REPORT OF
PROPOSED AMENDMENTS
TO THE

Rules of Civil Procedure for the United States District Courts

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Prepared by the
ADVISORY COMMITTEE ON RULES
FOR CIVIL PROCEDURE

OCTOBER 1955

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New matter is underlined; matter to be omitted is lined through

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ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

OFFICE OF THE SECRETARY
SUPREME COURT OF THE UNITED STATES BUILDING,
WASHINGTON, D. C.

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The Advisory Committee on Rules for Civil Procedure presents herewith certain amendments to the Federal Rules of Civil Procedure which it recommends to the Court for adoption pursuant to the rule-making authority conferred by 28 U. S. C. § 2072. Under the statute, the amendments, when adopted, must be reported by the Chief Justice to Congress by May 1, in order to become effective within ninety days thereafter.

The original Rules went into effect September 16, 1938. Since that time and prior to the present venture there has been but one major re-examination of them, that conducted by the Committee in 1942–46 and resulting in the amendments adopted by the Court in 1946, effective March 19, 1948. That, like this, was only corrective and clarifying in aim; it worked no basic change in the successfully operating system. In addition, there have been three other amendments of a limited character—one in 1939, effective April 3, 1941, making the rules applicable to proceedings under the Longshoremen's and Harbor Workers' Compensation Act; one in 1948, effective

October 20, 1949, making minor changes of nomenclature and form necessary by virtue of the revision of the Judicial Code embodied in the newly enacted Title 28, United States Code; and a final one, the adoption of a condemnation rule, Rule 71A, in 1951, effective August 1 of that year.

Work on the present amendments has been underway since early in 1953. The Committee has held three meetings in Washington, D. C., as follows: May 18–20, 1953; March 24–26, 1954; and March 9–11, 1955. A preliminary draft of proposed amendments was published under date of May 1954 and circulated among the bar with a request for comments and criticisms. This follows the practice successfully employed in the case of previous drafts. As the Committee said in submitting the draft: "The Committee has always believed that no committee can safely recommend the adoption of rules which have not run the gauntlet of examination and criticism by the judges, bar associations, and the legal profession generally. They attribute the success of the federal rules to the fact that they have represented the united effort of the lawyers of the nation and not merely the views of a relatively small group of lawyers." The invitation for criticism and suggestions was more widely followed than ever, more than five hundred different communications being received from various persons, committees, tribunals, and associations. This response has been most gratifying and, beyond the value of the individual comments, gives the Committee confidence that its work has been of major appeal to the profession. While

sharp differences of opinion developed as to a few issues, notably those involving certain details of the discovery process, yet the comments almost invariably showed or indicated confidence in the methods of the Committee and belief in the value of appropriate amendments; indeed, objections to the amending process were negligible in numbers.

In suggesting clarifying amendments the Committee feels that it has taken a proper middle course, tending on the whole toward conservatism between the advocates of continuous supervision and frequent correction on the one hand and the opponents of all change on the other. It has had in mind that the profession should not be troubled with frequent small changes in a procedure basically sound and that the now many imitating state systems should not be confused in attempting to follow the federal model. On the other hand, it has noted the invariable tendency (accentuated by the reporting of the striking or technical procedural decisions more extensively than of the merely permissive rulings) of procedure to harden and become inflexible so as to be increasingly unadaptable to developing needs in law administration and the cause of appeals elsewhere, as to the legislative bodies, for reform or change. The amendments here proposed seem therefore at once conservative and reasonably necessary. No amendments have been included save those supported not merely in comments received, but by a substantial majority of the members of the Committee; amendments not so supported, even though vigorously favored by many at the bar or by Committee members, have been either rejected or reserved for later study.

We regret that this Report has been delayed beyond the time originally contemplated. The delays have been due to a variety of circumstances, including an extension of time which the Committee thought it desirable to grant for the submission of the views of the bench and bar. While our Chairman, Honorable William D. Mitchell, died before the Report could be physically completed, he participated in all of the debates and discussions of the Committee with respect to the amendments now recommended and concurred in all of them. Professor Sunderland, who took an active part in the early discussions within the Committee, has been prevented by illness from participating in later discussions and for that reason does not join in this Report. All of the other members of the Committee now join in recommending to the Court the adoption of the amendments submitted herewith except Professor Moore, whose views are set out in a separate statement appended hereto which was received from him after the preparation of this Report. While Professor Moore recites that the Committee is recommending amendments of more than one-fourth of the rules, the Committee believes it more accurate to say that the recommendations cover less than one-tenth of the Rules because the amendments proposed apply only to 23 out of the 292 subdivisions that make up the Rules. All members of the Committee are, of course, sensitive to the importance of restraint in proposing amendments, and have given full weight to that principle in presenting the recommendations now submitted. These represent, therefore, a careful and considered selection from a larger number having substantial support from members of our own Committee and from the bar. As noted in the second

paragraph of this Report, there has been only one major re-examination of the Rules since they went into effect in January 1938, and the amendments then submitted were adopted by the Court in 1946, almost 10 years ago. The comments which have been received from members of the bench and bar indicate the general concurrence in the view that the amendments now proposed should be made.

The undersigned believe that the explanations given in the Notes appended to the proposed amendments are sufficient to indicate the reasons which lead the Committee to recommend the amendments. But if the Court thinks that it would be desirable or helpful to have a further explanation from the Committee on any point, an opportunity to submit such explanation will be welcomed.

Respectfully submitted,

George Wharton Pepper,
Vice Chairman,
Charles E. Clark,
Reporter,
Leland L. Tolman,
Secretary,
Armistead M. Dobie,
Robert G. Dodge,
Sam M. Driver,
Clifton Hildebrand,
Monte M. Lemann,
Edmund M. Morgan,
Maynard E. Pirsig,
John C. Pryor,
Advisory Committee.

October, 1955.

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SEPARATE STATEMENT

To The Honorable, The Justices of the Supreme Court of the United States:

Fully cognizant of the Court's duty under the rule-making Act to amend the Federal Rules when necessary, Chief Justice Stone admonished the Committee that unnecessary amendments should be avoided and that a clear case should be made for an amendment before it be regarded as necessary. This advice was sound when given some years ago, and remains so today. With deference to the Advisory Committee I believe that it has not followed this advice in making its present recommendations.

At the outset may I express wholehearted approval of the Committee's rejection of a proposal to amend pleading Rule 8 (a). My wish is that the Committee had shown an equal skepticism of and abstemiousness in accepting most of the other proposals for change.

Since in a memorandum prepared for the Judicial Conference of the Third Circuit, under date of June 24, 1955, I have set forth in some detail objections to various proposed amendments, a résumé of only the more important objections will here suffice. These are made with a sense of humility for in most cases they were decisively rejected by the Advisory Committee; and I would accordingly let the matter rest at that point were it not for the strong belief that the proposed amendments will do more harm than good to federal judicial administration.

My main points are these: (1) the proposed revision is too extensive; (2) certain amendments are not now desirable or are unsound in principle.

(1) More than one-fourth of the Rules—23 out of 87—are to be amended. Such an extensive revision is not needed. Several of the proffered amendments are said to be declaratory or clarifying in nature; but declaratory amendments often fall short of their mark, and clarifying amendments fail to clarify. For example, proposed Rule 50 (c) is a codification of *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, as it deals with conditional rulings on grant of a motion for judgment notwithstanding a verdict. This proposal serves little purpose and the elaborate statement in rule form may well raise troublesome problems in jury cases. Similarly, proposed Rule 23 (d) dealing with orders to ensure adequate representation in class actions when read in conjunction with the Committee Note will stir more problems concerning res judicata than it settles. Rules can seldom be an exhaustive catalog of procedural power and practice, as this Court recognized in *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U. S. 502 (Rule 24—Intervention). And seldom should they. The extensive revision is a product of too little reliance upon the creative and corrective natures of the judicial process.

(2) It is unwise to increase the number of diversity cases that can be brought originally in the district courts by providing for quasi in rem jurisdiction as the amendment to Rule 4 (e) proposes. Practicalities do not justify this enlargement.

And even assuming arguendo that the proposed amendments to the deposition and discovery rules, Rules 26–37, are theoretically sound, I think it now unwise to expand the present practice. Probably the

provisions of Rules 26–37 were the most revolutionary features of the Rules when promulgated, and some of their features still stir considerable controversy. In my opinion these Rules are basically sound and, on the whole, the courts have struck a fair and moderate balance in their application. I would leave that achievement alone for the present.

Proposed revision of Rules 50 (b), 52 (a), and 60 (b) is, in my opinion, unsound in principle because the proposed amendment to

Rule 50 (b) attempts by a fiction to equate a motion for a new trial in a jury case with a motion for judgment n. o. v., although these motions serve very different functions;

Rule 52 (a) rejects the rational and practical distinction between demeanor and non-demeanor testimony for purposes of appellate review of the trial court's findings of fact;

Rule 60 (b) unnecessarily undermines the finality of judgments by rejecting the rule stated in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, that leave of an appellate court is necessary before the trial court may proceed with a motion for relief from a judgment entered in accordance with the appellate court's mandate.

Respectfully,

JAMES WM. MOORE.

OCT. 14, 1955.

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. *Where under Rule 4 (e) service of a summons or of a notice is made under a state statute or state rule of court, the summons or notice shall conform as nearly as may be to the form required in such statute or rule and the time for the defendant to defend or respond shall be as therein provided.*

(d) SUMMONS: PERSONAL SERVICE.

(4) Upon the United States, by delivering ~~a copy~~ *two copies* 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 *either* sending ~~a copy~~ *two copies* of the summons and ~~of the~~ complaint by registered mail to the Attorney General of the United States at Washington, District of Columbia, *or delivering them to the Attorney General or to an official of the Department of Justice designated by the Attorney General in writing filed with the Clerk of the United States District*

Court for the District of Columbia; and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency.

(e) SAME: OTHER SERVICE. Whenever a statute of the United States *or any of these rules* or an order of court 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, service shall be made under the circumstances and in the manner prescribed by the statute, rule, or order. *Whenever a statute or rule of court of the state in which the district court is held provides for notice to such a party to appear and respond or to defend in an action by reason of the attachment or garnishment of his property located within the state, or for service of a summons, notice, or order in lieu of summons upon a party not an inhabitant of or found within the state, it shall also be sufficient if service is made or the party is brought before the court under the circumstances and in the manner prescribed in the state 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 a statute of the United States *or these rules* so provides, beyond the territorial limits of that state. *Process other than a subpoena may be served upon persons who are made parties pursuant to Rule 13 (h) or Rule 14, or who are indispensable parties to an existing action, or who are required to respond in proceedings for the enforcement of the court's orders and judgments, within the limits thus stated and at all places without the state that are within 100 miles of the place where the action has been commenced or assigned for trial.* A subpoena may be served within the territorial limits provided in Rule 45.

