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The New Federal Rules of Civil Procedure [Part 2]

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THE NEW FEDERAL RULES OF CIVIL PROCEDURE

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Depositions and Discovery

The rules contain an excellent set of regulations as to the taking of depositions.[71] The right to take depositions is freely permitted, but at the same time this is subject to reasonable restrictions for the protection of the rights of witnesses. By leave of court after jurisdiction has been obtained, or without such leave after service of the answer, the testimony of any person, whether a party or not, may be taken 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. Unless otherwise ordered by the court the examination may cover any relevant matter, not privileged, relating to the claim or defense of the examining party or any other party, and may include the nature, condition and location of any books, documents or other tangible things, and "the identity and location of persons having knowledge of relevant facts".

The deposition of an adverse party (or an officer, director or managing agent thereof) may be used at the trial for any purpose, rather than merely for impeachment. The deposition of a witness who is not a party may be used for purpose of impeachment and may be used for any purpose if, for certain reasons, he is unable to attend the trial.

Introduction in evidence of a deposition or any part thereof except for impeachment makes the deponent the witness of the party introducing the deposition, except as to adverse party witnesses. Merely taking a deposition, however, does not have that effect. "At the trial or hearing any party may rebut any evidence contained in a deposition, whether introduced by him or by any other party."[72]

Depositions upon oral examination may be taken upon reason-

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[71]Rule 26. Compare Washington rule VII; REM. SUPP. 308-7; 193 Wash. 44-a. See Notes to Rules of Civil Procedure, p. 27 *et seq.*; Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447, 450 (July, 1936); Mitchell, *Some Problems Confronting the Advisory Committee*, 23 A. B. A. J. 969 (Dec., 1937).

[72]This statement in the rules apparently is not limited to adverse party witnesses. (Rule 26(f).) Rule 27 authorizes perpetuation of testimony (even pending an appeal, in the event of further proceedings in the district court).

able written notice and without court order. (Rule 30 (a).) However, upon motion by any party or the deponent and upon notice and for good cause shown, the court may make an order that the deposition shall not be taken, or specifying where it may be taken, or requiring written interrogatories, or limiting the scope of the examination, or safeguarding the secrecy of facts disclosed, or that the parties shall simultaneously file specified documents or information in sealed envelopes. "The court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment or oppression." (Rule 30 (b).) In lieu of participating in the oral examination a party may transmit written interrogatories which shall be propounded by the officer taking the deposition.[73] 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 so as unreasonably to annoy, embarrass or oppress him, the court in which the action is pending or in the district where the deposition is being taken may terminate the examination or limit the scope and manner of taking the deposition. The court in its discretion may impose costs on either party or the witness. (Rule 30 (d).)

In the alternative, depositions may be taken upon written interrogatories subject to the power of the court to enter orders as hereinabove stated. (Rule 31.)

Objections as to errors and irregularities in notices for taking depositions and as to disqualification of the officer are waived unless properly made. Objections to the competency of a witness or to the competency or materiality of testimony need not be made before trial unless the ground of the objection is one which might have been obviated if previously presented. Errors and irregularities in the manner of taking the deposition, in the form of the questions or answers, or other errors which might be obviated, are waived unless seasonably objected to at the taking of the deposition. Objections to the form of written interrogatories are waived unless promptly served in writing. Errors and irregularities in the manner of completion and return of the deposition are waived unless motion to suppress is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. (Rule 32.)

Written interrogatories to be answered by the adverse party may be served, as under our state procedure.[74]

Upon motion showing good cause therefor, the court may order

[73]Rule 30(c). This is an excellent provision for reduction of expense to less affluent litigants.

[74]Rule 33. Compare REM. REV. STAT. § 1226 and equity rule 58.

any party to produce and permit inspection and copying or photographing of any designated relevant documentary evidence or tangible thing, not privileged, in his possession or control. This is a logical and appropriate extension of our state statute which contains a similar provision as to documentary evidence only.[75] The court may likewise order any party to permit entry upon designated land or other property in his possession, to inspect, survey or photograph the same or any designated relevant object or operation thereon. Such order shall specify the time, place and manner of such inspection, and may prescribe such terms and conditions as are just.[76]

When the physical or mental condition of a party is in controversy the court may on motion order him to submit to examination by a physician designated in the order and subject to conditions therein specified. If requested by the person examined, the party causing the examination to be made must deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions. Thereafter the party causing the examination to be made is entitled, upon request, to receive from the party examined a like report of any examination, previously or thereafter made, of the same physical or mental condition. By such request the person examined waives the privilege.[77] This rule likewise, it will be noted, goes further than our state practice, in accord with the general policy of these rules of facilitating a full disclosure of all relevant facts to all parties before trial.

