

REPORT OF THE COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE

TO THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in San Francisco on August 13 and 14, 1962. All the members of the Committee were present. Judge Walter L. Pope, Chairman of the Advisory Committee on Admiralty Rules, and Professors Benjamin Kaplan, Brainerd Currie, Frank R. Kennedy, Edward L. Barrett, Jr., and Bernard J. Ward, Reporters for Civil, Admiralty, Bankruptcy, Criminal and Appellate Rules, respectively, were also present by invitation. Reports were received and considered from each of the Advisory Committees.

Advisory Committee on Civil Rules

The Advisory Committee on Civil Rules submitted with its favorable recommendation a definitive draft of proposed amendments to certain of the Federal Rules of Civil Procedure. The Advisory Committee presented a brief explanatory statement with respect to these proposals, a copy of which is annexed hereto marked Exhibit "A". The statement also includes a progress report with respect to the

study of the rules on joinder of parties and discovery which the Advisory Committee is carrying on, and the cooperation which it has extended to other advisory committees.

In addition, Professor Kaplan made oral explanations of each of the proposals and they were fully discussed and considered by your Committee. With one modification, about to be mentioned, the proposals of the Advisory Committee on Civil Rules were approved by your Committee.

The modification involves the last sentence of the proposed amended Rule 58, relating to the Entry of Judgment. In this instance, your Committee recommends that the final sentence of the proposed amended Rule should read:

"Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course."

in lieu of the following sentence which the Advisory Committee had recommended:

"Except upon a direction of the court, which shall not be given as a matter of course, attorneys shall not submit forms of judgment in any case in which a party recovers only money or costs or in which all relief is denied."

The modified language would eliminate the practice, existing in some districts, of attorneys submitting forms of judgment in cases where they are not directed to do so by the court. Your Committee believes that this modification will tend to expedite the entry of judgment and eliminate an unnecessary burden upon counsel in such cases. It is believed that ordinarily it will be more expeditious if the form of judgment is prepared by the Clerk in accordance with the directions of the Judge, and that a direction to counsel to prepare forms of judgment, while undoubtedly helpful in complicated cases, should be the exception rather than the rule.

A draft of the proposed amendments to the Federal Rules of Civil Procedure, as approved by your Committee, is annexed hereto as Exhibit "B". Following each amendment is an explanatory note prepared by the Advisory Committee. Your Committee recommends that these proposed amendments be approved by the Judicial Conference and submitted to the Supreme Court with the recommendation that they be adopted.

Advisory Committee on Admiralty Rules

The Report of the Advisory Committee on Admiralty Rules was presented by its Chairman, Judge Pope. Your Committee had requested that the Advisory Committee give primary consideration to the question of the desirability of unifying or integrating the admiralty and civil

rules, and to report its conclusions to your Committee. Judge Pope reported that it is the sense of the Advisory Committee on Admiralty Rules, after full consideration of the subject, that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings. A copy of the Report of the Advisory Committee on Admiralty Rules is annexed hereto, marked Exhibit "C".

Your Committee accepted and approved the action of the Advisory Committee on Admiralty Rules in this regard and recommends to the Judicial Conference that unification of the civil and admiralty rules be approved with the inclusion of certain rules for dealing with special admiralty proceedings, and that the Conference request the Supreme Court to consider the proposal and indicate its views thereon so that your Committee may be free to proceed with the task of preparing a draft of unified civil and admiralty rules, as proposed.

Advisory Committee on Bankruptcy Rules

The Advisory Committee on Bankruptcy Rules is proceeding with its study of the General Orders and Official Forms in Bankruptcy, but had no definitive proposals for amendments to submit at this time. A copy of the progress report submitted by the Advisory Committee is annexed hereto marked Exhibit "D".

Advisory Committee on Criminal Rules

The Advisory Committee on Criminal Rules is proceeding with its study of the Federal Rules of Criminal Procedure. Tentative recommendations for amendments of certain of these rules are under consideration, but no definitive proposals for amendments were ready for submission at this time. A copy of the progress report of the Advisory Committee is annexed hereto marked Exhibit "E".

Advisory Committee on Appellate Rules

The Advisory Committee on Appellate Rules has prepared a second draft of a proposed rule for Review of the Decisions of the Tax Court, which has been circulated to the bench and bar. Comments on this draft are still being received and, accordingly, a definitive proposal was not presented to our Committee at this time.

The Advisory Committee is also engaged in a comprehensive study of appellate procedure in the United States Courts of Appeals and in the preparation of a tentative draft of uniform rules in this field. Here, also, the draft has not progressed to the point where definitive proposals are ready for consideration. In view of the fact that the Advisory Committee is engaged in a wholly new undertaking in this field, it has been requested to submit to your Committee drafts

of rules in related or integrated groups when and as such rules are approved by it, rather than to postpone their submission until the full draft of all the rules has been completed and approved by it.

A copy of the progress report of the Advisory Committee is annexed hereto marked Exhibit "F".

Special Committee on Uniform Rules of Evidence
for the Federal Courts

Professor Moore, Chairman of the Special Committee on Uniform Rules of Evidence for the Federal Courts, presented a progress report. The Committee has made a preliminary report recommending that uniform rules of evidence for the Federal Courts be formulated and adopted, and this report has been widely circulated to the bench and bar. It is anticipated that in January 1963 the Special Committee will reach a definitive conclusion upon this matter after considering the comments received from the bench and bar. Professor Moore reported that the comments received so far have been overwhelmingly favorable to the project.

Miscellaneous Matters

Your Committee gave consideration to more precisely delimiting the area of work of the Advisory Committee on Appellate Rules

on the one hand, and the Advisory Committees on Civil, Admiralty, Bankruptcy and Criminal Rules on the other hand, with respect to appellate procedure in the district courts. After full consideration of this matter the following statement was adopted for the guidance of the Advisory Committees:

"The advisory committees in the fields of criminal, civil, admiralty and bankruptcy procedure should take primary responsibility for the study of all such procedure in the district courts up to but not including the filing of a notice of appeal, or the form and manner of making up and transmitting the record on appeal or the procedure in the court of appeals after the appeal is lodged there, for all of which procedure the Advisory Committee on Appellate Rules would bear primary responsibility. With respect to matters within its primary responsibility as defined each committee should, of course, welcome such suggestions as the other committees may desire to make as a result of their own studies. It is also to be understood that all proposals with respect to procedure between the filing of the notice of appeal and the docketing of the appeal in the appellate court are to be submitted by the Advisory Committee on Appellate Rules to the appropriate other advisory committees and their views obtained before any proposal in that area is submitted to the standing Committee."

Your Committee also considered the philosophy which should underlie the style and manner in which rules are to be prepared -- whether they should be brief and general in scope, or whether they should attempt to spell out in detail the procedure to be followed in

all situations. After full discussion of the subject, your Committee voted to encourage the Advisory Committees to continue following the practice, which was followed in the formulation of the Federal Rules of Civil Procedure, of making their proposed rules amendments brief and general in scope, leaving large areas of discretion to the judges to deal with particular situations.

Respectfully submitted,

Albert B. Muris
Chairman

September 12, 1962

July 18, 1962

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

STATEMENT ON BEHALF OF THE
ADVISORY COMMITTEE ON CIVIL RULES

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

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

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

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

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

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

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

Summary Statement of the Civil Rules Amendments
Recommended for Adoption²

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

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

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

² This summary omits various matters of detail.

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

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

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

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

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

provides that a defendant need not obtain leave of court to bring in a third-party defendant if he files his third-party complaint not later than 10 days after he serves his answer in the action. However, after a third-party defendant is brought in, the court may in appropriate situations strike the impleader or sever it or accord it separate trial.

Official Forms are amended to reflect the basic change in the impleader Rule, and the statement of permitted pleadings is also correspondingly amended. An amendment makes it clear that a third-party defendant is required to serve his answer to the third-party complaint upon the plaintiff as well as the defendant (third-party plaintiff); more generally, except as otherwise provided in the Rules, the consequential papers in an action are required to be served on all parties, rather than the parties "affected thereby," as at present.

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

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

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

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

⁴ See note 3, supra.

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

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

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

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

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

⁶ See note 5, supra.

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

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

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

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

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

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

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

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

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

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

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

These are minor technical corrections.

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

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

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

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

B. Discussion of Other Matters

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

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

⁷ See note 5, supra.

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

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

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

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

There are also questions of common interest between the

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

Exhibit B

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

Rule 4. Process

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

17 (d) SUMMONS: PERSONAL SERVICE.

