

right, unless the action is against the United States and a federal statute provides for a nonjury trial.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

The provisions for express waiver of jury trial found in U.S.C., Title 28, [former] § 773 (Trial of issues of fact; by court) are incorporated in this rule. See rule 38, however, which extends the provisions for waiver of jury. U.S.C., Title 28, [former] § 772 (Trial of issues of fact; in equity in patent causes) is unaffected by this rule. When certain of the issues are to be tried by jury and others by the court, the court may determine the sequence in which such issues shall be tried. See *Liberty Oil Co. v. Condon Nat. Bank*, 260 U.S. 235 (1922).

A discretionary power in the courts to send issues of fact to the jury is common in state procedure. Compare Calif.Code Civ.Proc. (Deering, 1937) § 592; 1 Colo.Stat. Ann. (1935) Code Civ.Proc., ch. 12, § 191; Conn.Gen.Stat. (1930) § 5625; 2 Minn.Stat. (Mason, 1927) § 9288; 4 Mont.Rev. Codes Ann. (1935) § 9327; N.Y.C.P.A. (1937) § 430; 2 Ohio Gen.Code Ann. (Page, 1926) § 11380; 1 Okla.Stat. Ann. (Harlow, 1931) § 351; Utah Rev.Stat. Ann. (1933) § 104-23-5; 2 Wash.Rev.Stat. Ann. (Remington, 1932) § 315; Wis.Stat. (1935) § 270.07. See [former] Equity Rule 23 (Matters Ordinarily Determinable at Law When Arising in Suit in Equity to be Disposed of Therein) and U.S.C., Title 28, [former] § 772 (Trial of issues of fact; in equity in patent causes); *Colleton Merc. Mfg. Co. v. Savannah River Lumber Co.*, 280 Fed. 358 (C.C.A.4th, 1922); *Fed. Res. Bk. of San Francisco v. Idaho Grimm Alfalfa Seed Growers' Ass'n*, 8 F.(2d) 922 (C.C.A.9th, 1925), cert. den. 270 U.S. 646 (1926); *Watt v. Starke*, 101 U.S. 247, 25 L.Ed. 826 (1879).

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 39 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 40. Scheduling Cases for Trial**

Each court must provide by rule for scheduling trials. The court must give priority to actions entitled to priority by a federal statute.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

U.S.C., Title 28, [former] § 769 (Notice of case for trial) is modified. See [former] Equity Rule 56 (On Expiration of Time for Depositions, Case Goes on Trial Calendar). See also [former] Equity Rule 57 (Continuances).

For examples of statutes giving precedence, see U.S.C., Title 28, § 47 [now 1253, 2101, 2325] (Injunctions as to orders of Interstate Commerce Commission); § 380 [now 1253, 2101, 2284] (Injunctions alleged unconstitutionality of state statutes); § 380a [now 1253, 2101, 2284] (Same; Constitutionality of federal statute); [former] § 768 (Priority of cases where a state is party); Title 15, § 28 (Antitrust laws; suits against monopolies expedited); Title 22, § 240 (Petition for restoration of property seized as munitions of war, etc.); and Title 49, [former] § 44 (Proceedings in equity under interstate commerce laws; expedition of suits).

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 40 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.

The best methods for scheduling trials depend on local conditions. It is useful to ensure that each district adopts an explicit rule for scheduling trials. It is

not useful to limit or dictate the provisions of local rules.

**Rule 41. Dismissal of Actions**

(a) VOLUNTARY DISMISSAL.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

- (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
- (ii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

(b) INVOLUNTARY DISMISSAL; EFFECT. If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.

(c) DISMISSING A COUNTERCLAIM, CROSSCLAIM, OR THIRD-PARTY CLAIM. This rule applies to a dismissal of any counterclaim, crossclaim, or third-party claim. A claimant's voluntary dismissal under Rule 41(a)(1)(A)(i) must be made:

- (1) before a responsive pleading is served; or
- (2) if there is no responsive pleading, before evidence is introduced at a hearing or trial.

(d) COSTS OF A PREVIOUSLY DISMISSED ACTION. If a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court:

- (1) may order the plaintiff to pay all or part of the costs of that previous action; and
- (2) may stay the proceedings until the plaintiff has complied.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Dec. 4, 1967, eff. July 1, 1968; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

*Note to Subdivision (a).* Compare Ill.Rev.Stat. (1937) ch. 110, § 176, and *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 26.