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Amendments to the Colorado Rules of Civil Procedure

Dicta Editorial Board

Amendments to the Colorado Rules of Civil Procedure

AMENDMENTS TO THE COLORADO RULES OF CIVIL PROCEDURE

Adopted May 17, 1951

by

The Supreme Court of The State of Colorado

Effective August 18, 1951

PREFATORY REPORTS OF THE RULES COMMITTEE

To The Chief Justice and Justices of the Supreme Court of The State of Colorado:

On February 2, 1948, the Court requested the Rules Committee to consider the revisions made to the Federal Rules of Civil Procedure and to recommend to the Court such changes in the Colorado Rules of Civil Procedure as the Committee deemed desirable. The Committee has made a careful analysis of the Colorado Rules and the revisions of the Federal Rules.

Since the adoption of the Colorado Rules on January 6, 1941, the Court has found it necessary to amend the following rules: 4(f), 4(g), 4(h), 79(c), 98(c), 111(c), 115(h), 115(i), 117, 201, and 204.

The Advisory Committee on Rules of Civil Procedure, Supreme Court of the United States, on June 14, 1946, recommended 66 amendments to the Federal Rules and 3 amendments to the Appendix of Forms. These amendments were adopted by the Supreme Court of the United States on January 3, 1947, and are now effective.

A study of the revisions of the Federal Rules discloses that all are not applicable or desirable in state procedure. Your Committee recommends that 37 amendments be made to the Colorado Rules in order to conform to the amendments to the Federal Rules and that 2 amendments to the Appendix of Forms be made for the same purpose. In addition the Committee recommends 9 other amendments to the Colorado Rules.

The recommended amendments, together with explanatory notes, are submitted herewith. In considering the desirability of amendments the Committee has been greatly aided by the excellent notes to the Federal Rules of Civil Procedure contained in the report of the Advisory Committee on Rules of Civil Procedure, Supreme Court of the United States. In the preparation of the

explanatory notes appearing herein, your Committee has used copiously the notes to the Federal Rules. In some instances those notes have been copied verbatim and in other instances their substance has been stated. The only exception is where questions peculiar to state practice are involved.

The Committee has considered all suggestions made to it. No attempt has been made to submit the proposed amendments to the members of the Bar in advance of this presentation to the Court.

Respectfully submitted,

JEAN S. BREITENSTEIN, *Chairman,*
JOSEPH G. HODGES,
V. H. JOHNSON,
THOMAS KEELY,
PERCY S. MORRIS,

Rules Committee of the Supreme Court of the State of Colorado.

Denver, Colorado, Sept. 1, 1948.

To The Chief Justice and Justices of The Supreme Court of the State of Colorado:

Since the submission of its report, dated September 1, 1948, recommending certain amendments to the Colorado Rules of Civil Procedure, the Rules Committee has considered several suggestions as to other changes in the Rules. As a result of its study the Committee respectfully presents, for such action as the Court deems proper, certain amendments to Rule 4 covering the general subject of Process and an amendment to Rule 120 (b) covering the procedure for securing an order authorizing the sale of real estate by a Public Trustee.

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Respectfully submitted,

Rules Committee of the Supreme Court of the State of Colorado.

Denver, Colorado, January 4, 1950.

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AMENDMENTS TO THE COLORADO RULES OF CIVIL PROCEDURE

Adopted May 17, 1951

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The Supreme Court of The State of Colorado

Effective August 18, 1951

WITH NOTES PREPARED BY THE RULES COMMITTEE

(New matter shown in SMALL CAPITALS; matter omitted is bracketed in *italics*.)

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RULE 4. PROCESS.

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(d) BY WHOM SERVED. Process may be served:

* * * * * * * * *

(2) In another state or [*United States*] territory OF THE UNITED STATES, by the sheriff of the county where the service is made, or by his deputy, or by a United States marshal, or his deputy. (From Code Sec. 45.)

(3) [*In a foreign country, by a United States consul, or by some person over the age of 18 years appointed by such consul. (From Code Sec. 45.)*] AT ANY OTHER PLACE BY A SHERIFF, DEPUTY SHERIFF, CONSTABLE, DEPUTY CONSTABLE, BAILIFF, DEPUTY BAILIFF OR OTHER OFFICER HAVING LIKE POWERS AND DUTIES OF THE POLITICAL SUBDIVISION IN WHICH THE SERVICE IS MADE OR AN OFFICER AUTHORIZED BY THE LAWS OF THIS STATE TO TAKE ACKNOWLEDGMENTS IN SUCH POLITICAL SUBDIVISION TO DEEDS CONVEYING REAL ESTATE SITUATE IN THIS STATE OR AN ATTORNEY, COUNSELOR AT LAW, SOLICITOR, ADVOCATE OR BARRISTER DULY QUALIFIED TO PRACTICE LAW IN SUCH POLITICAL SUBDIVISION.

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(h) PUBLICATION. The party desiring service of process by publication shall file a motion verified by the oath of such party or of someone in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that [*the same is*] HIS ADDRESS

AND LAST KNOWN ADDRESS ARE unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within [*10*] 15 days after the order the clerk shall mail a copy of the process to each person whose address OR LAST KNOWN ADDRESS has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county. (From Supreme Court Rule 14A, Code Secs. 45, 46, 47 and 50.)

(i) MANNER OF PROOF.

(1) If served IN A STATE OR TERRITORY OF THE UNITED STATES by a sheriff or United States marshal, or a deputy, by his certificate with a statement as to date, place and manner of service. (From Code Sec. 49.)

COMMITTEE NOTE

The amendment to subdivision (d) (2) is to make it clear that the state mentioned therein is a state of the United States and not of a foreign country.

Subdivision (d) (3) as originally adopted followed the language of Section 45 of the Code and provided that service in a foreign country could be made only by a United States consul or by some person over the age of 18 years appointed by such consul. The Department of State now forbids United States consuls to serve process or to designate any one to do so, thereby rendering it impossible under the original provisions of the rule to secure personal service of process in a foreign country. The amendment to subdivision (d) (3) authorizes several classes of officials at the place of service and persons authorized to practice law at that place to make the service. It follows closely the provisions in the Civil Code of New York.