Note. Subdivision (b). State procedures for commencing an action by attachment or garnishment or by service on a designated state official as a means of acquiring jurisdiction over a nonresident frequently differ from these rules as to the form of the notice or summons and the time in which the defendant must answer. The amendment provides that the state provisions, rather than the federal provisions, govern where an action is commenced pursuant to Rule 4 (e). Federal procedures will become operative after the defendant has been brought before the court.

Subdivision (d) (4). The amendment calls for service of two copies upon the United States attorney and two copies upon the Attorney General. In litigation against the Government it frequently occurs that information and views will be requested from more than one department or agency, and the provision for additional copies will facilitate such requests.

Particularly in actions filed in the District of Columbia personal service on an official of the Department of Justice will be speedier and less expensive than sending copies of the summons and complaint to the Attorney General by registered mail. The amendment authorizes such personal service.

Subdivision (e). Rule 71A (d) (3) (ii), adopted in 1951, allows service by publication in actions for condemnation of property. The amendment to the first sentence of this subdivision reflects that fact, and corrects a slight inaccuracy which had hitherto existed through the reference in the last line of that sentence to service "in the manner prescribed by * * * rule * * * ." See 2 *Moore's Federal Practice* ¶ 4.32 (2d ed. 1948).

Most states permit actions against nonresident defendants where such defendants cannot be personally served but have property in the state belonging or owing to them. In such cases the property is brought within the custody of the court by attachment, garnishment, or other process and service is made upon the defendants by personal service outside the state or by

publication. The judgment in such actions extends only to the property within the state. *Pennoyer* v. *Neff*, 95 U. S. 714 (1877); 2 *Moore's Federal Practice* ¶ 4.19 (2d ed. 1948). It has long been settled, however, that except in a limited class of cases specifically provided for by statute personal service is necessary to invoke the original jurisdiction of the federal courts. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31 (1913). But where an action is commenced in a state court by attachment or garnishment, such an action may be removed to the federal court, though there has been no personal service. 28 U. S. C. § 1450; *Clark* v. *Wells*, 203 U. S. 164 (1906). The Supreme Court has made it clear that no constitutional obstacle bars commencement of actions in a federal court without personal service, but only the lack of legislation or a rule authorizing such procedure. *Rorick* v. *Devon Syndicate, Ltd.*, 307 U. S. 299 (1939). And indeed a statute, now 28 U. S. C. § 1655, has long permitted suit without personal service where the defendant cannot be served within the state and the action is one to enforce a pre-existing lien upon, or remove an encumbrance on the title to, property within the district. 2 *Moore's Federal Practice* ¶¶ 4.34–4.41 (2d ed. 1948); 3 *Cyc. Fed. Proc.* § 1195 (3d ed. 1951); Blume, *Actions Quasi in Rem Under Section 1655, Title 28, U. S. C.*, 50 Mich. L. Rev. 1 (1951); Anno., 30 A. L. R. 2d 201.

Some commentators have thought that Rule 64, authorizing attachment, garnishment, and other similar provisional remedies when available by local law, has supplied the previous lack and permits commencement of actions in a federal court without personal service. Manella, *Attachment in Federal Courts—When Personal Service Is Not Necessary*, 13 So. Calif. L. Rev. 361 (1940), 3 Fed. Rules Serv. 804; *cf.* Hart, *Attachment Without Personal Service of Summons*, 34 Corn. L. Q. 103 (1948), 11 Fed. Rules Serv. 978. Courts which have passed on the question have held to the contrary. 3 *Barron & Holtzoff, Fed. Prac. & Proc.* § 1423 (1950); 14 *Cyc. Fed. Proc.* § 71.04 (3d ed. 1952). While most of

these cases were decided before the power to make rules affecting service of process was definitively established, *Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438 (1946), they do show a trend toward a pattern of restricted effect to Rule 64. So Professor Moore says that these remedies cannot be utilized "to obtain quasi in rem jurisdiction over [the] defendant" in an *original* action, although the situation is otherwise in a removed action. *Moore's Federal Rules* 288 (1951); and see Hart, *supra*.

Thus the question is broader than the issue raised only by the attachment of movables and may arise as to immovables, such as an action to quiet title to realty. It may arise also as to service upon a nonresident motorist through the now popular device, adopted in all of the states, of service upon a state official, made defendant's agent by statutory force upon defendant's use of the highways, together with some form of notice to the defendant. The Supreme Court has resolved disagreement among the lower federal courts by holding that there is no waiver of federal venue requirements by the statutory appointment of a state official as the agent for a nonresident motorist, and thus that this device may not be used to bring suit in the district where the accident occurred if neither all the plaintiffs nor all the defendants are residents thereof. *Olberding* v. *Illinois Cent. R. Co.*, 346 U. S. 338 (1953). But the Court has expressed no opinion on the view urged in the concurring opinion to *McCoy* v. *Siler*, 205 F. 2d 498, 501–502 (3d Cir. 1953), cert. den. 346 U. S. 872 (1953), that service on the state official as a means of bringing the nonresident motorist into court is also barred because Rule 4 (f), prescribing the territorial limits of service, restricts Rule 4 (d) (7), authorizing service in the manner prescribed by state law, and thus makes ineffective the notice which due process requires be given to the nonresident under *Wuchter* v. *Pizzutti*, 276 U. S. 13, 57 A. L. R. 1230 (1928). Such a construction of the Rules would prevent use of this convenient means for suing at the place where the accident occurred even where all

the plaintiffs reside in that district, and the venue is, therefore, proper. This construction was not followed in *Giffin* v. *Ensign*, 15 F. R. D. 200 (M. D. Pa. 1953), where it was held that Rule 4 (f) is to be construed as in "assistance" of, rather than as a limitation upon, Rule 4 (d) (7), or in *Pasternack* v. *Dalo*, 17 F. R. D. 420 (W. D. Pa. 1955), or *Holbrook* v. *Cafiero*, 24 U. S. L. Week 2191 (D. Md. Oct. 25, 1955). See 2 *Moore's Federal Practice* ¶¶ 4.18, 4.19 (2d ed. 1948).

The Rules do not control or affect questions of venue. Rule 82. They can and properly should control service of process, and the means by which defendants may be "brought into court," where requirements of subject-matter jurisdiction and venue are met. *Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438 (1946). This amendment will remove doubt and allay confusion to permit suits in the diversity jurisdiction of the court equally in original as in removed actions and in conformity with state practice and available local remedies. While paralleling the attachment remedies made available by Rule 64, the provision is made independent of, and not subordinate to, any possible limitations thought to inhere in that rule.

Subdivision (f). The amendment permits service of process without the state within 100 miles of the place where the action has been commenced or assigned for trial in certain limited circumstances to bring in or reach additional parties to an existing action, in order that an entire controversy may be determined in one lawsuit. Thus in the situations which it covers the amended rule makes the territorial limits of service of all process analogous to those which hitherto have prevailed on service of a subpoena. Rule 45 (e) (1). Service outside the state is authorized by this rule where it is necessary to bring in an additional defendant to a counterclaim, Rule 13 (h), to add a third-party defendant, Rule 14, to join an indispensable party without whose joinder the existing action must be dismissed, Rule 19, or to enforce the court's decrees.

An example of the situation met by the amendment is *Graber* v. *Graber*, 93 F. Supp. 281 (D. D. C. 1950), where the court held that an order of commitment for civil contempt of court could not validly be served outside the district, and it was thus powerless to compel payment of back alimony so long as the defendant remained across the Potomac River in Virginia. The proposal of the court in that case for an amendment to Rule 4 (f) to allow service within the borders of any district immediately adjoining that in which the process is issued seems less desirable than a limitation corresponding to that applicable to subpoenas in terms not of districts of varying size, but of the distance from the place where court is held.

The amendment will facilitate use of third-party practice where the prohibition on service beyond state borders has been said to be "an effective limitation on the use of Rule 14 in many cases." Willis, *Five Years of Federal Third-Party Practice*, 29 Va. L. Rev. 981, 1009 (1943), 7 Fed. Rules Serv. 1018, 1038. Under the amended rule use of the third-party practice would have been possible in such cases as *Banachowski* v. *Atlantic Refining Co.*, 84 F. Supp. 444 (S. D. N. Y. 1949); *Thompson* v. *Temple Cotton Oil Co.*, 2 F. R. D. 373 (W. D. Ark. 1942); *O'Brien* v. *Richtarsic*, 2 F. R. D. 42 (W. D. N. Y. 1941); *F. & M. Skirt Co.* v. *Wimpfheimer & Bro.*, 27 F. Supp. 239 (D. Mass. 1939); *cf. Hook* v. *Hook & Ackerman*, 89 F. Supp. 238 (W. D. Pa. 1950); and see *Lesnik* v. *Public Industrials Corp.*, 144 F. 2d 968 (2d Cir. 1944). And it will allow suit, not now possible, in situations where one of two indispensable parties defendant lives across the state border from another if venue problems are not present or are waived. See *Bunn, Jurisdiction and Practice of the Courts of the United States* 118–119 (5th ed. 1949).

The Court's power in the premises is settled by *Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438 (1946).

The additional words in the first sentence of the subdivision make clear that Rule 4 (f) does not limit Rule 4 (e). See the note to Rule 4 (e).

Rule 5. Service and Filing of Pleadings and Other Papers.

(a) SERVICE: WHEN REQUIRED. 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 no 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.

(b) SAME: HOW MADE. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with

some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. *Where a suit is against the United States or an officer or agency of the United States, service of two copies upon the United States attorney for the district in which the action is brought or his designee under Rule 4 (d) (4) constitutes service upon the attorney.*

Note. Subdivision (a). The amended rule will require service of all papers upon all of the parties to the action, save where the court has ordered otherwise pursuant to Rule 5 (c). The amendment eliminates the limitation that the papers were to be served only on "parties affected thereby" which had been productive only of confusion. Thus in the situation most discussed it will now be clear that a third-party defendant must serve his pleadings upon the original plaintiff as well as upon the original defendant. Compare *Wright's Minnesota Rules* 30–31, 89–91 (1954).

