I am thinking that perhaps this is merely a carry-over from the rules which were adopted by the Supreme Court where we do have the cross-claims between defendants, and I think perhaps that on proper study we should strike out the "cross-claim" wherever it appears and substitute the proper words, whether it be "counter-claim" or "set-off".

MR. WIGGINTON: We thank you, sir.

MR. HILL: May I be heard again?

MR. WIGGINTON: Yes, sir.

MR. HILL: I want to make an observation in connection with what was said about the proof of service. We have recently, in Miami, the Committee of the Bar Association has submitted to the Circuit Judges and the Judges of the Civil Court of Record and the County Judge, among other things, in the interest of simplifying procedure and in an effort to avoid the necessity of

this old archaic effort-wasting and time-consuming habit of making an affidavit of mailing by the secretary in a law office, backed up by the oath of another secretary who is a notary public, the affirmative act that she licked the postage stamp and stuck it in a certain receptacle in a certain building at a certain hour, in a certain way, on the assumption that the United States mails would convey it to its destination, and all of our judges have concurred and have approved a certificate of the attorney that he has either mailed on a certain date, or 'delivered to the address of the addressee, whatever the pleading is or whatever the notice might be. I would like to suggest that the Committee consider, if it is such a matter for consideration by the Committee, that such a provision be incorporated in the rules. That is leaving out, now, the affidavit of mailing. Let us take an example of mine in Miami Beach. And, the Chamber of Commerce did not ask me to mention this. But, during the season its requires a considerable time, by reason of traffic conditions there for a journey,—for an attorney from Miami Beach to come over to Miami and vice versa and try to serve pleadings on the attorneys in the area. That is a situation, but probably in a lesser degree in all parts of the state, I presume. In populous counties it might be entirely necessary for a counsel to travel many miles to effect personal service. And if the certificate of the attorney of record, who is an officer of the court, to the effect that he placed in the United States mail, or mailed to the addressee, or that he had service made personally at the office of the addressee, isn't that as good as any other method, or, if not, I would like to know why it would not be.

MR. WIGGINTON: Thank you very much. This question of the attorney's certificate in lieu of proof of service was discussed at a joint committee meeting of our Committee and the Supreme Court Committee, and I think that Judge Wisehart and Judge Paul Barnes both told about the practice in Miami and Dade County and it appealed very strongly to the members of the Committee. We too thought it would eliminate an unnecessary amount of useless paper work and the work of some secretary, which, of course was all right, who was no more responsible than the attorney himself. Mr. Pleus has just reminded me and I want to remind you that we wound up on the 29th of February to get this ready by the First of March, to get it published. Judge Barnes, as I recall, volunteered to draft such a rule and incorporate it in these rules. But, in the bedlam and the rush, Judge Barnes was to draw two of them and one of them I recall discussing with him later and he found that the statute which delegated to the court the authority to promulgate these rules, prohibited him from getting up the kind of rules that he thought he should get up. So he dropped that, I know. And I imagine he forgot about the other one. But we will make a note of that and remind Judge Barnes when we get through here and try to get such a rule as that promulgated and incorporated into our rules. We think it would be very helpful and I am glad that you called it to our attention.

MR. WIGGINTON: Is there any further discussion?

MR. ROSS: In this discussion, I do not know whether you decided it would be well to serve a copy of the declaration on all of the defendants or not.

MR. WIGGINTON: It was under discussion.

MR. ROSS: Quite often in a Common Law proceedings, we have a similarity of interests between a number of defendants. That is, John Jones and his wife, Sam Smith and his wife and a whole lot of children, who have a community of interest and will be represented by one attorney. Now I suggest that it is going to entail a lot of paper work if we have to, in a suit of ten defendants, or something like that, and they are going to be represented by one attorney, to have each one of them served with a copy of that declaration. Frankly, I don't see why it is necessary to serve each of those defendants, who have a

community of interest, with a copy of the declaration. You might provide in your rules that where there is more than one defendant, that you shall leave an additional copy there.

MR. WIGGINTON: Yes, sir.

MR. ROSS: To take care of that. Now one other thing that I wanted to call to your attention, there is a dissimilarity of procedure among the judges of the state relative to the issuing of writs of mandamus, covered by Rule 59. Some of them prefer to issue an order for an alternative writ of mandamus and some prefer to issue the madamus itself. It is provided here, in Rule 59 (a) that when an alternative writ of mandamus or prohibition or writs of quo warranto shall have been issued, the court shall allow such writs to be amended,—no, that is not it. Back up to Rule 57. "Proceedings in mandamus shall be instituted by petition setting up as briefly as may be, the basis for the relief prayed. If the petition makes a prima facie case, the court will issue the alternative writ or it may issue a rule to show cause on a return day certain, why an alternative writ should not be granted". You are making it mandatory for the court to issue the alternative writ, if the court elects to issue an alternative writ rather than for the court to issue an order to the clerk to issue an alternative writ. There is a difference in practice among the judges as to that procedure.

MR. WIGGINTON: Well, sir, on that matter of mandamus, we recognized that there was quite a variance amongst the several circuits, or amongst the judges of the several circuits as to the procedure. Some liked one way and some liked another. But for you, practicing in Lauderdale, if you are called upon to get an alternative writ out of the Circuit Court of Lee County, there is no way in the world that you could know how to proceed until you went over and talked to the judge. There were, as I said a while ago, in our Common Law Practice, just two short rules on extraordinary writs, and each court does as it pleases. Now this is setting it up in such way that you would know how to proceed, whether you were filing the case in Miami or Pensacola, when you were sitting in your law office here preparing your case. We went into that quite in detail and we have taken, as a basis of these rules, the procedure and practice in the Supreme Court of Florida, when you invoke the original jurisdiction of that Court. We used that as our pattern and we tried to develop in these rules on extraordinary writs, a pattern where, no matter where you are located or no matter where you are going to bring your action, you will know how to proceed and what procedure to follow when you get there.

MR. ROSS: This is the experience I have had in my practice, and that is they say, upon the filing of a petition, it may issue a rule to show cause, on a return day, why the alternative writ shall not be issued. And then they have a hearing on the matter of whether they shall issue the alternative writ, then it is determined whether it should be made preemptory. Most courts generally just give the order for the alternative writ.

MR. WIGGINTON: I think most courts do, but that is something else that is a rather dangerous procedure, in not knowing what the court is going to do. Now, you can walk into the court with your petition and lay it before him and the other side has not been notified and they are not present with an opportunity to say anything about whether your petition states a cause of action. The court under this procedure issues his rule to show cause on a certain day, five days hence, maybe three days or maybe two days, depending on the circumstances, why the alternative writ should not issue. The defendant can come before the court and point out that no cause of action is stated, and the court can refuse to issue even the alternative writ. However, if upon that petition, the court is satisfied a cause is stated, he issues the alternative writ and makes

it returnable on a day certain and then the defendant has a chance to go off and prepare a return. It is a little more complicated procedure than is sometimes followed by some of the courts, but again we are trying to get a pattern that will protect the interests of all parties, and if your petition does not state a cause of action, there is no reason why a man should have to employ an attorney who then has to sit down and brief the law and file a return, and come in and gets discharged, when he would have a chance to go before the court, in oral argument, and point out that the petition does not state a cause, whereupon he gets it dismissed and is through with it.

MR. ROSS: It seems to me like these extraordinary writs have always been labeled as "speedy writs". The effect of that order to show cause why no alternative writ should be issued, is further and further and further delaying the case. We are sacrificing speed. Thank you.

MR. WIGGINTON: Thank you, sir. We are trying by these rules to get away from delays, but some times you can get your cause of action speeded up to where a man will lose his rights, and I think they should be framed in such way that the rights of all parties will at all times be protected, consistent with an expeditious handling of the case. And while you say the rule to show cause is superfluous and should be replaced by the mere issuance of an alternative writ, you may be speeding up the part where the defendant would not have a chance to object and have the entire proceedings thrown out and the alternative writ refused, but the burden is then on him to prepare his return and assemble his evidence and his law and go before the court prepared to offer his evidence, perhaps, in the event the court doesn't agree that a cause of action is not stated in the petition. This is the practice that has been going on for years in the Supreme Court, that we have all used, and we think that it is fair. The court can speed up the day for the return date of that rule and issue the alternative writ twenty four hours later if he sees fit to do it, or he can make it five days. So after all we come back again to the question of the courts.

On this question of the multiplicity of the copies of the declaration, when you are suing a number of parties who have a community of interests and in all probability might be represented by one attorney, again we get back to the point where most any rule is going to cause some extra expense, perhaps, and inconvenience. I don't know who would be the judge, where a man and his wife and six children are being sued,—who would be the judge as to which of those children should get a copy of the declaration or which should not or, if none of them should. Very often children at eighteen are married and have their own separate household, or may be at outs with the old man, so to speak, and they wouldn't want his lawyer. Now who is to say whether that man should have a copy of the declaration served on him, as a child, and none on the balance? I don't know, but I think we are getting into dangerous territory when you are going to leave it to someone's judgment as to who should get a copy of the declaration and who should not. Now if our rule requires that a copy of the declaration shall accompany the summons,—we know that they have all got to be served with the summons—then we had better be on safe ground and let everybody get a copy of it, or, do like we have it in our proposed rules now, and just leave one copy with the clerk if you are suing one man, or two copies if you are suing two or more, and let them pick it up at the clerk's office. Let them shuffle for themselves if they are going to get separate counsel. But that is a matter that we are going to give further discussion to, and I appreciate your suggestions about trying to get around having to make so many copies of your declarations to be served.

MR. BEGGS: Gentlemen, I am sure from the discussion thus far of these rules, you have gained some idea of the tremendous amount of work that Mr.

Wigginton and This Committee have done. I am certain that you have been impressed with his knowledge of practically every question that has been raised. Bob Pleus has been called upon only once. This discussion will resume this afternoon in this room at two o'clock. We are about to adjourn now for lunch. I know you will be interested in some announcements that I am about to make. Let me encourage you to be back as promptly as you can for the afternoon session at two o'clock. We will try to conclude that session for all of you to enjoy some pleasures this afternoon as well as this evening.

We have an expression of regret from Judge Louie W. Strum, U. S. District Judge, because of his inability to be present and conveying his best wishes for a successful meeting of the Association.

The Conference of Bar Delegates will now adjourn to be reconvened at two o'clock this afternoon. Please be back as promptly as possible for the afternoon session.

... The Conference of Bar Delegates then adjourned until two o'clock  
P. M., Thursday, April 15th, 1948.

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#### AFTERNOON SESSION

WEDNESDAY, APRIL 15, 1948, 2:00 P. M.

MR. BEGGS: Gentlemen, the Conference of Bar Delegates will come to order. Upon the conclusion of the discussion of the Rules of Civil Procedure this afternoon, we will receive the reports of several committees who have important proposals for consideration by this Conference and by the Convention. I suppose there will be sufficient time for that later this afternoon. However, the rules are to be given priority, and if they require all of the afternoon, that will be permissible. Some one was asking me this morning why no reference was made, in the introduction of the able Chairman of the Committee on Rules of Civil Procedure, as to his ability on the subject of libel and slander. Some one has also asked if it would be appropriate to inquire of him and his associates as to what part of that judgment will actually go to the Florida A. & M. College. That is important.

We will resume, at this point, the discussion of the Rules of Civil Procedure by the Hon. John T. Wigginton, of Tallahassee, Chairman of that Committee.

MR. WIGGINTON: In the first place, I do not think anybody asked Mr. Beggs about that, and as to his inquiry, I want to file a plea of privilege.

I think, perhaps, you gentlemen are getting a little tired of listening to me talk and make explanations of these matters so I am going to ask Bob Pleus to take over from here and I will sit back and see if I can be of a little assistance to him and let Bob answer some of the questions. Bob, will you do that?

MR. PLEUS: It is all right with me but if it were left to me, I would say "go right on". I think we might proceed on the question and answer theory and see if we cannot clear up any thoughts that you have, and we will also welcome, and welcome most heartily, any suggestions that you might make.

MR. DeJARNETT: With reference to matters that I know are going to arise, we, all of us, will make a lot of mistakes in connection with the administration of these rules. As the rules are now set up, there is no provision whereby a judge can relieve a lawyer for mistake or inadvertence. There are going to be a lot of times when we are going to be caught with our pants down, because in the process of trying to decide how to operate under these rules, we are going to make some mistakes. Some of them are going to be honest mistakes and some of them are going to be just because we have got to do it today and didn't do it until tomorrow. For instance as the rules are now constituted,

under the admissions, "Requests for Admissions", if the request for admissions is filed and you do not answer it within ten days, why then the facts called for by that request are admitted. Even though they may not be true, they may be the very guts of your law suit. Well now it is perfectly obvious that if, through some mistake of counsel, or through some inadvertence of counsel, that happens, there should be some method set up whereby the mistake could be remedied. That is taken care of in the Federal Rules, under Rule 60, and here is what that rule says:

"On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order or process, for the following reasons: (1) Mistake, inadvertence, surprise or excusable neglect."

And then it goes ahead and lists other matters as newly discovered evidence and things of that kind. I believe that the adoption, and the adding to these rules, of Federal Rule 60, would put us in a position where we could then apply to the Court, and the Court, in the justice of the case demanded, could give us the relief that all of us are going to find ourselves asking for.

MR. PLEUS: I think that is a splendid suggestion and I am sure that the Committee will see fit to incorporate in the rules if they do not have in the draft, a rule comparable to Federal Rule 60.

Now are there any other suggestions?

