EXHIBIT "A"

July 18, 1962

To the Chairman and Members of the Standing Committee on Practice and Procedure of the Judicial Conference of the United States:

STATEMENT ON BEHALF OF THE
ADVISORY COMMITTEE ON CIVIL RULES

A. The Advisory Committee Recommends Adoption of the Amendments Appearing in "Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts" (October 1961), as Revised and Supplemented.

Upon the recommendation of the Advisory Committee on Civil Rules, the Standing Committee on Rules of Practice and Procedure in October 1961 published and circulated a preliminary draft of various proposed Civil Rules amendments to the bench and bar, inviting comment and criticism. The proposed amendments had been considered at three meetings of the Advisory Committee and in substantial part resulted from its restudy of proposals made by the former Advisory Committee in 1955, upon which the Supreme Court had taken no action. A copy of the October 1961 draft is annexed hereto as Exhibit "A."

At its fourth meeting on May 28-29, 1962, the Advisory Committee again reviewed the amendments contained in the October 1961 draft, taking into consideration the communications which had been received from the bench and bar in response to the Standing Committee's invitation. The com-

munications were generally favorable to the amendments. An analysis of the communications, prepared by the reporter and submitted to the Advisory Committee in advance of the May meeting, is set forth in a memorandum dated May 1, 1962, and a supplemental memorandum dated May 14, 1962, annexed hereto as Exhibits "B" and "C" respectively.[1]

In the light of the discussion at the May meeting, the Advisory Committee voted a number of changes of and supplements to the October 1961 draft, affecting both the text of amendments and the Advisory Committee's Notes. The draft, as revised and supplemented pursuant to the Advisory Committee's direction, is annexed hereto as Exhibit "D."

The Advisory Committee now recommends to the Standing Committee the adoption of the October 1961 draft, revised and supplemented as indicated in Exhibit "D."

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1 Some additional communications were received after the preparation of these memoranda.

Summary Statement of the Civil Rules Amendments Recommended for Adoption[2]

1. Process [Rules 4, 12, 13, 30, 71A]. An amendment allows resort in original Federal actions to the procedures provided by State laws for effecting service on nonresidents. The State laws referred to include statutes of the nonresident-motorist and similar types. (To this extent the amendment confirms decisions interpreting the present Rules.) Also included, and of particular interest, are State laws of the quasi-in-rem type (attachment or similar seizure of the nonresident's property within the State, accompanied by notice).

In addition to all other authority for service, service is permitted within a stated territorial area on persons brought in as impleaded parties, as parties to counterclaims and cross-claims, or as additional parties "indispensable" or "conditionally necessary" to pending actions; the stated territorial range is an area outside the State in which the District Court is held, but within the United States, which is within a 100-mile radius of the Federal courthouse. Service of an order of commitment for civil contempt is also permitted within this territorial range.

Related amendments are as follows: When service is made upon nonresidents in accordance with State law, the summons

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2 This summary omits various matters of detail.

is to correspond as nearly as may be with the State form, and the time to answer is in accordance with the State provision. When a defendant is brought in by attachment or other process by which the court does not acquire personal jurisdiction over him, he need not plead counterclaims which would ordinarily be compulsory. (If, however, he voluntarily pleads any counterclaim, he falls under the usual obligation to plead his compulsory counterclaims.)

Service upon persons in foreign countries is clarified and facilitated. Whenever service is authorized upon a nonresident and is to be effected on him abroad, various alternative manners of carrying out the service are permitted which may make it easier to accomplish the service, avoid collision with foreign law or policy, and improve the chance of recognition of the judgment in the action by the law of the foreign country. Proof of foreign service is also facilitated.[3]

Certified mail is allowed as an alternative to registered mail in making service upon the United States. (This alternative is also permitted in sending depositions to the clerk of court for filing.)

2. Third-party practice (impleader) [Rules 5, 7, 14, 24, 77(d), Forms 22-A, 22-B]. Modifying the present Rule which requires leave of court for all impleaders, an amendment

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3 The amendments referred to in this paragraph were developed collaboratively by the Commission and Advisory Committee on International Rules of Judicial Procedure and the Advisory Committee on Civil Rules.

provides that a defendant need not obtain leave of court to bring in a third-party defendant if he files his third-party complaint not later than 10 days after he serves his answer in the action. However, after a third-party defendant is brought in, the court may in appropriate situations strike the impleader or sever it or accord it separate trial. Official Forms are amended to reflect the basic change in the impleader Rule, and the statement of permitted pleadings is also correspondingly amended. An amendment makes it clear that a third-party defendant is required to serve his answer to the third-party complaint upon the plaintiff as well as the defendant (third-party plaintiff); more generally, except as otherwise provided in the Rules, the consequential papers in an action are required to be served on all parties, rather than the parties "affected thereby," as at present.

3. Supplemental pleadings [Rule 15]. An amendment, overruling some case decisions, provides that the court may grant permission to file a supplemental pleading even though the original pleading is defective in its statement of a claim or defense.

4. Substitution of parties upon death [Rules 6(b), 25, Form 30]. The present unsatisfactory provision, that an action shall be dismissed as to a party who dies pending the action if substitution is not made within 2 years after the death, is abandoned, and it is provided instead (following

the Illinois practice) that a motion for substitution must be made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of death. The 90-day period may be enlarged by the court. An Official Form is added illustrating the "Suggestion of Death upon the Record."

5. Depositions in foreign countries [Rules 26, 28]. Foreign depositions on notice are facilitated by enlarging the class of persons before whom such depositions may be taken. An amendment overrules case law to the effect that a letter rogatory will not be issued unless a deposition on notice or by commission is shown to be impractical; choice will now be made among the devices in the light of all the circumstances. To accommodate to the fact that, in taking evidence in response to a letter rogatory, foreign authorities follow their own methods of eliciting and recording testimony, it is provided that evidence obtained under a letter rogatory shall not be excluded by our courts merely for the reason that it is not a verbatim transcript, or that the testimony is not taken under oath, or for any similar departure from the requirements for a domestic deposition. (The method of taking or recording the testimony may, however, affect its weight or warrant its exclusion.)[4]

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4 See note 3, supra.

6. Motion for involuntary dismissal at close of plaintiff's evidence [Rule 41]. At present a motion for involuntary dismissal at the close of the plaintiff's evidence, when made in a case tried to a jury, has the same effect as a motion for a directed verdict made at the same stage. To eliminate the confusing overlap, it is provided that a motion for involuntary dismissal at the close of the plaintiff's evidence can be made only in a case tried without a jury, where it has a distinctive and useful function.[5]

7. Dismissal for lack of an indispensable party [Rule 41]. The present Rule omits to mention that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. A statement to this effect is added.

8. Directed verdict [Rule 50(a)]. The order of the court granting a motion for a directed verdict is stated to be effective without any assent by the jury. This eliminates the merely formal but offensive practice of requiring the jury to signify assent to a so-called verdict which is actually not theirs.[6]

9. Motion for judgment n.o.v.; conditional rulings accompanying grant or denial of this motion [Rule 50(b), (c), (d)]. The time limit for making a motion for judgment n.o.v.

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5 This amendment did not appear in the October 1961 draft as published and circulated, but is considered noncontroversial.

6 See note 5, supra.

is set at 10 days after entry of judgment, rather than 10 days after reception of the verdict, as at present, in order to conform to the period provided for making a motion for a new trial.

At present the procedure to be followed in ruling on the now conventional post-verdict alternative motions for judgment n.o.v. and for a new trial, and the consequences of these rulings, must be pieced out of the court decisions, and this is not easy. Accordingly, the proper practice is summarized in the text of the amended Rule. The amended Rule deals with the situations where the motion of the verdict-loser for judgment n.o.v. is granted, and his alternative motion for a new trial is either conditionally granted or conditionally denied by the trial court. It mentions the right of the verdict-winner to move in the trial court for a new trial after his opponent's motion for judgment n.o.v. has been granted. It also refers to the right of the verdict-winner to assert grounds for a new trial in the appellate court when the trial court has denied his opponent's motion for judgment n.o.v. and entered judgment on the verdict, but the appellate court reverses the judgment on the verdict.

10. Summary judgment [Rule 56]. An amendment corrects the omission to provide that answers to interrogatories may be used in supporting or opposing a motion for summary judgment.

A further amendment overrules decisions, principally in the Third Circuit, holding that a party against whom a

factual case has been made sufficient to warrant summary judgment, may avert such judgment simply by standing upon averments of his own pleadings without bringing forward opposing facts. These decisions impaired the utility of the summary judgment device. The amendment does not affect the normal standards applicable to the summary judgment motion, nor does it alter the burden normally cast on the moving party.

11. Entry of judgment [Rules 49, 52, 58, 79, Forms 31, 32]. When a judge has used apparently dispositive words in an opinion or memorandum, such as "The plaintiff's motion for summary judgment is granted," the question has arisen whether this is tantamount to a judgment and is therefore a sufficient basis for the entry of judgment in the civil docket. As the time to make post-verdict motions and to file notice of appeal begins to run from the effective entry of judgment, the question has been serious. To avoid doubts, an amendment provides that every judgment shall be set forth in a separate document. The wording of other related Rules is clarified.

A further amendment states clearly the situations in which the clerk (unless the court otherwise orders) is authorized to prepare, sign, and enter a judgment without awaiting a direction from the court, and the more complex situations in which the court is to approve the form of the judgment which the clerk is then to enter. Two forms of judgment are added to the Official Forms.

To avoid useless paper work and delay, it is provided that, except upon the court's direction, which shall not be given as a matter of course, attorneys shall not submit forms of judgment where a party recovers only money or costs or all relief is denied.