The amendments with respect to address and last known address in the second and fifth sentences in subdivision (h) make no substantial change but clarify and make more easily understood and followed the language of said sentences. With reference to the amendment of said fifth sentence increasing to 15 days the time within which the clerk shall mail copies of the process, it has been found that the 10 days after the order of publication allowed by the rule as originally adopted are sometimes insufficient for the supplying to the clerk of the copies of the process, where the copies to be mailed by him are printed copies supplied by the publisher after the first publication of the process has been made, particularly where the attorney handling the case lives in a county other than that wherein the case is pending.

The amendment of subdivision (i) (1) is necessitated by the provisions added by the amendment to subdivision (d) (3) which authorize a sheriff or deputy sheriff in a foreign country to make the service; this amendment makes it clear that, no matter by whom the service outside of a state or territory of the United States may

be made, the proof of the service is to be made by his affidavit under the provisions of Rule 4 (i) (2). and not by his unsworn certificate under Rule 4 (i) (1).

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RULE 6. TIME.

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(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*] REQUEST therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion MADE AFTER THE EXPIRATION OF THE SPECIFIED PERIOD 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*] EXTEND THE TIME FOR TAKING ANY ACTION UNDER RULES 25, 50 (b), 52 (b), 59 (e), and 60 (b), EXCEPT TO THE EXTENT AND UNDER THE CONDITIONS STATED IN THEM, NOR SHALL IT EXTEND THE PERIOD in which a writ of error may be sued out. (Supplants Code Sec. 417.)

COMMITTEE NOTE

The amendment of Rule 6 (b) is based on the view that there should be a definite point where it can be said a judgment is final. The next succeeding subdivision (c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by subdivision (c), some other limitation must be substituted or judgments may never be said to be final. Under the Colorado rule, the court may extend the time for the filing of a motion for new trial under Rule 59, but as amended may not extend the time for substitution of parties under Rule 25, for a motion for judgment notwithstanding a verdict under Rule 50 (b), for motion to amend the findings of the court or to make additional findings under Rule 52 (b), to amend a judgment under Rules 52 (b) or new 59 (e), or to relieve a party from a judgment under Rule 60 (b), except as stated in those particular rules. Other changes in Rule 6 (b) are merely clarifying and conforming.

The former Committee Note is deleted.

(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 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.

COMMITTEE NOTE

The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these Rules.

For terms of court, see Rule 77 (a).

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RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

(a) RESPONSIVE PLEADINGS; WHEN PRESENTED. A defendant shall file his answer within 20 days after the service of the summons on him, or if a copy of the complaint be not served with the summons, or if the summons be served without the state, or by publication, within 30 days after the service thereof on him. In actions under subdivisions (1) to (4), inclusive, of Rule 106, the court, ex parte, before process issues, may shorten the time for answer, and thereafter may shorten any of the periods fixed in these rules. A party served with a pleading stating a cross-claim against him shall file an answer thereto within 20 days after the service on him. The plaintiff shall file his reply to a counter-claim in the answer within 20 days after the service of the answer. If a reply is ordered by the court it shall be filed within 20 days after the entry of the order, unless the order otherwise directs. The filing of [*any*] A motion [*provided for in*] PERMITTED UNDER this rule alters [*the time fixed by these rules for filing any required responsive pleadings*] THESE PERIODS OF TIME, as follows, unless a different time is fixed by the 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*] SHALL be filed within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement, or for a bill of particulars, or for a statement in separate counts or defenses, the responsive pleading [*may*] SHALL be filed within 10 days after the service of the more definite statement or bill of particulars or amended [*complaint*] PLEADING. [*In either case, the time for filing the responsive pleading shall not be less than remains of the time which would have been allowed under these rules if the motion had not been made.*] (Supplants Code Secs. 36 and 66.)

COMMITTEE NOTE

The changes in wording provide a clearer statement of substance.

(b) DEFENSES; 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, 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*] INSUFFICIENCY OF PROCESS, (4) INSUFFICIENCY OF SERVICE OF PROCESS, (5) FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, (6) FAILURE TO JOIN AN INDISPENSABLE PARTY. 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 with any other motion permitted under Rule 12 OR UNDER RULE 98. If a pleading sets forth a claim for relief to which the adverse party is not required to [*serve*] FILE a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. IF, ON A MOTION ASSERTING THE DEFENSE NUMBERED (5) TO DISMISS FOR FAILURE OF THE PLEADING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, MATTERS OUTSIDE THE PLEADING ARE PRESENTED TO AND NOT EXCLUDED BY THE COURT, THE MOTION SHALL BE TREATED AS ONE FOR SUMMARY JUDGMENT AND DISPOSED OF AS PROVIDED IN RULE 56, AND ALL PARTIES SHALL BE GIVEN REASONABLE OPPORTUNITY TO PRESENT ALL MATERIAL MADE PERTINENT TO SUCH A MOTION BY RULE 56. (Supplants part of Supreme Court Rule 4 and Code Secs. 56, 60 and 189.)

COMMITTEE NOTE

The reference to "(3), improper venue" as a defense appearing in original Rule 12 (b) has been eliminated. Motions relating to venue are covered by Rule 98, and unless filed as provided in Rule 98 (e) may be waived. Failure to join an indispensable party has been added as a defense which may be raised by motion.

The addition at the end of subdivision (b) makes it clear that on motion under Rule 12 (b) (5) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12 (b) (5) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment.

The Federal Court decisions are about evenly divided on whether the Statute of Limitations and Statute of Frauds must be raised by Answer or may be raised by Motion to Dismiss under 12(b)(5) when the bar of the Statute appears on the face of the Complaint.

The final disposition of these questions should await the decision of the Colorado Supreme Court; and accordingly, the Committee withdraws its comment as to the necessity of raising the Statute

of Limitations and Statute of Frauds by Answer as it appeared in the original note to original Rule 12 (b).

The words "or with any other Motion permitted under Rule 12", were added to overcome decisions holding that the filing of a motion under 12 (c), 12 (e) or 12 (f) with a Motion based on defenses (1) to (4) in this subdivision, waives those defenses; and to insure that the filing of all Motions permitted under Rule 12 at the same time would not waive those defenses.

The words "or under Rule 98" were also added to insure that the filing of a motion to change venue with a motion based on defenses (1) to (4) of this subdivision, despite the court's ruling on the motion to change venue, will not waive any of these defenses.

The filing of a Motion containing any of the defenses (1) to (4), although overruled, preserves the points for consideration on review. This directly changes old Supreme Court Rule 4.

The former Committee Note is deleted.

