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# Missouri Law Review

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## **PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THEIR SIGNIFICANCE TO MISSOURI LAWYERS**

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The Federal Rules of Civil Procedure, having been tested since September, 1938, in the crucible of litigation, the Supreme Court's Advisory Committee thereon, in May, 1944, issued a preliminary draft of proposed amendments to these rules. After this draft had been analyzed and criticized by the legal profession, a second and amended draft was published in May, 1945. It is this second draft which I shall discuss.

The amendments proposed therein are of peculiar significance to Missouri lawyers, for, if adopted, they not only will affect local practitioners in their practice in federal courts, but they will also raise the question whether the corresponding local rules of procedure should be amended.

There follows in their present and amended forms those rules which it is proposed should be amended and a discussion of suggested amendments. Material in the present form of those rules which it is suggested should be eliminated has been printed in bold face type and enclosed in parentheses. Proposed new material is italicized.

### RULE 6. TIME.

(b) ENLARGEMENT. When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if (application) *request* therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion *made after the expiration of the specified period* permit the act to be done (after

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the expiration of the specified period) where the failure to act was the result of excusable neglect; but it may not (enlarge the period) *extend the time* for taking any action under (Rule 59, except as stated in subdivision (e) thereof) *Rules 25, 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them, (or the period for an appeal as provided by law.)*

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

Under this rule, as presently drafted, the long-standing law that a court loses jurisdiction to alter its judgments after the expiration of the term at which they are rendered<sup>1</sup> is abrogated and the court is given discretion, even after the expiration of specified periods prescribed for taking actions, to allow further time for taking them, except that the times granted within which to make a motion for a new trial (other than on the ground of newly discovered evidence) and to take an appeal may not be extended. The result is that in many instances the finality of judgments may be extended indefinitely within the discretion of a district court. Thus, it has been held that a motion under Rule 52 (b) to amend and supplement the findings, if made with the court's permission after the time allowed by Rule 52 (b) to make the motion, was timely made and deprived the judgment of the finality essential to appealability.<sup>2</sup> The same has been held in relation to motions tardily made under Rule 60 (b) to set aside a default judgment.<sup>3</sup> Further, the time permitted by Rule 73 (g) within which to file a record on appeal has been extended, though the motion to be allowed to file the record late was not made until after the time for filing provided by the rule had passed and though no notice was given to the appellee of the motion and there was no hearing on the motion.<sup>4</sup>

Though the old rule was considered too narrow, the new rule is believed unduly to delay the finality of judgments. The suggested remedy for

1. FREEMAN, JUDGMENTS (5th ed. 1925) 381-386.

2. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203 (1943).  
*Coca-Cola Co. v. Busch* 7 Fed. Rule Serv. 883 (E.D. Pa. 1943).

3. *Schram v. O'Connor*, 2 F.R.D. 192 (E.D. Mich. 1941).

4. *Ainsworth v. Gill Glass & Fixture Co.*, 104 F. (2d) 83 (C.C.A. 3d, 1939)

this is to increase the exceptions to the court's discretion to extend times provided for doing acts and to lengthen any of the excepted periods which it is believed are too short and to shorten excepted periods which are considered too long.

Hence, proposed amendments prohibit extension of the period allowed to substitute parties,<sup>5</sup> to move to have judgment entered in accordance with a motion for a directed verdict,<sup>6</sup> for an amendment of findings or the making of additional findings after judgment,<sup>7</sup> for alteration or amendment of a judgment,<sup>8</sup> or for relief from a judgment.<sup>9</sup> The exceptions relating to the granting of a new trial<sup>10</sup> and to the time in which to appeal are retained.<sup>11</sup> The time to move for relief from a judgment has been enlarged from six months to a year<sup>12</sup> and the time in which to appeal has been reduced to 30 days from the entry of the judgment appealed from except when the United States is a party in which cases the time allowed is 60 days.<sup>13</sup>

Other changes in Rule 6 are meant to clarify, rather than to change, it. Thus, in Rule 6 (b) "request" replaces "application" because an "application," according to Rule 7 (b), is made by a motion and the application referred to in Rule 6 (b) is not a motion.

Inserting, in Rule 6 (b), the words "made after the expiration of the specified period" after "motion" and eliminating, "after the expiration of the specified period" after "done" make it clear that the motion to permit an act to be done after the specified period is to be made after the period has elapsed.

"Extend the time," which replaces "enlarge the period" in Rule 6 (b), is thought to relate more closely to both clauses (1) and (2) than does the deleted phrase. This change may be significant, for I presume that if one is given further time to act after the period originally granted in which to act does not enlarge that time.

The phrase "or the period for taking an appeal as provided by law" is

5. Though Rule 25 is not connected with the problem of finality, it is thought wise to fix a definite limit to the possibility of substituting parties.

6. FED. RULES CIV. PROC., Rule 50 (b).

7. FED. RULES CIV. PROC., Rule 52 (b).

8. FED. RULES CIV. PROC., Rule 59 (e).

9. FED. RULES CIV. PROC., Rule 60 (b).

10. FED. RULES CIV. PROC., Rule 59 (b), (d).

11. FED. RULES CIV. PROC., Rule 73 (a), (g).

12. FED. RULES CIV. PROC., Rule 60 (b).

13. FED. RULES CIV. PROC., Rule 73 (a).

deleted, since reference is already made in the amended form of this rule to Rule 73 (a), which states the time within which an appeal must be taken.

The addition to Rule 6 (c) of the words "continued existence" is to make it clear that, though the time for doing an act elapses *before* the expiration of the term at which a case is heard, the court may not extend the periods provided in the excepted cases referred to in Rule 6 (b). The necessity of this change is suggested by decisions holding that throughout such term a court may disturb its judgments.<sup>14</sup>

#### RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS.

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

There has been some question as to whether this rule requires or permits a reply to any other part of an answer containing a counterclaim than to the counterclaim. A comment in *Federal Rules Service* at pages 672 and 673 says that, though interpreting Rule 7 (a) in the light of Rules 8 (d) and 12 (a), it seems that one need reply only to the counterclaim, one is wise to reply to all of the answer containing a counterclaim, since it is not certain that that is not necessary and the only penalty for the insertion of the additional portion of the answer would be that it might be stricken.