MR. DIXON: I would like to make one suggestion for a modification of Rule 26. The suggestion might also be extended to the other rules relating to discovery. The suggestion which I have to make is based, primarily, upon an experience which happened to me, or rather that happened to my client about four years ago, under the Federal Rules and under the Federal Provisions in regard to interrogatories to opposite parties. A suit was filed under the Wage and Hour Act by 487 plaintiffs. Interrogatories were almost immediately filed, calling upon the defendant, the employer, to supply complete payroll records showing the straight time and the overtime which would be payable to the 487 plaintiffs, if they were covered under the Federal Statute. The defendant contended that there was no such coverage under the Wage and Hour Act, and filed a motion to dismiss, based upon that grounds. He also filed objections to the interrogatories. The objections to the interrogatories were overruled and the court reserved ruling upon the motion to dismiss until the conclusion of the case. My client had to answer that interrogatory. It kept sixteen people working nine weeks and the payroll alone was over sixteen thousand dollars. When it came on for final hearing, this evidence accumulated by the answers to these interrogatories was never even referred to because the case was dismissed upon motion. Not upon the trial of the merits. Dismissed upon the point of law that there was no coverage. I do not like any rule which will even permit a client to be charged with \$16,000.00 expense to answer an interrogatory which ultimately turns out to be useless. I do not believe that any rule for discovery, which is capable of such abuse, should ever be adopted. I realize that the Committee working on these rules, has, as nearly as they could, endeavored to approximate them to the Federal Rules. If I have any criticism of the Committee, it is because they have not endeavored to improve upon the Federal Rules. As near as I can observe from this draft, in place of trying to improve upon the Federal Rules, they have tried to imitate them. The Federal Rules are not perfect by any means. They were adopted in 1936, as you will recall, and almost immediately, certain imperfections appeared in them. They were revised and the revisions later became effective on the 19th of March of this year. We have had less than a month's experience with the rules as revised. If you followed the comment of the Advisory Committee, as it appeared at various times in the American Bar Association Journal, you will realize that

the Advisory Committee to the Supreme Court, that brought about the revision of the Federal Rules, was, itself, extremely and violently divided, so that the Federal Rules are far from being the unanimous product of the best minds of the profession. It was the product, at best, of a compromise, and even that compromise failed to obtain the assent of a substantial portion of the Advisory Committee to the Supreme Court. It seems to me that if we are to have a revision of the rules of practice—our practice rules—we should not be satisfied merely to imitate the Federal Rules but we should try to improve upon them. Based upon my own experience, I would say that any rule that is capable of operating as this rule did, as I have described, is a bad rule and we should not have it. I realize that some discovery, by way of interrogatories, is proper. I therefore suggest to the Committee a substitute for Rule 26, a rule which will read approximately this way:

“That prior to the time when a case becomes at issue, the person seeking the discovery must make an affirmative showing of good cause why the discovery should be granted”.

Present that to the court and then let the court order the discovery if the court feels that good cause has been shown. After issue has been reached, after the court has ruled upon the sufficiency of the pleadings and whether the position of the plaintiff is sound, as a matter of law; whether the position of the defendant is sound as a matter of law, and then let either party have whatever discovery they please, and put the burden then upon the person resisting the discovery to show why it should not be granted. It seems to me that that would accomplish all of the good features that the Federal Discovery Rule has, and would avoid the possibilities of abuse of it, such as these rules were certainly capable of. I therefore would like to make that as a suggestion to the members of this Committee.

I would also like to make one inquiry. Is it proposed to continue with the rule permitting interlocutory appeals? In Common Law actions? Or, is that to be abandoned? Was that outside the function of this Committee?

MRS. PLEUS: That was outside of the function of this Committee on these rules and we turned that down. We specifically refused to deal with that in our Committee.

May I ask one question in regard to your comment? The situation that you gave by way of illustration, did that arise—of course it arose under the original Rule 33, did it not?

MR. DIXON: It arose under the Federal Rules governing interrogatories, which was, prior to its present form, which gives the protection of Rule 30 (b).

MR. PLEUS: That is right. The order for the protection of the parties.

MR. DIXON: In this particular case such an order was sought and denied.

MR. PLEUS: Was it because there was no authority to grant it? Is that not probably one of the instances that led to it?

MR. DIXON: I cannot tell you what went on in the judge's mind. There was a motion to postpone the filing of the answers to the interrogatories, to allow additional time, in which they might not be answered until the court had completely ruled on the question of the sufficiency of the pleadings. It was denied. Now, for what reason, and, what operated on the judge's mind, I cannot answer. Nevertheless it cost my client sixteen thousand dollars to answer interrogatories that were never used.

MR. PLEUS: I just call the Conference's attention to the fact that under our proposed state rules, as under the Federal Rule as amended, the provisions with reference to protective orders are fully incorporated now, as to interrogatories, as they had been prior to this time in the Federal Rules, applicable only to depositions and other discovery process. The Federal Rules were amended

to specifically give those provisions with reference to protective orders in connection with interrogatories. Our proposed draft incorporates that same feature. Now under those protective features, after notice is served, or after interrogatories are served, upon motion seasonably made by any party or by the person to be examined, and upon notice and for good cause shown, the court in which the action is pending, may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than stated in the notice, or that it may be taken only on written interrogatories, and here is where the applicable provisions as to interrogatories apply. Or, that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers and counsel, or that after being sealed, the deposition shall be opened only by order of court in secret process, and so forth, and not divulged. In other words, as the Committee saw it there was ample protection there. And, after all, we can't make good courts and good judges just by adopting rules. The efficacy of the rule and what is accomplished by it, is, in the final analysis, the judge who administers that rule. But there is certainly the right there as to protective orders.

MR. WIGGINTON: Are there other comments?

... To which inquiry there was no response.

MR. DeJARNETT: Just one moment. In order that there might be no misunderstanding, I want to state that I am "agin em", so I want to take a broadside at them. So excuse me, John, for treading on your toes.

MR. BEGGS: I suggest, if you are going to discuss the rules, generally, that it be limited until the time that the motion is made to adopt them, or, approve or disapprove them. Now, the comment is on specific rules.

Mr. DeJARNETT: Thank you sir. That saves me an awful lot of trouble.

MR. BRADFORD: I would like to ask the Committee why the Committee would not include the question of interlocutory appeal in law cases, such as we have in Chancery? Is there some specific reason?

MR. PLEUS: I can only speak from my recollection of our discussions at that time, when the matter came up. Now John can probably better verify this than I can. But, my recollection is that it was brought up and it was specifically discussed and it was determined not to include it in this present draft of the rules. Now, many reasons were given for that action. That a common law action is not and should not be the subject of the delays that are incident to interlocutory appeals or appeals from interlocutory proceedings and orders.

MR. WIGGINTON: I will supplement that, Bob, by saying this: The Committee realized that in actions at law, the great bulk of them, or many of them, the important ones, involved personal injuries. It was our feeling that when a man is injured and goes into court, seeking redress, that he should be entitled to and get as speedy a trial as possible. And, appeals from interlocutory orders at law would only tend to keep that man in court by constant appeals to the Supreme Court until perhaps he has died or the money could do him no good. Now there was an additional consideration that was discussed by our Committee, and that was gained in talks and conferences with others. We know, as you do, that our Supreme Court has only seven men on it. We know that there is a tremendous volume of work there, resting on the Court's shoulders. They are constantly under pressure to turn out more work, and of course many lawyers want better work. I think the members of the Court recognize that they are not, at times, doing their best work because of the great press and volume of work that is handled through that Court. Florida is growing and expanding and the population is increasing and so forth, which means more litigation, of

course. They are doing all they can within the limits of their ability. I think the members were of the opinion that if we inaugurate a rule that will permit interlocutory appeals at law, it is going to greatly multiply the matters that they will have on hand for disposition. It would be almost impossible for that amount of work to be disposed of. So, those factors being considered, and the further fact that there is no provision for interlocutory appeals provided, I submit, frankly, it is not advisable at this time. Some of the members felt that under strange and extraordinary circumstances, an appeal from an interlocutory order at law, should be allowed. But none of us had enough sense to figure up a rule that would take care of that type of situation. We, therefore, would not include in our draft, a rule permitting interlocutory appeals at law. We did not think it advisable or wise.

MR. AUSLEY: It occurs to me that the reasons for interlocutory appeals are just as numerous as the ones expressed against them. I concur that it would probably lead innumerable cases going to the Supreme Court but I cannot see the reason why we should limit our rules merely to fit a court system that may be antiquated. I just wanted to voice an opposition on that point. Very definitely I have seen the case where a plaintiff was required to go to trial before a referee because the judge would not permit us to use a jury, saying that the jury could not comprehend the evidence. We, of course, had certain witnesses that we wanted to catch at that time and we were forced to go to trial on a case that we felt should not be tried under that system at all but should have been submitted to a jury. We were just at the court's mercy so to speak but had to do it at that time. If we had been permitted to go up on an interlocutory appeal to the Supreme Court and have the Supreme Court straighten out the judge on that particular point, we could have had our jury hearing. I think that there would be, certainly, as many reasons why the interlocutory appeal would be in order to establish the law of a case in a law case, such as there are in equity. I certainly can see no reason to differentiate between interlocutory appeals from one branch as against the other.

MR. PLEUS: Are there any other further comments?

MR. GREEN: Mr. Chairman, on that point, it seems to me that I recall that there was a further reason why the Committee did not act on that, and that is that it was thought that it was not within the scope of procedure. The question of whether we have interlocutory appeals at Common Law, really isn't the province of the Committee. That is for the Legislature to promulgate. I recollect that when this matter came up before the Committee, before, one of the reasons we declined to act on it was we felt it was not within the scope of procedure. That is a matter that the Legislature must determine.

MR. PLEUS: Are there any further comments?

MR. GRAY: It occurs to me that it is obviously admitted by the Rules Committee that in many, or all times, if these rules are promulgated, with the idea that the court have tremendous authority in the exercise of discretion. Then that being the case,—personally I am not in favor of interlocutory appeals and burdening the courts,—it does seem that the party litigant should have some way to curb a court in the event of an arbitrary abuse of discretion. Now, the fact that the person is hurt, that is all right. But, it isn't presumed, Mr. Wigginton, that he is hurt and there was liability under the law. The question as I see it, is to where, if the judges, as instances have been cited by Mr. Dixon and others, have, for reasons within their own minds worked a hardship in the use of these rules, then how is the attorney or the party litigant going to protect himself under the rules if an interlocutory appeal is not granted to him. They are helpless, one way or another, as I illustrated to you this morning. It is the plaintiff's case, but he can

bring it over again. You can enter a default against the defendant. And that is how we will find ourselves when we give to the court this tremendous power in the exercise of a very important rule.

MR. PARKER: I am very much opposed to having these rules incorporate any provision that would allow an interlocutory appeal in a common law action. I think it requires only one thought that the purpose of a common law suit in its effectiveness, as distinguished from an equitable action, to make it readily apparent that under a system such as we have, with only one appellate court, that it is not a practical rule to adopt or to permit to be adopted or to be permitted to be incorporated in our procedure. To begin with, a common law action for damages can put a defendant, ordinarily, to no expense other than the defense of the cause. It can deprive him of no rights in property; it can take nothing from the defendant until a final judgment has been rendered, which, of course, pre-supposes a trial by jury, and the rendition of a verdict for the plaintiff, and a judgment based upon that verdict. Now, on the other hand, in an equitable proceeding, all of us know that interlocutory orders, where courts can issue injunctions of a compulsory nature, or of a prohibitory character, the valuable property rights in causes of action can be protected by appeals from interlocutory orders. It strikes me that then you do not need an interlocutory order or interlocutory right of appeal in a common law action. It is the same thing as saying that every defendant, ostensibly questions the right of every plaintiff to file a law suit to start with. And of course all of us know that under our system of jurisprudence, a plaintiff has got the right to sue anybody at any time, and one of the hazards of civilized life is having to defend it. Now, as Mr. Wigginton has pointed out, the Supreme Court does not have but seven men on it. Their deliberations cover some eleven to fifteen hundred cases a year. I was informed by the clerk, about two or three months ago,—I believe I have that space in time about right—that more cases were filed in the Supreme Court in one month than had ever been filed before, including the period of time back in 1925, during the boom. Now we do not want to kill the judges over there all off. We are not that much disappointed, or do not have the feeling that they are not performing their work properly. And if you allow interlocutory appeals in every common law order or even if you sit down and with all of the skill and ingenuity that the human mind could command, and tried to put limitations on the right, it would still be attempted to be exercised, and you are appealing from orders that, in effect, grant no substantial right to the plaintiff in the cause or against the defendant until the case is finally terminated. That is one reason. Now another one is it is not done in the Federal Court under the Federal Rules, which these rules, in good part, are patterned after. So far as I know, it is not permitted in any common law state. I believe at one time, in an examination of this question about two or three years ago, with the Junior Bar Section, some folks wanted all of the interlocutory appeals in common law actions, and looked it up, and found that it was not permitted. Now, under those circumstances I certainly trust that this body will permit the recommendation of the Committee to stand and not require that it should be put in. I do not think it is justified. I think it is going to cause far more trouble than anybody will ever get any benefit from, except the benefit of delay and that is the very thing that the Bar Association has been attempting, in the adoption of these rules, to stop, so the public confidence can be restored in the courts to the extent that they will at least know that things are handled in an orderly and expeditious way without having the course of a law suit interrupted five or six times for interlocutory appeals.

MR. PLEUS: I will just remind the Conference again of the feeling of the Committee, as emphasized by Mr. Green, that these rules are for the direc-

tion or government procedure in our trial courts. They have nothing to do with appellate procedure, let alone the giving of any right which is new to our system on an appeal, that heretofore has not existed, any more so than the Federal Rules of Civil Procedure, or even remotely such on any question of rights to or manner of conducting appellate proceedings. That, I believe, was the fundamental reason in the minds of the Committee, that that question was beyond the scope of the Committee's work. Now, are there any further comments? Let us have them all.

MR. BEGGS: Gentlemen, there is no desire to curtail this discussion. I wonder if we have arrived at the point where the fundamental question might be submitted in the form of a motion.

MR. WIGGINTON: Mr. President, I move the adoption of this draft of rules, as our Committee's report. I move its adoption by the Conference.

MR. PLEUS: Second the motion.