(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. IF, ON A MOTION FOR JUDGMENT ON THE PLEADINGS, MATTERS OUTSIDE THE PLEADINGS ARE PRESENTED TO AND NOT EXCLUDED BY THE COURT, THE MOTION SHALL BE TREATED AS ONE FOR SUMMARY JUDGMENT AND DISPOSED OF AS PROVIDED IN RULE 56, AND ALL PARTIES SHALL BE GIVEN REASONABLE OPPORTUNITY TO PRESENT ALL MATERIAL MADE PERTINENT TO SUCH A MOTION BY RULE 56.

COMMITTEE NOTE

The sentence appended to subdivision (c) permits the court to consider extraneous matter on a motion for judgment on the pleadings and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

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(g) CONSOLIDATION OF [*MOTIONS*] DEFENSES. A party who makes a motion under this rule may join with it [*or include therein*] 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*] AS PROVIDED IN SUBDIVISION (h) OF THIS RULE.

COMMITTEE NOTE

Other than as provided by subdivision (h), a party who resorts to a motion to raise any of the defenses and objections specified in

Rule 12, must file with it all motions that are then available to him. Under the original rule, defenses and objections were divided into two groups which could be the subjects of successive motions.

For motions to change venue and the time for filing same see Rule 98.

(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, 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, 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. (Supplants Code Sec. 61.)

COMMITTEE NOTE

The addition of the phrase relating to indispensable parties is one of necessity.

For motions to change venue and the time for filing same see Rule 98.

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 that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, EXCEPT THAT SUCH A CLAIM NEED NOT BE SO STATED IF AT THE TIME THE ACTION WAS COMMENCED THE CLAIM WAS THE SUBJECT OF ANOTHER PENDING ACTION. (Supplants Code Sec. 63.)

COMMITTEE NOTE

The removal of the phrasing "not the subject of a pending action" and the addition of the new clause at the end of the subdivision insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the action but before filing his pleading in the action.

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(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim 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 OR RELATING TO ANY PROPERTY THAT IS THE SUBJECT MATTER OF THE ORIGINAL ACTION. 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. (Supplants Code Sec. 63. Part is new.)

COMMITTEE NOTE

The amendment is to care for a situation such as where a second mortgagee is made defendant in a foreclosure proceeding and wishes to file a cross-complaint against the mortgagor in order to secure a personal judgment for the indebtedness and foreclose his lien. A claim of this sort by the second mortgagee may not necessarily arise out of the transaction or occurrence that is the subject matter of the original action under the terms of original Rule 13 (g).

See Rule 110 (d) providing that where a cross-claim or counterclaim is filed the claimant has the same rights and remedies as if a plaintiff.

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(i) SEPARATE TRIALS; SEPARATE [*JUDGMENTS*] JUDGMENT. [*Judgment on a counterclaim or cross-claim may be rendered even if the claims of the opposing party have been dismissed or otherwise disposed of.*] IF THE COURT ORDERS SEPARATE TRIALS AS PROVIDED IN RULE 42 (b), JUDGMENT ON A COUNTERCLAIM OR CROSS-CLAIM MAY BE RENDERED IN ACCORDANCE WITH THE TERMS OF RULE 54 (b) WHEN THE COURT HAS JURISDICTION SO TO DO, EVEN IF THE CLAIMS OF THE OPPOSING PARTY HAVE BEEN DISMISSED OR OTHERWISE DISPOSED OF.

COMMITTEE NOTE

The change is to bring about conformity and to clarify the interdependence of Rules 13 (i) and 54 (b).

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RULE 14. THIRD-PARTY PRACTICE.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the filing of his answer a defendant may move ex parte or, after the filing 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 TO THE THIRD PARTY

PLAINTIFF'S CLAIM as provided in Rule 12 and his counterclaims AGAINST THE THIRD-PARTY PLAINTIFF and cross-claims against [*the plaintiff, the third-party plaintiff, or any other party*] OTHER THIRD-PARTY DEFENDANTS as provided in Rule 13. The third-party defendant may assert AGAINST THE PLAINTIFF 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 THIRD-PARTY DEFENDANT MAY ALSO ASSERT ANY CLAIM AGAINST THE PLAINTIFF ARISING OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER OF THE PLAINTIFF'S CLAIM AGAINST THE THIRD-PARTY PLAINTIFF. The plaintiff may [*amend his pleadings to*] assert ANY CLAIM 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*] ARISING OUT OF THE TRANSACTION OR OCCURRENCE THAT IS THE SUBJECT MATTER OF THE PLAINTIFF'S CLAIM AGAINST THE THIRD-PARTY PLAINTIFF, AND THE THIRD-PARTY DEFENDANT THEREUPON SHALL ASSERT HIS DEFENSES AS PROVIDED IN RULE 12 AND HIS COUNTERCLAIMS AND CROSS-CLAIMS AS PROVIDED IN RULE 13. 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. (Supplants Code Sec. 139.)

COMMITTEE NOTE

The provisions in Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14 (a) the plaintiff need not amend his complaint to state a claim against such third-party if he does not wish to do so. Thus, impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility.

For these reasons the words "or to the plaintiff" in the first sentence of subdivision (a) are removed by the amendment, and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentences thereof are also eliminated.

The third sentence of Rule 14 (a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the impleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. Accordingly, the next to the last sentence of subdivision (a) has also been revised to

make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counterclaims and cross-claims provided in Rules 12 and 13.

The sentence reading "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" has been stricken from Rule 14 (a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

The elimination of the words "the third-party plaintiff, or any other party" from the second sentence of Rule 14 (a), together with the insertion of the new phrases therein, are not changes of substance but are merely for the purpose of clarification.

See Rule 110 (d) providing that where a third-party complaint is filed the claimant has the same rights and remedies as if a plaintiff.

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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 WHICH IS in the custody OR SUBJECT TO THE CONTROL OR DISPOSITION of the court or of an officer thereof. (Supplants Code Secs. 17 and 22.)

COMMITTEE NOTE

The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or agency —but the control and disposition of the property is lodged in the court wherein the action is pending.

(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. WHEN A PARTY TO AN ACTION RELIES FOR GROUND OF CLAIM OR DEFENSE UPON ANY STATUTE OR EXECUTIVE ORDER ADMINISTERED BY A FEDERAL OR STATE GOVERNMENTAL OFFICER OR AGENCY OR UPON ANY REGULATION, ORDER, REQUIREMENT, OR AGREEMENT ISSUED OR MADE PURSUANT TO THE STATUTE OR EXECUTIVE ORDER, THE OFFICER OR AGENCY UPON TIMELY

APPLICATION MAY BE PERMITTED TO INTERVENE IN THE ACTION. 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. (Supplants Code Secs. 17 and 22.)

