REPORT
OF
PROPOSED AMENDMENTS
TO
RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

Prepared by the

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

New matter is shown in italics; matter to be omitted is lined through

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UNITED STATES
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REPORT OF THE ADVISORY COMMITTEE

To the Honorable, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The present Federal Rules of Civil Procedure went into effect September 16, 1938. Except to extend their application to proceedings under the Longshoremen's and Harbor Workers' Compensation Act, no change in the rules has heretofore been made. They have been tested and tried for over 7 years. Fortunately no deficiencies developed during that period of such a nature as to require immediate amendment. The time has arrived when the Court should consider amendments which experience may have shown to be desirable.

Early in 1942 the Advisory Committee began to consider amendments. Meetings of the Committee were held at Washington

May 17–20, 1943,
October 25–28, 1943,
April 3–5, 1944,
January 29–February 2, 1945,
April 30–May 2, 1945,
March 25–28, 1946.

A preliminary draft of proposed amendments was printed and distributed to the profession in May 1944. After consideration of the suggestions from the bar and bench resulting from that distribution, a second preliminary draft was printed and distributed in May 1945. In each case the responses from the profession were voluminous and helpful. Every suggestion, whether from an individual, a committee, or a group, was mimeographed and supplied to each member of the Advisory Committee, and considered at our meetings. The final result of our efforts is contained in the attached draft of proposed amend-

ments, the adoption of which we recommend. The purpose and effect of the amendments are stated in the notes.

The Committee still have under advisement a proposed rule to govern the practice in condemnation cases under the power of eminent domain. Our first preliminary draft of proposed amendments contained a draft of such a rule. At this time we do not feel warranted in making a recommendation to the Court on that subject. If we are able to make another draft of a condemnation rule which gives promise of being generally acceptable to the Government agencies affected, and to the profession, it will be printed and distributed to the profession, and after consideration of the suggestions which may then be received, the Committee will decide whether to recommend the promulgation of such a rule by the Court. It is not desirable to delay consideration of our other recommendations to await further action on a condemnation rule.

June 14, 1946.

Respectfully submitted.

WILLIAM D. MITCHELL, *Chairman,*
GEORGE WHARTON PEPPER, *Vice Chairman,*
EDGAR B. TOLMAN, *Secretary,*
CHARLES E. CLARK, *Reporter,*
WILBUR H. CHERRY,
ARMISTEAD M. DOBIE,
ROBERT G. DODGE,
GEORGE DONWORTH,
JOSEPH G. GAMBLE,
MONTE M. LEMANN,
SCOTT M. LOFTIN,
EDMUND M. MORGAN,
EDSON R. SUNDERLAND,

Advisory Committee.

REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES

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Rule 6. Time

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if ~~application~~ *request* therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion *made after the expiration of the specified period* permit the act to be done ~~after the expiration of the specified period~~ where the failure to act was the result of excusable neglect; but it may not ~~enlarge the period~~ *extend the time* for taking any action under ~~Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.~~ *Rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.*

(c) UNAFFECTED BY EXPIRATION OF TERM. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the *continued existence or* expiration of a term of court. The *continued existence or* expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

Note. Subdivision (b). The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73 (a). Rule 6 (c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6 (b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6 (b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59 (b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6 (b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6 (b).

Decisions of lower federal courts suggest that some of the rules containing time limits which may be set aside under Rule 6 (b) are Rules 25, 50 (b), 52 (b), 60 (b), and 73 (g).

In a number of cases the effect of Rule 6 (b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to

relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6 (b), and in some cases the rule has been so construed.

With regard to Rule 25 (a) for substitution, it was held in *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Service 25a.1, Case 1, and in *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025, that under Rule 6 (b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25 (a).

As to Rules 50 (b) for judgments notwithstanding the verdict and 52 (b) for amendment of findings and vacation of judgment, it was recognized in *Leishman* v. *Associated Wholesale Electric Co.* (1943) 318 U. S. 203, that Rule 6 (b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52 (b). See *Coca-Cola* v. *Busch* (E. D. Pa. 1943) 7 Fed. Rules Service 59 b. 2, Case 4. Obviously, if the time limit in Rule 52 (b) could be set aside under Rule 6 (b), the time limit in Rule 50 (b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered "forthwith" on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59 (b) and (d) for making motions for or granting new trial could not be set aside under Rule 6 (b), because Rule 6 (b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc.* v. *Coe* (App. D. C. 1943) 136 F. (2d) 771; *Jusino* v. *Morales & Tio* (C. C. A. 1st, 1944) 139 F. (2d) 946; *Coca-Cola Co.* v. *Busch* (E. D. Pa. 1943) 7 Fed. Rules Service 59b. 2, Case 4; *Peterson* v. *Chicago Great Western Ry. Co.* (D. Neb. 1943) 7 Fed. Rules Service 59b.2, Case 1; *Leishman* v. *Associated Wholesale Electric Co.* (1943) 318 U. S. 203.

As to Rule 60 (b) for relief from a judgment, it was held in *Schram* v. *O'Connor* (E. D. Mich. 1941) 5 Fed. Rules Serv. 6 b. 31, Case 1, 2 F. R. D. 192, s. c. 5 Fed. Rules Serv. 6 b. 31, Case 2, F. R. D. 192, that the six-

months time limit in original Rule 60 (b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6 (b). The contrary result was reached in *Wallace* v. *United States* (C. C. A. 2d, 1944) 142 F. (2d) 240, cert. den. (1944) 323 U. S. 712; *Reed* v. *South Atlantic Steamship Co. of Del.* (D. Del. 1942) 6 Fed. Rules Serv. 60 b. 31, Case 1.

As to Rule 73 (g), fixing the time for docketing an appeal, it was held in *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3d, 1939) 104 F. (2d) 83, that under Rule 6 (b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73 (g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n* v. *Snyder* (C. C. A. 6th, 1940) 109 F. (2d) 469 and in *Burke* v. *Canfield* (App. D. C. 1940) 111 F. (2d) 526.

The amendment of Rule 6 (b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6 (b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6 (c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6 (c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under 52 (b) has the same effect

on the time for appeal. *Leishman* v. *Associated Wholesale Electric Co.* (1943) 318 U. S. 203. By the same reasoning a motion for judgment under Rule 50 (b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6 (c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6 (b) is amended to prevent enlargement of the times specified in Rules 50 (b), 52 (b) and 60 (b), and the limitation as to Rule 59 (b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59 (e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6 (b). In consideration of the amendment, however, it should be noted that Rule 60 (b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73 (g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6 (b).

As to Rule 59 (c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6 (b) to enlarge the time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6 (b) are merely clarifying and conforming. Thus "request" is substituted for "application" in clause (1) because an

application is defined as a motion under Rule 7 (b). The phrase "extend the time" is substituted for "enlarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6 (b), "or the period for taking an appeal as provided by law", is deleted and a reference to Rule 73 (a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

Subdivision (*c*). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill* v. *Hawes* (1944) 320 U. S. 520; *Boaz* v. *Mutual Life Ins. Co. of New York* (C. C. A. 8th, 1944) 146 F. (2d) 321; *Bucy* v. *Nevada Construction Co.* (C. C. A. 9th, 1942) 125 F. (2d) 213.

Rule 7. Pleadings Allowed; Form of Motions.

(a) PLEADINGS. There shall be a complaint and an answer; and there shall be a reply~~, if the answer contains~~ *to* a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

Note. This amendment eliminates any question as to whether the compulsory reply, where a counterclaim is pleaded, is a reply only to the counterclaim or is a general reply to the answer containing the counterclaim. See Commentary, *Scope of Reply Where Defendant Has Pleaded Counterclaim* (1939) 1 Fed. Rules Serv. 672;

Fort Chartres and Ivy Landing Drainage and Levee District No. Five v. *Thompson* (E. D. Ill. 1945) 8 Fed. Rules Serv. 13.32, Case 1.

Rule 12. Defenses and Objections—When and How Presented—by Pleading or Motion—Motion for Judgment on Pleadings.

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of ~~any~~ *a* motion ~~provided for in~~ *permitted under* this rule alters ~~the time fixed by these rules for serving any required responsive pleading~~ *these periods of time* as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading ~~may~~ *shall* be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement ~~or for a bill of particulars,~~ the respon-

sive pleading ~~may~~ *shall* be served within ~~ten~~ *10* days after the service of the more definite statement ~~or bill~~ of ~~particulars~~. ~~In either case the time for service of the responsive pleading shall be not less than remains of the time which would have been allowed under these rules if the motion had not been made.~~

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, *(7) failure to join an indispensable party.* A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as*

provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) MOTION FOR JUDGMENT ON THE PLEADINGS. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. *If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

(d) PRELIMINARY HEARINGS. The defenses specifically enumerated (1)~~—(6)~~(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) MOTION FOR MORE DEFINITE STATEMENT ~~OR FOR BILL OF PARTICULARS~~. ~~Before responding to a pleading or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.~~ *If a pleading to which a responsive pleading is permitted is so vague or*

ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. ~~A bill of particulars becomes part of the pleading which it supplements~~.

(f) MOTION TO STRIKE. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order *striken from any pleading any insufficient defense or* any redundant, immaterial, impertinent, or scandalous matter ~~striken from any pleading.~~

(g) CONSOLIDATION OF ~~MOTIONS~~ *DEFENSES*. A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted, except ~~that prior to making any other motions under this rule he may make a motion in which are joined all the defenses~~

~~numbered (1) to (5) in subdivision (b) of this rule which he cares to assert~~ *as provided in subdivision (h) of this rule.*

(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, *the defense of failure to join an indispensable party,* and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 (b) in the light of any evidence that may have been received.

Note. Subdivision (*a*). Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (*b*). The addition of defense (7), "failure to join an indispensable party", cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, *Manner of Raising Objection of Non-Joinder of Indispensable Party* (1940) 2 Fed. Rules Serv. 658 and (1942) 5 Fed. Rules Serv. 820. In one case, *United States* v. *Metropolitan Life Ins. Co.* (E. D. Pa. 1941) 36 F. Supp. 399, the failure to join an indispensable party was raised under Rule 12 (c).

Rule 12 (b) (6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief

can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara* v. *United States* (C. C. A. 2d, 1942) 129 F. (2d) 594, cert. den. (1942) 317 U. S. 686; *Boro Hall Corp.* v. *General Motors Corp.* (C. C. A. 2d, 1942) 124 F. (2d) 822, cert. den. (1943) 317 U. S. 695. See also *Kithcart* v. *Metropolitan Life Ins. Co.* (C. C. A. 8th, 1945) 150 F. (2d) 997, aff'g 62 F. Supp. 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12 (b) (6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of ap-

peals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule. The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp.* v. *General Motors Corp.* (C. C. A. 2d, 1942) 124 F. (2d) 822, cert. den. (1943) 317 U. S. 695; *Gallup* v. *Caldwell* (C. C. A. 3d, 1941) 120 F. (2d) 90; *Central Mexico Light & Power Co.* v. *Munch* (C. C. A. 2d, 1940) 116 F. (2d) 85; *National Labor Relations Board* v. *Montgomery Ward & Co.* (App. D. C. 1944) 144 F. (2d) 528, cert. den. (1944) 65 S. Ct. 134; *Urquhart* v. *American-La France Foamite Corp.* (App. D. C. 1944) 144 F. (2d) 542; *Samara* v. *United States* (C. C. A. 2d, 1942) 129 F. (2d) 594; *Cohen* v. *American Window Glass Co.* (C. C. A. 2d, 1942) 126 F. (2d) 111; *Sperry Products Inc.* v. *Association of American Railroads* (C. C. A. 2d, 1942) 132 F. (2d) 408; *Joint Council Dining Car Employees Local 370* v. *Delaware, Lackawanna and Western R. Co.* (C. C. A. 2d, 1946) — F. (2d) —; *Weeks* v. *Bareco Oil Co.* (C. C. A. 7th, 1941) 125 F. (2d) 84; *Carroll* v. *Morrison Hotel Corp.* (C. C. A. 7th, 1945) 149 F. (2d) 404; *Victory* v. *Manning* (C. C. A. 3rd, 1942) 128 F. (2d) 415; *Locals*

No. 1470, No. 1469, and No. 1512 of International Longshoremen's Association v. *Southern Pacific Co.* (C. C. A. 5th, 1942) 131 F. (2d) 605; *Lucking* v. *Delano* (C. C. A. 6th, 1942) 129 F. (2d) 283; *San Francisco Lodge No. 68 of International Association of Machinists* v. *Forrestal* (N. D. Cal. 1944) 58 F. Supp. 466; *Benson* v. *Export Equipment Corp.* (N. Mex. 1945) 164 P. (2d) 380 (construing New Mexico rule identical with Rule 12 (b) (6)); *F. E. Myers & Bros. Co.* v. *Gould Pumps, Inc.* (W. D. N. Y. 1946) 9 Fed. Rules Serv. 12b. 33, Case 2, 5 F. R. D. 132. Cf. *Kohler* v. *Jacobs* (C. C. A. 5th, 1943) 138 F. (2d) 440; *Cohen* v. *United States* (C. C. A. 8th, 1942) 129 F. (2d) 733.

Under group (2) are: *Sparks* v. *England* (C. C. A. 8th, 1940) 113 F. (2d) 579; *Continental Collieries, Inc.* v. *Shober* (C. C. A. 3d, 1942) 130 F. (2d) 631; *Downey* v. *Palmer* (C. C. A. 2d, 1940) 114 F. (2d) 116; *DeLoach* v. *Crowley's Inc.* (C. C. A. 5th, 1942) 128 F. (2d) 378; *Leimer* v. *State Mutual Life Assurance Co. of Worcester, Mass.* (C. C. A. 8th, 1940) 108 F. (2d) 302; *Rossiter* v. *Vogel* (C. C. A. 2d, 1943) 134 F. (2d) 908, compare s. c. (C. C. A. 2d, 1945) 148 F. (2d) 292; *Karl Kiefer Machine Co.* v. *United States Bottlers Machinery Co.* (C. C. A. 7th, 1940) 113 F. (2d) 356; *Chicago Metallic Mfg. Co.* v. *Edward Katzinger Co.* (C. C. A. 7th, 1941) 123 F. (2d) 518; *Louisiana Farmers' Protective Union, Inc.* v. *Great Atlantic & Pacific Tea Co. of America, Inc.* (C. C. A. 8th, 1942) 131 F. (2d) 419; *Publicity Bldg. Realty Corp.* v. *Hannegan* (C. C. A. 8th, 1943) 139 F. (2d) 583; *Dioguardi* v. *Durning* (C. C. A. 2d, 1944) 139 F. (2d) 774; *Package Closure Corp.* v. *Sealright Co., Inc.* (C. C. A. 2d, 1944) 141 F. (2d) 972; *Tahir Erk* v. *Glenn L. Martin Co.* (C. C. A. 4th, 1941) 116 F. (2d) 865; *Bell* v. *Preferred Life Assurance Society of Montgomery, Ala.* (1943) 320 U. S. 238.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12 (b) (6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It

will also be observed that if a motion under Rule 12 (b) (6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher* v. *Jones* (E. D. Ky. 1943) 7 Fed. Rules Serv. 12e.231, Case 5, 3 F. R. D. 168; *Best Foods, Inc.* v. *General Mills, Inc.* (D. Del. 1943) 7 Fed. Rules Serv. 12e.231, Case 7, 3 F. R. D. 275; *Braden* v. *Callaway* (E. D. Tenn. 1943) 8 Fed. Rules Serv. 12e.231, Case 1 (". . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12 (e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 *Moore's Federal Practice* (1938), Cum. Supplement §12.07, under "Page 657"; also, Holtzoff, *New Federal Procedure and the Courts* (1940) 35–41. And compare vote of Second Circuit Conference of Circuit and District Judges (June 1940) recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co.* v. *Mylish* (E. D. Pa. 1944) 8 Fed. Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling* v. *American Steamship Co.* (W. D. N. Y. 1945) 4 F. R. D. 355, 8 Fed. Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling* v. *Alabama Pipe Co.* (W. D. Mo. 1942) 6 Fed. Rules Serv. 12e.244, Case 7; *Fleming* v. *Mason & Dixon Lines, Inc.* (E. D. Tenn. 1941) 42 F. Supp. 230; *Kellogg Co.* v. *National Biscuit Co.* (D. N. J. 1941) 38 F. Supp. 643; *Brown* v. *H. L. Green Co.* (S. D. N. Y. 1943) 7 Fed. Rules Serv. 12e.231, Case 6; *Pedersen* v. *Standard Accident Ins. Co.* (W. D. Mo. 1945) 8 Fed. Rules Serv. 12e.231, Case 8; *Bowles* v. *Ohse* (D. Neb. 1945) 4 F. R. D. 403, 9 Fed. Rules Serv. 12e.231, Case 1; *Klages* v. *Cohen* (E. D. N. Y. 1945) 9 Fed. Rules Serv.

8a.25, Case 4; *Bowles* v. *Lawrence* (D. Mass. 1945) 8 Fed. Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co.* v. *Hoyt* (N. D. Ohio 1945) 9 Fed. Rules Serv. 12e.235, Case 1; *Bowles* v. *Jack* (D. Minn. 1945) 5 F. R. D. 1, 9 Fed. Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. *Poole* v. *White* (N. D. W. Va. 1941) 5 Fed. Rules Serv. 12e.231, Case 4, 2 F. R. D. 40. See also *Bowles* v. *Gabel* (W. D. Mo. 1946) 9 Fed. Rules Serv. 12e.244, Case 10 ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart* v. *Remington-Rand, Inc.* (D. Conn. 1939) 31 F. Supp. 296; *Eastman Kodak Co.* v. *McAuley* (S. D. N. Y. 1941) 4 Fed. Rules Serv. 12f.21, Case 8, 2 F. R. D. 21; *Schenley Distillers Corp.* v. *Renken* (E. D. S. C. 1940) 34 F. Supp. 678; *Yale Transport Corp.* v. *Yellow Truck & Coach Mfg. Co.* (S. D. N. Y. 1944) 3 F. R. D. 440; *United States* v. *Turner Milk Co.* (N. D. Ill. 1941) 4 Fed. Rules Serv. 12b.51, Case 3, 1 F. R. D. 643; *Teiger* v. *Stephan Oderwald, Inc.* (S. D. N. Y. 1940) 31 F. Supp. 626; *Teplitsky* v. *Pennsylvania R. Co.* (N. D. Ill. 1941) 38 F. Supp. 535; *Gallagher* v. *Carroll* (E. D. N. Y. 1939) 27 F. Supp. 568; *United States* v. *Palmer* (S. D. N. Y. 1939) 28 F. Supp. 936. And see *Indemnity Ins. Co. of North America* v. *Pan American Airways, Inc.* (S. D. N. Y. 1944) 58 F. Supp. 338; Commentary, *Modes of Attacking Insufficient Defenses in the Answer* (1939) 1 Fed. Rules Serv. 669, (1940) 2 Fed. Rules Serv. 640.

Subdivision (g). The change in title conforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then avail-

able to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (*h*). The addition of the phrase relating to indispensable parties is one of necessity.

Rule 13. Counterclaim and Cross-Claim.

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim ~~; not the subject of a pending action,~~ which at the time of ~~filing~~ *serving* the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, *except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.*

(g) CROSS-CLAIM AGAINST CO-PARTY. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein *or relating to any property that is the subject matter of the original action.* Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered *in accordance with the terms of Rule 54* (*b*) when the court has juris-

diction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Note. Subdivision (a). The use of the word "filing" was inadvertent. The word "serving" conforms with subdivision (*e*) and with usage generally throughout the rules.

The removal of the phrase "not the subject of a pending action" and the addition of the new clause at the end of the subdivision is designed to eliminate the ambiguity noted in *Prudential Insurance Co. of America* v. *Saxe* (App. D. C. 1943) 134 F. (2d) 16, 33–34, cert den. (1943) 319 U. S. 745. The rewording of the subdivision in this respect insures against an undesirable possibility presented under the original rule whereby a party having a claim which would be the subject of a compulsory counterclaim could avoid stating it as such by bringing an independent action in another court after the commencement of the federal action but before serving his pleading in the federal action.

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

Subdivision (i). The change clarifies the interdependence of Rules 13 (i) and 54 (b).

Rule 14. Third-Party Practice.