At any time after the pleadings are closed a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant document described in and exhibited with the request (also serving a copy thereof), or of the truth of any relevant matters of fact set forth therein. Said matters shall be deemed admitted unless within a certain period, not less than ten days, a sworn statement is served either denying the same specifically or stating in detail the reasons why he cannot truthfully either admit or deny them. Such admissions cannot be used against a person except in the pending action.[78] In such event erroneous denial without cause of a matter having substantial importance may on motion be penalized by the court by imposing liability for the reasonable expenses incurred in making

[75]REM. REV. STAT. § 1262.
[76]Rule 34. See form 24.
[77]Rule 35. Compare REM. REV. STAT. § 1230-1.
[78]Rule 36. See form 25. Compare REM. REV. STAT. § 1263 containing a similar provision as to admissions of the genuineness of documentary evidence only.

such proof, including reasonable attorney's fees. (Rule 37 (c).)

The court is granted extremely broad authority to enforce compliance with its orders in connection with interrogatories and depositions, including imposing liability upon a delinquent party or his attorney for the adverse party's expenses and attorney's fees in connection therewith or rendering final judgment against the delinquent party.[79]

Trials

Trial by jury is waived unless written demand therefor (which may be endorsed upon a pleading) is served and filed not later than ten days after service of the last pleading directed to such issues of fact. In his demand a party may specify the issues which he wishes so tried; otherwise he is deemed to have demanded jury trial as to all issues so triable. If demanded for only some of the issues, any other party within ten days may serve a demand for trial by jury of any other or all of the issues of fact.[80]

Rule 41 relates to voluntary and involuntary dismissal of actions.[81] The court is granted broad discretion as to consolidating actions for trial or ordering separate trials of separate claims or issues involved in an action. (Rule 42.)

Rule 43 as to evidence is very liberal, as all evidence must be admitted which is admissible either under federal statute, under the former federal equity procedure, or under the rules of evidence applied in the state where the court is held. "The statute or rule which favors the reception of the evidence governs." A like rule applies in determining the competency of a witness to testify.[82] A party may, as under our state statute, call an adverse party as a witness and interrogate him by leading questions and contradict and impeach him.[83]

Without discussing them in detail, it may be stated that rule 43 (c) relates to offers of proof and a record of excluded evidence; rule 44 to proof of official records; rule 45 to subpoenas, which

[79]Rule 37. Compare REM. REV. STAT. § 1230; Hammond Packing Co. v. Arkansas, 212 U. S. 322 (1909).

[80]Rule 38. Compare REM. REV. STAT. § 316. It is unnecessary to pay a jury fee. In actions not triable of right by jury the court may try any issue with an advisory jury. Rule 39.

[81]Compare Washington rule IV; 193 Wash. 41-a; REM. SUPP. 308-4 and 408, *et seq.*

[82]"The whole trend of judicial administration has been toward more and more freedom in the admission of evidence." Clark, *Proposed Federal Rules of Civil Procedure*, 22 A. B. A. J. 447, 450 (July, 1936).

[83]Or an officer, director or managing agent of an adverse party corporation or partnership. Rule 43(b). Compare REM. REV. STAT. §§ 1225, 1229; Repanich v. Columbia, etc. Packing Co., 135 Wash. 429, 237 Pac. 1012 (1925).

are issued by the clerk signed and sealed but otherwise in blank[84]; rule 48 permits by written stipulation a trial or verdict by less than twelve jurors;[85] and rule 49 relates to general and special verdicts and inconsistencies therein.[86]

In *Slocum v. New York Life Insurance Co.*,[87] the Supreme Court in effect held that in the federal courts under the seventh amendment there could be no motion for judgment notwithstanding the verdict, and a new trial would be in such event the only remedy. For obvious reasons this has been a serious defect of federal procedure. In 1935 in *Baltimore and Carolina Line v. Redmon*,[88] the Supreme Court unanimously modified the Slocum decision and held that the district court may reserve decision on a motion for directed verdict and submit the case to the jury subject to the court's opinion on the questions reserved.

