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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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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[Ed. This is the concluding installment of the article begun by Professor Wheaton in 11 Missouri Law Review 1. In order to compare the text of the present Rules of Civil Procedure with the text of the same rules if the proposed changes were adopted, throughout this article the rules have been printed as follows: those words which it is proposed to eliminate have been printed in bold face type and enclosed in parentheses. Material which it is proposed to insert in the rule has been italicized.]

RULE 50. MOTIONS FOR A DIRECTED VERDICT AND FOR JUDGMENT.

(a) (WHEN MADE: EFFECT) MOTION FOR DIRECTED VERDICT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) (RESERVATION OF DECISION ON MOTION) MOTION FOR JUDGMENT. (Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion.) Within 10 days after the reception of a verdict, a party who has moved for a directed verdict at the close of all the evidence may move to (have)

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set aside the verdict and any judgment entered thereupon (set aside) and (to have) for judgment (entered) in accordance with his motion for a directed verdict. (; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the) The court may allow the verdict or judgment to stand or may (reopen the judgment) set it aside and either order a new trial or direct the entry of judgment (as if the requested verdict had been directed) for the moving party. The making of a motion for judgment in conformity with the motion for a directed verdict shall not be necessary for the purpose of raising on review the question whether the verdict should have been directed or whether judgment in conformity with the motion for a directed verdict should be entered. If no verdict (was) is returned, the court on motion made within 10 days after the jury has been discharged may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

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

The proposed changes in the main title to Section 50 and to sections (a) and (b) thereof more nearly indicate their contents than do their present titles.

The first paragraph of Rule 50 (b) is deleted, since the advisory committee believes that the court, without reserving the right to do so,
and without being deemed to have reserved that right, has the power to enter a judgment in accordance with a previous motion to direct a verdict at the close of all the evidence. The history of the legal warfare over this issue will be easily recalled by all lawyers. Briefly it is this. In *Slocum v. New York Life Insurance Company*\(^76\) the majority held that a circuit court of appeals, when reversing a judgment of a trial court because of error in refusing to instruct the jury that the evidence was insufficient to support such a verdict, could not direct that a judgment be entered contrary to the verdict, but must award a new trial. The decision was based on the seventh amendment to the constitution which gives one the right to a trial by jury in all actions of common law involving more than twenty dollars.

In a strong dissenting opinion by Mr. Justice Hughes, concurred in by three other justices, it was said that the seventh amendment was not involved. The argument was that the appellate court’s judgment did not involve a question of *fact*. Whether the evidence was sufficient to take the case to the jury, which was the question decided by the court when it rendered a judgment for the defendant, was surely a question of *law*. Hence there were no facts to be decided by a jury. In support of this conclusion, Justice Hughes cited *Chinoweth v. Haskell*\(^77\). In that case the Supreme Court held that, on appeal from a judgment overruling a demurrer to the evidence, the appellate court, upon finding that the demurrer should have been sustained, could remand the case with a direction to enter judgment for the defendant in the trial court.

In *Baltimore & Carolina Line v. Redman*\(^78\) the Supreme Court decided that the appellate court could direct a judgment for the defendant, though there had been a verdict for the plaintiff, since the trial court, when submitting the case to the jury, had expressly reserved its ruling on the defendant’s motions to dismiss and for a directed verdict.

Finally, by adopting Rule 50, the Supreme Court must have taken the position that an appellate court may direct a judgment for the defendant in such a case, though the trial court does not expressly reserve its ruling on a motion for a directed verdict when it submits a case to a jury without ruling on such a motion.

One may well ask how effective a rule is to reserve the right of a judge to make a decision on a motion after verdict when that rule merely

76. 228 U. S. 364 (1913).
77. 28 U. S. (3 Pet.) 92 (1830).
78. 295 U. S. 654 (1935).
saying that "the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." This writer believes that those words are merely window dressing and that, in effect, the Supreme Court has adopted the dissent of Justice Hughes in Slocum v. New York Life Insurance Company as the law on this matter.

Therefore, the proposed deletion of the initial paragraph of Rule 50 (b) is in order. Of course, as the advisory committee says, if the Supreme Court has not receded wholly from its position in the Slocum case, the deletion would be improper.