12. Saturday closing of clerks' offices; computation of time [Rules 6(a), 77(c)]. It is provided that clerks' offices may be closed on Saturdays so far as civil business is concerned, except as the particular district court may require that its clerk's office remain open for specified hours on that day. "Legal holiday" is defined and closing of clerks' offices on those holidays is also regulated.

In the light of the foregoing changes in the Rules, the provision for computation of time periods is suitably amended.

13. Proceedings to which Rules are applicable, references to officer of the United States [Rule 81(a), (f)]. These are minor technical corrections.

14. Jury demands in removed cases [Rule 81(c)]. To prevent unintended waivers of the jury right in removed cases, it is provided that a party who, prior to removal, has made an express demand for jury in accordance with State law, need not make a demand after removal; and, further, that if State law does not require an express demand in order to claim trial by jury, the party need not make demand after removal. In the latter situation, however, the court on its own motion

may, and upon request of any party must, require the parties to state whether they desire to claim a jury, and failure then to make a claim constitutes a waiver of trial by jury.

15. Correction of Official Forms as to the amount of damages alleged [Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21]. The statements of the damages claimed, appearing in various Official Forms, are now misleading because of statutory changes increasing the requisite jurisdictional amount in diversity and Federal question cases. The relevant Forms are therefore amended.

16. Official Form of complaint for patent infringement [Form 16]. The prayer for relief is amended to conform to the present patent statute.[7]

B. Discussion of Other Matters

The principal additional matters now engaging the attention of the Advisory Committee on Civil Rules may be summarized as follows.

1. Study of the Rules on joinder of parties (and related study of joinder of claims). At its meeting on May 28-29, 1962, the Advisory Committee undertook the consideration, among other subjects, of various problems regarding the joinder of

7 See note 5, supra.

parties and claims. The reporter's preliminary studies will be amplified in succeeding months and consideration will be resumed at the next meeting of the Committee.

2. Study of the Rules on discovery (and related study of the pretrial conference). As the Standing Committee is aware, the Advisory Committee has undertaken a study of discovery (including the pretrial conference) on both analytic and empirical lines. On the latter aspect of the study, the Advisory Committee invited the assistance of the Project for Effective Justice at Columbia Law School. Funds have been provided to the Project for this purpose through the generosity of the Ford Foundation and the Walter E. Meyer Research Institute of Law, Inc., which is acknowledged with thanks.

The analytic study is under way and a start has been made on the field investigation. The help of the Administrative Office of the United States Courts and of other groups and persons is required to make this work a success. Help is already being given in good measure, for which the Committee desires also to express its thanks.

3. Cooperation with the Admiralty Committee and others. Cooperation between the Admiralty and Civil Committees is essential and has been forwarded by discussion and correspondence between the reporters and by the attendance and participation of the reporter to the Admiralty Committee at meetings of the Civil Committee.

There are also questions of common interest between the

Criminal and Civil Committees; and in the future cooperation will also be needed between the Appellate Rules and Civil Committees. In addition, the work of the Study of the Division of Jurisdiction between State and Federal Courts (American Law Institute) is closely related to the Civil Rules.

Exhibit B

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

Rule 4. Process

(b) SAME: FORM. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. *When, under Rule 4(e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.*

(d) SUMMONS: PERSONAL SERVICE.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered *or certified* mail to the

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

Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United S tes not made a party, by also sending a copy of the summons and of the complaint by registered *or certified* mail to such officer or agency.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the ~~service~~ ~~is~~ ~~made~~ *district court is held* for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) SAME: ~~OTHER SERVICE~~ *SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE.* Whenever a statute of the United States or an order of court *thereunder* provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state *in which the district court is held,* service ~~shall~~ *may* be made under the circumstances and in the manner prescribed by the statute~~, rule,~~ or order~~.~~, *or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon*

or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when *authorized by* a statute of the United States *or by these rules,* ~~so provides,~~ beyond the territorial limits of that state. *In addition, persons who are brought in as parties pursuant to Rule 13(h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places.* A subpoena may be served within the territorial limits provided in Rule 45.

*(i) ALTERNATIVE PROVISIONS FOR SERVICE IN A FOREIGN COUNTRY.**

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found

*This subdivision was developed collaboratively by the Commission and Advisory Committee on International Rules of Judicial Procedure, a statutory organization established pursuant to Act of September 2, 1958, 72 Stat. 1743, and the Advisory Committee on Civil Rules.

within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction, or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

ADVISORY COMMITTEE'S NOTE

Subdivision (b). Under amended subdivision (e) of this rule, an action may be commenced against a non-

resident of the State in which the district court is held by complying with State procedures. Frequently the form of the summons or notice required in these cases by State law differs from the Federal form of summons described in present subdivision (b) and exemplified in Form 1. To avoid confusion, the amendment of subdivision (b) states that a form of summons or notice, corresponding "as nearly as may be" to the State form, shall be employed. See also a corresponding amendment of Rule 12(a) with regard to the time to answer.

Subdivision (d)(4). This paragraph, governing service upon the United States, is amended to allow the use of certified mail as an alternative to registered mail for sending copies of the papers to the Attorney General or to a United States officer or agency. *Cf.* N.J. Rule 4:5–2. See also the amendment of Rule 30(f)(1).

Subdivision (d)(7). Formerly a question was raised whether this paragraph, in the context of the rule as a whole, authorized service in original Federal actions pursuant to State statutes permitting service on a State official as a means of bringing a nonresident motorist defendant into court. It was argued in *McCoy* v. *Siler*, 205 F. 2d 498, 501–2 (3d Cir.) (concurring opinion), *cert. denied*, 346 U.S. 872 (1953), that the effective service in those cases occurred not when the State official was served but when notice was given to the defendant outside the State, and that subdivision (f) (Territorial limits of effective service), as then worded, did not authorize out-of-State service. This contention found little support. A considerable number of cases held the service to be good, either by fixing upon the service on the official within the State as the effective service, thus satisfying the wording of subdivision (f) as it then stood, see *Holbrook* v. *Cafiero*, 18 F.R.D. 218 (D. Md. 1955); *Pasternack* v. *Dalo*, 17 F.R.D. 420 (W D. Pa. 1955); *cf. Super Prods. Corp.* v. *Parkin*, 20 F.R.D. 377 (S.D.N.Y. 1957), or by reading paragraph (7) as not limited by subdivision (f). See *Giffin* v. *Ensign*, 234 F. 2d 307 (3d Cir. 1956); 2 *Moore's Federal Practice*, ¶ 4.19 (2d ed. 1948);

1 Barron & Holtzoff, *Federal Practice & Procedure* § 182.1 (Wright ed. 1960); Comment, 27 U. of Chi. L. Rev. 751 (1960). See also *Olberding* v. *Illinois Central R.R.*, 201 F. 2d 582 (6th Cir.), *rev'd on other grounds*, 346 U.S. 338 (1953); *Feinsinger* v. *Bard*, 195 F. 2d 45 (7th Cir. 1952).

An important and growing class of State statutes base personal jurisdiction over nonresidents on the doing of acts or on other contacts within the State, and permit notice to be given the defendant outside the State without any requirement of service on a local State official. See, *e.g.*, Ill. Ann. Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis. Stat. § 262.06 (1959). This service, employed in original Federal actions pursuant to paragraph (7), has also been held proper. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba*, 243 F. 2d 342 (2d Cir. 1957); *Kappus* v. *Western Hills Oil, Inc.*, 24 F.R.D. 123 (E.D. Wis. 1959); *Star* v. *Rogalny*, 162 F. Supp. 181 (E.D. Ill. 1957). It has also been held that the clause of paragraph (7) which permits service "in the manner prescribed by the law of the state," etc., is not limited by subdivision (c) requiring that service of all process be made by certain designated persons. See *Farr & Co.* v. *Cia. Intercontinental de Nav. de Cuba, supra. But cf. Sappia* v. *Lauro Lines*, 130 F. Supp. 810 (S.D.N.Y. 1955).

The salutary results of these cases are intended to be preserved. See paragraph (7), with a clarified reference to State law, and amended subdivisions (e) and (f).

Subdivision (e). For the general relation between subdivisions (d) and (e), see 2 Moore, *supra*, ¶ 4.32.

The amendment of the first sentence inserting the word "thereunder" supports the original intention that the "order of court" must be authorized by a specific United States statute. See 1 Barron & Holtzoff, *supra*, at 731. The clause added at the end of the first sentence expressly adopts the view taken by commentators that, if no manner of service is prescribed in the statute or order, the service may be made in a manner stated in Rule 4. See 2 Moore, *supra*, ¶ 4.32,

at 1004; Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1036–39 (1961). *But see* Commentary, 5 Fed. Rules Serv. 791 (1942).

Examples of the statutes to which the first sentence relates are 28 U.S.C. § 2361 (Interpleader: process and procedure); 28 U.S.C. §1655 (Lien enforcement; absent defendants).