Pursuant to the *Redmon* case, rule 50 (b) provides that whenever a motion for directed verdict at the close of all of the evidence 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 verdict a party who has moved for a directed verdict "may move to have the verdict or 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,[89] may move for judgment in accordance with his motion for a directed verdict. He may also move for a new trial in the alternative. The court has full power to grant or deny such motion or order a new trial.

A motion for a directed verdict must state the specific grounds therefor. "A motion for a directed verdict which is not granted is not a waiver of trial by jury, even though all parties have moved for a directed verdict."[90]

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[84]Subpoenas need not be served by the marshal or his deputy. In serving subpoenas, however, it is necessary to tender fees for one day's attendance and mileage. A subpoena *duces tecum* on the taking of a deposition cannot be issued without a court order. Rule 45 (c) and (d).)

[85]Compare REM. REV. STAT. § 323.

[86]Compare REM. REV. STAT. § 365; Amann v. Tacoma, 170 Wash. 296, 16 Pac. (2d) 601 (1932); Great Western Land & Imp. Co. v. Sandygren, 141 Wash. 451, 252 Pac. 123 (1927).

[87]228 U. S. 364 (1913) (5 to 4 decision). Contrast REM. REV. STAT. § 431. See Dimick v. Schiedt, 293 U. S. 474 (1935) as to power to grant new trial conditionally for excessive or inadequate damages.

[88]295 U. S. 654. This decision is, of course, the basis for the new rule. 61 A. B. A. Rep. 428, 483 (1936).

[89]Compare Fobes Supply Co. v. Kendrick, 88 Wash. 284, 152 Pac. 1028 (1915).

[90]Rule 50(a). Our state practice is to the contrary, at least unless the submission of certain questions to the jury is specially requested. People's Bank & Trust Co. v. Douglas, 154 Wash. 450, 282 Pac. 838 (1929).

Although instructions to the jury are given after the completion of the argument, as formerly, the court must inform counsel of its proposed action upon requested instructions before their argument to the jury. (Rule 51.)

Exceptions to the giving or the failure to give an instruction are to be taken before the jury retires to consider its verdict, counsel "stating distinctly the matter to which he objects and the grounds of his objection."[91] "Opportunity shall be given to make the objections out of the hearing of the jury."[92]

Findings of fact and conclusions of law are necessary "in all actions tried upon the facts without a jury", both law and equity, and also in granting and refusing interlocutory injunctions.[93] Requests for findings are unnecessary for purposes of review. As to the effect to be given to findings in the event of appeal, the rule provides that "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." This rule wisely adopts for all non-jury cases the principle formerly allowed in federal equity suits and in our state practice.[94]

Upon motion 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. Such motion may be made with a motion for new trial. Such motion, or any objection to the findings in the district court, is unnecessary, however, for purpose of appellate review.[95]

Judgment

When an action presents more than one claim for relief, the court may enter judgment disposing of such claim prior to termination

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[91]It is to be hoped that this rule will not be so misconstrued as our corresponding state rule. (Rule X, REM. SUPP. 308-10; 193 Wash. 47-a.) TeSelle v. Terpstra, 180 Wash. 73, 38 P. (2d) 379 (1934), and previous cases therein cited.

[92]As to the problem of what to do with the jury, see Chestnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A. B. A. J. 533, 539 (Aug., 1936). This rule constitutes an admirable improvement in federal procedure, although it is submitted that the state practice of taking exceptions after the retirement of the jury is superior. (REM. SUPP. 308-10.)

[93]Rule 52. While findings are unnecessary in equity suits under our state practice, they were required under federal equity rule 70½ adopted in 1935.

[94]Notes to Rules of Civil Procedure, p. 46 (March, 1938); Mitchell, *Problems Confronting the Advisory Committee*, 23 A. B. A. J. 967 (Dec., 1937); Mitchell, *The New Federal Rules of Civil Procedure*, 61 A. B. A. Rep. 431 (1936); Hammond, *Changes in Preliminary Draft of Rules*, 23 A. B. A. J. 629, 633 (Aug., 1937); Clark, 61 A. B. A. Rep. 444 (1936).

[95]Rule 53 deals with the subject of masters.

of the action. (Rule 54 (b).) Every final judgment except default judgments must 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 pleading." (Rule 54 (c).) Unless otherwise ordered, costs are taxed by the clerk in favor of the prevailing party subject to review by the court. (Rule 54 (d).) Defaults (that is, orders of default) are entered by the clerk. Judgment by default may be entered by the clerk upon request of the plaintiff and upon affidavit of the amount due when the claim is for a sum certain or which can be made certain by computation. In all other cases judgment by default may be entered only by the court. (Rule 55.)