COMMITTEE NOTE

The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule.

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RULE 25. SUBSTITUTION OF PARTIES.

(a) DEATH.

(1) If a party dies and the claim is not extinguished or barred, 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 process; provided that, if the service upon persons not parties be made by publication, the publication of the notice shall be sufficient without the publication of the motion, but in such case the notice shall state the names of the persons who are sought to be substituted upon whom the service by publication is made. (Supplants part of Code Sec. 15 and all of 290).

COMMITTEE NOTE

The federal rule requires substitution of parties within two years after death; the amendment makes state and federal practice conform.

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RULE 26. DEPOSITIONS PENDING ACTION.

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(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*] 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 INAD-

MISSIBLE AT THE TRIAL IF THE TESTIMONY SOUGHT APPEARS REASONABLY CALCULATED TO LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE.

COMMITTEE NOTE

The amendments make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved.

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RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, OR BEFORE A PERSON APPOINTED BY THE COURT IN WHICH THE ACTION IS PENDING. A PERSON SO APPOINTED HAS POWER TO ADMINISTER OATHS AND TAKE TESTIMONY. (Supplants Code Secs. 377 and 384.)

COMMITTEE NOTE

The added language provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties.

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RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.

* * * * * * * * *

(b) ORDERS FOR 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. THE PROVISIONS HEREOF SHALL BE LIBERALLY CONSTRUED BY THE COURT IN ORDER TO PREVENT UNNECESSARY INCONVENIENCE AND EXPENSE TO PARTIES AND TO WITNESSES, AND TO AVOID UNNECESSARY DELAY.

COMMITTEE NOTE

The last sentence has been added to make clear the intent of the rule.

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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, association, or body politic, by any officer or [*managing*] agent [*thereof competent to testify in its behalf*] WHO SHALL FURNISH SUCH INFORMATION AS IS AVAILABLE TO THE PARTY. 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*] SERVICE 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 filed with the clerk and served upon the party submitting the same within 10 days after service thereof, and*] WITHIN 10 DAYS AFTER SERVICE OF INTERROGATORIES A PARTY MAY SERVE WRITTEN OBJECTIONS THERETO. SUCH OBJECTIONS SHALL BE DETERMINED BY THE COURT AT THE EARLIEST PRACTICABLE TIME. Answers TO INTERROGATORIES TO WHICH OBJECTION IS MADE 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.]

INTERROGATORIES MAY RELATE TO ANY MATTERS WHICH CAN BE INQUIRED INTO UNDER RULE 26 (b), AND THE ANSWERS MAY BE USED TO THE SAME EXTENT AS PROVIDED IN RULE 26 (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 30 (b) ARE APPLICABLE FOR THE PROTECTION OF THE PARTY FROM WHOM ANSWERS TO INTERROGATORIES ARE SOUGHT UNDER THIS RULE.

COMMITTEE NOTE

In the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories might be withheld until objections, sometimes to but a few interrrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and particularity to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26 (b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30 (b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve in-

terrogatories on a party after having taken his deposition, or vice versa. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30 (b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

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, AND SUBJECT TO THE PROVISIONS OF RULE 30 (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 [*material to any matter involved in the action*] RELATING TO ANY OF THE MATTERS WITHIN THE SCOPE OF THE EXAMINATION PERMITTED BY RULE 26 (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, sampling, or photographing the property or any designated [*relevant*] object or operation thereon WITHIN THE SCOPE OF THE EXAMINATION PERMITTED BY RULE 26 (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. (Supplants Code Secs. 279, 280, 390 and 399.)

COMMITTEE NOTE

The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26 (b), and thus remove any ambiguity created by the former differences in language. At the same time the addition of the words following the term "parties" makes certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30 (b).

See 1935 C. S. A., c. 110, Sec. 211, for inspection of mines.

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RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. [*At any time after the pleadings are closed,*] 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. Copies of the documents shall be [*delivered*] 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 [*further*] 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 [*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 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. SUCH OBJECTIONS SHALL BE DETERMINED BY THE COURT 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.

COMMITTEE NOTE

The change in the first sentence of Rule 36 (a) brings Rule 36 in line with Rules 26 (a) and 33. There is no reason why these rules should not be treated alike. Other provisions of Rule 36 (a) give the party whose admissions are requested adequate protection.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule is in conformance with the use of the word "serve" elsewhere in the rule. The substitution of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (2) specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. The changes in clause (1) are merely of a clarifying and conforming nature.

The first of the added last two sentences prevents an objection to a part of a request from holding up the answer, if any, to the remainder. See similar change in Rule 33. The last sentence strengthens the rule by making the denial accurately reflect the party's position. It is taken, with necessary changes, from Rule 8 (b).

* * * * * * * * *

RULE 41. DISMISSAL OF ACTIONS.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) BY PLAINTIFF; BY STIPULATION. Subject to the provisions of Rule 23 (c), OF RULE 66, and of any statute, an action may be dismissed by the plaintiff upon payment of costs without order of court (i) by filing a notice of dismissal at any time before filing or service [*of the*] BY THE ADVERSE PARTY OF AN answer OR OF A MOTION FOR SUMMARY JUDGMENT, WHICHEVER FIRST OCCURS, or (ii) by filing a stipulation of dismissal signed by all 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 an action based on or including the same claim. (Supplants Supreme Court Rule 5 and Code Sec. 184.)

COMMITTEE NOTE

The insertion of the reference to Rule 66 correlates Rule 41 (a) (1) with the express provisions concerning dismissal set forth in amended Rule 66 on receivers.

The change in Rule 41 (a) (1) (i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

The word "generally" has been stricken from Rule 41 (a) (1) (ii) in order to avoid confusion and to conform with the elimination of the necessity for special appearance by original Rule 12 (b).

* * * * * * * * *

(b) INVOLUNTARY DISMISSAL.