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

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

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

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

45 (e) SAME: ~~OTHER SERVICE~~ SERVICE UPON
46 PARTY NOT INHABITANT OF OR FOUND WITHIN
47 STATE. Whenever a statute of the United
48 States or an order of court *thereunder* provides
49 for service of a summons, or of a notice, or of an
50 order in lieu of summons upon a party not an
51 inhabitant of or found within the state *in which*
52 *the district court is held*, service ~~shall~~ *may* be
53 made under the circumstances and in the man-
54 ner prescribed by the statute, ~~rule,~~ or order, *or,*
55 *if there is no provision therein prescribing the*
56 *manner of service, in a manner stated in this rule.*
57 *Whenever a statute or rule of court of the state in*
58 *which the district court is held provides (1) for serv-*
59 *ice of a summons, or of a notice, or of an order in*
60 *lieu of summons upon a party not an inhabitant*
61 *of or found within the state, or (2) for service upon*

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

66 (f) **TERRITORIAL LIMITS OF EFFECTIVE SERV-**
67 **ICE.** All process other than a subpoena may
68 be served anywhere within the territorial limits
69 of the state in which the district court is held,
70 and, when *authorized by* a statute of the United
71 States *or by these rules, so provides,* beyond the
72 territorial limits of that state. *In addition,*
73 *persons who are brought in as parties pursuant*
74 *to Rule 13(h) or Rule 14, or as additional parties*
75 *to a pending action pursuant to Rule 19, may be*
76 *served in the manner stated in paragraphs*
77 *(1)-(6) of subdivision (d) of this rule at all*
78 *places outside the state but within the United*
79 *States that are not more than 100 miles from the*
80 *place in which the action is commenced, or to*
81 *which it is assigned or transferred for trial;*
82 *and persons required to respond to an order of*
83 *commitment for civil contempt may be served at*
84 *the same places. A subpoena may be served*
85 *within the territorial limits provided in Rule 45.*

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

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

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

91 *within the state in which the district court is held,*
92 *and service is to be effected upon the party in a*
93 *foreign country, it is also sufficient if service of*
94 *the summons and complaint is made: (A) in the*
95 *manner prescribed by the law of the foreign coun-*
96 *try for service in that country in an action in any*
97 *of its courts of general jurisdiction, or (B) as*
98 *directed by the foreign authority in response to a*
99 *letter rogatory, when service in either case is*
100 *reasonably calculated to give actual notice; or (C)*
101 *upon an individual, by delivery to him personally,*
102 *and upon a corporation or partnership or*
103 *association, by delivery to an officer, a managing*
104 *or general agent; or (D) by any form of mail,*
105 *requiring a signed receipt, to be addressed and*
106 *dispatched by the clerk of the court to the party to*
107 *be served; or (E) as directed by order of the court.*
108 *Service under (C) or (E) above may be*
109 *made by any person who is not a party and is not*
110 *less than 18 years of age or who is designated by*
111 *order of the district court or by the foreign court.*
112 *On request, the clerk shall deliver the summons to*
113 *the plaintiff for transmission to the person or the*
114 *foreign court or officer who will make the service.*
115 *(2) Return. Proof of service may be made as*
116 *prescribed by subdivision (g) of this rule, or by the*
117 *law of the foreign country, or by order of the*
118 *court. When service is made pursuant to sub-*
119 *paragraph (1)(D) of this subdivision, proof of*
120 *service shall include a receipt signed by the*
121 *addressee or other evidence of delivery to the*
122 *addressee satisfactory to the court.*

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 5. Service and Filing of Pleadings and Other Papers

- 1 (a) SERVICE: WHEN REQUIRED. *Except as*
- 2 *otherwise provided in these rules, Every order*

3 required by its terms to be served, every plead-
4 ing subsequent to the original complaint unless
5 the court otherwise orders because of numerous
6 defendants, every written motion other than one
7 which may be heard ex parte, and every written
8 notice, appearance, demand, offer of judgment,
9 designation of record on appeal, and similar
10 paper shall be served upon each of the parties.
11 ~~affected thereby, but n~~ No service need be made
12 on parties in default for failure to appear except
13 that pleadings asserting new or additional claims
14 for relief against them shall be served upon them
15 in the manner provided for service of summons
16 in Rule 4.

ADVISORY COMMITTEE'S NOTE

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

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

Rule 6. Time

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

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

25 (b) ENLARGEMENT. When by these rules or
26 by a notice given thereunder or by order of
27 court an act is required or allowed to be done at
28 or within a specified time, the court for cause
29 shown may at any time in its discretion (1) with
30 or without motion or notice order the period
31 enlarged if request therefor is made before the
32 expiration of the period originally prescribed or
33 as extended by a previous order or (2) upon
34 motion made after the expiration of the specified
35 period permit the act to be done where the failure
36 to act was the result of excusable neglect; but it
37 may not extend the time for taking any action
38 under Rules ~~25~~, 50(b), 52(b), 59(b), (d) and (e),
39 60(b), and 73(a) and (g), except to the extent
40 and under the conditions stated in them.

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

Rule 7. Pleadings Allowed; Form of Motions

1 (a) PLEADINGS. There shall be a complaint
 2 and an answer; ~~and there shall be~~ a reply to a
 3 counterclaim denominated as such; an answer to
 4 a *cross-claim, if the answer contains a cross-*
 5 *claim; a third-party complaint, if leave is given*
 6 ~~under Rule 14 to summon~~ a person who was not
 7 an original party *is summoned under the provisions*
 8 *of Rule 14; and there shall be* a third-party
 9 answer, if a third-party complaint is served.
 10 No other pleading shall be allowed, except that
 11 the court may order a reply to an answer or a
 12 third-party answer.

ADVISORY COMMITTEE'S NOTE

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

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

1 (a) WHEN PRESENTED. A defendant shall
 2 serve his answer within 20 days after the service
 3 of the summons and complaint upon him, ~~unless~~
 4 ~~the court directs otherwise when service is made~~
 5 ~~pursuant to Rule 4(e) except when service is~~
 6 ~~made under Rule 4(e) and a different time is~~
 7 ~~prescribed in the order of court under the statute~~
 8 ~~of the United States or in the statute or rule of~~
 9 ~~court of the state.~~ A party served with a pleading
 10 stating a cross-claim against him shall serve an
 11 answer thereto within 20 days after the service

12 upon him. The plaintiff shall serve his reply to a
13 counterclaim in the answer within 20 days after
14 service of the answer or, if a reply is ordered by
15 the court, within 20 days after service of the
16 order, unless the order otherwise directs. The
17 United States or an officer or agency thereof
18 shall serve an answer to the complaint or to a
19 cross-claim, or a reply to a counterclaim, within
20 60 days after the service upon the United States
21 attorney of the pleading in which the claim is
22 asserted. The service of a motion permitted
23 under this rule alters these periods of time as
24 follows, unless a different time is fixed by order
25 of the court: (1) if the court denies the motion or
26 postpones its disposition until the trial on the
27 merits, the responsive pleading shall be served
28 within 10 days after notice of the court's action;
29 (2) if the court grants a motion for a more
30 definite statement the responsive pleading shall
31 be served within 10 days after the service of the
32 more definite statement.

ADVISORY COMMITTEE'S NOTE

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

Rule 13. Counterclaim and Cross-Claim

1 (a) **COMPULSORY COUNTERCLAIMS.** A plead-
2 ing shall state as a counterclaim any claim which
3 at the time of serving the pleading the pleader
4 has against any opposing party, if it arises out
5 of the transaction or occurrence that is the
6 subject matter of the opposing party's claim and
7 does not require for its adjudication the presence

8 of third parties of whom the court cannot
 9 acquire jurisdiction; ~~except that such a claim~~
 10 ~~need not be so stated~~ *But the pleader need not*
 11 *state the claim if (1) at the time the action was*
 12 *commenced the claim was the subject of another*
 13 *pending action; or (2) the opposing party*
 14 *brought suit upon his claim by attachment or*
 15 *other process by which the court did not acquire*
 16 *jurisdiction to render a personal judgment on*
 17 *that claim, and the pleader is not stating any*
 18 *counterclaim under this Rule 13.*

ADVISORY COMMITTEE'S NOTE

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

Rule 14. Third-Party Practice

1 (a) WHEN DEFENDANT MAY BRING IN
 2 THIRD PARTY. ~~Before the service of his answer~~
 3 *At any time after commencement of the action a*
 4 *defendant, may move ex parte or, after the*

5 ~~service of his answer, on notice to the plaintiff.~~
6 ~~for leave as a third-party plaintiff, to serve~~
7 *may cause a summons and complaint to be*
8 *served upon a person not a party to the action*
9 *who is or may be liable to him for all or part*
10 *of the plaintiff's claim against him. The third-*
11 *party plaintiff need not obtain leave to make the*
12 *service if he files the third-party complaint not*
13 *later than 10 days after he serves his original*
14 *answer. Otherwise he must obtain leave on motion*
15 *upon notice to all parties to the action. If the*
16 ~~motion is granted and the summons and com-~~
17 ~~plaint are served, †The person so served with the~~
18 *summons and third-party complaint, hereinafter*
19 *called the third-party defendant, shall make*
20 *his defenses to the third-party plaintiff's claim*
21 *as provided in Rule 12 and his counterclaims*
22 *against the third-party plaintiff and cross-*
23 *claims against other third-party defendants as*
24 *provided in Rule 13. The third-party de-*
25 *fendant may assert against the plaintiff any*
26 *defenses which the third-party plaintiff has to*
27 *the plaintiff's claim. The third-party de-*
28 *fendant may also assert any claim against the*
29 *plaintiff arising out of the transaction or occur-*
30 *rence that is the subject matter of the plaintiff's*
31 *claim against the third-party plaintiff. The*
32 *plaintiff may assert any claim against the*
33 *third-party defendant arising out of the trans-*
34 *action or occurrence that is the subject matter*
35 *of the plaintiff's claim against the third-party*
36 *plaintiff, and the third-party defendant there-*
37 *upon shall assert his defenses as provided in*
38 *Rule 12 and his counterclaims and cross-claims*
39 *as provided in Rule 13. Any party may move*

40 *to strike the third-party claim, or for its severance*
41 *or separate trial. A third-party defendant*
42 *may proceed under this rule against any person*
43 *not a party to the action who is or may be*
44 *liable to him for all or part of the claim made*
45 *in the action against the third-party defendant.*

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

Rule 15. Amended and Supplemental Pleadings

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

ADVISORY COMMITTEE'S NOTE

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

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

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

Rule 24. Intervention

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

7 intervention is sought. The same procedure
8 shall be followed when a statute of the United
9 States gives a right to intervene. When the
10 constitutionality of an act of Congress affecting
11 the public interest is drawn in question in any
12 action to which the United States or an officer,
13 agency, or employee thereof is not a party, the
14 court shall notify the Attorney General of the
15 United States as provided in Title 28, U.S.C.,
16 § 2403.

