The New Federal Rules and Louisiana Practice

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September 16th, 1938, may well be written in red figures on the calendar of American legal history, for on this date the Federal Rules of Civil Procedure became effective. It marked the successful termination of a thirty year fight for a system of procedure in actions at law common to all of the federal district courts and the courts of the District of Columbia. For the first time in their history these federal courts were governed by a single procedural system, applicable both to cases in equity and actions at law. However great these advantages may prove to be, they by no means constitute the sole benefits of the adoption of the new Federal Rules. The legal profession in America will profit from this event in at least two other important aspects. First, in litigation conducted in the federal courts the practitioner will reap the fruits of the most advanced and enlightened system of procedure which American genius has yet devised. Second, the opportunity for comparative study resulting from the necessity of possessing a working knowledge of the new federal procedure as well as the local state practice is certain to lead to improvement of the latter through borrowings from the former. September 16th marked the beginning of a great movement towards uniformity of procedure in America.

In all probability, Louisiana practitioners will have less difficulty in adjusting themselves to the new federal procedure than the lawyers of many other states. The Federal Equity Rules of 1913, springing from much the same Romano-canonical base as did our own practice, have had so great an influence on the Federal Rules of Civil Procedure, that the differences between Louisiana practice and the new federal procedure are not so great as would be imagined. However, it must not be assumed that even a mastery of Louisiana procedure will be the equivalent of a working knowledge of the new federal practice. Much of the substance of the Rules, dealing only with aspects of federal

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procedure and making important changes in this field, can be understood only in the light of prior federal practice. In addition, a few of the procedural advances embodied in the Federal Rules bear not the slightest resemblance to any of the concepts and principles of the adjective law of Louisiana.

When the Code of Practice of 1825 was redacted, the Livingston Committee presented Louisiana with a system of procedure far in advance of that of any other American state. Within the past century, however, other jurisdictions of the United States have made great strides in the improvement of the system of adjective law by adopting procedural codes incorporating many of the best features of the Code of Practice.\(^1\) But this process of improving procedure did not stop there; in certain of the states it has been a continuous one, resulting in the gradual evolution of new procedural devices, the best of which have been incorporated into the new Federal Rules. The experience in Louisiana during the past hundred years has not been a similar one. Too little attention was paid to adjective law, and while numerous statutes have been adopted affecting the procedural law of this state, a few have been hastily drafted, ill-considered, and productive only of confusion and uncertainty. Ignoring the original symmetry of our Code of Practice, some of these statutes have run afoul of code provisions not intended to be affected.\(^2\) At least one of these misdirected efforts, representing nothing but a phase in the evolution of the procedure of other states towards an ultimate which Louisiana then enjoyed, robbed Louisiana pleading of much of its efficacy and simplicity.\(^3\) The result is that, in certain phases of procedural development, Louisiana practice has lagged

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2. E. g., La. Act 53 of 1839, § 23 was passed to overturn the doctrine of Magee v. Dunbar, 10 La. 546 (1837) which held that a dilatory exception might be filed after the taking of a default. In the revision of 1870 this statutory provision was tacked on to Art. 333, La. Code of Practice of 1870. The result was to override Art. 336, La. Code of Practice of 1870. Chaffe v. Ludeling, 34 La. Ann. 962 (1882). From this sprang the highly objectionable practice of "stringing out" the exceptions—a result which the Legislature never dreamed of. To suppress this practice Art. 333, La. Code of Practice of 1870 was amended and re-enacted by La. Act 124 of 1936. The last amendment in turn has produced complications which the Legislature did not foresee. See Comment, infra, p. 174.

far behind the new federal procedure. If we enjoy a workable system of procedure in Louisiana today it is largely in spite of, rather than because of, efforts at improvement since 1825. A few of the concepts and principles of the Federal Rules will prove novel to the majority of Louisiana practitioners.

Once before, an era of improvement of adjective law was ushered in when, in 1848, New York adopted the David Dudley Field Code of Procedure. Two factors were responsible for the judicial antagonism which braked the momentum of this earlier movement. The first was the traditional antipathy of common law courts towards legislation. The second was that the Field Commission, fearful of arbitrary judicial action, attempted the wholly visionary scheme of drafting a code so complete that nothing would be left to judicial discretion. The Federal Rules have profited by the unfortunate experience of the Field Code of Procedure. The enabling statute empowered the Supreme Court itself "to prescribe, by general rules, . . . the practice and procedure in civil actions at law," and further provided that the court might "at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." The committee appointed by the Supreme Court to draft these Rules obviated the other difficulty by confining these Rules, as far as practicable, to the statement of procedural principles, leaving the treatment of particular cases to the exercise of judicial discretion. Not only is the new federal procedure the handiwork of the judiciary, but the responsibility for its effective operation is placed squarely upon the shoulders of the courts. The basic philosophy of the new system is voiced by a canon of construction in the initial Rule, providing that the new Federal Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." This, it must be remembered, is a judicial commitment and not an expression of legislative coercion. There is little reason to fear that judicial antagonism will throttle the new movement towards improvement of the adjective law.

Probably the most outstanding feature of the new Rules is that, insofar as practice is concerned, they sweep away all distinctions between suits in equity and actions at law. The Rules go as far as constitutionally possible in levelling the two. While

5. Rule 2. "There shall be one form of action known as 'civil action.'"
suits in equity are not triable ordinarily before a jury, it must be remembered that the Seventh Amendment saved to all suitors at law in the federal courts the right to a trial by jury. The enabling act therefore contained the proviso that "in such union of rules the right of trial by jury as at common law . . . shall be preserved to the parties inviolate." This constitutional right has been reserved by the Rules.

Limitations of space require the omission from this paper of a number of the new Federal Rules which could not be included in this comparative treatment. As far as practicable, the others will be discussed under the nine following topics in the order in which they are presented in the new Federal Rules.

**Process**—The form prescribed for the summons is almost identical with that required of the citation. Similarly to Louisiana practice, the summons is issued by the clerk and ordinarily delivered to and served by the marshal. Service of the complaint is substantially identical with service of the petition under

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7. Rule 38 (a).
8. Omitted from the scope of this article are the following:
   - Rule 53, relating to the appointment of Masters, their powers and compensation, and proceedings had before them.
   - Rule 66, concerning administration of estates by receivers or similar officers.
   - Rule 71, relating to serving of orders on persons not parties to the litigation.
   - Rule 77, concerning district courts and the clerks thereof.
   - Rule 78, requiring the designation of Motion Days by district courts.
   - Rule 79, requiring clerks of the district courts to keep certain books and records.
   - Rule 80, providing for the appointment, and regulating the duties, of district court stenographers.
   - Rule 81, regulating the general applicability of the Rules. See also Rule 1.
   - Rule 82: "These rules shall not be construed to extend or limit the jurisdiction of the district courts of the United States or the venue of actions therein."
   - Rule 83, authorizing district courts to make rules not inconsistent with the new Federal Rules.
   - Rule 84, referring to the Appendix of Forms to indicate the simplicity and brevity of pleadings under the Rules.
   - Rule 85: "These rules may be known and cited as the Federal Rules of Civil Procedure."
   - Rule 86, concerning the effective date of the Rules. It further provides that the Rules "govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."
Louisiana practice; however, under the new federal practice the court is authorized to make "special appointment to serve process... when substantial savings in travel fees will result." As under our practice, service of process upon a competent individual may be either personal or domiciliary. Jurisdiction is exercised over incompetents "by serving the summons and complaint in the manner prescribed by the law of the state in which the service is made..." The same similarity obtains with regard to foreign or domestic corporations for whom process may be served upon "an officer, a managing or general agent, or... any other agent authorized by appointment or by law to receive service of process." Special provisions provide for service upon the United States. Obviously, no similar provisions are necessary under Louisiana practice. Under the Rules, process against a state or municipal corporation thereof may be served either upon the chief executive officer thereof, or in the manner prescribed by state law. Apparently, the return of service is identical with that required by Louisiana practice, except that special process servers must execute an affidavit of the service and facts thereof. Greater liberality is afforded by the new Rules which permit ready amendment both of "any process or proof of service thereof."