Subdivision (b). The amendment conforms to the change made in Rule 4 (d) (4).

Rule 6. Time.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if 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.

Note. The reference to Rule 25 is deleted to conform with the elimination from that rule of any time limitation.

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 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.

Note. The amendment conforms to the change now proposed in Rule 14 (a) eliminating the necessity for leave to serve a third-party complaint.

Rule 8. General Rules of Pleading.

(a) CLAIMS FOR RELIEF.

Note. Rule 8 (a) (2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee.

The criticisms appear to be based on the view that the rule does not require the averment of any information as to what has actually happened. That Rule

8 (a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated not only by the forms appended to the rules showing what should be considered as sufficient compliance with the rule, but also by other intermeshing rules; see, inter alia, Rules 8 (c) and (e), 9 (b)–(g), 10 (b), 12 (b) (6), 12 (h), 15 (c), 20, and 54 (b). Rule 12 (e), providing for a motion for a more definite statement, also shows that the complaint must disclose information with sufficient definiteness. The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement. The decision in *Dioguardi* v. *Durning*, 139 F. 2d 774 (2d Cir. 1944), to which proponents of an amendment to Rule 8 (a) have especially referred, was not based on any holding that a pleader is not required to supply information disclosing a ground for relief. The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.

While there has been some minority criticism, the consensus favors the rule and the reported cases indicate that it has worked satisfactorily and has advanced the administration of justice in the district courts. The rule has been adopted verbatim by a number of states in framing their own rules of court procedure. This circumstance appears to the Committee to confirm its view that no change in the rule is required or justified.

It is accordingly the opinion of the Advisory Committee that, as it stands, the rule adequately sets forth the characteristics of good pleading; does away with the confusion resulting from the use of "facts" and "cause of action"; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.

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 to be served* a summons and complaint upon a person not a party to the action who is or may be liable ~~to him~~ *such third-party plaintiff* for all or part of the plaintiff's claim against him. ~~If the motion is granted and the summons and complaint are served,~~ ~~t~~*T*he person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against 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 for severance, separate trial, or dismissal of the third-*

party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54 (b). 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.

Note. The amendment of the initial sentences of this rule is designed to end the necessity of moving for leave to serve a third-party complaint; under the amended rule a defendant may serve such a complaint as a matter of right, subject to a motion to dismiss or for severance or separate trial. The previous requirement of leave to serve a third-party complaint was an additional procedural complication which accomplished little, for it required the court to pass on the propriety of the impleader sought before the third-party defendant had answered, and thus at a time when it was difficult to determine whether the main action would be unduly delayed or complicated by bringing in the third party. N. Y. Jud. Council, 12th Ann. Rep. 199–201 (1946); Wright, *Joinder of Claims and Parties under Modern Pleading Rules*, 36 Minn. L. Rev. 580, 612 (1952); Comment, 37 Corn. L. Q. 721, 731 (1952). Desirability of amendment to the rule is also suggested by holdings such as in *Texas Eastern Transmission Corp.* v. *Standard Acc. Ins. Co.*, 13 F. R. D. 324 (M. D. Tenn. 1952), that a third-party defendant may not move to vacate his impleader, as this would amount to a rehearing of the matters on which the court passed in granting leave to serve the third-party complaint. See R. C., 37 Minn. L. Rev. 634 (1953). Recent state procedures do not require such initial leave to serve a third-party complaint. N. Y. C. P. A. § 193–a (1); Pa. R. C. P. 2252 (a).

The amendment to Rule 14 (a) eliminating the requirement of a motion for leave to serve a third-party complaint does not deny the existing discretion of the

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court as to allowance of impleader. *General Taxicab Ass'n* v. *O'Shea*, 109 F. 2d 671 (D. C. Cir. 1940); Comm., *Discretion of Court on Motion to Implead*, 2 Fed. Rules Serv. 648. Instead, that discretion will be exercised after the third party has been brought into the case, and upon motion of a party. N. Y. C. P. A. § 193–a (4) specifically authorizes such an exercise of discretion and indicates the variety of orders which the court may make and the factors which may guide it in exercising its discretion. The sentence added before the final sentence of subdivision (a) expresses this power in shorter form; it shows also the interdependence of this rule with the final judgment provisions of Rule 54 (b).

Rule 5 (a), as it is now proposed to be amended, requires service of all papers on all parties to the action. Thus the third-party complaint must be served on the original plaintiff as well as on the third-party defendant, and all pleadings and motions of the third-party defendant must be served on the original plaintiff as well as on the third-party plaintiff.

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, *whether or not 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, it shall so order, specifying the time therefor.

Note. There has developed a gloss on Rule 15 (d) to the effect that a supplemental complaint is proper only where the original complaint states a claim on which relief can be granted; thus where parties were

before the court on a defective complaint it has been held necessary to dismiss their action and make them begin again, even though events occurring after commencement of the action have made clear the right to judicial relief. *Bonner* v. *Elizabeth Arden, Inc.*, 177 F. 2d 703, 705 (2d Cir. 1949); *Bowles* v. *Senderowitz*, 65 F. Supp. 548 (E. D. Pa. 1946); *Randolph* v. *Missouri-Kansas-Texas R. Co.*, 78 F. Supp. 727 (W. D. Mo. 1948); *Berssenbrugge* v. *Luce Mfg. Co.*, 30 F. Supp. 101 (W. D. Mo. 1939). This requires a distinction between a supplemental pleading and an amended pleading, since an amendment to cure a defective complaint is of course accepted practice. *Technical Tape Corp.* v. *Minnesota Mining & Mfg. Co.*, 200 F. 2d 876 (2d Cir. 1952); *Magee* v. *McNany*, 10 F. R. D. 5 (W. D. Pa. 1950). Such a distinction and the rule-gloss from which it stems have been criticized by commentators, 3 *Moore's Federal Practice* ¶ 15.16, pp. 858–860 (2d ed. 1948); Comm., *Stating New Claim in Supplemental Pleading*, 2 Fed. Rules Serv. 656, and seemingly not followed by other courts. *Porter* v. *Block*, 156 F. 2d 264 (4th Cir. 1946); *Genuth* v. *National Biscuit Co.*, 81 F. Supp. 213 (S. D. N. Y. 1948), appeal dism. 177 F. 2d 962 (2d Cir. 1949); see *Technical Tape Corp.* v. *Minnesota Mining & Mfg. Co.*, *supra*, 200 F. 2d 876, at 879 (2d Cir. 1952).

The amendment to this rule will end uncertainty by following the course urged by the commentators and courts just cited. A supplemental complaint will be tested on its own merits and, if it states a claim on which relief can be granted, will be heard even though the complaint which it purports to supplement is defective in its statement of such a claim. The claim stated in such a supplemental complaint may be met by all defenses to which it would have been subject if pleaded as an original complaint in a new action, and thus such substantive matters as that the claim stated in the supplemental pleading is barred by the statute of limitations are not affected by the amendment.

Rule 16. Pre-Trial Procedure; Formulating Issues; *Protracted Litigation.*

(*a*) *PRE-TRIAL CONFERENCE.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

(b) PROTRACTED LITIGATION. Where protracted litigation of an action is probable, it may be assigned, by the chief judge or as otherwise provided by local rule, to a designated judge for the trial of the action and for the direction and control of all matters preliminary to trial, including control of the taking of depositions and of discovery and the entry of orders for the protection of the parties on proceedings in discovery.

Note. Subdivision (a). The Committee in its Preliminary Draft of May 1954 proposed amendments to Rule 16 (4) and to Rule 33 which would have permitted inquiry, both at the pre-trial conference and by means of interrogatories, as to the witnesses which each side intends to call at the trial. The Committee was of the view that such a procedure is consonant with the purpose of avoiding surprise in the trial of a lawsuit, which underlies the discovery and pre-trial practices, and that it might reduce the expense of litigation by ending the need to prepare for cross-examination and rebuttal of a witness who will not be called. 4 *Moore's Federal Practice* ¶26.19 (2d ed. 1950). The Committee has received many comments on these proposed changes. The comments evidence a great difference of opinion at the Bar, largely perhaps reflecting the experience of the particular lawyer commenting as to whether he customarily represents plaintiffs or defendants. After considering all these comments, the Committee has concluded to withdraw the proposed amendment to Rule 33 permitting interrogatories calling for the names of witnesses to be used at the trial, leaving this matter to be dealt with under Rule 16. In considering the proposed amendment to Rule 16(4), the Committee is advised that many district judges, under the Rule as it now exists and in particular subdivision (6), are exercising the power to require the disclosure of the names of trial witnesses. The Committee is of the opinion that in many cases this practice is properly and wisely followed, but that this is a matter requiring decision according to the circumstances of each case.

Since the power exists and is being exercised, the Committee has concluded that no amendment is required.

Subdivision (b). The addition of the new subdivision (b) is intended to give or confirm in a particular judge broad and flexible powers over the proceedings before trial in the so-called "big case," as well as to ensure that the judge who hears the pre-trial motions will also try the case. This provision will implement the recommendation for such procedure contained in the Report of the Committee of the Judicial Conference of the United States, Judge Prettyman, Chairman, entitled *Procedure in Anti-Trust and Other Protracted Cases* (1951), reprinted in 13 F. R. D. 62. As the Report points out, the court now has the various detailed powers whose robust exercise is there urged. These powers may be exercised by a single judge of a three-judge district court in cases which are to be tried by such a court. 28 U. S. C. § 2284 (5).

The assignment of a case as contemplated in this rule is always discretionary. The assignment may be made by the chief judge or in accordance with procedures set up by local rule. 28 U. S. C. § 137. And see Local Rule 2 of the Southern and Eastern Districts of New York.

Rule 23. Class Actions.