ADVISORY COMMITTEE'S NOTE

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

Rule 25. Substitution of Parties

1 (a) DEATH.

2 (1) If a party dies and the claim is not
3 thereby extinguished, the court ~~within 2~~
4 ~~years after the death~~ may order substitution
5 of the proper parties. ~~If substitution is not~~
6 ~~so made, the action shall be dismissed as to~~
7 ~~the deceased party.~~ The motion for sub-
8 stitution may be made by *any party or by*
9 *the successors or representatives of the*
10 *deceased party or by any party* and, to-
11 *gether with the notice of hearing, shall be*
12 *served on the parties as provided in Rule 5*
13 *and upon persons not parties in the manner*
14 *provided in Rule 4 for the service of a*
15 *summons, and may be served in any judicial*
16 *district. Unless the motion for substitution*
17 *is made not later than 90 days after the death*
18 *is suggested upon the record by service of a*
19 *statement of the fact of the death as provided*

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

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

Rule 26. Depositions Pending Action

- 1 (e) OBJECTIONS TO ADMISSIBILITY. Subject
- 2 to the provisions of Rules 28(b) and 32(c), objec-
- 3 tion may be made at the trial or hearing to
- 4 receiving in evidence any deposition or part
- 5 thereof for any reason which would require the
- 6 exclusion of the evidence if the witness were then
- 7 present and testifying.

ADVISORY COMMITTEE'S NOTE

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

**Rule 28. Persons Before Whom Depositions
May Be Taken**

1 (b) IN FOREIGN COUNTRIES.* In a foreign
 2 ~~state or~~ country, depositions ~~shall~~ *may* be taken
 3 (1) on notice before a ~~secretary of embassy or~~
 4 ~~legation, consul general, consul, vice consul, or~~
 5 ~~consular agent of the United States person~~
 6 *authorized to administer oaths in the place in*
 7 *which the examination is held, either by the law*
 8 *thereof or by the law of the United States, or (2)*
 9 *before such a person or officer as may be ap-*
 10 *pointed by commission commissioned by the*
 11 *court, and a person so commissioned shall have*
 12 *the power by virtue of his commission to administer*
 13 *any necessary oath and take testimony, or (3)*
 14 ~~under~~ *pursuant to a letters rogatory. A com-*
 15 *mission or a letters rogatory shall be issued*
 16 ~~only when necessary or convenient,~~ on applica-
 17 tion and notice, and on ~~such~~ terms ~~and with~~
 18 ~~such directions as that~~ are just and appropriate.
 19 *It is not requisite to the issuance of a commission*
 20 *or a letter rogatory that the taking of the deposition*
 21 *in any other manner is impracticable or incon-*
 22 *venient; and both a commission and a letter roga-*
 23 *tory may be issued in proper cases. Officers may*
 24 ~~be designated in notices or commissions~~ *A*
 25 *notice or commission may designate the person*
 26 *before whom the deposition is to be taken either*
 27 *by name or descriptive title. and A letters*
 28 *rogatory may be addressed "To the Appropriate*

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

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

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

Rule 30. Depositions Upon Oral Examination

- 1 (f) CERTIFICATION AND FILING BY OFFICER;
- 2 COPIES; NOTICE OF FILING.
- 3 (1) The officer shall certify on the deposition
- 4 that the witness was duly sworn by him and
- 5 that the deposition is a true record of the testi-
- 6 mony given by the witness. He shall then
- 7 securely seal the deposition in an envelope
- 8 indorsed with the title of the action and marked
- 9 "Deposition of [here insert name of witness]"
- 10 and shall promptly file it with the court in which

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

ADVISORY COMMITTEE'S NOTE

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

Rule 41. Dismissal of Actions

1 (b) INVOLUNTARY DISMISSAL: EFFECT THERE-
2 OF. For failure of the plaintiff to prosecute or to
3 comply with these rules or any order of court, a
4 defendant may move for dismissal of an action or
5 of any claim against him. After the plaintiff,
6 *in an action tried by the court without a jury,*
7 has completed the presentation of his evidence,
8 the defendant, without waiving his right to offer
9 evidence in the event the motion is not granted,
10 may move for a dismissal on the ground that
11 upon the facts and the law the plaintiff has
12 shown no right to relief. ~~In an action tried~~
13 ~~by the court without a jury~~ ~~†~~The court as
14 trier of the facts may then determine them and
15 render judgment against the plaintiff or may
16 decline to render any judgment until the close of
17 all the evidence. If the court renders judgment
18 on the merits against the plaintiff, the court shall
19 make findings as provided in Rule 52(a). Unless
20 the court in its order for dismissal otherwise spec-
21 ifies, a dismissal under this subdivision and any
22 dismissal not provided for in this rule, other
23 than a dismissal for lack of jurisdiction or for
24 improper venue *or for lack of an indispensable*
25 *party*, operates as an adjudication upon the
26 merits.

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

Rule 49. Special Verdicts and Interrogatories

1 (b) GENERAL VERDICT ACCOMPANIED BY
2 ANSWER TO INTERROGATORIES. The court may
3 submit to the jury, together with appropriate
4 forms for a general verdict, written inter-
5 rogatories upon one or more issues of fact the
6 decision of which is necessary to a verdict.
7 The court shall give such explanation or in-
8 struction as may be necessary to enable the
9 jury both to make answers to the interrogatories
10 and to render a general verdict, and the court
11 shall direct the jury to make written
12 answers and to render a general verdict. When
13 the general verdict and the answers are har-
14 monious, ~~the court shall direct the entry of the~~
15 appropriate judgment upon the verdict and
16 answers *shall be entered pursuant to Rule 58.*
17 When the answers are consistent with each other
18 but one or more is inconsistent with the general
19 verdict, ~~the court may direct the entry of~~
20 judgment *may be entered pursuant to Rule 58*
21 in accordance with the answers, notwithstand-
22 ing the general verdict, or *the court* may return

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

ADVISORY COMMITTEE'S NOTE

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

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

1 (a) *MOTION FOR DIRECTED VERDICT: WHEN*
 2 *MADE; EFFECT.* A party who moves for a
 3 directed verdict at the close of the evidence
 4 offered by an opponent may offer evidence
 5 in the event that the motion is not granted,
 6 without having reserved the right so to do
 7 and to the same extent as if the motion had
 8 not been made. A motion for a directed
 9 verdict which is not granted is not a waiver
 10 of trial by jury even though all parties to the
 11 action have moved for directed verdicts. A
 12 motion for a directed verdict shall state the
 13 specific grounds therefor. *The order of the*
 14 *court granting a motion for a directed verdict*
 15 *is effective without any assent of the jury.*
 16 (b) ~~RESERVATION OF DECISION ON MOTION.~~
 17 *MOTION FOR JUDGMENT NOTWITHSTANDING THE*
 18 *VERDICT.* Whenever a motion for a directed

19 verdict made at the close of all the evidence is
20 denied or for any reason is not granted, the court
21 is deemed to have submitted the action to the
22 jury subject to a later determination of the legal
23 questions raised by the motion. ~~Within 10~~
24 ~~days after the reception of a verdict~~ *Not later*
25 *than 10 days after entry of judgment*, a party who
26 has moved for a directed verdict may move to
27 have the verdict and any judgment entered
28 thereon set aside and to have judgment entered
29 in accordance with his motion for a directed
30 verdict; or if a verdict was not returned such
31 party, within 10 days after the jury has been
32 discharged, may move for judgment in accord-
33 ance with his motion for a directed verdict. A
34 motion for a new trial may be joined with this
35 motion, or a new trial may be prayed for in the
36 alternative. If a verdict was returned the court
37 may allow the judgment to stand or may reopen
38 the judgment and either order a new trial or
39 direct the entry of judgment as if the requested
40 verdict had been directed. If no verdict was
41 returned the court may direct the entry of
42 judgment as if the requested verdict had been
43 directed or may order a new trial.

44 (c) *SAME: CONDITIONAL RULINGS ON GRANT OF*
45 *MOTION.*

46 (1) *If the motion for judgment notwithstand-*
47 *ing the verdict, provided for in subdivision (b) of*
48 *this rule, is granted, the court shall also rule on the*
49 *motion for a new trial, if any, by determining*
50 *whether it should be granted if the judgment is*
51 *thereafter vacated or reversed, and shall specify*
52 *the grounds for granting or denying the motion for*
53 *the new trial. If the motion for a new trial is thus*

54 conditionally granted, the order thereon does not
55 affect the finality of the judgment. In case the
56 motion for a new trial has been conditionally
57 granted and the judgment is reversed on appeal,
58 the new trial shall proceed unless the appellate
59 court has otherwise ordered. In case the motion for
60 a new trial has been conditionally denied, the
61 appellant on appeal may assert error in that denial,
62 and if the judgment is reversed on appeal, sub-
63 sequent proceedings shall be in accordance with
64 the order of the appellate court.

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

70 (d) *SAME: DENIAL OF MOTION.* If the motion for
71 judgment notwithstanding the verdict is denied,
72 the party who prevailed on that motion may, as
73 appellee, assert grounds entitling him to a new
74 trial in the event the appellate court concludes that
75 the trial court erred in denying the motion for
76 judgment notwithstanding the verdict. If the ap-
77 pellate court reverses the judgment, nothing in this
78 rule precludes it from determining that the appellee
79 is entitled to a new trial, or from directing the
80 trial court to determine whether a new trial shall
81 be granted.