Of more than passing interest is Rule 4 (f) which permits

12. Rule 4 (c).
15. Rule 4 (d3). For corresponding provisions of Louisiana law, see:
DOMESTIC CORPORATIONS—La. Act 156 of 1928, § 37 [Dart's Stats. (1932) § 1117].
FOREIGN CORPORATIONS—La. Act 184 of 1924, §§ 1-3 [Dart's Stats. (1932) §§ 1250-3]. See also, La. Act. 179 of 1918, § 1 (6a-e) [Dart's Stats. (1932) § 1933 (6a-e)].
16. Rule 4 (d4-5).
17. Rule 4 (d6).
19. Rule 4 (g).
service of process (other than of a subpoena) anywhere within the territorial limits of the state. Differently from the former practice, it is now possible to institute suit in one federal district and have process served on an agent of defendant in another in the same state, provided the requirements of jurisdiction and venue are satisfied.

In the service of notices, contradictory motions and all pleadings other than the original complaint, the new procedure is markedly superior to Louisiana practice. It requires that all these pleadings be served upon the opposing party, and this service may be made by simple delivery of a copy to the party or his counsel. In comparison, few such proceedings need to be served under Louisiana practice, and the only provision for their service is the mere power to have all service after appearance made by the sheriff or his deputy on the opposing counsel of record.

**PLEADING**—It is in this field that Louisiana practice suffers most from a comparison with the Federal Rules. The chief characteristics of this phase of the new adjective law are the *simplicity* and *brevity* of the contemplated pleadings. The Louisiana practitioner, accustomed to the minute and never-ending ramifications of the fact pleadings in an automobile accident personal injury suit, has both a treat and a shock awaiting him when he turns to Forms 9 and 10 and reads the complaints suggested by the new Rules for such a claim. The new procedure comes closer to notice

23. Rule 5 (b).
24. Rule 5 (b). This delivery may be made by: handing a copy to the party or his attorney; mailing it to either at his last known address; leaving it at his office with a clerk or other person in charge, or if no one is in charge, leaving it there in a conspicuous place; or if no office exists or it is closed, leaving it at his usual place of abode with some person of suitable age or discretion.
25. E. g., neither exceptions, answers nor reconventional demands need be served on plaintiff, who is presumed to be in court and who must take notice thereof. Cf. Hobson v. Woolfolk, 23 La. Ann. 384 (1871). Nothing is more provoking than the necessity of going to court to write out long exceptions, answers and reconventional demands, copies of which a discourteous opponent has refused to mail.
26. La. Act 179 of 1918, § 1 (16) [Dart's Stats. (1932) § 1933 (16)]. This provision was construed very strictly, and held not to apply to service of a petition of intervention upon counsel of record. Adams v. Ross Amusement Co., 182 La. 252, 161 So. 601 (1935). La. Act 120 of 1938, § 1 has overruled this case to the extent of allowing service of the intervention upon counsel of record; but Louisiana practice still lacks the liberality of the Federal Rule on this point.
27. The Appendix of Forms annexed to the Rules "are intended to indi-
pleading than that followed in any superior court in America. It is much the same form as that which Louisiana enjoyed until the unfortunate adoption of the Pleading and Practice Act superimposed the fact pleading of American code procedure upon the simple system of the Code of Practice.

As Dean Clark, the Reporter of the Supreme Court Committee charged with the duty of drafting the new Federal Rules, once had occasion to observe, we have expected too much of pleading. "It is a means to an end, not an end in itself—the 'handmaid rather than the mistress' of justice." By anticipation he voiced, some few years ago, the philosophy of the new federal pleading:

"The aim of pleadings should be therefore to give reasonable notice of the pleader's case to the opponent and to the court. This does not go as far as the technical notice pleading, since it requires notice of the pleader's entire cause, not merely that he has a claim. The notice to the court is perhaps the more important, for in general the opponent knows enough about the case to relieve us of worry about him. In fact we have spent altogether too much thought over the danger of surprising a defendant. If his case is prepared at all adequately he will not be surprised. Our solicitude for him will simply result in giving him opportunities to delay the case and harass his opponent. The main purpose of the pleadings should therefore be to give the trial court a proper understanding of the case. If the trial court is adequately informed of the issue by the pleadings, it means that the parties are likewise so informed. It is for the court not the litigants to vindicate pleading rules."

The basic pleadings required under the Rules are the complaint, answer, and reply (if the answer contains a counterclaim denominated as such). Further pleadings allowed are answers to a cross-claim, third-party complaints and answers thereto; "no other pleading shall be allowed, except that the court may order..."
a reply to an answer or a third-party answer." The cursory reader is apt to conclude that the reply and the answers to a third-party complaint would be considered as prohibited replications under Louisiana practice, but despite the difference of terminology, except in rare and occasional cases, the federal system of pleading is exactly the same as our own.

Verification or certification of pleadings is not required under the Rules, except in the rare case when required by express statute or rule. All pleadings must be "signed by at least one attorney of record in his individual name," and "the signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Breach of this implied certificate subjects counsel to appropriate disciplinary action. This method has very obvious advantages over the useless formality of its counterpart in Louisiana practice.

The anachronistic rule of former equity practice that the averments of an answer under oath must be overcome by the testimony of two witnesses or one witness sustained by corroborating evidence is now abolished. The "proof and half-proof"

33. Ibid. When the answer contains a counterclaim denominated as such, the filing of a reply thereto is a matter of right; but if the answer does not set forth such a counterclaim the filing of a reply thereto is subject to the discretion of the court.


35. Plaintiff is required to file a reply only when the answer sets out a counterclaim denominated as such; otherwise a reply can be filed only if the court so orders. Rule 7 (a). Thus, normally no reply to the answer is filed, as under Louisiana practice. However a difference occurs when the answer contains a counterclaim denominated as such. Under the new federal procedure a reply must be filed, Rule 7 (a); under Louisiana practice an answer to a reconventional demand may, but is not required to, be filed. Young v. Geter, 174 So. 661, 664 (La. App. 1937). The cross-claim of the Federal Rules has no analogue in Louisiana procedure. The Code of Practice contemplates an answer to the call in warranty. Cf. Art. 384, La. Code of Practice of 1870. The Federal Rules similarly contemplate the filing of an answer to a third-party complaint; however, the latter go further in permitting the court to require a reply to a third-party answer. Rule 7 (a).

36. Rule 11. "A party who is not represented by an attorney shall sign his pleading and state his address."

37. Rule 11. Furthermore, if the pleading is not signed or signed with intent to defeat the purpose of the rule, the pleading may be stricken as sham and false.

38. Cf. La. Act 157 of 1912, § 1 (5, 6) as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483 (5, 6)].

39. This doctrine of equity procedure is a survival of the proof and half-proof rules of Roman-canonical law. Cf. Engelmann-Millar, A History of Continental Civil Procedure (1927) 41-44. In order to escape the difficult burden of this rule it was customary to pray that the defendant be ordered to answer, "but not under oath."
rule which had accounted for this result in federal equity practice was at one time firmly imbedded in Louisiana practice, but its influence today is slight.\textsuperscript{40}

The formal requirements of the pleadings under the new Rules are much the same as under Louisiana practice, with the one exception that the latter is fact pleading while the former constitute an approach to notice pleading. All pleadings must be captioned with the name of the court, the title of the action,\textsuperscript{41} the file number and a designation of the pleading;\textsuperscript{42} this is substantially identical with a well-nigh universal custom in Louisiana.\textsuperscript{43} The new Rules further provide that "all averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances"\textsuperscript{44} but the similarity of statement should not cause this rule to be confused with the basically different Louisiana requirement that the plaintiff shall "state each of the \textit{material facts} upon which he bases his claim for relief in a separate paragraph, separately numbered."\textsuperscript{45} The principle of pleading by reference, highly conducive to brevity, is recognized both by the new Rules\textsuperscript{46} and Louisiana practice.\textsuperscript{47}

A pleading which sets forth a claim for relief must contain, in addition to the jurisdictional allegation when necessary,\textsuperscript{48} "a short and plain statement of the claim showing that the pleader is entitled to relief" and a prayer for appropriate relief.\textsuperscript{49} The re-

\textsuperscript{40} As a rule of evidence, proof and half-proof was abandoned quite early. Dranguet v. Prudhomme, 3 La. 83 (1831). Originally, the rule was consecrated by Art. 354, La. Code of Practice of 1825, insofar as answers to interrogatories on facts and articles were concerned; but in the 1870 revision it was rejected. Cf. Art. 354, La. Code of Practice of 1870. See Rush v. Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 355 (1902). The influence of proof and half-proof is still visible in Art. 264, La. Code of Practice of 1870, and in La. Act 11 of 1926, amending and re-enacting La. Act 207 of 1906 [Dart's Stats. (1932) §§ 2024-2025].