(d) ORDERS TO ENSURE ADEQUATE REPRESENTATION. The court at any stage of an action under subdivision (a) of this rule may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate

fairly to protect the interests of absent persons who may be bound by the judgment, the court may, at any time prior to judgment, order an amendment of the pleadings, eliminating therefrom all reference to representation of the absent persons, and the court shall order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

Note. Although the addition of this subdivision to Rule 23 does not change the rule as much as some commentators have urged or suggested, *Chafee, Some Problems of Equity* 243–295 (1950); Keeffe, Levy & Donovan, *Lee Defeats Ben Hur*, 33 Corn. L. Q. 327 (1948); Kalven & Rosenfield, *Contemporary Function of the Class Suit*, 8 U. of Chi. L. Rev. 684 (1941); Comment, 46 Col. L. Rev. 818 (1946), it is intended to make the class-suit device more flexible and to allow in all kinds of class suits full and fair protection of the absentees. The amended rule does not undertake to regulate the effect of res judicata upon the judgment in a class action. As to that problem, see *Hansberry* v. *Lee*, 311 U. S. 32, 132 A. L. R. 741 (1940); Note, *Binding Effect of Class Actions*, 67 Harv. L. Rev. 1059–1068 (1954), and Note, 6 Stan. L. Rev. 120, 139–141 (1953). The language of the new subdivision is modeled on subdivisions 2 and 3 of the revision of N. Y. C. P. A. § 195 proposed by the New York Judicial Council in its 18th Ann. Rep. 80, 217–249 (1952). Compare Iowa R. C. P. 46.

The first two sentences of the amendment give the court broad power to impose any terms necessary to ensure adequate protection to absentees, including, but not limited to, the giving of notice. Thus explicit provision is made for the kind of procedure approved in *Dickinson* v. *Burnham*, 197 F. 2d 973 (2d Cir. 1952), cert. den. 344 U. S. 875 (1952), where absent members of the class were notified to come in and share a fund found owing to the class.

The concluding sentence of the subdivision allows the court to eliminate all class-representation aspects

from an action, and thereby limit the suit to the parties actually present in court. Thus even where all the requirements of Rule 23(a) for prosecution of a class action have been met, the court may so limit the action if the interests of the absent parties are not fairly protected. Such a limitation must be based on inadequate representation, however, rather than on general considerations of convenient judicial administration as contemplated in the proposal of the New York Judicial Council.

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 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. *If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.*

(d) PUBLIC OFFICERS; DEATH OR SEPARATION FROM OFFICE. When an officer of the United States, or of the District of Columbia, the Canal Zone, a territory, an insular possession, a state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if ~~within 6 months after the successor takes office~~ it is satisfactorily

shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. *If substitution is not made within a reasonable time, the action may be dismissed as to such public officer. When an officer of the class described herein sues or is sued as such officer, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.*

Note. Subdivision (*a*) (1). The provision of this rule that substitution must be made within 2 years after the death of a party was said by the Supreme Court to operate "both as a statute of limitations upon revivor and as a mandate to the court to dismiss an action not revived within the two-year period." *Anderson* v. *Yungkau*, 329 U. S. 482, 485 (1947). It may be questioned whether a statute of limitation may be prescribed by rule of court. At the time of the *Anderson* decision this question did not arise, because the 2-year provision of the rule was substantially identical with what was then 28 U. S. C. § 778, and the right involved in the action was a federal one. But the statute was repealed by the Revision Act of 1948, for the stated reason that it was "superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 80th Cong., 1st Sess. A239 (1947). Thus the rule now stands as a statute of limitations

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without support in the statutes. Even if the existing rule is valid, the rigid limitation it prescribes is not satisfactory. Thus in *Anderson* v. *Yungkau*, *supra*, 329 U. S. 482 (1947), the Court noted that it was through no lack of diligence that the plaintiff, who was seeking to enforce assessments against more than 5,000 stockholders, failed to learn of the deaths of a few of these stockholders until more than 2 years after the event. Nevertheless his failure to move for substitution within 2 years after these deaths was held to bar further action against the estates of the dead stockholders. A late case holds, however, that failure to make timely substitution may be waived. *Bush* v. *Remington Rand, Inc.*, 213 F. 2d 456 (2d Cir. 1954), cert. den. 348 U. S. 861 (1954).

The amendment to Rule 25 (a) (1) removes the time limit formerly contained in the rule; and therefore only the mechanics of substitution, rather than the time in which it must be made, are prescribed. Provision has been made for dismissal of the action if substitution is not made within a reasonable time; thus to the extent that the period for substitution is not otherwise limited by applicable state or federal law, the trial court is left free to consider the circumstances of the particular case in determining whether substitution has been delayed so long that the action should be dismissed as to the deceased party.

Subdivision (d). This subdivision is amended by eliminating the arbitrary limitation on substitution of a public officer as a party to the period of 6 months after he takes office and by providing that in certain cases action may be brought by or against the office rather than the officer.

The first change is proposed for reasons similar to those which support amendment of Rule 25 (a). Rule 25 (d) was a substantial restatement of what was formerly 28 U. S. C. § 780. The statute was repealed and not included in the 1948 Judicial Code, for the stated reason that it was superseded by Rules 25 and 81 of the Federal Rules of Civil Procedure. H. Rep. No. 308, 80th Cong., 1st Sess. A239 (1947). Unlike

Rule 25 (a), this rule did not operate as a statute of limitations, as dismissal for failure to substitute the successor public officer within 6 months was without prejudice to the bringing of a new action. *Oklahoma ex rel. McVey* v. *Magnolia Petroleum Co.*, 114 F. 2d 111 (10th Cir. 1940); 4 *Moore's Federal Practice* ¶ 25.09, p. 530 (2d ed. 1950). Nevertheless, a brief and fixed period for substitution, which cannot be extended under Rule 6 (b) or by agreement of the parties or even by estoppel, is, as one court has said, "a harsh rule." *Rossello* v. *Marshall*, 12 F. R. D. 352 (S. D. N. Y. 1952). The amendment therefore removes the fixed limitation and substitutes a more flexible provision that the action may be dismissed if substitution is not made within a reasonable time.

Where an action is by or against a public officer in name, but the government in reality, the substitution of one nominal party for another nominal party is a time-consuming formality. Various means have been found for avoiding this formality in some classes of cases. A statute provides that substitution of a new Commissioner of Internal Revenue is unnecessary in proceedings before any appellate court reviewing the action of the Tax Court. 26 U. S. C. § 1143. Some courts have permitted an *ex parte* blanket substitution of a succeeding Price Administrator in all actions brought by the preceding Price Administrator and then pending in the particular court. 2 *Barron & Holtzoff, Fed. Prac. & Proc.* § 625, p. 248 (1950). In other cases the United States has been discovered to be the real party in interest, and substitution held unnecessary. *United States* v. *Allied Oil Corp.*, 341 U. S. 1 (1951); 4 *Moore's Federal Practice* ¶ 25.09, p. 537 (2d ed. 1950); 5 Miami L. Q. 611, 614 (1951). *Contra: Snyder* v. *Buck*, 340 U. S. 15 (1950); *Bowles* v. *Wilke*, 175 F. 2d 35 (7th Cir. 1949), cert. den. 338 U. S. 861 (1949). Where the action is by or against a board or agency with a continuity of existence and which is subject to suit, it has long been held that there is no necessity for naming the individuals who comprise the board, and

that a change in personnel does not require the formality of a substitution. 4 *Moore's Federal Practice* ¶ 25.09, p. 536 (2d ed. 1950); Anno., 102 A. L. R. 943, 956–958. Finally, there has recently grown up a practice, perhaps by analogy to the cases last cited, of naming the office rather than the individual officer. Such practice is common in the states, Comment, 50 Mich. L. Rev. 443, 450 (1952), and examination of any recent volume of the Federal Reporter shows that it is being used increasingly in the federal courts, though without explicit sanction in statutes or rules; *e. g., U. S. ex rel. Figueiredo* v. *District Director of Immigration and Naturalization*, 202 F. 2d 958 (2d Cir. 1953); *U. S. ex rel. Carey* v. *Keeper of Montgomery County Prison*, 202 F. 2d 267 (3d Cir. 1953); *Fallbrook Public Utility Dist.* v. *U. S. District Court, Southern District California, Southern Division*, 202 F. 2d 942 (9th Cir. 1953).

The convenient practice last described will be clearly permissible under the last two sentences added to Rule 25 (d). Hence wherever, by the substantive law, an officer sues or is sued in his official capacity, it will now be sufficient to describe him as a party by his official title rather than by name, as has previously been the case with boards and agencies. Since the office continues to exist regardless of changes in the incumbent, no substitution will be necessary upon a change of personnel. Thus the amended rule makes provision for both kinds of cases which it encompasses. Where the officer is a party in his official capacity, as in actions of mandamus, proceedings to obtain judicial review of his orders, and the like, and in all actions brought by him for the government, he may be described by his official title. But where the action is for personal wrongdoing beyond his official power, as for misconduct, nuisance, trespass, or enforcement of an unconstitutional statute, it is still necessary to name the officer and to show a substantial need for substitution of his successor. The remedy for failure to name the officer, however, will be insertion of his name, not abatement of the action. And if, for any reason, naming of the

individual is desirable where he is a party in his official capacity, either party may so move or the court may so require on its own initiative. Should such a motion be granted, and the name of the officer added, substitution will be necessary as heretofore.

The amendment to the rule makes no change in those cases where the officer is involved in an action in so individual a capacity that upon his death or retirement the cause of action abates and no substitution is possible. See, *e. g.*, *McGrath* v. *National Ass'n of Manufacturers*, 344 U. S. 804 (1952), where a judgment enjoining enforcement of an unconstitutional statute was vacated and the case ordered to be dismissed as moot, on the authority of *Snyder* v. *Buck*, *supra*, 340 U. S. 15 (1950), though the 6-month period for substitution had not expired and plaintiff had in fact moved to substitute the new Attorney General as defendant. See also Longsdorf, *Abatement of Actions and Substitution of Parties; Federal Suits upon Death or Extinction of Office of a Party*, 1953 Federal Rules of Civil Procedure and Title 28, U. S. Code Judiciary and Judicial Procedure 37, 50 (West Pub. Co.). The problem posed by such a case as this, as well as the regulation of substitution on appeal, in admiralty or in other situations to which these rules are not applicable, is beyond the scope of the presently applicable rule-making power. See 4 *Moore's Federal Practice* ¶ 25.01[7](2) (2d ed. 1950); 2 *Barron & Holtzoff, Fed. Prac. & Proc.* § 621 (1950).

The amended rule will not apply to a suit for a tax refund against a collector or director of internal revenue, where the personal representative must be substituted, pursuant to Rule 25 (a), rather than the successor in office. 4 *Moore's Federal Practice* ¶ 25.09, pp. 531–534 (2d ed. 1950); *Ignelzi* v. *Granger*, 16 F. R. D. 517 (W. D. Pa. 1955). Under a 1954 statute, such suits will usually be against the United States rather than the director. 28 U. S. C. § 1346 (a) (1), as amended 68 Stat. 589 (1954).

Rule 30. Depositions Upon Oral Examination.