MR. BEGGS: It has been moved and seconded that the rules as presented by the Committee, with such modifications as today's discussion may necessitate, be recommended to the Section of the Bar for approval and endorsement by the State Bar Association.

MR. WIGGINTON: I want it clearly understood that that is on the condition that what I said this morning would be done. That is, a transcript of these proceedings will be before the joint committees of the Supreme Court and the State Bar Association for further consideration, together with all of the comments and suggestions that we can get from you gentlemen and others, who read the rules between now and that time, and each of those suggestions and recommendations will be given earnest and careful and sincere attention on the part of your Committee. And, where they can be adopted and worked into these rules, that will be done. It is on that condition that I have moved the adoption.

MR. BEGGS: The floor, now, is open for discussion.

MR. KEEN: May I ask a question?

MR. BEGGS: Come right up.

MR. KEEN: My inquiry is this. Will the Committee set a date, or set a time, after which, no recommendations will be considered, so that everybody will know beyond what time the Committee will not consider suggestions for changes in the rules, and so that everybody who is interested, will know that there is a dead line of one month or two months, or three months, or however long you want to have it, so that everybody will have an opportunity and full opportunity to get before the Committee, all suggestions that they may care to make. If you do not fix some definite date, somebody's suggestions will not be considered.

MR. WIGGINTON: Mr. Keen, I think the action for that will lie largely with Judge Terrell and his Committee, as to what date they will want to sit down and finish up the matter. It is my hope that we can accomplish that so that it will be concluded before the Supreme Court goes into recess in August. I think I can give the assurance to the Conference that it will not be done within sixty days and we hope that it will be done within ninety days. I think that will carry us right up to the summer recess of the Court so that during that recess we can be working on our final draft and come back in position to present a petition with our final draft shortly after the Court reconvenes in September. So I think there will be no fear that that will be done under sixty days and we hope to do it within ninety. But it will finally lie with Judge Terrell, I think, as to when he wants to reconvene his Committee in joint session with ours. We will conform to their wishes and pleasure.

MR. BEGGS: The floor will now be opened for discussion. I assume that

there will be those who will desire to speak both for and against the adoption of the motion. It will be my endeavor to recognize one speaker on one position and one speaker on the other side, alternately, until all who desire to speak have been heard. As there may be a large number of speakers, I ask all of you who desire to talk to be as brief as you conveniently can. The first speaker to be recognized will be Mr. Bradford.

... The floor was then opened for discussion by the President, for the purpose of permitting such members as desired, to express their views in support of or opposition to the motion as made.

MR. BEGGS: I want to remind you gentlemen that we desire to adjourn at four-thirty this afternoon. We have about twenty five minutes to go. We have several important and interesting committee reports to consider and I hope that we can dispose of them before we adjourn.

Now, the question before the house is whether this Conference, in convention assembled, recommend the adoption of the Proposed Rules of Civil Procedure by the Supreme Court for promulgation as the rules of practice in this State. I assume that there will be a standing vote. I will ask the Secretary to count all of the votes on the right of this aisle and I will try to count them to the left.

... A tabulation of the vote on the motion, as announced by the President is as follows:

In favor of the motion.	63
Opposed to the motion.	7

MR. BEGGS: The Chair recognizes at this time, Mrs. Ethel Ernest Murrell, of Miami, who, for several years now, has served as Chairman on the Committee on married women's rights. I trust you will remain to hear the very novel bill that is to be presented for the emancipation of married men.

MRS. MURRELL: This bill, the author of which is Ed R. Bentley, whom I know you all know and respect, I will read without any preliminaries.

TO AMEND CHAPTER 21976 OF THE LAWS OF FLORIDA, 1943, being an act relating to the removal of disabilities of married women and providing corresponding rights for the husbands. Be it enacted by the Legislature of the State of Florida::

1. That Chapter 21976 of the Laws of Florida, 1943, be and the same is hereby amended by adding thereto a section to be known as 9(a), as follows:

That upon a married woman being made a free dealer as provided by this act, giving her the right to take charge of and manage her own property as if she were not married, the husband of such woman, on and after date of said decree, shall also have the right to perform any and all acts, matters and things in respect to his own estate and property, whether real or personal, that he could do if he were not married, provided, however, that this law shall not apply to homestead property.

(2) That this act shall take effect upon immediately becoming a law.

Now this bill is not unanimously recommended by the Committee, but it is recommended by the Committee with one vote against it. The Committee consists of the Hon. Glenn Terrell, Ed R. Bentley, Helen Hunt West, A. S. Bradley, Thelma H. Waybright, and Ophelia Lester. I would like to tell you that the vote in the Committee was not against the principle involved in the bill but Mrs. West of Jacksonville, voted against it simply because she felt that equality should not come through this kind of an act. She felt it should be a sweeping gesture, removing all discrimination.

Now I do not believe that any argument is necessary. I think the bill speaks for itself. It is an attempt to further equalize the laws of Florida as they apply to men and women. I have spoken to you so often on this subject that you all know all of my argument. It is, however, in the best trend of the times. Every

# RADIN

## *Law Dictionary*

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law writ used in England before 1833, to partition land.

**PARTNER.** A member of a **partnership**.

**PARTNERSHIP.** An association of two or more persons in a common enterprise in such a way that each may act as agent for the others, and each is liable for the debts incurred in the carrying out of the enterprise. The contract between them will, at common law, be assumed, unless other provision is made, to require joint management and an equal division of the profits and losses. The partnership will be dissolved by death, **bankruptcy** or withdrawal of any partner. This will be the case even if a fixed period is agreed upon. The effect of such an agreement may be that a withdrawing partner will be held to have breached his agreement.

The partnership at common law was not treated as an entity separate from the partners. Following mercantile practice, modern statutes have to a limited extent recognized the partnership as an entity, but never to the extent of relieving a partner from partnership debts, except in the case of a limited partnership. For tax purposes, a partnership is considered an entity to the extent that it is required to file a partnership return or report, although the partners are individually liable.

A number of states have adopted a Uniform Partnership Act in an attempt to codify the existing law on the subject. See Rowley, *Modern Law of Partnership*.

**PARTNERSHIP ACT.** An English Act of 1865 (called Bovill's Act) making extensive changes in the law of partnership. In 1890, a Partnership Act was enacted in England which codified the partnership laws in a manner similar to the Uniform Partnership Act in the United States.

**PART OWNERS.** Owners in common or jointly of the same property; especially said of a vessel.

**PART PAYMENT.** Payment of a part of a debt due. This satisfies the debt pro tanto, and tolls the **Statute of Limitations** for the balance. It will also satisfy the **Statute of Frauds** in the case of sale of goods.

**PART PERFORMANCE.** The partial carrying out of an obligation to do something, which will in some cases prevent, in equity, the defense of informality in the making of the contract. See **Frauds, Statute of**.

**PARTY.** 1. A person who takes part in a legal transaction, especially in an agree-

ment. The various parties are described as "parties of the first part," "of the second part," etc.

2. A litigant, whether as plaintiff, defendant or intervener.

3. A group of persons, organized for political purposes, and recognized by law in the United States as entitled to nominate candidates for office. The legislature has the constitutional power to regulate such political parties, so far as they involve the rights of a citizen freely to select his party and to participate in its organization.

**PARTY IN INTEREST.** 1. In the law of procedure, a party in interest is a person who has a beneficial interest in the result of the action or who might be injured as the result thereof, and who is entitled to maintain an action. *Edwards' Est.*, 234 Wis. 40, 289 N.W. 605.

2. In some jurisdictions, evidentiary rules prohibit a party in interest from testifying as to transactions with a decedent. *Jackson's Est.*, 200 Wash. 116, 93 P. (2) 349.

**PARTY-WALL.** The wall which is a common wall to two adjoining buildings so that it forms part of the structure of both. It generally stands on the dividing line. Both owners have rights in it. Usually they own it as tenants in common. They may also own it in severalty, in which case each will have an easement in the other. Or one may own it separately, in which case the other will have an easement in it. *Nabers v. Wise*, 241 Ala. 812, 4 S. (2) 149.

**PARVISE.** Another name for moot.

**PASS.** 1. To transfer, as in the case of title to property of any kind; or, intransitely, to be transferred, as in the phrases, "the title passes" or "the estate passes."

2. To accept as valid or to allow, a report or an account. With the preposition "on" or "upon," it is equivalent to "decide" or "determine."

3. A free ticket to the use of certain privileges, as to ride on a railroad. Such passes are subject to restrictions contained in The Federal Interstate Commerce Act.

**PASSAGE.** 1. The privilege of transportation or transit, especially by water. 2. The voyage itself, especially by water. 3. The money paid for passage.

**PASSENGER.** One who is carried by a public carrier from one place to another, whether for consideration or without it. The master, mate and crew of a ship,

## REPORT OF MID-WINTER CONFERENCE OF BAR DELEGATES

The Mid-Winter Conference of Bar Delegates was called to order by Mr. Julius F. Parker, President, Florida State Bar Association, at 9:30 A. M., December 15th, 1945, in the George Washington Hotel, Jacksonville, Florida. Invocation was offered by Mr. Charles Mitchell. The welcoming address was made by Mr. Gene Mitchell, President of the Jacksonville Bar Association. Response was given by Mr. E. Harris Drew, past President, of the Florida State Bar Association.

Mr. James Booth, of St. Petersburg, Chairman of the Committee on Education and Admission made his report on the petition of the Attorney General to relax the rules on education requirements for admission to practice, which was recently presented and argued before the Supreme Court. After developing the history of the rule he stated he was pleased to report that the Supreme Court denied the petition.

M. Lyle Holcomb, of the Miami Bar, was called upon to speak upon the subject of "A Proposal on the Effective Date of New Legislation." In the course of his remarks, Mr. Holcomb stated:

"We have had a situation that is absolutely astounding. I do not see how we, as lawyers, how the Courts and business people of this state, have stood by for the last 20 years and permitted such a condition to exist, and I refer to the fact that almost without exception the Florida Legislature gave immediate effect to every act that was passed. The only one that I can recall now that has not been given immediate effect was the new act for guardians.

As a result of that condition, and as a result of the fact there is confusion in the printing of acts, laws that were adopted last April were brought to our attention in the bound volume in the early part of this month.

"Now, that is just utterly inconceivable in a state as great as the State of Florida. Something should be done about it. I wrote to the President of our State Bar Association and he asked me whether I would appear here and bring this matter up. The Bay County Bar Association, the Palm Beach County Bar Association, and the Key West Bar Association have all adopted resolutions on this matter, calling attention to this situation."

After further discussion he offered the following resolution and moved its adoption:

"WHEREAS, for many years it has been the practice and custom of the Florida Legislature to pass many acts with a provision giving them immediate effect; and

"WHEREAS, the effect of this practice has been to cause these acts to become law and effective long before they are printed and distributed and the courts, lawyers and people of Florida thereby become subject to laws of which they have no notice for a considerable period after they become effective; and

"WHEREAS, because of this situation it is impossible to safely advise a client or engage in litigation or take any action, and business is thereby hampered, impeded and delayed; and

"WHEREAS, few of the acts given immediate effect have any real need therefor and their effective date could usually be postponed without causing undue hardship;

"NOW, THEREFORE, BE IT HEREBY RESOLVED by the Mid-winter Conference of Bar Delegates of the Florida State Bar Association assembled

in Jacksonville, this December 15, 1945, that the effective date of Acts of the Florida Legislature should not be earlier than such time as will permit the printing and distributing of such acts. and we recommend that none except emergency legislation be given immediate effect."

After discussion from the floor by Messrs. Ellis, Edrehi, Petteway, Drew, Carmichael and McCarthy, the motion for the adoption of the resolution was carried and the resolution was adopted.

Thereupon, Mr. Holcomb made the following motion:

"I move that the President of this Association appoint a committee of sufficient size as he determines advisable to investigate the question of the effective date of the acts of the Legislature and the matter of publication and distribution, and to invite the cooperation of the Secretary of State and the Attorney General, and to report back to the Bar delegates at the next convention on some feasible means of remedying this situation."

The motion was seconded and there being no discussion a vote was taken and the motion was carried.

Mr. Chief Justice Chapman and Mr. Justice Sebring were next called upon to discuss the plans for the new Supreme Court Building. Justice Chapman explained the need for a new building, its location and the proposed alternate exterior plans if sufficient money was not available for the exterior finish as proposed in the original plans.

Mr. Justice Sebring exhibited the architectural drawings and explained the many features which were to be incorporated in the new building.

Mr. Justice Glenn Terrell reported as follows on the present status of the new rules:

Mr. President, Bar delegates, and guests. It would not be amiss to spend a minute to give a preliminary statement to bring everybody up to date, and to give you a picture of the reasons for this committee, and this attempt to modernize the rules of procedure.

The Legislature of 1943 passed an act, which was Chapter 21995, authorizing the Supreme Court of Florida to prescribe rules, forms of procedure, writs, and so on, for the Circuit Courts, and the Civil Courts of Record, and the County Courts. In pursuance to that act, the Florida State Bar Association, through its appropriate committee, filed a petition in the Supreme Court praying that the Court adopt the Federal rules, or such modification of the Federal rules as the court thought were applicable to practice in this State.

That petition was argued at length, and on March 9th of this year, the court handed down its opinion in which it declined to accept or adopt the Federal rules entirely, but did recognize the fact that some changes and modifications or modernizations of the rules, whichever term you choose to call it, was necessary.

There were three distinct points decided in that opinion. The first was the Constitution of Florida recognized power in the Legislature and power in the Supreme Court to prescribe rules of procedure. That authorization, as in the Constitution, is more or less a left-handed authorization in that its terms are not direct. If you read Section 20 and 21 of Article 3, with reference to the enactment of local laws and general laws, you will find an authorization there that allows prescribing rules of procedure for the Courts of Justice which shall be general.

That is certainly an authorization of the Legislature to pass and enact rules of procedure or statutes that amount to rules of procedure.