(a) When Defendant May Bring in Third Party. Before the service of his answer a defendant may move *ex parte* or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the

action who is or may be liable to him ~~or to the plaintiff~~ for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses *to the third-party plaintiff's claim* as provided in Rule 12 and his counterclaims *against the third-party plaintiff* and cross-claims against ~~the plaintiff, the third-party plaintiff, or any other party~~ *other third-party defendants* as provided in Rule 13. The third-party defendant may assert *against the plaintiff* any defenses which the third-party plaintiff has to the plaintiff's claim. ~~The third party defendant is bound by the adjudication of the third party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third party plaintiff.~~ *The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may ~~amend his pleadings to~~ assert *any claim* against the third-party defendant ~~any claim which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant.~~ *arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13.* A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him ~~or to the third~~

~~party~~ ~~plaintiff~~ for all or part of the claim made in the action against the third-party defendant.

Note. The provisions in Rule 14 (a) which relate to the impleading of a third party who is or may be liable to the plaintiff have been deleted by the proposed amendment. It has been held that under Rule 14 (a) the plaintiff need not amend his complaint to state a claim against such third party if he does not wish to do so. *Satink* v. *Holland Township* (D. N. J. 1940) 31 F. Supp. 229, noted (1940) 88 U. Pa. L. Rev. 751; *Connelly* v. *Bender* (E. D. Mich. 1941) 36 F. Supp. 368; *Whitmire* v. *Partin* v. *Milton* (E. D. Tenn. 1941) 5 Fed. Rules Serv. 14a.513, Case 2; *Crim* v. *Lumbermen's Mutual Casualty Co.* (D. D. C. 1939) 26 F. Supp. 715; *Carbola Chemical Co., Inc.* v. *Trundle* (S. D. N. Y. 1943) 7 Fed. Rules Serv. 14a.224, Case 1; *Roadway Express, Inc.* v. *Automobile Ins. Co. of Hartford, Conn.* v. *Providence Washington Ins. Co.* (N. D. Ohio 1945) 8 Fed. Rules Serv. 14a.513, Case 3. In *Delano* v. *Ives* (E. D. Pa. 1941) 40 F. Supp. 672, the court said: ". . . the weight of authority is to the effect that a defendant cannot compel the plaintiff, who has sued him, to sue also a third party whom he does not wish to sue, by tendering in a third party complaint the third party as an additional defendant directly liable to the plaintiff." Thus impleader here amounts to no more than a mere offer of a party to the plaintiff, and if he rejects it, the attempt is a time-consuming futility. See *Satink* v. *Holland Township, supra; Malkin* v. *Arundel Corp.* (D. Md. 1941) 36 F. Supp. 948; also Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure* (1941) 4 Fed. Rules Serv. 1010. But *cf. Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.* (M. D. Ga. 1943) 52 F. Supp. 177. Moreover, in any case where the plaintiff could not have joined the third party originally because of jurisdictional limitations such as lack of diversity of citizenship, the majority view is that any attempt by the plaintiff to amend his complaint and assert a claim against the impleaded third party would be unavailing.

Hoskie v. *Prudential Ins. Co. of America* v. *Lorrac Real Estate Corp.* (E. D. N. Y. 1941) 39 F. Supp. 305; *Johnson* v. *G. J. Sherrard Co.* v. *New England Telephone & Telegraph Co.* (D. Mass. 1941) 5 Fed. Rules Serv. 14a.511, Case 1, 2 F. R. D. 164; *Thompson* v. *Cranston* (W. D. N. Y. 1942) 6 Fed. Rules Serv. 14a.511, Case 1, 2 F. R. D. 270, aff'd (C. C. A. 2d, 1942) 132 F. (2d) 631, cert. den. (1943) 319 U. S. 741; *Friend* v. *Middle Atlantic Transportation Co.* (C. C. A. 2d, 1946) 153 F. (2d) 778, cert. den. (1946) 66 S. Ct. 1370; *Herrington* v. *Jones* (E. D. La. 1941) 5 Fed. Rules Serv. 14a.511, Case 2, 2 F. R. D. 108; *Banks* v. *Employers' Liability Assurance Corp.* v. *Central Surety & Ins. Corp.* (W. D. Mo. 1943) 7 Fed. Rules Serv. 14a.11, Case 2; *Saunders* v. *Baltimore & Ohio R. Co.* (S. D. W. Va. 1945) 9 Fed. Rules Serv. 14a.62, Case 2; *Hull* v. *United States Rubber Co.* v. *Johnson Larsen & Co.* (E. D. Mich. 1945) 9 Fed. Rules Serv. 14a.62, Case 3. See also concurring opinion of Circuit Judge Minton in *People of State of Illinois for use of Trust Co. of Chicago* v. *Maryland Casualty Co.* (C. C. A. 7th, 1942) 132 F. (2d) 850, 853. *Contra: Sklar* v. *Hayes v. Singer* (E. D. Pa. 1941) 4 Fed. Rules Serv. 14a.511, Case 2, 1 F. R. D. 594. Discussion of the problem will be found in Commentary, *Amendment of Plaintiff's Pleading to Assert Claim Against Third-Party Defendant* (1942) 5 Fed. Rules Serv. 811; Commentary, *Federal Jurisdiction in Third-Party Practice* (1943) 6 Fed. Rules Serv. 766; Holtzoff, *Some Problems Under Federal Third-Party Practice* (1941) 3 La. L. Rev. 408, 419–420; 1 *Moore's Federal Practice* (1938), Cum. Supplement § 14.08. For these reasons therefore, the words "or to the plaintiff" in the first sentence of subdivision (a) have been removed by the amendment; and in conformance therewith the words "the plaintiff" in the second sentence of the subdivision, and the words "or to the third-party plaintiff" in the concluding sentence thereof have likewise been eliminated.

The third sentence of Rule 14 (a) has been expanded to clarify the right of the third-party defendant to assert any defenses which the third-party plaintiff may have to the plaintiff's claim. This protects the im-

pleaded third-party defendant where the third-party plaintiff fails or neglects to assert a proper defense to the plaintiff's action. A new sentence has also been inserted giving the third-party defendant the right to assert directly against the original plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. This permits all claims arising out of the same transaction or occurrence to be heard and determined in the same action. See *Atlantic Coast Line R. Co.* v. *United States Fidelity & Guaranty Co.* (M. D. Ga. 1943) 52 F. Supp. 177. Accordingly, the next to the last sentence of subdivision (a) has also been revised to make clear that the plaintiff may, if he desires, assert directly against the third-party defendant either by amendment or by a new pleading any claim he may have against him arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. In such a case, the third-party defendant then is entitled to assert the defenses, counterclaims and cross-claims provided in Rules 12 and 13.

The sentence reading "The third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third-party plaintiff" has been stricken from Rule 14 (a), not to change the law, but because the sentence states a rule of substantive law which is not within the scope of a procedural rule. It is not the purpose of the rules to state the effect of a judgment.

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

Rule 17. Parties Plaintiff and Defendant; Capacity.

(b) CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued

shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held~~:~~, except (*1*) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, *and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rule 66.*

Note. The new matter makes clear the controlling character of Rule 66 regarding suits by or against a federal receiver in a federal court.

Rule 23. Class Actions.

Note. Subdivision (b), relating to secondary actions by shareholders, provides among other things, that in, such an action the complainant

"shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law . . ."

As a result of the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (decided April 25, 1938, after this rule was promulgated by the Supreme Court, though before it took effect) a question has arisen as to whether the provision above quoted deals with a matter of substantive right or is a matter of procedure. If it is a matter of substantive law or right, then under *Erie R. Co.* v. *Tompkins* clause (1) may not be validly applied in cases pending in states whose local law permits a shareholder to maintain such actions, although not a shareholder at the time of the transactions complained

of. The Advisory Committee, believing the question should be settled in the courts, proposes no change in Rule 23 but thinks rather that the situation should be explained in an appropriate note.

The rule has a long history. In *Hawes* v. *Oakland* (1882) 104 U. S. 450, the Court held that a shareholder could not maintain such an action unless he owned shares at the time of the transactions complained of, or unless they devolved on him by operation of law. At that time the decision in *Swift* v. *Tyson* (1842) 16 Peters 1, was the law, and the federal courts considered themselves free to establish their own principles of equity jurisprudence, so the Court was not in 1882 and has not been, until *Erie R. Co.* v. *Tompkins* in 1938, concerned with the question whether *Hawes* v. *Oakland* dealt with substantive right or procedure.

Following the decision in *Hawes* v. *Oakland*, and at the same term, the Court, to implement its decision, adopted Equity Rule 94, which contained the same provision above quoted from Rule 23 F. R. C. P. The provision in Equity Rule 94 was later embodied in Equity Rule 27, of which the present Rule 23 is substantially a copy.

In *City of Quincy* v. *Steel* (1887) 120 U. S. 241, 245, the Court referring to *Hawes* v. *Oakland* said: "In order to give effect to the principles there laid down, this Court at that term adopted Rule 94 of the rules of practice for courts of equity of the United States."

Some other cases dealing with Equity Rules 94 or 27 prior to the decision in *Erie R. Co.* v. *Tompkins* are *Dimpfell* v. *Ohio & Miss. R. R.* (1884) 110 U. S. 209; *Illinois Central R. Co.* v. *Adams* (1901) 180 U. S. 28, 34; *Venner* v. *Great Northern Ry.* (1908) 209 U. S. 24, 30; *Jacobson* v. *General Motors Corp.* (S. D. N. Y. 1938) 22 F. Supp. 255, 257. These cases generally treat *Hawes* v. *Oakland* as establishing a "principle" of equity, or as dealing not with jurisdiction but with the "right" to maintain an action, or have said that the defense under the equity rule is analogous to the defense that the plaintiff has no "title" and results in a dismissal "for want of equity."

Those state decisions which held that a shareholder acquiring stock after the event may maintain a derivative action are founded on the view that it is a right belonging to the shareholder at the time of the transaction and which passes as a right to the subsequent purchaser. See *Pollitz* v. *Gould* (1911) 202 N. Y. 11.

The first case arising after the decision in *Erie R. Co.* v. *Tompkins*, in which this problem was involved, was *Summers* v. *Hearst* (S. D. N. Y. 1938) 23 F. Supp. 986. It concerned Equity Rule 27, as Federal Rule 23 was not then in effect. In a well considered opinion Judge Leibell reviewed the decisions and said: "The federal cases that discuss this section of Rule 27 support the view that it states a principle of substantive law." He quoted *Pollitz* v. *Gould* (1911) 202 N. Y. 11, as saying that the United States Supreme Court "seems to have been more concerned with establishing this rule as one of practice than of substantive law" but that "whether it be regarded as establishing a principle of law or a rule of practice, this authority has been subsequently followed in the United States courts."

He then concluded that, although the federal decisions treat the equity rule as "stating a principle of substantive law", if "Equity Rule 27 is to be modified or revoked in view of *Erie R. Co.* v. *Tompkins*, it is not the province of this Court to suggest it, much less impliedly to follow that course by disregarding the mandatory provisions of the Rule."

Some other federal decisions since 1938 touch the question.

In *Picard* v. *Sperry Corporation* (S. D. N. Y. 1941) 36 F. Supp. 1006, 1009–10, affirmed without opinion (C. C. A. 2d, 1941) 120 F. (2d) 328, a shareholder, not such at the time of the transactions complained of, sought to intervene. The court held an intervenor was as much subject to Rule 23 as an original plaintiff; and that the requirement of Rule 23 (b) was "a matter of practice," not substance, and applied in New York where the state law was otherwise, despite *Erie R. Co.* v. *Tompkins*. In *York* v. *Guaranty Trust Co. of New*

York (C. C. A. 2d, 1944) 143 F. (2d) 503, rev'd on other grounds (1945) 65 S. Ct. 1464, the court said: "Restrictions on the bringing of stockholders' actions, such as those imposed by F. R. C. P. 23 (b) or other state statutes are procedural," citing the *Piccard* and other cases.

In *Gallup* v. *Caldwell* (C. C. A. 3d, 1941) 120 F. (2d) 90, 95, arising in New Jersey, the point was raised but not decided, the court saying that it was not satisfied that the then New Jersey rule differed from Rule 23 (b), and that "under the circumstances the proper course was to follow Rule 23 (b)."

In *Mullins* v. *DeSoto Securities Co.* (W. D. La. 1942) 45 F. Supp. 871, 878, the point was not decided, because the court found the Louisiana rule to be the same as that stated in Rule 23 (b).

In *Toebelman* v. *Missouri-Kansas Pipe Line Co.* (D. Del. 1941) 41 F. Supp. 334, 340, the court dealt only with another part of Rule 23 (b), relating to prior demands on the stockholders and did not discuss *Erie R. Co.* v. *Tompkins* or its effect on the rule.

In *Perrott* v. *United States Banking Corp.* (D. Del. 1944) 53 F. Supp. 953, it appeared that the Delaware law does not require the plaintiff to have owned shares at the time of the transaction complained of. The court sustained Rule 23 (b), after discussion of the authorities, saying:

"It seems to me the rule does not go beyond procedure. * * * Simply because a particular plaintiff cannot qualify as a proper party to maintain such an action does not destroy or even whittle at the cause of action. The cause of action exists until a qualified plaintiff can get it started in a federal court."

In *Bankers Nat. Corp.* v. *Barr* (S. D. N. Y. 1945) 9 Fed. Rules Serv. 23 b. 11, Case 1, the court held Rule 23 (b) to be one of procedure, but that whether the plaintiff was a stockholder was a substantive question to be settled by state law.

The New York rule, as stated in *Pollitz* v. *Gould*, *supra*, has been altered by an act of the New York

Legislature (Chapter 667, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61) which provides that "in any action brought by a shareholder in the right of a . . . corporation, it must appear that the plaintiff was a stockholder at the time of the transaction of which he complains, or that his stock thereafter devolved upon him by operation of law." At the same time a further and separate provision was enacted, requiring under certain circumstances the giving of security for reasonable expenses and attorney's fees, to which security the corporation in whose right the action is brought and the defendants therein may have recourse. (Chapter 668, Laws of 1944, effective April 9, 1944, General Corporation Law, § 61–b.) These provisions are aimed at so-called "strike" stockholders' suits and their attendant abuses. *Shielcrawt* v. *Moffett* (Ct. App. 1945) 294 N. Y. 180, 61 N. E. (2d) 435, rev'g 51 N. Y. S. (2d) 188, aff'g 49 N. Y. S. (2d) 64; *Noel Associates, Inc.* v. *Merrill* (Sup. Ct. 1944) 184 Misc. 646, 53 N. Y. S. (2d) 143.

Insofar as § 61 is concerned, it has been held that the section is procedural in nature. *Klum* v. *Clinton Trust Co.* (Sup. Ct. 1944) 183 Misc. 340, 48 N. Y. S. (2d) 267; *Noel Associates, Inc.* v. *Merrill, supra.* In the latter case the court pointed out that "The 1944 amendment to Section 61 rejected the rule laid down in the *Pollitz* case and substituted, in place thereof, in its precise language, the rule which has long prevailed in the Federal Courts and which is now Rule 23 (b) . . ." There is, nevertheless, a difference of opinion regarding the application of the statute to pending actions. See *Klum*, v. *Clinton Trust Co., supra* (applicable); *Noel Associates, Inc.* v. *Merrill, supra* (inapplicable).

With respect to § 61–b, which may be regarded as a separate problem (*Noel Associates, Inc.* v. *Merrill, supra*), it has been held that even though the statute is procedural in nature—a matter not definitely decided—the Legislature evinced no intent that the provision should apply to actions pending when it became effective. *Shielcrawt* v. *Moffett, supra.* As to actions

instituted after the effective date of the legislation, the constitutionality of § 61–b is in dispute. See *Wolf* v. *Atkinson* (Sup. Ct. 1944) 182 Misc. 675, 49 N. Y. S. (2d) 703 (constitutional); *Citron* v. *Mangel Stores Corp.* (Sup. Ct. 1944) — Misc. —, 50 N. Y. S. (2d) 416 (unconstitutional); Zlinkoff, *The Amercan Investor and the Constitutionality of Section 61–B of the New York General Corporation Law* (1945) 54 Yale L. J. 352.

New Jersey also enacted a statute, similar to Chapters 667 and 668 of the New York law. See P. L. 1945, Ch. 131, R. S. Cum. Supp. 14: 3–15. The New Jersey provision similar to Chapter 668 (§ 61–b) differs, however, in that it specifically applies retroactively. It has been held that this provision is procedural and hence will not govern a pending action brought against a New Jersey corporation in the New York courts. *Shielcrawt* v. *Moffett* (Sup. Ct. N. Y. 1945) 184 Misc. 1074, 56 N. Y. S. (2d) 134.

See also generally, 2 *Moore's Federal Practice* (1938) 2250–2253, and Cum. Supplement § 23.05.

The decisions here discussed show that the question is a debatable one, and that there is respectable authority for either view, with a recent trend towards the view that Rule 23 (b) (1) is procedural. There is reason to say that the question is one which should not be decided by the Supreme Court *ex parte*, but left to await a judicial decision in a litigated case, and that in the light of the material in this note, the only inference to be drawn from a failure to amend Rule 23 (b) would be that the question is postponed to await a litigated case.

The Advisory Committee is unanimously of the opinion that this course should be followed.

If, however, the final conclusion is that the rule deals with a matter of substantive right, then the rule should be amended by adding a provision that Rule 23 (b) (1) does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transactions of which he complains.

Rule 24. Intervention.

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property *which is* in the custody *or subject to the control or disposition* of the court or an officer thereof.

(b) PERMISSIVE INTERVENTION. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. *When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.* In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Note. Subdivision (a). The addition to subdivision (a) (3) covers the situation where property may be in the actual custody of some other officer or agency—

such as the Secretary of the Treasury—but the control and disposition of the property is lodged in the court wherein the action is pending.

Subdivision (*b*). The addition in subdivision (b) permits the intervention of governmental officers or agencies in proper cases and thus avoids exclusionary constructions of the rule. For an example of the latter, see *Matter of Bender Body Co.* (Ref. Ohio 1941) 47 F. Supp. 224, aff'd as moot (N. D. Ohio 1942) 47 F. Supp. 224, 234, holding that the Administrator of the Office of Price Administration, then acting under the authority of an Executive Order of the President, could not intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices. Compare, however, *Securities and Exchange Commission* v. *United States Realty & Improvement Co.* (1940) 310 U. S. 434, where permissive intervention of the Commission to protect the public interest in an arrangement proceeding under Chapter XI of the Bankruptcy Act was upheld. See also dissenting opinion in *Securities and Exchange Commission* v. *Long Island Lighting Co.* (C. C. A. 2d, 1945) 148 F. (2d) 252, judgment vacated as moot and case remanded with direction to dismiss complaint (1945) 325 U. S. 833. For discussion see Commentary, *Nature of Permissive Intervention Under Rule 24b* (1940) 3 Fed. Rules Serv. 704; Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts* (1940) 50 Yale L. J. 65.

Regarding the construction of subdivision (b) (2), see *Allen Calculators, Inc.* v. *National Cash Register Co.* (1944) 322 U. S. 137.

Rule 25. Substitution of Parties.

(a) DEATH.

(1) If a party dies and the claim is not thereby extinguished, the court *upon application made* within 2 years after the death *shall* order substitution of the proper parties. *If the application is made after 2 years the court may order substitu-*

tion but only upon the showing of a reasonable excuse for failure to apply within that period. If substitution is not so made, the action shall be dismissed as to the deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district.

Note. This amendment guards against possible injustice in a case where there is some reasonable excuse for not applying for substitution within the 2-year period. It has been held that the court has no power to permit substitution after the expiration of the 2-year limit, irrespective of the circumstances. *Winkelman* v. *General Motors Corp.* (S. D. N. Y. 1939) 30 F. Supp. 112; *Anderson* v. *Brady* (E. D. Ky. 1941) 4 Fed. Rules Serv. 25a.1, Case 1; *Photometric Products Corp.* v. *Radtke* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 25a.3, Case 1; *Anderson* v. *Yungkau* (C. C. A. 6th, 1946) 153 F. (2d) 685, cert. granted (1946) 66 S. Ct. 1025.

Rule 26. Depositions Pending Action.