Rule 56 authorizes entry of summary judgment where it appears upon the pleadings and affidavits that there is no genuine issue. This practice has been found beneficial in New York and other more populous states with congested trial calendars.[96]

Rule 57 provides that the procedure for obtaining a declaratory judgment pursuant to federal statute[97] shall be in accordance with these rules, including the demanding of trial by jury. Existence of another adequate remedy does not preclude such judgment in cases where it is appropriate. The court may expedite the hearing of such actions.

The manner of entering judgment is materially changed. Unless the court otherwise directs, judgment upon the verdict of a jury is entered forthwith by the clerk; but the court directs the appropriate judgment to be entered upon a special verdict or a general verdict accompanied by answers to interrogatories. When the court directs entry of a judgment for recovery of money only or costs or no recovery, the clerk enters judgment forthwith; but as to other relief the judge shall promptly settle or approve the form of the judgment.[98]

New Trials

New trials may be granted to all or any of the parties and on all or part of the issues.[99] Grounds for new trial are, in jury cases, "any of the reasons for which new trials have heretofore been

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[96]Notes to Rules of Civil Procedure, p. 53 (March, 1938); 61 A. B. A. Rep. 430, 468 (1936).

[97]28 U. S. C. A. § 400. See Notes to Rules of Civil Procedure. p. 54 (March, 1938).

[98]Rule 58. It is submitted that our state procedure whereby, particularly in jury cases, no judgment is entered until after disposition of all motions, is obviously much preferable. REM. REV. STAT. § 431.

[99]Rule 59(a). See Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494, and annotation in 75 L. Ed. 1188, 1191 (1931).

granted" in federal law actions; and in non-jury cases, "any of the reasons for which rehearings have heretofore been granted" in federal equity suits. On motion for new trial in a non-jury action the court may open the judgment if one has been entered, take additional testimony, amend findings and conclusions or make new ones, and direct entry of a new judgment. (Rule 59 (a).)

Motion for new trial may be served not later than ten days after entry of judgment. The court may permit such motion thereafter before expiration of time for appeal, on the ground of newly discovered evidence, on a showing of due diligence. During said ten day period execution shall not be issued upon a judgment nor enforcement proceedings be taken. The court may grant a further stay of proceedings pending disposition of motions. (Rule 62.)

Harmless errors are not grounds for new trial or for disturbing a judgment "unless refusal to take such action appears to the court inconsistent with substantial justice." The court must disregard errors and defects which do not "affect the substantial rights of the parties." (Rule 61.)[100]

Provisional and Final Remedies and Special Proceedings

The state law as it exists at the time of the suit governs as to attachments, garnishments, replevin, executions, supplementary proceedings, and similar remedies. (Rules 64, 69, 70, 71.) A temporary restraining order without notice may be granted only upon the giving of security and where it clearly appears from specific facts shown by affidavit or verified complaint that immediate irreparable injury will otherwise result. (Rule 65.) Except as to appeals, the practice in receiverships is retained as heretofore followed in the federal courts or as provided in rules promulgated by the district court. (Rule 66.)

Rule 68 contains a novel provision as to 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 (without an actual tender or deposit with the clerk, as is necessary under our state statute) an offer to allow judgment to be taken against him to the effect therein specified, with costs then accrued. If within ten days thereafter written notice of acceptance thereof is served, the clerk upon request enters judgment. If the offer is not accepted, it is deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he cannot recover costs in the district

[100]Compare REM. REV. STAT. §§ 1734, 1752, 144, 285, 308-3.

court from the time of the offer, but shall pay costs from that time.[101]

Appeals

Procedure on an appeal to a circuit court of appeals is greatly simplified and improved. Petition for appeal, order allowing appeal, assignment of errors and citation are eliminated and there is substituted a simple, direct procedure by notice of appeal, as under our state statute. An appeal is taken merely by filing a short notice of appeal (form 27) with the clerk of the district court. That is the only jurisdictional step. The clerk mails copies thereof to the attorneys for all other parties.[102]

With the notice of appeal the appellant files a $250.00 cost bond on appeal, with sufficient surety (which bond need not be approved), unless the court fixes a different amount or unless a supersedeas bond is filed. To obtain a stay on appeal, a supersedeas bond with surety must be filed, conditioned as the rule specifies and approved by the court. The liability of a surety may be enforced on motion without an independent action. (Rule 73 (c) (d) (f).)