(a) NOTICE OF EXAMINATION: TIME AND PLACE. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. On motion of any party upon whom the notice is served, the court may for cause shown enlarge or shorten the time. *The court may regulate at its discretion the time and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice.*

(b) ORDERS FOR THE PROTECTION OF PARTIES AND DEPONENTS. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated *time or* place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any

other order which justice requires to protect the party or witness from annoyance, *undue expense* embarrassment, or oppression.

(c) RECORD OF EXAMINATION; OATH; OBJECTIONS. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by some one acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed unless the parties agree otherwise; *where transcription is requested by a party other than the one taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request.* All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties served with notice of taking a deposition may transmit written interrogatories to the officer, who shall propound them to the witness and record the answers verbatim.

Note. Subdivision (a). Although not required by the Rules, it has been customary to give priority in the taking of depositions to the party who first serves his notice for depositions. 7 *Cyc. Fed. Proc.* § 25.247 (3d ed. 1951). Although some courts have properly varied the order of examination in particular cases, *Hillside Amusement Co.* v. *Warner Bros. Pictures, Inc.*, 2 F. R. D. 275 (S. D. N. Y. 1942); *Kenealy* v. *Texas Co.*, 29 F. Supp. 502 (S. D. N. Y. 1939); Bard, 12 F. R. D. 131, at 157–158, in other cases the usual rule of priority has been applied in the face of circumstances which made a different course seem possibly more just. *Ginsberg* v. *Railway Express Agency*, 6 F. R. D. 371 (S. D. N. Y.

1945); *Modigliani Glass Fibers, Inc.* v. *Glasfloss Mfg. Co.*, 7 F. R. D. 647 (E. D. N. Y. 1948). The existence of a rule of priority has given rise to a race of diligence in serving notice of the taking of depositions, *e. g.*, *Stover* v. *Universal Moulded Products Corp.*, 11 F. R. D. 90 (E. D. Pa. 1950), which is said to be "the most easily discernible abuse" of discovery even in a rural district such as Minnesota. Note, 36 Minn. L. Rev. 364, 376 (1952); and see Comment, *Tactical Use and Abuse of Depositions*, 59 Yale L. J. 117, 134–136 (1949); Marsh, *Pre-Trial Discovery in An Anti-Trust Case*, 8 The Record 401, 407, 408 (1953).

This amendment does not prevent a court from giving priority in usual cases to the party first serving notice; it is intended to emphasize that the power to regulate the order of taking depositions is with the court, and that where a dispute as to priority arises it is to be resolved in terms of the circumstances of the particular case and the interests of justice, rather than by application of a mechanical rule. Compare Yudkin, *Some Refinements in Federal Discovery Procedure*, 11 Fed. B. J. 289, 296–297 (1951), with *Hare* v. *Southern Pac. Co.*, 9 F. R. D. 307 (N. D. N. Y. 1949). The court is not limited to giving priority to one or the other party, but, in proper cases, may order that parties proceed simultaneously or that they alternate in the taking of depositions.

Subdivision (*b*). The addition of the words "time or" obviates any implication arising from their omission that the protective orders authorized by Rule 30 (b) do not extend to matters of time as well as place. The insertion of the words "undue expense" gives the court clear authority to protect the party or witness where the taking of the deposition at the time or place proposed would necessitate the outlay of undue costs or expenditures in order to comply. Comment, 59 Yale L. J. 117, 126–131 (1949); 7 *Cyc. Fed. Proc.* § 25.386

(3d ed. 1951). The phrase "undue expense," rather than merely "expense" as in the amendment proposed by the Committee in 1946, but not adopted, follows the usage in La. Rev. Stat. 13:3762 (1950); it emphasizes the conclusion of all studies to date of the discovery process in operation that the cost of discovery is normally not exorbitant, and that its value is more than commensurate with its expense. Speck, *The Use of Discovery in United States District Courts*, 60 Yale L. J. 1132, 1150 (1951); Wright, Wegner & Richardson, *The Practicing Attorney's View of the Utility of Discovery*, 12 F. R. D. 97, 103–104; Note, 36 Minn. L. Rev. 364, 373 (1952).

Subdivision (*c*). The amendment gives the court authority to determine how the expense of transcription of a deposition shall be borne in cases where the transcription is requested by a party other than the one who took the deposition; it will explicitly permit such a course as that followed in *Odum* v. *Willard Stores*, 1 F. R. D. 680 (D. D. C. 1941), where the adverse party was required to bear the entire expense of transcription if he wished a copy of the deposition when the party who took the deposition did not care to have it transcribed. Other authorities had held that the court lacked the power to make such an order, however desirable it might seem. *Burke* v. *Central-Illinois Securities Corp.*, 9 F. R. D. 426 (D. Del. 1949); *Saper* v. *Long*, 17 F. R. D. 491 (S. D. N. Y. 1955); 4 *Moore's Federal Practice* ¶ 30.17 (2d ed. 1950); see Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure*, 4 Fed. Rules Serv. 1010, 1012–1013. The amended rule affects only the bearing of the expense of the deposition at the time it is taken. The court continues to have the power to determine whether to allow this expense as a taxable cost upon the conclusion of the litigation. See 7 *Cyc. Fed. Proc.* §§ 25.251–25.365 (3d ed. 1951).

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

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

(*b*) *Discovery Without Court Order.* *Copies of such designated documents or other things listed in (1) of subdivision (a) of this rule as are subject to discovery without a showing of necessity or justification may be obtained without a court order by requiring such copies to be at-*

tached to the answers to interrogatories under Rule 33 or produced in response to a subpoena under Rule 45 (d). In lieu of furnishing copies of such documents or other things, the party against whom discovery is sought may afford an opportunity for their examination and copying. Copies of statements concerning the action or its subject-matter previously given by the party seeking such statement shall be obtainable without court order in accord with the procedures of this subdivision.

Note. Subdivisions (a) and (b). The new subdivision (b) specifically authorizes submission of interrogatories asking that copies of described classes of documents be attached to the answers, unless the interrogating party is given an opportunity to examine and make copies of such documents. Thus the amendment resolves what has been called an "irreconcilable conflict among the decisions." *Alfred Pearson & Co.* v. *Hayes*, 9 F. R. D. 210 (S. D. N. Y. 1949). Many cases had held that production of documents could be had only by a court order for good cause shown, and that it was not proper to seek production or inspection of documents in connection with interrogatories; *e. g., Alltmont* v. *United States*, 177 F. 2d 971 (3d Cir. 1949), cert. den. 339 U. S. 967 (1950). In another group of cases, however, it has been urged that to require a party to serve an interrogatory asking whether documents exist, and then to make a motion for inspection of the document, is a needless technicality, serving only to delay the ultimate result. *Hayman* v. *Pullman Co.*, 8 F. R. D. 238, 240 (N. D. Ohio 1948). See also, *e. g., DeBruce* v. *Pennsylvania R. Co.*, 6 F. R. D. 403 (E. D. Pa. 1947). Yet a third line of cases had held that copies of documents can be obtained in connection with interrogatories, provided a showing of "good cause," equal to that required heretofore under Rule 34, can be made; *e. g., Maddox* v. *Wright*, 11 F. R. D. 170 (D. D. C. 1951); *Alfred Pearson & Co.* v. *Hayes, supra*, 9 F. R. D. 210 (S. D. N. Y. 1949).

The amendment will resolve this conflict and integrate in one rule the various devices for discovery of documents or other tangible things. Copies of documents will be obtainable, under Rule 34 (b), in connection with interrogatories under Rule 33 or a subpoena duces tecum under Rule 45 (d), except that documents which are within the protection of *Hickman* v. *Taylor*, 329 U. S. 495 (1947), and therefore not subject to discovery without a showing of necessity or justification, cannot be so obtained. Documents of the class last described, as well as original documents and such unusual kinds of discovery as entry onto land, can be had only by court order for good cause shown under Rule 34 (a).

The party served with an interrogatory calling for documents as authorized by Rule 34 (b) may attach copies of the documents in question to his answer to the interrogatories, or, as an alternative, he may name a time and place at which the interrogating party may examine the document and make copies thereof. If copies are prepared, the interrogating party may be required to bear the cost of their preparation. *Barrows* v. *Koninklijke Luchtvaart Maatschappij*, 11 F. R. D. 400 (S. D. N. Y. 1951).

Rule 34 (b) resolves another mooted question by granting a party a right to obtain a copy of any statement which he has given his adversary without first getting a court order or being required to show good cause or necessity or justification. See collection of cases in 4 *Moore's Federal Practice* ¶ 26.23 [8], pp. 1147–1149, ¶ 34.08, p. 2454 (2d ed. 1950); 2 *Barron & Holtzoff, Fed. Prac. & Proc.* § 770 (1950); 7 *Cyc. Fed. Proc.* § 25.552 (3d ed. 1951). Such amendment is consonant with the public policy evidenced by such statutes as, *e. g.*, Fla. Stat. Ann. § 92.33 (1943); La. Rev. Stat. 13:3732 (1950); Mass. Ann. Laws c. 271, § 44; Minn. Stat. § 602.01 (1953); *cf. Elank* v. *Great Northern Ry. Co.*, 4 F. R. D. 213 (D. Minn. 1945). See also the remarks of Judge Bard, 12 F. R. D. 131, at 155–157.

Because Rule 34, as it is proposed to amend it, integrates all the devices for discovery of documents, the amendments to Rule 33, suggested by the Advisory Committee in an earlier draft, have been withdrawn.

Rule 35. Physical and Mental Examination of Persons.

(a) ORDER FOR EXAMINATION. In an action in which the mental or physical condition *or the blood relationship* of a party, *or of an agent or a person in the custody or under the legal control of a party*, is in controversy, the court in which the action is pending may order ~~him~~ *the party* to submit to a physical or mental *or blood* examination by a physician *or to produce for such examination his agent or the person in his custody or legal control.* The order may be made only on motion for good cause shown and upon notice to the ~~party~~ *person* to be examined and to all ~~other~~ parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

(b) REPORT OF FINDINGS.

(1) If requested by the *party against whom an order is made under Rule 35 (a) or the* person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the examining physician setting out his findings and conclusions, *together with like reports of all earlier examinations of the same condition.* After such request and delivery the party causing the examination to be made shall be entitled upon request to receive from the party *or person* examined a like report of any

examination, previously or thereafter made, of the same ~~mental or physical~~ condition. If the party *or person* examined refuses to deliver such report the court on motion and notice may make an order requiring delivery on such terms as are just, and if a physician fails or refuses to make such a report the court may exclude his testimony if offered at the trial.