(a) When Depositions May Be Taken. ~~By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or~~

~~for use as evidence in the action or for both purposes.~~ *Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action.* The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) SCOPE OF EXAMINATION. Unless otherwise ordered by the court as provided by Rule 30 (b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether ~~relating~~ *it relates* to the claim or defense of the examining party or to the claim or defense of any other party, including the existense, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. *It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.*

Note. Subdivision (a). The amendment eliminates the requirement of leave of court for the taking of a depo-

sition except where a plaintiff seeks to take a deposition within 20 days after the commencement of the action. The retention of the requirement where a deposition is sought by a plaintiff within 20 days of the commencement of the action protects a defendant who has not had an opportunity to retain counsel and inform himself as to the nature of the suit; the plaintiff, of course, needs no such protection. The present rule forbids the plaintiff to take a deposition, without leave of court, before the answer is served. Sometimes the defendant delays the serving of an answer for more than 20 days, but as 20 days are sufficient time for him to obtain a lawyer, there is no reason to forbid the plaintiff to take a deposition without leave merely because the answer has not been served. In all cases, Rule 30 (a) empowers the court, for cause shown, to alter the time of the taking of a deposition, and Rule 30 (b) contains provisions giving ample protection to persons who are unreasonably pressed. The modified practice here adopted is along the line of that followed in various states. See, *e. g.*, 8 Mo. Rev. Stat. Ann. (1939) § 1917; 2 Burns' Ind. Stat. Ann. (1933) § 2–1506.

Subdivision (b). The amendments to subdivision (b) make clear the broad scope of examination and that it may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. *Engl* v. *Aetna Life Ins. Co.* (C. C. A. 2d, 1943) 139 F. (2d) 469; *Mahler* v. *Pennsylvania R. Co.* (E. D. N. Y. 1945) 8 Fed. Rules Serv. 33.351, Case 1. In such a preliminary inquiry admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as leads to evidence are not within the scope of inquiry, but to the extent that the examination develops useful

information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible. *Lewis* v. *United Air Lines Transportation Corp.* (D. Conn. 1939) 27 F. Supp. 946; *Engl* v. *Aetna Life Ins. Co., supra; Mahler* v. *Pennsylvania R. Co., supra; Bloomer* v. *Sirian Lamp Co.* (D. Del. 1944) 8 Fed. Rules Serv. 26b.31, Case 3; *Rosseau* v. *Langley* (S. D. N. Y. 1945) 9 Fed. Rules Serv. 34.41, Case 1 (Rule 26 contemplates "examinations not merely for the narrow purpose of adducing testimony which may be offered in evidence but also for the broad discovery of information which may be useful in preparation for trial."); *Olson Transportation Co.* v. *Socony-Vacuum Co.* (E. D. Wis. 1944) 8 Fed. Rules Serv. 34.41, Case 2 (". . . the Rules . . . permit 'fishing' for evidence as they should."); Note (1945) 45 Col. L. Rev. 482. Thus hearsay, while inadmissible itself, may suggest testimony which properly may be proved. Under Rule 26 (b) several cases, however, have erroneously limited discovery on the basis of admissibility, holding that the word "relevant" in effect meant "material and competent under the rules of evidence". *Poppino* v. *Jones Store Co.* (W. D. Mo. 1940) 3 Fed. Rules Serv. 26b.5, Case 1; *Benevento* v. *A. & P. Food Stores, Inc.* (E. D. N. Y. 1939) 26 F. Supp. 424. Thus it has been said that inquiry might not be made into statements or other matters which, when disclosed, amounted only to hearsay. See *Maryland for use of Montvila* v. *Pan-American Bus Lines, Inc.* (D. Md. 1940) 3 Fed. Rules Serv. 26b.211, Case 3; *Gitto* v. *"Italia," Societa Anonima Di Navigazione* (E. D. N. Y. 1940) 31 F. Supp. 567; *Rose Silk Mills, Inc.* v. *Insurance Co. of North America* (S. D. N. Y. 1939) 29 F. Supp. 504; *Colpak* v. *Hetterick* (E. D. N. Y. 1941) 40 F. Supp. 350; *Matthies* v. *Peter F. Connolly Co.* (E. D. N. Y. 1941) 6 Fed. Rules Serv. 30a.22, Case 1, 2 F. R. D. 277; *Matter of Examination of Citizens Casualty Co. of New York* (S. D. N. Y. 1942) 7 Fed. Rules Serv. 26b.211, Case 1; *United States* v. *Silliman* (D. N. J. 1944) 8 Fed. Rules Serv. 26b.52, Case 1. The contrary and better view, however, has often been stated. See,

e. g., Engl v. *Aetna Life Ins. Co., supra; Stevenson* v. *Melady* (S. D. N. Y. 1940) 3 Fed. Rules Serv. 26b.31, Case 1, 1 F. R. D. 329; *Lewis* v. *United Air Lines Transport Corp., supra; Application of Zenith Radio Corp.* (E. D. Pa. 1941) 4 Fed. Rules Serv. 30b.21, Case 1, 1 F. R. D. 627; *Steingut* v. *Guaranty Trust Co. of New York* (S. D. N. Y. 1941) 4 Fed. Rules Serv. 26b.5, Case 2; *DeSeversky* v. *Republic Aviation Corp.* (E. D. N. Y. 1941) 5 Fed. Rules Serv. 26b.31, Case 5; *Moore* v. *George A. Hormel & Co.* (S. D. N. Y. 1942) 6 Fed. Rules Serv. 30b.41, Case 1, 2 F. R. D. 340; *Hercules Powder Co.* v. *Rohm & Haas Co.* (D. Del. 1943) 7 Fed. Rules Serv. 45b.311, Case 2, 3 F. R. D. 302; *Bloomer* v. *Sirian Lamp Co., supra; Crosby Steam Gage & Valve Co.*, v. *Manning, Maxwell & Moore, Inc.* (D. Mass. 1944) 8 Fed. Rules Serv. 26b.31, Case 1; *Patterson Oil Terminals, Inc.* v. *Charles Kurz & Co., Inc.* (E. D. Pa. 1945) 9 Fed. Rules Serv. 33.321, Case 2; *Pueblo Trading Co.* v. *Reclamation Dist. No. 1500* (N. D. Cal. 1945) 9 Fed. Rules Serv. 33.321, Case 4, 4 F. R. D. 471. See also discussion as to the broad scope of discovery in *Hoffman* v. *Palmer* (C. C. A. 2d, 1942) 129 F. (2d) 976, 995–997, aff'd on other grounds (1942) 318 U. S. 109; Note (1945) 45 Col. L. Rev. 482.

Rule 27. Depositions Before Action or Pending Appeal.

(a) BEFORE ACTION.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then

be taken in accordance with these rules; *and the court may make orders of the character provided for by Rules 34 and 35.* For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken *and may make orders of the character provided for by Rules 34 and 35,* and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules

for depositions taken in actions pending in the district court.

Note. Since the second sentence in subdivision (a) (3) refers only to depositions, it is arguable that Rules 34 and 35 are inapplicable in proceedings to perpetuate testimony. The new matter clarifies. A conforming change is also made in subdivision (b).

Rule 28. Persons Before Whom Depositions May Be Taken.

(a) WITHIN THE UNITED STATES. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, *or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.*

Note. The added language provides for the situation, occasionally arising, when depositions must be taken in an isolated place where there is no one readily available who has the power to administer oaths and take testimony according to the terms of the rule as originally stated. In addition, the amendment affords a more convenient method of securing depositions in the case where state lines intervene between the location of various witnesses otherwise rather closely grouped. The amendment insures that the person appointed shall have adequate power to perform his duties. It has been held that a person authorized to act in the premises, as, for example, a master, may take testimony outside the district of his appointment. *Consolidated Fastener Co.* v. *Columbian Button & Fastener Co.* (C. C. N. D. N. Y. 1898) 85 Fed. 54; *Mathieson Alkali Works* v. *Arnold, Hoffman & Co.* (C. C. A. 1st, 1929) 31 F. (2d) 1.

Rule 30. Depositions Upon Oral Examination.

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated *time or* place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, *expense*, embarrassment, or oppression. *The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The*

court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert.

Note. The addition of the words "time or" obviate any implication arising from their omission that the protective orders authorized by Rule 30 (b) do not extend to matters of time as well as place. The insertion of the word "expense" gives the court clear authority to protect the party or witness where the taking of the deposition at the time or place proposed would necessitate the outlay of undue costs or expenditures in order to comply. See Commentary, *Orders as to Expenses on Taking of Depositions* (1943) 7 Fed. Rules Serv. 967; *Stevens* v. *Minder Construction Co.* (S. D. N. Y. 1943) 7 Fed. Rules Serv. 30b.31, Case 2.

The two sentences added at the end of Rule 30 (b) deal with the problem of inquiry into writings obtained or prepared by the adverse party, his attorneys, agents or insurers in anticipation of litigation or in preparation for trial.

The district courts have been in disagreement over the extent to which such an inquiry may be made. A number of courts have held that matters obtained or prepared as the result of an investigation in anticipation of litigation or in preparation for trial are generally subject to discovery. *Bough* v. *Lee* (S. D. N. Y. 1939) 28 F. Supp. 673, s. c. (S. D. N. Y. 1939) 29 F. Supp. 498; *Kulich* v. *Murray* (S. D. N. Y. 1939) 28 F. Supp. 675; *Price* v. *Levitt* (E. D. N. Y. 1939) 29 F. Supp. 164; *Seligson* v. *Camp Westover, Inc.* (S. D. N. Y. 1941) 4 Fed. Rules Serv. 26b.211, Case 2; *Colpak* v. *Hetterick* (E. D. N. Y. 1941) 40 F. Supp. 350; *Matthies* v. *Peter F. Connolly Co.* (E. D. N. Y. 1941) 6 Fed. Rules Serv. 30a.22, Case 1, 2 F. R. D. 277; *Blank* v. *Great Northern Ry. Co.* (D. Minn. 1943) 8 Fed. Rules Serv. 34.42, Case 1, 4 F. R. D. 213; *Revheim* v. *Merritt-Chapman & Scott Corp.* (S. D. N. Y. 1942) 6 Fed.

Rules Serv. 34.411, Case 1, 2. F. R. D. 361 (up to time action is begun); *Van Sant* v. *American Express Co.* (E. D. Pa. 1944) 8 Fed. Rules Serv. 34.41, Case 4; *Bowles* v. *Ackerman* (S. D. N. Y. 1945) 8 Fed. Rules Serv. 26b.43, Case 1, 4 F. R. D. 260; *Mahler* v. *Pennsylvania R. Co.* (E. D. N. Y. 1945) 8 Fed. Rules Serv. 33.351, Case 1. Some courts have taken this view even where the matter was turned over to an attorney by a party, insurer or investigator, *Bough* v. *Lee, supra; Price* v. *Levitt, supra; Seligson* v. *Camp Westover, Inc., supra; Kane* v. *News Syndicate Co., Inc.* (S. D. N. Y. 1941) 4 Fed. Rules Serv. 34.42, Case 2; *Colpak* v. *Hetterick, supra; Blank* v. *Great Northern Ry. Co., supra,* or when the investigation was made by the attorney himself, *Kane* v. *News Syndicate Co., Inc., supra; Matter of The Examination of Citizens Casualty Co. of New York* (S. D. N. Y. 1942) 7 Fed. Rules Serv. 26b.211, Case 1 (as to names of witnesses secured). Discovery has been allowed as to matters involving communications between counsel for various parties, or between counsel for one party and another party. *E. W. Bliss Co.* v. *Cold Metal Process Co.* (N. D. Ohio 1940) 3 Fed. Rules Serv. 34.41, Case 1; *Leach* v. *Greif Bros. Cooperage Corp.* (S. D. Miss. 1942) 6 Fed. Rules Serv. 34.411, Case 2, 2 F. R. D. 444. And reports made by a party's employees in the regular course of business have been held subject to discovery. *Murphy* v. *New York & Porto Rico Steamship Co.* (S. D. N. Y. 1939) 27 F. Supp. 878; *Kenealy* v. *Texas Co.* (S. D. N. Y. 1939) 29 F. Supp. 502; *Stark* v. *American Dredging Co.* (E. D. Pa. 1943) 7 Fed. Rules Serv. 34.411, Case 1, 3 F. R. D. 300; *Eiseman* v. *Pennsylvania R. Co.* (E. D. Pa. 1944) 7 Fed. Rules Serv. 34.411, Case 2, 3 F. R. D. 338; *Farr* v. *Delaware, Lackawanna & Western R. Co.* (S. D. N. Y. 1944) 8 Fed. Rules Serv. 34.35, Case 1; *Topolinsky* v. *Palmer* (S. D. N. Y. 1945) 8 Fed. Rules Serv. 34.411, Case 2; *Terrell* v. *Standard Oil Co. of New Jersey* (E. D. Pa. 1945) 9 Fed. Rules Serv. 33.318, Case 3.

Of course, it has been held that communications to an attorney by his client or advice given to a client by

his attorney are privileged within the well settled meaning of that term in evidence and hence not the proper subject of inquiry. *Grauer* v. *Schenley Products Inc.* (S. D. N. Y. 1938) 26 F. Supp. 768; *Rowe* v. *Union Central Life Ins. Co.* (D. D. C. 1939) 1 Fed. Rules Serv. 26b.41, Case 2; *Westmoreland Asbestos Co., Inc.* v. *Johns-Manville Corp.* (S. D. N. Y. 1941) 4 Fed. Rules Serv. 34.42, Case 3. See Rule 26 (b). Also decreed to be without the scope of inquiry are the opinions, or results of examinations, tests, etc., by hired experts. *Lewis* v. *United Air Lines Transport Corp.* (W. D. Pa. 1940) 32 F. Supp. 21, superseding 31 F. Supp. 617; *Boynton* v. *R. J. Reynolds Tobacco Co.* (D. Mass. 1941) 36 F. Supp. 593; *United States* v. *720 Bottles, etc.* (E. D. N. Y. 1944) 8 Fed. Rules Serv. 81a.24, Case 1, 3 F. R. D. 466; *Midland Steel Products Co.* v. *Clark Equipment Co.* (W. D. Mich. 1945) 9 Fed. Rules Serv. 34.411, Case 1.

A considerable number of decisions, for various reasons and to the varying extent hereafter indicated, have ruled, however, that the results of investigations or other information or matters secured or prepared by the adversary or his representatives in contemplation of litigation or in preparation for trial are not the proper subjects of discovery. Thus it has been held by some courts that statements obtained from witnesses, parties or others are not material as evidence, or are hearsay and inadmissible, and discovery has been denied. *Kenealy* v. *Texas Co., supra; Fluxgold* v. *United States Lines Co.* (S. D. N. Y. 1939) 29 F. Supp. 506; *Bennett* v. *Waterman S. S. Corp.* (S. D. N. Y. 1939) 29 F. Supp. 506; *Rose Silk Mills, Inc.* v. *Insurance Co. of North America* (S. D. N. Y. 1939) 29 F. Supp. 504; *Slydell* v. *Capital Transit Co.* (D. D. C. 1939) 2 Fed. Rules Serv. 34.411, Case 1; *Gitto* v. *"Italia," Societa Anonima Di Navigazione* (E. D. N. Y. 1940) 31 F. Supp. 567; *Conneway* v. *City of New York* (E. D. N. Y. 1940) 32 F. Supp. 54; *Poppine* v. *Jones Store Co.* (W. D. Mo. 1940) 3 Fed. Rules Serv. 26b.5, Case 1; *Maryland for Use of Montvila* v. *Pan American Bus Lines, Inc.* (D. Md. 1940) 3 Fed. Rules Serv. 26b.211, Case 3; *Schwein-*

ert v. *Insurance Co. of North America* (S. D. N. Y. 1940) 3 Fed. Rules Serv. 26b.211, Case 2; *Matter of Examination of Citizens Casualty Co. of New York, supra; Condry* v. *Buckeye Steamship Co.* (W. D. Pa. 1945) 8 Fed. Rules Serv. 34.11, Case 5, 4 F. R. D. 310. Some courts have also emphasized what they thought to be the unfairness of letting the other party, through discovery, obtain free of charge the material gathered or prepared by his adversary; that to permit such a course would penalize diligence and put a premium on laziness; and that discovery should not constitute a "fishing expedition." *McCarthy* v. *Palmer* (E. D. N. Y. 1939) 29 F. Supp. 585; *Conneway* v. *City of New York, supra; Maryland for Use of Montvila* v. *Pan-American Bus Lines, Inc., supra; Byers Theaters, Inc.* v. *Murphy* (W. D. Va. 1940) 3 Fed. Rules Serv. 33.31, Case 3; *French* v. *Zalstem-Zalessky* (S. D. N. Y. 1940) 4 Fed. Rules Serv. 26b.211, Case 1; *Piorkowski* v. *Socony-Vacuum Oil Co.* (M. D. Pa. 1940) 4 Fed. Rules Serv. 34.411, Case 1; *Courteau* v. *Interlake Steamship Co.* (W. D. Mich. 1941) 4 Fed. Rules Serv. 34.411, Case 2; *Stern* v. *Exposition Greyhound, Inc.* (E. D. N. Y. 1941) 4 Fed. Rules Serv. 26b.211, Case 3; *Rosenblum* v. *Dingfelder* (S. D. N. Y 1941.) 5 Fed. Rules Serv. 34.11, Case 3; *Hercules Powder Co.* v. *Rhom & Haas Co.* (D. Del. 1944) 7 Fed. Rules Serv. 33.342, Case 2, 3 F. R. D. 328; *Midland Steel Products Co.* v. *Clark Equipment Co., supra; Kirshner* v. *Palmer* (S. D. N. Y. 1945) 9 Fed. Rules Serv. 26b.211, Case 3. Some courts have held that it is improper to seek any evidentiary matter gathered by or for the adversary party after commencement of the action. *Stanley Works* v. *C. S. Mersick & Co.* (D. Conn. 1939) 1 Fed. Rules Serv. 33.313, Case 2; *Murphy* v. *New York & Porto Rico Steamship Co., supra; Byers Theaters, Inc.* v. *Murphy, supra; Caraballo* v. *Export Steamship Corp.* (S. D. N. Y. 1940) 3 Fed. Rules Serv. 34.411, Case 2; *Revheim* v. *Merritt-Chapman & Scott Corp., supra; Cortese* v. *British Ministry of War Transport Representative* (S. D. N. Y. 1945) 8 Fed. Rules Serv. 30a.22, Case 4. And a number of cases, as

to particular matters to be discovered, have either denied the discovery because no reason or cause therefor was shown regarding the data sought, or denied discovery on the general principle that no inquiry should be made into the adversary's preparation of his case for trial. *Floridin Co.* v. *Attapulgus Clay Co.* (D. Del. 1939) 26 F. Supp. 968; *Seals* v. *Capital Transit Co.* (D. D. C. 1940) 2 Fed. Rules Serv. 34.411, Case 5; *Olson* v. *New York Central R. Co.* (E. D. N. Y. 1940) 2 Fed. Rules Serv. 34.411, Case 6; *Creden* v. *Central R. Co of New Jersey* (E. D. N. Y. 1940) 2 Fed. Rules Serv. 33.351, Case 1; *Conneway* v. *City of New York, supra; French* v. *Zalstem-Zalessky, supra; Stein* v. *Exposition Greyhound, Inc., supra; Stark* v. *American Dredging Co., supra; Nelson* v. *Reid* (S. D. Fla. 1944) 8 Fed. Rules Serv. 34.411, Case 1, 4 F. R. D. 199; *Cortese* v. *British Ministry of War Transport Representative, supra; Topolinsky* v. *Palmer, supra; Zeoli* v. *New York Central R. Co.* (E. D. N. Y. 1945) 8 Fed. Rules Serv. 34.411, Case 3; *Midland Steel Products Co.* v. *Clark Equipment Co., supra; Walling* v. *J. Friedman & Co., Inc.* (S. D. N. Y. 1944) 9 Fed. Rules Serv. 45b.3, Case 1, 4 F. R. D. 384.