The second sentence, added by amendment, expressly allows resort in original Federal actions to the procedures provided by State law for effecting service on nonresident parties (as well as on domiciliaries not found within the State). See, as illustrative, the discussion under amended subdivision (d)(7) of service pursuant to State nonresident motorist statutes and other comparable State statutes. Of particular interest is the change brought about by the reference in this sentence to State procedures for commencing actions against nonresidents by attachment and the like, accompanied by notice. Although an action commenced in a State court by attachment may be removed to the Federal court if ordinary conditions for removal are satisfied, see 28 U.S.C. § 1450; *Rorick* v. *Devon Syndicate, Ltd.*, 307 U.S. 299 (1939); *Clark* v. *Wells*, 203 U.S. 164 (1906), there has heretofore been no provision recognized by the courts for commencing an original Federal civil action by attachment. See Currie, *Attachment and Garnishment in the Federal Courts*, 59 Mich. L. Rev. 337 (1961), arguing that this result came about through historical anomaly. Rule 64, which refers to attachment, garnishment, and similar procedures under State law, furnishes only provisional remedies in actions otherwise validly commenced. See *Big Vein Coal Co.* v. *Read*, 229 U.S. 31 (1913); *Davis* v. *Ensign-Bickford Co.*, 139 F. 2d 624 (8th Cir. 1944); 7 *Moore's Federal Practice* ¶ 64.05 (2d ed. 1954); 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1423 (Wright ed. 1958); *but cf.* Note, 13 So. Calif. L. Rev. 361 (1940). The amendment will now permit the institution of original Federal actions against nonresidents through the use of familiar State procedures by which property of these defendants

is brought within the custody of the court and some appropriate service is made upon them.

The necessity of satisfying subject-matter jurisdictional requirements and requirements of venue will limit the practical utilization of these methods of effecting service. Within those limits, however, there appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts. See 1 Barron & Holtzoff, *supra*, at 374–80; Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (1956); Note, 34 Corn. L.Q. 103 (1948); Note, 13 So. Calif. L. Rev. 361 (1940).

If the circumstances of a particular case satisfy the applicable Federal law (first sentence of Rule 4(e), as amended) and the applicable State law (second sentence), the party seeking to make the service may proceed under the Federal or the State law, at his option.

See also amended Rule 13(a), and the Advisory Committee's Note thereto.

Subdivision (f). The first sentence is amended to assure the effectiveness of service outside the territorial limits of the State in all the cases in which any of the rules authorize service beyond those boundaries. Besides the preceding provisions of Rule 4, see Rule 71A(d)(3). In addition, the new second sentence of the subdivision permits effective service within a limited area outside the State in certain special situations, namely, to bring in additional parties to a counterclaim or cross-claim (Rule 13(h)), impleaded parties (Rule 14), and indispensable or conditionally necessary parties to a pending action (Rule 19); and to secure compliance with an order of commitment for civil contempt. In those situations effective service can be made at points not more than 100 miles distant from the courthouse in which the action is commenced, or to which it is assigned or transferred for trial.

The bringing in of parties under the 100-mile provision in the limited situations enumerated is designed

to promote the objective of enabling the court to determine entire controversies. In the light of present-day facilities for communication and travel, the territorial range of the service allowed, analogous to that which applies to the service of a subpoena under Rule 45(e)(1), can hardly work hardship on the parties summoned. The provision will be especially useful in metropolitan areas spanning more than one State. Any requirements of subject-matter jurisdiction and venue will still have to be satisfied as to the parties brought in, although these requirements will be eased in some instances when the parties can be regarded as "ancillary." See *Pennsylvania R.R.* v. *Erie Avenue Warehouse Co.*, 5 F.R. Serv. 2d 14a.62, Case 2 (3d Cir. 1962); *Dery* v. *Wyer*, 265 F. 2d 804 (2d Cir. 1959); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213 (2d Cir. 1955); *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968 (2d Cir. 1944); *Vaughn* v *Terminal Transp. Co.*, 162 F. Supp. 647 (E.D. Tenn. 1957); and compare the fifth paragraph of the Advisory Committee's Note to Rule 4(e), as amended. The amendment is but a moderate extension of the territorial reach of Federal process and has ample practical justification. See 2 Moore, *supra*, § 4.01[13] (Supp. 1960); 1 Barron & Holtzoff, *supra*, § 184; Note, 51 Nw. U.L. Rev. 354 (1956). *But cf.* Nordbye, *Comments on Proposed Amendments to Rules of Civil Procedure for the United States District Courts*, 18 F.R.D. 105, 106 (1956).

As to the need for enlarging the territorial area in which orders of commitment for civil contempt may be served, see *Graber* v. *Graber*, 93 F. Supp. 281 (D.D.C. 1950); *Teele Soap Mfg. Co.* v. *Pine Tree Products Co., Inc.*, 8 F. Supp. 546 (D.N.H. 1934); *Mitchell* v. *Dexter*, 244 Fed. 926 (1st Cir. 1917); *In re Graves*, 29 Fed. 60 (N.D. Iowa 1886).

As to the Court's power to amend subdivisions (e) and (f) as here set forth, see *Mississippi Pub. Corp.* v. *Murphree*, 326 U.S. 438 (1946).

Subdivision (i). The continual increase of civil litigation having international elements makes it ad-

visable to consolidate, amplify, and clarify the provisions governing service upon parties in foreign countries. See generally Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L. J. 515 (1953); Longley, *Serving Process, Subpoenas and Other Documents in Foreign Territory*, Proc. A.B.A., Sec. Int'l & Comp. L. 34 (1959); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031 (1961).

As indicated in the opening lines of new subdivision (i), referring to the provisions of subdivision (e), the authority for effecting foreign service must be found in a statute of the United States or a statute or rule of court of the State in which the district court is held providing in terms or upon proper interpretation for service abroad upon persons not inhabitants of or found within the State. See the Advisory Committee's Note to amended Rule 4(d)(7) and Rule 4(e). For examples of Federal and State statutes expressly authorizing such service, see 8 U.S.C. § 1451(b); 35 U.S.C. §§ 146, 293; Me. Rev. Stat., ch. 22, § 70 (Supp. 1961); Minn. Stat. Ann. § 303.13 (1947); N.Y. Veh. & Tfc. Law § 253. Several decisions have construed statutes to permit service in foreign countries, although the matter is not expressly mentioned in the statutes. See, *e.g.*, *Chapman* v. *Superior Court*, 162 Cal. App. 2d 421, 328 P. 2d 23 (Dist. Ct. App. 1958); *Sperry* v. *Fliegers*, 194 Misc. 438, 86 N.Y.S. 2d 830 (Sup. Ct. 1949); *Ewing* v. *Thompson*, 233 N.C. 564, 65 S.E. 2d 17 (1951); *Rushing* v. *Bush*, 260 S.W. 2d 900 (Tex. Ct. Civ. App. 1953). Federal and State statutes authorizing service on nonresidents in such terms as to warrant the interpretation that service abroad is permissible include 15 U.S.C. §§ 77v(a), 78aa, 79y; 28 U.S.C. § 1655; 38 U.S.C. § 784(a); Ill. Ann. Stat., c. 110, §§ 16, 17 (Smith-Hurd 1956); Wis. Stat. § 262.06 (1959).

Under subdivisions (e) and (i), when authority to make foreign service is found in a Federal statute or statute or rule of court of a State, it is always sufficient to carry out the service in the manner indicated therein.

Subdivision (i) introduces considerable further flexibility by permitting the foreign service and the return thereof to be carried out in any of a number of other alternative ways that are also declared to be sufficient. Other aspects of foreign service continue to be governed by the other provisions of Rule 4. Thus, for example, subdivision (i) effects no change in the form of the summons, or the issuance of separate or additional summons, or the amendment of service.

Service of process beyond the territorial limits of the United States may involve difficulties not encountered in the case of domestic service. Service abroad may be considered by a foreign country to require the performance of judicial, and therefore "sovereign," acts within its territory, which that country may conceive to be offensive to its policy or contrary to its law. See Jones, *supra*, at 537. For example, a person not qualified to serve process according to the law of the foreign country may find himself subject to sanctions if he attempts service therein. See Inter-American Juridical Committee, *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures* 20 (1952). The enforcement of a judgment in the foreign country in which the service was made may be embarrassed or prevented if the service did not comport with the law of that country. See *ibid.*

One of the purposes of subdivision (i) is to allow accommodation to the policies and procedures of the foreign country. It is emphasized, however, that the attitudes of foreign countries vary considerably and that the question of recognition of United States judgments abroad is complex. Accordingly, if enforcement is to be sought in the country of service, the foreign law should be examined before a choice is made among the methods of service allowed by subdivision (i).

Subdivision (i) (1). Subparagraph (A) of paragraph (1), permitting service by the method prescribed by the law of the foreign country for service on a person in that country in a civil action in any of its courts of general jurisdiction, provides an alternative that is likely to create least objection in the place of service and also

is likely to enhance the possibilities of securing ultimate enforcement of the judgment abroad. See *Report on Uniformity of Legislation on International Cooperation in Judicial Procedures, supra.*

In certain foreign countries service in aid of litigation pending in other countries can lawfully be accomplished only upon request to the foreign court, which in turn directs the service to be made. In many countries this has long been a customary way of accomplishing the service. See *In re Letters Rogatory out of First Civil Court of City of Mexico*, 261 Fed. 652 (S.D.N.Y. 1919); Jones, *supra*, at 543; Comment, 44 Colum. L. Rev. 72 (1944); Note, 58 Yale L.J. 1193 (1949). Subparagraph (B) of paragraph (1), referring to a letter rogatory, validates this method. A proviso, applicable to this subparagraph and the preceding one, requires, as a safeguard, that the service made shall be reasonably calculated to give actual notice of the proceedings to the party. See *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

Subparagraph (C) of paragraph (1), permitting foreign service by personal delivery on individuals and corporations, partnerships, and associations, provides for a manner of service that is not only traditionally preferred, but also is most likely to lead to actual notice. Explicit provision for this manner of service was thought desirable because a number of Federal and State statutes permitting foreign service do not specifically provide for service by personal delivery abroad, see *e.g.*, 35 U.S.C. §§ 146, 293; 46 U.S.C. § 1292; Calif. Ins. Code § 1612; N.Y. Veh. & Tfc. Law § 253, and it also may be unavailable under the law of the country in which the service is made.