(1) BY DEFENDANT. 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 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. IN AN ACTION TRIED BY THE COURT WITHOUT A JURY THE COURT AS TRIER OF THE FACTS MAY THEN DETERMINE THEM AND RENDER JUDGMENT AGAINST THE PLAINTIFF OR MAY DECLINE TO RENDER ANY JUDGMENT UNTIL THE CLOSE OF ALL THE EVIDENCE. IF THE COURT RENDERS JUDGMENT ON THE MERITS

AGAINST THE PLAINTIFF, THE COURT SHALL MAKE FINDINGS AS PROVIDED IN RULE 52 (*a*). 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*] FAILURE TO FILE A COMPLAINT UNDER RULE 3, operates as an adjudication upon the merits.

COMMITTEE NOTE

The motion for dismissal after the presentation of plaintiff's evidence provided for in this Rule supplants a motion for nonsuit under Code Sec. 184-Fifth.

In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41 (b) on the ground that plaintiff's evidence is insufficient for recovery, the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. The added sentence in Rule 41 (b) incorporates the view that on such a motion in a non-jury case the judge may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required.

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RULE 45. SUBPOENA.

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(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, 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, [*or*] documents, OR TANGIBLE THINGS.

COMMITTEE NOTE

The added words "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions. The insertion of the words "or modify" in clause (1) affords desirable flexibility.

* * * * * * * * *

(d) SUBPOENA FOR TAKING DEPOSITIONS: PLACE OF EXAMINATION.

(1) Presentation of a notice to take a deposition (either before or after service thereof) as provided in Rules 30 (a) and

31 (a), or of a stipulation for the taking thereof, constitutes a sufficient authorization for the issuance by the judge or clerk of any court of record in the county where the deposition is to be taken, or by the notary public or other officer authorized to take the deposition, of subpoenas for the persons named or described therein. A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be issued without an order of the court. 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 26 (b), BUT IN THAT EVENT THE SUBPOENA WILL BE SUBJECT TO THE PROVISIONS OF SUBDIVISION (b) OF RULE 30 AND SUBDIVISION (b) OF THIS RULE 45. (Supplants Code Sec. 382.)

(2) A resident of [*the*] THIS state [*in which the deposition is to be taken*] may be required BY SUBPOENA to attend an examination UPON DEPOSITION only in the county wherein he resides or is employed or transacts his business in person, OR AT SUCH OTHER CONVENIENT PLACE AS IS FIXED BY AN ORDER OF COURT. A nonresident of [*the*] THIS state [*in which the deposition is to be taken*] may be required BY SUBPOENA to attend only in the county wherein he is served with [*a*] THE subpoena, or within 40 miles from the place of service, or at such other CONVENIENT place as is fixed by an order of court.

COMMITTEE NOTE

The added last sentence of amended subdivision (d) (1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26 (b), thus promoting uniformity.

The changes in subdivision (d) (2) give the court the same power in the case of residents of the state as is conferred in the case of non-residents, and permit the court to fix a place for attendance which may be more convenient and accessible for the parties than that specified in the rule. The remaining changes are clarifying.

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RULE 47. JURORS.

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(h) PEREMPTORY CHALLENGES. Each side shall be entitled to four peremptory challenges, and if there be more than one party to a side they must join in such challenges. ADDITIONAL PEREMPTORY CHALLENGES IN SUCH NUMBER AS THE COURT MAY SEE FIT MAY BE ALLOWED TO PARTIES APPEARING IN THE ACTION EITHER UNDER RULE 14 OR RULE 24 IF THE TRIAL COURT IN ITS DISCRETION DETERMINES THAT THE ENDS OF JUSTICE SO REQUIRE. (From Code Sec. 199.)

COMMITTEE NOTE

The added sentence is intended to cover cases in which there are third-party defendants or intervenors and to permit the court in its discretion to allow peremptory challenges to such parties.

* * * * * * * * *

RULE 52. FINDINGS BY THE COURT.

(a) EFFECT. In all actions tried upon the facts without a jury OR WITH AN ADVISORY JURY, the court shall find the facts and state 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. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. IF AN OPINION OR MEMORANDUM OF DECISION IS FILED, IT WILL BE SUFFICIENT IF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW APPEAR THEREIN. FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNNECESSARY ON DECISIONS OF MOTIONS UNDER RULES 12 OR 56 OR ANY OTHER MOTION EXCEPT AS PROVIDED IN RULE 41 (b). (Supplants part of Code Sec. 191.)

COMMITTEE NOTE

Retain present Committee Note and add the following:

The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent.

The two sentences added at the end of Rule 52 (a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. They thus not only aid the appellate court on review, but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts.

The last sentence of Rule 52 (a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41 (b).

(b) AMENDMENT.

There is no change in Rule 52 (b) but the Committee Note has been changed to read as follows:

COMMITTEE NOTE

Compare Rule 59 [*e*] (f).
(This change in the note is necessary to bring about conformity with the amendments to Rule 59.)

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RULE 54. JUDGMENTS; COSTS.

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(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.*]

JUDGMENT UPON MULTIPLE CLAIMS. WHEN MORE THAN ONE CLAIM FOR RELIEF IS PRESENTED IN AN ACTION, WHETHER AS A CLAIM, COUNTERCLAIM, CROSS-CLAIM, OR THIRD-PARTY CLAIM, THE COURT MAY DIRECT THE ENTRY OF A FINAL JUDGMENT UPON ONE OR MORE BUT LESS THAN ALL OF THE CLAIMS ONLY UPON AN EXPRESS DETERMINATION THAT THERE IS NO JUST REASON FOR DELAY AND UPON AN EXPRESS DIRECTION FOR THE ENTRY OF JUDGMENT. IN THE ABSENCE OF SUCH DETERMINATION AND DIRECTION, ANY ORDER OR OTHER FORM OF DECISION, HOWEVER DESIGNATED, WHICH ADJUDICATES LESS THAN ALL THE CLAIMS SHALL NOT TERMINATE THE ACTION AS TO ANY OF THE CLAIMS, AND THE ORDER OR OTHER FORM OF DECISION IS SUBJECT TO REVISION AT ANY TIME BEFORE THE ENTRY OF JUDGMENT ADJUDICATING ALL THE CLAIMS. (Supplants Code Secs. 185, 242, 243 and 246.)

COMMITTEE NOTE

For judgment on the pleadings see Rule 12 (c).

Rule 54 (b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the rule against piece-meal disposal of litigation. In practice situations have arisen where a court has entered what

the parties have thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. Hence, the question of the finality of a partial judgment has arisen. The amendment retains the rule against piece-meal disposal of litigation but gives discretionary power to afford a remedy in the infrequent harsh case.