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 52. Findings by the Court

1 (a) EFFECT. In all actions tried upon the facts
2 without a jury or with an advisory jury, the
3 court shall find the facts specially and state
4 separately its conclusions of law thereon, and
5 ~~direct the entry of the appropriate judgment~~
6 *shall be entered pursuant to Rule 58*; and in
7 granting or refusing interlocutory injunctions
8 the court shall similarly set forth the findings of
9 fact and conclusions of law which constitute the

10 grounds of its action. Requests for findings are
11 not necessary for purposes of review. Findings
12 of fact shall not be set aside unless clearly
13 erroneous, and due regard shall be given to the
14 opportunity of the trial court to judge of the
15 credibility of the witnesses. The findings of a
16 master, to the extent that the court adopts them,
17 shall be considered as the findings of the court.
18 If an opinion or memorandum of decision is filed,
19 it will be sufficient if the findings of fact and
20 conclusions of law appear therein. Findings of
21 fact and conclusions of law are unnecessary on
22 decisions of motions under Rules 12 or 56 or any
23 other motion except as provided in Rule 41(b).

ADVISORY COMMITTEE'S NOTE

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

Rule 56. Summary Judgment

1 (c) MOTION AND PROCEEDINGS THEREON.
2 The motion shall be served at least 10 days
3 before the time fixed for the hearing. The
4 adverse party prior to the day of hearing may
5 serve opposing affidavits. The judgment sought
6 shall be rendered forthwith if the pleadings,
7 depositions, *answers to interrogatories*, and ad-
8 missions on file, together with the affidavits, if
9 any, show that there is no genuine issue as to
10 any material fact and that the moving party
11 is entitled to a judgment as a matter of law.
12 A summary judgment, interlocutory in character,
13 may be rendered on the issue of liability alone

14 although there is a genuine issue as to the amount
15 of damages.

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

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

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

Rule 58. Entry of Judgment

1 Unless the court otherwise directs and sub-
2 ject to the provisions of Rule 54(b), judgment
3 upon the verdict of a jury shall be entered
4 forthwith by the clerk; but the court shall direct
5 the appropriate judgment to be entered upon a
6 special verdict or upon a general verdict accom-
7 panied by answers to interrogatories returned
8 by a jury pursuant to Rule 40. When the
9 court directs that a party recover only money
10 or costs or that all relief be denied, the clerk
11 shall enter judgment forthwith upon receipt by
12 him of the direction; but when the court directs
13 entry of judgment for other relief, the judge
14 shall promptly settle or approve the form of the
15 judgment and direct that it be entered by the
16 clerk. The notation of a judgment in the civil
17 docket as provided by Rule 70(a) constitutes
18 the entry of the judgment; and the judgment is
19 not effective before such entry. The entry of

20 ~~the judgment shall not be delayed for the taxing~~
21 ~~of costs.~~

22 *Subject to the provisions of Rule 54(b): (1)*
23 *upon a general verdict of a jury, or upon a decision*
24 *by the court that a party shall recover only a sum*
25 *certain or costs or that all relief shall be denied, the*
26 *clerk, unless the court otherwise orders, shall forth-*
27 *with prepare, sign, and enter the judgment without*
28 *awaiting any direction by the court; (2) upon a*
29 *decision by the court granting other relief, or upon*
30 *a special verdict or a general verdict accompanied*
31 *by answers to interrogatories, the court shall*
32 *promptly approve the form of the judgment, and*
33 *the clerk shall thereupon enter it. Every judgment*
34 *shall be set forth on a separate document. A judg-*
35 *ment is effective only when so set forth and when*
36 *entered as provided in Rule 79(a). Entry of the*
37 *judgment shall not be delayed for the taxing of*
38 *costs. Attorneys shall not submit forms of judg-*
39 *ment except upon direction of the court, and these*
40 *directions shall not be given as a matter of course.*

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

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

Rule 71A. Condemnation of Property

- 1 (d) PROCESS. * * *
- 2 (3) Service of Notice. (i) Personal service.
- 3 Personal service of the notice (but with-
- 4 out copies of the complaint) shall be made
- 5 in accordance with Rule 4 (c) and (d) upon
- 6 a defendant who resides within the United
- 7 States or its territories or insular possessions
- 8 and whose residence is known. ~~The provi-~~
- 9 sions of Rule 4(f) shall not be applicable.

ADVISORY COMMITTEE'S NOTE

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

Rule 77. District Courts and Clerks

- 1 (c) CLERK'S OFFICE AND ORDERS BY CLERK.
2 The clerk's office with the clerk or a deputy in
3 attendance shall be open during business hours
4 on all days except *Saturdays*, Sundays, and legal
5 holidays-, *but a district court may provide by local*
6 *rule or order that its clerk's office shall be open for*
7 *specified hours on Saturdays or particular legal*
8 *holidays other than New Year's Day, Washington's*
9 *Birthday, Memorial Day, Independence Day,*
10 *Labor Day, Veterans Day, Thanksgiving Day, and*
11 *Christmas Day.* All motions and applications in
12 the clerk's office for issuing mesne process, for
13 issuing final process to enforce and execute judg-
14 ments, for entering defaults or judgments by
15 default, and for other proceedings which do not
16 require allowance or order of the court are
17 grantable of course by the clerk; but his action
18 may be suspended or altered or rescinded by the
19 court upon cause shown.
- 20 (d) NOTICE OF ORDERS OR JUDGMENTS. Im-
21 mediately upon the entry of an order or judg-
22 ment the clerk shall serve a notice of the entry
23 by mail in the manner provided for in Rule 5
24 upon ~~every~~ *each* party ~~affected thereby~~ who is
25 not in default for failure to appear, and shall
26 make a note in the docket of the mailing. Such
27 mailing is sufficient notice for all purposes for
28 which notice of the entry of an order is required
29 by these rules; but any party may in addition
30 serve a notice of such entry in the manner pro-

31 vided in Rule 5 for the service of papers. Lack
32 of notice of the entry by the clerk does not affect
33 the time to appeal or relieve or authorize the
34 court to relieve a party for failure to appeal
35 within the time allowed, except as permitted in
36 Rule 73(a).

ADVISORY COMMITTEE'S NOTE

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

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

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

1 (a) CIVIL DOCKET. The clerk shall keep a
2 book known as "civil docket" of such form and
3 style as may be prescribed by the Director of
4 the Administrative Office of the United States
5 Courts with the approval of the Judicial Con-
6 ference of the United States, and shall enter
7 therein each civil action to which these rules are
8 made applicable. Actions shall be assigned con-
9 secutive file numbers. The file number of each
10 action shall be noted on the folio of the docket
11 whereon the first entry of the action is made.
12 All papers filed with the clerk, all process issued

13 and returns made thereon, all appearances,
14 orders, verdicts, and judgments shall be ~~noted~~
15 *entered* chronologically in the civil docket on the
16 folio assigned to the action and shall be marked
17 with its file number. These ~~notations~~ *entries*
18 shall be brief but shall show the nature of each
19 paper filed or writ issued and the substance of
20 each order or judgment of the court and of the
21 returns showing execution of process. The
22 ~~notation~~ *entry* of an order or judgment shall
23 show the date the ~~notation~~ *entry* is made.
24 When in an action trial by jury has been properly
25 demanded or ordered the clerk shall enter the
26 word "jury" on the folio assigned to that
27 action.

ADVISORY COMMITTEE'S NOTE

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

Rule 81. Applicability in General

1 (a) TO WHAT PROCEEDINGS APPLICABLE.
2 (4) These rules do not alter the method
3 prescribed by the Act of February 18, 1922, c.
4 57, § 2 (42 Stat. 388), U.S.C. Title 7, § 292; or
5 by the Act of June 10, 1920, c. 356, § 7 (46
6 Stat. 534), as amended, U.S.C., Title 7, §
7 499g(c), for instituting proceedings in the United
8 States district courts to review orders of the
9 Secretary of Agriculture; or prescribed by the
10 Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214),
11 U.S.C., Title 15, § 522, for instituting pro-
12 ceedings to review orders of the Secretary of
13 ~~Commerce~~ *the Interior*; or prescribed by the Act

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

21 (6) These rules apply to proceedings for
22 enforcement or review of compensation orders
23 under the Longshoremen's and Harbor Workers'
24 Compensation Act, Act of March 4, 1927, c.
25 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended,
26 U.S.C., Title 33, §§ 918, 921, except to the
27 extent that matters of procedure are provided
28 for in that Act. The provisions for service by
29 publication and for answer in proceedings to
30 cancel certificates of citizenship under the Act of
31 October 14, 1940, c. 876, § 238 (54 Stat. 1158),
32 U.S.C., Title 8, § 738, Act of June 27, 1952, c.
33 477, Title III, c. 2, § 340 (66 Stat. 260), U.S.C.,
34 Title 8, § 1451, remain in effect.