The third sentence of Rule 50 (b) in the suggested revision thereof, is entirely new and provides that an appellate court may determine whether the verdict should have been directed as requested or whether judgment should be entered in conformity with the motion for a directed verdict, though the losing party makes no motion after verdict requesting such action and though the trial court fails of its own motion to grant a judgment in favor of the losing party. Although the majority opinion permits this practice under the present rule, there appears to be at least one decision opposing it. Hence, if this practice is desirable, it would be well to write it into this rule. That it is desirable seems clear, for it is a time saver.

The first sentence of the new paragraph which it is proposed should be added to Rule 50 (b) is a partial redraft of the present form of the third sentence of this rule, which, under the suggested revision of the rule, is deleted. The new form permits one to move for judgment and to join therewith a motion for a new trial as an alternative. The current form permits one to join a motion for a new trial with a motion for a judgment or to request a new trial as an alternative. The second sentence of the new form further provides that, if the motion for judgment is granted, the trial court may refuse to rule on the motion for a new trial or it may decide whether to grant a new trial if the judgment which it grants to the losing

79. Second Preliminary Draft, pp. 56, 57.

https://scholarship.law.missouri.edu/mlr/vol11/iss2/1
party is vacated or reversed. It should be noticed that the present practice approved by the Supreme Court is that, if alternative prayers or motions are made to a trial court for judgment or a new trial, the Court must rule on both motions,\(^\text{82}\) whereas, the suggested practice would permit the Court to decline to make an alternative ruling on the motion for a new trial. The advisory committee does not state why it proposes this variation in the present federal practice. It is, therefore, difficult to evaluate the committee's suggestion. It may be justified on the grounds that the disposition of a motion for a new trial is ordinarily not subject to appeal\(^\text{83}\) and that the rules should be elastic.

The third and fourth sentences of the new paragraph adopt the view of the seventh circuit that the granting of a new trial does not cancel out a contemporaneously granted judgment notwithstanding the verdict. The granting of the new trial is not acted upon unless the judgment notwithstanding the verdict is reversed on appeal and the appellate court makes no order nullifying the order granting a new trial.\(^\text{84}\) The basis of this rule is that, since the judgment and the order for the new trial are both in favor of the same party, the latter is tentative and becomes operative only if the judgment is overruled on appeal.\(^\text{85}\) In the third circuit, it has been held that the granting of an unconditional new trial in addition to a judgment notwithstanding the verdict vacates the latter. The Court claims that this view is supported by the Supreme Court's holding in **Montgomery Ward & Co. v. Duncan**. It says that, though the Supreme Court there said that, if a court granted a judgment notwithstanding the verdict, it should also grant a new trial, the new trial referred to is one in which it is specifically stated that it will be effective only if the judgment is reversed. It bases this conclusion on the statement of the high court in that case that, if "the judgment were reversed, the case, on remand, would be governed by the trial judge's award of a new trial."\(^\text{86}\) This argument is not valid. The court in making that observation merely stated the effect of a grant of a new trial and was not describing the terms of an order granting a new trial which would have that effect. Since there is a conflict

\(^{82}\) Montgomery Ward & Co. v. Duncan, 311 U. S. 243 (1940).

\(^{83}\) Ibid. p. 196.


\(^{85}\) Ibid. See also 37 Moore's Federal Practice (1938), Cumulative Supplement § 50.03.

\(^{86}\) 311 U. S. 243, 254 (1940).
of authority on the effect of an order granting a new trial under these circumstances, it is well to state in this rule the position which the Supreme Court has taken in relation thereto.

The last sentence in this new paragraph is commendable. As the rule permits the trial court to forego ruling on a motion for a new trial when it rules on a motion for a judgment notwithstanding the verdict, it is well that provision should be made for disposition of the former motion after appeal, if the judgment of the trial court is reversed and if the appellate court does not rule in relation to a new trial. Otherwise there would be a motion which would never be ruled on.

RULE 52. FINDINGS BY THE COURT.

(a) EFFECT. In all actions tried upon the facts without a jury, or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, the findings of fact and conclusions of law may be incorporated as a part of the opinion or memorandum.