Judge Wham, in *Fort Chartres and Ivy Landing Drainage and Levee District v. Thompson*,<sup>15</sup> held that Rule 7 (a) does not permit a reply to any part of an answer containing a counterclaim except to the counterclaim. Rule 7 (a), as amended, clearly provides that the reply shall be only to the counterclaim unless a court order provides otherwise.

#### RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint

14. *Hill v. Hawes*, 320 U.S. 520 (1944); *Bucy v. Nevada Construction Co.*, 125 F. (2d) 213 (C.C.A. 9th, 1942); *Boaz v. Mutual Life Insurance Co. of New York*, 146 F. (2d) 321 (C.C.A. 8th, 1944).

15. 4 F.R.D. 369 (E.D. Ill. 1945).

upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of (any) *a* motion (provided for in) *permitted under* this rule alters (the time fixed by these rules for serving any required responsive pleading) *these periods of time* as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading (may) *shall* be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement (or for a bill of particulars,) the responsive pleading (may) *shall* be served within (ten) 10 days after the service of the more definite statement (or bill of particulars. In either case the time for service of the responsive pleading shall not be less than remains of the time which would have been allowed under these rules if the motion had not been made.)

(b) HOW PRESENTED. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) *failure to join an indispensable party*. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. *If, on a motion under (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and received by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall*

*be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

**(c) MOTION FOR JUDGMENT ON THE PLEADINGS.**

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

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

**(e) MOTION FOR MORE DEFINITE STATEMENT (OR FOR BILL OF PARTICULARS.)** Before responding to a pleading (or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him,) a party may move for a more definite statement (, or for a bill of particulars) of any matter (which is not averred with sufficient definiteness of particularity to enable him properly to prepare his responsive pleading or to prepare for trial) *where the pleading is so vague or ambiguous that the party cannot reasonably be required to frame a responsive pleading.* The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. (A bill of particulars becomes part of the pleading which it supplements.)

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

**(g) CONSOLIDATION OF (MOTIONS) DEFENSES.** A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein

all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on any of the defenses or objections so omitted (, except that prior to making any other motions under this rule he may make a motion in which are joined all the defenses numbered (1) to (5) in subdivision (b) of this rule which he cares to assert.)

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

The minor changes in Rule 12 (a) are made to improve the statement thereof. References to bills of particulars are omitted, since it is proposed to eliminate such bills by Rule 12 (e). Under (1) and (2) of this rule a definite period is provided within which one must serve a responsive pleading after a court disposes of a motion permitted under Rule 12. It is proposed that the sentence stating that the time for such service shall not be less than would be allowed if the motion had not been made be eliminated. This might shorten the time for service.

The question has arisen as to whether the defense of a failure to join an indispensable party may be raised by motion under Rule 12 (b). Some have thought that the omission of an indispensable party results in a lack of jurisdiction over the subject matter and that the defense of failure to join an indispensable party may be raised by motion under Rule 12 (b) (1).<sup>16</sup> The reason for this conclusion is: "Where an indispensable person is not before it, the court can not adjudicate the controversy because its action would affect interests over which it does not have jurisdiction."<sup>17</sup>

16. *Hale v. Campbell*, 40 F. Supp. 584 (N.D. Iowa, 1941); (1940) 2 Fed. Rules Serv. 658, (1942) 5 Fed. Rules Serv. 820.

17. Commentary (1940) 2 Fed. Rules Serv. 658, 659.



However, this has been doubted.<sup>18</sup> To settle the question it is proposed to add as a seventh ground for motion the failure to join an indispensable party.

There has been some question as to whether, in case of a motion based upon the defense that a pleading has failed to state a claim upon which relief can be granted, any extraneous matter, such as affidavits or depositions, should be allowed to be introduced in support of the motion or in opposition thereto. Some have felt that such a motion merely supplants a demurrer on that ground and that, since so-called speaking demurrers, which include matter not contained in the pleading demurred to, are improper, new material not contained in the pleading attacked by a motion under Rule 12 (b)(6) should not be permitted in support of, or in opposition to, the motion.

On the other hand, some courts have permitted the use of such material.<sup>19</sup> In an opinion by Judge Augustus N. Hand of the second circuit, it was said that a motion to dismiss the complaint, accompanied by an affidavit, which in turn was answered by the plaintiff without raising any material issues of fact, might be treated as one for a summary judgment.<sup>20</sup> The advisory committee has approved this position in a sentence added to Rule 12 (b). It thus allows one to file a speaking motion to dismiss a complaint, but treats it as a motion for a summary judgment. The committee emphasizes that material extraneous to the motion is permitted only with a court's consent, and that, if a motion under Rule 12 (b)(6) is converted into a motion for a summary judgment, both parties shall be given reasonable opportunity to submit proofs to avoid taking a person by surprise through such conversion, and that Rule 56 does not permit a summary judgment on the merits on affidavits showing a conflict on a material issue of fact.<sup>21</sup>

The addition to Rule 12 (c) plays the same role and is based upon the same reasons as the corresponding sentence added to Rule 12 (b).

The change from "6" to "7" in Rule 12 (d) is necessitated by the addition to Rule 12 (b) of a seventh ground for a motion.

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18. *Shields v. Barrow*, 17 How 130 (U.S. 1855); *State of Washington v. United States*, 87 F. (2d) 421 (C.C.A. 9th, 1936).

19. Second Preliminary Draft, pp. 12-15.

20. *Boro Hall Corp. v. General Motors Corp.*, 124 F. (2d) 822 (C.C.A. 2d, 1942), *cert. denied*, 317 U.S. 695 (1943).