The record on appeal shall be filed with the appellate court within forty days after the notice of appeal. The court may, during said period, extend the time therefor, but not to exceed ninety days after the notice of appeal. (Rule 73 (g).) Without summons and severance any one or more parties may appeal separately or any two or more may join in an appeal. (Rule 74.)

In preparing the record on appeal, promptly after an appeal is taken, the appellant serves and files a designation of the portions of the record, proceedings and evidence to be contained therein. Within ten days thereafter any other party may serve and file a designation of additional portions thereof to be included. (Rule 75 (a).) If there is designated for inclusion any proceedings which were stenographically recorded, the appellant must file with his designation two copies 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 must file two copies of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added. One of the copies is available for the use of the other parties and for use of the appellate court in printing the record. (Rule 75 (b).)

[101]Rule 68. Compare REM. REV. STAT. §§ 485, 486; Patrick v. Ilwaco Oyster Co., 189 Wash. 152, 63 P. (2d) 520 (1937).

[102]Rule 73(a) and (b). This practice is adopted from Kansas. 61 A.

Testimony may be in narrative form or 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, if dissatisfied therewith, may require testimony in question and answer form to be substituted for all or part thereof.[103]

If the appellant does not designate for inclusion the complete record and all of the proceedings and evidence, he must serve with his designation a concise statement of the points on which he intends to rely on the appeal. All matter not essential to the decision of the questions presented by the appeal shall be omitted.[104]

The parties may stipulate as to the portions of the record to be included, in which event serving said designation is unnecessary. (Rule 75 (f).) It is unnecessary for the record on appeal to be approved by the court; but if any difference arises as to whether the record truly discloses what occurred, the same shall be settled by the court. What part of the record on appeal shall be printed and the manner of the printing "shall be as prescribed in the rules of the court to which the appeal is taken". Rule 75 (l).) When the questions can be determined without an examination of all of the pleadings and evidence, the parties may sign an agreed statement of the case, approved by the district court. (Rule 76.)

Local Rules

The method adopted to "fill in the gaps" or omissions in the rules which may appear through experience is through rules hereafter to be adopted by the district courts. Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules, copies being furnished to the Supreme Court. "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."[105]

III

A frequently stated secondary object of the new rules is to

B. A. Rep. 112 (1936); 23 A. B. A. J. 968 (Dec., 1937).

[103]Rule 75(c). "This opens the way to narrative statements of those parts of the testimony which are not greatly in controversy, but does not require the parties to perform the laborious and expensive task of agreeing on a narrative statement where they are in controversy over it." Mitchell, *Some Problems Confronting the Advisory Committee*, 23 A. B. A. J. 968 (Dec., 1937). See Notes to Rules of Civil Procedure, p. 71 (March, 1938).

[104]Rule 75(d) and (e). The court may withhold or impose costs upon offending parties or attorneys.

[105]Rule 83. 23 A. B. A. J. 965 (Dec., 1937).

provide a model of procedure for adoption by the states.[106] The inquiry therefore naturally arises which, if any, of these new rules should be adopted in this state. This question will therefore be briefly discussed in conclusion. We are admittedly on controversial ground and each lawyer will probably have different views on the subject.

Washington is undoubtedly in the vanguard of the states from the standpoint of practice and procedure, due to the excellent work of our Judicial Council and our Supreme Court in the exercise of its rule-making power.[107] Consequently the new rules more closely resemble procedure in this state than in many other states, and there is less that our state procedure can gain therefrom.

In fact, as hereinabove stated, in numerous respects the Washington practice is deemed superior to the new federal procedure. Instances are: the necessity of filing before serving summons and complaint (Rules 3 and 4); the elimination of a reply to an affirmative defense and elimination of demurrers (Rule 7); elimination of verification of pleadings (Rule 11); requirement of court order for issuance of subpoena *duces tecum* for taking a deposition (Rule 45); necessity of taking exceptions to instructions before retirement of the jury (Rule 51); the power to grant relief in contested actions different in kind or greater in amount than prayed for (Rule 54); entry of judgments on verdicts forthwith by the clerk before disposition of motions (Rule 58). In these and other respects it is submitted that the federal rules would be improved if they more closely followed the Washington procedure. Nor do we see any such calendar congestion as would justify the adoption of pre-trial procedure (Rule 16) or summary judgment procedure (Rule 56) in the courts of this state.