Note. Subdivision (*a*). The amendment adopts the language of Minn. R. C. P. 35.01 with some amplification. It makes clear the right to require a blood test in an action in which blood relationship is in controversy, as was held proper in *Beach* v. *Beach*, 114 F. 2d 479, 131 A. L. R. 804 (D. C. Cir. 1940); *cf. Fong Sik Leung* v. *Dulles*, 21 Fed. Rules Serv. 35a.1, Case 1 (9th Cir. 1955). The authorization for examination of a person in the custody or under the legal control of a party will allow, for example, a physical examination of a minor where his parent or guardian sues to recover for injuries to the minor, or a blood examination of an infant in a paternity action. And the authorization for examination of an agent will cure such a case as *Kell* v. *Denver Tramway Corp.*, Civ. No. A–81314, Div. 4, Denver County, 1953, decided under the Colorado equivalent of F. R. 35 (a), where plaintiff was denied an examination of the vision of defendant's bus driver, though the driver was claimed to be color blind. Where examination is sought of an agent or of a person in the custody or under the legal control of a party, notice of the motion to compel such examination must be served on the person sought to be examined as well as on all parties to the action. The amendment also makes clear, by necessary implication, that examinations under this rule may be had in other than personal injury actions, contrary to what was said in *Wadlow* v. *Humberd*, 27 F. Supp. 210 (W. D. Mo. 1939). See Louisell, *Discovery and Pre-Trial under the Minnesota Rules*, 36 Minn. L. Rev. 633, 642–644 (1952).

Subdivision (b) (1). The amendment reflects the fact that under the amendment to subdivision (a) the person examined will no longer always be a party. The phrase added at the end of the first sentence adopts the principle of Utah R. C. P. 35 (c) and La. Rev. Stat. 13:3783 (C) (1950). Hubert, *The New Louisiana Statute on Depositions and Discovery*, 13 La. L. Rev. 173, 201–202 (1953). Hitherto the rule had provided, on its face at least, that the party examined could require a copy of the report only on the particular examination ordered by the court, though at the same time he was required to give the examining party a copy of all reports of other examinations of the same mental or physical condition, previously or thereafter made. The amendment is consistent with, and supplements, the line of cases which has held that a party may proceed under Rule 35 (b) to obtain a report of an examination of him by his adversary's physician, even though he had submitted voluntarily to the examination, rather than requiring an order under Rule 35 (a). *Keil* v. *Himes*, 13 F. R. D. 451 (E. D. Pa. 1952); *Dumas* v. *Pennsylvania R. Co.*, 11 F. R. D. 496 (N. D. Ohio 1951); and cases cited in 4 *Moore's Federal Practice* ¶ 35.06, n. 1 (2d ed. 1950).

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

(a) REQUEST FOR ADMISSION. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained.

Copies of the documents shall be served with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder. *If a request is refused because of lack of information or knowledge upon the part of the party to whom the request is directed, he shall also show in his sworn statement that the means of securing the information or knowledge are not reasonably within his power.*

Note. Some decisions have held that a party should not be required to admit or deny facts which are not within his knowledge, although the means of acquiring knowledge are readily at hand. *United States* v. *Lewis*, 10 F. R. D. 56 (D. N. J. 1950); *Wilson* v. *Gas Service Co.*, 9 F. R. D. 101 (W. D. Mo. 1949); *Hopsdal* v. *Loewenstein*, 7 F. R. D. 263 (N. D. Ill. 1945); *Booth Fisheries Corp.* v. *General Foods Corp.*, 27 F. Supp. 268 (D. Del. 1939). The better view, consistent with the purpose of Rule 36, has been that a party must answer a request for admission, even though he has no personal knowledge, if the means of information are reasonably within his power. *United States* v. *Scofield*, 17 Fed. Rules Serv. 36a.21, Case 1 (D. Conn. 1952); *Van Horne* v. *Hines*, 31 F. Supp. 346 (D. D. C. 1940); *Thomas French & Sons* v. *Carleton Venetian Blind Co.*, 1 F. R. D. 178 (E. D. N. Y. 1940); *Hanauer et al., for Use of Wogahn* v. *Siegel*, 29 F. Supp. 329 (N. D. Ill. 1939); *Walsh* v. *Connecticut Mut. Life Ins. Co. of Hartford, Conn.*, 26 F. Supp. 566 (E. D. N. Y. 1939); *cf. United States* v. *Schine Chain Theatres*, 4 F. R. D. 109 (W. D. N. Y. 1944); 4 *Moore's Federal Practice* ¶ 36.04 (2d ed. 1950); 7 *Cyc. Fed. Proc.* § 25.726 (3d ed. 1951). The amendment follows the cases last cited.

Rule 37. Refusal to Make Discovery: Consequences.

(b) FAILURE TO COMPLY WITH ORDER.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 ~~to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property~~, or an order made under Rule 35 ~~requiring~~

~~him to submit to a physical or mental examination~~, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental *or blood* condition ~~of the party~~ *sought to be examined,* or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of *the* physical or mental *or blood* condition *sought to be examined;*

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental *or blood* examination;

(v) Where a party has failed to comply

with an order under Rule 35 (a) requiring him to produce another for examination, such orders as are listed in subdivisions (i), (ii), and (iii) of this subdivision of this rule, unless the party failing to comply shows that he is unable to produce such person for examination.

Note. The amendments conform to the broadened scope now given to Rule 35 (a). They make clear that the sanctions heretofore applicable for failure to submit to a mental or physical examination apply also to a failure to submit to a blood test, and that the penalties which apply to a party who fails so to submit apply also to him for failure to produce his agent or a person under his custody or legal control unless he shows that he is in good faith unable to produce such person.

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 has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the

plaintiff, the court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue *or for lack of an indispensable party*, operates as an adjudication upon the merits.

Note. The addition of the phrase relating to indispensable parties is needed to conform to law and other existing rules. See the amendment to Rule 12 (h), effective in 1948, and the Note thereto.

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

(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.~~ *the moving party may move* ~~Within~~ *not later than* 10 days after the ~~reception of a verdict, a party who has moved for a directed verdict may move~~ *entry of judgment* 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.; *and a motion to set aside or otherwise nullify a verdict or for a new trial shall be deemed to include a motion for judgment notwithstanding the verdict as an 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 rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for new trial is thus conditionally granted, the court shall specify the grounds therefor, and such an order does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court shall have otherwise ordered. In case the motion for new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may, not later than 10 days after

entry of judgment, serve a motion for a new trial, which shall be granted or denied, conditionally or otherwise, and if conditionally, with the consequences stated in paragraph (1) of this subdivision.

(3) Any party who fails to make a motion for new trial as provided in this rule shall be deemed to have waived the right to move for a new trial.

Note. Subdivisions (b) and (c). These amendments are designed to remove some confusion and make clear the operation of this rule which has been a popular reform; in addition to the dozen jurisdictions which have adopted the Federal Rules in full, it has been specially adopted in states such as New York, N. Y. C. P. A. § 457-a, as amended in 1940; Connecticut, Conn. Prac. Bk. § 234 (1951), see 25 Conn. B. J. 117, 119 (1951), and *Robinson* v. *Southern New England Tel. Co.*, 140 Conn. 414, 101 A. 2d 491 (1953); California, in substance, Cal. Code Civ. Proc. § 630, as added in 1947 (Deering, 1949), see 23 Calif. St. B. J. 197, 214–216 (1948); and Nebraska, with special provisions authorizing the appellate court to direct judgment in favor of the party entitled to it, Neb. Rev. Stat. §§ 25–1315.01 to 25–1315.03 (1943), approved as preferable to the present federal practice in Note, 30 Neb. L. Rev. 630 (1951). Except for some changes in form, the amendments follow rather closely the carefully worded provisions formulated in the Kentucky rules, Ky. R. C. P. 50.02, 50.03, to codify the practice suggested in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1940); they should thus protect the rights of the parties without resort to technical procedures. 38 Corn. L. Q. 449 (1953); 25 Rocky Mt. L. Rev. 243 (1953). The addition to the second sentence of Rule 50 (b)—which does not appear in the Kentucky rules—safeguards the reasonable expectations of the lawyer without regard to a precise form of words. Compare the discussion in the three opinions in *Johnson* v.

New York, N. H. & H. R. Co., 344 U. S. 48 (1952). And see 5 *Moore's Federal Practice* ¶ 50.01 *et seq.*, especially ¶ 50.11 (2d ed. 1951), and *id.* (1955 Cum. Supp.); *Robinson* v. *Isbrandtsen Co.*, 203 F. 2d 514 (2d Cir. 1953).

Rule 52. Findings by the Court.

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous~~, and due~~. *In the application of this principle* regard shall be given to the *special* opportunity of the trial court to judge of the credibility of ~~the~~ *those* witnesses *who appeared personally before it.* The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

Note. The amendment is designed to correct a judicial gloss upon the rule which had tended to distort it. As is stated in the Committee Note to the original rule, the purpose of the third sentence of Rule 52 (a)

was to prescribe for all cases the scope of review theretofore applied in equity. Equity review, as defined in the federal precedents, tended to follow a middle course, broader than that in legal actions, where reversal was only for errors of law, but more restrictive than that in admiralty, where appellate courts recognized a rather undefined "trial *de novo*." Rule 52 (a) was intended to state this middle view for all cases, whatever the nature of the action or the character of the evidence. The stated test that findings of fact shall not be set aside "unless clearly erroneous" obviously grants a considerable discretion to the trial or reviewing court; hence the rule contained a further admonition to govern the exercise of such discretion that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." The Supreme Court, in applying this rule, has said: "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also *United States* v. *Yellow Cab Co.*, 338 U. S. 338 (1949); *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326 (1952); *Dalehite* v. *United States*, 346 U. S. 15, 24, 42, 54 (1953); *Gindorff* v. *Prince*, 189 F. 2d 897 (2d Cir. 1951); 2 *Barron & Holtzoff, Fed. Prac. & Proc.* §§ 1131–1136 (1950).