35 (c) REMOVED ACTIONS. These rules apply to
36 civil actions removed to the United States
37 district courts from the state courts and govern
38 procedure after removal. Repleading is not
39 necessary unless the court so orders. In a
40 removed action in which the defendant has not
41 answered, he shall answer or present the other
42 defenses or objections available to him under
43 these rules within 20 days after the receipt
44 through service or otherwise of a copy of the
45 initial pleading setting forth the claim for relief
46 upon which the action or proceeding is based,
47 or within 20 days after the service of summons
48 upon such initial pleading, then filed, or within

49 5 days after the filing of the petition for removal,
50 whichever period is longest. If at the time of
51 removal all necessary pleadings have been served,
52 a party entitled to trial by jury under Rule 38
53 shall be accorded it, if his demand therefor is
54 served within 10 days after the petition for
55 removal is filed if he is the petitioner, or if he is
56 not the petitioner within 10 days after service
57 on him of the notice of filing the petition. A
58 *party who, prior to removal, has made an express*
59 *demand for trial by jury in accordance with state*
60 *law, need not make a demand after removal. If*
61 *state law applicable in the court from which the*
62 *case is removed does not require the parties to make*
63 *express demands in order to claim trial by jury,*
64 *they need not make demands after removal unless*
65 *the court directs that they do so within a specified*
66 *time if they desire to claim trial by jury. The*
67 *court may make this direction on its own motion*
68 *and shall do so as a matter of course at the request*
69 *of any party. The failure of a party to make*
70 *dema n a s directed constitutes a waiver by him*
71 *of trial by jury.*

72 (f) REFERENCES TO OFFICER OF THE UNITED
73 STATES. Under any rule in which reference is
74 made to an officer or agency of the United States,
75 the term "officer" includes a ~~collector~~ *district*
76 *director* of internal revenue, a former *district*
77 *director* or collector of internal revenue, or the
78 personal representative of a deceased *district*
79 *director* or collector of internal revenue.

ADVISORY COMMITTEE'S NOTE

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

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

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

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

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

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

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

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

ADVISORY COMMITTEE'S NOTE

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

Form 3. Complaint on a Promissory Note

- 1 1. Allegation of jurisdiction.
- 2 2. Defendant on or about June 1, 1935, exe-
- 3 cuted and delivered to plaintiff a promissory
- 4 note [in the following words and figures: (here
- 5 set out the note verbatim)]; [a copy of which is
- 6 hereto annexed as Exhibit A]; [whereby defend-
- 7 ant promised to pay to plaintiff or order on
- 8 June 1, 1936 the sum of ~~ten thousand~~ -----
- 9 dollars with interest thereon at the rate of six
- 10 percent per annum].
- 11 3. Defendant owes to plaintiff the amount
- 12 of said note and interest.

13 Wherefore plaintiff demands judgment against
 14 defendant for the sum of ~~ten thousand~~
 15 ----- dollars, interest, and costs.

16 Signed: -----
 17 *Attorney for Plaintiff.*

18 Address: -----
 [Explanatory Note unchanged.]

Form 4. Complaint on an Account

- 1 1. Allegation of jurisdiction.
- 2 2. Defendant owes plaintiff ~~ten thousand~~
 3 ----- dollars according to the account
 4 hereto annexed as Exhibit A.
- 5 Wherefore (etc. as in Form 3).

Form 5. Complaint for Goods Sold and Delivered

- 1 -1. Allegation of jurisdiction.
- 2 2. Defendant owes plaintiff ~~ten thousand~~
 3 ----- dollars for goods sold and delivered
 4 by plaintiff to defendant between June 1, 1936
 5 and December 1, 1936.
- 6 Wherefore (etc. as in Form 3).
 [Explanatory Note unchanged.]

Form 6. Complaint for Money Lent

- 1 1. Allegation of jurisdiction.
- 2 2. Defendant owes plaintiff ~~ten thousand~~
 3 ----- dollars for money lent by plaintiff
 4 to defendant on June 1, 1936.
- 5 Wherefore (etc. as in Form 3).

Form 7. Complaint for Money Paid by Mistake

- 1 1. Allegation of jurisdiction.
- 2 2. Defendant owes plaintiff ~~ten thousand~~
 3 ----- dollars for money paid by plaintiff
 4 to defendant by mistake on June 1, 1936, under
 5 the following circumstances: [here state the
 6 circumstances with particularity—see Rule
 7 9(b)].
- 8 Wherefore (etc. as in Form 3).

Form 8. Complaint for Money Had and Received

- 1 1. Allegation of jurisdiction.
- 2 2. Defendant owes plaintiff ~~ten thousand~~
- 3 -----dollars for money had and received
- 4 from one G. H. on June 1, 1936, to be paid by
- 5 defendant to plaintiff.
- 6 Wherefore (etc. as in Form 3).

Form 9. Complaint for Negligence

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

- 1 Wherefore plaintiff demands judgment against
- 2 defendant in the sum of ~~ten thousand~~ -----
- 3 dollars and costs.

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

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

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

Form 11. Complaint for Conversion

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

6 value of ~~ten thousand~~ ----- dollars, the
 7 property of plaintiff.
 8 Wherefore plaintiff demands judgment against
 9 defendant in the sum of ~~ten thousand~~ -----
 10 dollars, interest, and costs.

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

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

1 Wherefore plaintiff demands (1) that de-
 2 fendant be required specifically to perform said
 3 agreement, (2) damages in the sum of one
 4 thousand dollars, and (3) that if specific per-
 5 formance is not granted plaintiff have judgment
 6 against defendant in the sum of ~~ten thousand~~
 7 ----- dollars.

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

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

1 Wherefore plaintiff demands:
 2 (1) That plaintiff have judgment against
 3 defendant C. D. for ~~ten thousand~~ -----
 4 dollars and interest; (2) that the aforesaid con-
 5 veyance to defendant E. F. be declared void and
 6 the judgment herein be declared a lien on said
 7 property; (3) that plaintiff have judgment
 8 against the defendants for costs.

Form 18. Complaint for Interpleader and Declaratory Relief

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

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

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

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

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

Form 16. Complaint for Infringement of Patent

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

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

ADVISORY COMMITTEE'S NOTE

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

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

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

1 United States District Court for the
2 Southern District of New York
3
4 Civil Action, File Number -----
5 A.B., Plaintiff
6 v.
7 C.D., Defendant and Third-Party } Summons
8 Plaintiff }
9 v.
10 E.F., Third-Party Defendant }
11 To the above-named Third-Party Defendant:
12 You are hereby summoned and required to
13 serve upon -----, plaintiff's at-
14 torney whose address is -----,
15 and upon -----, who is at-
16 torney for C.D., defendant and third-party
17 plaintiff, and whose address is -----
18 -----, an answer to the third-party complaint
19 which is herewith served upon you ~~and an an-~~
20 ~~swer to the complaint of the plaintiff, a copy of~~
21 ~~which is herewith served upon you,~~ within 20
22 days after the service of this summons upon you
23 exclusive of the day of service. If you fail to do
24 so, judgment by default will be taken against
25 you for the relief demanded in the third-party
26 complaint. *There is also served upon you here-*

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

29 -----,
 30 *Clerk of Court.*

31 [Seal of District Court]

32 Dated -----

33 United States District Court for the
 34 Southern District of New York
 35 Civil Action, File Number -----

36 A.B., Plaintiff

37 v.

38 C.D., Defendant and
 39 Third-Party Plaintiff

40 v.

41 E.F., Third-Party De-
 42 fendant

} Third-Party Com-
 } plaint.

43 1. Plaintiff A.B. has filed against defendant
 44 C.D. a complaint, a copy of which is hereto at-
 45 tached as "Exhibit C A."

46 2. (Here state the grounds upon which C.D.
 47 is entitled to recover from E.F., all or part of
 48 what A.B. may recover from C.D. The state-
 49 ment should be framed as in an original com-
 50 plaint.)

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

55 Signed: -----

56 Attorney for C.D., Third-Party Plaintiff.

57 Address: -----

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

ADVISORY COMMITTEE'S NOTE

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

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

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

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

1 *Defendant moves for leave, as third-party*
 2 *plaintiff, to cause to be served upon E.F. a sum-*
 3 *mons and third-party complaint, copies of which*
 4 *are hereto attached as Exhibit X.*

5 *Signed: -----*
 6 *Attorney for Defendant C.D.*
 7 *Address: -----*

8 *Notice of Motion*

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

11 *Exhibit X*
 12 *(Contents the same as in Form 22-A.)*

ADVISORY COMMITTEE'S NOTE

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

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

[NEW]

1 A.B. [describe as a party, or as executor,
 2 administrator, or other representative or suc-
 3 cessor of C.D., the deceased party] suggests
 4 upon the record, pursuant to Rule 25(a)(1),
 5 the death of C.D. [describe as party] during
 6 the pendency of this action.

Form 31. Judgment on Jury Verdict

[NEW]

1 United States District Court for the Southern
 2 District of New York
 3 Civil Action, File Number-----
 4 A.B., Plaintiff }
 5 v. } Judgment
 6 C.D., Defendant }
 7 This action came on for trial before the Court
 8 and a jury, Honorable John Marshall, District
 9 Judge, presiding, and the issues having been
 10 duly tried and the jury having duly rendered
 11 its verdict,
 12 It is Ordered and Adjudged
 13 [that the plaintiff A.B. recover of the de-
 14 fendant C.D. the sum of -----,

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

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

22 Dated at New York, New York, this -----
 23 ----- day of -----, 19-----

24 -----
 25 *Clerk of Court*

EXPLANATORY NOTE

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

7 2. The clerk, unless the court otherwise orders,
 8 is required forthwith to prepare, sign, and enter
 9 the judgment upon a general jury verdict with-
 10 out awaiting any direction by the court. The
 11 form of the judgment upon a special verdict or
 12 a general verdict accompanied by answers to
 13 interrogatories shall be promptly approved by
 14 the court, and the clerk shall thereupon enter it.
 15 See Rule 58, as amended.