Subparagraph (D) of paragraph (1), permitting service by certain types of mail, affords a manner of service that is inexpensive and expeditious, and requires a minimum of activity within the foreign country. Several statutes specifically provide for service in a foreign country by mail, *e.g.*, Hawaii Rev. Laws §§ 230–31, 230–32 (1955); Minn. Stat. Ann. § 303.13 (1947); N.Y. Civ. Prac. Act. § 229–b; N.Y. Veh. & Tfc. Law § 253, and it has been sanctioned by the courts even in the absence

of statutory provision specifying that form of service. *Zurini* v. *United States*, 189 F. 2d 722 (8th Cir. 1951); *United States* v. *Cardillo*, 135 F. Supp. 798 (W.D. Pa. 1955); *Autogiro Co.* v. *Kay Gyroplanes, Ltd.*, 55 F. Supp. 919 (D.D.C. 1944). Since the reliability of postal service may vary from country to country, service by mail is proper only when it is addressed to the party to be served and a form of mail requiring a signed receipt is used. An additional safeguard is provided by the requirement that the mailing be attended to by the clerk of the court. See also the provisions of paragraph (2) of this subdivision (i) regarding proof of service by mail.

Under the applicable law it may be necessary, when the defendant is an infant or incompetent person, to deliver the summons and complaint to a guardian, committee, or similar fiduciary. In such a case it would be advisable to make service under subparagraph (A), (B), or (E).

Subparagraph (E) of paragraph (1) adds flexibility by permitting the court by order to tailor the manner of service to fit the necessities of a particular case or the peculiar requirements of the law of the country in which the service is to be made. A similar provision appears in a number of statutes, *e.g.*, 35 U.S.C. §§146, 293; 38 U.S.C. §784(a); 46 U.S.C. §1292.

The next-to-last sentence of paragraph (1) permits service under (C) and (E) to be made by any person who is not a party and is not less than 18 years of age or who is designated by court order or by the foreign court. *Cf.* Rule 45(c); N.Y. Civ. Prac. Act §§233, 235. This alternative increases the possibility that the plaintiff will be able to find a process server who can proceed unimpeded in the foreign country; it also may improve the chances of enforcing the judgment in the country of service. Especially is this alternative valuable when authority for the foreign service is found in a statute or rule of court that limits the group of eligible process servers to designated officials or special appointees who, because directly connected with another "sovereign," may be particularly offensive to

the foreign country. See generally Smit, *supra*, at 1040–41. When recourse is had to subparagraph (A) or (B) the identity of the process server always will be determined by the law of the foreign country in which the service is made.

The last sentence of paragraph (1) sets forth an alternative manner for the issuance and transmission of the summons for service. After obtaining the summons from the clerk, the plaintiff must ascertain the best manner of delivering the summons and complaint to the person, court, or officer who will make the service. Thus the clerk is not burdened with the task of determining who is permitted to serve process under the law of a particular country or the appropriate governmental or nongovernmental channel for forwarding a letter rogatory. Under (D), however, the papers must always be posted by the clerk.

Subdivision (*i*)(*2*). When service is made in a foreign country, paragraph (2) permits methods for proof of service in addition to those prescribed by subdivision (g). Proof of service in accordance with the law of the foreign country is permitted because foreign process servers, unaccustomed to the form or the requirement of return of service prevalent in the United States, have on occasion been unwilling to execute the affidavit required by Rule 4(g). See Jones, *supra*, at 537; Longley, *supra*, at 35. As a corollary of the alternate manner of service in subdivision (i)(1)(E), proof of service as directed by order of the court is permitted. The special provision for proof of service by mail is intended as an additional safeguard when that method is used. On the type of evidence of delivery that may be satisfactory to a court in lieu of a signed receipt, see *Aero Associates, Inc.* v. *La Metropolitana*, 183 F. Supp. 357 (S.D.N.Y. 1960).

Rule 5. Service and Filing of Pleadings and Other Papers

(a) SERVICE: WHEN REQUIRED. *Except as otherwise provided in these rules,* ~~E~~every order

required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. ~~affected thereby, but n~~*N*o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

ADVISORY COMMITTEE'S NOTE

The words "affected thereby," stricken out by the amendment, introduced a problem of interpretation. See 1 Barron & Holtzoff, *Federal Practice & Procedure* 760–61 (Wright ed. 1960). The amendment eliminates this difficulty and promotes full exchange of information among the parties by requiring service of papers on all the parties to the action, except as otherwise provided in the rules. See also subdivision (c) of Rule 5. So, for example, a third-party defendant is required to serve his answer to the third-party complaint not only upon the defendant but also upon the plaintiff. See amended Form 22–A and the Advisory Committee's Note thereto.

As to the method of serving papers upon a party whose address is unknown, see Rule 5(b).

Rule 6. Time

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, *by the local rules of any district court,* by order of court, or by any applicable statute, the day of the act, event, or default ~~after~~ *from* which the

designated period of time begins to run ~~is~~ *shall* not ~~to~~ be included. The last day of the period so computed ~~is to~~ *shall* be included, unless it is *a Saturday*, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is ~~neither~~ *not a Saturday*, a Sunday, ~~nor~~ *or* a *legal* holiday. When the period of time prescribed or allowed is less than 7 days, intermediate *Saturdays*, Sundays, and *legal* holidays shall be excluded in the computation. ~~A half holiday shall be considered as other days and not as a holiday.~~ *As used in this rule and in rule 77(c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.*

(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 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 where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under 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.

ADVISORY COMMITTEE'S NOTE

Subdivision (*a*). This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a "legal holiday" in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. "Legal holiday" is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of "holiday" in 11 U.S.C. § 1 (18); also 5 U.S.C. § 86a; Executive Order No. 10358, "Observance of Holidays," June 9, 1952, 17 Fed. Reg. 5269. In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Subdivision (*b*). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90-day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

Rule 7. Pleadings Allowed; Form of Motions

(a) PLEADINGS. There shall be a complaint and an answer; ~~and there shall be~~ a reply 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 *is summoned under the provisions of Rule 14*; 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.

ADVISORY COMMITTEE'S NOTE

Certain redundant words are eliminated and the subdivision is modified to reflect the amendment of Rule 14(a) which in certain cases eliminates the requirement of obtaining leave to bring in a third-party defendant.

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 is made pursuant to Rule 4(e)~~ *except when service is made under Rule 4(e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state.* 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 a motion permitted under this rule alters 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 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 the responsive pleading shall be served within 10 days after the service of the more definite statement.

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

Rule 13. Counterclaim and Cross-Claim

(a) COMPULSORY COUNTERCLAIMS. A pleading shall state as a counterclaim any claim which at the time of 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~~ *But the pleader need not state the claim* if *(1)* at the time the action was commenced the claim was the subject of another pending action~~,~~, *or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.*

ADVISORY COMMITTEE'S NOTE

When a defendant, if he desires to defend his interest in property, is obliged to come in and litigate in a court to whose jurisdiction he could not ordinarily be subjected, fairness suggests that he should not be required to assert counterclaims, but should rather be permitted to do so at his election. If, however, he does elect to assert a counterclaim, it seems fair to require him to assert any other which is compulsory within the meaning of Rule 13(a). Clause (2), added by amendment to Rule 13(a), carries out this idea. It will apply to various cases described in Rule 4(e), as amended, where service is effected through attachment or other process by which the court does not acquire jurisdiction to render a personal judgment against the defendant. Clause (2) will also apply to actions commenced in State courts jurisdictionally grounded on attachment or the like, and removed to the Federal courts.

Rule 14. Third-Party Practice

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. ~~Before the service of his answer~~ *At any time after commencement of the action* 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~~ *may cause* a summons and complaint *to be served* upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. *The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action.* ~~If the motion is granted and the summons and complaint are served, t~~*T*he person ~~so~~ served *with the summons and third-party complaint*, 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 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 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 assert any claim against the third-party 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. *Any party may move*

to strike the third-party claim, or for its severance or separate trial. 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 for all or part of the claim made in the action against the third-party defendant.

ADVISORY COMMITTEE'S NOTE

Under the amendment of the initial sentences of the subdivision, a defendant as third-party plaintiff may freely and without leave of court bring in a third-party defendant if he files the third-party complaint not later than 10 days after he serves his original answer. When the impleader comes so early in the case, there is little value in requiring a preliminary ruling by the court on the propriety of the impleader.

After the third-party defendant is brought in, the court has discretion to strike the third-party claim if it is obviously unmeritorious and can only delay or prejudice the disposition of the plaintiff's claim, or to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result. This discretion, applicable not merely to the cases covered by the amendment where the third-party defendant is brought in without leave, but to all impleaders under the rule, is emphasized in the next-to-last sentence of the subdivision, added by amendment.

In dispensing with leave of court for an impleader filed not later than 10 days after serving the answer, but retaining the leave requirement for impleaders sought to be effected thereafter, the amended subdivision takes a moderate position on the lines urged by some commentators, see Note, 43 Minn. L. Rev. 115 (1958); *cf.* Pa. R. Civ. P. 2252–53 (60 days after service on the defendant); Minn. R. Civ. P. 14.01 (45 days). Other commentators would dispense with the requirement of leave regardless of the time when impleader is effected, and would rely on subsequent action by the court to dismiss the impleader if it would unduly delay

or complicate the litigation or would be otherwise objectionable. See 1A Barron & Holtzoff, *Federal Practice & Procedure* 649–50 (Wright ed. 1960); Comment, 58 Colum. L. Rev. 532, 546 (1958); *cf.* N.Y. Civ. Prac. Act § 193–a; Me. R. Civ. P. 14. The amended subdivision preserves the value of a preliminary screening, through the leave procedure, of impleaders attempted after the 10-day period.