In some of the cases, however, this further admonition of the rule was raised from its position as subordinate to the basic provision to constitute a principle that where the testimony before the trial court was by deposition or the evidence was documentary, the reviewing court was in as good a position as the trial judge to evaluate it and thus could more easily discover the findings to be clearly erroneous. See, *e. g.*, *Fleming* v. *Palmer*, 123 F. 2d 749 (1st Cir. 1941), cert. den. *Caribbean Embroidery Cooperative, Inc.* v. *Fleming*, 316 U. S. 662 (1942); *Banister* v. *Solomon*, 126 F. 2d 740 (2d Cir. 1942); *Ball* v. *Paramount Pictures, Inc.*, 169 F. 2d 317 (3d Cir. 1948); *Pennsylvania Thresherman & Farmers'*

Mut. Cas. Ins. Co. v. *Crapet*, 199 F. 2d 850 (5th Cir. 1952); *Himmel Bros. Co.* v. *Serrick Corp.*, 122 F. 2d 740 (7th Cir. 1941); *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. 2d 412 (8th Cir. 1940); *Smyth* v. *Barneson*, 181 F. 2d 143, 144 (9th Cir. 1950). This principle was then extended in some decisions to make review substantially *de novo*, where the testimony below was not oral. *Dollar* v. *Land*, 184 F. 2d 245 (D. C. Cir. 1950), cert. den. *Land* v. *Dollar*, 340 U. S. 884 (1950); *Panama Transport Co.* v. *The Maravi*, 165 F. 2d 719, 720 (2d Cir. 1948); *Stokes* v. *United States*, 144 F. 2d 82, 85 (2d Cir. 1944); *Bertel* v. *Panama Transport Co.*, 202 F. 2d 247, 249 (2d Cir. 1953); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (7th Cir. 1940). See the detailed classification suggested in *Orvis* v. *Higgins*, 180 F. 2d 537, 538 (2d Cir. 1950), cert. den. 340 U. S. 810 (1950), and criticisms thereof in Comment, *Scope of Appellate Fact Review Widened*, 2 Stan. L. Rev. 784 (1950). Compare Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand L. Rev. 493, 505–506 (1950), with 5 *Moore's Federal Practice* ¶ 52.04 (2d ed. 1951).

Notwithstanding this trend of precedents, other courts have continued to apply Rule 52 (a) according to its language and intent. *Holt* v. *Werbe*, 198 F. 2d 910 (8th Cir. 1952); *Jacuzzi Bros., Inc.* v. *Berkeley Pump Co.*, 191 F. 2d 632, 637–638 (9th Cir. 1951); *Quon* v. *Niagara Fire Ins. Co. of New York*, 190 F. 2d 257 (9th Cir. 1951); see *Heim* v. *Universal Pictures Co.*, 154 F. 2d 480, 491 (2d Cir. 1946); Yankwich, *Findings in the Light of the Recent Amendments to the Federal Rules of Civil Procedure*, 8 F. R. D. 271, 289. And see *Pendergrass* v. *New York Life Ins. Co.*, 181 F. 2d 136, 138 (8th Cir. 1950), stating the traditional rule: "The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions

of the district courts, and multiplies the number of appeals in such cases."

The amendment is designed to end the confusion and show definitively that the "clearly erroneous" test is not modified by the language which formerly followed it, but is applicable in all cases. The separate provision that regard must be given the trial court's opportunity to judge the credibility of witnesses who appeared personally emphasizes only the special reluctance which must be felt in holding clearly erroneous a finding based on oral testimony. Compare also Rule 53 (e) (2), which has always provided: "In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous."

Rule 54. Judgments; Costs.

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

Note. The Committee has previously noted scholarly suggestions that existing Rule 54 (b) does not permit appeal, even with the requisite finding by the trial judge, from an order dismissing an action as to less than all the parties jointly suing or being sued, and that an amendment should be made to permit appeal in such a situation. 6 *Moore's Federal Practice.* ¶ 54.34 [2] (2d ed. 1953); Note, 62 Yale L. J. 263, 271–272 (1953); *cf.* Note, 28 N. Y. U. L. Rev. 203 (1953). The great bulk of cases had held, however, that such a judgment is in fact final and appealable where the trial judge has actually made the requisite finding. *Rao* v. *Port of New York Authority*, 222 F. 2d 362 (2d Cir. 1955); *United Artists Corp.* v. *Masterpiece Productions, Inc.*, 221 F. 2d 213 (2d Cir. 1955); *Colonial Airlines* v. *Janas*, 202 F. 2d 914 (2d Cir. 1953); *Boston Medical Supply Co.* v. *Lea & Febiger*, 195 F. 2d 853 (1st Cir. 1952); *Williams* v. *Protestant Episcopal Theological Seminary in Virginia*, 198 F. 2d 595 (D. C. Cir. 1952), cert. den. 344 U. S. 864 (1952); *Lopinsky* v. *Hertz Drive-Ur-Self Systems*, 194 F. 2d 422 (2d Cir. 1951); *Vale* v. *Bonnett*, 191 F. 2d 334 (D. C. Cir. 1951). Cases where the trial judge had failed to make the finding are of course not inconsistent. Thus the Committee believed that since the courts were already reaching the result conceded by all to be desirable, no amendment was needed.

A recent decision which faces this question squarely has held, contrary to the cases last cited, that such a judgment is not appealable even where the trial judge has made the requisite finding of no just reason for delay. *Steiner* v. *20th Century-Fox Film Corp.*, 220 F. 2d 105 (9th Cir. 1955). Since such an important question should not be left in doubt, the Committee therefore now proposes an amendment stating explicitly that Rule 54 (b) applies to multiple parties as well as to multiple claims. The amended Rule is based generally on § 50 (a) of the proposed new Illinois Civil Practice Act.

Because this amendment is now proposed, the amendments to Rules 20 (b) and 42 (b), set forth by the Committee in the Preliminary Draft, seem no longer necessary and have been withdrawn.

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~~ ~~j~~*J*udgment ~~sought~~ shall be rendered forthwith if the pleadings, depositions, 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~~ *any* 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. *Summary judgment, when appropriate, may be rendered against the moving party.*

(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 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.

Note. Subdivision (c). The specific provision, made by the amendment, allowing summary judgment to be granted against the party who has moved therefor, is in accord with N. Y. C. P. Rule 113 and Wis. Stat. § 270.635 (3) (1951), as well as the urging of commentators. McDonald, *Summary Judgments*, 30 Tex. L. Rev. 285, 303 (1952); Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567, 570–571 (1952); Comment, *Summary Judgment*, 25 Wash. L. Rev. 71, 76–77 (1950). It codifies a result already achieved by most federal courts. See 6 *Moore's Federal Practice* ¶ 56.12 (2d ed. 1953).

Subdivision (e). Some recent cases, particularly in the Third Circuit, have held that a mere allegation in the pleading is sufficient to create a genuine issue as to a material fact, and thus prevent summary judgment, even though the pleader has made no attempt to controvert affidavits and other evidentiary matter presented by his opponent; *e. g., Frederick Hart & Co.* v. *Recordgraph Corp.*, 169 F. 2d 580, 581 (3d Cir. 1948); *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F. R. D. 349 (D. N. J. 1948), aff'd 176 F. 2d 90 (3d Cir. 1949); *Chappell* v. *Goltsman*, 186 F. 2d 215, 218 (5th Cir. 1950); and cases cited in 6 *Moore's Federal Practice* ¶ 56.11 [3], n. 16 (2d ed. 1953). This line of cases is termed "patently erroneous" in Note, 99 U. of Pa. L. Rev. 212, 214–215 (1950), citing many contrary authorities. The purpose of Rule 56 is to pierce the formal allegations of the pleadings and reach immediately the merits of the controversy. If pleading allegations are sufficient to raise a genuine issue as against uncontradicted

evidentiary matter, this remedy then becomes substantially without utility. *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (2d Cir. 1943). The view of most cases and commentators is that, where the motion for summary judgment is supported by depositions or affidavits, the opposing party must make a similar presentation to show the existence of a genuine issue of fact, or suffer judgment to be entered. 6 *Moore's Federal Practice* ¶ 56.11 [3], n. 21 (2d ed. 1953), and cases there cited; *id.* at ¶ 56.15 [2]; Asbill & Snell, *Summary Judgment Under the Federal Rules—When An Issue of Fact Is Presented*, 51 Mich. L. Rev. 1143, 1159–1165 (1953); *Shientag, The Summary Judgment* 24 (1941); Kennedy, *The Federal Summary Judgment Rule*, 13 Brooklyn L. Rev. 5 (1947); Comm., *"Genuineness" of Issues on Summary Judgment*, 4 Fed. Rules Serv. 940.

The amendment to subdivision (e) states this last principle and thus makes it clear that pleading allegations cannot, in themselves, create a genuine issue of material fact when summary judgment is sought. By emphasizing the function of the motion for summary judgment, the amendment may stimulate more frequent and effective use of this device, as urged by the Judicial Conference of the United States, in its Report of Sept. 1948, pp. 36–37, and by commentators. Yankwich, *Summary Judgment under Federal Practice*, 40 Calif. L. Rev. 204 (1952); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 Vand. L. Rev. 493, 502–505 (1950); Clark, *The Summary Judgment*, 36 Minn. L. Rev. 567 (1952); Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. of Pa. L. Rev. 909, 936–937 (1953); Comment, *Summary Judgment*, 25 Wash. L. Rev. 71 (1950); Note, *The Scope of Summary Judgment Under the Federal Rules*, 5 Vand. L. Rev. 607 (1952); Note, *Summary Judgments in the Federal Courts*, 99 U. of Pa. L. Rev. 212 (1950); see McAllister, *Pre-Trial Practice in the Southern District of New York*, 12 F. R. D. 373, 378. Compare the holding that summary judgment granting specific performance can never be proper, for a party cannot be entitled to equitable relief as a matter

of law, *Seaboard Surety Co.* v. *Racine Screw Co.*, 203 F. 2d 532 (7th Cir. 1953), with the grant of summary judgment of specific performance in *Dale* v. *Preg*, 204 F. 2d 434 (9th Cir. 1953), and *Palmer* v. *Chamberlin*, 191 F. 2d 532, 27 A. L. R. 2d 416 (5th Cir. 1951), and as expressly authorized in N. Y. C. P. Rule 113. See also the grant of summary judgment of injunction in *United States* v. *W. T. Grant Co.*, 345 U. S. 629 (1953), and *Houghton, Mifflin Co.* v. *Stackpole Sons*, 113 F. 2d 627 (2d Cir. 1940).

The amended rule does not, of course, require the grant of summary judgment in a case where such judgment is not proper even though the facts be taken as in the moving party's affidavit.