In *Hickman* v. *Taylor* (C. C. A. 3d, 1945) 153 F. (2d) 212, cert. granted (1946) 66 S. Ct. 1337, rev'g (E. D. Pa. 1945) 9 Fed. Rules Serv. 26 b.211, Case 1, 4 F. R. D. 479, the Third Circuit Court of Appeals, *en banc*, held that statements of witnesses taken by a party's attorney and memoranda of witnesses' statements made by the attorney following an accident but prior to suit were not the proper subject of discovery by the other party, although the court rejected such contentions as that the discovery would penalize the diligent or constitute a "fishing expedition." The matters sought to be discovered, the court said, came within the scope of privileged documents and hence could not be inquired into since Rule 26 (b) excepts from inquiry any matter deemed "privileged." Such things, it was believed, were the "work product of the lawyer," "the results of the lawyer's use of his tongue, his pen, and his head, for his client." In line with this result were the pre-

vious cases of *Matthies* v. *Peter F. Connolly Co., supra; Farr* v. *Delaware, Lackawanna & Western R. Co.* (S. D. N. Y. 1944) 8 Fed. Rules Serv. 34.35, Case 1; *Sano Petroleum Corp.* v. *Shell Oil Co., Inc.* (E. D. N. Y. 1944) 8 Fed. Rules Serv. 26b.41, Case 1, 3 F. R. D. 467; *Walling* v. *J. Friedman & Co., Inc., supra.* The appellate court in the *Hickman* case admitted that this view of privilege extended it beyond that of testimonial exclusion, but believed that reasons of public policy supported such an extension. This was contrary to the position of the district court (consisting of the full bench of the Eastern District of Pennsylvania), which denied the application of a rule of privilege to the statements in question, in the opinion cited above, but excluded from discovery any matters which might reflect the mental impressions, opinions or legal theories of the attorney. A subsequent decision in the Eastern District, *Shields* v. *Sobelman* (E. D. Pa. 1946) 9 Fed. Rules Serv. 26b.211, Case 5, endeavored to distinguish *Hickman* v. *Taylor* and to allow discovery in a situation where photographs of the place of and machine causing the accident were taken under the direction of a lawyer for one of the parties. The district court held that very little legal talent had gone into the supervision and direction of the photography and that the case came within a *dictum* in the *Hickman* case to the effect that a lawyer could not claim privilege against production of a piece of a machine which had hurt someone. And in *Ryan* v. *Lehigh Valley R. Co.* (S. D. N. Y. 1946) 9 Fed. Rules Serv. 33, 342, Case 1, the court distinguished between reports, statements, affidavits and the like obtained by a party "before the matter goes to the attorney" and such reports, etc., taken by the attorney in direct preparation for trial. The former, the court held, were not protected by privilege and were subject to discovery.

For a discussion of the whole problem, see 2 *Moore's Federal Practice* (1938) Cum. Supplement § 26.12, under "Page 2477" (Discovery of Matters Obtained in Adverse Party's Preparation for Trial); Note (1941) 50 Yale L. J. 708; Holtzoff, *Instruments of Discovery under*

Federal Rules of Civil Procedure (1942) 41 Mich. L. Rev. 205; and for the broad scope of discovery generally, see *Hoffman* v. *Palmer* (C. C. A. 2d, 1942) 129 F. (2d) 976, 995–997, aff'd on other grounds (1942) 318 U. S. 109; *Mahler* v. *Pennsylvania R. Co.* (E. D. N. Y. 1945) 8 Fed. Rules Serv. 33.351, Case 1; see also the observation in *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.* (E. D. Wis. 1944) 8 Fed. Rules Serv. 34.41, Case 2, that "The . . . rules were designed to eliminate surprise and decisions which result from strategy."

The Advisory Committee, one member disagreeing, questions the view in *Hickman* v. *Taylor*, *supra*, that the word "privileged" in Rule 26 (b) encompassed the situation before the court in that case. The Committee believes that the term "privileged" as used in that rule was not designed to include anything more than that embraced within the rule of testimonial exclusion regarding privileged communications as developed under the applicable laws of evidence, both common-law and statutory. *Engl* v. *Aetna Life Ins. Co.* (C. C. A. 2d, 1943) 139 F. (2d) 469. The Committee was not willing to accept the conclusion that material obtained or prepared by the adversary in apprehension of litigation or preparation for trial was completely privileged, if obtained or prepared by an attorney, without regard to the contents or the nature of the information sought. On the other hand, it did not feel willing to accept the view that such matters could be delved into in every case without restriction.

Accordingly, the amendment of Rule 30 (b), while placing the burden on the person seeking the discovery of the writing to demonstrate the necessity therefor, states a test of whether denial of the production or inspection sought by the party "will unfairly prejudice" him in "preparing his claim or defense" or will cause him "undue hardship or injustice." This gives the court a guide in determining whether inquiry may justly be made. Tests such as whether the examination constitutes a "fishing expedition," "penalizes the diligent," puts a "premium on laziness," or is subject to a broad rule of privilege protecting all matter gathered

or prepared by or for an attorney, are rejected. A client's privilege of free communication with his attorney is protected in that production or inspection is not permitted as to any part of a writing reflecting the attorney's legal thinking—that is, his "mental impressions, conclusion, opinions, or legal theories." Parties who have retained expert witnesses at their own expense are also protected, except as provided in Rule 35. And since Rules 26 (b), 31 (d), 33, 34 and 45 (d) (1), as they were originally or as proposed to be amended, all expressly incorporate the protective orders permitted by Rule 30 (b), the provisions of the latter rule govern the extent of general inquiry under any of the other rules just enumerated. Attention, however, is called to that part of Rule 26 (b) which expressly allows inquiry as to the identity and location of persons having knowledge of relevant facts. The amendment of Rule 30 (b) is not intended to restrict such an inquiry.

Rule 33. Interrogatories to Parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer ~~thereof competent to testify in its behalf~~ *or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained.* The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the

interrogatories within 15 days after the ~~delivery~~ *service* of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. ~~Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and~~ *Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time.* Answers *to interrogatories to which objection is made* shall be deferred until the objections are determined~~, which shall be at as early a time as is practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.~~

Interrogatories may relate to any matters which can be inquired into under Rule 26 (b), and the answers may be used to the same extent as provided in Rule 26 (d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30 (b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

Note. The added second sentence in the first paragraph of Rule 33 conforms with a similar change in

Rule 26 (a) and will avoid litigation as to when the interrogatories may be served. Original Rule 33 does not state the times at which parties may serve written interrogatories upon each other. It has been the accepted view, however, that the times were the same in Rule 33 as those stated in Rule 26 (a). *United States* v. *American Solvents & Chemical Corp. of California* (D. Del. 1939) 30 F. Supp. 107; *Sheldon* v. *Great Lakes Transit Corp.* (W. D. N. Y. 1942) 5 Fed. Rules Serv. 33.11, Case 3; *Musher Foundation, Inc.*, v. *Alba Trading Co.* (S. D. N. Y. 1941) 42 F. Supp. 281; 2 *Moore's Federal Practice* (1938) 2621. The time within which leave of court must be secured by a plaintiff has been fixed at 10 days, in view of the fact that a defendant has 10 days within which to make objections in any case, which should give him ample time to engage counsel and prepare.

Further in the first paragraph of Rule 33, the word "service" is substituted for "delivery" in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Note to Rule 13 (a) herein. The portion of the rule dealing with practice on objections has been revised so as to afford a clearer statement of the procedure. The addition of the words "to interrogatories to which objection is made" insures that only the answers to the objectionable interrogatories may be deferred, and that the answers to interrogatories not objectionable shall be forthcoming within the time prescribed in the rule. Under the original wording, answers to all interrogatories may be withheld until objections, sometimes to but a few interrogatories, are determined. The amendment expedites the procedure of the rule and serves to eliminate the strike value of objections to minor interrogatories. The elimination of the last sentence of the original rule is in line with the policy stated subsequently in this note.

The added second paragraph in Rule 33 contributes clarity and specificity as to the use and scope of interrogatories to the parties. The field of inquiry will be as broad as the scope of examination under Rule 26

(b). There is no reason why interrogatories should be more limited than depositions, particularly when the former represent an inexpensive means of securing useful information. See *Hoffman* v. *Wilson Line, Inc.* (E. D. Pa. 1946) 9 Fed. Rules Serv. 33.514, Case 2; *Brewster* v. *Technicolor, Inc.*, (S. D. N. Y. 1941) 5 Fed. Rules Serv. 33.319, Case 3; *Kingsway Press, Inc.* v. *Farrell Publishing Corp.* (S. D. N. Y. 1939) 30 F. Supp. 775. Under present Rule 33 some courts have unnecessarily restricted the breadth of inquiry on various grounds. See *Auer* v. *Hershey Creamery Co.* (D. N. J. 1939) 2 Fed. Rules Serv. 33.31, Case 2, 1 F. R. D. 14; *Tudor* v. *Leslie* (D. Mass. 1940) 4 Fed. Rules Serv. 33.324, Case 1. Other courts have read into the rule the requirement that interrogation should be directed only towards "important facts", and have tended to fix a more or less arbitrary limit as to the number of interrogatories which could be asked in any case. See *Knox* v. *Alter* (W. D. Pa. 1942) 6 Fed. Rules Serv. 33.352, Case 1; *Byers Theaters, Inc.* v. *Murphy* (W. D. Va. 1940) 3 Fed. Rules Serv. 33.31, Case 3, 1 F. R. D. 286; *Coca-Cola Co.* v. *Dixi-Cola Laboratories, Inc.* (D. Md. 1939) 30 F. Supp. 275. See also comment on these restrictions in Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure* (1942) 41 Mich. L. Rev. 205, 216–217. Under amended Rule 33, the party interrogated is given the right to invoke such protective orders under Rule 30 (b) as are appropriate to the situation. At the same time, it is provided that the number of or number of sets of interrogatories to be served may not be limited arbitrarily or as a general policy to any particular number, but that a limit may be fixed only as justice requires to avoid annoyance, expense, embarrassment or oppression in individual cases. The party interrogated, therefore, must show the necessity for limitation on that basis. It will be noted that in accord with this change the last sentence of the present rule, restricting the sets of interrogatories to be served, has been stricken. In *J. Schoeneman, Inc.* v. *Brauer* (W. D. Mo. 1940) 3 Fed. Rules Serv. 33.31,

Case 2, the court said: "Rule 33 . . . has been interpreted . . . as being just as broad in its implications as in the case of depositions . . . It makes no difference therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain." To the same effect, see *Canuso* v. *City of Niagara Falls* (W. D. N. Y. 1945) 8 Fed. Rules Serv. 33.352, Case 1; *Hoffman* v. *Wilson Line, Inc., supra.*

By virtue of express language in the added second paragraph of Rule 33, as amended, any uncertainty as to the use of the answers to interrogatories is removed. The omission of a provision on this score in the original rule has caused some difficulty. See, *e. g., Bailey* v. *New England Mutual Life Ins. Co.* (S. D. Cal. 1940) 4 Fed. Rules Serv. 33.46, Case 1.

The second sentence of the second paragraph in Rule 33, as amended, concerns the situation where a party wishes to serve interrogatories on a party after having taken his deposition, or vice versa. It has been held that an oral examination of a party, after the submission to him and answer of interrogatories, would be permitted. *Howard* v. *States Marine Corp.* (S. D. N. Y. 1940) 4 Fed. Rules Serv. 33.62, Case 1, 1 F. R. D. 499; *Stevens* v. *Minder Construction Co.* (S. D. N. Y. 1943) 7 Fed. Rules Serv. 30b.31, Case 2. But objections have been sustained to interrogatories served after the oral deposition of a party had been taken. *McNally* v. *Simons* (S. D. N. Y. 1940) 3 Fed. Rules Serv. 33.61, Case 1, 1 F. R. D. 254; *Currier* v. *Currier* (S. D. N. Y. 1942) 6 Fed. Rules Serv. 33.61, Case 1. Rule 33, as amended, permits either interrogatories after a deposition or a deposition after interrogatories. It may be quite desirable or necessary to elicit additional information by the inexpensive method of interrogatories where a deposition has already been taken. The party to be interrogated, however, may seek a protective order from the court under Rule 30 (b) where the additional deposition or interrogation works a hardship or injustice on the party from whom it is sought.

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, *and subject to the provisions of Rule 30 (b)*, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence ~~material to any matter involved in the action~~ *relating to any of the matters within the scope of the examination permitted by Rule 26 (b)* and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated ~~relevant~~ object or operation thereon *within the scope of the examination permitted by Rule 26 (b)*. The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

Note. The changes in clauses (1) and (2) correlate the scope of inquiry permitted under Rule 34 with that provided in Rule 26 (b), and thus remove any ambiguity created by the former differences in language. As stated in *Olson Transportation Co.* v. *Socony-Vacuum Oil Co.* (E. D. Wis. 1944) 8 Fed. Rules Serv. 34.41, Case 2, ". . . Rule 34 is a direct and simple method of discovery." At the same time the addition of the words following the term "parties" makes

certain that the person in whose custody, possession, or control the evidence reposes may have the benefit of the applicable protective orders stated in Rule 30 (b). This change should be considered in the light of the proposed expansion of Rule 30 (b).

An objection has been made that the word "designated" in Rule 34 has been construed with undue strictness in some district court cases so as to require great and impracticable specificity in the description of documents, papers, books, etc., sought to be inspected. The Committee, however, believes that no amendment is needed, and that the proper meaning of "designated" as requiring specificity has already been delineated by the Supreme Court. See *Brown* v. *United States* (1928) 276 U. S. 134, 143 ("The subpoena . . . specifies . . . with reasonable particularity the subjects to which the documents called for related."); *Consolidated Rendering Co.* v. *Vermont* (1908) 207 U. S. 541, 543–544 ("We see no reason why all such books, papers and correspondence which related to the subject of inquiry, and were described with reasonable detail, should not be called for and the company directed to produce them. Otherwise, the State would be compelled to designate each particular paper which it desired, which presupposes an accurate knowledge of such papers, which the tribunal desiring the papers would probably rarely, if ever, have.").

Rule 36. Admission of Facts and of Genuineness of Documents.

(a) REQUEST FOR ADMISSION. ~~At any time after the pleadings are closed,~~ *After commencement of an action* a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth ~~therein,~~ *in the request. If a plaintiff desires to serve a request within 10 days*

after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be ~~delivered~~ *served* with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such ~~further~~ *shorter or longer* time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission *either* (*1*) a sworn statement ~~either~~ denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully ~~either~~ admit or deny those matters *or* (*2*) *written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder.*

Note. The first change in the first sentence of Rule 36 (a) and the addition of the new second sentence, specifying when requests for admissions may be served, bring Rule 36 in line with amended Rules 26 (a) and 33. There is no reason why these rules should not be

treated alike. Other provisions of Rule 36 (a) give the party whose admissions are requested adequate protection.

The second change in the first sentence of the rule removes any uncertainty as to whether a party can be called upon to admit matters of fact other than those set forth in relevant documents described in and exhibited with the request. In *Smyth* v. *Kaufman* (C. C. A. 2d, 1940) 114 F. (2d) 40, it was held that the word "therein", now stricken from the rule, referred to the request and that a matter of fact not related to any document could be presented to the other party for admission or denial. The rule of this case is now clearly stated.

The substitution of the word "served" for "delivered" in the third sentence of the amended rule is in conformance with the use of the word "serve" elsewhere in the rule and generally throughout the rules. See also Notes to Rule 13 (a) and 33 herein. The substitution of "shorter or longer" for "further" will enable a court to designate a lesser period than 10 days for answer. This conforms with a similar provision already contained in Rule 33.

The addition of clause (2) specifies the method by which a party may challenge the propriety of a request to admit. There has been considerable difference of judicial opinion as to the correct method, if any, available to secure relief from an allegedly improper request. See Commentary, *Methods of Objecting to Notice to Admit* (1942) 5 Fed. Rules Serv. 835; *International Carbonic Engineering Co.* v. *Natural Carbonic Products, Inc.* (S. D. Cal. 1944) 57 F. Supp. 248. The changes in clause (1) are merely of a clarifying and conforming nature.

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

Rule 41. Dismissal of Actions.

(a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

(1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23 (c), *of Rule 66*, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service ~~of the~~ *by the adverse party of an* answer *or of a motion for summary judgment, whichever first occurs*, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared ~~generally~~ in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *In an action tried by the court without a jury the court*

as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (*a*). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

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

The change in Rule 41 (a) (1) (i) gives the service of a motion for summary judgment by the adverse party the same effect in preventing unlimited dismissal as was originally given only to the service of an answer. The omission of reference to a motion for summary judgment in the original rule was subject to criticism. 3 *Moore's Federal Practice* (1938) 3037–3038, n. 12. A motion for summary judgment may be forthcoming prior to answer, and if well taken will eliminate the necessity for an answer. Since such a motion may require even more research and preparation than the answer itself, there is good reason why the service of the motion, like that of the answer, should prevent a voluntary dismissal by the adversary without court approval.

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

Subdivision (*b*). In some cases tried without a jury, where at the close of plaintiff's evidence the defendant moves for dismissal under Rule 41 (b) on the ground that plaintiff's evidence is insufficient for recovery,

the plaintiff's own evidence may be conflicting or present questions of credibility. In ruling on the defendant's motion, questions arise as to the function of the judge in evaluating the testimony and whether findings should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young* v. *United States* (C. C. A. 9th, 1940) 111 F. (2d) 823; *Gary Theatre Co.* v. *Columbia Pictures Corporation* (C. C. A. 7th, 1941) 120 F. (2d) 891; *Bach* v. *Friden Calculating Machine Co., Inc.* (C. C. A. 6th, 1945) 148 F. (2d) 407. *Cf. Mateas* v. *Fred Harvey, a Corporation* (C. C. A. 9th, 1945) 146 F. (2d) 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp.* v. *Mason* (C. C. A. 3d, 1940) 115 F. (2d) 548; *Schad* v. *Twentieth Century-Fox Film Corp.* (C. C. A. 3d, 1943) 136 F. (2d) 991. The added sentence in Rule 41 (b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 *Moore's Federal Practice* (1938), Cum. Supplement § 41.03, under "Page 3045"; Commentary, *The Motion to Dismiss in Non-Jury Cases* (1946), 9 Fed. Rules Serv., Comm. Pg. 41b.14.

Rule 43. Evidence.

Rule 44. Proof of Official Record.

Note. 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* v. *Metropolitan Life Ins. Co. of New York* (C. C. A. 3d, 1941) 118 F. (2d) 430; *Franzen* v. *E. I. DuPont De-Nemours & Co.* (C. C. A. 3d, 1944) 146 F. (2d) 837; *Fakouri* v. *Cadais* (C. C. A. 5th, 1945) 147 F. (2d) 667; *In re C. & P. Co.* (S. D. Cal. 1945) 63 F. Supp. 400, 408. But *cf. United States* v. *Aluminum Co. of America* (S. D. N. Y. 1938) 1 Fed. Rules Serv. 43a.3, Case 1; Note (1946) 46 Col. L. Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F. R. D. 124, 137–138.

Rule 45. Subpoena.

(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE. A subpoena may also command the person to whom it is directed to produce the books, papers, ~~or~~ documents, *or tangible things* designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash *or modify* the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, ~~or~~ documents, *or tangible things*.

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

(1) Proof of service of a notice to take a deposition as provided in Rules 30 (a) and 31 (a) constitutes a sufficient authorization for the issuance by the clerk of the district court for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. ~~A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court.~~ *The subpoena may command the person to whom it is directed to produce designated books, papers, documents, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26 (b), but in that event the subpoena will be subject to the provisions of subdivision (b) of Rule 30 and subdivision (b) of this Rule 45.*

(2) A resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, *or at such other convenient place as is fixed by an order of court.* A nonresident of the district may be required to attend only in the county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other *convenient* place as is fixed by an order of court.

Note. Subdivision (b). The added words, "or tangible things" in subdivision (b) merely make the rule for the subpoena duces tecum at the trial conform to that of subdivision (d) for the subpoena at the taking of depositions.

The insertion of the words "or modify" in clause (1) affords desirable flexibility.

Subdivision (d). The added last sentence of amended subdivision (d) (1) properly gives the subpoena for documents or tangible things the same scope as provided in Rule 26 (b), thus promoting uniformity. The requirement in the last sentence of original Rule 45 (d) (1)—to the effect that leave of court should be obtained for the issuance of such a subpoena—has been omitted. This requirement is unnecessary and oppressive on both counsel and court, and it has been criticized by district judges. There is no satisfactory reason for a differentiation between a subpoena for the production of documentary evidence by a witness at a trial (Rule 45 (a)) and for the production of the same evidence at the taking of a deposition. Under this amendment, the person subpoenaed may obtain the protection afforded by any of the orders permitted under Rule 30 (b) or Rule 45 (b). See *Application of Zenith Radio Corp.* (E. D. Pa. 1941) 4 Fed. Rules Serv. 30b.21, Case 1, 1 F. R. D. 627; *Fox* v. *House* (E. D. Okla. 1939) 29 F. Supp. 673; *United States of America for the Use of Tilo Roofing Co., Inc.* v. *J. Slotnik Co.* (D. Conn. 1944) 3 F. R. D. 408.