Then, if you read Section 5 of Article 4, you will find a similar authorization for the Supreme Court to enact or to adopt rules of procedure. So that has

been the history of the rules authorization in Florida. We hear lots of talk about inherent power in enacting rules of procedure, and unquestionably there is an area in which the Supreme Court and Circuit Court and other courts may prescribe rules of procedure. But there are so many of our proceedings that are statutory, and there are so many that deal with matters that are not within the area in which the Court may be said to have inherent authority to pass rules, it has been the case in this State for a hundred years that the Legislature has exercised that authority, and the court has also exercised that authority. So it is not worth while for us to waste any time over the question of the boundary line between inherent authority and legislative authority, and these other authorities that we may bother ourselves about in reference to this matter of procedure.

In interpreting the Acts of 1943, the court was confronted with some difficulty in reconciling some of its provisions. The title and Section 1 in clear terms authorize the court to prescribe rules. Section 3 reads: "Wherever the Supreme Court shall adopt any rules under this Act, they shall be reported by the court to the legislature of the State of Florida in its next ensuing session and shall not take effect until after the close of such a session."

If you will read Section 3 with Section 1, and then read it again with Section 6 and Section 5, you will unquestionably experience some trouble in reconciling those provisions and you will see that this section requires these rules to be reported back to the Legislature.

Some members of the Bar took the position that the Legislature, in enacting that provision, held a whip over the court, with the authority to veto any rule that the court may prescribe. The court could not bring itself, I say, to that conclusion. The court was perfectly in harmony with the idea of submitting the rules that it promulgated back to the Legislature, and a further section of the Act retains the authority in the Legislature to promulgate further and different rules. But our thought was that the rules should appropriately be submitted to the Legislature as a matter of information, that they should be given a test, and then, if future considerations determine that they were not what they were expected to be or designed to be or served the purpose that they were designed to serve, they might be repealed. The court thought that was the only reasonable interpretation or manner in which to harmonize Section 3 and Sections 5 and 6 with the other sections of the Act.

With reference to the scope of revision, I stated in the beginning that the court unanimously agree that it would not substitute the Federal rules of civil procedure for the common law rules that we have in this State. We have been working under rules that we have in Florida somewhat similar to those that we have at the present time for over one hundred years. During that time many decisions of the court, construing various provisions of those rules and various phases of the practice, have become familiar to the members of the Bar. Well, now, we recognize that there were many advantageous and admirable provisions in the Federal rules, but our thought was that those provisions should be taken out of the Federal rules and integrated into the State rules, in the common law rules, and perhaps some phases of the equity rules.

Another reason that the court took that position, its reason being epitomized in one of the concluding paragraphs of the opinion that I am going to read, because it states it here a good deal more succinctly than I could attempt to state it by speaking. The Federal rules of civil procedure are geared to a system that is materially different from our State system. It is hardly necessary to say to a body of lawyers that one of the reasons for Federal rules for civil procedure was that prior to the time of the adoption of these rules, the Federal courts had been following generally the practice in the State courts, and one of

the main purposes actuating the Federal rules of civil procedure was to have a similar system throughout the country.

"The Federal system was designed to provide a uniform system of practice in the Federal District Courts and by reason of Constitutional, statutory and other reasons cannot contemplate rules for the orderly conduct of a variety of suits and statutory proceedings that arise in State practice. If we should adopt the Federal rules of civil procedure, many of them would have no application to our State practice. At the same time there are many proceedings that we would be without rules to govern."

Rule 38 of the Federal Rules recite those provisions which have no application whatever.

This rule shall not apply to mandamus proceedings, quo warranto, habeas corpus and other constitutional writs, certiorari, statutory provision for enforcement of liens either in personam or in rem, statutory proceedings relating to the adoption of children, changing the names of persons, appointment of curator, landlord and tenant proceedings, forcible and unlawful entry, right of eminent domain, violation of bonds, scire facia, reestablishment of lost papers and records, guardianship and bastardy.

So far as litigation to the Supreme Court is concerned, I attempted to make an analysis of the cases there to determine what percentage of the litigation that comes into the court, comes within those provisions that are eliminated in the rules, and only thirty per cent of cases now come to the Supreme Court within these terms that are eliminated. So that and other considerations that I might mention are the main ones that would induce the court to refuse to adopt the Federal rules bodily.

We did attempt to take some of the provisions from the Federal rules to integrate into our system. When the court reached its conclusion, the court decided also that it would not undertake as a court to do the physical act of revising the rules, so this committee was appointed. This committee was appointed by the court. The court was aware of the fact that there were two schools of thought among lawyers—perhaps more than that, but at least two—it would be difficult to get three lawyers together that would not have a variety of opinion. So we realized that there are at least two schools of thought with reference to what shall be done as to the manner of revision or modernization. The court designating this committee purposely put representatives from both schools of thought on this committee. The committee is composed of (Justice Terrell read all the names of the committee).

Those are the members that were designated to that committee. This committee has been working for several months on this modernization program, and the result of the committee's work is published in the recent issue of the Bar Journal and I understand that there is considerable controversy about that.

I am going to discuss those provisions briefly from the standpoint of what it seems to the court. Departures were made from the present common law system, and those departures are embraced in rules 11, 12, 13, 15 and 34. Those five rules embrace rules that are a distinct departure from the present common law practice.

You can turn to your Bar Journal there. Rule 11 has to do with the manner of commencement of an action. It abandons the present manner that is prescribed in the common law rules and it is consonant with what we have in the Federal rules. In reaching this conclusion, the court had access to the rules of practice from every State in the Union, and we used them liberally. We also had access to the Federal rules of civil procedure, and as I stated a while ago, the members of the committee were not in unison about the adoption of the

recommendation of the rules. But these rules were recommended by a majority of the committee.

One of the things that actuated us, we thought it was advantageous to harmonize, as near as possible, the common law practice with the Federal practice and the equity practice. We have our equity practice which was revised a few years ago by a very able committee appointed by the Bar Association. The Bar Association undertook that work and our thought was that very few changes needed to be made in the equity practice. But we thought that the common law practice could be modernized and that was the first step that we undertook, to modernize it. You notice the numbering of these rules, and we took them and attempted to integrate these pages in the proper place where they should come to retain what we do not propose to discard, and this question of the commencement of an action happened to be Rule 11.

Under that procedure, as I stated, we thought it was proper and advisable to harmonize as far as possible the common law practice and equity practice and the Federal practice. The only purpose of Rule 11 was to effect that harmonization.

Now Rule 12: You find on page 296 that it abolishes rule days. You will find, if you will examine the rule of the practice in different States of the Union, there are hardly any States now that retain the old system of pleading from rule day to rule day. From my observation and experience in talking to the lawyers, and I talked to a great many lawyers, that have come into the office from time to time, my observation was that lawyers who are doing considerable practice in both State and Federal courts were anxious to see a harmonization of the practice in both courts. They thought it would serve a good purpose in the practice in both courts if both procedures were harmonized. The lawyers who restrict their practice exclusively to State practice, and a good many of them do, didn't want any change at all, they were satisfied with the present system and preferred to leave it as it is. So I figure that we are fully conscious of that situation. But there are other things that must actuate the Bar with reference to modernizing the practice, and that is we cannot overlook this fact that, as we say, with reference to public utilities, that the practice of law is not a means by which, as lawyers, we make a living, but a thing in which the public is vitally interested. And the public, those who have litigation, are intensely interested in the fact that litigation be dispatched as soon as it is reasonably possible to dispatch it and with the minimum expense. You will find, if you will talk to people you represent, that they are intensely interested in those two elements, those two factors.

I did not think any rule or rules of procedure will affect that purpose. I think it is a matter that depends much more on personnel than it does on rules. But with this change, certainly, the trial judges and the Bar, if they bear those factors, those elements in mind, certainly they can expedite litigation better than they have been able to expedite it before. In a good many of the States they have abolished trial terms entirely, and when a case or issues are made up, it is ready for trial or disposition just as equity is in our practice, and there is no reason in the world why that should not be the rule in our own State. Business of all kinds is transacted according to modern methods, if we do not bring the transaction of the legal business up to modern methods, it just means that the transaction of legal business is going out of the hands of the Bar, where it should stay, and be done by commissions and other bodies and organizations.

Then the Rule 13, with reference to the service of pleadings. I did not apprehend that there should be any objection to that. When a pleading is filed, a copy is served on opposing counsel, and if there is more than one

defendant I think it should be filed in triplicate so that all defendants may be furnished with a copy of the declaration. It is hardly necessary, I think, to speak of the advantage of that. All of us well know, especially those who have practiced in the country, when a declaration is filed, the other fellow files one and if you are counsel for the defendant, you have to go to the Court House and get the record in the case, and perhaps you cannot get the case because some other lawyer has it. You experience all kinds of difficulty in getting it. But under this system, the declaration will be furnished you regardless of the number of defendants there are.

The next one is Rule 15 with reference to pleadings. I enumerated that as one of the distinct departures from the present system, but we do have something like it in that we require the declaration to conform to certain specifications. This goes into a little more detail with reference to the filing of those, making it a requirement to conform to those specifications and also with reference to particular defenses. Then the fifteenth rule also restricts the pleadings to a declaration and to an answer, and then if the circumstances require, to a reply. Now, that is in conformity with the Federal rule and in conformity with the rule of Michigan and in conformity with the rule of many, many other states, and is approved practice procedure by, I would say, at least one third of the States in the Country or the States that we look to for leadership with reference to modern practice. It is the most effective means of reaching issues and dispatching litigation.

Rule 34 was fostered by the Junior Bar Association. It was first rejected by the committee. Then on a motion to reconsider, the vote by which it was rejected, the committee reconsidered it and approved it. We have not heretofore taken ample safe guards to stop objections to that rule which would prolong and hinder rather than speed litigation and reduce procedural difficulties it would make. We would have a maximum instead of to reduce them to a minimum. But we thought there were safeguards enough placed in that rule to remove those difficulties.

There are instances, I would not say a great many instances, but the most flagrant abuse of it, and the reason for it was a case we had which came up from Miami a few years ago, in which the question turned on the sufficiency of the declaration under the statute. It was brought out in the argument in this case it would cost \$4,000.00 or \$5,000.00 to take the evidence in that case and to litigate it, and the sufficiency of the declaration depended on the third portion of the statute under which it was brought. Yet, a majority of our court refused to pass on that sufficiency of that declaration under the old rule. It was common law, and it wasn't brought up for final judgment. Well, we have a good many cases that come to the Supreme Court of that kind, and they require those folks to go back down there and take \$5,000.00 worth of evidence and spend a year to take it, and then bring it up to the court and the court will say the declaration was not sufficient.

To me it is just utterly foolish and inexcusable, and there are instances in which that rule will serve a splendid purpose.

The rest of these rules in Volume 1 here are what we might term "Additions to the present practice." With reference to Rule 21 "Pleading special matters," and Rule 22, "Defenses," Rule 23 "Misjoinder and Non-joinder of parties":

We have something similar in practice to all of these rules, but they have been redrawn and additions that were taken from what was thought to be the best practice over the Country and injected into them, sometimes from Federal practice, and sometimes from the practice of other States.

And that is where all of these other rules are derived such as "Consolidation

of causes," "Sham pleas," "pre-trial procedure." We had a rule already authorizing pre-trial procedure to be employed at the option of the Circuit Courts, but it was brought out that it had been very advantageously employed in two or three circuits, and that only two or three circuits have adopted it. From the urgency of some of those that had not adopted it and seen the beneficial advantages of it, the Court saw fit to approve that as a general rule of procedure, and as an optional rule with the Circuit Courts.

Then the "Motions for directed verdicts" and "Special verdicts and interrogatories," and "Evidence in new trials,"—that is Rule 29 and 31, were actuated by what has been our experience here in the Supreme Court in those kinds of appeals. And in reference to Rule 32, "Evidence in new trials." It has always been the trouble in many cases where a case is reversed for a new trial that witnesses disappear. It has sometimes been impossible and always difficult to get witnesses brought back for a second trial. The purpose of that rule is to use the testimony which was taken at the former trial. Then the next rule 33 "Assigning error on record in appeals from new trial." It has been a practice for the court in reversing a case, to often state something in the nature of instruction to the Circuit judge with reference to a second trial which is advantageous, and that rule is put in there to cover those kinds of cases.

As to Volume II, the committee has not completed its work on that, and I don't think it is worth while to discuss it except to take suggestions. Now, if any of you have suggestions you want to make, the committee will be delighted to consider them because I have a great faith in the practitioners who have had lots of experience and attempted to amend these things in the light of what that experience has been. I think it is the best guide, the best determinant of these amendments.

Mr. Parker: Mr. Drew.

Mr. Drew: Justice Terrell, since this December issue has been circulated in my Bar, great confusion reigns. Most of the lawyers think that they have been practicing under the wrong set of rules since June. We have gotten the impression that these rules of Volume I have been adopted and didn't take effect at the adjournment of the Legislature under the provisions of Chapter 21995.

Justice Terrell: That is another case of interpretating the acts of the Legislature. The court feels that it is authorized to adopt an order putting these rules into effect, and the court has not adopted any order yet. This first volume was finished before the Legislature adjourned and because it was finished, we thought that that volume should be submitted to the Legislature and be finished, as far as the Legislature is concerned. But the court has made no order putting that volume into effect because, as I thought, the other volume should be completed and both volumes put in effect at the same time. It was further the thought of the court that this matter with reference to rule days, and reference to filing of pleadings, should be carried through the equity rule. That is practically all the change that the court has in mind of making in the equity practice, but it was thought those provisions should go through those to harmonize them. When that is done, then the equity practice, the common law practice, and the Federal practice would all be harmonized on the question of pleading, the time of pleading, and so forth.

There was considerable discussion from the floor with respect to various features of the rules, and especially the service of a copy of the declaration by the Sheriff at the time he serves the summons.