In certain other respects, however, it is believed that the new federal rules furnish excellent suggestions for improvement of Washington procedure. It is, of course, impossible to discuss the reasons without unduly extending the length of this article, but it is believed the same are self-evident. For example, a motion for judgment on the pleadings should be authorized by rule of court in accord with Rule 12 (c) (d) and (h), rather than the view apparently followed in this state that when such motion is made and denied, judgment must be thereupon granted against the moving party.[108] Other desirable improvements are third-party practice

[106]Mitchell, *Some Problems Confronting the Advisory Committee*, 23 A. B. A. J. 970 (Dec., 1937).

[107]REM. REV. STAT. §§ 10959-1, 13-1, 13-2. Eventually there should doubtless be a federal judicial council or permanent advisory committee to suggest improvements in the rules. 24 A. B. A. J. 198 (March, 1938); 61 A. B. A. Rep. 446 (1936).

[108]See State v. Vinther, 183 Wash. 350, 48 P. (2d) 915, 186 Wash. 691,

as under Rule 14, and joinder of claims and remedies as under Rule 18; in particular it should be permissible to prosecute a claim for money and a claim to have set aside a fraudulent conveyance in the same action.

Our Washington rule of court as to depositions and discovery is an excellent one, but it could probably be further improved by incorporating the features found in Rule 30 (b) and (d) for the protection of rights of deponents.

Rule 34 contains a desirable extension of the right of inspection to include not only documentary evidence but also tangible real and personal property. Likewise Rule 36 properly suggests that the right to make written request for the admission by the adverse party of the genuineness of documents should be extended to include a written request for the admission of the truth of any relevant matters of fact set forth therein, the same to be deemed admitted unless specifically denied on oath or valid reason stated for inability to admit or deny.

It should also be permissible as under Rule 50 for both parties in a jury case to make a motion for directed verdict at the close of the evidence without thereby waiving right of jury trial. Finally, Rule 68 contains an excellent suggestion for the speedy determination of litigation whereby without an actual tender (he may not have the money readily available) a defendant may serve an offer to submit to judgment in a stated amount which, if accepted, results in prompt entry of judgment therefor. Future costs as the plaintiff's reward or punishment are his incentive to be reasonable.

In conclusion we repeat that the Supreme Court and the Advisory Committee, as well as the various state committees, are entitled to the highest praise and the utmost gratitude for the splendid work which has been so ably accomplished in the preparation of these rules. The task was arduous, but it has been performed in an exceedingly diligent and conscientious manner. Circuit Judge Parker recently well stated that the rules embody "the best and simplest code of practice that has ever been devised."[109] This is, in the words of Dean Wigmore, "the most important event

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58 P. (2d) 357 (1935).

Our state Supreme Court recently adopted two very desirable rules as to the record on appeal, one based on rule 75 permitting an abbreviated record containing so much of the evidence as bears upon the questions sought to be reviewed and filing a concise statement of the points on which appellant intends to rely (Rule IX (2), 193 Wash. 10-a), and the other based on rule 76 permitting an appeal upon a condensed agreed statement of the case approved by the trial court. (Rule X, 193 Wash. 11-a.)

[109]24 A. B. A. J. 239 (March, 1938).

in a hundred years of federal justice."[110] Fortunately neither Court nor committee has forgotten the great fundamental truth that "a form of action or remedy is but a means of administering justice, rather than an end in itself."[111]

Paradoxical as it may seem, although the rule-making power of the courts is of ancient origin,[112] no other improvement holds greater promise as a means of modernizing judicial procedure and rendering our courts more prompt and effective instrumentalities for the enlightened administration of justice, "the greatest interest of man on earth". [113]

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[110]61 A. B. A. Rep. 453 (1936).

[111]Frederickson v. Nye (Ohio), 144 N. E. 299, 35 A. L. R. 1163. Compare White v. Million, 175 Wash. 189, 197, 27 P. (2d) 320 (1933); BORCHARD ON DECLARATORY JUDGMENTS, pref. p. vii.

[112]Pound, *Regulations of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163 (1915); Tyler, *The Origin of the Rule-Making Power and Its Exercise by Legislatures*, 61 A. B. A. Rep. 532 (1936).

[113]The effective date of the rules was September 16, 1938. For an excellent discussion thereof by members of the Advisory Committee, with bibliography, see "*Rules of Civil Procedure and Proceedings of the Institute on Federal Rules*", recently published by the American Bar Association.