16 3. The Rules contemplate a simple judgment
 17 promptly entered. See Rule 54(a). Every judg-
 18 ment shall be set forth on a separate document.
 19 See Rule 58, as amended.

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

Form 32. Judgment on Decision by the Court

[NEW]

1 United States District Court for the Southern
 2 District of New York
 3 Civil Action, File Number.....
 4 A.B., Plaintiff }
 5 v. } Judgment
 6 C.D., Defendant }
 7 This action came on for [trial] [hearing] before
 8 the Court, *Honorable John Marshall*, District
 9 Judge, presiding, and the issues having been
 10 duly [tried] [heard] and a decision having been
 11 duly rendered,
 12 It is Ordered and Adjudged
 13 [that the plaintiff A.B. recover of the de-
 14 fendant C.D. the sum of -----,
 15 with interest thereon at the rate of -----
 16 per cent as provided by law, and his costs
 17 of action.]
 18 [that the plaintiff take nothing, that the
 19 action be dismissed on the merits, and that the
 20 defendant C.D. recover of the plaintiff A.B.
 21 his costs of action.]
 22 Dated at New York, New York, this -----
 23 day of -----, 19-----
 24 -----
 25 *Clerk of Court*

EXPLANATORY NOTE

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

4 awarding a party only money damages or costs,
 5 but is adaptable to other decisions by the court.
 6 2. The clerk, unless the court otherwise orders,
 7 is required forthwith, without awaiting any
 8 direction by the court, to prepare, sign, and
 9 enter the judgment upon a decision by the court
 10 that a party shall recover only a sum certain or
 11 costs or that all relief shall be denied. The form
 12 of the judgment upon a decision by the court
 13 granting other relief shall be promptly approved
 14 by the court, and the clerk shall thereupon
 15 enter it. See Rule 58, as amended.
 16 3. See also paragraphs 3-4 of the Explana-
 17 tory Note to Form 31.

Rule 86. Effective Date

1 (c) *EFFECTIVE DATE OF AMENDMENTS.* The
 2 amendments adopted by the Supreme Court on
 3 -----, 196-, and transmitted to
 4 the Congress on -----, 196-,
 5 shall take effect on -----, 196-.
 6 They govern all proceedings in actions brought
 7 after they take effect and also all further proceed-
 8 ings in actions then pending, except to the extent
 9 that in the opinion of the court their application
 10 in a particular action pending when the amend-
 11 ments take effect would not be feasible or
 12 would work injustice, in which event the former
 13 procedure applies.

August 13, 1962

REPORT BY ADVISORY COMMITTEE ON ADMIRALTY
RULES TO THE STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES

One of the first actions taken by the Standing Committee was the adoption of a motion formally requesting the Advisory Committee on Admiralty Rules to make an inquiry into the question of the desirability of unifying or integrating the admiralty and civil rules, and to report back to the Standing Committee. Before the Admiralty Committee could undertake studies in response to that request, it was confronted with the emergency task of making the surveys and inquiries and recommendations suggested by the Supreme Court in *Miner v. Atlass*, 363 U.S. 641, which had invalidated the local rules relating to discovery depositions prevailing in a number of districts. The Committee was thus diverted to this other task which finally resulted in our recommendation to the Standing Committee of the Amendments to the Rules of Practice in Admiralty and Maritime Cases which your Committee approved and which were ultimately adopted by the Supreme Court, becoming effective July 19, 1961.

Since that time the Advisory Committee on Admiralty Rules has given its undivided attention to the problem presented

by the original inquiry of the Standing Committee with respect to unification of the civil and admiralty rules. It has held meetings on September 18, 1961, January 22, 23, 24, 1962, and June 11, 12 and 13, 1962. At the conclusion of its last meeting the Committee adopted the following motion:

"That it is the sense of this Committee that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings; that we so report to the standing Committee; that we further report to that Committee that we now conceive our future task to be the effectuation of that unification."

Twelve of the thirteen members of the Committee voted in favor of the motion; the single negative vote was not a vote against the desirability or feasibility of unification. The member so voting did so only because of his objection to the phrasing of the motion. He wished to exclude the reference to "certain rules for dealing with special admiralty proceedings".

The Committee is therefore able to make this progress report to the effect that its work has proceeded to a point where it is able to express its unanimous agreement that the inquiry addressed to the Advisory Committee on Admiralty Rules by the Standing Committee should be answered in the affirmative.

Our mode of procedure has been as follows: Our Reporter has prepared suggested sample sets of possible unified rules. After a first such draft was considered by the Committee,

the Reporter produced a second draft incorporating suggestions made by or to the Committee. This further draft has had much study by the Committee.

There has been made available to the members of the Standing Committee a revised summary of how the existing rules would be disposed of in such a unification. This summary should be added to this report.

The work of revising and completing the current draft of the sample set of rules has not been completed. Some difficult problems remain to be solved; but the Committee has reached the point where it has been able to ascertain, as reflected by the action taken by the Committee, that these problems are capable of solution.

Our Reporter, Professor Brainerd Currie, has set forth the following statement of some of the problems of unification. It is illustrative only.

"Unification does not mean complete uniformity. No one has ever suggested that unification could be accomplished by revoking the Admiralty Rules and making the Civil Rules applicable to what are now admiralty cases. There must be special rules to take care of certain admiralty proceedings heretofore unknown to the Civil Practice, such as attachment and garnishment, actions in rem, and proceedings for limitation of

liability. These matters have been dealt with in a set of Supplemental Rules, so constructed as not to have any impact on the civil practice. In the main body of the unified rules uniformity is highly desirable; yet in those few instances in which it does not seem that early agreement on a uniform rule is feasible, exceptions can be made: There can be differential treatment depending on the ground of jurisdiction invoked by the plaintiff. Of course, each exceptions should be kept to a minimum; to multiply them unnecessarily would detract from the desirability of unification. For this reason there should be full cooperation by the two Advisory Committees in an effort to achieve the maximum degree of uniformity.

Most of the Civil Rules are either identical with existing Admiralty Rules or can be applied to admiralty cases without difficulty. Most of the problems involved in agreeing on a uniform rule have been satisfactorily solved, or are minor. Thus the basic problem of the right to jury trial was solved, to the satisfaction of the Advisory Committee on Admiralty Rules, at an early stage. Our purpose was to preserve the status quo: neither to enlarge nor to curtail the right to jury trial. At the present time a suitor wishing to avoid jury trial files a libel in admiralty; a suitor wishing to insure jury trial (if his claim is within the saving-to-suitors clause) files a civil

action. By providing for one form of action, to be commenced by the filing of a complaint, unification will remove this method of differentiating between cases in which there is a right to jury trial from those in which there is no such right. But unification, as envisaged, would preserve the status quo, and in particular the plaintiff's control over the question of jury trial, but (1) providing that the rules do not impair any constitutional or statutory right to jury trial and (2) providing that the rules do not create any right to jury trial when the plaintiff invokes only the admiralty jurisdiction.

Illustrative of the minor problems, and incidentally of the contribution which the study of unification is capable of making to general improvement of the practice, is the time for appeal. In the beginning there was some ground for anticipating that there would be sentiment for retaining the present times for appeals in admiralty cases (90 days, fifteen days for interlocutory appeals). These would be superimposed on the present times for appeal in civil cases (30 days, 60 when the United States is a party, plus one or two special statutory provisions). After some discussion, however, the Advisory Committee on Admiralty Rules unanimously voted in favor of a single time of 30 days for all cases. This rather bold and original move in the direction of uniformity and simplification was made un-

animously, and present indications are that it will be regarded sympathetically by the Civil Committee. There may be objection from the Government, but at our last meeting the Admiralty Committee voted to adhere to its recommendation. Even if it should turn out in the end that agreement cannot be reached on a single time for appeal for all cases, it is evident that agreement can be reached on a uniform rule without distinction between suits in admiralty and civil actions.

It appears that there are probably only two problems that are serious in the sense that agreement on a rule uniformly applicable to civil and admiralty cases may not be likely in the near future.

The first of these concerns third-party practice. This practice originated in admiralty (Admiralty Rule 56), and the original Civil Rule (FRCP 14) was modeled on the Admiralty Rule. Like the admiralty practice, the Civil Rule originally contemplated that the defendant could bring in a third-party defendant not only on the ground of indemnification but also on the ground that the third-party defendant is liable directly to the plaintiff: in other words, that the defendant could tender a new defendant to the plaintiff, and demand that the plaintiff take judgment against him. This feature of the Civil practice encountered two difficulties: (1) In diversity cases, the addi-

tion of a party having the same citizenship as the plaintiff was held to destroy jurisdiction; (2) if the plaintiff refused to amend his complaint and demand judgment against the third-party defendant, there was no way of requiring him to do so. Minor adjustments in the rule might have dealt with these difficulties. Instead, the Civil Rule was amended to abandon this feature of third-party practice altogether, so that the third-party defendant can be impleaded only on the ground of liability over to the defendant.

This feature of the practice, however, is an important implementation of a substantive right under the maritime law. At least in collision cases, and probably in some other cases of maritime tort, it is to the defendant's advantage as a matter of law to implead another party who may be jointly liable to the plaintiff. This is so because of the maritime rule of divided damages, and because of the practice of entering conditional decrees when joint tortfeasors are sued together. Thus if the innocent victim of a mutual-fault collision between two vessels sues only one of the vessels, he is entitled to unconditional judgment for his full damage; but if the vessel sued can implead the other, and mutual fault is found, the decree against each will be in the first instance for only a moiety of the plaintiff's damage, and the original defendant will be liable for the

whole only in the event that the plaintiff cannot collect from the third-party defendant. Our Committee feels that it is important to preserve this procedure.