After Justice Terrell had answered the questions propounded from the floor the President thanked him for delivering the talk, stating "The Bar

Association is deeply grateful to the judges who have given their time to come here, particularly on this matter about the rules."

After Justice Terrell's talk, Mr. Lawrence Truett, of the Tallahassee Bar, Chairman of the Civil Procedure Committee, made his report as follows:

"My committee was in a peculiar position as having not been on the Supreme Court's committee or having any voice therein, nor did they have any benefit of any discussions that have taken place. However, I must say that Mr. Justice Terrell has very kindly talked to me about the matter and said that any time he would be glad to discuss these rules with me. It would seem to me from what I have heard this morning on a discussion of a very simple rule that the committee has had somewhat of a difficult task. I do not know that the rules could have been made any better than they have submitted it. When you take into consideration the conflict that seems to exist between the members of the Bar, I think they have done a very excellent job. It would seem to me we have a very full report upon the status of the present rules. There is nothing that my committee can do with regard to those rules, except that I believe we might possibly act as a clearing house for such information, such suggestions that might be made by the various members of the Bar. Now, frankly, I have not had a very long time in which to study these rules. I do not think you had, and I know that the committee would be very happy to have your suggestions and in turn convey them to the Supreme Court."

Mr. Truett then addressed his remarks to the particular discussion of several of the rules as they appeared in the Law Journal.

Mr. Ausley, of the Tallahassee Bar, Chairman of the Committee on Legislation, reported that the Legislative program in almost its entirety had been adopted by the 1945 Legislature. He closed his remarks with the statement "I think that the Bar Association can point with a great deal of pride to its achievements of the last two sessions and I believe when you have heard the explanation of the new guardianship law by Mr. Redfearn you will agree it has its place along with the chancery act and probate act as one of the real achievements of the last few years."

Mr. J. Velma Keen, of the Tallahassee Bar, Chairman of the Committee on Refresher Courses, reported as follows:

**MR. KEEN:** Mr. President, and gentlemen, long before the war was over there was a good deal of agitation among those of us who could not go to war, over the question of whether or not the Bar Associations over the country should give refresher courses to lawyers who returned from the service. Many suggestions were made and opinions seemed to be pretty well centered on the idea that we ought to definitely elaborate on refresher courses for lawyers as they come back from the service. The American Bar Association has done much work in this connection, and we have somewhat followed their lead. Yesterday we had a meeting of the committee and after several hours discussion, the members of the committee were not so certain as to whether or not there existed the need we previously thought existed. It seems that in some parts of the State, they think they do not need refresher courses for returning veterans at all.

For example, in Jacksonville we were told at the meeting there is no demand for this kind of service. Down in Tampa we were told that the demand is now immediate, and in other parts of the State there was some demand.

First of all, it seems to the Committee that we would have to wait until a sufficient number of these men come back to find out from them whether or not they want this held. You know, it is difficult to take a fellow and choke down him a refresher course. It was the same kind of dealing with the Chinese when we sent missionaries to China. If he does not want to be saved, we can't

serve on Juries has been thrashed out over a quarter of a century. It is no longer a question.

Whenever, (in states where Compulsory Jury Service exists), mothers with children, or expectant mothers, are called for service, the judiciary always excuses the applicants—as the judiciary excuses men pleading illness, or press of business.

3. Therefore, the Bar Association, in being asked by this Committee to recommend the aforementioned change in the Jury Bill, is not required to be radical, or particularly progressive. The Committee requires the Association to blaze no trails, nor yet court criticism. The Committee requests the Bar Association simply to go on record as a body of technicians, to request the simplification of the law in question, and the procedure thereto attached.

4. Wherefore, your Committee submits that unless a contrary expression be issued by the Assembly, your Committee will go ahead with its plans.

Armstead Brown  
Frances M. Lovelace  
Edith M. James  
Clara Floyd Gehan  
Byron Butler

Kathryn Gregory  
A. S. Bradley  
John P. Corcoran, Jr.  
Catherine H. Carter, Vice Chrnm.  
Ethel Ernest Murrell, Chairman

## RULES OF CIVIL PROCEDURE

At the mid-winter conference held in Jacksonville in December 1949, we reported that the work of this Committee had successfully culminated in the entry of an order by the Supreme Court on November 22, 1949, promulgating the new rules of civil procedure and making them effective on January 1, 1950.

Before the rules became effective, it came to the Committee's attention that doubt existed in the minds of the Clerks of the Circuit Courts of Florida as to the proper form of summons to be issued under the rules. The Committee joined with the Attorney General of Florida in the preparation and filing of a petition before the Court, asking that an approved form of summons at law and summons in chancery be prescribed by the Court for use in all civil actions in Florida. The petition also prayed that the Court adopt by reference for use in this State the forms of pleading heretofore approved by the Supreme Court of the United States in connection with the federal rules of civil procedure.

An order was entered by the Court on January 21, 1950, adopting the form of summons submitted with our petition and also adopting by reference the forms of pleading heretofore promulgated and approved by the Supreme Court of the United States for use under the new rules of civil procedure.

We found a genuine interest among the members of the Bar in the new rules, and a consequent demand for a clarifying explanation as to their mechanics and the manner in which they are intended to operate. In response to this demand, and in an effort to be of assistance to the Bar of the State, representatives of this Committee appeared before the Circuit Bar Associations in thirteen of the fifteen Circuits. In these appearances, an effort was made to explain the fundamental theory and underlying concepts of the new system of procedure called for by the rules, and the manner in which the Committee conceived the rules should operate. It is hoped that these appearances resulted in eliminating the natural uncertainties and confusion that would be expected to arise from a transition into the new concept of pleading.

Although the rules have been in effect only a short time, it is already apparent to the Committee that some clarifying amendments, particularly to the chancery rules, would be desirable. It is our recommendation that the Committee on Rules of Civil Procedure be continued as a standing committee of the Bar, charged with the duty of making a study of the rules in actual operation, and through collaboration with the State Association of Circuit Judges and the Supreme Court of Florida, recommended by petition such amendments to the rules as may from time to time seem necessary and proper.

Maximum benefits from the new procedure cannot be expected without the sympathetic understanding of the Courts who will interpret and administer the rules, and a genuine desire on the part of the Bar to use them in an effort to attain more expeditious administration of justice. To that end, the aid of the Bench and Bar is respectfully solicited.

JOHN T. WIGGINTON, Chairman,  
Committee on Rules of Civil Procedure,  
State Bar Association.

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Write:

**R. L. WOODARD,**  
Vice President and General Manager



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Number 2—Special Session

Wednesday, November 28, 1979

The Senate was called to order by Senator Williamson for the purpose of conducting the order of business of introduction and reference of resolutions, memorials, bills and joint resolutions pursuant to Rule 4.3. Senator Gordon represented the Committee on Rules and Calendar.

## INTRODUCTION

By Senator Gordon (by request)—

SB 23-C—A bill to be entitled An act relating to ad valorem taxation; providing legislative intent with respect to equalization of funding efforts among school districts; amending s. 236.081(4), Florida Statutes; providing duties of Department of Revenue and Commissioner of Education with respect to computation of required local effort under the Florida Education Finance Program; providing for consideration of the school district's assessment level; providing a limitation; providing definitions; amending s. 236.25(1), Florida Statutes; providing requirements with respect to computation of the district school tax; amending s. 195.098(1) and (2), Florida Statutes; providing duties of the Assessment Administration Review Commission with respect to complaints relating to the determination of the level of assessment; providing for actions by the school board or the Commissioner of Education to contest such determination; amending s. 195.096, Florida Statutes; providing requirements with respect to review of county assessment rolls by the Division of Ad Valorem Tax; revising time periods; providing for publication of results; providing for determination of projected levels of assessment for certain counties; providing requirements with respect to audits of the administration of ad valorem tax laws by the Auditor General; amending s. 195.097, Florida Statutes; providing requirements and procedures with respect to notification by the executive director of the department to property appraisers regarding defects in assessment rolls; providing duties of property appraiser upon receipt of an administrative order relating thereto; providing for continuing supervision; revising time periods and providing for an extension of deadlines; providing an appropriation; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

By Senator Gordon (by request)—

SB 24-C—A bill to be entitled An act relating to ad valorem taxation; creating s. 193.1145, Florida Statutes, providing intent; providing for interim assessment rolls under specified circumstances; specifying the valuations to be shown on such assessment rolls; requiring taxing units to levy provision millage rates upon such assessment rolls and to certify the rates to the property appraiser; providing for the applicability of certain laws to such rates; providing duties of property appraisers, tax collectors, and circuit court clerks with respect to such interim assessment rolls; specifying certain notice in tax bills based on such assessment rolls; providing for the recomputation of millage rates and for the reconciliation of interim and approved assessment rolls for certain purposes; providing for and restricting billings and refunds based upon such reconciliation; authorizing delays in supplemental billing or refunding; providing a form for notice of supplemental bills or refunds; providing for review of interim assessments; providing for the applicability of certain delinquent tax provisions to delinquent provisional taxes based upon such interim assessment rolls; providing that the recomputation of millage rates shall not affect the amount of revenues to school districts, counties and municipalities; providing for the effect of provisional millage rates levied by multi-county taxing authorities; amending s. 197.012, Florida Statutes, specifying an alternative date by which tax collectors must collect delinquent taxes; creating s. 197.0125, Florida Statutes, authorizing certain de-

lays in time requirements relating to the collection of or administrative procedures regarding delinquent taxes; amending s. 120.57(1)(b), Florida Statutes, conforming provisions relating to formal proceedings to the act; creating s. 120.571, Florida Statutes, providing uniform procedures for decisions relating to the levy, assessment or refund of certain taxes, tax roll approvals, and county assessment levels; including the Comptroller as a party in matters involving refunds; providing that the hearing officer's order shall constitute final agency action; providing for judicial review; adding a new subsection (3) to s. 120.65, Florida Statutes, creating a bureau within the Division of Administrative Hearings of the Department of Administration to conduct hearings relating to such taxes, tax roll approvals, and county assessment levels; adding a new subsection (2) to s. 120.69, Florida Statutes, providing for the enforcement of final agency action on such tax matters; providing for severability; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

By Senator Gordon (by request)—

SJR 25-C—A joint resolution proposing a revision of Article VII of the State Constitution relating to finance and taxation.

—was read the first time by title and referred to the Committee on Ways and Means.

The Senate adjourned to reconvene at 9:00 a.m.

The Senate was called to order by the President at 9:00 a.m. A quorum present—40:

Mr. President	Gordon	Maxwell	Spicola
Anderson	Gorman	McClain	Steinberg
Barron	Grizzle	McKnight	Stuart
Carlucci	Hair	Myers	Thomas
Chamberlin	Henderson	Neal	Tobiasen
Childers, D.	Hill	Peterson	Trask
Childers, W. D.	Holloway	Poole	Vogt
Dunn	Jenne	Scarborough	Ware
Fechtler	Johnston	Scott	Williamson
Frank	MacKay	Skinner	Winn

Prayer by Senator Trask:

Father, as we begin this day we pause to give you thanks for your great love and the great blessings that you've given us.

Father, we raise to you this morning heavy hearts because of the world situation. We ask that you will be with our fellow countrymen around this world who find themselves in tense situations and find their lives in danger. We ask you to give a special measure of wisdom to the leaders of this country as they cope with these very complex problems.

Father, we ask you to guide us now as we deal with the problems of this state. Give us wisdom to find the right answers, give us courage to do the right thing, and strength and peace as we go back among our constituents and face the everyday problems.

Father, now as we get on with this day we ask that you would become more real to each of us because we know that in you we find all the answers for all the problems of all mankind. We ask these things in the name of Christ. Amen.

REPORTS OF COMMITTEES

The Committee on Judiciary-Civil recommends the following pass: SB 20-C with 2 amendments

The bill was referred to the Committee on Rules and Calendar under the original reference.

The Committee on Judiciary-Civil recommends the following pass: SB 11-C with 3 amendments

The bill was referred to the Committee on Ways and Means under the original reference.

The Committee on Commerce recommends the following pass: SB 19-C

The Committee on Judiciary-Civil recommends the following pass: SB 21-C

The Committee on Ways and Means recommends the following pass:

SB 11-C SB 17-C with 3 amendments
SB 18-C with 6 amendments

The bills contained in the foregoing reports were placed on the calendar.

Senator Barron moved that the provision of Rule 4.17 which is in effect during a regular session, be adopted which permits the chairman of the Committee on Rules and Calendar or his designee, the minority leader or his designee, and two other members of the committee designated by the chairman to submit each day a special order calendar determining the priority for consideration of bills. The motion was adopted without objection.

MOTIONS RELATING TO COMMITTEE REFERENCE

On motion by Senator Barron, by two-thirds vote SJR 20-C was withdrawn from the Committee on Rules and Calendar.

The President declared the Senate in recess at 9:08 a.m. until 9:35 a.m.

The Senate was called to order by the President at 9:35 a.m. A quorum present.

By permission the following report was received:

REPORTS OF COMMITTEES

The Committee on Rules and Calendar submits the following bills to be placed on the Special Order Calendar for Wednesday, November 28, 1979:

SB 18-C SB 11-C SB 21-C
SB 19-C SJR 20-C SB 17-C

Respectfully submitted,
Dempsey J. Barron, Chairman

SPECIAL ORDER

SB 18-C—A bill to be entitled An act relating to governmental auditing; amending s. 11.45(1)-(4), (8), Florida Statutes, as amended; providing definitions; replacing references to post-audits with references to financial audits; providing for selection of accountants to audit county agencies; creating the County Government Audit Trust Fund in the Department of Banking and Finance; providing circumstances for reimbursement of county agencies for certain costs of auditing; providing an appropriation; providing an effective date.

—was read the second time by title.