Findings of fact and conclusions of law are unnecessary on a decision of a motion under Rules 12 and 56 or any other motion except as provided in Rule 41 (b).

The suggested addition in the first sentence of this rule makes it clear that the rule applies in cases where there is an advisory jury. Professor Moore interprets the rule as presently written to cover such cases. He says this is necessarily true, because the court "must adopt or reject the findings (of such a jury) as its own." That is, if there is an advisory jury, the court makes the findings as is required by Rule 52 (a).

There has been considerable controversy whether, under Rule 52 (a), a judge of a district court may properly include findings of facts and of conclusions of law in an opinion. Several courts have held that this may not be done, but that such findings must be stated separately from any

opinion. Courts have gone so far as to say that "it is now a work of supererogation to write a considered and detailed opinion on the facts" in a non-jury cause, "for the place of the opinion must now be taken by formal findings of fact and conclusions of law, separately stated and numbered." 88

This conclusion has, in some cases, been based upon the holding of the Supreme Court in Interstate Circuit, Inc. v. United States, 304 U. S. 55 (1938). 89 In this decision, the Supreme Court considered Equity Rule 70½ which reads, in part: "In deciding suits in equity, . . . , the court of first instance shall find the facts specially and state separately its conclusions of law thereon." The court held that the rule had not been followed because there were no formal findings and the court had not found the facts specially and had not stated its conclusions of law separately as the rule required. It said, further, that the opinion of the court, which included various findings of fact, was not a substitute for the required facts and that a discussion of portions of the evidence and the court's reasoning did not constitute the special and formal findings by which it was the court's duty appropriately and specifically to determine all of the issues which the case presented. The case was remanded and the trial court was directed to state its findings as required by Equity Rule 20½. There was a dissent by Justices Stone and Black to the effect that they thought that the opinion and decree of the district court, while informal, were sufficient for the purposes of decision.

In contrast to these decisions, there have been a number which without referring to the Interstate Circuit case, have held that it is unnecessary to state the findings of fact and law separately from an opinion if it is said in the opinion that the statements of fact and of legal conclusions are intended as findings of fact and as rulings of law in accordance with Rule 52. 90 In Matton Oil Transfer Corporation v. The Dynamic, 91 the court

89. See 27 F. Supp. 86 and 43 F. Supp. 5, supra n. 87.
said, referring to Admiralty Rule 46½, which is substantially the same as Rule 52 (a), that the insistence of the Supreme Court upon appropriate findings should not be disregarded and that trial courts would not find it unduly burdensome to state findings briefly when they made decisions. The court added that it did not wish to preclude trial courts from preparing opinions. 93 On appeal, it was said in Carter Coal Co. v. Litz94 that, though the trial court did not file separate formal findings of fact and conclusions of law, it had set forth findings and conclusions in its opinion. Hence, the court refused to remand the case to the district court for formal findings and conclusions. Robert Oglebay, assistant to the official reporter for the advisory committee during 1942-1944, has said that, while a mere discussion of the facts and evidence in an opinion may not comply with Rule 52 (a), the better view is that findings and conclusions, if clearly stated, may be contained in a written opinion.95

The writer is of the opinion that, as 52 (a) now reads, it requires a separate statement of findings of fact and conclusions of law, and that inclusion thereof at different points of an opinion is inadequate. The very words of the rule require this, as do decisions of the Supreme Court. This is apparent from the opinions in Interstate Circuit, Inc. v. United States, already discussed herein,96 and in Mayo v. Lakeland Highlands Company.97 In the latter case the court said that it was of the highest importance that there should be fair compliance with Rule 52 (a). It stated further that the observations made in the course of the opinion were not findings of fact. In conclusion, the court said that, if there was a further hearing, any action taken by the court should be upon findings of fact and conclusions founded upon the evidence, in accordance with Rule 52 (a). Of course, it is possible to argue that these Supreme Court decisions permit including findings and conclusions in ordinary opinions, but this seems extremely doubtful.