We have considered several ways of dealing with this problem. Unless, as seems unlikely, the Civil Committee is prepared to return to a modified version of its practice prior to the amendment of FRCP 14, it appears that we shall have to make a differentiation on jurisdictional lines, retaining the admiralty practice for cases founded solely on the admiralty jurisdiction.

The second of the relatively serious problems concerns FRCP 26(a) and depositions. The stumbling-block here is the requirement of leave of court when the plaintiff serves a deposition notice within 20 days after commencement of the action. Because of its reservations as to this feature of the Rule, our Committee, in adopting the substance of Rule 26 as a new Admiralty Rule, provided that depositions may also be taken in accordance with the de bene esse statutes, which, whatever their limitations, do not require leave. Our Committee objects to the 20-day rule as it stands because (1) it is often inconvenient to obtain leave of court when it is desired to take the deposition of a witness who is about to leave the jurisdiction, and because (2) the rule of thumb concerning the order in which depositions are taken

("first come, first served"), which has grown outside the Rules, is nevertheless based on the 20-day requirement. Probably the latter objection is not peculiar in any way to the admiralty practice, and is just as much a problem for the Civil Committee. While the first is not necessarily peculiar to admiralty, the feeling is that the problem of the departing witness is especially acute because of the mobility of vessels and maritime personnel.

Preliminary discussions have indicated that there is not much hope of early agreement on a uniform rule, so that differential treatment may be necessary here also. As a result of our most recent meeting, however, it appears that there may be good prospects of agreement on a modification of FRCP 26(a) dispensing with the requirement of leave where there is an affidavit to the effect that the witness is about to become unavailable."

Respectfully submitted,

Bailey Aloxich
Charles L. Black, Jr.
Stuart B. Bradley
Herbert W. Christenberry
Leavenworth Colby
Edward J. Dimock
Abraham E. Freedman
William A. Grimes
Harold M. Kennedy
Sam L. Levinson
John C. McHose
W. J. Symmers
Walter L. Pope, Chairman

Brainerd Currie, Reporter

MEMORANDUM ON THE FEASIBILITY OF UNIFICATION

February, 1962

Now that the Advisory Committee has devoted two full meetings to consideration of the feasibility and desirability of unifying the Civil and Admiralty rules, the following summary can be made. This may be regarded as a revision of the memorandum of August 9, 1960, on feasibility.

1. The following Civil and Admiralty rules are identical, or substantially so. The enumeration does not include Admiralty rules that are in principle the same as various provisions of the Civil Rules. (A separate memorandum included in the new draft of "Sample" Unified Rules shows the disposition of each Admiralty rule.)

FRCP	ADMIRALTY	SUBJECT
3	1	Commencement of Action
16	44 1/2	Pre-Trial Procedure; Formulating Issues
27	30B	Depositions before Action or Pending Appeal
28	30C	Persons before Whom Depositions May Be Taken
29	30D	Stipulations regarding the Taking of Depositions
30	30E	Depositions upon Oral Examination
31	30F	Depositions of Witnesses upon Written Interrogatories
32	30G	Effect of Errors and Irregularities in Depositions
34	32	Discovery and Production of Documents and Things for Inspection, Copying, or Photographing
35	32A	Physical and Mental Examination of Persons
36	32B	Admission of Facts and of Genuineness of Documents
37	32C	Refusal to Make Discovery: Consequences
43(b)	46A	Evidence: (b) Scope of Examination and Cross-examination
45	32D	Subpoena
56	58	Summary Judgment
57	59	Declaratory Judgments
83	44	Rules by District Courts

2. The following Civil Rules can be incorporated in unified rules with no substantial problem so far as the admiralty practice is concerned. This means that no objection has been voiced either in MLA Document 375 or in the course of the Committee's consideration of unification, or that objections have been found unsubstantial.

FRCP	SUBJECT
5	Service and Filing of Pleadings and Other Papers
9	Pleading Special Matters
10	Form of Pleadings
19	Necessary Joinder of Parties
20	Permissive Joinder of Parties
21	Misjoinder and Non-Joinder of Parties
22	Interpleader
23	Class Actions
24	Intervention
25	Substitution of Parties
39	Trial by Jury or by the Court
40	Assignment of Cases for Trial
41	Dismissal of Actions
42	Consolidation; Separate Trials
43	Evidence
44	Proof of Official Record
46	Exceptions Unnecessary
47	Jurors
48	Juries of Less Than Twelve--Majority Verdict
49	Special Verdicts and Interrogatories
50	Motion for a Directed Verdict
51	Instructions to Jury: Objection
52	Findings by the Court
59	New Trials; Amendment of Judgments
60	Relief From Judgment or Order
61	Harmless Error
65	Injunctions
66	Receivers Appointed by Federal Courts
69	Execution
70	Judgment for Specific Acts; Vesting Title
71	Process in Behalf of and Against Persons Not Parties
71A	Condemnation of property
72	Appeal from a District Court to the Supreme Court
74	Joint or Several Appeals to the Supreme Court or to a Circuit Court of Appeals; Summons and Severance Abolished
75	Record on Appeal to a Circuit Court of Appeals
76	Record on Appeal to a Circuit Court of Appeals; Agreed Statement
77	District Courts and Clerks
78	Motion Day
79	Books and Records Kept by the Clerk and Entries Therein
80	Stenographer; Stenographic Report or Transcript as Evidence
82	Jurisdiction and Venue Unaffected
84	Forms
85	Title
86	Effective Date

3. The following Civil Rules, considered as unified rules, raise more or less substantial problems that have been solved, or may have to be solved, by providing for differential treatment of actions founded on the admiralty and maritime jurisdiction:

FRCP	SUBJECT
2	One Form of Action
<u>14</u>	Third-party practice
<u>38</u>	Jury trial of Right
<u>26</u>	Depositions Pending Action (the twenty-day rule)
<u>33</u>	Interrogatories to Parties (the 10-day rule)

With respect to the rules in brackets the problem may still be solved by agreement with the Civil Rules Committee on a uniform rule.

4. The following Civil Rules, considered as unified rules, raise more or less substantial problems that have been solved, or can readily be solved, without resort to differential treatment based on jurisdictional grounds (except that the bracketed rules may have to be solved by such differential treatment). In some instances agreement must be reached with the Civil Rules Committee on the particular solution reached by the Admiralty Committee; but in each instance agreement on a uniform rule seems possible.

FRCP	SUBJECT
4	Process
6	Time
7	Pleadings Allowed; Form of Motions
8	General Rules of Pleading
11	Signing of Pleadings
12	Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings
13	Counterclaim and Cross-Claim
15	Amended and Supplemental Pleadings
17	Parties Plaintiff and Defendant; Capacity
18	Joinder of Claims and Remedies
<u>26</u>	Depositions Pending Action
<u>33</u>	Interrogatories to Parties
53	Masters
54	Judgments; Costs
55	Default
58	Entry of Judgment
:	Stay of Proceedings To Enforce a Judgment
63	Disability of a Judge
64	Seizure of Person or Property
68	Offer of Judgment
73	Appeal to a Circuit Court of Appeals

5. A few Civil Rules such as FRCP 1 (Scope of rules), 2 (One form of action), and 81 (Applicability in general) raise no problem as unified rules, but go to the essence of unification. The incorporation of these rules as modified may encounter resistance; but such resistance goes not to the feasibility but to the desirability of unification. Similarly, there may remain resistance to the treatment of terminology, counterclaims, joinder, and jury trial although all problems of feasibility associated with these matters have been solved.

6. The rules relating to the distinctively maritime remedies (maritime attachment and garnishment, actions in rem, and limitation of liability) are collected in a set of Supplemental Rules. There are relatively few problems, all susceptible of ready solution. Whatever the problems, they are not problems of unification, since they concern only proceedings founded solely on the admiralty and maritime jurisdiction. Their solution does not involve agreement with the Civil Rules Committee. Since these rules are not physically part of the Federal Rules of Civil Procedure the problems can be treated without fear of unduly encumbering those rules.

July 13, 1962

To the Honorable Albert B. Maris, Chairman, and the Members of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

The following is a progress report of the Advisory Committee on Bankruptcy Rules.

The Advisory Committee on Bankruptcy Rules is engaged in a study of the General Orders and Official Forms in Bankruptcy. The Orders and Forms, promulgated by the Supreme Court pursuant to the authority granted by section 30 of the Bankruptcy Act, are valid only insofar as consistent with the Act.

The Committee has had two meetings of two days each, the first in December 1960 and the second in October 1961. A three-day meeting scheduled for May 2, 3, and 4 of this year was postponed because of the deficiency in the appropriation. The agenda for that meeting included proposed amendments of about forty of the General Orders and Official Forms and proposals for about ten new Orders or Forms. The meetings held have been well attended and have been fruitful. The Committee has been materially aided in its deliberations by the presence and active participation in the discussion of Judge Maris at its first meeting and, at both its meetings, of Professor J. W. Moore of the Standing Committee and Edwin Covey, Chief of the Bankruptcy Division of the Administrative Office.

The Advisory Committee has twelve members in addition to the Chairman. It has lost one member by death, and he has been replaced. The original terms of the appointments of six of the members expire on September 30, 1962.

Amendments of twelve General Orders and twenty-three Official Forms as recommended by the Advisory Committee and approved by the Standing Committee and the Judicial Conference became effective on July 19, 1961, by order of the Supreme Court. On the same date and by the same action three new Official Forms were established, and nine were abrogated. These amendments were restricted in scope to those required (1) to bring the General Orders and Official Forms into harmony with recent amendments of the Bankruptcy Act, (2) to bring them into harmony with current and sound practice, and (3) to correct obvious departures from approved form.