The amendment applies also when an impleader is initiated by a third-party defendant against a person who may be liable to him, as provided in the last sentence of the subdivision.

Rule 15. Amended and Supplemental Pleadings

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. *Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense.* If the court deems it advisable that the adverse party plead ~~thereto~~ *to the supplemental pleading,* it shall so order, specifying the time therefor.

ADVISORY COMMITTEE'S NOTE

Rule 15(d) is intended to give the court broad discretion in allowing a supplemental pleading. However, some cases, opposed by other cases and criticized by the commentators, have taken the rigid and formalistic view that where the original complaint fails to state a claim upon which relief can be granted, leave to serve a supplemental complaint must be denied. See *Bonner v. Elizabeth Arden, Inc.*, 177 F. 2d 703 (2d Cir. 1949);

Bowles v. *Senderowitz*, 65 F. Supp. 548 (E.D. Pa.), *rev'd on other grounds*, 158 F. 2d 435 (3d Cir. 1946), *cert. denied*, 330 U.S. 848 (1947); *cf. LaSalle Nat. Bank* v. *222 East Chestnut St. Corp.*, 267 F. 2d 247 (7th Cir.), *cert. denied*, 361 U.S. 836 (1959). *But see Camilla Cotton Oil Co.* v. *Spencer Kellogg & Sons*, 257 F. 2d 162 (5th Cir. 1958); *Genuth* v. *National Biscuit Co.*, 81 F. Supp. 213 (S.D.N.Y. 1948), *app. dism.*, 177 F. 2d 962 (2d Cir. 1949); 3 *Moore's Federal Practice* ¶15.01[5] (Supp. 1960); 1A Barron & Holtzoff, *Federal Practice & Procedure* 820–21 (Wright ed. 1960). Thus plaintiffs have sometimes been needlessly remitted to the difficulties of commencing a new action even though events occurring after the commencement of the original action have made clear the right to relief.

Under the amendment the court has discretion to permit a supplemental pleading despite the fact that the original pleading is defective. As in other situations where a supplemental pleading is offered, the court is to determine in the light of the particular circumstances whether filing should be permitted, and if so, upon what terms. The amendment does not attempt to deal with such questions as the relation of the statute of limitations to supplemental pleadings, the operation of the doctrine of laches, or the availability of other defenses. All these questions are for decision in accordance with the principles applicable to supplemental pleadings generally. *Cf. Blau* v. *Lamb*, 191 F. Supp. 906 (S.D.N.Y. 1961); *Lendonsol Amusement Corp.* v. *B. & Q. Assoc., Inc.*, 23 F.R. Serv. 15d.3, Case 1 (D. Mass. 1957).

Rule 24. Intervention

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon ~~all~~ *the* parties ~~affected~~ ~~thereby~~ *as provided in Rule 5*. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which

intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403.

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

Rule 25. Substitution of Parties

(a) DEATH.

(1) If a party dies and the claim is not thereby extinguished, the court ~~within 2 years after the death~~ may order substitution of the proper parties. ~~If substitution is not so made, the action shall be dismissed as to the deceased party.~~ The motion for substitution may be made by *any party or 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. *Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided*

herein for the service of the motion, the action shall be dismissed as to the deceased party.

ADVISORY COMMITTEE'S NOTE

Present Rule 25(a)(1), together with present Rule 6(b), results in an inflexible requirement that an action be dismissed as to a deceased party if substitution is not carried out within a fixed period measured from the time of the death. The hardships and inequities of this unyielding requirement plainly appear from the cases. See, *e.g.*, *Anderson* v. *Yungkau*, 329 U.S. 482 (1947); *Iovino* v. *Waierson*, 274 F. 2d 41 (1959), *cert. denied*, 362 U.S. 949 (1960); *Perry* v. *Allen*, 239 F. 2d 107 (5th Cir. 1956); *Starnes* v. *Pennsylvania R.R.*, 26 F.R.D. 625 (E.D.N.Y.), *aff'd per curiam*, 295 F. 2d 704 (2d Cir. 1961), *cert. denied*, 369 U.S. 813 (1962); *Zdanok* v. *Glidden Co.*, 28 F.R.D. 346 (S.D.N.Y. 1961). See also 4 *Moore's Federal Practice* ¶ 25.01[9] (Supp. 1960); 2 Barron & Holtzoff, *Federal Practice & Procedure* § 621, at 420–21 (Wright ed. 1961).

The amended rule establishes a time limit for the motion to substitute based not upon the time of the death, but rather upon the time information of the death is provided by means of a suggestion of death upon the record, *i.e.* service of a statement of the fact of the death. *Cf.* Ill. Ann. Stat., c. 110, § 54(2) (Smith-Hurd 1956). The motion may not be made later than 90 days after the service of the statement unless the period is extended pursuant to Rule 6(b), as amended. See the Advisory Committee's Note to amended Rule 6(b). See also the new Official Form 30.

A motion to substitute may be made by any party or by the representative of the deceased party without awaiting the suggestion of death. Indeed, the motion will usually be so made. If a party or the representa-

tive of the deceased party desires to limit the time within which another may make the motion, he may do so by suggesting the death upon the record.

A motion to substitute made within the prescribed time will ordinarily be granted, but under the permissive language of the first sentence of the amended rule ("the court may order") it may be denied by the court in the exercise of a sound discretion if made long after the death—as can occur if the suggestion of death is not made or is delayed—and circumstances have arisen rendering it unfair to allow substitution. *Cf. Anderson* v. *Yungkau*, *supra*, at 485, 486, where it was noted under the present rule that settlement and distribution of the estate of a deceased defendant might be so far advanced as to warrant denial of a motion for substitution even though made within the time limit prescribed by that rule. Accordingly, a party interested in securing substitution under the amended rule should not assume that he can rest indefinitely awaiting the suggestion of death before he makes his motion to substitute.

Rule 26. Depositions Pending Action

(e) OBJECTIONS TO ADMISSIBILITY. Subject to the provisions of Rules *28(b) and* 32(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 28(b). See the next-to-last paragraph of the Advisory Committee's Note to that amendment.

Rule 28. Persons Before Whom Depositions May Be Taken

(b) IN FOREIGN COUNTRIES.* In a foreign ~~state or~~ country, depositions ~~shall~~ *may* be taken (1) on notice before a ~~secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States~~ *person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States,* or (2) before ~~such~~ *a* person ~~or officer as may be appointed by commission~~ *commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony,* or *(3)* ~~under~~ *pursuant to a* letters rogatory. A commission or *a* letters rogatory shall be issued ~~only when necessary or convenient,~~ on application and notice~~,~~ and on ~~such~~ terms ~~and with such directions as~~ *that* are just and appropriate. *It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases.* ~~Officers may be designated in notices or commissions~~ *A notice or commission may designate the person before whom the deposition is to be taken* either by name or descriptive title. ~~and~~ *A* letters rogatory may be addressed "To the Appropriate

*The amendments of this subdivision and of Rule 26(e) were developed collaboratively by the Commission and Advisory Committee on International Rules of Judicial Procedure, a statutory organization established pursuant to Act of September 2, 1958, 72 Stat. 1743, and the Advisory Committee on Civil Rules.

~~Judicial~~ Authority in [here name the country]." *Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.*

ADVISORY COMMITTEE'S NOTE

The amendment of clause (1) is designed to facilitate depositions in foreign countries by enlarging the class of persons before whom the depositions may be taken on notice. The class is no longer confined, as at present, to a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States. In a country that regards the taking of testimony by a foreign official in aid of litigation pending in a court of another country as an infringement upon its sovereignty, it will be expedient to notice depositions before officers of the country in which the examination is taken. See generally *Symposium, Letters Rogatory* (Grossman ed. 1956); Doyle, *Taking Evidence by Deposition and Letters Rogatory and Obtaining Documents in Foreign Territory*, Proc. A.B.A., Sec. Int'l & Comp. L. 37 (1959): Heilpern, *Procuring Evidence Abroad*, 14 Tul. L. Rev. 29 (1939); Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L. J. 515, 526–29 (1953); Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1056–58 (1961).

Clause (2) of amended subdivision (b), like the corresponding provision of subdivision (a) dealing with depositions taken in the United States, makes it clear that the appointment of a person by commission in itself confers power upon him to administer any necessary oath.

It has been held that a letter rogatory will not be issued unless the use of a notice or commission is

shown to be impossible or impractical. See, *e.g.*, *United States* v. *Mattes*, 154 F. Supp. 574 (E.D.N.Y. 1957); *The Edmund Fanning*, 89 F. Supp. 282 (E.D.N.Y. 1950); *Branyan* v. *Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953). See also *Ali Akber Kiachif* v. *Philco International Corp.*, 10 F.R.D. 277 (S.D.N.Y. 1950). The intent of the fourth sentence of the amended subdivision is to overcome this judicial antipathy and to permit a sound choice between depositions under a letter rogatory and on notice or by commission in the light of all the circumstances. In a case in which the foreign country will compel a witness to attend or testify in aid of a letter rogatory but not in aid of a commission, a letter rogatory may be preferred on the ground that it is less expensive to execute, even if there is plainly no need for compulsive process. A letter rogatory may also be preferred when it cannot be demonstrated that a witness will be recalcitrant or when the witness states that he is willing to testify voluntarily, but the contingency exists that he will change his mind at the last moment. In the latter case, it may be advisable to issue both a commission and a letter rogatory, the latter to be executed if the former fails. The choice between a letter rogatory and a commission may be conditioned by other factors, including the nature and extent of the assistance that the foreign country will give to the execution of either.