The court may deny the motion if for any reason summary judgment would be inappropriate, even though the opposite party has not submitted an affidavit. The court may order a continuance in accordance with the provisions of Rule 56 (f) where a party makes a substantial showing by affidavit that he cannot then present the facts essential to justify his opposition to judgment.

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. *If an opinion or memorandum is filed, it will be sufficient if a specific direction as to the judgment to be entered is included therein or appended thereto; and any such direction either for an immediate or for a delayed entry of judgment is controlling and shall be followed 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.

Note. The amendment is declaratory of existing law as set forth in such cases as *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936 (2d Cir. 1952); *In re Forstner Chain Corp.*, 177 F. 2d 572 (1st Cir. 1949); *Steccone* v. *Morse-Starrett Products Co.*, 191 F. 2d 197 (9th Cir. 1951); *cf. United States* v. *Roth*, 208 F. 2d 467 (2d Cir. 1953); 6 *Moore's Federal Practice* ¶ 58.04 [4] (2d ed. 1953). It should set to rest the doubts noted in Comm., *Entry of Judgment*, 18 Fed. Rules Serv. 927, due to certain cases there cited—and see also 3 *Barron & Holtzoff, Fed. Prac. & Proc.* § 1283, p. 220 (1950)—as to the effect of the court's direction as an entry of judgment.

Rule 60. Relief From Judgment or Order.

(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by

due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. *Leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court.* This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Note. "The dearth of cases involving unjust results or judicial confusion bears out the opinion that Rule 60 (b)," as extensively amended in 1946, "is a carefully drafted, smoothly-operating Rule of Civil Procedure." Note, *History and Interpretation of Federal Rule 60 (b) of the Federal Rules of Civil Procedure*, 25 Temp. L. Q. 77, 83 (1951). The amendment adding a sentence after the third sentence deals with the requirement of leave from an appellate court to reopen a judgment which had been settled on appeal. Some courts have laid down such a requirement, though the carefully detailed procedure of this rule included none; *e. g.*, *Butcher & Sherrerd* v. *Welsh*, 206 F. 2d 259 (3d Cir. 1953), cert. den. *Alker* v. *Butcher & Sherrerd*, 346 U. S. 925 (1954); *Home Indemnity Co. of New York* v. *O'Brien*, 112 F. 2d 387 (6th Cir. 1940); *Switzer* v. *Marzall*, 95 F. Supp. 721 (D. D. C. 1951); *Daniels* v. *Goldberg*, 8 F. R. D. 580 (S. D. N. Y. 1948), aff'd 173 F. 2d 911 (2d Cir. 1949); *Albion-Idaho Land Co.* v. *Adams*, 58 F. Supp. 579 (D. Idaho 1945). *Contra: Von Wedel* v. *McGrath*, 100 F. Supp. 434 (D. N. J. 1951), aff'd 194 F. 2d 1013 (3d Cir. 1952); *cf. In re Long Island Lighting Co.*, 197 F. 2d 709, 710 (2d Cir. 1952); *S. C. Johnson & Son* v. *Johnson*, 175 F. 2d 176, 177, 184 (2d Cir. 1949), cert. den. 338 U. S. 860 (1949); *Perlman* v. *322 West Seventy-Second Street Co.*, 127 F. 2d 716, 719 (2d Cir. 1942). Such a requirement of leave from the appellate court is a useless and delaying formalism. An appellate court cannot know whether the requirements for reopening a case under the rule are actually met without a full record which must obviously be made in the district court. The amendment expressly negatives any such barren requirement.

Although there has been some confusion as to the relation of subdivision (6) to the other subdivisions of the rule and the time limits applicable thereto, Note, *Federal Rule 60 (b): Relief from Civil Judgments*, 61 Yale L. J. 76 (1952); Comment, *Temporal Aspects of the Finality of Judgments: The Significance of Federal*

Rule 60 (b), 17 U. of Chi. L. Rev. 664 (1950), the courts seem to have been resolving this problem in a flexible and satisfactory manner and the Committee, therefore, proposes no amendment dealing with that question.

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~~ *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, § 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~~.~~*; but a party who has made a timely demand for trial by jury prior to removal need not make a new demand after removal.*

(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.

Note. Subdivision (*a*). The amendment to paragraph (4) reflects the transfer of functions from the Secretary of Commerce to the Secretary of the Interior made by 1939 Reorganization Plan No. II. The amendment to paragraph (6) changes the citation to the 1952 statute which superseded the 1940 statute cited in the existing rule.

Subdivision (*c*). A preponderance of cases and commentators have agreed that a party who has made an affirmative demand for jury trial in state court is not obliged to renew the demand in federal court after removal of the action. *Zakoscielny* v. *Waterman S. S. 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., Inc.*, 15 F. R. D. 113 (D. Del. 1953); *Wardrep* v. *New York Life Ins. Co.*, 1 F. R. D. 175 (E. D. Tenn. 1940); *Angel* v. *McLellan Stores Co.*, 27 F. Supp. 893 (E. D. Tenn. 1939); 1 *Barron & Holtzoff, Fed. Prac. & Proc.* § 132 (1955 Supp.); 5 *Moore's Federal Practice* ¶ 38.39 [3] (2d ed. 1951). There are, however, authorities supporting a contrary conclusion. *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); Local Rule 11 of the Northern and Southern Districts of Iowa; Note, 38 Iowa L. Rev. 177 (1952); *cf. Ferris* v. *Farnsworth Television & Radio Corp.*, 8 F. R. D. 489 (S. D. N. Y. 1947). The proposed amendment codifies the result of the authorities first cited. It should be noted that the rule applies only where the party has made an affirmative demand for a jury in the state court, and does not apply where the case has been removed in a state which gives a jury trial without such an affirmative demand.

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

Rule 86. Effective Date.

(d) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on ----------, and transmitted to the Congress on ----------, shall take effect on ----------, 1956. 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.

Note. Pursuant to the 1950 amendment of 28 U. S. C. § 2072, the amendments become effective 3 months after they are transmitted to Congress.

APPENDIX OF FORMS

Form 22. The contents of this Form are eliminated down to and including the words "Exhibit A," thus eliminating the motion and notice of motion. The complete Form now follows:

FORM 22. SUMMONS AND COMPLAINT AGAINST THIRD-PARTY DEFENDANT

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 herewith a copy of the complaint of the plaintiff which you may answer.*

----------,
Clerk of Court.

[Seal of District Court]
Dated ----------

Note. The elimination of the motion to bring in a third-party defendant conforms to the amendment of Rule 14 (a) which abolished such motions. The provision in the form of summons requiring an answer to the complaint of the plaintiff has not been accurate, since the 1948 amendment to Rule 14 (a) changed that rule so that the third party is now permitted, but not required, to assert such defenses as he may have against the plaintiff's claim. 3 *Moore's Federal Practice* ¶ 14.18, p. 448 (2d ed. 1948). The additional third sentence of the amended summons informs the third party that he is receiving a copy of the plaintiff's complaint, and that he may answer this complaint if he wishes. By virtue of the amendment now proposed for Rule 5 (a), the defendant must serve a copy of the summons and complaint against the third-party defendant on the original plaintiff, and the third-party defendant in turn is required to serve his answer upon the original plaintiff as well as upon the original defendant even though he may not wish to answer the plaintiff's complaint.

FORM 30. 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 presiding, and the issues having been duly tried [and the jury having returned its answers to the interrogatories propounded by the Court] and the jury on June 2, 1953, having rendered a verdict for the [plaintiff to recover of the defendant damages in the amount of $10,000,] [defendant,]

It is ORDERED and ADJUDGED that the [plaintiff recover of the defendant [1] the sum of $10,000 with interest thereon at the rate of ---- per cent from the date hereof until paid and

[1] The judgment should properly state the full name and either the residence or the business address of the judgment debtor.

his costs of action] [plaintiff take nothing, that the action is dismissed on the merits, and that the defendant recover of the plaintiff [1] his costs of action].

Dated at New York, N. Y., this 2d day of June, 1953.

----------,
Clerk of Court.

Note. The Rules contemplate a simple judgment promptly entered. See Rule 54 (a), providing that a judgment "shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings," and Rule 58, providing for judgment "forthwith" by the clerk on a jury verdict "[u]nless the court otherwise directs," or on a direction by the court for the recovery of only money or costs or that all relief be denied; "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."

Nevertheless there has been some tendency for clerks to await submission of forms by counsel, with inexcusable delay and with intricate and confusing recitals. See *United States* v. *Wissahickon Tool Works*, 200 F. 2d 936, 938 (2d Cir. 1952); *Binder* v. *Commercial Travelers Mut. Acc. Ass'n of America*, 165 F. 2d 896, 901 (2d Cir. 1948); *Leonard* v. *Prince Line*, 157 F. 2d 987, 989 (2d Cir. 1946). Use of this form and Form 31 by the clerks seems desirable to conform "to what has been prescribed under Rule 58 in order to expedite and simplify procedure." A. N. Hand, J., in *Leonard* v. *Prince Line*, *supra*. Through choice among bracketed clauses, or other modifications for particular situations, the basic simplicity indicated can be preserved in a wide variety of actions.

The provision for inclusion of the full name and address of the judgment debtor is intended to assist identification in searches of the judgment roll. See 6 *Moore's Federal Practice* ¶ 54.03 (2d ed. 1953).

Interest on a money judgment is made mandatory by statute, 28 U. S. C. § 1961; and the form indicates that this should properly be reflected in the judgment, 5 *Barron, Darnieder & Keogh, Fed. Prac. & Proc.* §§ 4202, 4204 (1951).

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[1] The judgment should properly state the full name and either the residence or the business address of the judgment debtor.

FORM 31. JUDGMENT ON TRIAL TO THE COURT [NEW]

United States District Court for the Southern District of 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 presiding, and the Court on June 2, 1953, having ordered that judgment be entered for the [plaintiff to recover of the defendant damages in the amount of $10,000,[1]] [defendant,]

It is ORDERED and ADJUDGED that the [plaintiff recover of the defendant [2] damages in the amount of $10,000 with interest thereon at the rate of____per cent from the date hereof until paid and his costs of action [1]] [plaintiff take nothing, that the action is dismissed on the merits, and that the defendant recover of the plaintiff [2] his costs of action].

Dated at New York, N. Y., this 2d day of June, 1953.

----------,
Clerk of Court.

[1] Or here substitute direction for such specific relief as may have been ordered by the court.

[2] The judgment should properly state the full name and either the residence or the business address of the judgment debtor.

Note. See Note to Form 30.

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