Six matters have been specifically referred to the Advisory Committee through the Standing Committee by the Judicial Conference: (1) the improvement of procedures in installment fee cases under General Order 35(4); (2) elimination of the oath on proofs of claim; (3) revision of Schedule B-4 in conformity to a proposed amendment of section 60d of the Bankruptcy Act; (4) the proposal of the Bankruptcy Division of the Administrative Office to establish panels of standing trustees to handle small cases; (5) the question whether referees should preside over jury trials in proceedings authorized by the Bankruptcy Act; and (6) a proposal to amend General Order 45 to make

employees of the Judicial Branch and the Department of Justice of the United States ineligible for appointment or employment as auctioneers, appraisers, or accountants in bankruptcy cases. The status of these matters will be indicated in brief statements about each as follows.

(1) The agenda for the postponed meeting of the Advisory Committee includes drafts of a proposed revision of General Order 35(4) and of new Official Forms for an Application for Permission to Pay Filing Fees in Installments and for an Order for Payment of Filing Fees in Installments. Discussions at two meetings and a considerable exchange of correspondence have explored the subject of installment fees rather fully, and the issues remaining to be resolved are fairly narrow.

(2) Elimination of the oath on proofs of claim was accomplished by the amendments ^{to} the Official Forms promulgated last year. The agenda for the postponed meeting includes proposals for further simplification of the forms for proofs of claim.

(3) A draft of a revision of Schedule B-4 in conformity with the proposed amendment of section 60d in H.R. 5149 now pending in Congress has been drafted. When and if the proposal is enacted, an appropriate revision of the schedule will be submitted by the Advisory Committee for approval.

(4) The proposal to establish panels of trustees for small cases and other aspects of administering the enormous burden of no-asset and nominal-asset cases have received extended attention at both

meetings of the Advisory Committee. It is in this area that differences of opinion among members of the Committee are most pronounced. Like differences, it should be added, develop in most discussions of this subject, and generally acceptable solutions are elusive. The Administrative Office of United States Courts has made a survey of the administration of no-asset cases among a number of selected districts and has furnished tabulated results to the Committee, but the implications have not yet been fully considered. The Advisory Committee is not ready to submit a recommendation on this matter.

(5) The propriety of the conduct of jury trials by referees was extensively discussed at the first meeting of the Advisory Committee. The Committee was impressed by two facts: (1) that the demands for jury trial in bankruptcy proceedings are exceedingly few and far between; and (2) that there appears to be a general antipathy toward use of the rule-making power to dilute or modify traditional rights to jury trial, whether derived from constitutional or statutory sources. Nonetheless the Committee resolved tentatively to approve a revision of General Order 12 which would assure a jury trial before a judge in any bankruptcy proceeding only if request for a judge had been coupled with the demand for jury trial made pursuant to the Act. Pending completion of its study of other aspects of General Order 12 the Committee was disposed to postpone submitting a final recommendation on this matter.

(6) The proposed amendment of General Order 45 was attributable to a situation that developed in one federal district where the judges' bailiffs were uniformly appointed as appraisers in all bankruptcy proceedings. After disapproval of the practice by the Judicial Conference the judges of the court in question promulgated a district rule to prohibit it. Although the immediate cause of the reference to the Advisory Committee has been dissolved, the Committee has proceeded to consider the Conference's suggestion in company with a number of other proposals affecting General Order 45. It appears to be close to agreement on a draft of a revision of this Order.

The Committee on Bankruptcy Rules has received a large number of recommendations for changes affecting practically every one of the General Orders and Official Forms. Recommendations come not only from such organizations as the National Bankruptcy Conference and the National Association of Referees in Bankruptcy but from individual members of the bench and bar and from staff members in governmental agencies. Additionally an increasing number of proposals are being received which contemplate new Orders or Forms. The Reporter is undertaking preliminary evaluations of the proposals and preparation of drafts for those susceptible of formulation.

H.R. 7405, now pending in Congress, would amend title 28 of the United States Code by inserting a new section 2075 to confer rule-making power on the Supreme Court in respect to practice and procedure

under the Bankruptcy Act in terms comparable to the grants in other areas of federal procedure. Section 30 of the Bankruptcy Act would be repealed. H.R. 7405 passed the House without amendment on 7 August 1961, and it is understood that passage by the Senate during this Second Session of the 87th Congress is likely. The immediate result of enactment of H.R. 7405 would be to impress a new pattern on the procedure to be pursued in prescribing and amending bankruptcy rules and forms, which do not now need to be reported to Congress. Enactment would, moreover, make appropriate a consideration of the question whether new rules and forms of practice and procedure under the Bankruptcy Act should be formulated. Such rules would presumably merge the General Orders and procedural provisions of the Bankruptcy Act and would supersede the latter. Reforms not now within the jurisdiction of the Committee on Rules of Practice and Procedure and the Advisory Committee on Bankruptcy Rules could be studied and proposed. The dimensions of such a project would be substantially different from those of the present assignment of the Advisory Committee on Bankruptcy Rules.

MEMORANDUM

TO: Judge Albert B. Maris, Chairman, Committee on Rules of Practice and Procedure

FROM: Judge John C. Pickett, Chairman, Advisory Committee on Criminal Rules

RE: Report of Advisory Committee on Criminal Rules.

1. The Advisory Committee on Criminal Rules has had three meetings--October 14, 1960; May 31-June 2, 1961; and October 30-November 1, 1961. All members of the Committee were present at each of these meetings. A fourth meeting, scheduled for April, 1962, was cancelled for budgetary reasons.

2. At its first meeting the Advisory Committee adopted the following motion: "That the Committee proceed to a study of all the Criminal Rules, but that any tentative or final report on its recommendations be held in abeyance until the entire study has been completed, except where a situation otherwise requires."

3. The Reporter has now completed a study of all of the rules and has made tentative recommendations concerning them. The Committee has discussed in meetings substantially all of these recommendations. Proposals for amendments to Rules 4, 15, 17-21, 23, 24, 28-31, 33-35, 45, 49, and 54-56 are substantially in form for circulation to the bench and bar for comment and criticism. More important and difficult problems concerning Rules 5, 6, 8, 11, 14, 16, 32, 37, 44, and 46 are on the agenda for discussion and determination at a meeting to be held early in October.

4. It is planned that shortly after the October meeting the Committee will have ready for circulation to the bench and bar its recommendations for all of the proposed amendments which have been the subject of Committee discussion. If work on some rules is not completed at that meeting they will be withheld for further study and later recommendations.

STATEMENT OF THE PROGRESS
OF THE WORK OF
THE ADVISORY COMMITTEE ON APPELLATE RULES

JULY 1962

To the Committee on Rules of Practice and Procedure:

The Committee on Rules of Practice and Procedure has instructed the Advisory Committee on Appellate Rules (1) to present a proposed draft of a uniform rule for review of decisions of the Tax Court of the United States, and (2) to undertake a comprehensive study of appellate procedure in the courts of appeals of the United States for the purpose of presenting its recommendations for improvement of present procedures.

(1) The Uniform Rule for Review of Decisions of the
Tax Court of the United States

In November, 1960, the Appellate Rules Committee submitted to the Standing Committee a draft of a proposed rule for review of decisions of the Tax Court. The draft was then submitted to the Bench and Bar for criticisms. A number of suggestions were received, and in the meantime the Appellate Rules Committee had tentatively determined as a result of its general study to recommend certain changes in appellate practice which it was thought desirable to incorporate in the Tax Court Rule. Accordingly, in March, 1962, it submitted a second proposed draft to the Standing Committee. This draft has recently been submitted to the Bench and Bar for criticisms. The Committee will consider a final proposed draft at its next meeting.

(2) Study of Appellate Procedure in the United States
Courts of Appeals

The Appellate Rules Committee is now studying the statutes, rules and practices which touch upon the work of the United States courts of appeals and the judges thereof. This study includes provisions respecting appeals which are now contained in the Civil, Criminal and Admiralty Rules and in the Bankruptcy Act and the General Orders. The Committee feels that its recommendations to the Standing Committee can be set forth most precisely and effectively in a set of rules regulating the whole of the practice and procedure in the courts of appeals from the invocation of jurisdiction to ultimate disposition of the case. It has accordingly undertaken to present a draft of such a set of rules to the Standing Committee.

The Committee is working from an outline in the form of tentative descriptive titles of rules. In general, its procedure is this: (1) following preparation and distribution of relevant materials, titles are placed on the agenda for general discussion and agreement on principles and content; (2) a tentative draft incorporating the decisions reached as a result of the general discussion is then prepared and circulated for detailed consideration at the next meeting; and (3) following consideration of the tentative draft, a preliminary draft is prepared for adoption by the Committee and, ultimately, for presentation to the Standing Committee.

The general scope of the Committee's work and its progress to date may best be indicated by setting out its working outline of titles together with a brief statement of the present status of each title in terms of the three-step process described in the paragraph above:

I. GENERAL PROVISIONS.

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(Tentative draft considered; preliminary draft in preparation.)

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(Reserved pending decisions on extent of coverage of the rules.)

II. APPEALS FROM JUDGMENTS AND ORDERS OF THE DISTRICT COURTS

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(Tentative draft considered; preliminary draft in preparation.)

Rule 6. Appeals -- When Taken.

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Respectfully submitted,

Bernard J. Ward

Reporter

Advisory Committee on Appellate Rules

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