The Committee on Ways and Means offered the following amendments which were moved by Senator Johnston and adopted;

Amendment 1—On page 7, on line 22 strike "\$12,700,000" and insert: \$6,700,000; on line 24 strike "\$12,700,000" and insert: \$6,700,000; on line 27 strike "1981" and insert: 1980

Amendment 2—On page 7, line 21, strike "1982" and insert: 1981

Amendment 3—On page 7, line 19, after "any" insert: reasonable

Amendment 4—On page 4, line 1, strike the period and insert: according to the following procedure:

(i) In each non-charter county, an Auditor Selection Committee shall be established consisting of the county officers elected pursuant to Article VIII, section 1(d), Florida Constitution, and one member of the Board of County Commissioners or its designee.

(ii) The Auditor Selection Committee shall review requests for proposals for auditing services required pursuant to Chapter 79-183, Laws of Florida.

(iii) Following their review of qualifications, abilities of professional personnel, past performance, willingness to meet time and budget requirements, and recent, current and projected work loads of auditors or auditing firms desiring to perform the annual independent audit required pursuant to Chapter 79-183, Laws of Florida, the Auditor Selection Committee shall rank in order of preference, not less than three firms which they shall recommend to the Board of County Commissioners.

(iv) If fewer than three firms respond to a request for proposals for the annual independent audit, the Auditor Selection Committee may recommend a single firm to the Board of County Commissioners.

(v) The Board of County Commissioners may accept or reject the recommendation of the Auditor Selection Committee. If the Board of County Commissioners accepts the recommendation of the Auditor Selection Committee, it shall begin negotiations pursuant to Section 16 of Chapter 79-202, Laws of Florida. If the Board of County Commissioners rejects the recommendation of the Auditor Selection Committee, it shall direct the Auditor Selection Committee to review the proposals submitted and submit another recommendation. Should the Board of County Commissioners reject the recommendation of the Auditor Selection Committee, the selection process shall continue in accordance with this act until a recommendation is accepted.

Amendment 5—On page 7, between lines 21 and 22, insert a new section 3: All agencies, other than state agencies as defined herein, and all district school boards and district boards of trustees of community colleges shall have the power to have a performance audit or postaudit of their accounts and records by an independent certified public accountant retained by them and paid from their public funds.

Renumber subsequent sections.

Amendment 6—On page 1 in title, strike line 7 and insert: establishment of an auditor selection committee in noncharter counties and providing duties thereof with respect to selection of qualified auditors to audit county

On motion by Senator Johnston, by two-thirds vote SB 18-C as amended was read the third time by title, passed, ordered engrossed and then certified to the House. The vote on passage was:

Yeas—36

Table with 4 columns: Name, Gorman, Maxwell, Steinberg. Lists names of senators and their corresponding votes.

Nays—1

Skinner

Votes after roll call:

Yea—Chamberlin, Dunn, McClain

**SB 19-C**—A bill to be entitled An act relating to banking; amending s. 659.06, Florida Statutes; authorizing the establishment of branches by merger anywhere in the state with certain restrictions; providing for the establishment of not more than two branches per calendar year in a county in which a branch is established by merger; providing certain considerations and procedures for the granting of a branch application; requiring written notification to the Department of Banking and Finance prior to operating a bank facility; providing for the conversion of certain military facilities into branches; providing an effective date.

—was read the second time by title.

Senator Scarborough moved the following amendment:

**Amendment 1**—On page 6, line 1, insert new Section 3:

No bank may charge an individual more than 12% interest annually.

Renumber subsequent section.

**Point of Order**

Senator Barron raised a point of order that the amendment was not germane to the bill. The President ruled the point well taken and the amendment out of order.

On motion by Senator Frank, by two-thirds vote SB 19-C was read the third time by title, passed and certified to the House. The vote on passage was:

Yeas—35

Mr. President	Gorman	Maxwell	Stuart
Anderson	Grizzle	McKnight	Thomas
Barron	Hair	Myers	Tobiassen
Chamberlin	Henderson	Neal	Trask
Childers, D.	Hill	Peterson	Vogt
Childers, W. D.	Holloway	Poole	Ware
Fechtel	Jenne	Scott	Williamson
Frank	Johnston	Skinner	Winn
Gordon	MacKay	Steinberg	

Nays—2

Carlucci Scarborough

Votes after roll call:

Yea—Dunn, McClain, Spicola

**SB 11-C**—A bill to be entitled An act relating to public defenders; amending s. 27.51(4), Florida Statutes; providing that the public defender of the tenth judicial circuit handle all appeals arising within the district comprising the Second District Court of Appeal; providing that the public defender for the seventh judicial circuit handle all appeals within the district comprising the Fifth District Court of Appeal; removing the requirement that funds for certain staff and other expenses incurred by certain public defenders be appropriated on an annual basis; providing an effective date.

—was read the second time by title.

The Committee on Judiciary-Civil offered the following amendments which were moved by Senator Hair and adopted:

**Amendment 1**—On page 1, line 29, strike "~~tenth twelfth~~" and insert: twelfth

**Amendment 2**—On page 2, line 11, strike "~~annually~~" and insert: annually

**Amendment 3**—Strike on page 1, all of lines 4 through and including line 13 and insert: the public defender for the seventh judicial circuit handle all appeals within the district comprising the Fifth District Court of Appeal;

On motion by Senator Hair, by two-thirds vote SB 11-C as amended was read the third time by title, passed, ordered engrossed and then certified to the House. The vote on passage was:

Yeas—37

Mr. President	Gorman	McKnight	Thomas
Anderson	Grizzle	Myers	Tobiassen
Barron	Hair	Neal	Trask
Carlucci	Henderson	Peterson	Vogt
Chamberlin	Hill	Poole	Ware
Childers, D.	Holloway	Scarborough	Williamson
Childers, W. D.	Jenne	Scott	Winn
Fechtel	Johnston	Skinner	
Frank	MacKay	Steinberg	
Gordon	Maxwell	Stuart	

Nays—None

Votes after roll call:

Yea—Dunn, McClain, Spicola

**SJR 20-C**—A joint resolution proposing an amendment to Section 3, Article V of the State Constitution, relating to the organization and jurisdiction of the Supreme Court.

—was read the second time.

The Committee on Judiciary-Civil offered the following amendment which was moved by Senator Hair and failed:

**Amendment 1**—On page 2, line 9, after the word "*Commission*" insert: , or its successor,

Senator Hair moved the following amendment which was adopted:

**Amendment 2**—On page 2, strike all of line 9 and insert: *review action of statewide agencies*

**Legislative Intent**

At the request of Senator Myers, by direction of the President the following statements were published in the Journal:

**Senator Myers:** To clarify the term "statewide agency" so that we have a clear expression of legislative intent in the record on this, I want to ask Senator Hair a question so that he can give me the answer and perhaps put that in the Senate Journal.

**Mr. President:** Does the Senator yield?

**Senator Hair:** I yield.

**Senator Myers:** Senator Hair, to clarify the matter, is it true that the term "statewide agency" will comport with the term "state agency" in chapter 120 insofar as review of orders of the Public Service Commission are concerned to the District Court of Appeal now that you are changing it, or to the Supreme Court with respect to electric, telephone and gas cases?

**Senator Hair:** That's correct.

**Senator Myers:** So that even though you have a difference of terminology between "statewide agency" in the constitutional language and the definition designated as "state agency" in chapter 120, insofar as review of Public Service Commission orders are concerned to respective courts they are one and the same?

**Senator Hair:** That's correct.

**Senator Myers:** I would respectfully request that this be shown in the Senate Journal as a direct statement of legislative intent, so we have a clear understanding, since there is a difference in terminology between "statewide agency" as used in this Constitutional amendment, and the definition "state agency" under Chapter 120.

The Committee on Judiciary-Civil offered the following amendment which was moved by Senator Hair and adopted:

Amendment 3—On page 2, lines 11 and 12, strike "and shall review agency action of the Florida Commission on Ethics"

Senator Hair moved the following amendment which was adopted:

Amendment 4—On page 2, line 16, strike "that affects a class of constitutional or state officers," and insert: , or that expressly affects a class of constitutional or state officers,

On motion by Senator Hair, by two-thirds vote SJR 20-C as amended was read the third time in full as follows:

A joint resolution proposing an amendment to Section 3, Article V of the State Constitution, relating to the organization and jurisdiction of the Supreme Court.

Be It Resolved by the Legislature of the State of Florida:

That the following amendment to Section 3 of Article V of the State Constitution is hereby agreed to and shall be submitted to the electors of this state for approval or rejection at a special election to be held in conjunction with the presidential preference primary election in March 1980; and which, if approved, shall take effect April 1, 1980.

ARTICLE V
JUDICIARY

SECTION 3. Supreme court.—

(a) ORGANIZATION.—The supreme court shall consist of seven justices. Of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of his original appointment or election. Five justices shall constitute a quorum. The concurrence of four justices shall be necessary to a decision. When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices.

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

(2) When provided by general law, shall hear appeals from final judgments and orders of trial courts imposing life imprisonment or final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review by certiorari any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that expressly and directly conflicts that is in direct conflict with a decision of another any district court of appeal or of the supreme court on the same question of law; and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout

the state, and certified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7)(4) May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review, and all writs necessary to the complete exercise of its jurisdiction.

(8)(5) May issue writs of mandamus and quo warranto to state officers and state agencies.

(9)(6) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(7) Shall have the power of direct review of administrative action prescribed by general law.

(c) CLERK AND MARSHAL.—The supreme court shall appoint a clerk and a marshal who shall hold office during the pleasure of the court and perform such duties as the court directs. Their compensation shall be fixed by general law. The marshal shall have the power to execute the process of the court throughout the state, and in any county may deputize the sheriff or a deputy sheriff for such purpose.

BE IT FURTHER RESOLVED that the following statement be placed on the ballot:

CONSTITUTIONAL AMENDMENT

ARTICLE V, SECTION 3

Proposing an amendment to the State Constitution to modify the jurisdiction of the Supreme Court.

On motion by Senator Hair, SJR 20-C as amended passed by the required constitutional three-fifths vote of the membership, was ordered engrossed and then certified to the House. The vote on passage was:

Yeas—34

Table with 4 columns: Name, Grizzle, McKnight, Thomas. Lists names of senators and their corresponding votes.

Nays—2

Table with 2 columns: Name, Gordon. Lists names of senators and their corresponding votes.

Votes after roll call:

Yea—Dunn, McClain, Myers, Spicola

SB 21-C—A bill to be entitled An act relating to a special election to be held on March 11, 1980, pursuant to Section 5 of Article XI of the State Constitution, for the approval or rejection by the electors of a joint resolution amending Section 3 of Article V of the State Constitution relating to the judiciary; providing for publication of notice and for procedures; providing an effective date.

—was read the second time by title. On motion by Senator Hair, by two-thirds vote SB 21-C was read the third time by title, passed by the required constitutional three-fourths vote of the membership and was certified to the House. The vote on passage was:

Yeas—34

Table with 4 columns: Name, Childers, W. D., Hair, Johnston. Lists names of senators and their corresponding votes.

Peterson	Skinner	Tobiassen	Williamson
Poole	Steinberg	Trask	Winn
Scarborough	Stuart	Vogt	
Scott	Thomas	Ware	

izing the Escambia County Civil Service Board to exempt from the provisions of chapter 79-453, Laws of Florida, employees employed by the Escambia County Public Health Trust; providing an effective date.

Proof of publication of the required notice was attached.

—was read the first time by title and referred to the Committee on Rules and Calendar.

Nays—1

Carlucci

On motions by Senator W.D. Childers, by two-thirds vote SB 29-C was withdrawn from the Committee on Rules and Calendar and by two-thirds vote placed on the special order calendar.

Votes after roll call:

Yea—Dunn, McClain, Myers, Spicola

On motion by Senator W.D. Childers, by two-thirds vote SB 29-C was read the second time by title and by two-thirds vote was read the third time by title, passed and certified to the House. The vote on passage was:

On motion by Senator Hair, consideration of SB 17-C was deferred.

**INTRODUCTION**

On motion by Senator Holloway, by the required constitutional two-thirds vote of the membership, SCR 27-C was admitted for introduction.

Yeas—39

By Senators Barron, Holloway, W. D. Childers, Skinner, Thomas, Henderson and Hill—

Mr. President	Gordon	Maxwell	Steinberg
Anderson	Gorman	McKnight	Stuart
Barron	Grizzle	Myers	Thomas
Carlucci	Hair	Neal	Tobiassen
Chamberlin	Henderson	Peterson	Trask
Childers, D.	Hill	Poole	Vogt
Childers, W. D.	Holloway	Scarborough	Ware
Dunn	Jenne	Scott	Williamson
Fechtcl	Johnston	Skinner	Winn
Frank	MacKay	Spicola	

SCR 27-C—A concurrent resolution commending the Masons of Florida.

Nays—None

—was read the first time in full. On motions by Senator Holloway, by two-thirds vote SCR 27-C was placed on the calendar and by two-thirds vote read the second time by title, adopted, and certified to the House. The vote on adoption was:

Vote after roll call:

Yeas—39

Mr. President	Gordon	McClain	Steinberg
Anderson	Gorman	McKnight	Stuart
Barron	Grizzle	Myers	Thomas
Carlucci	Hair	Neal	Tobiassen
Chamberlin	Henderson	Peterson	Trask
Childers, D.	Hill	Poole	Vogt
Childers, W. D.	Holloway	Scarborough	Ware
Dunn	Jenne	Scott	Williamson
Fechtcl	Johnston	Skinner	Winn
Frank	MacKay	Spicola	

Nays—None

Yea—McClain

On motion by Senator Barron, by the required constitutional two-thirds vote of the membership, SB 30-C was admitted for introduction.

On motion by Senator Vogt, by the required constitutional two-thirds vote of the membership, SB 28-C was admitted for introduction.

By Senator Barron—

SB 30-C—A reviser's bill to be entitled An act relating to the Florida Statutes; reenacting ss. 120.63(2)(a), 121.052(1)(b), (d), 215.47(1), 319.22(2), 656.17(3)-(5), and 659.18(3)-(5), Florida Statutes; restoring provisions inadvertently omitted from republication in the amendatory process.