In executing a letter rogatory the courts of other countries may be expected to follow their customary procedure for taking testimony. See *United States* v. *Paraffin Wax, 2255 Bags*, 23 F.R.D. 289 (E.D.N.Y. 1959). In many noncommon-law countries the judge questions the witness, sometimes without first administering an oath, the attorneys put any supplemental questions either to the witness or through the judge, and the judge dictates a summary of the testimony, which the witness acknowledges as correct. See Jones, *supra*, at 530–32; Doyle, *supra*, at 39–41. The last sentence of the amended subdivision provides, contrary to the implications of some authority, that evidence

recorded in such a fashion need not be excluded on that account. See *The Mandu*, 11 F. Supp. 845 (E.D.N.Y. 1935). *But cf. Nelson* v. *United States*, 17 Fed. Cas. 1340 (No. 10,116) (C.C.D. Pa. 1816); *Winthrop* v. *Union Ins. Co.*, 30 Fed. Cas. 376 (No. 17,901) (C.C.D. Pa. 1807). The specific reference to the lack of an oath or a verbatim transcript is intended to be illustrative. Whether or to what degree the value or weight of the evidence may be affected by the method of taking or recording the testimony is left for determination according to the circumstances of the particular case, *cf. Uebersee Finanz-Korporation, A. G.* v. *Brownell*, 121 F. Supp. 420 (D.D.C. 1954); *Danisch* v. *Guardian Life Ins. Co.*, 19 F.R.D. 235 (S.D.N.Y. 1956); the testimony may indeed be so devoid of substance or probative value as to warrant its exclusion altogether.

Some foreign countries are hostile to allowing a deposition to be taken in their country, especially by notice or commission, or to lending assistance in the taking of a deposition. Thus compliance with the terms of amended subsivision (b) may not in all cases ensure completion of a deposition abroad. Examination of the law and policy of the particular foreign country in advance of attempting a deposition is therefore advisable. See 4 *Moore's Federal Practice* ¶¶28.05–28.08 (2d ed. 1950).

Rule 30. Depositions Upon Oral Examination

(f) CERTIFICATION AND FILING BY OFFICER; COPIES; NOTICE OF FILING.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which

the action is pending or send it by registered *or certified* mail to the clerk thereof for filing.

ADVISORY COMMITTEE'S NOTE

This amendment corresponds to the change in Rule 4(d)(4). See the Advisory Committee's Note to that amendment.

Rule 41. Dismissal of Actions

(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, *in an action tried by the court without a jury,* 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~~ *T*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 *or for lack of an indispensable party,* operates as an adjudication upon the merits.

ADVISORY COMMITTEE'S NOTE

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien* v. *Westinghouse Electric Corp.*, 293 F. 2d 1, 5-10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to non-jury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 *Moore's Federal Practice* ¶ 59.08[5] (2d ed. 1954); *cf. Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as non-jury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable

party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello* v. *United States*, 365 U.S. 265, 284–88 & n. 5 (1961); *Mallow* v. *Hinde*, 12 Wheat. (25 U.S.) 193 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); *Restatement of Judgments* § 49, comm. a, b (1942). This amendment corrects an omission from the rule and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

Rule 49. Special Verdicts and Interrogatories

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answer to the interrogatories and to render a general verdict, and the court shall direct the jury to make written answers and to render the general verdict. When the general verdict and the answers are harmonious, ~~the court shall direct the entry of~~ the appropriate judgment upon the verdict and answers *shall be entered pursuant to Rule 58.* When the answers are consistent with each other but one or more is inconsistent with the general verdict, ~~the court may direct the entry of~~ judgment *may be entered pursuant to Rule 58* in accordance with the answers, notwithstanding the general verdict, or *the court* may return

the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, ~~the court shall not direct the entry of~~ judgment *shall not be entered,* but *the court* ~~may~~ *shall* return the jury for further consideration of its answers and verdict or ~~may~~ *shall* order a new trial.

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

Rule 50. Motion for a Directed Verdict *and for Judgment Notwithstanding the Verdict*

(a) *MOTION FOR DIRECTED VERDICT:* WHEN MADE~~;~~; EFFECT. 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. *The order of the court granting a motion for a directed verdict is effective without any assent of the jury.*

(b) ~~RESERVATION OF DECISION ON MOTION.~~ *MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.* 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~~ *Not later than 10 days after entry of judgment*, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 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 court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) *Same: Conditional Rulings on Grant of Motion.*

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus

conditionally granted, the order thereon does not affect the finality of the judgment. In case the 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 has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

ADVISORY COMMITTEE'S NOTE

Subdivision (*a*). The practice, after the court has granted a motion for a directed verdict, of requiring the jury to express assent to a verdict they did not reach by their own deliberations serves no useful purpose and may give offense to the members of the jury. See 2B Barron & Holtzoff, *Federal Practice &*

Procedure § 1072, at 367 (Wright ed. 1961); Blume, *Origin and Development of the Directed Verdict*, 48 Mich. L. Rev. 555, 582–85, 589–90 (1950). The final sentence of the subdivision, added by amendment, provides that the court's order granting a motion for a directed verdict is effective in itself, and that no action need be taken by the foreman or other members of the jury. See Ariz. R. C v P. 50(c); *cf.* Fed. R. Crim. P. 29(a). No change is intended in the standard to be applied in deciding the motion. To assure this interpretation, and in the interest of simplicity, the traditional term, "directed verdict," is retained.

Subdivision (*b*). A motion for judgment notwithstanding the verdict will not lie unless it was preceded by a motion for a directed verdict made at the close of all the evidence.

The amendment of the second sentence of this subdivision sets the time limit for making the motion for judgment n.o.v. at 10 days after the entry of judgment, rather than 10 days after the reception of the verdict. Thus the time provision is made consistent with that contained in Rule 59(b) (time for motion for new trial) and Rule 52(b) (time for motion to amend findings by the court).

Subdivision (*c*) deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, and the motion for judgment n.o.v. is granted. The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 253 (1940), and have been further elaborated in later cases. See *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co., Inc.* v. *San Roman*, 332 U.S. 571 (1948); *Fountain* v. *Filson*, 336 U.S. 681 (1949); *Johnson* v. *New York, N.H. & H. R.R. Co.*, 344 U.S. 48 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text

of the rule. The amendments do not alter the effects of a jury verdict or the scope of appellate review.

In the situation mentioned, *subdivision* (c)(*1*) requires that the court make a "conditional" ruling on the new-trial motion, *i.e.*, a ruling which goes on the assumption that the motion for judgment n.o.v. was erroneously granted and will be reversed or vacated; and the court is required to state its grounds for the conditional ruling. Subdivision (c)(1) then spells out the consequences of a reversal of the judgment in the light of the conditional ruling on the new-trial motion.

If the motion for new trial has been conditionally granted, and the judgment is reversed, "the new trial shall proceed unless the appellate court has otherwise ordered." The party against whom the judgment n.o.v. was entered below may, as appellant, besides seeking to overthrow that judgment, also attack the conditional grant of the new trial. And the appellate court, if it reverses the judgment n.o.v., may in an appropriate case also reverse the conditional grant of the new trial and direct that judgment be entered on the verdict. See *Bailey* v. *Slentz*, 189 F. 2d 406 (10th Cir. 1951); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246 (9th Cir. 1957), *cert. denied*, 356 U.S. 968 (1958); *Peters* v. *Smith*, 221 F. 2d 721 (3d Cir. 1955); *Dailey* v. *Timmer*, 292 F. 2d 824 (3d Cir. 1961), explaining *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960); *Cox* v. *Pennsylvania R.R.*, 120 A. 2d 214 (D.C. Mun. Ct App. 1956); 3 Barron & Holtzoff, *Federal Practice & Procedure* §1302.1 at 346–47 (Wright ed. 1958); 6 *Moore's Federal Practice* ¶ 59.16 at 3915 n. 8a (2d ed. 1954).

If the motion for a new trial has been conditionally denied, and the judgment is reversed, "subsequent proceedings shall be in accordance with the order of the appellate court." The party in whose favor judgment n.o.v. was entered below may, as appellee, besides seeking to uphold that judgment, also urge on the appellate court that the trial court committed error in conditionally denying the new trial. The appellee may assert this

error in his brief, without taking a cross-appeal. *Cf. Patterson* v. *Pennsylvania R.R.*, 238 F. 2d 645, 650 (6th Cir. 1956); *Hughes* v. *St. Louis Nat. L. Baseball Club, Inc.*, 359 Mo. 993, 997, 224 S.W. 2d 989, 992 (1949). If the appellate court concludes that the judgment cannot stand, but accepts the appellee's contention that there was error in the conditional denial of the new trial, it may order a new trial in lieu of directing the entry of judgment upon the verdict.

Subdivision (c)(2), which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone* v. *West Virginia Pulp & Paper Co.*, *supra*, 330 U.S. at 217, 218. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

In some unusual circumstances, however, the grant of the new-trial motion may be only conditional, and the judgment will not be superseded. See the situation in *Tribble* v. *Bruin*, 279 F. 2d 424 (4th Cir. 1960) (upon a verdict for plaintiff, defendant moves for and obtains judgment n.o.v.; plaintiff moves for a new trial on the ground of inadequate damages; trial court might properly have granted plaintiff's motion, conditional upon reversal of the judgment n.o.v.).

Even if the verdict-winner makes no motion for a new trial, he is entitled upon an appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but

that errors were committed during the trial which at the least entitle him to a new trial.

Subdivision (*d*) deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course is advisable where the grounds urged are suitable for the exercise of trial court discretion.

Subdivision (d) does not attempt a regulation of all aspects of the procedure where the motion for judgment n.o.v. and any accompanying motion for a new trial are denied, since the problems have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage. It is, however, designed to give guidance on certain important features of the practice.