92. 123 F. (2d) 999 (C.C.A. 2d, 1941).
93. That findings should be filed with opinions is suggested in United States v. Farnes, 125 F. (2d) 928 (C.C.A. 2d, 1942), cert. denied 316 U. S. 694 (1942).
94. 140 F. (2d) 934 (C.C.A. 4th, 1944).
95. Oglebay, Some Developments in Bankruptcy Law (1944) 18 J. of Nat'L Ass'n of Ref. 68, 69.
96. See supra p. 83.
97. 309 U. S. 310 (1940).
It is desirable, therefore, for the advisory committee to present the problem of the interpretation of the first sentence of Rule 52 (a) to the Supreme Court for solution. This it has done by proposing the addition of a sentence to Rule 52 (a) which permits findings to be included in opinions.

The second sentence which it is suggested should be added to Rule 52 (a) states the view of the courts that this rule does not apply to decisions in proceedings on motions in which there is no trial on the facts. Thus, it has been held that this rule does not apply to proceedings on motions for summary judgments, because such cases are tried on the law, not on the facts, and because such cases do not involve final hearings and submissions. Similar results have been reached upon like reasoning in connection with motions to dismiss. Although it is probable that Rule 52 (a) would be given the interpretation proposed in the suggested addition thereto, the possibility of contradictory decisions makes it advisable to include in the rule a statement of the desired interpretation thereof.

RULE 54. JUDGMENTS; COSTS.
(b) JUDGMENT AT VARIOUS STAGES. (When more than one claim for relief is presented in an action, the court at any state, upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.) When more than one claim for relief is presented in an action, whether as claim, counter-claim, cross-claim, or third-party claim, judgment may be entered as follows: (1) when all claims arising out of a single transaction or

occurrence have been decided final judgment may be entered on
those claims; (2) when one or more but less than all claims arising
out of a single transaction or occurrence have been decided and the
court expressly determines that there is no just reason for delay
and so orders, final judgment may be entered. If at the time judg-
ment is entered upon any claim, any other claim or claims, whether
or not arising out of the same transaction or occurrence, have not
been adjudicated, the court may stay the enforcement of any
judgment so entered until the entry of a subsequent judgment
and may prescribe such conditions as are necessary to secure the
benefit of the prior judgment to the party in whose favor it was
entered. If an order or other form of decision, however designated,
adjudicates less than all claims, counterclaims, cross-claims, and
third-party claims arising out of a single transaction or occurrence
and if the court has not directed entry of final judgment as above
stated, the action is not thereby terminated as to the claims so
adjudicated and the order or other form of decision is subject to
revision at any time before the entry of judgment adjudicating all
such claims.

This rule, which Judge Charles Clark says is, in substance, "the pre-
existing rule in equity providing for split judgments in extended cases,"¹⁰¹
has resulted in considerable confusion, even among members of the same
court, due largely to difficulty in determining when all matters arising out
of a transaction or occurrence which is the subject of the plaintiff's claim
have been decided.¹⁰² This creates uncertainty among lawyers as to what
should be done when a trial court grants a final judgment before the case
is fully determined. If a final judgment is granted and no order is made
staying its enforcement, it is unsafe not to appeal, yet the appellate court
may hold that the judgment appealed from was not a final judgment, since
all matters arising out of the transaction or occurrence which was the
subject of the plaintiff's claim have not been decided.¹⁰³

The advisory committee has proposed a rule which is entirely new in
form. It says that the first two sentences thereof state more precisely the
substance and intent of the present rule than does that rule.¹⁰⁴ It is sug-
gested that the new form goes beyond the present one. To-day the "claim

¹⁰² Ibid.
¹⁰³ For examples of this see Rosenblum v. Dingfelder, 111 F. (2d) 406 (C.C.A. 2d, 1940); Audi Vision, Inc. v. RCA Manufacturing Co., 136 F. (2d) 621 (C.C.A. 2d, 1943); Toomey v. Toomey, 149 F. (2d) 19 (App. D.C. 1945).
¹⁰⁴ Second Preliminary Draft, p. 62.
for relief” appears to refer to the plaintiff’s claim, whereas, under the proposed form “claim for relief” includes claims, and third-party claims. Today, on the face of the rule, separate judgments may be entered if there has been a decision on a claim of the plaintiff and on all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim. Under the suggested revision, there can be no partial judgment unless there has been a decision on all claims of all parties arising out of a single transaction or occurrence. This may well be a better rule than the present one, but I wish to point out that the committee is not correct in saying that this is a restatement of the present rule, though the committee may be stating in the new form of the rule what it thought it said in the present form thereof.