21. Second Preliminary Draft, pp. 13, 15.

The suggested changes in Rule 12 (e) provide for the elimination of bills of particulars and for the restriction of the use of motions for a more definite statement to instances where a responsive pleading is permitted. They may be used only to assist in the preparation of responsive pleadings, not in the preparation for trial. Hence, the reference to the 20-day time limit is omitted, since that was inserted to "state a time period where the motion for a bill is made for the purpose of preparing for trial."

The advisory committee in suggesting the removal of the provision for the bill of particulars emphasizes the fact that the free granting by some courts of extended bills of particulars, which bills become part of the pleadings which they supplement, neutralizes Rule 8, which calls for short simple pleadings and that such lavish use of bills of particulars overlooks the intended use of the rules on depositions and discovery.<sup>22</sup> In proposing the elimination of bills of particulars, the committee follows the suggestion of the Second Circuit Conference of Circuit and District Judges made in 1940.

Holtzoff refers<sup>23</sup> to bills of particulars as a source of delay. Though he does not advocate their elimination, he thinks that they should be used only to assist in the preparation of pleadings and that information needed to prepare for trial should be obtained by interrogatories, discovery, or depositions. He supports this view by saying that, if, as is provided by Rule 12 (b), a motion for a bill of particulars is appropriate only before joinder of issue, "It seems premature to afford to a party opportunity to secure data that may be needed in preparation for the trial but are not required to enable him to plead."<sup>23a</sup>

Both Judge Clark and Professor Moore favor the deletion of all of Rule 12 (e). Clark asserts that pleadings are not the place to obtain particularization of the case, but that, if a claim or defense is legally stated, the matter of particularization should be foregone since ". . . parties are protected by discovery, pre-trial, and summary judgment."<sup>24</sup> Moore, in substance, says the same thing.<sup>25</sup>

The proposed amendment to Rule 12 (f) fills a need in making it clear that an insufficient defense may be attacked by a motion to strike

22. *Id.* at 16-17.

23. HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* (1940) 35-41.

23a. *Id.* at 36.

24. Clark, *Judicial Administration Monographs*, (1942) 6 Fed. Rules Serv. 819, 829-830.

25. 1 MOORE, *FEDERAL PRACTICE* 657 (Cum. Supp. 1945).

Under the rules as presently drafted no provision is specifically made for attacking such a defense immediately. As a result, there are various decisions as to how one may attack forthwith the legal insufficiency of a defense. There are holdings that this may be done by a motion to strike.<sup>26</sup> But the contrary has been held. The reason given for this conclusion in one case was that Rule 12 (f) applies to claims, not defenses,<sup>27</sup> and in another that the motion to strike was not designed as an instrument to test the legal sufficiency of a pleading.<sup>28</sup> In the latter case it was said that, though the plaintiff's motion for judgment on the pleadings, which sought a ruling on the legal sufficiency of certain defenses, would lie, it would have been more accurately entitled ". . . objections that the special defenses fail to state each a legal defense." Still another case decides that the legal insufficiency of a defense should be attacked by a motion to dismiss.<sup>29</sup>

The change in the title to Rule 12 (g) conforms it to the wording of the title in Rule 12 (h). The elimination of the exception in Rule 12 (g) forces one to join in one motion all defenses which may be made under Rule 12, whereas, as the rule now reads, two motions are available, one including defenses (1) to (5) in Rule 12 (b), and the other including any other defenses and objections available under Rule 12. This should tend to shorten proceedings.

In Rule 12 (h), the proposed addition to each class of exceptional instances in which defenses are not waived of "failure to join an indispensable party" indicates that the advisory committee is not certain whether that defense is an instance of a failure to state a claim upon which relief can be granted or of a lack of jurisdiction over the subject matter. It would seem preferable to place it in one category or the other.

### RULE 13. COUNTERCLAIM AND CROSS-CLAIM.

(a) **COMPULSORY COUNTERCLAIMS.** A pleading shall state as a counterclaim any claim (, not the subject of a pending action,) which at the time of (filing) *serving* the pleading the plead-

26. *Gallagher v. Carroll*, 27 F. Supp. 568 (E.D. N.Y. 1939); *Teiger v. Stephan Oderwald, Inc.*, 31 F. Supp. 626 (S.D. N.Y. 1940); *Schenley Distillers Corp. v. Renken*, 34 F. Supp. 678 (E.D. S.C. 1940); *Teplitzky v. Pennsylvania R.R.*, 38 F. Supp. 535 (N.D. Ill. 1941); *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.*, 3 F.R.D. 440 (S.D. N.Y. 1944; *Commentary* (1939) 1 Fed. Rules Serv. 669.

27. *Indemnity Insurance Co. of North America v. Pan American Airways, Inc.*, 58 F. Supp. 338 (S.D. N.Y. 1944).

28. *Dysart v. Remington Rand, Inc.*, 31 F. Supp. 296, 297 (D. Conn. 1939)

29. *Eastman Kodak Co. v. McAuley*, 2 F.R.D. 21 (S.D. N.Y. 1941).

er has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, *except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.*

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

(i) SEPARATE TRIALS; SEPARATE JUDGMENTS. If the court orders separate trials as provided in Rule 42 (b), judgment on a counterclaim or cross-claim may be rendered *in accordance with the terms of Rule 54 (b)* when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

The suggested substitution in Rule 13 (a) of the word "serving" for "filing" is proposed to conform the usage in this rule with that throughout the rules, and particularly with that in Rule 13 (e). "The use of 'filing' was inadvertent."<sup>30</sup>

Deletion of the words "not the subject of a pending action" and the addition of the proposed clause found at the end of Rule 13 (a) are intended to make it clear that a claim must be presented by counterclaim, and may not be submitted as an independent action, unless the claim has been sued upon before the plaintiff's action was *commenced*. This would eliminate the possibility of suing independently on a claim after the commencement of the plaintiff's action but before the serving of the defendant's answer.<sup>31</sup> That such possibility exists under the present wording of this rule has been pointed out by the United States Court of Appeals of the District of Columbia.<sup>32</sup>

An example of a case covered by the proposed addition to Rule 13 (g) is a situation in which a second mortgagee is made defendant in a proceeding

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30. Second Preliminary Draft, p. 19.