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 *shall be entered pursuant to Rule 58*; 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).

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 58. See the Advisory Committee's Note to Rule 58, as amended.

Rule 56. Summary Judgment

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time 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, *answers to interrogatories*, and admissions on file, together with the affidavits, if any, show that 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.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; *DEFENSE REQUIRED.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, *answers to interrogatories*, or ~~by~~ further affidavits. *When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*

ADVISORY COMMITTEE'S NOTE

Subdivision (*c*). By the amendment "answers to interrogatories" are included among the materials which may be considered on motion for summary judgment. The phrase was inadvertently omitted from the rule, see 3 Barron & Holtzoff, *Federal Practice & Procedure* 159–60 (Wright ed. 1958), and the courts have generally reached by interpretation the result which will hereafter be required by the text of the amended rule. See Annot., 74 A.L.R. 2d 984 (1960).

Subdivision (*e*). The words "answers to interrogatories" are added in the third sentence of this subdivision to conform to the amendment of subdivision (c).

The last two sentences are added to overcome a line of cases, chiefly in the Third Circuit, which has impaired the utility of the summary judgment device. A typical case is as follows: A party supports his motion for summary judgment by affidavits or other evidentiary matter sufficient to show that there is no genuine issue as to a material fact. The adverse party, in opposing the motion, does not produce any evidentiary matter, or produces some but not enough to establish that there is a genuine issue for trial. Instead, the adverse party rests on averments of his pleadings which on their face present an issue. In this situation Third Circuit cases have taken the view that summary judgment must be denied, at least if the averments are "well-pleaded," and not supposititious, conclusory, or ultimate. See *Frederick Hart & Co., Inc.* v. *Recordgraph Corp.*, 169 F. 2d 580 (3d Cir. 1948); *United States ex rel. Kolton* v. *Halpern*, 260 F. 2d 590 (3d Cir. 1958); *United States ex rel. Nobles* v. *Ivey Bros. Constr. Co., Inc.*, 191 F. Supp. 383 (D. Del. 1961); *Jamison* v. *Pennsylvania Salt Mfg. Co.*, 22 F.R.D. 253 (W.D. Pa. 1958); *Bunny Bear, Inc.* v. *Dennis Mitchell Industries*, 139 F. Supp. 542 (E.D. Pa. 1956); *Levy* v. *Equitable Life Assur. Society*, 18 F.R.D. 164 (E.D. Pa. 1955).

The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. The Third Circuit doctrine, which permits the pleadings themselves to stand in the way of granting an otherwise justified summary judgment, is incompatible with the basic purpose of the rule. See 6 *Moore's Federal Practice* 2069 (2d ed. 1953); 3 Barron & Holtzoff, *supra*, § 1235.1.

It is hoped that the amendment will contribute to the more effective utilization of the salutary device of summary judgment.

The amendment is not intended to derogate from the solemnity of the pleadings. Rather it recognizes that, despite the best efforts of counsel to make his pleadings

accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Nor is the amendment designed to affect the ordinary standards applicable to the summary judgment motion. So, for example: Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate. Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matt r is presented. And summary judgment may be inappropriate where the party opposing it shows under subdivision (f) that he cannot at the time present facts essential to justify his opposition.

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 that a party recover only money or costs or that 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.~~

Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

ADVISORY COMMITTEE'S NOTE

Under the present rule a distinction has sometimes been made between judgments on general jury verdicts, on the one hand, and, on the other, judgments upon decisions of the court that a party shall recover only money or costs or that all relief shall be denied. In the first situation, it is clear that the clerk should enter the judgment without awaiting a direction by the court unless the court otherwise orders. In the second situation it was intended that the clerk should similarly enter the judgment forthwith upon the court's decision; but because of the separate listing in the rule, and the use of the phrase "upon receipt . . . of the direction," the rule has sometimes been interpreted as requiring the clerk to await a separate direction of

the court. All these judgments are usually uncomplicated, and should be handled in the same way. The amended rule accordingly deals with them as a single group in clause (1) (substituting the expression "only a sum certain" for the present expression "only money"), and requires the clerk to prepare, sign, and enter them forthwith, without awaiting court direction, unless the court makes a contrary order. (The clerk's duty is ministerial and may be performed by a deputy clerk in the name of the clerk. See 28 U.S.C § 956; *cf. Gilbertson* v. *United States*, 168 Fed. 672 (7th Cir. 1909).) The more complicated judgments described in clause (2) must be approved by the court before they are entered.

Rule 58 is designed to encourage all reasonable speed in formulating and entering the judgment when the case has been decided. Participation by the attorneys through the submission of forms of judgment involves needless expenditure of time and effort and promotes delay, except in special cases where counsel's assistance can be of real value. See *Matteson* v. *United States*, 240 F. 2d 517, 518–19 (2d Cir. 1956). Accordingly, the amended rule provides that attorneys shall not submit forms of judgment unless directed to do so by the court. This applies to the judgments mentioned in clause (2) as well as clause (1).

Hitherto some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, *e.g.*, "the plaintiff's motion [for summary judgment] is granted," see *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 229 (1958). Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose

of appeal. See *id.*; and *compare Blanchard* v. *Commonwealth Oil Co.*, 294 F. 2d 834 (5th Cir. 1961); *United States* v. *Higginson*, 238 F. 2d 439 (1st Cir. 1956); *Danzig* v. *Virgin Isle Hotel, Inc.*, 278 F. 2d 580 (3d Cir. 1960); *Sears* v. *Austin*, 282 F. 2d 340 (9th Cir. 1960), *with Matteson* v. *United States, supra; Erstling* v. *Southern Bell Tel. & Tel. Co.*, 255 F. 2d 93 (5th Cir. 1958); *Barta* v. *Oglala Sioux Tribe*, 259 F. 2d 553 (8th Cir. 1958), *cert. denied*, 358 U.S. 932 (1959); *Beacon Fed. S. & L. Assn.* v. *Federal Home L. Bank Bd.*, 266 F. 2d 246 (7th Cir.), *cert. denied*, 361 U.S. 823 (1959); *Ram* v. *Paramount Film D. Corp.*, 278 F. 2d 191 (4th Cir. 1960).

The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for the entry of judgment. That judgments shall be on separate documents is also indicated in Rule 79(b); and see General Rule 10 of the U.S. District Courts for the Eastern and Southern Districts of New York; *Ram* v. *Paramount Film D. Corp., supra*, at 194.

See the amendment of Rule 79(a) and the new specimen forms of judgment, Forms 31 and 32.

See also Rule 55(b) (1) and (2) covering the subject of judgments by default.

Rule 71A. Condemnation of Property

(d) PROCESS. * * *

(3) Service of Notice. (i) Personal service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 (c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known. ~~The provisions of Rule 4(f) shall not be applicable.~~

ADVISORY COMMITTEE'S NOTE

This amendment conforms to the amendment of Rule 4(f).

Rule 77. District Courts and Clerks

(c) CLERK'S OFFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except *Saturdays,* Sundays, and legal holidays~~.~~, *but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day.* All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(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~~ *each* 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 pro-

vided 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).

ADVISORY COMMITTEE'S NOTE

Subdivision (c). The amendment authorizes closing of the clerk's office on Saturday as far as civil business is concerned. However, a district court may require its clerk's office to remain open for specified hours on Saturdays or "legal holidays" other than those enumerated. ("Legal holiday" is defined in Rule 6(a), as amended.) The clerk's offices of many district courts have customarily remained open on some of the days appointed as holidays by State law. This practice could be continued by local rule or order.

Subdivision (d). This amendment conforms to the amendment of Rule 5(a). See the Advisory Committee's Note to that amendment.

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 Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States, 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~~ *entered* chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These ~~notations~~ *entries* 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~~ *entry* of an order or judgment shall show the date the ~~notation~~ *entry* 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.

ADVISORY COMMITTEE'S NOTE

The terminology is clarified without any change of the prescribed practice. See amended Rule 58, and the Advisory Committee's Note thereto.

Rule 81. Applicability in General

(a) TO WHAT PROCEEDINGS APPLICABLE.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U.S.C. Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U.S.C., Title 7, § 499g(c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U.S.C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of ~~Commerce~~ *the Interior*; or prescribed by the Act

of February 22, 1935, c. 18, § 5 (49 Stat. 31), U.S.C., Title 15, § 715d(c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(6) These rules 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), as amended, 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 for answer in proceedings to cancel certificates of citizenship under the ~~Act of October 14, 1940, c. 876, § 338 (54 Stat. 1158), U.S.C., Title 8, § 738,~~ *Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C., Title 8, § 1451*, remain in effect.

(c) REMOVED ACTIONS. These rules apply to civil actions removed to the United States district courts from the state courts and govern 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 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within

5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. *A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demands as directed constitutes a waiver by him of trial by jury.*

(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~~ *district director* of internal revenue, a former *district director or* collector of internal revenue, or the personal representative of a deceased *district director or* collector of internal revenue.

ADVISORY COMMITTEE'S NOTE

Subdivision (a)(4). This change reflects the transfer of functions from the Secretary of Commerce to the

Secretary of the Interior made by 1939 Reorganization Plan No. II, § 4(e), 53 Stat. 1433.

Subdivision (a)(6). The proper current reference is to the 1952 statute superseding the 1940 statute.