Attention is called to (2) of the first sentence. The final clause thereof is “judgment may be entered.” Although this surely means that judgment may be entered as to the claims concerning which a decision has been reached, it does not say so. As the clause reads, final judgment might be entered on the entire case. This verbal uncertainty could be remedied by inserting the word “thereon” between “judgment” and “may.” As stated by the advisory committee, the last sentence of the suggested revision of this rule, if adopted, will make it unlikely that a court will enter what appears to be, but is not, a valid final judgment. This is true, for it contains clear directions when, and when not, to enter a final partial judgment.

RULE 56. SUMMARY JUDGMENT.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the (pleading in answer thereto has been served), expiration of 20 days from the commencement of the action, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

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

105. Ibid.
A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

The suggested deletion and substitution in Rule 56 (a) permits one to move for a summary judgment at any time after twenty (20) days from the commencement of an action rather than at any time after answer. This may shorten the time within which one may make such a motion, since it permits such a motion twenty days after a complaint is filed. Under the present rule the plaintiff may not be able to make that motion within that time, since the complaint may not be served for several days after it is filed and the defendant need not answer the complaint for another twenty days. Moreover, the interjection into the case by a defendant of other motions prior to answer may further delay the time when a motion for a summary judgment may be made. It should be noticed, that, under this rule, a motion for a summary judgment by a defendant is not the equivalent of an answer. Thus, it has been held that a plaintiff’s counter-motion for a summary judgment may not be filed prior to answer. Mr. Armstrong believes that this suggested change, and a similar one in Rule 26 (a), relating to the taking of depositions without leave, would occasionally result in an inequality of operation similar to that complained of when the expiration of a term gave finality to judgment entered during the term. He suggests that uniformity could be attained by permitting the taking of depositions without leave and moving for summary judgments “only when twenty days have expired since service of the complaint.” This might result in uniformity, but it might also delay proceedings unduly.

Under Rule 56 (c), as it is now written, the Supreme Court has said: “Where the undisputed facts leave the existence of a cause of action depending on questions of damage which the rule has reserved from the summary judgment process, it is doubtful whether summary judgment is warranted on any showing.”

As has been said by the editor of the Federal Rules Service, this doubt which the court expresses is unwarranted by the rule. The exception

106. Rule 3.
as to the amount of damages was not intended to mean that there could be no summary judgment relating to the amount of damages where the existence of a cause of action depended on the amount of damages. Certainly there is not such a difference between the nature of an issue as to damages and one as to another fact that those issues should be treated differently in respect to summary judgments. It is submitted that what the present rule means is that the existence of a genuine controversy as to the amount of damages, whether the amount of damages does or does not determine the existence of a cause of action, is no bar to a summary judgment, if there is no controversy as to the existence of all of the elements of a cause of action, including any required amount of damages.

The advisory committee, by the deletion and substitution therefor in Rule 56 (c), has attempted to provide that there may be a summary judgment where the existence of a cause of action depends on questions of damage. This may have been accomplished, but it would be wise to insert between "fact" and "and" some such word as "including facts relating to damages." Otherwise some courts may believe that the substitution is the equivalent of the deletion.

RULE 58. ENTRY OF JUDGMENT.

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

In suggesting the deletion of "the entry of a judgment" the advisory committee is not proposing any change in the meaning of this rule but is merely recommending the elimination of an unnecessary phrase. In advising changing "there be no recovery" to "all relief be denied," it suggests the use of language having a broader meaning than that now in use. As is
said in the Second Preliminary Draft, the “phrase ‘all relief be denied’ covers cases such as the denial of a bankrupt’s discharge and similar situations where the relief sought is refused but there is literally no denial of a ‘recovery.’” The addition of the sentence stating that the entry of a judgment shall not be delayed for the taxing of costs would make it clear that clerks are to enter judgments promptly without waiting for the taxing of costs. This is in line with the doctrine, long held by federal courts, that a judgment may be final, though the amount of costs to be recovered, as set forth therein, is left blank and should speed up the taking of appeals. To the writer, the proposed changes seem to be commendable.