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

Rule 50. Motions for Directed Verdict *and for Judgment.*

(a) ~~When Made; Effect~~ *Motion For Directed Verdict.* A party who moves for a directed verdict at the close of the evidence offered by an

opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) ~~Reservation Of Decision On Motion~~ *Motion For Judgment.* ~~Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.~~ Within 10 days after the reception of a verdict, a party who has moved for a directed verdict *at the close of all the evidence* may move to ~~have~~ *set aside* the verdict and any judgment entered thereon ~~set aside~~ and ~~to have~~ *for* judgment ~~entered~~ in accordance with his motion for a directed verdict. ~~; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the~~ *The* court may allow the *verdict or* judgment to stand or may ~~reopen the judgment~~ *set it aside* and either order a new trial or direct the entry of judgment ~~as if the requested verdict had been directed~~ *for the moving party. The making of a motion for judgment in*

conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered. If no verdict ~~was~~ *is* returned, the court *on motion made within 10 days after the jury has been discharged* may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

A motion for a new trial, as an alternative, may be joined with a motion for judgment. If the motion for judgment is granted, the court in its discretion may either refrain from ruling upon the motion for new trial or rule upon it by determining whether it should be granted if the judgment is thereafter vacated or reversed. The making of a conditional order on the motion for new trial or the refraining from making such an order, does not affect the finality of the judgment. In case the alternative motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the alternative motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court. In case the district court has refrained from ruling upon the motion for a new trial when granting the motion for judgment and the judgment is reversed on appeal, the district court shall then dispose of the motion for a new trial unless the appellate court shall have otherwise ordered.

Note. Subdivision (a). The titles of Rule 50 and subdivision (a) have been altered in conformance with the changes proposed in subdivision (b).

The court may deny a motion for directed verdict made under Rule 50 (a) by a party opposing a claim, and under Rule 41 (a) (2) permit the claimant to dismiss without prejudice where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim.

Subidivision (b). The revision of subdivision (b) accomplishes three objectives.

The first is a straightforward recognition of the trial court's power to enter a judgment, notwithstanding a verdict (or in the absence of a verdict when the jury cannot agree), in accordance with a previous motion to direct a verdict.

The provision in the original rule that 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" to direct, resulted from an over-meticulous effort to stay within the limits of *Baltimore & Carolina Line Inc.* v. *Redman* (1935) 295 U. S. 654; and *Slocum* v. *New York Life Ins. Co.* (1913) 288 U. S. 364. It is an awkward fiction. The Advisory Committee thinks it should be eliminated, and that it is not a denial of the constitutional right to jury trial to grant a judgment, notwithstanding a verdict, whether or not the trial court reserved or may be "deemed" to have reserved the question of law raised by a motion to direct. See *Aetna Life Ins. Co.* v. *Kennedy* (1937) 301 U. S. 389; *Simkins Federal Practice* (3d ed. 1938 by Schweppe) § 637; also *Ryan Distributing Corp.* v. *Caley* (C. C. A. 3d, 1945) 147 F. (2d) 138.

The third sentence of revised subdivision (b) embodies the second objective and permits an appellate court to order final judgment in accordance with the motion for a directed verdict, although no post-verdict motion for judgment was made in the district court (and the court failed to act of its own motion) within the time specified. Circuit courts of appeals have generally

interpreted Rule 50 (b) as sanctioning such a course, despite lack of express language on the point in the rule. See *Conway* v. *O'Brien* (C. C. A. 2d, 1940) 111 F. (2d) 611, rev'd on other grounds (1941) 312 U. S. 492; *Berry* v. *United States* (C. C. A. 2d, 1940) 111 F. (2d) 615, rev'd on other grounds (1941) 312 U. S. 450; *United States* v. *Halliday* (C. C. A. 4th, 1941) 116 F. (2d) 812, rev'd on other grounds (1942) 315 U. S. 94; *Howard University* v. *Cassell* (App. D. C. 1941) 126 F. (2d) 6, cert. den. (1942) 316 U. S. 675; *Lowden* v. *Bell* (C. C. A. 8th, 1943) 138 F. (2d) 558; *West Virginia Pulp & Paper Co.* v. *Cone* (C. C. A. 4th, 1946) 153 F. (2d) 576. For further discussion, see Commentary, *Action by Appellate Court Where Directed Verdict Should Have Been Granted* (1941) 4 Fed. Rules Serv. 934; 3 *Moore's Federal Practice* (1938), Cum. Supplement § 50.04, under subhead "Necessity of Appealable Judgment; Effect of Failure of Appellant to Move for Judgment N. O. V."

The third objective of the revision is secured by the new paragraph added to subdivision (b). The first sentence thereof is a transposition and restatement of a sentence deleted from the first paragraph of the subdivision. The second sentence incorporates the practice established by the Supreme Court in *Montgomery Ward & Co.* v. *Duncan* (1940) 311 U. S. 243, subject to the qualification that the district court is given discretion to decline to make an alternative ruling on the motion for new trial. The third sentence avoids the rule of *County of Alleghany* v. *Maryland Casualty Co.* (C. C. A. 3d, 1943) 132 F. (2d) 894 (contemporaneous unconditional order for a new trial cancels out a judgment notwithstanding the verdict and there is no appealable order), and adopts the principle of *McIlvaine Patent Corp.* v. *Walgreen Co.* (C. C. A. 7th, 1943) 138 F. (2d) 177 (where the district court sets aside the verdict and enters a judgment notwithstanding the verdict and also grants the motion for a new trial, the judgment stands subject to appeal). The balance of the paragraph makes any conditional ruling on the motion for new trial subject, of course, to the mandate of the appellate court.

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amendment of Rule 73 (a) and Note.

It has been suggested that when a verdict has been returned and the losing party makes a motion for judgment notwithstanding the verdict, the party who has won the verdict should be allowed to make a motion for new trial conditioned on his verdict being set aside in the trial court or on appeal. This suggestion is based on the erroneous assumption that the party winning the verdict must be allowed to make such a conditional motion in order to make a showing that if his verdict is set aside, he should at least have another chance at a second trial to supply the deficiencies in his proof. A trial court or an appellate court in setting aside a verdict always has discretion, if justice requires it, to order a new trial, instead of directing the entry of judgment. Rule 50 (b) states that the court on a motion for judgment notwithstanding the verdict "may either order a new trial or direct the entry of judgment" for the moving party. A party resisting a motion for judgment notwithstanding his verdict may endeavor to sustain his verdict, and at the same time make a showing by argument or affidavit that if his verdict is set aside he should at least have a new trial, and he may do that without making a conditional motion for new trial. Even on appeal, if the appellate court sets aside his verdict, he may present to the appellate court affidavits to support his claim to a new trial, and the appellate court has power to receive the affidavits and remand the case to the trial court with instructions to consider the affidavits and determine whether a new trial should be allowed.

The Committee, therefore, believes there is no reason to provide in such a case for a "conditional" motion for new trial by the party who won the verdict.

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury *or with an advisory jury*, the court shall find the facts specially and state

separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. 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 findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. *If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).*

Note. Subdivision (a). The amended rule makes clear that the requirement for findings of fact and conclusions of law thereon applies in a case with an advisory jury. This removes an ambiguity in the rule as originally stated, but carries into effect what has been considered its intent. 3 *Moore's Federal Practice* (1938) 3119; *Hurwitz* v. *Hurwitz* (App. D. C. 1943) 136 F. (2d) 796.

The two sentences added at the end of Rule 52 (a) eliminate certain difficulties which have arisen concerning findings and conclusions. The first of the two sentences permits findings of fact and conclusions of law to appear in an opinion or memorandum of decision. See, *e. g., United States* v. *One 1941 Ford Sedan* (S. D. Tex. 1946) 65 F. Supp. 84. Under original Rule 52 (a) some courts have expressed the view that findings and conclusions could not be incorporated in an opinion. *Detective Comics, Inc.* v. *Bruns Publications* (S. D. N. Y. 1939) 28 F. Supp. 399; *Pennsylvania Co. for In-*

surance on Lives & Granting Annuities v. *Cincinnati & L. E. R. Co.* (S. D. Ohio 1941) 43 F. Supp. 5; *United States* v. *Aluminum Co. of America* (S. D. N. Y. 1941) 5 Fed. Rules Serv. 52a. 11, Case 3; see also s. c., 44 F. Supp. 97. But, to the contrary, see *Wellman* v. *United States* (D. Mass. 1938) 25 F. Supp. 868; *Cook* v. *United States* (D. Mass. 1939) 26 F. Supp. 253; *Proctor* v. *White* (D. Mass. 1939) 28 F. Supp. 161; *Green Valley Creamery, Inc.* v. *United States* (C. C. A. 1st, 1939) 108 F. (2d) 342. See also *Matton Oil Transfer Corp.* v. *The Dynamic* (C. C. A. 2d, 1941) 123 F. (2d) 999; *Carter Coal Co.* v. *Litz* (C. C. A. 4th, 1944) 140 F. (2d) 934; *Woodruff* v. *Heiser* (C. C. A. 10th, 1945) 150 F. (2d) 869; *Coca Cola Co.* v. *Busch* (E. D. Pa. 1943) 7 Fed. Rules Serv. 59b. 2, Case 4; Oglebay, *Some Developments in Bankruptcy Law* (1944) 18 J. of Nat'l Ass'n of Ref. 68, 69. Findings of fact aid in the process of judgment and in defining for future cases the precise limitations of the issues and the determination thereon. Thus they not only aid the appellate court on review (*Hurwitz* v. *Hurwitz* (App. D. C. 1943) 136 F. (2d) 796) but they are an important factor in the proper application of the doctrines of res judicata and estoppel by judgment. Nordbye, *Improvements in Statement of Findings of Fact and Conclusions of Law*, 1 F. R. D. 25, 26–27; *United States* v. *Forness* (C. C. A. 2d, 1942) 125 F. (2d) 928, cert. den. (1942) 316 U. S. 694. These findings should represent the judge's own determination and not the long, often argumentative statements of successful counsel. *United States* v. *Forness, supra: United States* v. *Crescent Amusement Co.* (1944) 323 U. S. 173. Consequently, they should be a part of the judge's opinion and decision, either stated therein or stated separately. *Matton Oil Transfer Corp.* v. *The Dynamic, supra.* But the judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. *United States* v. *Forness, supra; United States* v. *Crescent Amusement Co., supra.* See also *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.* (C. C. A. 2d,

1942) 126 F. (2d) 992; *Brown Paper Mill Co., Inc.* v. *Irwin* (C. C. A. 8th, 1943) 134 F. (2d) 337; *Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.* (C. C. A. 2d, 1944) 145 F. (2d) 215, rev'd on other grounds (1945) 325 U. S. 797; *Young* v. *Murphy* (N. D. Ohio 1946) 9 Fed. Rules Serv. 52a. 11, Case 2.

The last sentence of Rule 52 (a) as amended will remove any doubt that findings and conclusions are unnecessary upon decision of a motion, particularly one under Rule 12 or Rule 56, except as provided in amended Rule 41 (b). As so holding, see *Thomas* v. *Peyser* (App. D. C. 1941) 118 F. (2d) 369; *Schad* v. *Twentieth Century-Fox Corp.* (C. C. A. 3d, 1943) 136 F. (2d) 991; *Prudential Ins. Co. of America* v. *Goldstein* (E. D. N. Y. 1942) 43 F. Supp. 767; *Somers Coal Co.* v. *United States* (N. D. Ohio 1942) 6 Fed. Rules Serv. 52a.1, Case 1; *Pen-Ken Oil & Gas Corp.* v. *Warfield Natural Gas Co.* (E. D. Ky. 1942) 5 Fed. Rules Serv. 52a.1, Case 3; also Commentary, *Necessity of Findings of Fact* (1941) 4 Fed. Rules Serv. 936.

Rule 54. Judgments; Costs.

(b) ~~JUDGMENT AT VARIOUS STAGES. When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the~~

~~judgment is entered.~~ *JUDGMENT UPON MULTIPLE CLAIMS. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.*

Note. The historic rule in the federal courts has always prohibited piecemeal disposal of litigation and permitted appeals only from final judgments except in those special instances covered by statute. *Hohorst* v. *Hamburg-American Packet Co.* (1893) 148 U. S. 262; *Rexford* v. *Brunswick-Balke-Collender Co.* (1913) 228 U. S. 339; *Collins* v. *Miller* (1920) 252 U. S. 364. Rule 54 (b) was originally adopted in view of the wide scope and possible content of the newly created "civil action" in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case. It was not designed to overturn the settled federal rule stated above, which, indeed, has more recently been reiterated in *Catlin* v. *United States* (1945) 324 U. S. 229. See also *United States* v. *Florian* (1941) 312 U. S. 656, rev'g (and restoring the first opinion in) *Florian* v. *United States* (C. C. A. 7th, 1940) 114 F. (2d) 990; *Reeves* v. *Beardall* (1942) 316 U. S. 283.

Unfortunately, this was not always understood, and some confusion ensued. Hence situations arose where district courts made a piecemeal disposition of an action

and entered what the parties thought amounted to a judgment, although a trial remained to be had on other claims similar or identical with those disposed of. In the interim the parties did not know their ultimate rights, and accordingly took an appeal, thus putting the finality of the partial judgment in question. While most appellate courts have reached a result generally in accord with the intent of the rule, yet there have been divergent precedents and division of views which have served to render the issues more clouded to the parties appellant. It hardly seems a case where multiplicity of precedents will tend to remove the problem from debate. The problem is presented and discussed in the following cases: *Atwater* v. *North American Coal Corp.* (C. C. A. 2d, 1940) 111 F. (2d) 125; *Rosenblum* v. *Dingfelder* (C. C. A. 2d, 1940) 111 F. (2d) 406; *Audi-Vision, Inc.* v. *RCA Mfg. Co., Inc.* (C. C. A. 2d, 1943) 136 F. (2d) 621; *Zalkind* v. *Scheinman* (C. C. A. 2d, 1943) 139 F. (2d) 895; *Oppenheimer* v. *F. J. Young & Co., Inc.* (C. C. A. 2d, 1944) 144 F. (2d) 387; *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp.* (C. C. A. 2d, 1946) 154 F. (2d) 814, cert. den. (1946) 66 S. Ct. 1353; *Zarati Steamship Co.* v. *Park Bridge Corp.* (C. C. A. 2d, 1946) 154 F. (2d) 377; *Baltimore and Ohio R. Co.* v. *United Fuel Gas Co.* (C. C. A. 4th, 1946) 154 F. (2d) 545; *Jefferson Electric Co.* v. *Sola Electric Co.* (C. C. A. 7th, 1941) 122 F. (2d) 124; *Leonard* v. *Socony-Vacuum Oil Co.* (C. C. A. 7th, 1942) 130 F. (2d) 535; *Markham* v. *Kasper* (C. C. A. 7th, 1945) 152 F. (2d) 270; *Hanney* v. *Franklin Fire Ins. Co. of Philadelphia* (C. C. A. 9th, 1944) 142 F. (2d) 864; *Toomey* v. *Toomey* (App. D. C. 1945) 149 F. (2d) 19.

In view of the difficulty thus disclosed, the Advisory Committee in its two preliminary drafts of proposed amendments attempted to redefine the original rule with particular stress upon the interlocutory nature of partial judgments which did not adjudicate all claims arising out of a single transaction or occurrence. This attempt appeared to meet with almost universal approval from those of the profession commenting upon it, although there were, of course, helpful suggestions

for additional changes in language or clarification of detail. But *cf.* Circuit Judge Frank's dissenting opinion in *Libbey-Owens-Ford Glass Co.* v. *Sylvania Industrial Corp., supra* (n. 21 of the dissenting opinion). The Committee, however, became convinced on careful study of its own proposals that the seeds of ambiguity still remained, and that it had not completely solved the problem of piecemeal appeals. After extended consideration, it concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54 (b). It re-establishes an ancient policy with clarity and precision. For the possibility of staying execution where not all claims are disposed of under Rule 54 (b), see amended Rule 62 (h).

Rule 55. Default.

Note. The operation of Rule 55 (b) (Judgment) is directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. §501 *et seq.*). Section 200 of the Act imposes specific requirements which must be fulfilled before a default judgment can be entered (*e. g.*, *Ledwith* v. *Storkan* (D. Neb. 1942) 6 Fed. Rules Serv. 60b.24, Case 2, 2 F. R. D. 539), and also provides for the vacation of a judgment in certain circumstances. See discussion in Commentary, *Effect of Conscription Legislation on the Federal Rules* (1940) 3 Fed. Rules Serv. 725; 3 *Moore's Federal Practice* (1938) Cum. Supplement §55.02.

Rule 56. Summary Judgment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the ~~pleading~~ ~~in~~ ~~answer~~ ~~thereto~~ ~~has~~ ~~been~~ ~~served,~~ *expiration of 20 days from the commencement of the action or after service of a motion*

for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time ~~specified~~ *fixed* for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that~~,~~ ~~except as to the amount of damages,~~ there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.*

Note. Subdivision (*a*). The amendment allows a claimant to move for a summary judgment at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party. This will normally operate to permit an earlier motion by the claimant than under the original rule, where the phrase "at any time after the pleading in answer thereto has been served" operates to prevent a claimant from moving for summary judgment, even in a case clearly proper for its exercise, until a formal answer has been filed. Thus in *Peoples Bank* v. *Federal Reserve Bank of San Francisco* (N. D. Cal. 1944) 58 F. Supp. 25, the plaintiff's countermotion for a summary judgment was stricken as premature, because the defendant had not filed an answer. Since Rule 12 (a) allows at least 20 days for an answer, that time plus the 10 days required in Rule 56 (c) means that under original Rule 56 (a) a minimum period of 30 days necessarily has to elapse in every case before

the claimant can be heard on his right to a summary judgment. An extension of time by the court or the service of preliminary motions of any kind will prolong that period even further. In many cases this merely represents unnecessary delay. See *United States* v. *Adler's Creamery, Inc.* (C. C. A. 2d, 1939) 107 F. (2d) 987. The changes are in the interest of more expeditious litigation. The 20-day period, as provided, gives the defendant an opportunity to secure counsel and determine a course of action. But in a case where the defendant himself serves a motion for summary judgment within that time, there is no reason to restrict the plaintiff and the amended rule so provides.

Subdivision (*c*). The amendment of Rule 56 (c), by the addition of the final sentence, resolves a doubt expressed in *Sartor* v. *Arkansas Natural Gas Corp.* (1944) 321 U. S. 620. See also Commentary, *Summary Judgment as to Damages* (1944) 7 Fed. Rules Serv. 974; *Madeirense Do Brasil S/A* v. *Stulman-Emrick Lumber Co.* (C. C. A. 2d, 1945) 147 F. (2d) 399, cert. den. (1945) 325 U. S. 861. It makes clear that although the question of recovery depends on the amount of damages, the summary judgment rule is applicable and summary judgment may be granted in a proper case. If the case is not fully adjudicated it may be dealt with as provided in subdivision (d) of Rule 56, and the right to summary recovery determined by a preliminary order, interlocutory in character, and the precise amount of recovery left for trial.

Subdivision (*d*). Rule 54 (a) defines "judgment" as including a decree and "any order from which an appeal lies." Subdivision (d) of Rule 56 indicates clearly, however, that a partial summary "judgment" is not a final judgment, and, therefore, that it is not appealable, unless in the particular case some statute allows an appeal from the interlocutory order involved. The partial summary judgment is merely a pre-trial adjudication that certain issues shall be deemed established for the trial of the case. This adjudication is more nearly akin to the preliminary order under Rule 16, and likewise serves the purpose of speeding up litiga-

tion by eliminating before trial matters wherein there is no genuine issue of fact. See *Leonard* v. *Socony-Vacuum Oil Co.* (C. C. A. 7th, 1942) 130 F. (2d) 535; *Biggins* v. *Oltmer Iron Works* (C. C. A. 7th, 1946) 154 F. (2d) 214; 3 *Moore's Federal Practice* (1938) 3190–3192. Since interlocutory appeals are not allowed, except where specifically provided by statute (see 3 *Moore, op. cit. supra,* 3155–3156), this interpretation is in line with that policy, *Leonard* v. *Socony-Vacuum Oil Co., supra.* See also *Audi Vision Inc.* v. *RCA Mfg. Co.* (C. C. A. 2d, 1943) 136 F. (2d) 621; *Toomey* v. *Toomey* (App. D. C. 1945) 149 F. (2d) 19; *Biggins* v. *Oltmer Iron Works, supra; Catlin* v. *United States* (1945) 324 U. S. 229.