—was read the first time by title and referred to the Committee on Rules and Calendar.

On motion by Senator Gordon, by two-thirds vote SJR 13-C was withdrawn from the Committee on Rules and Calendar.

On motions by Senator Gordon, the rules were waived and the Committee on Ways and Means was granted permission to consider the following bills today: the Governor's Tax Package (SJR 25-C, SB-24-C, SB 23-C) or take up House-passed Package, if it is available to the committee; SJR 7-C, SJR 13-C, SB 6-C, SJR 10-C, SJR 15-C, SB 16-C, SB 28-C, proposed SB 22-C by Senator Peterson relating to remodeling, renovation and maintenance of educational facilities.

**CO-INTRODUCERS**

Senators McClain and Spicola SJR 4-C and SB 5-C

**CORRECTION AND APPROVAL OF JOURNAL**

The Journal of November 27 was corrected and approved.

On motion by Senator Barron, the Senate adjourned at 10:28 a.m. to convene upon call of the President, no earlier than 10:00 a.m., Thursday, November 29.

By Senator Vogt—

SB 28-C—A bill to be entitled An act relating to the Department of Health and Rehabilitative Services; providing an appropriation for a fixed capital outlay project to the Office of Assistant Secretary for Operations - District Administration of the Department of Health and Rehabilitative Services; providing an effective date.

—was read the first time by title and referred to the Committee on Ways and Means.

On motion by Senator W.D. Childers, by the required constitutional two-thirds vote of the membership, SB 29-C was admitted for introduction.

By Senators W.D. Childers and Tobiassen—

SB 29-C—A bill to be entitled An act relating to Escambia County; amending s. 8.2, chapter 79-453, Laws of Florida; autho-

# The Florida State Constitution

Second Edition

Talbot D'Alemberte

THE OXFORD COMMENTARIES ON THE STATE CONSTITU-  
TIONS OF THE UNITED STATES

*G. Alan Tarr, Series Editor*

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ministrative hearing does not violate the separation-of-powers clause in Article I, [Section 3](#).<sup>14</sup>

These cases are consistent with the decision that declared unconstitutional a statute allowing an administrative hearing officer to make a determination of mental competency for purposes of treatment in a state hospital.<sup>15</sup>

Where a statute gives judges authority in mediation proceedings, this is not a judicial proceeding subject to normal appellate proceedings.<sup>16</sup> But judicial power exists for a judge to direct an investigation into an agency that has custody of dependent juveniles pursuant to court orders.<sup>17</sup>

## SECTION 2

### ADMINISTRATION; PRACTICE AND PROCEDURE.

(a) The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion.

Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

(b) The chief justice of the supreme court shall be chosen by a majority of the members of the court; shall be the chief administrative officer of the judicial system; and shall have the power to assign justices or judges, including consenting retired justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in that circuit.

(c) A chief judge for each district court of appeal shall be chosen by a majority of the judges thereof or, if there is no majority, by the chief justice. The chief judge shall be responsible for the administrative supervision of the court.

(d) A chief judge in each circuit shall be chosen from among the circuit judges as provided by supreme court rule. The chief judge shall be responsible for the administrative supervision of the circuit courts and county courts in his circuit.

## History

*Pre-1968.* The origin of rule-making authority for the Florida Supreme Court may be traced to a 1956 amendment to the 1885 Constitution; the provision relating to the authority of the legislature to repeal a rule was added in the 1972 revision.<sup>18</sup>

*Post-1968.* The significant revision to all of [Article V](#) took place in 1972 (S.J.R. 52-D, 1971); this section was further amended in 1998 by the Constitution Revision Commission (Revision No. 13, 1998). Although the Supreme Court has had authority to adopt rules of practice and procedure since 1956 (CS/HJR 810), there was obvious tension with legislative authority. This method of handling the tension was fashioned along lines suggested by a noted scholar and constitutional law litigator.<sup>19</sup> The 1998 amendments added authority to get advisory opinions on military law and removed gender-specific language from the section.

## **Commentary**

The power to make assignments originated with the 1956 amendment and became more significant with consolidation of the courts in the 1972 revision. The 1956 amendment also set up the method of selecting the chief justice, placing a constitutional process in place of the much-criticized lottery method used previously.

In addition to making changes in gender references, the 1998 amendment allowed District Courts of Appeal to submit a question of military law to the Federal Court of Military Appeals for an advisory opinion.

**Section 2** provides the basic rule-making authority of the Supreme Court and sets up the administrative machinery of the courts, with a chief justice (selected by the justices), a chief judge for each appellate court (chosen by the judges of that court or, if there is no majority, the chief justice), and a chief judge for each of the circuits (a circuit judge chosen in accordance with Supreme Court rule). The selection language may not appear important but, in earlier constitutions, the chief justice was selected by lot, leading to numerous problems.<sup>20</sup>

The authority to fashion rules relating to practice and procedure has been used by the Court for historic and far-reaching decisions, including two rules that have been adopted in all other states: the first rule to allow cameras and electronic devices in courts,<sup>21</sup> and the so-called IOLTA (Interest on Lawyer Trust Accounts) rules governing income from lawyers' trust accounts.<sup>22</sup> The IOLTA rule turned an ethical rule barring attorneys from profiting on interest from trust funds, which had allowed banks to avoid paying interest on trust accounts, into a rule in which the income from those accounts would be directed to the Florida Bar Foundation and used for public purposes.

Rule-making has been significant in less dramatic matters as well. The Court has established an intricate procedure for regular review and revision of rules of

procedure, and rule-making for procedural and administrative purposes takes up much of the Court docket.

The constitutional provision for the Supreme Court's administrative structure has not been the subject of much litigation. Essentially, the presiding officer is the chief justice, and the court system is run by a system of committees and conferences functioning under rules adopted by the Court. However, the rule-making power itself has been the subject of a great number of cases and is a difficult area conceptually because, in the making of rules, the Court is functioning in a legislative capacity and without the procedures that accompany most court activities.

The Court's power to make rules extends to "rules for the practice and procedure in all courts," including certain aspects specified in [Section 2](#). Thus, when the legislature repealed a rule of appellate procedure and attempted to write a new rule, the Court upheld the power to repeal (by a two-thirds vote) but ruled that the legislature is without authority to rewrite rules of practice and procedure.<sup>23</sup> The Court has held that any repeal must be an express repeal, and, even where legislation is adopted by the requisite supermajority, there is no implicit repeal.<sup>24</sup>

The term *practice and procedure* is nowhere clearly defined; thus, it is often a close call whether a matter falls within this language. Often when a legislative en-

actment intrudes, or arguably may intrude into the area of practice and procedure, the Court has adopted clarifying rules that parallel the legislation. This procedure has somewhat smoothed over the differences and prevented unnecessary confusion to litigants. Because the same provisions, then, are both statutes and rules, [Section 2](#)-based conflict has been avoided.<sup>25</sup> A consequence of this accommodation is that the definition of “practice and procedure” has not been fully sharpened.

Still, conflicts have produced some definition. When the Florida legislature attempted to radically change the court procedure relating to capital punishment, the Court held that it had drifted into unconstitutional territory. Though the Court’s opinion is diplomatically framed, it made clear that rule-making in practice and procedure belongs to the Court.<sup>26</sup> Questions surrounding capital punishment legislation were the context for a later case where the Court upheld a statute that imposed certification duties on the Court clerk.<sup>27</sup>

The authority to assign judges has resulted in some litigation. In a 1986 case, the Court held that permanent assignment of a county judge to circuit court duties would be improper,<sup>28</sup> but a later decision held that successive six-month assignments were not improper.<sup>29</sup> Still, assignments that violate the spirit of the earlier decision have been found invalid.<sup>30</sup> The Court

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## "THE FEDERAL RULES OF CIVIL PROCEDURE"

*Discussion by W. F. HIMES, Tampa, Florida  
Before Annual Convention, Hollywood, May 6*

The Supreme Court of the United States, on December 20, 1937, adopted 86 new rules designated therein as "Federal Rules of Civil Procedure," which will constitute, when these rules take effect, a code of pleading, practice and procedure in the District Courts of the United States. These rules will not take effect until three months after the adjournment of the present session of Congress, and in no event earlier than September 1, 1938. The rules will regulate the institution, conduct and disposition of what have heretofore constituted actions at law and suits in equity. They will govern actions instituted in or removed to the Federal Courts after their effective date, and will also apply in actions then pending except insofar as the Court in a particular case may order otherwise. The rules will not apply to proceedings in admiralty or in bankruptcy, nor will they apply in habeas corpus or in quo warranto except upon appeal. And certain specially named proceedings, largely of statutory authorization, are excepted therefrom.

The new rules provide that they shall not be construed to extend or limit the jurisdiction of the District Courts of the United States or the venue of actions therein.

Hereafter, there is to be but one form of action, to be known as a "civil action." The pleadings that have heretofore been incident to suits in equity and actions at law are abolished. The pleadings in the new form of action will consist chiefly of the complaint and answer, with motions allowable for certain restrictive purposes. Radical changes will take place in the method by which issues are reached and disposed of and cases are reviewed upon appeal. A lawyer well equipped for the present practice but unfamiliar with the new practice will be as inadequately prepared to conduct litigation under the new rules as a military genius of the middle ages to direct military operations in the present day.

Before attempting such a general discussion of the new rules as the time allotted to me makes permissible, it is quite appropriate that some consideration be given to the historical background which preceded the adoption of the rules. It has been said that no other example of such nationwide participation and cooperation on the part of both the Bar and the Judiciary is afforded by the history of this or any other country as preceded and resulted in the adoption of the new rules.

At the present time and throughout a large number of years, the conduct of suits in equity in the Federal Courts has been regulated by the rules adopted for that purpose by the Federal Supreme Court, while the practice, pleadings and modes of proceedings in actions at law have conformed to the form of practice, pleading and modes of proceeding existing in like causes of the State in which the District Courts were held. The occasion for this has been because of the fact that the Federal Supreme Court, from time to time, under the rule-making power with which such court was invested by Congress, adopted rules governing equity causes. The Federal Supreme Court never having attempted to adopt rules governing actions at law, Congress, by its Act of June 1, 1872, prescribed that the practice in such actions governing in the respective states should apply in such actions in the District Courts sitting in these states.

The existing diversity in practice and procedure in the Federal Courts in the various states resulted in a determined effort to abolish such diversity and for the substitution of a new uniform system of procedure which would be simple, inexpensive and expeditious. From 1912 until 1934 various acts were placed before Congress intended to accomplish the result referred to. During this twenty-year period, the acts pending before Congress were championed by the American Bar Association, the Bar Associations of various states, and by eminent jurists and members of the legal profession, among whom conspicuous examples were the late Thomas W. Shelton of Virginia, Judge Henry D. Clayton of Alabama, Frank B. Kellogg, Elihu Root, and William H. Taft. However, none of the proposed measures became a law, and Congress did not act until it passed the act of June 19, 1934, championed by the Honorable Homer S. Cummings, the present Attorney General of the United States, which invested the Federal Supreme Court with the authority pursuant to which that Court adopted the new rules, with only Mr. Justice Brandeis disapproving. The act of Congress last referred to contained two sections, by the first of which the Supreme Court was given power to prescribe general rules to govern the conduct of civil actions at law, and by the second of which the Court was invested with the larger power of uniting the general rules prescribed by that Court for cases in equity with those for actions at law so as to secure "one form of civil action and procedure for both," with the proviso that in such union the right of trial by jury guaranteed by the 7th Amendment to the Federal Constitution should be preserved inviolate.

The Supreme Court apparently deliberated for an approximate period of twelve months after the passage by Congress of the Act above referred to, as to whether the Court thereunder should undertake only to adopt a uniform system of rules to govern actions at law in the Federal Courts, or whether it should undertake the adoption of such general rules for cases in equity and actions at law as would secure one form of civil action and procedure for both. On June 3, 1935, the Supreme Court, by its order of that date, determined upon the latter course, and appointed to assist the Court in such undertaking an Advisory Committee to serve without compensation, consisting of fifteen members, of which William D. Mitchell, former Solicitor General of the United States, was named Chairman, and the membership of which Committee included a number of eminent members of the legal profession and instructors of law at outstanding universities of the country, and of which Committee the Honorable Scott M. Loftin, of Florida, was made a member.

Some ten drafts were made by this Committee from time to time, of the proposed rules, and three of such drafts were printed and given wide distribution in order that the Committee might have the benefit of suggestions and criticisms from members of the Bar, the Judges of the various courts, and instructors of law at the various universities. In the course of its work, the Committee was aided by an able reporter and research staff, and extensive study and consideration was given throughout a period of years to the merits and demerits of the existing equity practice, pleading and practice as it existed at common law, and of the various reforms inaugurated in judicial procedure in the several states of the Union and in the English practice. The new rules, as finally adopted by the Federal Supreme Court on December 20, 1937, therefore represent a symposium of pleading, practice and procedure concurred in and found from experience by eminent authority as best calculated to bring about an inexpensive and expeditious administration of the law in civil actions.

The members of the legal profession in Florida will be interested to know from what sources aid may be obtained in becoming familiar with the new rules.

The rules themselves constitute,—

House Document No. 460, obtainable from the Superintendent of Documents, U. S. Government Printing Office, Washington, D. C. (Price 15c);

Notes to the Rules of Civil Procedure, March, 1938, obtainable from Advis-

ory Committee on Rules for Civil Procedure, Supreme Court of the United States Building, Washington, D. C. (No charge).

The following works are now in process of publication :

The New Federal Rules of Civil Procedure, Annotated, by Byron F. Babbitt, of the St. Louis Bar, Reviser of Rose's Fed. Jurisdiction and Procedure, Hopkins Federal Equity Rules; published by Thomas Law Book Company, St. Louis. Price \$6.50.