Mr. Chandler objects “to the idea of the clerk entering a judgment especially upon an accepted offer by a party, “since it will be pregnant with possible future embarrassment to the Court,” especially where judgments, under Rule 68, are based upon accepted offers. He doubts, however, that this objection is, as a practical matter, serious, as few judges will permit the clerk to enter judgments without their approval, except one for dismissal or for a sum certain and, in many districts, judges, notwithstanding the rules, require all judgments to be submitted to them for approval. It is doubted that judges will be embarrassed, if clerks enter judgments only in the cases in which Rule 58 permits them to do it, and if they enter them properly.

**RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS.**

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

The advisory committee, as will later be seen, has recommended that Rule 73 (a) be amended so as to reduce to thirty (30) days the time, in most instances, in which one may appeal from a judgment. If this

113. Ibid.
suggestion were adapted, one would, under the present wording of Rule 59 (b), have only thirty (30) days after judgment in which to move for a new trial on the ground of newly discovered evidence. The committee believed that this would be too short a time within which to require the making of such a motion. This is probably correct, since the new evidence is often not brought to light until several months after a trial is over. Hence the committee has deleted everything in Rule 59 (b) after "judgment," and has provided in Rule 60 (b) for moving for relief from a judgment on the ground of newly discovered evidence within one year after a judgment is entered.

The shortening of the time in which to appeal is probably advisable. Thirty (30) days from the entry of judgment should not, under the methods provided by Rules 72 and 73 for initiating an appeal, be too short a time in which to appeal.

The new Rule 59 (e) is proposed to take care of situations in which the desire is to alter or amend a judgment. For instance, in Boaz v. Mutual Life Insurance Co., the court first rendered a judgment of dismissal without prejudice. The defendant thereafter moved to have the judgment read that the dismissal was with prejudice. This motion was granted.

Mr. Armstrong contends that the ten days permitted by Rules 50 (b), 52 (b), and 59 (b) and (e) in which to move, respectively, for a judgment notwithstanding a verdict, to amend findings, for a new trial, and to alter or amend a judgment is too short a time in which to require a busy practitioner to make such a motion. I am inclined to agree with Mr. Armstrong on this point. There may well be times when it might be physically impossible for a lawyer to obtain and put in proper form the material necessary to the making of such a motion. The laudable purpose of not unduly delaying the proceedings in a case should not lead to unfairness.

Expansion of the title of Rule 59 is suggested to indicate the inclusion of Rule 59 (e).

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) CLERICAL MISTAKES. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any

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117. Infra p. 92.
118. 146 F. (2d) 321 (C.C.A. 8th, 1945).
time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. *During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.*

(b) **MISTAKE; INADVERTANCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC.**

On motion (the court), and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding (taken against him through his) on the following grounds: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); or (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party. The motion shall be made within a reasonable time, but in no case (exceeding six months) *more that one year after* (such) the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year as provided in Section 57 of the Judicial Code, U. S. C., Title 28, § 118, a judgment obtained against a defendant not actually personally notified, or (3) to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining relief from judgments shall be by motion as prescribed in these rules or by an independent action.

The additional sentence which it is recommended should be added to Rule 60 (a) makes it clear that clerical mistakes in a record and errors therein arising from oversight or omission may, during an appellate proceeding, be corrected by the trial court prior to the docketing of the appeal in the appellate court. This appears to be in accordance with the view of Professor Moore and of Judge Charles E. Clark in *Perlman v. 332 West Seventy-Second Street Company,* though in that case it was Rule 60 (b) which was involved. The advisory committee seems to believe that

120. 3 Moore's Federal Practice (1938) 3276.
121. 127 F. (2d) 716 (C.C.A. 2d, 1942).
Miller v. United States\textsuperscript{122} and Schram v. Safety Investment Company\textsuperscript{123} are to the contrary.\textsuperscript{124} If this is its view, I must differ with it, for the courts in those cases do not refer to the power of district courts, after appeal, to deal with errors covered by Rule 60 (a). Rather, they state that district courts have authority to vacate judgments after appeals have been taken therefrom.