31. *Ibid.*

32. Prudential Insurance Co. of America v. Saxe, 134 F. (2d) 16, 33-34 (App. D.C. 1943).

to foreclose the first mortgage. He could file a cross-complaint against the mortgagor to secure a personal judgment for the indebtedness and to foreclose his lien. If it were not for the additional phrase, he might not be able to do this, since the second mortgagee's claim might well not arise out of the transaction or occurrence which is the subject matter of the plaintiff's claim.<sup>33</sup> This change might conserve time and money and seems to be advisable.

The additional clause suggested for Rule 13 (e) makes it clear that judgments on counter claims and cross-claims, when separate trials thereof are ordered, are to be governed by the terms of Rule 54 (b). At present there is no such warning.

#### RULE 14. THIRD-PARTY PRACTICE.

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him (or to the plaintiff) for all or part of the plaintiff's claim against him. If the motion is granted and the summons and complaint are served, the person so served, hereinafter called the third-party defendant, shall make his defenses *to the third-party plaintiff's claim* as provided in Rule 12 and his counterclaims *against the third-party plaintiff* and cross-claims against (the plaintiff, the third party plaintiff, or any other party) *other third-party defendants* as provided in Rule 13. The third-party defendant may assert *against the plaintiff* any defenses which the third-party plaintiff has to the plaintiff's claim. (The third party defendant is bound by the adjudication of the third party plaintiff's liability to the plaintiff, as well as of his own to the plaintiff or to the third party plaintiff.) *The third-party defendant may also assert against the plaintiff any claim he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff.* The plaintiff may (amend his pleadings to) assert against the third-party defendant any claim (which the plaintiff might have asserted against the third party defendant had he been joined originally as a defendant.) *he has against him which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaim*

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33. Second Preliminary Draft, p. 19.

and cross-claim as provided in Rule 13. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him (or to the third party plaintiff) for all or part of the claim made in the action against the third-party defendant.

The deletion of "or to the plaintiff" in the first sentence of this rule and of "or to the third party plaintiff" in the last sentence thereof is based upon the fact that those phrases are futile in most instances. One reason for this is that, if the third-party defendant's liability, if any, is to the plaintiff, rather than to the defendant, the plaintiff is not compelled to proceed against such third-party defendant.<sup>34</sup> Further, according to the majority view, the plaintiff can not amend his complaint and sue a third-party defendant unless he could have sued him originally.<sup>35</sup> Very often he could not have done this because of lack of diversity of citizenship. Hence, the offer by the defendant of the third party as a defendant may be ineffective and time-consuming.

Under such circumstances, the usual rule is that an order granting leave to bring in third-party defendants<sup>36</sup> or bringing them in,<sup>37</sup> is vacated, and a motion to add a third-party defendant is denied.<sup>38</sup>

The suggested changes in the second and third sentences of Rule 14 (a) state more accurately the third-party defendant's right to present defenses than it is now stated.

The new sentence giving the third-party defendant the right to assert against the plaintiff any claim which he has against the latter and which arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim is inserted so that all claims arising therefrom may be

34. See authorities in notes 35, 36, 37 *infra*.

35. People of State of Illinois, for use of Trust Co. of Chicago v. Maryland Casualty Co., 132 F. (2d) 850 (C.C.A. 7th, 1942); Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E.D. N.Y. 1941); Herrington v. Jones, 2 F.R.D. 108 (E.D. La. 1941); Johnson v. G. J. Sherrard Co., 2 F.R.D. 164 (D. Mass. 1941); Thompson v. Cranston, 2 F.R.D. 270 (W.D. N.Y. 1942); Banks v. Employers' Liability Assurance Corp., 7 Fed. Rules Serv. 271 (W.D. Mo. 1943); Commentary (1942) 6 Fed. Rules Serv. 766.

36. Delano v. Ives, 40 F. Supp. 672 (E.D. Pa. 1941); Whitmire v. Partin, 2 F.R.D. 83 (E.D. Tenn. 1941); Roadway Express, Inc. v. Automobile Ins. Co. of Hartford, Conn., 8 Fed. Rules Serv. 265 (N.D. Ohio 1945).

37. Satink v. Holland Township, 31 F. Supp. 229 (D N.J. 1940).

38. Connelly v. Bender, 36 F. Supp. 368 (E.D. Mich. 1941). It is said in an article by Lawrence Koenigsberger, *Suggestions for Changes in the Federal Rules of Civil Procedure*, 4 Fed. Rules Serv. 1010, 1012, that ". . . no useful purpose is served by permitting a defendant to make suggestions to the plaintiff in regard" to who shall be defendants.

heard and determined in the same action. As a corollary to this, the plaintiff, in a new phrase, is given the right to assert claims against a third-party defendant which arise out of that transaction or occurrence, and the defendant is, in fairness, allowed to present defenses, counterclaims, and cross-claims in connection with this claim of the plaintiff. There seems to be an inconsistency between the fourth and fifth sentences of the proposed rule. In the fourth sentence the third-party defendant may assert against the plaintiff only those claims arising out of the transaction or occurrence which is the subject of the plaintiff's claim, whereas in the fifth sentence he is granted counterclaims provided in Rule 13. This rule allows permissive counterclaims against an opposing party *not* arising out of such transaction or occurrence.

The fourth sentence of the present rule is deleted as it is believed to relate to substantive law. This action is proper.

#### RULE 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.

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

The new provision in this rule merely makes clear that the capacity of a federal receiver to sue or be sued in a federal court is determined by Rule 66 *infra*.