Subdivision (c). Most of the cases have held that a party who has made a proper express demand for jury trial in the State court is not required to renew the demand after removal of the action. *Zakoscielny* v. *Waterman Steamship Corp.*, 16 F.R.D. 314 (D. Md. 1954); *Talley* v. *American Bakeries Co.*, 15 F.R.D. 391 (E.D. Tenn. 1954); *Rehrer* v. *Service Trucking Co.*, 15 F.R.D. 113 (D. Del. 1953); 5 *Moore's Federal Practice* ¶38.39[3] (2d ed. 1951); 1 Barron & Holtzoff, *Federal Practice & Procedure* §132 (Wright ed. 1960). But there is some authority to the contrary. *Petsel* v. *Chicago, B. & Q. R. Co.*, 101 F. Supp. 1006 (S.D. Iowa 1951); *Nelson* v. *American Nat. Bank & Trust Co.*, 9 F.R.D. 680 (E.D. Tenn. 1950). The amendment adopts the preponderant view.

In order still further to avoid unintended waivers of jury trial, the amendment provides that where by State law applicable in the court from which the case is removed a party is entitled to jury trial without making an express demand, he need not make a demand after removal. However, the district court for calendar or other purposes may on its own motion direct the parties to state whether they demand a jury, and the court must make such a direction upon the request of any party. Under the amendment a district court may find it convenient to establish a routine practice of giving these directions to the parties in appropriate cases.

Subdivision (f). The amendment recognizes the change of nomenclature made by Treasury Dept. Order 150–26(2), 18 Fed. Reg. 3499 (1953).

As to a special problem arising under Rule 25 (Substitution of parties) in actions for refund of taxes, see the Advisory Committee's Note to the amendment of Rule 25(d), effective July 19, 1961; and 4 *Moore's Federal Practice* ¶25.09 at 531 (2d ed. 1950).

Amendments of Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21

ADVISORY COMMITTEE'S NOTE

At various places, these Forms allege or refer to damages of "ten thousand dollars, interest, and costs," or the like. The Forms were written at a time when the jurisdictional amount in ordinary "diversity" and "Federal question" cases was an amount in excess of $3,000, exclusive of interest and costs, so the illustrative amounts set out in the Forms were adequate for jurisdictional purposes. However, U.S.C., Title 28, §1331 (Federal question; amount in controversy; costs) and §1332 (Diversity of citizenship; amount in controversy; costs), as amended by PL 85–554, 72 Stat. 415, July 25, 1958, now require that the amount in controversy, exclusive of interest and costs, be *in excess of* $10,000. Accordingly the Forms are misleading. They are amended at appropriate places by deleting the stated dollar amount and substituting a blank, to be properly filled in by the pleader.

Form 3. Complaint on a Promissory Note

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ~~ten thousand~~ _____ dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ~~ten thousand~~ _____ dollars, interest, and costs.

Signed: _____
Attorney for Plaintiff.
Address: _____

[Explanatory Note unchanged.]

Form 4. Complaint on an Account

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ~~ten thousand~~ _____ dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

Form 5. Complaint for Goods Sold and Delivered

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ~~ten thousand~~ _____ dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

[Explanatory Note unchanged.]

Form 6. Complaint for Money Lent

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ~~ten thousand~~ _____ dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

Form 7. Complaint for Money Paid by Mistake

1. Allegation of jurisdiction.
2. Defendant owes plaintiff ~~ten thousand~~ _____ dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9(b)].

Wherefore (etc. as in Form 3).

Form 8. Complaint for Money Had and Received

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ~~ten thousand~~ _____dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

Form 9. Complaint for Negligence

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands judgment against defendant in the sum of ~~ten thousand~~ _____ dollars and costs.

Form 10. Complaint for Negligence Where Plaintiff is Unable to Determine Definitely Whether the Person Responsible is C. D. or E. F. or Whether Both Are Responsible and Where His Evidence May Justify a Finding of Wilfulness or of Recklessness or of Negligence

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ~~ten thousand~~ _____ dollars and costs.

Form 11. Complaint for Conversion

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the _____ Company (here insert brief identification as by number and issue) of the

value of ~~ten thousand~~ _____ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ~~ten thousand~~ _____ dollars, interest, and costs.

Form 12. Complaint for Specific Performance of Contract to Convey Land

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ~~ten thousand~~ _____ dollars.

Form 13. Complaint on Claim for Debt and to Set Aside Fraudulent Conveyance Under Rule 18(b)

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ~~ten thousand~~ _____ dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

Form 18. Complaint for Interpleader and Declaratory Relief

[Amend the second paragraph of the complaint to read as follows:]

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ~~ten thousand~~ _____ dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

Form 21. Answer to Complaint Set Forth in Form 8, With Counterclaim for Interpleader

[Amend the first paragraph of the Counterclaim for Interpleader to read as follows:]

1. Defendant received the sum of ~~ten thousand~~ _____ dollars as a deposit from E. F.

Form 16. Complaint for Infringement of Patent

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands a preliminary and final injunction against *continued* ~~further~~ infringement ~~by defendant and those controlled by defendant~~, an accounting for ~~profits and~~ damages, and an assessment of *interest and* costs against defendant.

ADVISORY COMMITTEE'S NOTE

The prayer for relief is amended to reflect the language of the present patent statute, Title 35, U.S.C., §284 (Damages).

Form 22-*A. Summons and Complaint Against Third-Party Defendant*

[The contents of Form 22 are eliminated down to and including the words "Exhibit A," thus eliminating the motion and notice of motion.]

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 Defendant

Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon ----------, plaintiff's attorney whose address is ----------, and upon ----------, who is attorney for C.D., defendant and third-party plaintiff, and whose address is ---------- ------, an answer to the third-party complaint which is herewith served upon you ~~and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you,~~ within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. *There is also served upon you here-*

with a copy of the complaint of the plaintiff which you may but are not required to answer.

_____,
Clerk of Court.

[Seal of District Court]

Dated _____

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 Defendant	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~~ *A*."

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. The statement should be framed as in an original complaint.)

Wherefore C.D. demands judgment against third-party defendant E.F. for all sums [1] that may be adjudged against defendant C.D. in favor of plaintiff A.B.

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

[1] *Make appropriate change where C.D. is entitled to only partial recovery-over against E.F.*

ADVISORY COMMITTEE'S NOTE

Under the amendment of Rule 14(a), a defendant who files a third-party complaint not later than 10 days after serving his original answer need not obtain leave of court to bring in the third-party defendant by service under Rule 4. Form 22–A is intended for use in these cases.

The changes in the form of summons reflect an earlier amendment of Rule 14(a), effective in 1948, making it permissive, rather then mandatory, for the third-party defendant to answer the plaintiff's complaint. See *Cooper* v. *D/S A/S Progress*, 188 F. Supp. 578 (E.D. Pa. 1960); 1A Barron & Holtzoff, *Federal Practice & Procedure* 696 (Wright ed. 1960).

Under the amendment of Rule 5(a) requiring, with certain exceptions, that papers be served upon all the parties to the action, the third-party defendant, even if he makes no answer to the plaintiff's complaint, is obliged to serve upon the plaintiff a copy of his answer to the third-party complaint. Similarly, the defendant is obliged to serve upon the plaintiff a copy of the summons and complaint against the third-party defendant.

Form 22–B. Motion to Bring in Third-Party Defendant

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E.F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: _____
Attorney for Defendant C.D.
Address: _____

Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

Exhibit X

(*Contents the same as in Form 22–A.*)

ADVISORY COMMITTEE'S NOTE

Form 22–B is intended for use when, under amended Rule 14(a), leave of court is required to bring in a third-party defendant.

Form 30. Suggestion of Death Upon the Record Under Rule 25(a)(1)

[NEW]

A.B. [describe as a party, or as executor, administrator, or other representative or successor of C.D., the deceased party] suggests upon the record, pursuant to Rule 25(a)(1), the death of C.D. [describe as party] during the pendency of this action.

Form 31. Judgment on Jury Verdict

[NEW]

United States District Court for the Southern District of New York

Civil Action, File Number_____

A.B., Plaintiff
v.
C.D., Defendant } Judgment

This action came on for trial before the Court and a jury, Honorable John Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

[that the plaintiff A.B. recover of the defendant C.D. the sum of _____,

with interest thereon at the rate of _____ per cent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B his costs of action.]

Dated at New York, New York, this_____ _____day of _____, 19___

_____

Clerk of Court

EXPLANATORY NOTE

1. This Form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdicts.

2. The clerk, unless the court otherwise orders, is required forthwith to prepare, sign, and enter the judgment upon a general jury verdict without awaiting any direction by the court. The form of the judgment upon a special verdict or a general verdict accompanied by answers to interrogatories shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. The Rules contemplate a simple judgment promptly entered. See Rule 54(a). Every judgment shall be set forth on a separate document. See Rule 58, as amended.

4. Attorneys are not to submit forms of judgment unless directed in exceptional cases to do so by the court. See Rule 58, as amended.

Form 32. Judgment on Decision by the Court

[NEW]

United States District Court for the Southern District of New York

Civil Action, File Number.....

A.B., Plaintiff
v.
C.D., Defendant
} Judgment

This action came on for [trial] [hearing] before the Court, *Honorable John Marshall, District* Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A.B. recover of the defendant C.D. the sum of ....., with interest thereon at the rate of ..... per cent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B. his costs of action.]

Dated at New York, New York, this ..... day of ....., 19....

.....
Clerk of Court

EXPLANATORY NOTE

1. This Form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court

awarding a party only money damages or costs, but is adaptable to other decisions by the court.

2. The clerk, unless the court otherwise orders, is required forthwith, without awaiting any direction by the court, to prepare, sign, and enter the judgment upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied. The form of the judgment upon a decision by the court granting other relief shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. See also paragraphs 3–4 of the Explanatory Note to Form 31.

Rule 86. Effective Date

(e) *EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on* ----------, *196-, and transmitted to the Congress on* ----------, *196-, shall take effect on* ----------, *196-. 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.*

○