Simpkin's Federal Practice, The Harrison Company of Atlanta, Ga. Price \$15.00.

The New Federal Rules of Civil Procedure, by Judge Palmer D. Edmunds, Callaghan & Co. Price \$10.00.

Moore's Federal Practice Under the New Federal Equity Rules, by James William Moore, Chief of the Research Staff of the Advisory Committee appointed by the Supreme Court, and Joseph M. Friedman, Assistant on the Research Staff; published by Matthew Bender & Company. Price \$25.00. The following is a brief topical analysis of the rules,—

*FEDERAL RULES OF CIVIL PROCEDURE (86)*

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The provisions of the new rules in many respects are in conflict with and will either repeal, modify or extend existing provisions of law. That this should take place was provided for by Congress in the Act delegating power to the Supreme Court to adopt the rules. That the delegation of such power by Congress to the Court could lawfully be done was settled in *Wayman et al v. Southard, et al*, 10 Wheaton 1, decided in 1825, where Chief Justice Marshall, speaking for the Court, affirmed the right of Congress to delegate to the courts the power of altering by rules the modes of proceedings in suits established by law. Therefore, the new rules having been expressly authorized by Congress and approved by the Supreme Court, there remains no debatable question as to the binding force and validity of the provisions found therein. While the provisions of the Conformity Act, 28 U. S. C. A., par. 724, have in a very large measure been superseded by the provisions of the new rules, yet not so in their entirety, as illustrated by the provisions continuing the remedies afforded under state laws for the seizure of person or property to secure the satisfaction of judgments recovered or ultimately to be entered. I shall therefore make the bold statement that regardless of the merit which is inherent in the new procedure, a greater rather than a lesser knowledge of the law will hereafter be required of qualified and successful practitioner.

Preliminary to such discussion as is now permissible of the salient features of the new procedure, it is of the utmost importance to bear constantly in mind the greatly

increased power and the tremendously enlarged discretion with which the judges of the district courts of the United States will be invested, which may be exercised at almost every step in the cause, and for which in many instances no yardstick is prescribed. In the hands of a learned, wise and impartial judge, this authority will doubtless expedite the due disposition of causes, but in the hands of an unequipped, arbitrary or biased judge it may prove the weapon of a tyrant.

#### ARRIVING AT THE ISSUES

The new rules will consign to the Hall of Relics weapons of offense and defense with which the members of the Bar have heretofore conducted mighty legalistic encounters. Bills in equity, supplemental bills, bills of revivor, declarations, pleas, demurrers, rejoinders, rebutters and sur-rebutters, exceptions, writs of scire facias, and writs of mandamus are to become matters of memory only.

There is to be but one form of action, to wit, a civil action. In ordinary action the only pleadings permissible will be the complaint and the answer thereto, except that if the answer asserts a counter-claim a reply thereto will be permissible. Motions will be allowed to raise the following defenses:

- (1) Lack of jurisdiction over subject matter.
- (2) Lack of jurisdiction of person.
- (3) Improper venue.
- (4) Insufficiency of process.
- (5) Insufficiency of service of process.
- (6) Failure to state a claim upon which relief can be granted.

Motions will be permitted to require more definite allegations and to supply bills of particulars. Motions to strike will be permitted to reach redundant, immaterial, impertinent or scandalous matter found in any pleading. Two innovations of great significance are introduced by the new rules, to wit, the filing of cross claims and third party complaints. A cross-claim will be a pleading by which one party is permitted to allege and enforce against a co-party a claim arising out of the transaction or occurrence that is the subject matter either of the original action or of any counter-claim therein.

A third party complaint will be a pleading which may be filed by a defendant against one not a party to the cause alleging that such third party is or may be liable to the party filing the cross complaint or to the plaintiff in the action for all or some part of plaintiff's claim against the party filing the third party complaint. Where cross claims or third party complaints are filed, answers and counter-claims thereto will be in order.

The new rules require all counter-claims to be asserted in the answer of the defendant which arise out of the transaction or occurrence which is the subject-matter of the plaintiff's claim and which do not require for their adjudication the presence of third parties over whom the court cannot acquire jurisdiction. It is permissible for a party defendant to assert as counter-claims in his answer any and all existing claims against the plaintiff whether or not they arise out of the transaction or occurrence which is the subject matter of the opposing party's claim.

Since in one action the plaintiff may combine all claims which the plaintiff has against the defendant, whether of legal or equitable character or both, and the corresponding right obtains with respect to the answer of the defendant, it becomes readily apparent that an action under the new rules has a potential scope not heretofore existing and wholly unknown to any practice which has obtained in Florida.

Another innovation which the new rules will inaugurate is a pre-trial conference which the court may call of the attorneys for the parties for a simplification of the issues, and for expediting the trial. A more detailed discussion of this feature has been reserved for another speaker.

When the summons is served, a copy of the complaint must be served with it. Copies must be served of all pleadings and motions thereafter filed in the cause. The return date of the summons will be twenty days after service thereof. The court may appoint a third party to make service of the summons or any subpoena to witnesses.

Another innovation introduced by the new rules is the privilege given a party to make an offer at any time ten days or more before trial to allow judgment to be taken against him for money or other property or to the effect specified in the offer with costs then accrued. If the offer be accepted, judgment accordingly will be entered. If the offer be refused and the party to whom the offer was made fails to obtain a judgment more favorable than that offered, the party to whom the offer was made is denied the right to recover costs accruing after the offer made.

### *PARTIES*

Because under the new rules, a civil action may embrace all claims between the parties, whether of legal or equitable nature or both, and third party complaints are permitted to be filed, it becomes obvious for these reasons alone that the necessary and proper parties to such an action may become more numerous than heretofore allowable.

The new rules have other features, however, which must be reckoned with in determining who may be necessary or permissible parties to an action. Such features, among others, are,—

1st: All persons are permitted to join in one action if they assert any right to relief jointly or severally in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action.

2nd: All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences, and if any question of law or fact common to all of them will arise in the action.

3rd: A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.

4th: Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not a ground for objection to the joinder that the claims do not have a common origin or are not identical but are adverse.

5th: The right of third persons to intervene is so expanded as to make the same permissible when the applicant's claim or defense and the main action have only a question of law or fact in common.

6th: Where a plaintiff has a claim heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined and enforced in a single action; e.g., a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him without having first obtained a judgment on the money demand.

7th: Provision is made which permits a partnership or other incorporated association to sue and be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or Laws of the United States.

### *DEPOSITIONS AND DISCOVERY*

No aspect of the new rules is of greater significance or importance than that which deals with the taking of depositions and the obtaining of discovery. The rights and liabilities of parties to an action are greatly extended by the new rules. The district courts are invested with powers not heretofore possessed by them. Provision is made

for the taking of depositions before action, during the pendency of an action, and while the action is on appeal. A party may be compelled to submit to a physical or mental examination by a physician. The party so examined is entitled upon request to be furnished a copy of the report of the examining physician. Thereafter, the examined party, if requested, is required to furnish any similar examination which he may previously or thereafter have caused to be made touching the same physical or mental condition.

A party may be compelled to produce and permit the inspection and copying or photographing by or on behalf of another party of any designated documents, papers, books, accounts, letters, photographs, objects or tangible things which constitute or contain evidence material to any matter involved in the action which are in his possession, custody or control.

A party to an action is given the right to serve notice upon any other party to admit the genuineness of any documents described in and exhibited with the request, and the opposing party is held to admit the genuineness thereof unless such party within a prescribed time files a sworn statement denying the genuineness of the document or setting forth detailed reasons why he cannot truthfully admit or deny such matters.

The practice obtaining in Florida is in effect adopted and somewhat extended whereby any party may serve upon an adverse party written interrogatories, or if a public or private corporation or partnership or association, then to any officer thereof.

The rules make provision for the pre-trial examination of a party to the cause respecting claims, defenses and persons having knowledge of relevant facts, which I shall not discuss but will be the subject of a more detailed discussion by another speaker.

#### *TRIAL*

The new rules assure trial by jury only in those cases where that right is guaranteed by the Seventh Amendment to the Federal Constitution. Even in such cases the right to trial by jury is waived if not demanded by a party to the cause not later than ten days after the filing of the last pleading directed to the formation of the issues. In all other cases, it is permissible for the Court in its discretion to order a trial by jury of all or any of the issues, either that the verdict of the jury may be advisory only or have the same effect as if trial by jury had been a matter of right.

Separate trials are permissible of any claim, cross-claim, counter-claim, third party claim, or of any separate issue, or of any number of claims, cross-claims, counter-claims, third party claims or issues.

Not more than two alternate jurors may be empaneled in any case to replace jurors who may become unable or disqualified to perform their duties before the jury retires to consider its verdict. Parties are permitted to stipulate that a jury may consist of any number less than twelve, or that a verdict of a stated majority of the jurors shall be taken as the verdict of the jury.

Special verdicts are authorized. Also the submission to the jury of written interrogatories to be answered by them in connection with the general verdict. In case of inconsistency between special findings and the general verdict, the practice to be followed by the court is prescribed.

The charge of the court is to follow the arguments of counsel, but where a written request for charges is submitted, the court is required to advise counsel of its rulings thereon prior to the arguments.

Exceptions to the rulings of the court are no longer required.

In cases tried before the court without a jury, the court is required to make separate findings of fact and conclusions of law thereon, and such findings are subject to amend-

ment or to be supplemented by additional findings after judgment, and the final judgment may be amended accordingly. The appointment of general and special masters is authorized and proceedings before them are regulated, but it is prescribed that a reference to a master shall be the exception and not the rule.

### JUDGMENTS

One of the innovations of the greatest importance which will be brought about by the new rules is that in a single case there may be a number of different judgments entered at different times. Where more than one claim is involved in an action, the court at any stage, upon a determination of the issues material to a particular claim and of any counter-claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. Such judgment terminates the action with respect to the claim disposed of and permits the action to proceed as to the remaining claims. In case of the entry of a separate judgment, the court may or may not stay its enforcement until the entry of a subsequent judgment or judgments in the action. Like proceedings are prescribed as to counter-claims, cross claims and third party claims.

The new rules confer jurisdiction upon the court to entertain applications at any time after the institution of an action for a summary judgment in favor of or against all or any part thereof, and to render such summary judgment. Such summary judgments may be applied for by motion, and upon a hearing thereof the court may consider the pleadings, depositions and admissions on file, together with affidavits, and upon a finding by the court that there is no genuine issue, the moving party is entitled to summary judgment. Although the court upon application for summary judgment determines that judgment should not be rendered upon the whole case or for all the relief asked and that a trial is necessary, the Court may nevertheless make an adjudication of the facts established and as to which there is no substantial controversy, and may limit further proceedings to a determination of the issues as to which the Court finds there is a substantial controversy.

Motions for new trials are permitted and ten days are allowed for the filing thereof, except that a longer time is allowed for such motions when based upon the ground of newly discovered evidence.

Rule 61 is of such significance and importance that it is quoted in full:—

#### *"HARMLESS ERROR"*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. 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."

### APPEALS

In appeals from the district courts to the circuit courts of appeals, among the changes made are—

(1) The necessity for the allowance of the appeal and the issuance and service of a citation is dispensed with.

(2) 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 may join in an appeal.

(3) The testimony may be incorporated in the record in the form of question and answer.

(4) It is required that there be omitted from the transcript all matter not essential to the decision of the questions presented by the appeal, including formal parts of all exhibits. Documents are required to be abridged by omitting all irrelevant and formal portions thereof.

(5) In place of the ordinary transcript of record, provision is made for the use, with the approval of the district court, of an abbreviated record, which shall consist of a copy of the judgment appealed from and of the notice of appeal, and a statement of the points relied on by the appellant, and a signed statement by counsel showing how the questions arose and were decided in the district court, and setting forth only so many of the facts alleged and proven as are essential to a decision of the involved questions by the appellate court.

In concluding what of necessity has been an unsatisfactory and inadequate discussion of the new rules in view of the time allowed for that purpose, let me lay emphasis upon the importance of becoming familiar with the rules, let me stress the fact that the rules are the result of a non-political, non-partisan and unselfish effort on the part of both the Bench and the Bar to inaugurate a simplified, expeditious and inexpensive procedure for the disposition of causes in the Federal Courts, and let me express the hope of us all that in actual application the rules will accomplish the intent and purpose for which they were adopted.

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## JOHN DICKINSON OF ST. PETERSBURG NEW SECRETARY-TREASURER

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At a meeting of the Executive Council held in Tallahassee on May 30 consideration was given to the selection of a secretary-treasurer of the Association. After much discussion of various possible selections, the President appointed John Dickinson of St. Petersburg, as provided by Article 14 of the Constitution, which appointment was unanimously approved by the Executive Council.

All members of the Executive Council were present except Richard H. Hunt, who was detained in Miami.

In line with two resolutions passed at the Hollywood convention, the president was authorized to appoint a committee of five to study the question of public relations, formulate a program and report the same back to the Council with all convenient speed.

In considering the report of the Conference of Delegates made to the Hollywood convention the Council voted to adopt Recommendation 3 and the president instructed to appoint a committee of five for the purpose of studying the advisability of sponsoring legal institutes and clinics.

Recommendation 5 in reference to the Lien Law was referred to the Committee of Judicial Administration and Legal Reform and the president instructed to contact the Title Association and Real Estate Board requesting that they sponsor what is regarded as necessary amendments to the present Lien Law. The president was also instructed to appoint a committee of five to cooperate with the Junior Bar Law Book Committee studying the question of an early revision of the Florida Statutes sought to be published in convenient form.

A resolution was adopted authorizing the president to appoint a committee of five to study the Common Law rules, particularly in reference to the advisability of working out a plan whereby they can be made to conform with the new Federal rules. Another committee to study married women's rights was authorized with the understanding that no legislation would be recommended for the 1939 Legislature.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed via the Florida Courts E-Filing Portal on June 4, 2020, and an electronic copy has been furnished to the following counsel of record:

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