Rule 58. Entry of Judgment.

Unless the court otherwise directs *and subject to the provisions of Rule 54 (b),* judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs ~~the entry of a judgment~~ that a party recover only money or costs or that ~~there be no recovery~~ all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79 (a) constitutes the entry of the judgment; and the judgment is not effective before such entry. *The entry of the judgment shall not be delayed for the taxing of costs.*

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

Two changes have been made in Rule 58 in order to clarify the practice. The substitution of the more inclusive phrase "all relief be denied" for the words "there be no recovery", makes it clear that the clerk shall enter the judgment forthwith in the situations specified without awaiting the filing of a formal judgment approved by the court. The phrase "all relief be denied" covers cases such as the denial of a bankrupt's discharge and similar situations where the relief sought is refused but there is literally no denial of a "recovery".

The addition of the last sentence in the rule emphasizes that judgments are to be entered promptly by the clerk without waiting for the taxing of costs. Certain district court rules, for example, Civil Rule 22 of the Southern District of New York—until its annulment Oct. 1, 1945, for conflict with this rule—and the like rule of the Eastern District of New York, are expressly in conflict with this provision, although the federal law is of long standing and well settled. *Fowler* v. *Hamill* (1891) 139 U. S. 549; *Craig* v. *The Hartford* (C. C. Cal. 1856) Fed. Case No. 3, 333; *Tuttle* v. *Claflin* (C. C. A. 2d, 1895) 60 Fed. 7, cert. den. (1897) 166 U. S. 721; *Prescott & A. C. Ry. Co.* v. *Atchison, T. & S. F. R. Co.* (C. C. A. 2d, 1897) 84 Fed. 213; *Stallo* v. *Wagner* (C. C. A. 2d, 1917) 245 Fed. 636, 639–40; *Brown* v. *Parker* (C. C. A. 8th, 1899) 97 Fed. 446; *Allis-Chalmers* v. *United States* (C. C. A. 7th, 1908) 162 Fed. 679. And this applies even though state law is to the contrary. *United States* v. *Nordbye* (C. C. A. 8th, 1935) 75 F. (2d) 744, 746, cert. den. (1935) 296 U. S. 572. Inasmuch as it has been held that failure of the clerk thus to enter judgment is a "misprision" "not to be excused" (*The Washington* (C. C. A. 2d, 1926) 16 F. (2d) 206), such a district court rule may have serious consequences for a district court clerk. Rules of this sort also provide for delay in entry of the judgment contrary to Rule 58. See *Commissioner of Internal Revenue* v. *Bedford's Estate* (1945) 325 U. S. 283.

Rule 59. New Trials; *Amendment of Judgments.*

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment~~, except that a motion for a new trial on the ground of newly discovered evidence may be made after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence~~.

(e) *MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.*

Note. Subdivision (b). With the time for appeal to a circuit court of appeals reduced in general to 30 days by the proposed amendment of Rule 73 (a), the utility of the original "except" clause, which permits a motion for a new trial on the ground of newly discovered evidence to be made before the expiration of the time for appeal, would have been seriously restricted. It was thought advisable, therefore, to take care of this matter in another way. By amendment of Rule 60 (b), newly discovered evidence is made the basis for relief from a judgment, and the maximum time limit has been extended to one year. Accordingly the amendment of Rule 59 (b) eliminates the "except" clause and its specific treatment of newly discovered evidence as a ground for a motion for new trial. This ground remains, however, as a basis for a motion for new trial served not later than 10 days after the entry of judgment. See also Rule 60 (b).

As to the effect of a motion under subdivision (b) upon the running of appeal time, see amended Rule 73 (a) and Note.

Subdivision (e). This subdivision has been added to care for a situation such as that arising in *Boaz* v.

Mutual Life Ins. Co. of New York (C. C. A. 8th, 1944) 146 F. (2d) 321, and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry. The subdivision deals only with alteration or amendment of the original judgment in a case and does not relate to a judgment upon motion as provided in Rule 50 (b). As to the effect of a motion under subdivision (e) upon the running of appeal time, see amended Rule 73 (a) and Note.

The title of Rule 59 has been expanded to indicate the inclusion of this subdivision.

Rule 60. Relief From Judgment or Order.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. *During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.*

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; *NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.* On motion ~~the court,~~ *and* upon such terms as are just, *the court* may relieve a party or his legal representative from a *final* judgment, order, or proceeding ~~taken against him through his~~ *for the following reasons: (1)* mistake, inadvertence, surprise, or excusable neglect*; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other mis-*

conduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, ~~but in no case exceeding six months~~ *and for reasons (1), (2) and (3) not more than one year* after ~~such~~ *the* judgment, order, or proceeding was *entered or* taken. A motion under this subdivision (*b*) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court ~~(1)~~ to entertain an *independent* action to relieve a party from a judgment, order, or proceeding, or ~~(2) to set aside within one year, as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified~~ *to grant relief to a defendant not actually personally notified as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.*

Note. Subdivision (*a*). The amendment incorporates the view expressed in *Perlman* v. *322 West Seventy-Second Street Co., Inc.* (C. C. A. 2d, 1942) 127 F. (2d) 716; 3 *Moore's Federal Practice* (1938) 3276, and further

permits correction after docketing, with leave of the appellate court. Some courts have thought that upon the taking of an appeal the district court lost its power to act. See *Schram* v. *Safety Investment Co.* (E. D. Mich. 1942) 45 F. Supp. 636; also *Miller* v. *United States* (C. C. A. 7th, 1940) 114 F. (2d) 267.

Subdivision (b). When promulgated, the rules contained a number of provisions, including those found in Rule 60 (b), describing the practice by a motion to obtain relief from judgments, and these rules, coupled with the reservation in Rule 60 (b) of the right to entertain a new action to relieve a party from a judgment, were generally supposed to cover the field. Since the rules have been in force, decisions have been rendered that the use of bills of review, *coram nobis*, or *audita querela*, to obtain relief from final judgments is still proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules. It is obvious that the rules should be complete in this respect and define the practice with respect to any existing rights or remedies to obtain relief from final judgments. For extended discussion of the old common law writs and equitable remedies, the interpretation of Rule 60, and proposals for change, see Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623. See also 3 *Moore's Federal Practice* (1938) 3254 *et seq.;* Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment* (1941) 4 Fed. Rules Serv. 942, 945; *Wallace* v. *United States* (C. C. A. 2d, 1944) 142 F. (2d) 240, cert. den. (1944) 323 U. S. 712.

The reconstruction of Rule 60 (b) has for one of its purposes a clarification of this situation. Two types of procedure to obtain relief from judgments are specified in the rules as it is proposed to amend them. One procedure is by motion in the court and in the action in which the judgment was rendered. The other procedure is by a new or independent action to obtain relief from a judgment, which action may or may not be begun in the court which rendered the judgment,

Various rules, such as the one dealing with a motion for new trial and for amendment of judgments, Rule 59, one for amended findings, Rule 52, and one for judgment notwithstanding the verdict, Rule 50 (b), and including the provisions of Rule 60 (b) as amended, prescribe the various types of cases in which the practice by motion is permitted. In each case there is a limit upon the time within which resort to a motion is permitted, and this time limit may not be enlarged under Rule 6 (b). If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitations of time are those of laches or statutes of limitations. The Committee has endeavored to ascertain all the remedies and types of relief heretofore available by *coram nobis, coram vobis, audita querela,* bill of review, or bill in the nature of a bill of review. See Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623, 659–682. It endeavored then to amend the rules to permit, either by motion or by independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules, and the amendment concludes with a provision abolishing the use of bills of review and the other common law writs referred to, and requiring the practice to be by motion or by independent action.

To illustrate the operation of the amendment, it will be noted that under Rule 59 (b) as it now stands, without amendment, a motion for new trial on the ground of newly discovered evidence is permitted within ten days after the entry of the judgment, or after that time upon leave of the court. It is proposed to amend Rule 59 (b) by providing that under that rule a motion for new trial shall be served not later than ten days after the entry of the judgment, whatever the ground be for the motion, whether error by the court or newly discovered evidence. On the other hand, one of the pur-

poses of the bill of review in equity was to afford relief on the ground of newly discovered evidence long after the entry of the judgment. Therefore, to permit relief by a motion similar to that heretofore obtained on bill of review, Rule 60 (b) as amended permits an application for relief to be made by motion, on the ground of newly discovered evidence, within one year after judgment. Such a motion under Rule 60 (b) does not affect the finality of the judgment, but a motion under Rule 59, made within 10 days, does affect finality and the running of the time for appeal.

If these various amendments, including principally those to Rule 60 (b), accomplish the purpose for which they are intended, the federal rules will deal with the practice in every sort of case in which relief from final judgments is asked, and prescribe the practice. With reference to the question whether, as the rules now exist, relief by *coram nobis,* bills of review, and so forth, is permissible, the generally accepted view is that the remedies are still available, although the precise relief obtained in a particular case by use of these ancillary remedies is shrouded in ancient lore and mystery. See *Wallace* v. *United States* (C. C. A. 2d, 1944) 142 F. (2d) 240, cert. den. (1944) 323 U. S. 712; *Fraser* v. *Doing* (App. D. C. 1942) 130 F. (2d) 617; *Jones* v. *Watts* (C. C. A. 5th, 1944) 142 F. (2d) 575; *Preveden* v. *Hahn* (S. D. N. Y. 1941) 36 F. Supp. 952; *Cavallo* v. *Agwilines, Inc.* (S. D. N. Y. 1942) 6 Fed. Rules Serv. 60b. 31, Case 2, 2 F. R. D. 526; *McGinn* v. *United States* (D. Mass. 1942) 6 Fed. Rules Serv. 60b. 51, Case 3, 2 F. R. D. 562; *City of Shattuck, Oklahoma ex rel. Versluis* v. *Oliver* (W. D. Okla. 1945) 8 Fed. Rules Serv. 60b. 31, Case 3; Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623, 631–653; 3 *Moore's Federal Practice* (1938) 3254 *et seq.;* Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment, op. cit. supra. Cf. Norris* v. *Camp* (C. C. A. 10th, 1944) 144 F. (2d) 1; *Reed* v. *South Atlantic Steamship Co. of Delaware* (D. Del. 1942) 6 Fed. Rules Serv. 60b. 31, Case 1; *Laughlin* v. *Berens* (D. D. C. 1945) 8 Fed. Rules Serv. 60b 51, Case 1, 73 W. L. R. 209.

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

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

Fraud, whether intrinsic or extrinsic, misrepresentation, or other misconduct of an adverse party are express grounds for relief by motion under amended subdivision (b). There is no sound reason for their exclusion. The incorporation of fraud and the like within the scope of the rule also removes confusion as to the proper procedure. It has been held that relief from a judgment obtained by extrinsic fraud could be secured by motion within a "reasonable time," which might be after the time stated in the rule had run. *Fiske* v. *Buder* (C. C. A. 8th, 1942) 125 F. (2d) 841; see also inferentially *Bucy* v. *Nevada Construction Co.* (C. C. A. 9th, 1942) 125 F. (2d) 213. On the other hand, it has been suggested that in view of the fact that fraud was omitted from original Rule 60 (b) as a ground for relief, an independent action was the only proper remedy. Commentary, *Effect of Rule 60b on Other Methods of Relief From Judgment* (1941) 4 Fed. Rules Serv. 942, 945. The amendment settles this problem by making fraud an express ground for relief by motion; and under the saving clause, fraud may be urged as a basis for relief by independent action insofar as established doctrine permits. See Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623, 653–659; 3 *Moore's Federal Practice* (1938) 3267 *et seq.*

And the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause. As an illustration of this situation, see *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.* (1944) 322 U. S. 238.

The time limit for relief by motion in the court and in the action in which the judgment was rendered has been enlarged from six months to one year.

It should be noted that Rule 60 (b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.

It should also be noted that under § 200 (4) of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. § 501 *et seq.*), a judgment rendered in any action or proceeding governed by the section may be vacated under certain specified circumstances upon proper application to the court.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(b) STAY ON MOTION FOR NEW TRIAL OR FOR JUDGMENT. In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial *or to alter or amend a judgment* made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52 (b).

(h) STAY OF JUDGMENT UPON MULTIPLE CLAIMS. When a court has ordered a final judgment on some but not all of the claims presented in the

action under the conditions stated in Rule 54 (b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

Note. Subdivision (a). Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. § 501 *et seq.*) provide under certain circumstances for the issuance and continuance of a stay of execution of any judgment or order entered against a person in military service. See *Bowsman* v. *Peterson* (D. Neb. 1942) 45 F. Supp. 741. Section 201 of the Act permits under certain circumstances the issuance of a stay of any action or proceeding at any stage thereof, where either the plaintiff or defendant is a person in military service. See also Note to Rule 64 herein.

Subdivision (b). This change was necessary because of the proposed addition to Rule 59 of subdivision (e).

Subdivision (h). In proposing to revise Rule 54 (b), the Committee thought it advisable to include a separate provision in Rule 62 for stay of enforcement of a final judgment in cases involving multiple claims.

Rule 64. Seizure of Person or Property.

Note. Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. § 501 *et seq.*) provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

Rule 65. Injunctions.

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum

as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

Note. It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell* v. *Farley* (1881) 105 U. S. 433, 466. It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73 (f) for a similar situation. The paragraph added to Rule 65 (c) insures this result and is in the interest of efficiency. There is no reason why Rules 65 (c) and 73 (f) should operate differently. Compare § 50 (n) of the Bankruptcy Act, 11 U. S. C. § 78 (n), under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 *Collier on Bankruptcy* (14th ed. by Moore and Oglebay) 1853–1854.

Rule 66. Receivers *Appointed by Federal Courts.*

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts~~, but all appeals in receivership proceedings are subject to these rules~~. *In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.*

Note. The title of Rule 66 has been expanded to make clear the subject of the rule, *i. e.*, federal equity receivers.

The first sentence added to Rule 66 prevents a dismissal by any party, after a federal equity receiver has been appointed, except upon leave of court. A party should not be permitted to oust the court and its officer without the consent of that court. See Civil Rule 31 (e), Eastern District of Washington.

The second sentence added at the beginning of the rule deals with suits by or against a federal equity receiver. The first clause thereof eliminates the formal ceremony of an ancillary appointment before suit can be brought by a receiver, and is in accord with the more modern state practice, and with more expeditious

and less expensive judicial administration. 2 *Moore's Federal Practice* (1938) 2088–2091. For the rule necessitating ancillary appointment, see *Sterrett* v. *Second Nat. Bank* (1918) 248 U. S. 73; *Kelley* v. *Queeney* (W. D. N. Y. 1941) 41 F. Supp. 1015; see also *McCandless* v. *Furlaud* (1934) 293 U. S. 67. This rule has been extensively criticized. First, *Extraterritorial Powers of Receivers* (1932) 27 Ill. L. Rev. 271; Rose, *Extraterritorial Actions by Receivers* (1933) 17 Minn. L. Rev. 704; Laughlin, *The Extraterritorial Powers of Receivers* (1932) 45 Harv. L. Rev. 429; Clark and Moore, *A New Federal Civil Procedure—II, Pleadings and Parties* (1935) 44 Yale L. J. 1291, 1312–1315; Note (1932) 30 Mich. L. Rev. 1322. See also comment in *Bicknell* v. *Lloyd-Smith* (C. C. A. 2d, 1940) 109 F. (2d) 527, cert. den. (1940) 311 U. S. 650. The second clause of the sentence merely incorporates the well-known and general rule that, absent statutory authorization, a federal receiver cannot be sued without leave of the court which appointed him, applied in the federal courts since *Barton* v. *Barbour* (1881) 104 U. S. 126. See also 1 *Clark on Receivers* (2d ed.) § 549. Under 28 U. S. C. § 125, leave of court is unnecessary when a receiver is sued "in respect of any act or transaction of his in carrying on the business" connected with the receivership property, but such suit is subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as justice necessitates.

Capacity of a state court receiver to sue or be sued in federal court is governed by Rule 17 (b).

The last sentence added to Rule 66 assures the application of the rules in all matters except actual administration of the receivership estate itself. Since this implicitly carries with it the applicability of those rules relating to appellate procedure, the express reference thereto contained in Rule 66 has been stricken as superfluous. Under Rule 81 (a) (1) the rules do not apply to bankruptcy proceedings except as they may be made applicable by order of the Supreme Court. Rule 66 is applicable to what is commonly known as a federal "chancery" or "equity" receiver, or similar type of

court officer. It is not designed to regulate or affect receivers in bankruptcy, which are governed by the Bankruptcy Act and the General Orders. Since the Federal Rules are applicable in bankruptcy by virtue of General Orders in Bankruptcy 36 and 37 only to the extent that they are not inconsistent with the Bankruptcy Act or the General Orders, Rule 66 is not applicable to bankruptcy receivers. See *1 Collier on Bankruptcy* (14th ed. by Moore and Oglebay) ¶¶ 2.23–2.36.

Rule 68. Offer of Judgment.

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. ~~If the~~ *An* offer ~~is~~ not ~~so~~ accepted ~~it~~ shall be deemed withdrawn and evidence thereof is not admissible *except in a proceeding to determine costs.* ~~If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.~~ *If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.*

Note. The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is

admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

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

The phrase "before the trial begins", in the first sentence of the rule, has been construed in *Cover* v. *Chicago Eye Shield Co.* (C. C. A. 7th, 1943) 136 F. (2d) 374, cert. den. (1943) 320 U. S. 749.

Rule 69. Execution.

Note. With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U. S. C. § 501 *et seq.*) see Notes to Rules 62 and 64 herein.

Rule 73. Appeal to a Circuit Court of Appeals.

(a) *When and* How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals ~~and within the time prescribed, a~~ *the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days*

from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. *If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.*

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(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the ~~action~~ *appeal* there docketed within 40 days from the date of *filing* the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of *filing* the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the ~~action~~ *appeal*, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; but the district court shall not extend the time to a day more than 90 days from the date of *filing* the first notice of appeal.

Note. Subdivision (a). The most important amendment of subdivision (a) is the change in the time within which an appeal may be taken. Under the existing law, U. S. C., Title 28, § 230, the general rule is that an appeal to the circuit court of appeals from a final judgment of the district court may be taken within three months after the date of the entry of judgment. Other statutes, such as U. S. C., Title 28, § 227, fix thirty days from the date of the entry of the judgment as the time within which an appeal may be taken from orders granting or denying injunctions, and certain orders in proceedings for receivers. In the District of Columbia, by special rule authorized by Act of Congress, the time for taking an appeal in an ordinary case was long fixed at twenty days from the date of the entry of the judgment. This time was eventually enlarged to thirty days. The existing Rules of Civil

Procedure made no change in these statutory limits. In 1944, however, the Judicial Conference of Senior Circuit Judges adopted a resolution as follows:

"That in all civil cases, except where a shorter period may be provided by law and except those wherein the United States is a party, appeals shall be within thirty days after judgment or order denying motions affecting the judgment; and that in cases wherein the United States is a party, the time shall be sixty days; and that this recommendation be addressed to the Committee on Rules of Civil Procedure appointed by the Supreme Court."

Following this action by the Judicial Conference, the Advisory Committee considered the subject and, as a result, proposes a revision of Rule 73 (a).

Subdivision (a) as amended will fix the time for appeal in all cases, including those from the District of Columbia, at thirty days from the date of the entry of the judgment, unless a shorter period is provided by Act of Congress, but in any case in which the United States, or an officer or agency thereof, is a party, sixty days is allowed from the date of entry of the judgment. The three-months period now allowed by the statute in most cases is too long. See also *Commissioner of Internal Revenue* v. *Bedford's Estate* (1945) 325 U. S. 283. The shortened appeal time is in line with developments in state appellate practice; indeed, some states prescribe even shorter periods. See Pound, *Appellate Procedure in Civil Cases* (1941) 340–342. All that is necessary to take an appeal under the rules is the filing of a notice of appeal. Ample time is allowed thereafter for perfecting the appeal.

In cases where the United States or an officer or agency thereof is a party, allowance of sixty days to the government, its officers and agents is well justified. For example, in a tax case the Bureau of Internal Revenue must first consider and decide whether it thinks an appeal should be taken. This recommendation goes to the Assistant Attorney General in charge of the Tax Division in the Department of Justice, who must examine the case and make a recommendation.