The addition of the word "final" to the first sentence in Rule 60 (b) is intended to make clear that interlocutory judgments are not covered by this rule. The latter type of judgments is subject to the complete power of the trial court to give the proper relief.\textsuperscript{125}

The word "his" is deleted because it is thought that relief should be granted from a judgment resulting, not only from the mistake or excusable neglect of a party, but also from such mistake or neglect of others.\textsuperscript{126}

As stated in connection with Rule 59 (b), motions based on newly discovered evidence would, under the suggested amendments, be covered by Rule 60 (b) rather than Rule 59 (b), so that more time would be given to make such motions than would be available under Rule 59 (b). Fraud, intrinsic and extrinsic,\textsuperscript{127} misrepresentation, and any other misconduct of an adverse party are suggested as additional grounds for relief from a final judgment. As the committee says, there is no sound reason for the exclusion of such misconduct as grounds for relief.\textsuperscript{128}

Their inclusion is not only fair, but it removes confusion as to the proper procedure to use when a judgment is the result of such misconduct. Thus, it has been held that relief might be granted against a judgment obtained by extrinsic fraud, if a motion for such relief was made within a reasonable time after an appeal is taken.\textsuperscript{129} The amendment, if adopted, would make the procedure in Rule 60 (b) applicable to cases involving fraud.

**RULE 65. INJUNCTIONS.**

(c) SECURITY. No restraining order or preliminary in-

\textsuperscript{122} 114 F. (2d) 267 (C.C.A. 7th, 1940).
\textsuperscript{124} Second Preliminary Draft, p. 70.
\textsuperscript{125} Second Preliminary Draft, p. 73.
\textsuperscript{126} Ibid.
\textsuperscript{127} Intrinsic fraud is fraudulent conduct practiced during the course of a trial, such as the introduction of forged instruments or perjured testimony, whereas extrinsic fraud is fraudulent conduct practiced outside of a trial. Phillips Petroleum Co. v. Jenkins, 91 F. (2d) 183 (C.C.A. 8th, 1937).
\textsuperscript{128} Second Preliminary Draft, p. 74.
\textsuperscript{129} Fiske v. Buder, 125 F. (2d) 841 (C.C.A. 8th, 1942).
junction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

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

The addition to Rule 65 (c) of the proposed new paragraph would make it clear that the liability of a surety on the security referred to in this rule might be enforced by motion. This would provide a remedy similar to that now existing in Rule 73 (f) for the enforcement of the liability of sureties on appeal or supersedeas bonds. There seems to be no reason to treat sureties of these types of bonds differently. Mr. Armstrong believes that Rule 65 (c) should state specifically that one may recover against sureties in an independent action, even though the right to do that may be possible under the rule as it is presently drafted, since the motion provided for is permissive. He sees no reason why that remedy need be expressly given in Rule 60 (b) and not in Rule 65 (c).130 There is force in Mr. Armstrong's argument. The difference in the words of these rules which permit motions to be made are not so different that the right also to sue in an independent action is clear under one and not under the other. The addition of a clause giving the right, under Rule 65 (c), to bring an independent action would do no harm and might avoid future uncertainty as to the matter. If this is done, a similar clause should be added to Rule 73 (f).

RULE 66. RECEIVERS APPOINTED BY FEDERAL COURTS.

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. A receiver shall have the capacity to sue in any district court without ancillary appointment; but actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a

statute of the United States. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, (but all appeals in receivership proceedings are subject to these rules). In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.

The suggested title expands the one now in use to make clear that this rule applies to receivers appointed by federal, and only federal, courts.131

The purpose of the first of the sentences suggested for inclusion in this rule is to bar a dismissal of an action in which a receiver has been appointed except by order of court. It is felt that one should not be allowed to oust a court and its officer without consent of the court. It seems logical that the appointing authority, rather than the person requesting the appointment, should be the one to dismiss the receiver.