For the possibility of staying execution where not all claims are disposed of under Rule 54 (b), see amended Rule 62 (c).

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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,*] EXPIRATION OF 20 DAYS FROM THE COMMENCEMENT OF THE ACTION OR AFTER FILING 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.

COMMITTEE NOTE

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. 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. 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 files a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

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(c) MOTION AND PROCEEDINGS THEREON. The motion shall not be heard until at least 10 days after the service thereof. 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. 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.

COMMITTEE NOTE

The amendment makes it 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.

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RULE 58. ENTRY AND SATISFACTION OF JUDGMENT.

(a) ENTRY. 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 [*the entry of a judgment*] that a party recover only money or costs or that [*there be no recovery*] 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 judgment docket as provided by Rule 79 (d) constitutes the entry of the judgment; and the judgment is not effective before such entry. (Supplants Code Sec. 244.)

COMMITTEE NOTE

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

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 such cases as where judgment is against the plaintiff in an action to quiet title or in an action for a declaratory judgment or in an action for the construction of a will or in any other action where a judgment for money is not sought.

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RULE 59. NEW TRIALS.

Change title to read:

Rule 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.

COMMITTEE NOTE

The words "Amendment of Judgments" are incorporated into the title in order to include in such title the subject matter of the new subdivision (e) of this rule.

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Insert the following as subdivision (e) and make the present subdivision (e) subdivision (f).

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A MOTION TO ALTER OR AMEND THE JUDGMENT SHALL BE FILED NOT LATER THAN 10 DAYS AFTER ENTRY OF THE JUDGMENT.

COMMITTEE NOTE

This subdivision has been added to make clear that the trial court possesses the power to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50 (b).

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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. DURING THE PENDENCY OF AN APPEAL OR A WRIT OF ERROR, SUCH MISTAKES MAY BE SO CORRECTED BEFORE THE CASE IS DOCKETED IN THE APPELLATE COURT, AND THEREAFTER WHILE THE APPEAL OR WRIT OF ERROR IS PENDING MAY BE SO CORRECTED WITH LEAVE OF THE APPELLATE COURT.

COMMITTEE NOTE

This permits correction after docketing with leave of the appellate court and eliminates any contention that upon the taking of an appeal the trial court loses its power to act.

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT; FRAUD, ETC. On motion, [*the court*] AND upon such terms as are just, THE COURT may relieve a party or his legal representative from a FINAL judgment, order, or proceeding [*taken against him through his*] FOR THE FOLLOWING REASONS: (1) mistake, inadvertence, surprise, or excusable neglect; (2) FRAUD (WHETHER HERETOFORE DENOMINATED INTRINSIC OR EXTRINSIC), MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY; (3) THE JUDGMENT IS VOID; (4) THE JUDGMENT HAS BEEN SATISFIED, RELEASED, OR DISCHARGED, OR A PRIOR JUDGMENT UPON WHICH IT IS BASED HAS BEEN REVERSED OR OTHERWISE VACATED, OR IT IS NO LONGER EQUITABLE THAT THE JUDGMENT SHOULD HAVE PROSPECTIVE APPLICATION; OR (5) ANY OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT. The motion

shall be made within a reasonable time, [*but in no case exceeding*] AND FOR REASONS (1) AND (2) NOT MORE THAN 6 months after [*such*] THE judgment, order, or proceeding was ENTERED OR taken. A motion under this subdivision (b) 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 INDEPENDENT action to relieve a party from a judgment, order, or proceeding, or (2) TO SET ASIDE A JUDGMENT FOR FRAUD UPON THE COURT, OR (3) when, for any cause, the summons in an action has not been personally served within or without the state on the defendant, to allow, on such terms as may be just, such defendant, or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action. WRITS OF CORAM NOBIS, CORAM VOBIS, AUDITA QUERELA, AND BILLS OF REVIEW AND BILLS IN THE NATURE OF A BILL OF REVIEW, ARE ABOLISHED, AND THE PROCEDURE FOR OBTAINING ANY RELIEF FROM A JUDGMENT SHALL BE BY MOTION AS PRESCRIBED IN THESE RULES OR BY AN INDEPENDENT ACTION. (Supplants part of Code Sec. 50 (par. e) and Sec. 81.)

COMMITTEE NOTE

When promulgated, the rules contained a number of provisions, including those found in Rule 60 (b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60 (b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, the question has been raised that the use of bills of review, coram nobis, or audita querela, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments.

The reconstruction of Rule 60 (b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the amended rules. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment. Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict. Rule 50 (b), and including the provisions of Rule 60 (b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6 (b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations.

The transposition of the words "the court" and the addition of the word "and" at the beginning of the first sentence are merely verbal changes. The addition of the qualifying word "final" emphasizes the character of the judgments, orders or proceedings from which Rule 60 (b) affords relief; and hence interlocutory judgments are not brought within the restrictions of the rule, but rather they are left subject to the complete power of the court rendering them to afford such relief from them as justice requires.

The qualifying pronoun "his" has been eliminated on the basis that it is too restrictive, and that the subdivision should include the mistake or neglect of others which may be just as material and call just as much for supervisory jurisdiction as where the judgment is taken against the party through *his* mistake, inadvertence, etc.

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure.

All of the present Rule 60 (b), beginning with "A motion under this subdivision does not affect the finality of a judgment or suspend its operation" is left as it now is, except that the word "independent" is inserted before the word "action" in order to make it clear that the "action" which may be taken after the expiration of the six months is not a motion filed in the same case, but is an "independent" suit, and except that there is added the provision that the rule does not limit the power of the court to set aside a judgment for fraud upon the court and except that the last sentence is added, to abolish the old common law writs of *coram nobis, coram vobis*, etc. The Colorado Supreme Court has said that it is doubtful if the writ of *coram nobis* still exists in this jurisdiction. Hailey vs. The People, 113 Colo. 290, 291.

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RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

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(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 OR TO ALTER OR AMEND A JUDGMENT 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), or pending the filing and determination of an application to the supreme court for a supersedeas. (Supplants Supreme Court Rule 9.)

COMMITTEE NOTE

The addition of the words "or to alter or amend a judgment" is necessary because of the incorporation of subdivision (e) in Rule 59.