There is a question whether the provision of Rule 23 (b) that, in an action brought to enforce a secondary right on the part of one or more shareholders in an association, the complaint shall aver that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share devolved on him by operation of law deals with substantive or procedural law. The advisory committee believes that this matter should

be decided by the Supreme Court when a case is presented to it, not *ex parte* when it is asked to pass on the advisability of amending rules of procedure. Hence no change in this rule is suggested. If the Court decides that this provision deals with a substantive right, it is suggested that there should be added to Rule 23 (b) (1) a provision that it does not apply in jurisdictions where state law permits a shareholder to maintain a secondary action, although he was not a shareholder at the time of the transaction of which he complains.<sup>39</sup>

#### RULE 24. INTERVENTION.

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

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

The addition to Rule 24 (a) covers the situation where the court does not have actual custody of property but where it has the control or disposition thereof. This addition seems logical, for there is no reason to distinguish between the case in which a court has custody of property and that in which it lacks custody, but has control.

The commendable purpose of the additional sentence in Rule 24 (b) which permits government agencies to intervene is to avoid narrow con-

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39. Second Preliminary Draft, pp. 24-30.



structions of the rule as presently drafted when such agencies ask leave to intervene.<sup>40</sup>

#### RULE 26. DEPOSITIONS PENDING ACTION.

(a) WHEN DEPOSITIONS MAY BE TAKEN. (By leave of court after jurisdiction has been obtained over any defendant or over property which is the subject of the action or without such leave after an answer has been served, the testimony of any person, whether a party or not, may be taken at the instance of any party by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes.) *Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. A deposition may be taken after commencement of the action and without leave of court, except that if notice of the taking is served within 20 days after such commencement leave of court granted with or without notice must first be obtained.* The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

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

Under Rule 26 (a) one must to-day obtain leave of court to take a deposition prior to answer. This requirement having been objected to by numerous district judges as a time-consuming application which is usually granted as a matter of course, the advisory committee, in the first draft

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40. An example of such construction in connection with a request by the Office of Price Administration to intervene in a bankruptcy proceeding to protest the sale of assets above ceiling prices is found in the decision in *In Re Bender Body Co.*, 47 F. Supp. 224 (N.D. Ohio, 1942).

of proposed amendments to the federal rules of civil procedure, provided for the taking of depositions without leave of court after the commencement of an action.<sup>41</sup> However, in its second draft, it requires leave of court if notice of taking of a deposition is served within 20 days after commencement of the action. This is said to be to protect parties against abuse.<sup>42</sup> In the first draft Rules 30 and 31 were thought to give ample protection.<sup>43</sup> The suggested amendment as it now reads appears to change but slightly the rule as presently drafted. To-day one need not ask leave to take a deposition after an answer is served, and Rule 12 (a) provides that a "defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, unless the court directs otherwise when service of process is made pursuant to Rule 4 (e)."

The scope of examination permitted under the present form of Rule 26 (b) is unsettled. True, it has been held that ". . . examination before trial may be had not merely for the purpose of producing evidence to be used at the trial, but also for discovery of evidence, indeed, for leads as to where evidence may be located,"<sup>44</sup> and that it allows ". . . examination into matters which may not be admissible in evidence."<sup>45</sup> It has also been said that this rule contemplates ". . . the broad discovery of information which may be useful in preparation for trial."<sup>46</sup> On the other hand it has been decided that the ". . . test whether an examination before trial shall be permitted is, whether or not the testimony would be admissible upon the trial of the action."<sup>47</sup>

The proposed new sentence would settle this controversy in favor of the broader rule. This seems advisable, since one purpose of discovery is to aid in making adequate preparation for trial.

41. First Preliminary Draft, p. 37.

42. Second Preliminary Draft, p. 33. In both of the drafts of proposed amendments, § 1917 of the Mo. REV. STAT. (1939) is referred to as an example of the type of rule which is aimed at in those drafts.

43. Second Preliminary Draft, pp. 38-39.

44. *Engl v. Aetna Life Ins. Co.*, 139 F. (2d) 469, 472 (C.C.A. 2d, 1943).

45. *Ibid.*

46. *Lewis v. United Air Lines Transportation Corp.*, 27 F. Supp. 946, 947 (D. Conn. 1939).

47. *Benevento v. A. & P. Food Stores, Inc.*, 26 F. Supp. 424 (E.D. N.Y. 1939). See *Poppino v. Jones Store Co.*, 3 Fed. Rules Serv. 325 (W.D. Mo. 1940) and many other cases pro and con on this matter cited in Second Preliminary Draft, pp. 33-35.

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL.

(a) BEFORE ACTION.

(3) *Order and examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; *and the court may make an order of the character provided for by Rules 34 and 35, or either of them.* For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

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

It is thought by the advisory committee that the language of the present form of these rules might be interpreted to bar procedure under Rules 34 and 35 when one wishes to perpetuate testimony.<sup>48</sup> The suggested additions to Rule 27 make clear that the former rules may be applied in proceedings to perpetuate testimony. Fairness requires that one should

be accorded the same opportunity to prepare for the trial of a case which may be commenced as to prepare for one which has been begun.

**RULE 28. PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN.**

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

The purpose of the suggested addition to this rule is to facilitate the taking of depositions. In isolated localities it may be difficult to find one authorized by federal or local law to take depositions. The same might be true where officers otherwise available were incapacitated or on vacation. Further, a master appointed by the court could take depositions anywhere,<sup>49</sup> thus eliminating the necessity of using numerous officers whose territorial authority is limited. This change would be commendable.

**RULE 30. DEPOSITIONS UPON ORAL EXAMINATION.**

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

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49. A Master may take depositions outside of the district of his appointment. *Consolidated Fastener Co. v. Columbian Button & Fastener Co.*, 85 Fed. 54 (C.C. N.D. N.Y. 1898); *Mathieson Alkali Works v. Arnold, Hoffman & Co.*, 31 F. (2d) 1 (C.C.A. 1st, 1929).

parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, *expense*, embarrassment, or oppression.

The addition of the words "time or" makes it clear that protective orders authorized by this rule extend to matters of time as well as place, whereas the omission of those words from the present form of the rule may imply that a court can not order a deposition taken at a time other than that mentioned in the notice. The suggested change would be salutary.