\textsuperscript{41} In the complaint the title of the cause must include the names of all parties; in other pleadings it may include the name of the first party on each side with an appropriate indication of other parties. Rule 10 (a).

\textsuperscript{42} Rules 7 (a), 10 (a).

\textsuperscript{43} Although not required by any code or statutory provision, the prevalent custom in Louisiana (except in East Baton Rouge Parish) is to caption the pleading.

\textsuperscript{44} Rule 10 (b).

\textsuperscript{45} La. Act 157 of 1912, § 1 as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483].

\textsuperscript{46} Rule 10 (c). This rule of adoption by reference applies not only to exhibits, but likewise to other pleadings and parts of pleadings.

\textsuperscript{47} Tremont Lumber Co. v. May, 143 La. 389, 78 So. 550 (1918).

\textsuperscript{48} Jurisdictional averments must be made in the complaint because the courts are of limited jurisdiction; however, this is rarely done in subsequent pleadings.

\textsuperscript{49} Rule 8 (a).
Sponsive pleadings require the pleader to "state in short and plain terms his defenses to each claim asserted," and further require a denial or admission of the averments on which the adverse party relies. The denial for lack of sufficient information to justify a belief is less technical than that of Louisiana practice. The Rules, in permitting a general denial of all the averments of the adverse party except such designated averments as are admitted expressly, are more liberal than the corresponding Louisiana provision. In both systems, the effect of the failure to deny, in the responsive pleading, is to admit the averments of the adverse party. The pleading of affirmative defenses under the Rules and special defenses under Louisiana practice are similar—provided that due account be taken of the fact pleading of Louisiana. Both systems permit demands for alternative relief, as well as pleading inconsistent causes of action or defenses in the alternative; however, the Federal Rules are a little more liberal in permitting alternative pleading regardless of inconsistency. In

50. Rule 8 (b).
51. Rule 8 (b). In Louisiana, "the denial by the defendant ... may be based upon lack of sufficient information to justify a belief, ... but in such case the denial must be expressly so qualified." La. Act 157 of 1912, § 1(2) as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483 (2)]. An averment that the pleader lacks sufficient information to justify a belief, without a denial therefor, would constitute an admission in Louisiana. Maddox v. Robbert, 165 La. 694, 115 So. 905 (1928). Under the new federal practice, it would constitute a denial. Rule 8 (b).
52. Rule 8 (b). Louisiana does not permit the general denial except as to all matters admitted expressly, but insists upon a specific denial in each of the responsive paragraphs. La. Act 157 of 1912, § 1 (2) as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483 (2)]; Middleton v. Humble, 154 So. 400 (La. App. 1934).
53. Rule 8 (d); La. Act 157 of 1912, § 1 (3) as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483 (3)].
54. Rule 8 (c). Affirmative pleading of "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense" is required.
56. Rules 8 (a); 8(e2); Weinberger v. Merchants' Mut. Ins. Co., 41 La. Ann. 31, 5 So. 728 (1888).
57. Rules 8 (a), 8 (e2); Haas v. McCain, 161 La. 114, 108 So. 305 (1926); Succession of Markham, 180 La. 211, 156 So. 225 (1934); Wells v. Davidson, 149 So. 246 (La. App. 1933).
58. Rule 8 (e2).
Louisiana the emphasis on the pleading of facts narrows the effectiveness of this procedural device. 59

In the manner of urging technical objections to the pleadings, the Rules are far in advance of our procedure. Demurrers, pleas and exceptions for insufficiency of pleading are rejected, 60 and all procedural objections must be urged either in the motion to dismiss or in the answer. 61 The following defenses may, at the option of the pleader, be raised either through the motion to dismiss or the answer or reply: (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. 62 All other objections must be raised through the answer. 63 All defenses or objections which can be raised through the motion to dismiss can be consolidated in one motion, but unless a party raises all of the first five objections (of the six enumerated above) which are then available to him, he waives the right to raise them through this motion. 64 Similarly, all objections which are not presented in the motion to dismiss or in the answer or reply are waived, except those which urge failure to state a claim upon which relief can be granted and lack of jurisdiction over the subject matter. 65 In whatever manner the objection is raised, any party can apply to have it heard and determined before trial. 66

Translated into the terminology of Louisiana practice, it would seem that all objections which would be raised in Louisiana through the declinatory exceptions and the exceptions of no right (want of interest) or no cause of action may be raised either through the motion to dismiss or the answer; objections which would be raised in Louisiana through all other exceptions must be incorporated in the answer or reply. The rules relative to waiver prevent any “stringing out” of the procedural objections and insure the plaintiff getting to trial without undue delay.

59. In Louisiana, the pleading of inconsistent facts in the alternative is not permitted, unless the true facts are peculiarly within the knowledge of the adverse party and are unknown to the pleader. Succession of Markham, 180 La. 211, 156 So. 225 (1934); Davis v. Metropolitan Life Ins. Co., 168 So. 370 (La. App. 1938).
60. Rule 7 (c).
61. Rule 12 (b).
62. Ibid.
63. Ibid.
64. Rule 12 (g).
65. Rule 12 (h).
66. Rule 12 (d).
Aside from a difference of nomenclature, the federal practice on this point is not substantially different from the system obtaining in Louisiana prior to 1839. The superior features of a procedure identical with that of the new Federal Rules have been pointed out, and Louisiana practice could be improved immeasurably by borrowing these points.

Three other means of voicing procedural objections are contemplated by the Rules. The first is the motion to strike redundant, immaterial, impertinent or scandalous matter from a pleading. This finds its counterpart in Louisiana practice. The next is the motion for judgment on the pleadings, similar to but broader than our motion of the same name. The last is the motion for a more definite statement or bill of particulars, likewise broader and much more effective than our exception of vagueness. Louisiana would do well to borrow this device, not only to improve its procedure but also to prevent the downright miscarriage of justice which its present system tolerates and encourages. Under the brief and general pleadings contemplated by the new Rules, this motion will be necessary in certain cases to prevent genuine surprise. However, judging from the Forms approved by the Rules, the effective use of this motion will not be as great as might be imagined.

68. McMahon, The Exception of No Cause of Action in Louisiana (1934) 9 Tulane L. Rev. 17, 61 et seq.
69. Rule 12 (f).
70. McMahon, loc. cit. supra note 68, at 31 et seq.
71. Rule 12 (c): "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."
72. La. Act 157 of 1912, § 1 (4) as last amended by La. Act 27 of 1926 [Dart's Stats. (1922) § 1483 (4)]. In Louisiana the motion for judgment on the pleadings is open only to the plaintiff; in the new federal practice it is available to all parties.
73. Rule 12 (e).
74. The Louisiana exception is available only to the defendant; the new federal motion is open to all parties.
75. Under Louisiana practice, if the petition is vague the defendant must except to such generality and obscurity in limine; and if he fails to do so timely, he waives all objection thereto and evidence will be received in support of the pleadings. Doullut v. McManus, 37 La. Ann. 800 (1885). But when the special defense pleaded in the answer is similarly vague, plaintiff may successfully object to the introduction of all evidence in support thereof. The defendant is given no opportunity to amend, such as the plaintiff enjoys after an exception of vagueness has been maintained. Godchaux v. Hyde, 126 La. 187, 52 So. 269 (1910); Ouachita Nat. Bank v. McIlhenny, 168 La. 258, 125 So. 69 (1929); Bloommenstiel v. McKeithen, 19 La. App. 513, 139 So. 519 (1932); Arcadia Lumber Co. v. Austin, 15 La. App. 212, 131 So. 601 (1930); Quatray v. Wicker, 16 La. App. 515, 134 So. 313 (1931); McDonald v. Stellwagon, 140 So. 133 (La. App. 1932); Martin v. Toye Bros. Yellow Cab Co., 162 So. 257 (La. App. 1935). It has been held that even though the defendant discover his
The cross-claim is sanctioned by the new Rules as follows: “A pleading may state as a cross-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. 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.” This is particularly helpful to a defendant in asserting rights against a co-defendant. It has no counterpart in Louisiana, the closest approach being the call in warranty.

The counterclaim provided by the new Rules is not only extensive enough to include both the incidental demands of compensation and reconvention but is much broader and more liberal than the two devices named. The filing of a counterclaim is compulsory if the claim in question “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.” It is permissive if the claim does not arise out of the same transaction or occurrence. A counterclaim omitted through oversight, inadvertence or excusable neglect may, with leave of court, be presented by supplemental pleading. Separate trials of original claim and counterclaim are permitted within the discretion of the court. Here again Louisiana practice suffers from a comparison. Our unfortunate requirements that a claim pleaded in compensation must be equally liquidated, and that one forming error prior to trial and plead the defense with particularity in an amended answer, the amendment will not be allowed. Martin v. Toye Bros. Yellow Cab Co., supra. This harsh and technical rule sacrifices substantial rights of the client because of the harmless negligence of his counsel. The adoption of the motion contemplated by the Rules would prevent such denials of justice.

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76. Rule 13 (g).
77. Rule 13 (a-f).
80. Rule 13 (a).
81. Rule 13 (b).
82. Rule 13 (f). Even if the counterclaim matures, or is acquired, after the filing of the party's pleadings, it can with leave of court be presented by a supplemental pleading. Rule 13 (e).
83. Rule 13 (i).
84. Art. 2209, La. Civil Code of 1870. The reason for this was to prevent the defendant from delaying the case through the interposition of a plea of compensation, the evidence of which could not be presented within the same time required for the introduction of evidence of the main demand. “Liquidated” in the civil law meant “readily susceptible of proof.” Cf. Caldwell v. Davis, 2 Mart. (N.S.) 135 (La. 1824). Today, through the influence of the common law meaning of the term, it has been twisted around to mean “fixed and
the basis of a reconventional demand must arise out of or be connected with the main demand unless the residence of the parties be different,\(^{85}\) restrict unnecessarily the effective use of these procedural devices. The parties should be offered every inducement to adjudicate all their controversies in a single suit wherever practicable.

The intervention regulated by the Rules\(^{86}\) is substantially identical in scope with the combined effect of the Louisiana intervention and third opposition,\(^{87}\) despite the separate federal provisions for intervention of right and permissive intervention.\(^{88}\)

The third-party practice\(^{89}\) is quite similar to the Louisiana call in warranty,\(^{90}\) but it is broader in two respects. First, it permits the defendant to become a third-party plaintiff even after answer filed;\(^{91}\) in Louisiana apparently this would be impossible.\(^{92}\) Second, the plaintiff may amend his pleadings to assert against the third-party defendant any claim which might have been asserted against the third-party defendant had he been joined originally as a defendant.\(^{93}\) Louisiana has no equivalent of this highly convenient practice. When the defendant asserts a counterclaim,\(^{94}\) the new Rules expressly permit a plaintiff to bring in a third party and this is also the Louisiana practice insofar as the defendant in reconvention is concerned.\(^{95}\)

In addition to the benefits of brevity and precision of statement, the new Rules have several advantages over the correspond-

determinate." Cf. Moore v. Hamilton, 16 La. App. 630, 133 So. 790 (1931). Thus the historic reason for the rule has lost its significance, and the rule itself has developed into something entirely different from what the redactors of the Code intended.

86. Rule 24.
87. Arts. 389-403, La. Code of Practice of 1870. The third opposition of Louisiana practice is nothing more than a specific type of intervention.
88. Rule 24 (a, b). The reason for the permissive intervention is to retain judicial control so as to prevent delay and prejudicing of the rights of the parties by the intervention. These dangers are obviated by Art. 391, La. Code of Practice of 1870.
89. Rule 14.
91. Rule 14 (a).
92. Cf. Art. 382, La. Code of Practice of 1870. The prohibition against change of issue after contestatio litis in all probability would prevent a defendant from filing a supplemental answer containing the call in warranty.
93. Rule 14 (a).
94. Rule 14 (b).
95. The plaintiff in the main demand becomes the defendant in the reconventional demand, and it would seem that he would be permitted to call a third party in warranty on the demand in reconvention. Cf. Art. 380, La. Code of Practice of 1870.
ing Louisiana practice in the amendment of pleadings. There are no such unworkable limitations upon amendability as the Louisiana proscription against any amendment which changes the issue. Each litigant may "amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party." However, liberality of amendment is insured through a mandate to the trial courts. Similarly to modern Louisiana practice the amendment relates back to the date of the pleading sought to be amended.

One great advantage over Louisiana practice is the permission given, within the discretion of the trial court, to supplement the pleadings so as to set forth transactions, occurrences or events which have happened since the date of the pleading sought to be amended. Whereas evidence admitted without timely objection serves to enlarge the pleadings in Louisiana, the same result is effected by the new Rules in permitting amendment (within the discretion of the court) so as to conform to the evidence, but providing that failure to so amend will not affect the result of the trial of such issues. The new federal practice is broader, however, in permitting amendment even when timely objection to evidence is made on the ground that it is not within the issues

96. Cf. Arts. 419-420, La. Code of Practice of 1870. Actually, the interpretation placed upon these code provisions gives rise to a dual standard to test whether the issue has been changed. Thus, "the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of his demand by making it different from the one originally brought." Art. 419, La. Code of Practice of 1870. But the unfortunate statement of the rule as to amendment of answer by a simple reference to the foregoing has caused difficulty. Consequently, unless the defendant changes his prayer (which need never be done), he may amend his answer so as to set up new defenses. Meyer v. Farmer, 36 La. Ann. 785 (1884); Southport Mill v. Friedrichs, 167 La. 101, 118 So. 818 (1928).

98. "Leave [to amend] shall be freely given when justice so requires." Rule 15 (a).
100. Provided "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15 (c).
made by the pleadings. The court may grant a continuance to the adverse party in the event that he is surprised. 103

PRE-TRIAL PRACTICE—With full appreciation of the fact that pre-trial practice 104 may not be necessary in federal district courts whose dockets are not congested, discretion is granted to district courts to adopt this time and labor saving device by rule if they deem it necessary. 105 Due to the absence of the common law trial by jury in Louisiana, 106 dockets of our trial courts never reach the point of congestion, except in rare and purely temporary periods. Under such circumstances there would not appear to be any genuine need for pre-trial practice in Louisiana at this time.

PARTIES—As under Louisiana practice, 107 all actions under the new Rules must be instituted in the name of the real party at interest. 108 Generally speaking, the capacity of an individual or corporation to sue or be sued is to be determined by the law of the domicile of the individual or corporation. 109 A noteworthy change of viewpoint is that now both partnerships and unincorporated associations may sue and be sued in their common names when, but only when, a federal question is involved. 110 Louisiana practice always recognizes the entity status of partnerships which consequently may sue or be sued in their common names; 111 the unincorporated association may be sued in its common name; 112

103. Rule 15 (b).
105. Rule 16.
106. In Louisiana appeal lies both as to law and fact. La. Const. of 1921, Art. VII, §§ 10, 29. By reason of this power to review a jury’s findings of fact, there is no right to a “trial by jury” in the same sense in which the common law knows the term. Except in Orleans Parish where jury trials are used to some slight extent, civil jury trials are extremely rare in Louisiana.
108. Rule 17 (a). Legal representatives are expressly included as real parties at interest. Suits on bonds prescribed by statutes of the United States must be instituted in the name of the United States if the statute so prescribes.
109. Rule 17 (b). The exception pertains to legal representatives.
but all actions accruing to it must be enforced in the names of its members. Under both systems, incompetent parties may sue or be sued through their legal representatives, if there be such. The new Rules are slightly broader than our practice in permitting an incompetent who has no representative to sue by his next friend or guardian ad litem, and in permitting actions against him to be brought through a guardian ad litem.

With regard to actions at law, a marked improvement is effected by Rule 18 (a) which permits the joinder of different causes of action, either independently or alternatively. This has been the law of Louisiana since 1825. Another advance, of great importance in actions to set aside a fraudulent conveyance, is that "whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action." Louisiana has long permitted this practice.

Any comparison on the subject of joinder of parties is extremely difficult. This is due, not to any lack of precision of statement in the new Rules, but to the uncertainty of Louisiana law following the unfortunate decision of Gill v. City of Lake Charles. Only a comparison of the most general principles will


115. Rule 17 (c). In Louisiana the proper representative must be appointed before the rights of incompetents may be enforced. This works no particular hardship since the parties interested in the incompetent can always provoke the proper appointment.


117. Art. 148, La. Codes of Practice of 1825 and 1870. On the subject of alternative pleading, see the cases cited supra notes 56-57.


120. 119 La. 17, 43 So. 897 (1907). Prior to this decision, Louisiana had...
be attempted here. Under federal procedure, every person having a joint interest is deemed an indispensable party and must be joined;121 "necessary parties"122 must be joined if they are subject to the jurisdiction of the court both as to service and venue, otherwise it is discretionary with the trial judge as to whether the action shall proceed without them.123 However, even if the case proceeds without such necessary parties as cannot be served or whose presence in the suit would divest the court of jurisdiction, "the judgment rendered therein does not affect the rights or liabilities of absent persons."124 Corresponding procedural rules of Louisiana are somewhat different, because if all parties whose rights will be affected by the decree are not joined, the court cannot render judgment thereon.125 And if a person, whose presence in the litigation is proper yet not indispensable, has not been joined, this will be required by the court on timely objection of defendant. If he should be joined as plaintiff and refuses to do so he must be joined as a defendant.126

The new Rules concerning permissive joinder of parties are simple and are beautifully stated:

“All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative

settled all questions of “joinder of parties” by application of settled principles of Romano-canonical law relative to cumulation of actions. Cf. Kennedy v. Oakey, 3 Rob. 404 (La. 1843); Waldo & Hughes v. Angomar, 12 La. Ann. 74 (1857). All three of the statements of the court in Gill v. City of Lake Charles, supra, were erroneous. Firstly, Spanish procedure did have adequate rules on the subject. See Febbrero, Libreria de Escribanos (1798 ed.) Parte II, Lib. III, Tom. I, p. 61; Millar, Joinder of Actions in Continental Civil Procedure (1933) 23 Ill. L. Rev. 177, 194. Secondly, our early Louisiana cases did not look to the common law for guidance as to joinder of parties. Thirdly, the court did not (as it thought) in Gill v. City of Lake Charles, supra, cite with approval common law authorities on the subject of joinder of parties. What it cited were texts and precedents concerning multifariousness in equity practice—an entirely different matter. The latter, springing from the same Romano-canonical base as did our own practice, had rules quite similar to if not identical with the rules applied in our early cases. No particular damage was done Louisiana practice until quite recently, when the courts began to take the Gill case at its word and apply common law rules of joinder of parties. This subject will be discussed in greater detail in McMahon, Parties Litigant in Louisiana-III, to appear in an early issue of the Tulane Law Review.

121. Rule 19 (a).
122. On the subject of necessary and indispensable parties, see Dobie, Handbook of Federal Jurisdiction and Procedure (1928) 484-486.
123. Rule 19 (b).
124. Ibid.
125. Succession of Todd, 165 La. 453, 115 So. 653 (1928) and cases cited therein.
126. Reed v. Warren, 172 La. 1082, 136 So. 59 (1931); Pierce v. Robertson, 182 So. 544 (La. 1938).
in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.\textsuperscript{187}

This is substantially the same rule which obtained in Louisiana under the early cases,\textsuperscript{128} and substantially the same rule as to multifariousness which \textit{Gill v. City of Lake Charles}\textsuperscript{129} announced under the misapprehension that it was voicing the common law rule as to joinder of parties. Separate trials may be ordered within the discretion of federal district courts, so as to prevent delay and prejudice to the parties through permissive joinder.\textsuperscript{180} The Louisiana rules of severance are substantially in accord.\textsuperscript{181} Misjoinder of parties is not ground for dismissal of an action under either system.\textsuperscript{182} Under the new Rules "parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."\textsuperscript{183} Such a liberal and simple rule is worthy of adoption in Louisiana.

Rule 22, and the Federal Interpleader Statute\textsuperscript{134} which it contemplates, enjoy marked superiority over the Louisiana Interpleader Act.\textsuperscript{135} In the first place our statute protects only the stake holder in "possession of money," and furthermore it is

\begin{itemize}
\item \textsuperscript{127}Rule 20 (a). "A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities." Ibid.
\item \textsuperscript{128}See cases cited supra note 120.
\item \textsuperscript{129}119 La. 17, 43 So. 897 (1907).
\item \textsuperscript{130}Rules 20 (b), 21.
\item \textsuperscript{131}Sere v. Armitage, 9 Mart. 394, 13 Am. Dec. 311 (La. 1821); Mathews v. De Laronde, 8 Mart. (N.S.) 505 (La. 1830); Schwing v. Dunlap, 130 La. 498, 58 So. 162 (1912); Driefus v. Levy, 140 So. 259 (La. App. 1932). Flemming's Formulary (3d ed. 1933) 132 strikes a discordant note when, in connection with its form on the rule for severance, it says: "This form is rarely used, as a plea of misjoinder might accomplish the same thing." This is erroneous. The rule of severance is used when, and only when, the exception of misjoinder has been or would be overruled.
\item \textsuperscript{132}Rule 21; Morgan v. Tolle, 168 La. 496, 122 So. 594 (1929).
\item \textsuperscript{133}Rule 21.
\item \textsuperscript{135}La. Act 123 of 1922 [Dart's Stats. (1932) §§ 1556-1563].
\end{itemize}
much too narrow because it forces a person to admit liability judicially before permitting him to resort to the act. Federal practice, on the other hand, permits a bill in the nature of interpleader, whereby a person may implead all claimants and deny liability, thus adjudicating the liability as well as the respective rights of the claimants. Louisiana would do well to pattern its interpleader procedure upon this new practice.

The status of class actions in Louisiana practice is still too nebulous to permit of any comparison with the similar procedure contemplated by Rule 23.136

Substitution of parties as regulated by Rule 25 is substantially the same as the customary Louisiana practice on the subject.137

DEPOSITIONS AND DISCOVERY—The two general types of depositions—upon oral examination138 and upon written interrogatories139—as well as their procedure are substantially the same as under Louisiana practice. However, the time at which depositions may be taken differs. In Louisiana, with but one exception, no depositions may be taken until after joinder of issue;140 while under the new federal practice depositions may be taken by leave of court as soon as service of process has been made, and after service of the answer they may be taken as of right.141

The scope of examination in such cases is much broader and

137. Arts. 113, 120, La. Code of Practice of 1870; Rule XIV of the Supreme Court of Louisiana [1 Dart's Stats. (1932) pp. 523-524]. The general custom on points not covered by these authorities is substantially identical with the results of Rule 25.
138. Rule 30; La. Act 143 of 1934 [Dart's Stats. (Supp. 1937) §§ 1998.1-1998.5]. This is the type erroneously termed by the profession in Louisiana—probably because of the error in terminology committed in La. Act 98 of 1926 [Dart's Stats. (1932) § 1996]—as depositions de bene esse. The latter are merely provisional testimony to be used exclusively in cases where the witness is dead or absent at the time of trial. Bouvier's Law Dictionary (3d ed. Rev. 1914) 848-850. The closest approach in Louisiana to depositions de bene esse is the perpetuation of testimony. Cf. Arts. 138, 430, 440, La. Code of Practice of 1870.
Under Louisiana practice the party seeking to take depositions upon oral examination must obtain leave of court through a motion heard contradictorily with the adverse party. La. Act 143 of 1934, § 1 [Dart's Stats. (Supp. 1937) § 1998.1]. The federal practice permits the party to serve notice of his intention to take such depositions upon the adverse party, leaving the latter free to secure relief from the court against any abuse of the privilege. Rule 30 (b, d).
141. Rule 27 (a1).
more liberal than the Louisiana practice. Thus Rule 26 (b) provides that

"the deponent may be examined regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether relating to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts."

Quite evidently, this renders something more than lip service to the truism that a litigant has no proprietary right in any evidence within his possession or under his control. Discretion is vested in the court to prevent this privilege from being abused.\textsuperscript{142}

Perhaps the greatest weakness of modern Louisiana practice is the complete absence of any adequate discovery procedure.\textsuperscript{144} In view of our own apparent attitude of preventing the truth from becoming known, the discovery provisions of the new Rules are most enlightening. As a counterpart of our interrogatories on facts and articles,\textsuperscript{144} the new Rules offer the interrogatories to adverse parties, with a more workable rule on interposing objections to the answers thereto.\textsuperscript{145} Upon motion, the adverse party may be compelled to produce any of his tangible evidence for purposes of inspection, copying or photographing; and he may further be compelled to permit inspection and photographing of land or other property within his possession.\textsuperscript{146} Any Louisiana practitioner who has had to establish the authenticity of numerous documents under private signature in a trial in the state courts will be particularly interested in the following excerpt from Rule 36 (a):

"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 documents

\textsuperscript{142} Rule 30 (b, d).


\textsuperscript{144} Arts. 347-355, La. Code of Practice of 1870.

\textsuperscript{145} Rule 33.

\textsuperscript{146} Rule 34.
described in and exhibited with the request or the truth of any relevant matters of fact set forth therein. . . . 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 time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters."

Proceedings to perpetuate the testimony of witnesses or of the party form an important part of the new discovery procedure. At first blush this procedure would appear to be broader than, but otherwise similar to, perpetuation of testimony in Louisiana practice. A closer examination proves, however, that while the perpetuation of testimony forms an important cog in the federal discovery procedure, it is utterly useless for that purpose in Louisiana practice. Under the latter, the party seeking to perpetuate testimony can do so only at the peril of making a hostile witness and even the adverse party his own witness—as such vouching for his credibility, precluded from impeaching his testimony and prevented from asking him leading questions. Differently from the former federal rule, the new practice requires a party whose mental or physical condition is in controversy to submit to an examination. The same result is obtained in Louisiana practice through a different approach. However, the new federal practice has two advantages over our own sys-

147. Rule 27; Arts. 138, 430, La. Code of Practice of 1870; Art. 440, La. Code of Practice of 1870, as amended by La. Act 112 of 1914. Under the new federal practice any party may perpetuate testimony of all witnesses or parties either pending trial or prior to suit filed. Rule 27 (a1, c). Under Louisiana practice only the testimony of witnesses who are aged, infirm, or about to depart from the state may be perpetuated pending trial. Art. 430, supra. Prior to trial the testimony of all persons might be perpetuated. Art. 440, supra.


150. Rule 35 (a).

151. Cf. Grant v. New Orleans Ry. & Light Co., 129 La. 811, 56 So. 897 (1911); Kennedy v. New Orleans Ry. & Light Co., 142 La. 879, 77 So. 777 (1918); Bailey v. Fisher, 11 La. App. 187, 123 So. 166 (1929). Louisiana takes the position that while a party cannot be forced to submit to such an exami-
tern: the examination is held at a time and place specified by the
court and not by the adverse party; and the party examined is
entitled to secure a copy of the written report of the examining
physician.\textsuperscript{152} Penalties for failure to make discovery are in all
cases within the discretion of the court, but may include punish-
ment for contempt and taking the fact sought to be discovered as
confessed.\textsuperscript{158}

If a law suit is a search for truth, then no one could object
to the provisions of the new Rules relative to discovery. The
greatest single improvement which could be effected in Louisiana
practice would be a statute adopting all features of the new
federal discovery procedure.

\textbf{TRIALS—} "The right of trial by jury as declared by the Seventh
Amendment to the Constitution or as given by a statute of the
United States [is] preserved to the parties inviolate."\textsuperscript{154} However,
the new Rules made a most important change from the former
practice where jury trials in actions at law were had unless
waived by all parties, and shifted the burden of inertia by forcing
one of the parties to demand jury trial under penalty of it being
waived.\textsuperscript{155} This procedure is one of the many contributions of
Louisiana practice to American procedural law.\textsuperscript{156} Under the new
Rules a party may specify the issues which he wishes tried by
jury.\textsuperscript{157} If jury trial has been demanded by one of the parties
it may not be waived except by consent of all parties.\textsuperscript{158} Furth-
ernore, the court may of its own motion have the case tried with-
out a jury if it concludes that under the law right to a jury trial
does not exist.\textsuperscript{159} Conversely, even when the parties have waived
jury trial, the court may in its discretion require it.\textsuperscript{160}

Discretion is vested in the federal district courts to provide,
through rules of their own, the procedure for assigning cases for
trial.\textsuperscript{161}

\textsuperscript{152} Rule 35 (b).
\textsuperscript{153} Rule 37.
\textsuperscript{154} Rule 38 (a).
\textsuperscript{155} Rule 38 (b, d).
\textsuperscript{156} Arts. 494-495, La. Codes of Practice of 1825 and 1870. Louisiana was
the first jurisdiction in America to require that jury trial be demanded spe-
cially.
\textsuperscript{157} Rule 38 (c).
\textsuperscript{158} Rule 39 (a).
\textsuperscript{159} Ibid.
\textsuperscript{160} Rule 39 (b).
\textsuperscript{161} Rule 40.
The rules relating to the dismissal of actions under the new federal practice appear to be much more liberal than and superior to the corresponding rules of Louisiana practice. An action may be dismissed by stipulation of all the parties at any time, and by the plaintiff filing a notice of dismissal at any time prior to service of answer. Unless otherwise stated in the notice or stipulation, such dismissal is without prejudice, except that voluntary dismissal operates as res judicata when effected through notice of a plaintiff who had previously dismissed his case in any state or federal court. 162 Except as stated above, no action may be dismissed without an order of court which may fix the terms and conditions thereof. "If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court." 163 Corresponding Louisiana practice is too uncertain to make any detailed comparison feasible. 164

On motion of defendant the action may be dismissed for plaintiff's failure to prosecute, or for failure to comply with the Rules or any order of court. On the close of plaintiff's case defendant (with full right to introduce testimony if the motion is overruled) may also move to dismiss on the ground that under the law and facts plaintiff has shown no rights to relief. 165 The latter would appear to be the defendant's motion for a directed verdict of the former federal practice under a new name. It has no counterpart in Louisiana; 166 although its adoption would seem advisable. 167 Involuntary dismissal, unless the order therefor otherwise specifies, operates as an adjudication upon the merits. 168

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162. Rule 41 (a1).
163. Rule 41 (a2).
164. "The plaintiff may, in every state of the suit previous to judgment being rendered, discontinue the suit on paying the costs." Art. 491, La. Code of Practice of 1870. At one time it seemed that the following exceptions to this general rule were recognized: (1) After evidence had been adduced on the trial, discontinuance was allowed within the discretion of the court; and (2) No discontinuance was permitted: (a) when defendant had prayed for damages for dissolution of plaintiff's conservatory writ; or (b) when a reconventional demand had been filed; or (c) when plaintiff's right of action had been seized by a creditor. State ex rel. Gondran v. Rost, 48 La. Ann. 455, 19 So. 256 (1896). However, under more recent cases it would seem probable that the only exception to the general rule of discontinuance is after a reconventional demand had been filed. Smith v. New Orleans Public Service, 179 So. 606 (La. App. 1938) and cases cited therein.
165. Rule 41 (b).
167. Such procedure would tend to shorten the trial of cases where the plaintiff fails to prove a right to the relief demanded.
168. Rule 41 (b).
Similarly to Louisiana practice, under the new Rules the court may order the consolidation of actions involving common questions of law or fact so as to secure a joint hearing or trial.\textsuperscript{169} The new federal practice goes further, however, in adopting the converse rule which permits the judge to order "separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."\textsuperscript{170}

The greatest liberality as to evidence is effected by the new Rules. Thus, "all evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held."\textsuperscript{171} The statute or rule which favors the reception of the evidence governs.\textsuperscript{172} The new Federal Rules are slightly broader than Louisiana practice in permitting a party to lead an unwilling or hostile witness.\textsuperscript{173} On the other hand, the Louisiana statute is somewhat broader than pertinent provisions of the new Rules on the subject of cross-examination of the adverse party, or of an officer or managing agent thereof.\textsuperscript{174} Both systems of procedure have abolished bills of exceptions;\textsuperscript{175} and both appear to have adopted similar methods of making a record of excluded evidence.\textsuperscript{176}

An excellent provision is that of Rule 43 (e), concerning hearings on contradictory motions. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties or may direct that
the matter be heard wholly or in part on oral testimony or depositions. A similar provision in our injunction statute\(^{177}\) has proven workable, and the practice might be extended to the hearing of all exceptions and rules in Louisiana.

With the exceptions noted hereinafter, both systems have substantially similar procedures for subpoenas\(^{178}\) and subpoenas to compel the production of documentary evidence.\(^{179}\) However, under the new Rules both subpoenas and subpoenas for the production of documentary evidence may be issued by the clerk, "signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service."\(^{180}\) Service of subpoenas may be made by the marshal, or his deputy, or by another person who is not a party and is not less than 18 years of age.\(^{181}\)

The new Rules retain the very excellent procedure of the former federal practice as to examination of prospective jurors, either by the parties or their attorneys, or by the court. In the latter case, the examination may be supplemented by further inquiry of the parties or their counsel; or the court itself may submit such additional questions of the parties or their attorneys as it sees fit.\(^{182}\) Our local practice contemplates examination only by the parties or their counsel,\(^{183}\) and any one who has witnessed the examination of prospective jurors by the federal judge can appreciate the reasons why the new Rules retained the former practice. Differently from Louisiana practice, the court is permitted to call one or two alternate jurors to serve if any of the regular panel subsequently become incapacitated or disqualified.\(^{184}\) By stipulation of counsel, a jury may be less than twelve and a verdict of a stated majority shall be taken as the verdict of the jury.\(^{185}\)

Differently from Louisiana practice,\(^{186}\) the court may require the jury to return only special verdicts in the form of written findings upon each issue of fact.\(^{187}\) A new device permits the

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177. La. Act. 29 of 1924, § 2 [Dart's Stats. (1932) § 2079].
179. Rule 45 (b); Arts 139-143, 473-475, La. Code of Practice of 1870.
180. Rule 45 (a).
181. Rule 45 (c).
182. Rule 47 (a).
184. Rule 47 (b).
187. Rule 49 (a).
court to "submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict." If such answers are harmonious with the general verdict, judgment shall be entered upon the verdict. If the answers are consistent with each other but one or more are not harmonious with the general verdict, the court may order a new trial or return the case to the jury for further consideration or may direct the entry of judgment in accord with the answers. When the answers are not harmonious either with themselves or the general verdict the court may order a new trial or return the case to the jury for further consideration.

The new federal practice retains the old motion for a directed verdict but has simplified the procedure in two respects. In the first place, the mover has the right, without express reservation, to introduce evidence if the motion is overruled; and secondly, even though all parties may have moved for directed verdicts this fact no longer constitutes a waiver of jury trial. The former inability of the judge to render judgment contrary to the verdict has been modified so that whenever a motion for directed verdict has been denied or not granted for any reason, 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 10 days after reception of a verdict (or within 10 days from the discharge of the jury if no verdict was returned) the party who moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accord with the motion for a directed verdict. Such party may join with this motion a motion for a new trial, or may pray for the latter in the alternative. If a verdict has been received the court may either allow the judgment to stand or may reopen the case and either order a new trial or direct the entry of a judgment as if the verdict requested had been directed. If no verdict has been returned the court may direct the entry of judgment as if the verdict requested had been directed or may

188. Rule 49 (b).
189. Ibid.
190. Rule 50 (a).
192. Rule 50 (b).
order a new trial. Louisiana practice has not the remotest analogy to the federal procedure outlined above.

The two systems have substantially the same rules regarding the judge's instructions to the jury, the parties' right to request special charges and the time of objecting to the charge. However, there is a tremendous difference between the two because the federal judge enjoys the power to comment on the evidence which is denied the trial judge in Louisiana.

Where the case is tried by the court without a jury, special findings of fact must be stated separately from the conclusions of law. Similarly to Louisiana practice, these findings of fact are reviewable on appeal. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The new Rules go further than our practice, however, in permitting the court to amend its findings of fact and the judgment rendered—without the necessity of granting a new trial (or rehearing)—on motion made within 10 days after entry of judgment.

**JUDGMENT**—Differently from Louisiana practice the federal court may render judgment as to one or more of a plurality of claims, thus terminating the action with respect to such claim, but proceeding therewith with respect to all remaining claims. Except in case of judgment by default, the court "shall grant the relief to which the party in whose favor [the judgment] is rendered is entitled, even if the party has not demanded such relief in his pleadings." The same result is obtained in Louisiana under the pleading's prayer for general relief. Ordinarily costs are imposed upon the party cast in judgment, but the new Rules confer discretion upon the trial court to direct otherwise. This discretionary power has obvious advantages over the arbitrary rule in the trial courts of Louisiana.

193. Ibid.
196. Rule 52 (a).
197. Ibid.
198. Rule 52 (b).
199. Rule 52 (b).
200. Rule 54 (b).
201. Rule 54 (c).
202. Rule 54 (d).
204. Rule 54 (d).
205. Costs are always imposed by trial courts upon the party cast. Arts. 549, 551-552, La. Code of Practice of 1870. The appellate courts, however, are
Under the new Rules a judgment by default may be entered by the clerk of court when the demand is for "a sum certain or for a sum which can by computation be made certain."\textsuperscript{204} All other default judgments must be rendered by the court itself.\textsuperscript{205} Whenever any inquiry is necessary to determine the amount of damages or to establish the truth of any statement by evidence, the court may conduct such hearing or make whatever references it may deem necessary. Trial by jury in default cases is extended to the parties when required by any statute of the United States. If the party against whom judgment is sought has appeared in the action, written notice of the application for default judgment must be made at least three days prior to the hearing thereon.\textsuperscript{206} Rendition of default judgments against incompetents is prohibited unless there has been an appearance by the legal representatives.\textsuperscript{207}

Under Louisiana practice the plaintiff may move for judgment in whole or in part if, on the face of the pleadings, no defense sufficient in law has been pleaded which would prevent plaintiff from obtaining some or all of the relief prayed for.\textsuperscript{208} The summary judgment procedure of the new Federal Rules broadens the scope of this device by extending it to all parties seeking to recover upon a claim, counterclaim or cross-claim.\textsuperscript{209} Even more important, however, is that under the new federal practice the motion for summary judgment is not triable only on the face of the pleadings; the parties are permitted to support or oppose the motion by affidavits which the court may consider. These affidavits shall "set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."\textsuperscript{210} "The court may permit affidavits to be supplemented or opposed by depositions empowered to assess costs at their discretion. La. Act 229 of 1910, § 2 [Dart's Stats. (1932) § 1977].

\textsuperscript{204} Rule 55 (b1).
\textsuperscript{205} Rule 55 (b2).
\textsuperscript{206} Ibid.
\textsuperscript{207} "No judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein." Rule 55 (b2). The Rules are silent as to the procedure to be followed when the incompetent's legal representative does not appear. Rule 55 (b2). Apparently, the court's power to punish for contumacy would be a sufficient sanction to enforce a court order requiring such appearance.

\textsuperscript{208} La. Act 157 of 1912, § 1 (4) as last amended by La. Act 27 of 1926 [Dart's Stats. (1932) § 1483 (4) ].
\textsuperscript{209} Rule 56 (a).
\textsuperscript{210} Rule 56 (e).
or by further affidavits."211 A similar broadening of the scope of the present Louisiana procedure on the subject would be a material improvement.

The procedure for obtaining a declaratory judgment in the federal courts is provided by statute,212 and this procedure the new Rules retain.213 The federal district courts, however, are empowered to grant a judgment for declaratory relief in cases where it is appropriate despite the existence of another adequate remedy; and they are further permitted to advance an action for a declaratory judgment on the calendar, so as to obtain a speedy hearing thereof.214 One of the most serious defects of Louisiana practice is the complete absence of declaratory judgment procedure.215

The motion for new trial in actions at law is amalgamated with the equity petition for rehearing by Rule 59 (a) which provides:

"A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

211. Ibid.
213. Rule 57.
214. Ibid.
215. In 1930 a committee of the Louisiana State Bar Association drafted a proposed Declaratory Judgments Act for Louisiana, which was amended to some degree by the committee in 1931. 30 La. State Bar Ass'n Rep. (1930) 169-172; 31 La. State Bar Ass'n Rep. (1931) 146-147. This proposed act was rejected by the membership in 1932 and the subject thus far has not been revived. Of all the arguments directed against a Declaratory Judgments Act only that of Mr. Sidney L. Herold of the Shreveport Bar merits consideration. His argument may be summed up by the following words of his speech against recommending adoption of the act: "I can see in a declaratory judgment law abundant opportunity for the manufacture of jurisprudence by moot cases." 32 La. State Bar Ass'n Rep. (1932) 62. Mr. Herold's real objection is to case precedent. He has assumed his major premise that the Declaratory Judgments Act will permit moot cases to be submitted to the courts.
The same reasons which permit a party to move for a new trial enable the court to grant one on its own initiative.\textsuperscript{216} Thus far the motion for new trial is substantially similar to the Louisiana rule for new trial\textsuperscript{217} and petition for rehearing.\textsuperscript{218} But all motions for new trial, and new trials granted on the court's own initiative, must be made within 10 days after entry of judgment;\textsuperscript{219} except that when a party moves for a new trial on the ground of newly discovered evidence the motion may be filed after 10 days from date of entry of judgment as long as it is filed prior to the expiration of the time for appeal.\textsuperscript{220} The parties may present affidavits in support of or in opposition to motions for new trial.\textsuperscript{221} No error in ruling on evidence, or error in any ruling or order, is ground for a new trial or setting aside a verdict, or for disturbing any judgment or order "unless refusal to take such action appears to the court inconsistent with substantial justice."\textsuperscript{222}

Similarly to Louisiana practice, the new Rules permit the correction of clerical errors in judgments or orders at any time.\textsuperscript{223} Differently from Louisiana practice, however, the new Rules permit the court to relieve "a party or his legal representative from a judgment, order or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect."\textsuperscript{224} Such a motion must be made within a reasonable time, but in no case to exceed six months from the time the judgment, order or proceeding was taken.\textsuperscript{225}

The power of trial and appellate courts to stay proceedings to enforce judgments during the pendency of appeals will be discussed later. In addition to such power, the federal district courts are given discretion to stay proceedings to enforce judgments during the pendency of any motion for new trial, motion for relief from a judgment or order, or motion for judgment \textit{non obstante veredicto}, on such conditions for the security of the adverse party as the courts may deem proper.\textsuperscript{226}

\begin{itemize}
\item \textsuperscript{216} Rule 59 (d).
\item \textsuperscript{217} Arts. 557-563, \textit{La.} Code of Practice of 1870.
\item \textsuperscript{218} \textit{La.} Act 10 of 1926 [\textit{Dart's Stats.} (1932) \textit{\S} 1480-1482].
\item \textsuperscript{219} Rule 59 (b, d).
\item \textsuperscript{220} Rule 59 (b).
\item \textsuperscript{221} Rule 59 (a, c).
\item \textsuperscript{222} Rule 61.
\item \textsuperscript{223} Rule 60 (a). Cf. Glenn Falls Indemnity Co. v. Manning, 168 So. 787 (\textit{La. App.} 1938) and cases cited therein.
\item \textsuperscript{224} Rule 60 (b).
\item \textsuperscript{225} Ibid.
\item \textsuperscript{226} Rule 62 (b).
\end{itemize}
PROVISIONAL AND FINAL REMEDIES—All provisional remedies, for the seizure of person or property to secure satisfaction of the judgment ultimately, which are provided by statutes of the United States or state law at the time may be employed under the new Rules, regardless of whether the action was lodged in the federal court originally, or removed there. 227 Consequently, the Louisiana conservatory writs of arrest, attachment, provisional seizure and sequestration are available to litigants in the federal courts. It is important to remember, however, that under federal procedure these provisional remedies are but incidents to the suit, and unless personal service is had upon the defendant in actions instituted originally in the federal courts, the latter will not have jurisdiction. 228 Thus, such jurisdiction can not be acquired merely through nonresident attachment proceedings. The procedure for injunctive relief is prescribed specially by the new Rules. 229 It is substantially identical with Louisiana's present injunction procedure. 230

Money judgments are enforced by a "writ of execution" unless the court directs otherwise. This shall be carried out "in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable." 231 Examination of the judgment debtor is permitted by the Rules. 232 Judgments which direct the execution of documents or the performance of acts may be enforced either: (1) through the appointment of some person to execute the document if the party cast refuses to do so; (2) through punishment for contempt for refusal to comply with the judgment; or (3) if the property is within the jurisdiction of the court, through the rendition of another judgment divesting and vesting title in accordance with the original judgment. 233 These methods for enforcing judgments other than those for the payment of a sum of money, appear to be superior to those obtaining under Louisiana practice. 234

227. Rule 64.
229. Rule 65.
231. Rule 69 (a).
232. Ibid.
233. Rule 70.
A most interesting procedural device adopted by the new Federal Rules is the 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... with costs then accrued." If the offer is accepted within 10 days of its service, either party may then file the notices of offer and acceptance with the clerk who enters judgment accordingly. If the offer is not accepted within 10 days it is deemed withdrawn and evidence thereof is not admissible. If the adverse party does not obtain a judgment more favorable than the offer he is not entitled to recover costs subsequent thereto. This is quite similar to the rules of tender in Louisiana, but permit a party to escape costs and annoyance of continued litigation without actually paying the amount tendered.

Appeals—Under the new Rules an appeal from a district court to the Supreme Court is taken by a petition for appeal accompanied by an assignment of errors. "The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme Court of the United States governing such an appeal."

An appeal from a federal district court to a circuit court of appeals is prosecuted by filing in the district court a notice of appeal. This notice "shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken." Notification of the appeal is mailed to the attorneys of or all interested parties by the clerk; but his failure to do so does not affect the validity of the appeal. This practice appears simpler than, but somewhat similar to, the appeal through petition or motion in Louisiana. Similarly to our own practice, if the appeal is not intended to suspend the operation of the judgment only a cost bond is necessary. While the amounts of the bonds may vary somewhat,

235. Rule 68.
236. Ibid.
238. Rule 72; Revised Rules of the Supreme Court of the United States (1928), Rules 10 (1), 12 as amended, 36; 50 S.Ct. xxxi, xxxii, xxxviii (1929); 52 S. Ct. xxxi-xxxii (1931).
239. Rule 73 (a).
240. Rule 73 (b).
243. Rule 73 (c).
under both systems a bond adequate to protect the appellee must be furnished if the appeal is to suspend the enforcement of the judgment. 244

The new Rules make an important change affecting appeals by parties cast jointly in the same judgment. Under the former practice, unless all such parties united in suing out the appeal, summons and severance was necessary. 245 Rule 74 now permits the appeal in such cases to be prosecuted by any of the parties jointly cast, without the necessity of summons and severance.

Any one familiar with Edward Livingston's efforts toward simplification of procedure in Louisiana will rise from a study of the new Federal Rules with a feeling that his spirit has helped to guide and direct the work of the Supreme Court Committee. No stone has been left unturned in the effort to insure "the just, speedy and inexpensive determination of every action." 246 The application of these Rules in the federal district courts of Louisiana is certain to demonstrate the need for procedural reform in this state.

We do not imply that Louisiana's present system is so un-workable that it should be discarded in order to accept another. There are many points of excellence in our procedure which other American jurisdictions have not yet attained. We do submit, however, that there is considerable room for improvement in our present practice, and that much could be borrowed profitably from the new Federal Rules. No large-scale program of improvement of procedure has been attempted in Louisiana since 1824. 247 For the most part we are employing a system designed for the needs of more than a century ago. What little improvement has been attempted has not been co-ordinated, and in many instances the remedy has proven worse than the evil. If, during the past hundred and fourteen years, Louisiana has been waiting for a propitious moment to continue the work of Livingston, then that moment is at hand.

Just as important, however, as the subjects of reform are the methods of reform. Two modes of effecting procedural reform

244. Rule 73 (d); Art. 575, La. Code of Practice of 1870, as last amended by La. Act 289 of 1926; Arts. 576-577, La. Code of Practice of 1870.
246. Rule 1.
247. The revision of 1870 merely deleted all references to the institution of slavery, and brought into the Code of Practice all statutes affecting procedure adopted since 1825.
are open to us. Either we may divide responsibility for the administration of civil justice by permitting a Legislature composed in the main of laymen to select the tools with which the courts are required to work, or we may place the entire responsibility definitely upon the courts by directing them to prescribe suitable rules of procedure. The first method contemplates that any necessary revision be effected by a large legislative body meeting infrequently and with little or no opportunity for adequate study. The second places the responsibility of improvement in the branch of government which has the best opportunity of discerning the necessity thereof, and which can effect the needed revision at any time. Louisiana practice today is the fruit of the first method. The new Federal Rules are the product of the second. A comparison of the results obtained is sufficient to determine our mode of procedural reform.