(c) STAY OF JUDGMENT UPON MULTIPLE CLAIMS. WHEN A COURT HAS ORDERED A FINAL JUDGMENT ON SOME BUT NOT ALL OF THE CLAIMS PRESENTED IN THE ACTION UNDER THE CONDITIONS STATED IN RULE 54 (b), THE COURT MAY STAY ENFORCEMENT OF THAT JUDGMENT 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.

COMMITTEE NOTE

The revision of Rule 54 (b) makes it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims. Colorado Rule 62 (c) is the same as Federal Rule 62 (h).

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RULE 65. INJUNCTIONS.

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(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. No such security shall be required of the state or of any county or municipal corporation of this state or of any officer or agency thereof acting in official capacity. If at any time it shall appear to the court that security given under this rule has become impaired or is insufficient, the court may vacate the restraining order or preliminary injunction unless within such time as the court may fix the security be made sufficient. A SURETY UPON A BOND OR UNDERTAKING UNDER THIS RULE 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 OR UNDERTAKING 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 PERSONS GIVING THE SECURITY IF THEIR ADDRESSES ARE KNOWN. (Supplants Code Secs. 163, 164, 165 and 173.)

COMMITTEE NOTE

In all cases the litigant should have a right to proceed on the bond in the same proceeding in the manner provided in Rule 113 (f) for a similar situation. The addition to Rule 65 (c) insures this result and is in the interest of efficiency. There is no reason why Rules 65 (c) and 113 (f) should operate differently.

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RULE 66. RECEIVERS.

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(c) DISMISSAL OF RECEIVERSHIP ACTION. AN ACTION IN WHICH A RECEIVER HAS BEEN APPOINTED SHALL NOT BE DISMISSED EXCEPT BY ORDER OF THE COURT.

COMMITTEE NOTE

This prevents a dismissal by any party, after a receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court.

* * * * * * * * *

RULE 68. OFFER OF JUDGMENT.

At any time more than 10 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 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. [*If the*] AN offer [*is*] not [*so*] accepted [*it*] shall be deemed withdrawn and evidence thereof is not admissible EXCEPT IN A PROCEEDING TO DETERMINE COSTS. [*If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the trial court from the time of the offer but shall pay costs from that time.*] IF THE JUDGMENT FINALLY OBTAINED BY THE OFFEREE IS NOT MORE FAVORABLE THAN THE OFFER, THE OFFEREE MUST PAY THE COSTS INCURRED AFTER THE MAKING OF THE OFFER. THE FACT THAT AN OFFER IS MADE BUT NOT ACCEPTED DOES NOT PRECLUDE A SUBSEQUENT OFFER. (Supplants Code Sec. 313.)

COMMITTEE NOTE

The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

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RULE 81. APPLICABILITY IN GENERAL.

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(b) DIVORCE AND SEPARATE MAINTENANCE. These rules [*do*] SHALL not govern procedure and practice in actions in divorce or separate maintenance in so far as they [*are*] MAY BE inconsistent or in conflict with the procedure and practice provided by the [*present*] applicable statutes.

COMMITTEE NOTE

The change is to remove any doubt that the statutes referred to are those in effect at the time of the action and not those in effect at the time of the adoption of the Rules.

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RULE 84. FORMS.

The forms contained in the Appendix of Forms are SUFFICIENT UNDER THE RULES AND ARE intended to indicate, [*subject to the provisions of these rules,*] the simplicity and brevity of statement which the rules contemplate.

COMMITTEE NOTE

The amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent.

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RULE 98. PLACE OF TRIAL.

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(e) [*POWER TO CHANGE VENUE.*] MOTION TO CHANGE VENUE; WHEN PRESENTED; WAIVER; EFFECT OF FILING. [*The court shall have the power to change the venue in any of the subdivisions (a) to (c) inclusive under any of the conditions specified in subdivision (f) to (k) of this rule.*]

(1) A MOTION TO CHANGE VENUE UNDER THE PROVISIONS OF SUBDIVISIONS (a) TO (d), INCLUSIVE, AND (1) OF SUBDIVISION (f) OF THIS RULE, MUST BE FILED WITHIN THE TIME PERMITTED FOR THE FILING OF MOTIONS UNDER THE DEFENSES NUMBERED (1) TO (4) OF SUBDIVISION (b) OF RULE 12, AND IF ANY SUCH MOTION, OR ANY OTHER MOTION PERMITTED BY RULE 12, IS FILED WITHIN SAID TIME, SIMULTANEOUSLY THEREWITH. UNLESS SO FILED, THE RIGHT TO FILE IT IS WAIVED. A MOTION UNDER (2) OF SUBDIVISION (f), OR UNDER SUBDIVISION (g) OF THIS RULE, MUST BE FILED PRIOR TO THE TIME A CASE IS SET FOR TRIAL, OR THE RIGHT TO FILE IT IS WAIVED, UNLESS THE COURT, IN ITS DISCRETION, UPON MOTION FILED OR OF ITS OWN MOTION, FINDS THAT A CHANGE OF VENUE SHOULD BE ORDERED.

(2) IF A MOTION TO CHANGE VENUE IS FILED WITHIN THE TIME PERMITTED BY SUBDIVISION (a) OF RULE 12 FOR THE FILING OF A MOTION UNDER THE DEFENSES NUMBERED (1) TO (4) OF SUBDIVISION (b) OF RULE 12, THE FILING OF SUCH MOTION BY A PARTY UNDER THE PROVISIONS OF (1) OF THIS SUBDIVISION (e) ALTERS HIS TIME TO FILE HIS RESPONSIVE PLEADING AS FOLLOWS: IF THE MOTION IS OVERRULED THE RESPONSIVE PLEADING SHALL BE FILED WITHIN TEN DAYS THEREAFTER UNLESS A DIFFERENT TIME IS FIXED BY THE COURT, AND IF IT IS ALLOWED THE RESPONSIVE PLEADING SHALL BE FILED WITHIN TEN DAYS AFTER THE ACTION HAS BEEN DOCKETED IN THE COURT TO WHICH THE ACTION IS REMOVED UNLESS THAT COURT FIXES A DIFFERENT TIME.

(3) EXCEPT AS OTHERWISE PROVIDED IN AN ORDER ALLOWING A MOTION TO CHANGE VENUE, EARLIER EX-PARTE AND OTHER ORDERS AFFECTING AN ACTION, OR THE PARTIES THERETO, SHALL REMAIN IN EFFECT, SUBJECT TO CHANGE OR MODIFICATION BY ORDER OF THE COURT TO WHICH THE ACTION IS REMOVED.