The file then goes to the Solicitor General, who must take the time to go through the papers and reach a conclusion. If these departments are rushed, the result will be that an appeal is taken merely to preserve the right, or without adequate consideration, and once taken it is likely to go forward, as it is easier to refrain from an appeal than to dismiss it. Since it would be unjust to allow the United States, its officers or agencies extra time and yet deny it to other parties in the case, the rule gives all parties in the case 60 days. The Judicial Conference of Senior Circuit Judges in 1945 recorded itself as in favor of extending the additional time of 60 days to all parties in any case where the United States or its officers or agencies were parties. The term "officer" is defined in amended Rule 81 (f).

The existing law has provided that the time runs from the date of entry of the judgment and not from the date of notice, and this rule is preserved in the proposed amendments, except that some regard is given to the failure to receive notice of the entry of judgment by providing that an additional thirty days may be allowed if a party fails to appeal within the original thirty or sixty days as the case may be, because of excusable neglect based on his failure to learn of the entry of the judgment. In Rule 77 is a provision requiring the clerk to mail notice to all parties of the entry of an order or judgment. That rule is a reiteration of an old equity rule, and the service rendered by the clerk under that rule and the old equity rule was a mere accommodation service and not intended to affect the running of the time for appeal. Yet, in *Hill* v. *Hawes* (1944) 320 U. S. 520 originating in the District of Columbia, when only twenty days from the entry of judgment was the period allowed for taking an appeal and the clerk failed to send this formal notice, the district judge relieved the party by vacating the judgment and reentering it, so that the time started anew from the reentry. This action was sustained by the Supreme Court. At a time when the court lost jurisdiction of the cause at the expiration of a term, the holding in *Hill* v. *Hawes* would have caused no difficulty, but

since Rule 6 of these rules abolishes the old doctrine that the expiration of a term ends the court's jurisdiction, the effect of the decision in *Hill* v. *Hawes* seemed to be that at any time, even long after the entry of judgment, the court might vacate it for the purpose of reentering it and thus reviving the right of appeal. The proposed amendment of Rule 73 (a) allows the sort of relief that was brought about in *Hill* v. *Hawes*, but avoids the difficulty of indefinite lack of finality of the judgment, by providing that the extension of the time for appeal as the result of excusable neglect for failing to receive notice of it must be limited to an additional thirty days. The party in whose favor the judgment is rendered may, as provided in Rule 77, himself serve a formal notice on the defeated party of the entry of the judgment and thus avoid the possibility of any extension of time for appeal under the amendment of Rule 73 (a).

As recommended by the Judicial Conference of Senior Circuit Judges, proposed Rule 73 (a) contains a provision that where a shorter period than that prescribed in the rule is provided for by statute, the statutory period shall prevail. Research has disclosed but one such provision. Section 159 of U. S. C., Title 45, pertaining to a judgment of a district court upon an award of a board of arbitration under the Railway Labor Act, provides for an appeal time of 10 days from the decision of the district court. By virtue of Rule 81 (a) (3), the rules apply to U. S. C., Title 45, § 159, with respect to appeals.

The second sentence of the first paragraph of amended Rule 73 (a) makes clear the effect upon appeal time of the granting or denying of a motion under Rules 50 (b), 52 (b), and 59 (e) or the denying of a motion under Rule 59 (b). See *Leishman* v. *Associates Wholesale Electric Co.* (1943) 318 U. S. 203; *United States* v. *Crescent Amusement Co.* (1944) 65 S. Ct. 254; *Neely* v. *Merchants Trust Co.* (C. C. A. 3d, 1940) 110 F. (2d) 525; *Reliance Life Ins. Co.* v. *Burgess* (C. C. A. 8th, 1940) 112 F. (2d) 234; *Hawley* v. *Hawley* (App. D. C. 1940) 114 F. (2d) 745; *Gulf Refining Co.* v. *Mark C. Walker*

& Sons Co. (C. C. A. 6th, 1942) 124 F. (2d) 420, cert. den. (1942) 316 U. S. 682; *Steber* v. *Kohn* (C. C. A. 7th, 1945) 149 F. (2d) 4; Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623, 688–690.

In bankruptcy proceedings it is established that as the bankruptcy court has no terms it has the power at any time for good reason to revise its judgments or orders upon seasonable application and before rights have vested on the faith of its action. A motion so to do may be entertained even after the expiration of time for appeal, and such appeal time will start running anew upon the disposition of the motion. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.* (1937) 300 U. S. 131; *Bowman* v. *Loperena* (1940) 311 U. S. 262; *Pfister* v. *Northern Illinois Finance Corp.* (1942) 317 U. S. 144; *Chapman* v. *Federal Land Bank* (C. C. A. 6th, 1941) 117 F. (2d) 321; *State of Missouri* v. *Todd* (C. C. A. 8th, 1941) 122 F. (2d) 804. In ordinary civil actions governed by the Federal Rules of Civil Procedure, however, the better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction to entertain a motion, as for new trial or for a rehearing or to vacate or amend, as the case may be, and cannot thereafter entertain such a motion and thereby start the appeal time running anew. *Safeway Stores, Inc.* v. *Coe* (App. D. C. 1943) 136 F. (2d) 771; *Jusino* v. *Morales & Tio* (C. C. A. 1st, 1944) 139 F. (2d) 946; *Nealon* v. *Hill* (C. C. A. 9th, 1945) 149 F. (2d) 883; *Norris* v. *Camp* (C. C. A. 10th, 1944) 144 F. (2d) 1. It has been said that the bankruptcy rule, stated *supra*, is to be distinguished as based on the distinctive nature of bankruptcy proceedings; and that since the Federal Rules have abolished terms and substituted therefor various definite time limits, the same rule should be applied when such time limits expire as was applied formerly when terms were effective. *Safeway Stores, Inc.* v. *Coe, supra.* See also discussion of these distinctions in Oglebay, *Some Developments in Bankruptcy Law* (1946) 20 J. of Nat'l Ass'n of Ref. 76, 80.

Prior to the adoption of the Federal Rules the term of court played an all-important role in the district

court's power over its final judgments at law and in equity. While during the term the district court had plenary power over such judgments, it was in general without power to reconsider its final judgments at law and in equity after the expiration of the term, unless (1) the proceeding seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period. See *Delaware, L. & W. R. Co.* v. *Rellstab* (1928) 276 U. S. 1 (law); *In re Metropolitan Trust Co.* (1910) 218 U. S. 321 (equity); *United States* v. *Mayer* (1914) 235 U. S. 55 (law—criminal); *Zimmern* v. *United States* (1936) 298 U. S. 167 (equity). The exception to the general rule just stated was the utilization, under certain circumstances, of the ancillary remedies of *audita querela, coram nobis, coram vobis,* bill of review and bill in the nature of review—remedies which grew up to give relief after term time in certain limited and defined situations. Under the proposed amendment to Rule 6 (b) the court may not enlarge the time for taking action under Rule 50 (b), 52 (b), 59 (b), (d) and (e), and 60 (b); and the time periods of these rules limit the court's power just as effectively as the term time, which they replace, formerly did. See Moore and Rogers, *Federal Relief from Civil Judgments* (1946) 55 Yale L. J. 623, 627–630, 685–693.

Rulings or dicta to the contrary, as in *United States* v. *Schlotfeldt* (C. C. A. 7th, 1943) 136 F. (2d) 935; *Babler* v. *United States* (C. C. A. 8th, 1943) 137 F. (2d) 98 (dictum); *Suggs* v. *Mutual Benefit Health & Accident Ass'n* (C. C. A. 10th, 1940) 115 F. (2d) 80 (dictum), are not acceptable in light of these considerations.

The sentence added at the end of the second paragraph of the amended subdivision gives the district court express power to dismiss an appeal on stipulation or upon motion by the appellant after the notice of appeal has been filed but before the appeal is docketed. Such action avoids the useless formality and expense of docketing the appeal and then dismissing it in the appellate court, as where the parties have agreed to a

settlement and wish to protect their rights. Heretofore, the general view has been that once the notice of appeal was filed the district court had no authority to proceed further in the matter, except in aid of the appeal or under Rule 60 (a), until it has received the mandate of the appellate court. *Miller* v. *United States* (C. C. A. 7th, 1940) 114 F. (2d) 267; *Fiske* v. *Wallace* (C. C. A. 8th, 1940) 115 F. (2d) 1003, cert. den. (1941) 314 U. S. 663; *Schram* v. *Safety Investment Co.* (E. D. Mich. 1942) 45 F. Supp. 636; *In re Chin Ben Shim* (D. Mass. 1941) 4 Fed. Rules Serv. 73a.42, Case 1. But *cf. American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.* (S. D. N. Y. 1942) 6 Fed. Rules Serv. 73a.42, Case 1.

Subdivision (g). The insertion of the word "filing" cures an omission in the rule, since the use of the word "date" alone with respect to computation of the time limits prescribed is clearly inadvertent. The time from which the periods specified in Rule 73 (g) properly begins to run is the date of filing the notice of appeal. Thus Rule 75 (g)—specifying the contents of the record on appeal—provides that the notice of appeal "with date of filing" shall be included in the appellate record. No purpose is served, nor is it desirable, to have as the determinative time the mere date which is inserted on a notice of appeal. See also *Matter of Guanajuato Reduction & Mines Co.* (D. N. J. 1939) 29 F. Supp. 789, 41 Am. B. R. (N. S.) 3; *Bluford* v. *Canada* (W. D. Mo. 1941) 4 Fed. Rules Serv. 73g. 13, Case 2; Ilsen and Hone, *Federal Appellate Practice As Affected by the New Rules of Civil Procedure* (1939) 24 Minn. L. Rev. 1, 45.

"Appeal" is substituted for the less exact word "action."

See also Note to Rule 6 (b).

Rule 75. Record on Appeal to a Circuit Court of Appeals.

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a circuit court of appeals is taken, the appellant

shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, *unless the appellee has already served and filed a designation.* Within 10 days ~~thereafter~~ *after the service and filing of such a designation,* any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. *If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.*

(b) TRANSCRIPT. If there be designated for inclusion any evidence or proceedings at a trial or hearing which was stenographically reported, the appellant shall file with his designation ~~two copies~~ *a copy* of the reporter's transcript of the evidence or proceedings included in his designation. If the designation includes only part of the reporter's transcript, the appellant shall file ~~two copies~~ *a copy* of such additional parts thereof as the appellee may need to enable him to designate and file the parts he desires to have added, and if the appellant fails to do so the court on motion may require him to furnish the additional parts needed. ~~One of the copies~~ *The copy* so filed by the appellant shall be available for the use of the other parties ~~and for use in the appellate court in printing the record~~. *In the event that a copy of the reporter's transcript or of the necessary portions thereof is already on file, the appellant shall not be required to file an additional copy. When the rules of the circuit court of appeals so require, the appellant shall*

furnish a second copy of the transcript for use in the appellate court.

(d) STATEMENT OF POINTS. *No assignment of errors is necessary.* If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

(g) RECORD TO BE PREPARED BY CLERK—NECESSARY PARTS. The clerk of the district court, under his hand and the seal of the court, shall transmit to the appellate court a true copy of the matter designated by the parties, but shall always include, whether or not designated, copies of the following: the material pleadings without unnecessary duplication; the verdict or the findings of fact and conclusions of law together with the direction for the entry of judgment thereon; in an action tried without a jury, the master's report, if any; the opinion; the judgment or part thereof appealed from; the notice of appeal with date of filing; the designations or stipulations of the parties as to matter to be included in the record; and any statement by the appellant of the points on which he intends to rely. The matter so certified and transmitted constitutes the record on appeal. The clerk shall transmit with the record on appeal a copy thereof ~~for use in printing the record,~~ ~~if~~ *when* a copy is required by the rules of the circuit court of appeals. *The copy of the transcript filed as provided in subdivision (b) of this rule shall be certified by the clerk as a part of the record on appeal and the clerk may not*

require an additional copy as a requisite to certification.

(h) POWER OF COURT TO CORRECT *OR MODIFY* RECORD. It is not necessary for the record on appeal to be approved by the district court or judge thereof *except as provided in subdivisions (m) and (n) of this rule and in Rule 76,* but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court. *All other questions as to the content and form of the record shall be presented to the circuit court of appeals.*

(m) *APPEALS IN FORMA PAUPERIS. Upon leave to proceed in forma pauperis, the district court may by order specify some different and more economical manner by which the record on appeal may be prepared and settled, to the end that the appellant may be enabled to present his case to the appellate court.*

(n) *APPEALS WHEN NO STENOGRAPHIC REPORT WAS MADE. In the event no stenographic report of the evidence or proceedings at a hearing or trial*

was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval and as settled and approved shall be included by the clerk of the court in the record on appeal.

(o) *Rule for Transmission of Original Papers. Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate identifying the papers with reasonable definiteness. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been*

disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies.

Note 1. Subdivision (a). Under amended subdivision (a) an appellee may take the initiative in preparing the record for transmission to the appellate court under the terms of Rule 75 if he desires to expedite the hearing of the appeal. The party desiring to appeal must still take the first step of filing the notice of appeal required by Rule 73 (a), but thereafter the appellee should be able to avoid unnecessary or perhaps deliberate delay on the part of the appellant. The rights of the appellant to a record adequate to present his case are fully protected, since he is accorded all the rights the appellee would normally have had to designate material to be included. For a somewhat similar device, permitting the appellee "to expedite the appeal" by filing the complete record as soon as it is prepared, see Rule 15 (d) of the United States Court of Appeals for the District of Columbia.

Subdivision (b). The changes in subdivision (b) eliminate the necessity for a second copy of the transcript, except when the rules of the circuit court of appeals so require. Correspondence with the clerks of the various circuit courts of appeals has disclosed that the majority think the extra copy required by the original rule unnecessary. Particularly where the record is to be printed should one copy be adequate, just as are other original records of the court.

Subdivision (d). The phrase added at the beginning of subdivision (d) emphasizes that assignments of error are not to be required or included in the record on appeal. See *Mutual Benefit Health & Accident Ass'n* v. *Snyder* (C. C. A. 6th, 1940) 109 F. (2d) 469; *Starfred Properties, Inc.* v. *Ettinger* (C. C. A. 2d, 1943) 131 F. (2d) 575. *Cf. Keeley* v. *Mutual Life Ins. Co. of New York* (C. C. A. 7th, 1940) 113 F. (2d) 633. See also

Commentary, *Abolition of Assignments of Error* (1944) 7 Fed. Rules Serv. 980.

Subdivision (g). The change in the third sentence of the subdivision is necessary because of the changes in subdivision (b). The addition of the last sentence carries out the intent of subdivision (b) that one copy of the transcript shall be sufficient for all purposes, unless an additional copy is expressly required by the rules of the circuit court of appeals.

Subdivision (h). The title of this subdivision has been changed to indicate more clearly the scope of the rule stated. The reference to subdivisions (m) and (n) is made necessary by the proposed addition of these subdivisions to Rule 75. The reference to Rule 76 corrects an omission in the original rule. The last sentence operates to define exactly the limits of the district court's power under the subdivision. Thus the district court has no power to add to or subtract from the designated record, except insofar as it may be necessary to correct omissions or misstatements or comply with the added provisions of subdivisions (m) and (n). See also *Treasure Imports, Inc.* v. *Henry Amdur & Sons, Inc.* (C. C. A. 2d, 1942) 127 F. (2d) 3; *United States* v. *Forness* (C. C. A. 2d, 1942) 125 F. (2d) 928, cert. den. (1942) 316 U. S. 694; *William Howard Hay Foundation, Inc.* v. *Safety Harbor Sanatorium, Inc.* (C. C. A. 5th, 1944) 141 F. (2d) 952; *Westmoreland Asbestos Co., Inc.* v. *Johns-Manville Corp.* (S. D. N. Y. 1940) 3 Fed. Rules Serv. 75h.1, Case 1, 1 F. R. D. 249; *Petition of Phalberg* (S. D. N. Y. 1942) 6 Fed. Rules Serv. 75h.1, Case 1; *Prichard* v. *Nelson* (W. D. Va. 1943) 7 Fed. Rules Serv. 75h.1, Case 1.

Subdivision (m). This subdivision permits a relaxation of the normal requirements for a record under Rule 75, in order that a pauper appellant may not be deprived of his right to appeal. Without such a provision some difficulty has been encountered in pauper appeals, as evidenced by *Hall* v. *Gordon* (App. D. C. 1941) 119 F. (2d) 463, and *Middleton* v. *Hartford Accident & Indemnity Co.* (C. C. A. 5th, 1941) 119 F. (2d) 721.

Subdivision (n). Subdivision (n) provides a method whereby a record may be prepared in the perhaps rare case where there is no reporter present at all and no stenographic report is made of the proceedings. Normally, these situations are now unlikely in view of Public Law 222, 78th Cong., c. 3, §1, 2d Sess., approved Jan. 20, 1944, 28 U. S. C. § 9a, providing for the appointment of official court reporters, prescribing their duties and providing for the payment by the United States of fees for transcripts for appeals in forma pauperis. It is believed, however, that the provisions of subdivision (n) may nevertheless be helpful as supplemental safeguards to prevent injustice in unusual cases. There is nothing in the subdivision inconsistent with the new statute.

Subdivision (o). The addition of subdivision (o) to Rule 75 is in response to the suggestion of circuit judges that such a provision would be helpful to those circuit courts of appeals which desire to permit the transmittal of the original papers in the proceeding rather than a copy or a "transcript" of the papers. This course avoids the delay and expense entailed by the preparation of copies and gives the appellate court the advantage of having before it the original papers just as they were presented to the trial court. It appears particularly appropriate for those appellate courts which by rule have dispensed with formal printing of the record. The provision in the subdivision dealing with the time in which the clerk shall act gives the parties an opportunity to inspect papers while preparing their briefs.

Note 2. It has been suggested that the procedure now provided for in these rules allowing parties to designate what is to be included in the record on appeal should be abolished, and that the rules should provide that the record shall be made up under the supervision and with the approval of the district judge. The suggestion is based on the argument that when lawyers make up the record without approval of the district judge, they incorporate much useless or superfluous matter which adds to the burdens of the circuit court of appeals.

This suggestion has been carefully considered by the Committee. The present system providing for designation by the parties of what is to be included in the record on appeal has been the system prescribed by the equity rules for many years and has generally worked to the satisfaction of the bench and bar. The idea that a district judge will relieve the appellate court of some labor by himself combing over the proposed record and eliminating superfluous matter is not likely to be effective. District judges are very busy, and if a record is submitted to them, satisfactory to counsel, it is unlikely that they would drop their other duties and try to comb superfluous matter to diminish the appellate court's burdens. Granting to the district judges an opportunity to supervise the record has not been generally favored by them.

Furthermore, it is thought that a lawyer has a right to have incorporated in the record anything which actually occurred in the trial court which he thinks necessary to make his points on appeal. There have been occasions—fortunately rare—where a district judge has refused, in settling a case or bill of exceptions, to include matters which actually occurred in the trial court. The general trend is all against limiting by action of the district court the material to go into the record on appeal. On the contrary, some of the circuit judges have suggested that on appeal the district court send up its entire original record in the case, to save the parties the expense of getting up a copy of parts for certification, and one of the proposed amendments of Rule 75 (subdivision (o)) deals with that proposition. The circuit courts of appeals usually have rules as to what portions of the record need be printed or called to the attention of the court.

Rule 77. District Courts and Clerks.

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5

upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. *Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a).*

Note. Rule 77 (d) has been amended to avoid such situations as the one arising in *Hill* v. *Hawes* (1944) 320 U. S. 520. In that case, an action instituted in the District Court for the District of Columbia, the clerk failed to give notice of the entry of a judgment for defendant as required by Rule 77 (d). The time for taking an appeal then was 20 days under Rule 10 of the Court of Appeals (later enlarged by amendment to thirty days), and due to lack of notice of the entry of judgment the plaintiff failed to file his notice of appeal within the prescribed time. On this basis the trial court vacated the original judgment and then re-entered it, whereupon notice of appeal was filed. The Court of Appeals dismissed the appeal as taken too late. The Supreme Court, however, held that although Rule 77 (d) did not purport to attach any consequence to the clerk's failure to give notice as specified, the terms of the rule were such that the appellant was entitled to rely on it, and the trial court in such a case, in the exercise of a sound discretion, could vacate the former judgment and enter a new one, so that the appeal would be within the allowed time.