The addition to this rule of a provision that a court may restrict the inquiry into writings prepared, or obtained by an adverse party in the preparation of a case for trial, without including in the rule any standard by which the court's action shall be governed, other than that good cause for such action must be shown is objected to by some. Thus, Walter P. Armstrong, a former president of the American Bar Association, contends that the advisory committee should have acted more daringly and stated what writings of this type could, or could not, be examined. He believes that past performances of courts prove that they will not exercise any discretion in permitting or refusing parties the right to inspect such writings, but that they will either allow one to view all such documents or will deny the right to inspect any of them.<sup>50</sup> The Committee, on the other hand, wants to make it clear that in some, but not in all, instances such papers may be examined, and that it believes that the courts can be relied upon properly to restrict the use of the right of inspection of writings gathered in the course of the preparation of a case for trial. The committee promises careful consideration of any standard for the exercise of discretion which may be suggested. Certainly it should be possible to depend on courts to act with discretion, rather than arbitrarily, in this matter. In using such discretion they surely would apply the only logical standard of action, which is that the granting of a demand for disclosure should be reasonable. Under the circumstances, Mr. Armstrong's suggestion that a list of writings to be disclosed should be included in the rule seems impracticable. It would make the rule too inelastic.

The addition of the word "expense" is commendable as it makes

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50. Armstrong, *Second Draft of Proposed Amendments to Federal Rules Civ. Proc.* (1945) 31 A.B.A.J. 497.  
<https://scholarship.law.missouri.edu/mlr/vol11/iss1/7>

clear that a party or witness may be protected against undue expenditure in connection with the taking of a deposition. However, it might have been better to have provided that the court might make "any other order which justice requires to protect the party or witness" rather than to add a provision as to particular kind of order. Since the item of expense was not thought of when the rule was originally drafted, it may be that something else necessary for the reasonable protection of parties and witnesses has still been forgotten.

### RULE 33. INTERROGATORIES TO PARTIES.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf. *Interrogatories may be served after commencement of the action and without leave of court, except that if service is made within 20 days after such commencement leave of court granted with or without notice must first be obtained.* The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the (delivery) *service* of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. (Objections to any interrogatories may be presented to the court within 10 days after service thereof, with notice as in case of a motion; and) *Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of motion setting the objections down for the earliest practicable hearing.* Answers to interrogatories to which objection is made shall be deferred until the objections are determined (, which shall be at as early a time as practicable. No party may, without leave of court, serve more than one set of interrogatories to be answered by the same party.)

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

*in ruling on objections to interrogatories may make any order specified in Rule 30 (b) which is appropriate and just.*

The added second sentence in the first paragraph of this rule, as amended above, is intended to provide for a practice similar to that suggested in connection with Rule 26 (a) and to avoid litigation as to the necessity of obtaining leave of court to serve interrogatories.<sup>51</sup> Mr. Armstrong suggests that this proposed addition to this rule would occasionally result in inequality of operation, since the filing of a complaint (commencement of an action<sup>52</sup>) may occur more than twenty (20) days before the service of the complaint. Hence one might be served with interrogatories without having learned of the filing of the complaint and he would be obliged to deal with interrogatories without preparation, if the interrogatories are not to be served until more than twenty (20) days after the commencement of the action, as no notice of intent to serve interrogatories is necessary prior to the service thereof. He says that this objection to the proposal could be overcome by providing for allowing service of interrogatories without leave of court only after 20 days after *service* of the complaint.<sup>53</sup> There is substance to this objection.

The word "service" is substituted for "delivery" to conform this rule to the use of the word elsewhere in this rule and in other rules.<sup>54</sup>

The proposed new wording of the provisions relating to the taking of objections to interrogatories is intended to clarify the practice relating thereto. The interjection of the words "to interrogatories to which objection is made" is designed to provide that only the answers to objectionable interrogatories may be deferred and that other interrogatories shall be answered within the time prescribed by the rule. This eliminates the right to delay answers to all interrogatories by objecting to some of them and should expedite interrogatory procedure and do away with the strike value of objections to minor interrogatories.<sup>55</sup>

The proposed new paragraph, if adopted, would properly make clear that interrogatories may be as broad as deposition questions and that they, and the answers thereto, may be used to the same extent as depositions. Under the present form of this rule, some courts have unduly narrowed the

51. Second Preliminary Draft, p. 42.

52. FED. RULES CIV. PROC., Rule 3.

53. Armstrong, *Second Draft of Proposed Amendments to Federal Rules of Civil Procedure* (1945) 31 A.B.A.J. 497, 499.

54. Second Preliminary Draft, p. 42.

55. *Ibid.*

scope of interrogatories. Thus, it has been held that interrogatories shall be limited to matter which may be produced in evidence at the trial;<sup>56</sup> that they may not relate to an ultimate issue;<sup>57</sup> that they should be relatively few and should relate two important facts of the case;<sup>58</sup> and that interrogatories calling for opinions are improper.<sup>59</sup> Further, at times a narrow view has been taken of the use of interrogatories. For example, it has been decided that interrogatories cannot be introduced and read in evidence, as, contrary to the terms of Rule 26 (d), there is no express provision for that practice in Rule 33.<sup>60</sup>

The second sentence of the suggested paragraph makes certain that, if adopted, interrogatories could, without leave of court, be served after a deposition had been taken and *vice versa*. It has been held that, under the present form of this rule, interrogatories can not be thus served, for such service would be analogous to the service of a second set of interrogatories. Technically this is incorrect. There is nothing in the rules as now written to prevent the proposed practice, but to state specifically that it is permissible will avoid litigation. As stated by the advisory committee, it may be desirable to elicit, by the inexpensive method of interrogatories, necessary information not obtained by deposition.<sup>61</sup>

The policy of permitting, in general, but one set of interrogatories is changed by the third sentence of the proposed new paragraph for this rule. By it the party interrogated would have the burden of showing the necessity for a limitation on the number of sets of interrogatories which he must answer, whereas at present the party requesting the right to propound additional interrogatories has the burden of convincing the court that he should be given that right. There is at least one substantial objection to the suggested practice. It may lead to lack of thoroughness in the preparation of the original set of interrogatories. The cases which the advisory committee

56. *Ayer v. Hershey Creamery Co.*, 1 F.R.D. 14 (D.N.J. 1939); *Fisher v. Taylor*, 1 F.R.D. 448 (E.D. Tenn. 1940).

57. *Tudor v. Leslie*, 1 F.R.D. 448 (D. Mass. 1940).

58. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275 (D. Md. 1939); *Knox v. Alter*, 2 F.R.D. 337 (W.D. Pa. 1942). See, Holtzoff, *Instruments of Discovery Under Federal Rules of Civil Procedure* (1942) 41 MICH. L. REV. 205, 216-217.

59. *Coca Cola Co. v. Dixi-Cola Laboratories*, 30 F. Supp. 275 (D. Md. 1939); *Byers Theaters Inc. v. Murphy*, 1 F.R.D. 286 (W.D. Va. 1940); *J. Schoeneman, Inc. v. Brauer*, 1 F.R.D. 292 (W.D. Mo. 1940).

60. *Bailey v. New England Mut. Life Ins. Co.*, 1 F.R.D. 494 (S.D. Cal 1940).

61. Second Preliminary Draft, p. 44.



cites in support of its proposed change of policy merely state that the numbers of pertinent interrogatories propounded is unimportant. This conclusion appears to have been reached in connection with initial interrogatories.<sup>62</sup> These decisions do not, therefore, support the committee's conclusion that there should be a change of policy in connection with multiple sets of interrogatories.

It should be noticed that the last sentence of the proposed new paragraph provides for the same possible orders in connection with interrogatories as are provided by Rule 30 (b) in relation to depositions. This is proper, because of the similarity of interrogatories and depositions.

**RULE 34. DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING, OR PHOTOGRAPHING.**

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

The purposes of the suggested changes in this rule are plain and commendable. The initial innovation provides for the same protective orders in connection with discovery under this section as is furnished in connection with depositions under Rule 30. The last two changes correlate the scope of inquiry permitted under this rule with that provided in Rule 26 (b) in connection with depositions pending an action.<sup>63</sup>

62. *J. Schoeneman, Inc. v. Brauer*, 1 F.R.D. 292 (W.D. Mo. 1940); *Canuso v. City of Niagara Falls*, 8 Fed. Rules Serv. 618 (W.D. N.Y. 1945).

63. Second Preliminary Draft, pp. 45-46.

RULE 36. ADMISSION OF FACTS AND OF GENUINENESS OF DOCUMENTS.

(a) REQUEST FOR ADMISSION. (At any time after the pleadings are closed, a) *A* party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth (therein.) *in the request. A request may be served after the commencement of the action and without leave of court, except that if service is made within 20 days after such commencement leave of court granted with or without notice must first be obtained.* Copies of the documents shall be (delivered) *served* with the request unless copies have already been furnished. Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such (further) *shorter or longer* time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission *either (1) a sworn statement (either) denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully (either) admit or deny those matters, or (2) written objections to the request, in whole or in part, on the ground that some or all of the requested admissions are privileged or irrelevant, or the request, in whole or in part, is otherwise improper, together with a notice of motion setting the objections down for the earliest practicable hearing. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. All denials shall fairly meet the substance of the matters denied and when good faith requires that a party deny only a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and shall deny only the remainder.*

The first proposed deletion in this rule, together with the initial new sentence suggested, would change the present practice which permits one, without leave of court, to request admissions at any time *after pleadings are closed* to one which would allow such request to be made at any time *after the commencement of an action.*<sup>64</sup> No leave of court would be required as a condition to making such request, unless service was to be made within twenty (20) days after filing of a complaint.

The suggested substitution of the words "in the request" for the word

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64. By Rule 3 an action is commenced by filing a complaint.

"therein" at the end of the first sentence of this rule makes it clear that one may request the admission of the truth of facts not found in documents described in a request for admissions. It has been argued that, under the present wording of the rule, this can not be done, because "therein" refers to "documents" rather than to "request."<sup>65</sup>

The substitution of "served" for "delivered" conforms the use of words in this rule to their use in the rules generally. And the substitution of "shorter or longer" for "further" properly permits a court to shorten, as well as to lengthen, the time stated in a request for admissions within which one must act in order that he shall not be deemed to have made admissions.

The rule in its present form merely permits one to deny matters of which an admission is requested or to give reasons why one cannot truthfully admit or deny those matters. It makes no provision for objecting to the requests for admissions, though the rule clearly provides that one need not admit irrelevant matters. It also seems that there may be other effective objections to making admissions such as that the matters involved are privileged. This failure to specify a method of attacking a notice to admit facts has been unfortunate. Courts have held that one may not make an interlocutory motion to strike a request, though the matters concerning which motions are requested are irrelevant or privileged.<sup>66</sup> The result is that one must either make admissions or reach the same result by remaining silent, deny the facts involved, or state reasons why he cannot truthfully admit or deny those facts. Especially where the facts in question are privileged, though true and material, one requested to admit them is "on a spot." He will not wish to admit the facts. He cannot deny them without subjecting himself to costs under Rule 37 (c). Though it has been held that, if a request "is directed to irrelevant private matters or violates constitutional rights" there is good reason why one cannot admit or deny the matters in question,<sup>67</sup> this position seems untenable. There is no reason why one *can not* admit or deny such matters, though there is reason why he *should not be required* to do so. The proposed amendment contained in

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65. *Smith v. Kaufman*, 114 F. (2d) 40, 42 (C.C.A. 2d, 1940), and authorities cited therein. However, the court rejected this argument.

66. *Momand v. Paramount Pictures Distributing Co.*, 36 F. Supp. 568, 573 (D. Mass. 1941) and cases cited therein. *See also*, Commentaries (1939) 1 Fed. Rules Serv. 684-686, (1939) 2 Fed. Rules Serv. 670, and (1942) 5 Fed. Rules Serv. 835-837.

67. *Modern Food Process Co. v. Chester Packing & Provision Co.*, 30 F. Supp. 520 (E.D. Pa. 1939).

the provisions added to Rule 36 (a) supplies a method of attacking improper requests for admissions without delaying answers to unobjectionable requests. Further, in conformance with Rule 8 (b), it justly makes any denial accurately reflect the position of the party answering a request for admissions.<sup>68</sup>

#### RULE 41. DISMISSAL OF ACTIONS.

##### (a) VOLUNTARY DISMISSAL: EFFECT THEREOF.

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

##### (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *In an action tried by the court, without a jury, the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment against the plaintiff, the court shall make findings as provided in Rule 52 (a).* Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

The addition of "Rule 66" in Rule 41 (a) will be necessary, if, as suggested, the former rule is amended to include a provision concerning the dismissal of actions in which a receiver has been appointed.

The present wording of Rule 41 (b) relating to a defendant's motion to dismiss after the plaintiff has completed the presentation of his evidence

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68. Second Preliminary Draft, p. 48.

in a non-jury case had led to different interpretations thereof. Thus, in the third circuit it has been decided that, in such a case, no findings of fact are required. One reason given for this conclusion is that this situation is not covered by Rule 52 (a), which requires the finding of facts only in cases in which all of the evidence has been presented prior to motion.<sup>69</sup> The other reason given is that a motion for an order of dismissal is the equivalent of a motion for a "directed verdict" and that all the court need do is to determine whether the plaintiff's evidence and the inferences reasonably to be drawn therefrom, when viewed in the light most favorable to the plaintiff, are sufficient to support a judgment in favor of the plaintiff.<sup>70</sup> This view seems to find support in a note of the advisory committee which was published in connection with the rule when it was presented to the Supreme Court for adoption. The note read, in part: "It (Rule 41 (b)) also provides in actions tried without a jury for the equivalent of a directed verdict in actions tried by a jury as provided in Rule 50 (Motion for Directed Verdict)."

In the sixth, seventh, and ninth circuits it has been held that, when a court tries a case without a jury, it should, on a motion for dismissal at the close of the plaintiff's evidence, decide the facts against the defendant, if it believes that the facts are against him, though the plaintiff's evidence would take the case to the jury.<sup>71</sup> The reason given for this conclusion is that Rule 52 (a) requires that in all cases tried without a jury the facts must be decided.<sup>72</sup> Professor Moore agrees with this view, since Rule 41 (b) provides that the motion for a dismissal is upon the facts as well as upon the law.<sup>73</sup> This argument has been pressed in the third circuit. The answer of the court was that "the facts" referred to in that rule are the *prima facie* facts shown by the plaintiff's evidence in the light most favorable to him and that no weighing of the evidence is contemplated by the rule.

The new sentences which the committee proposes should be added to Rule 41 (b) would make it clear that the present majority rule should pre-

69. *Schad v. Twentieth Century Fox Film Corp.*, 136 F. (2d) 991, 993 (C.C.A. 3rd, 1943).

70. *Federal Deposit Insurance Corp. v. Mason*, 115 F. (2d) 548 (C.C.A. 3d, 1940).

71. *Young v. United States*, 111 F. (2d) 823 (C.C.A. 9th, 1940); *Gary Theater Co. v. Columbia Pictures Corp.*, 120 F. (2d) 891 (C.C.A. 7th, 1941); *Bach v. Friden Calculating Machine Co.*, 148 F. (2d) 407 (C.C.A. 6th, 1945).

72. *Ibid.*

73. 3 MOORE FEDERAL PRACTICE 52 (Cum. Supp. 1945).

vail to the extent that the court, on a motion to dismiss, *may* decide the facts against the plaintiff, though the case is one that might go to a jury. Though, as pointed out by the third circuit, there are substantial arguments against the rule adopted in the suggested amendments, there are equally strong arguments in its favor. One not mentioned above is that it would expedite the trial of cases. And it would be well to have the controversy settled.

#### RULE 45. SUBPOENA.

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

#### (d) SUBPOENA FOR TAKING DEPOSITIONS: PLACE OF EXAMINATION.

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

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

The change in Rule 45 (b) which adds "tangible things" to the list of which may be covered by subpoena *duces tecum* and the new sentence in Rule 45 (d)(1), except the last clause thereof, conform these rules to Rule 26 (b). Such a change would be commendable, for it will liberalize these rules and result in greater uniformity between them and Rule 26.

The addition to Rule 45 (b)(1) of the words "or modify" is advisable, as a court may feel that a subpoena, which, in its original form, is unreasonable and oppressive, can be *modified* to be reasonable and fair. As the rule now reads, an unreasonable, oppressive subpoena must be quashed.

The suggested deletion from Rule 45 (d)(1) of the sentence requiring a court order for the issuance of a subpoena *duces tecum* on the taking of a deposition seems logical. Such an order is not required when a similar subpoena is issued to obtain evidence at a trial,<sup>74</sup> and there is no substantial reason for any difference in procedure in obtaining a subpoena to procure evidence at a trial or by deposition. Further, the requirement of a court order has been criticized by some district judges as unnecessary and oppressive.<sup>75</sup>

The final clause of the sentence that it is suggested should be added to Rule 45 (d)(1) permits the granting of protective orders referred to in Rule 45 (b)(1) and (2). This is wise, since there is no substantial difference between the issuing of subpoenas in connection with the taking of depositions and in the presenting of evidence at trials.

At present, under Rule 45 (d)(2), there is no flexibility concerning the place at which the resident of a district in which a deposition is to be taken may be required to attend an examination, whereas the court may order attendance of a nonresident at any place within its jurisdiction. The first change proposed in this rule would provide flexibility therein by permitting the court to require attendance of a resident "at such other convenient place as is fixed by an order of court." The second change would require that any place at which a court order demanded a nonresident's attendance for the taking of a deposition should be "convenient." This probably spells out the practical effect of the present law, but, under a literal interpretation of the rule, a court can now designate a place for the taking of a deposition which is inconvenient for a nonresident deponent.

(To be continued)

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74. FED. RULES CIV. PROC., Rule 45 (a).

75. Second Preliminary Draft, p. 53.