COMMITTEE NOTE

The amendment to Rule 12 (b) eliminates "improper venue" as a ground for motion because "improper venue" is not a defense. The manner of presenting the question of "improper venue" is now covered by Rule 98 (e).

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RULE 111. WRIT OF ERROR.

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(f) SPECIFICATION OF POINTS. No assignments of error, assignments of cross error or formal joinder in error shall be required. Plaintiff in error shall file a "Specification of Points" upon which he relies for reversal OR MODIFICATION of the judgment and a defendant in error [*may*] SHALL file a "Cross-Specification of Points" upon which he relies [*for*] IF HE SEEKS a reversal or modification of the judgment OR THE CORRECTION OF ADVERSE FINDINGS, ORDERS OR RULINGS OF THE TRIAL COURT. Each such specification shall set out separately and particularly each point relied upon and shall be filed at or before the time of the filing of the brief of the party filing the specification and it may be a separate paper or may be included in the brief of such party, in which case it shall be separate from the remainder thereof. Counsel will be confined to the points so specified but the court may in its discretion notice any error appearing of record. No writ of error shall be dismissed and no specification of points shall be disregarded on account of any technical defect not affecting the substantial rights of the parties. A dismissal by plaintiff in error of the writ of error shall not affect the right of a defendant in error to seek reversal or modification of the judgment where cross-specification, or notice of intention to file the same,

has theretofore been filed. (Supplants parts of Supreme Court Rules 23, 27A, 29, 34, and all of 32, also Code Sec. 421.)

COMMITTEE NOTE

A plaintiff in error may desire a mere modification of a judgment and not a reversal thereof. The amendment makes it clear that a defendant in error "shall" file cross-specifications if he desires to object to any action of the trial court. This clarifies the rule by bringing it in line with such decisions as Markle v. Dearmin, 117 Colo. 45; City Real Estates, Inc. v. Sullivan, 116 Colo. 169, 171; Cahill v. Readon, 85 Colo. 9; Kahnt v. Caldwell, 85 Colo. 496, 497; Lumber Co. v. School District, 83 Colo. 272; Bennett v. Morrison, 78 Colo. 474, 467; and National Bank v. Follett, 46 Colo. 452, 456.

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RULE 120. ORDERS AUTHORIZING SALES UNDER POWERS.

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(b) SALES OF REAL ESTATE. Provided, however, that when the property to be sold is real estate and the power of sale is contained in a deed of trust to a Public Trustee, the motion need state the names of only those persons who [*have any record interest in such real estate*] WERE THE GRANTOR, OR GRANTORS, IN SUCH DEED OF TRUST AND THOSE PERSONS WHO APPEAR TO HAVE ACQUIRED A RECORD INTEREST IN SUCH REAL ESTATE, SUBSEQUENT TO THE RECORDING OF SUCH DEED OF TRUST, WHETHER BY DEED, MORTGAGE, JUDGMENT OR ANY OTHER INSTRUMENT OF RECORD, and the address of each such person as such address is given in the recorded instrument of writing and copies of the notice need be mailed only to each person so named in the motion whose address is so stated. If such recorded instrument of writing does not give such address no copy of the notice need be mailed to the particular person whose address is not so given; provided, however, that when only the county and state is given as the address of such person, then the copy of the notice shall be mailed to the county seat of such county.

COMMITTEE NOTE

The amendment of subdivision (b) makes the language of the rule follow more closely the language of Sec. 64, Ch. 40, 1935 C.S.A., which governs the mailing by the Public Trustee of copies of the notice of the foreclosure sale, and makes it clear that the persons to whom the clerk is, under the rule, to mail copies of the notice of the hearing on the motion for order authorizing the sale and the addresses to which they are to be mailed are identical with the persons to whom the Public Trustee is, under said Sec. 64, to mail copies of the notice of sale and the addresses to which they are to be mailed.

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RULE 121. EFFECTIVE DATE OF AMENDMENTS.

THE AMENDMENTS ADOPTED AND PROMULGATED BY THE SUPREME COURT OF THE STATE OF COLORADO ON MAY 17, 1951, SHALL TAKE EFFECT THREE MONTHS AFTER SUCH DATE. 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 AMENDMENTS TAKE EFFECT WOULD NOT BE FEASIBLE OR WOULD WORK INJUSTICE, IN WHICH EVENT THE FORMER PROCEDURE APPLIES.

COMMITTEE NOTE

Laws of 1939, Chap. 80, p. 264, provides that general rules prescribed by the Supreme Court "shall take effect three months after their promulgation." The last sentence of Rule 121 is taken from Federal Rule 86.

* * * * * * * * *

FURTHER AMENDMENT TO THE RULES WAS MADE BY THE COURT AS FOLLOWS: DELETE THE PREFIX "C" WHEREVER IT APPEARS IN THE RULES.

* * * * * * * * *

AMENDMENTS IN FORMS.

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FORM 18. MOTION TO BRING IN THIRD-PARTY DEFENDANT.

(Form for Motion remains unchanged.)

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EXHIBIT A.

(Form for summons as part of Exhibit A remains unchanged.)

IN THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER AND STATE OF COLORADO.

CIVIL ACTION NO..... DIV.....

A. B.,	Plaintiff,	
	vs.	
C. D.,	Defendant and Third-Party Plaintiff,	THIRD-PARTY COMPLAINT
	vs.	
E. F.,	Third-Party Defendant.	

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit C."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. [*or upon which A. B. is entitled to recover from E. F. and not from C. D.*] The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed:.....
Attorney for C. D., Third-Party Plaintiff.

Address:.....

Address of Third-Party Plaintiff:.....

COMMITTEE NOTE

The change in Form 18 is made necessary by the amendment of Rule 14.

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FORM 21. REQUEST FOR ADMISSION UNDER RULE 36.

Plaintiff A. B. requests defendant C. D. WITHIN DAYS AFTER SERVICE OF THIS REQUEST to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That each of the following documents, exhibited with this request, is genuine.

(Here list the documents and describe each document.)

2. That each of the following statements is true.
(Here list the statements.)

Signed:.....
Attorney for Plaintiff

Address:.....

COMMITTEE NOTE

Form 21 has been amended to include a provision for the designation of a time limit within which to comply with the request. Under Rule 36 as amended such a period must be fixed in the request, extending any length of time desired "not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice."