and thus supersedes the apparent right to dismiss by notice of dismissal.

Rule 42. Consolidation; Separate Trials

(a) CONSOLIDATION. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Subdivision (a) is based upon U.S.C., Title 28, [former] §734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) §1081; Calif.Code Civ.Proc. (Deering, 1937) §1048; N.M.Stat.Ann. (Courtright, 1929) §105–828; N.Y.C.P.A. (1937) §§96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) §1048; N.Y.C.P.A. (1937) §96; American Judicature Society, Bulletin XIV (1919) Art. 3, §2 and Art. 10, §10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule 12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, *Routine Bifurcation of Negligence Trials*, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See *e.g.*, *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 42 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 43. Taking Testimony

(a) IN OPEN COURT. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) AFFIRMATION INSTEAD OF AN OATH. When these rules require an oath, a solemn affirmation suffices.

(c) EVIDENCE ON A MOTION. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) INTERPRETER. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, [former] §635 (Proof in common-law actions), §637 [see 2072, 2073] (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the practice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-examination modify U.S.C., Title 28, §725 [now 1652] (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same: 2*, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] §631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) §1885 *et seq.*

Note to Subdivision (c). See [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1 (1876); *Nelson v. United States*, 201 U.S. 92. 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, §1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

NOTES OF ADVISORY COMMITTEE ON RULES—1946 SUPPLEMENTARY NOTE REGARDING RULES 43 AND 44

These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence* (3d ed. 1940) 200–204; Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States* (C.C.A.2d, 1941) 117 F.(2d) 387, cert. den. (1941) 313 U.S. 587; *Mosson v. Liberty Fast Freight Co.* (C.C.A.2d, 1942) 124 F.(2d) 448; *Hartford Accident & Indemnity Co. v. Olivier* (C.C.A.5th, 1941) 123 F.(2d) 709; *Anzano*