Because of Rule 6 (c), which abolished the old rule that the expiration of the term ends a court's power over its judgment, the effect of the decision in *Hill* v. *Hawes* is to give the district court power, in its discre-

tion and without time limit, and long after the term may have expired, to vacate a judgment and re-enter it for the purpose of reviving the right of appeal. This seriously affects the finality of judgments. See also proposed Rule 6 (c) and Note; proposed Rule 60 (b) and Note; and proposed Rule 73 (a) and Note.

Rule 77 (d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in Rule 73 (a), the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77 (d) or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under Rule 73 (a), for the extension of the time for appeal.

Rule 79. Books *and Records* Kept by the Clerk and Entries Therein.

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the ~~Attorney General under the authority of the Act of June 30, 1906, c. 3914, § 1 (34 Stat. 754), as amended, U. S. C. Title 28, § 568, or other statutory authority,~~ *Director of the Administrative Office of*

the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

(b) CIVIL ~~ORDER BOOK~~ *JUDGMENTS AND ORDERS.* The clerk shall ~~also~~ keep ~~a book for civil actions entitled "civil order book" in which shall be kept in the sequence of their making exact copies of all final judgments and orders, all orders,~~ *in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges may prescribe, a correct copy of every final judgment or appealable order, or order* affecting title to or lien upon real or personal property, ~~all appealable orders,~~ and ~~such~~ *any* other orders ~~as~~ *which* the court may direct *to be kept.*

(c) INDICES; CALENDARS. ~~Separate and~~ Suitable indices of the civil docket and of ~~the~~ *every* civil ~~order book~~ *judgment and order referred to in subdivision (b) of this rule* shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish "jury actions" from "court actions."

(*d*) *OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books and records as may be required from time to time by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges.*

Note. Subdivision (*a*). The amendment substitutes the Director of the Administrative Office of the United States Courts, acting subject to the approval of the Judicial Conference of Senior Circuit Judges, in the place of the Attorney General as a consequence of and in accordance with the provisions of the act establishing the Administrative Office and transferring functions thereto. Act of August 7, 1939, c. 501, §§ 1–7, 53 Stat. 1223, 28 U. S. C. §§ 444–450.

Subdivision (*b*). The change in this subdivision does not alter the nature of the judgments and orders to be recorded in permanent form but it does away with the express requirement that they be recorded in a book. This merely gives latitude for the preservation of court records in other than book form, if that shall seem advisable, and permits with the approval of the Judicial Conference the adoption of such modern, space-saving methods as microphotography. See *Proposed Improvements in the Administration of the Offices of Clerks of United States District Courts*, prepared by the Bureau of the Budget (1941) 38–42. See also Rule 55, Federal Rules of Criminal Procedure.

Subdivision (*c*). The words "Separate and" have

been deleted as unduly rigid. There is no sufficient reason for requiring that the indices in all cases be separate; on the contrary, the requirement frequently increases the labor of persons searching the records as well as the labor of the clerk's force preparing them. The matter should be left to administrative discretion.

The other changes in the subdivision merely conform with those made in subdivision (b) of the rule

Subdivision (d). Subdivision (d) is a new provision enabling the Administrative Office, with the approval of the Judicial Conference, to carry out any improvements in clerical procedure with respect to books and records which may be deemed advisable. See report cited in Note to subdivision (b), *supra.*

Rule 80. Stenographer; Stenographic Report or Transcript as Evidence.

(a) STENOGRAPHER. ~~A court or master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. His fees shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. The cost of a transcript shall be paid in the first instance by the party ordering the transcript.~~ (Abrogated because of statute.)

(b) OFFICIAL STENOGRAPHER. ~~Each district court may designate one or more official court stenographers for the district and fix by rule of court the compensation which such stenographers shall be entitled to charge for their services, with provision that amounts properly paid by parties for the service of such stenographers be taxable as costs in the case in the discretion of the trial judge. The work of the stenographers shall be so arranged as to avoid delay in furnishing transcripts ordered for the purposes of~~

~~motions for new trial, for amended findings, or for appeals.~~ (Abrogated because of statute.)

Note. Subdivisions (a) and (b) of Rule 80 have been abrogated because of Public Law 222, 78th Cong., c. 3, 2d Sess., approved Jan. 20, 1944, 28 U. S. C. § 9a, providing for the appointment of official stenographers for each district court, prescribing their duties, providing for the furnishing of transcripts, the taxation of the fees therefor as costs, and other related matters. This statute has now been implemented by Congressional appropriation available for the fiscal year beginning July 1, 1945.

Subdivision (c) of Rule 80 (Stenographic Report or Transcript as Evidence) has been retained unchanged.

Rule 81. Applicability in General.

(a) To What Proceedings Applicable.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, quo warranto, and forfeiture of property for violation of a statute of the United States. *The requirements of U. S. C., Title 28, § 466, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.*

(3) In proceedings under the Act of February 12, 1925, c. 213 (43 Stat. 883), U. S. C., Title 9, relating to arbitration, or under the Act of May 20, 1926, c. 347,

§ 9 (44 Stat. 585), U. S. C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply to appeals, but otherwise only to the extent that matters of procedure are not provided for in those statutes. *These rules apply (1) to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings, and (2) to appeals in such proceedings.*

(6) These rules do not apply to proceedings under the Act of September 13, 1888, c. 1015, § 13 (25 Stat. 479), as amended, U. S. C., Title 8, § 282, relating to deportation of Chinese; they apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and ~~allowing the defendant 60 days within which to~~ *for* answer in proceedings to cancel certificates of citizenship under the Act of June 29, 1906, c. 3592, § 15 (34 Stat. 601), as amended, U. S. C., Title 8, § ~~405,~~ *738*, remain in effect.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the district courts of the United States from the state courts and govern all procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within the time allowed for answer by the law of the state or within 5 days after the filing of the transcript of the record in the district court of the United States, whichever period is longer, *but in any event within 20 days after the filing of the transcript.* If at the time of removal all necessary pleadings have been filed, a party entitled to trial by jury under Rule 38 and who has not already waived his right to such trial shall be accorded it, if his demand therefor is served within 10 days after the record of the action is filed in the district court of the United States.

(f) REFERENCES TO OFFICER OF THE UNITED STATES. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a collector of internal revenue, a former collector of internal revenue, or the personal representative of a deceased collector of internal revenue.

Note. Subdivision (a). Despite certain dicta to the contrary [*Lynn* v. *United States* (C. C. A. 5th, 1940) 110 F. (2d) 586; *Mount Tivy Winery, Inc.* v. *Lewis* (N. D. Cal. 1942) 42 F. Supp. 636], it is manifest that the rules apply to actions against the United States under the Tucker Act. See *United States to use of Foster Wheeler Corp.* v. *American Surety Co. of New York* (E. D. N. Y. 1939) 25 F. Supp. 700; *Boerner* v.

United States (E. D. N. Y. 1939) 26 F. Supp. 769; *United States* v. *Gallagher* (C. C. A. 9th, 1945) 151 F. (2d) 556. Rules 1 and 81 provide that the rules shall apply to all suits of a civil nature, whether cognizable as cases at law or in equity, except those specifically excepted; and the character of the various proceedings excepted by express statement in Rule 81, as well as the language of the rules generally, shows that the term "civil action" [Rule 2] includes actions against the United States. Moreover, the rules in many places expressly make provision for the situation wherein the United States is a party as either plaintiff or defendant. See Rules 4 (d) (4), 12 (a), 13 (d), 25 (d), 37 (f), 39 (c), 45 (c), 54 (d), 55 (e), 62 (e), and 65 (c). In *United States* v. *Sherwood* (1941) 312 U. S. 584, the Solicitor General expressly conceded in his brief for the United States that the rules apply to Tucker Act cases. The Solicitor General stated: "The Government, of course, recognizes that the Federal Rules of Civil Procedure apply to cases brought under the Tucker Act." (Brief for the United States, p. 31). Regarding *Lynn* v. *United States*, *supra*, the Solicitor General said: "In *Lynn* v. *United States* . . . the Circuit Court of Appeals for the Fifth Circuit went beyond the Government's contention there, and held that an action under the Tucker Act is neither an action at law nor a suit in equity and, seemingly, that the Federal Rules of Civil Procedure are, therefore, inapplicable. We think the suggestion is erroneous. Rules 4 (d), 12 (a), 39 (c), and 55 (e) expressly contemplate suits against the United States, and nothing in the enabling Act (48 Stat. 1064) suggests that the Rules are inapplicable to Tucker Act proceedings, which in terms are to accord with court rules and their subsequent modifications (Sec. 4, Act of March 3, 1887, 24 Stat. 505)." (Brief for the United States, p. 31, n. 17.)

United States v. *Sherwood*, *supra*, emphasizes, however, that the application of the rules in Tucker Act cases affects only matters of procedure and does not operate to extend jurisdiction. See also Rule 82. In the *Sherwood* case, the New York Supreme Court, acting

under § 795 of the New York Civil Practice Act, made an order authorizing Sherwood, as a judgment creditor, to maintain a suit under the Tucker Act to recover damages from the United States for breach of its contract with the judgment debtor, Kaiser, for construction of a post office building. Sherwood brought suit against the United States and Kaiser in the District Court for the Eastern District of New York. The question before the United States Supreme Court was whether a United States District Court had jurisdiction to entertain a suit against the United States wherein private parties were joined as parties defendant. It was contended that either the Federal Rules of Civil Procedure or the Tucker Act, or both, embodied the consent of the United States to be sued in litigations in which issues between the plaintiff and third persons were to be adjudicated. Regarding the effect of the Federal Rules, the Court declared that nothing in the rules, so far as they may be applicable in Tucker Act cases, authorized the maintenance of any suit against the United States to which it had not otherwise consented. The matter involved was not one of procedure but of jurisdiction, the limits of which were marked by the consent of the United States to be sued. The jurisdiction thus limited is unaffected by the Federal Rules of Civil Procedure.

Subdivision (*a*) (*2*). The added sentence makes it clear that the rules have not superseded the requirements of U. S. C., Title 28. § 466. *Schenk* v. *Plummer* (C. C. A. 9th, 1940) 113 F. (2d) 726.

For correct application of the rules in proceedings for forfeiture of property for violation of a statute of the United States, such as under U. S. C., Title 22, § 405 (seizure of war materials intended for unlawful export) or U. S. C., Title 21, § 334 (b) (Federal Food, Drug, and Cosmetic Act; formerly Title 21, § 14, Pure Food and Drug Act), see *Reynal* v. *United States* (C. C. A. 5th, 1945) 153 F. (2d) 929; *United States* v. *108 Boxes of Cheddar Cheese* (S. D. Iowa 1943) 3 F. R. D. 40.

Subdivision (*a*) (*3*). The added sentence makes it clear that the rules apply to appeals from proceedings to

enforce administrative subpoenas. See *Perkins* v. *Endicott Johnson Corp.* (C. C. A. 2d, 1942) 128 F. (2d) 208, aff'd on other grounds (1943) 317 U. S. 501; *Walling* v. *News Printing Inc.* (C. C. A. 3d, 1945) 148 F. (2d) 57; *McCrone* v. *United States* (1939) 307 U. S. 61. And, although the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired [*Goodyear Tire & Rubber Co.* v. *National Labor Relations Board* (C. C. A. 6th, 1941) 122 F. (2d) 450; *Cudahy Packing Co.* v. *National Labor Relations Board* (C. C. A. 10th, 1941) 117 F. (2d) 692], it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful. See, *e. g.*, *Peoples Natural Gas Co.* v. *Federal Power Commission* (App. D. C. 1942) 127 F. (2d) 153, cert. den. (1942) 316 U. S. 700; *Martin* v. *Chandis Securities Co.* (C. C. A. 9th 1942) 128 F. (2d) 731. Compare the application of the rules in summary proceedings in bankruptcy under General Order 37. See 1 *Collier on Bankruptcy* (14th ed. by Moore and Oglebay) 326–327; 2 *Collier, op. cit. supra,* 1401–1402; 3 *Collier, op. cit. supra,* 228–231; 4 *Collier, op. cit. supra,* 1199–1202.

Subdivision (a) (6). Section 405 of U. S. C., Title 8 originally referred to in the last sentence of paragraph (6), has been repealed and § 738, U. S. C., Title 8, has been enacted in its stead. The last sentence of paragraph (6) has, therefore, been amended in accordance with this change. The sentence has also been amended so as to refer directly to the statute regarding the provision of time for answer, thus avoiding any confusion attendant upon a change in the statute.

That portion of subdivision (a) (6) making the rules applicable to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act was added by an amendment made pursuant to order of the Court, December 28, 1939, effective three months subsequent to the adjournment of the 76th Congress, January 3, 1941.

Subdivision (c). The change in subdivision (c) effects more speedy trials in removed actions. In some states many of the courts have only two terms a year. A case, if filed 20 days before a term, is returnable to that term, but if filed less than 20 days before a term, is returnable to the following term, which convenes six months later. Hence, under the original wording of Rule 81 (c), where a case is filed less than 20 days before the term and is removed within a few days but before answer, it is possible for the defendant to delay interposing his answer or presenting his defenses by motion for six months or more. The rule as amended prevents this result.

Subdivision (f). The use of the phrase "the United States or an officer or agency thereof" in the rules (as *e. g.*, in Rule 12 (a) and amended Rule 73 (a)) could raise the question of whether "officer" includes a collector of internal revenue, a former collector, or the personal representative of a deceased collector, against whom suits for tax refunds are frequently instituted. Difficulty might ensue for the reason that a suit against a collector or his representative has been held to be a personal action. *Sage* v. *United States* (1919) 250 U. S. 33; *Smietanka* v. *Indiana Steel Co.* (1921) 257 U. S. 1; *United States* v. *Nunnally Investment Co.* (1942) 316 U. S. 258. The addition of subdivision (f) to Rule 81 dispels any doubts on the matter and avoids further litigation.

Rule 84. Forms.

The forms contained in the Appendix of Forms are *sufficient under the rules and are* intended to indicate~~, subject to the provisions of these rules,~~ the simplicity and brevity of statement which the rules contemplate.

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

may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. *Sierocinski* v. *E. I. DuPont DeNemours & Co.* (C. C. A. 3d, 1939) 103 F. (2d) 843; *Swift & Co.* v. *Young* (C. C. A. 4th, 1939) 107 F. (2d) 170; *Sparks* v. *England* (C. C. A. 8th, 1940) 113 F. (2d) 579; *Ramsouer* v. *Midland Valley R. Co.* (C. C. A. 8th, 1943) 135 F. (2d) 101. And the forms as a whole have met with widespread approval in the courts. See cases cited in 1 *Moore's Federal Practice* (1938), Cum. Supplement § 8.07, under "Page 554"; see also Commentary, *The Official Forms* (1941) 4 Fed. Rules Serv. 954. In Cook, *'Facts' and 'Statements of Fact'* (1937) 4 U. Chi. L. Rev. 233, 245–246, it is said with reference to what is now Rule 84: ". . . pleaders in the federal courts are not to be left to guess as to the meaning of [the] language" in Rule 8 (a) regarding the form of the complaint. "All of which is as it should be. In no other way can useless litigation be avoided." *Ibid.* The amended rule will operate to discourage isolated results such as those found in *Washburn* v. *Moorman Mfg. Co.* (S. D. Cal. 1938) 25 F. Supp. 546; *Employers Mutual Liability Ins. Co. of Wisconsin* v. *Blue Line Transfer Co.* (W. D. Mo. 1941) 5 Fed. Rules Serv. 12e.235, Case 2.

Supplementary Rule A. Effective Date of Amendments.

The amendments transmitted to the Attorney General, and requested by the Court to be reported by him to the — Congress at the beginning of the — regular session in January, —, shall take effect on the day which is three months subsequent to the adjournment of the — regular session of the — Congress, but if that day is prior to September 1, 194—, then these amendments shall take effect on September 1, 194—. They govern all proceedings in actions brought after they take effect and

also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

APPENDIX OF FORMS

FORM 17.—COMPLAINT FOR INFRINGEMENT OF COPYRIGHT AND UNFAIR COMPETITION

1. Allegation of jurisdiction.

2. Prior to March, 1936, plaintiff, who then was and ever since has been a citizen of the United States, created and wrote an original book, entitled _____.

3. This book contains a large amount of material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States.

4. Between March 2, 1936, and March 10, 1936, plaintiff complied in all respects with the Act of (give citation) and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyright of said book, and received from the Register of Copyrights a certificate of registration, dated and identified as follows: "March 10, 1936, Class _____, No. _____."

5. Since March 10, 1936, said book has been published by plaintiff and all copies of it made by plaintiff or under his authority or license have been printed, bound, and published in strict conformity with the provisions of the Act of _____ and all other laws governing copyright.

6. Since March 10, 1936, plaintiff has been and still is the sole proprietor of all rights, title, and interest in and to the copyright in said book.

7. After March 10, 1936, defendant infringed said copyright by publishing and placing upon the market a book entitled _____, which was copied largely from plaintiff's copyrighted book, entitled _____.

8. A copy of plaintiff's copyrighted book is hereto attached as "Exhibit 1"; and a copy of defendant's infringing book is hereto attached as "Exhibit 2."

9. Plaintiff has notified defendant that defendant has infringed the copyright of plaintiff, and defendant has continued to infringe the copyright.

10. After March 10, 1936, and continuously since about _____, defendant has been publishing, selling and otherwise marketing the book entitled _____, and has thereby been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage.

Wherefore plaintiff demands:

(1) That defendant, his agents, and servants be enjoined during the pendency of this action and permanently from infringing said copyright of said plaintiff in any manner, *and from publishing, selling, marketing or otherwise disposing of any copies of the book entitled _____.*

(2) That defendant be required to pay to plaintiff such damages as plaintiff has sustained in consequence of defendant's infringement of said copyright *and said unfair trade practices and unfair competiiton* and to account ~~and any over to plaintiff~~ *for*

(a) all gains, profits and advantages derived by defendant by said trade practices and unfair competition and

(*b*) all ~~the~~ gains, profits, and advantages derived by defendant by his infringement of plaintiff's copyright or such damages as to the court shall appear proper within the provisions of the copyright statutes, but not less than two hundred and fifty dollars.

(3) That defendant be required to deliver up to be impounded during the pendency of this action all copies *of said book entitled _____* in his possession or under his control ~~infringing said copyright~~ and to deliver up for destruction all infringing copies and all plates, molds, and other matter for making such infringing copies.

(4) That defendant pay to plaintiff the costs of this action and reasonable attorney's fees to be allowed to the plaintiff by the court.

(5) That plaintiff have such other and further relief as is just.

NOTE

An improved form of complaint for infringement of copyright and unfair competition is effected by the changes shown.

FORM 20.—ANSWER PRESENTING DEFENSES UNDER RULE 12 (b)

REVISED NOTE

The above form contains examples of certain defenses provided for in Rule 12 (b). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a general demurrer or a motion to dismiss.

The second defense embodies the old plea in abatement; the decision thereon, however, may well provide under Rules 19 and 21 for the citing in of the party rather than an abatement of the action.

The third defense is an answer on the merits.

The fourth defense is one of the affirmative defenses provided for in Rule 8 (c).

The answer also includes a counterclaim and a cross-claim.

FORM 22.—MOTION TO BRING IN THIRD-PARTY DEFENDANT

(Form for motion remains unchanged)

EXHIBIT A

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

United States District Court for the Southern District of New York

CIVIL ACTION, FILE NUMBER ----------

A. B., PLAINTIFF *v.* C. D., DEFENDANT AND THIRD-PARTY PLAINTIFF *v.* E. F., THIRD-PARTY DEFENDENT	*Third-Party Complaint.*

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

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D.~~, or upon which A. B. is entitled to recover from E. F. and not from C. D.~~ The statement should be framed as in an original complaint.) Wherefore C. D. demands judgment against third-party defendant E. F. for all sums that may be adjudged against defendant C. D. in favor of plaintiff A. B.

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

NOTE

The single change in Form 22 is made necessary by the amendment of Rule 14.

FORM 25.—REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A. B. requests defendant C. D. *within* _____ *days after service of this request* to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

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

(Here list the documents and describe each document.)

2. That each of the following statements is true.

(Here list the statements.)

Signed:_____,
Attorney for Plaintiff.
Address:_____.

NOTE

Form 25 has been amended to include a provision for the designation of a time limit within which to comply with the request. Under Rule 36 as amended such a period must be fixed in the request, extending for any length of time desired "not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice."

○