The first clause of the second sentence which the committee proposes should be added to this rule is intended to change the federal rule that a receiver appointed by a federal court is not authorized by that appointment to sue in another jurisdiction unless he is at least a "quasi-assignee."132 There has been much criticism of this view. For example, it has been said that the "primary purpose of a receivership is to prevent dismemberment by gathering together all the assets for the purposes of administration. There is no more certain way to defeat this end than the practice of denying aid for no reason other than the vindication of local jurisdiction."133 It has also been stated:

"If the receivership device is to be modernized, cooperation among courts of the various states and districts is imperative. They must consider the problem in a broader light. A receiver appointed by the court of a sister state or district must no longer be regarded as an alien who would bankrupt local merchants by the withdrawal of assets to foreign shores. It is a matter of national economics rather than of local opportunism, but in which the

welfare of the community is ultimately better served by the granting rather than by the denial of comity.”134

In spite of this criticism, the advisory committee, when it first drafted this rule, felt, in view of the settled practice of the federal courts, that it should not then suggest a change in Rule 66. But it is now of the opposite opinion and believes that the gain in added expedition and lowered cost of judicial administration which will result from eliminating the necessity of auxiliary receiverships calls for the suggested modification of that rule.135

Having suggested a provision relating to the right of a receiver to sue, it was natural for the committee to propose a specific reference to the bringing of suits against receivers. It has, therefore, in the final clause of the second sentence which it would add to Rule 66, provided for inclusion in Rule 66 of the familiar law that actions may not be commenced against a federal receiver without leave of the court appointing him except when a federal statute permits such an action without leave of court.136 28 U. S. C. § 125 is such a statute. It permits a federal receiver of property to be sued “in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver . . . was appointed.”137

The sentence which the committee suggests affixing to Rule 66 as it is presently drafted makes the federal rules applicable to all proceedings relating to the appointment of a federal receiver and to actions brought by and against such a receiver, unless such proceedings are expressly excepted from the operation of the rules. Since this sentence covers appeals, the specific reference to appeals is stricken from the rule as presently drafted. The nature of the usual receivership proceedings is not so different from that of other proceedings that the rules should not apply to them. It should be noticed that Rule 81 (a) (1) excludes bankruptcy proceedings from the application of the rules and that General Order in Bankruptcy 37 states that the rules shall be applicable in so far as they are not inconsistent with the Bankruptcy Act of the General Orders. Since the Bankruptcy Act treats of referees,138 the rules do not apply to them.

134. Rose, Extraterritorial Actions by Receivers (1933) 17 MINN. L. REV. 704, 729. See also 2 MOORE, FEDERAL PRACTICE 2088-2091.
137. See Rule 17 (b) concerning the capacity of a state court receiver to sue or be sued in a federal court.
RULE 68. OFFER OF JUDGMENT.

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

The only significant change proposed in the third sentence of this rule is the addition of the words "except in a proceeding to determine costs." This makes it clear that in, and only in, a proceeding to determine costs, may evidence of the offer be admitted. Such evidence is necessary in the proceeding to determine costs in order to show the offeror's right to costs from the date of the offer.

The only substantial change suggested by the substitution of new sentences for the last sentence of the present rule is the addition of a sentence providing that one may make several offers if prior offers have been rejected. For example, if a new trial is granted after judgment for the plaintiff, the defendant may make an offer before the second trial, though, before the first trial, he had made an offer which had not been accepted. 139

Though the original preliminary draft of proposed amendments to the rules contained the draft of Rule 71a, covering the practice in proceedings for the condemnation of property for public use, it has been omitted from the second draft because the committee was unable, after considering the legitimate objections to its draft of such a rule, to prepare a rule which was satisfactory to it and to government agencies dealing with condemnation cases. It decided not to delay the issuance of the second draft of its proposed amendments.

139. Second Preliminary Draft, p. 79.
amendments long enough to prepare a rule on practice in condemnation proceedings. Mr. Armstrong believes that this was an unwise decision, for all of the presently contemplated amendments to the rules should be presented at the same time, since he thinks that frequent amendment of the rules is unadvisable. He feels that condemnation proceedings have an important part in federal practice and that there should be a rule covering it.\footnote{140}

\textbf{RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS.}

(a) \textit{WHEN AND HOW TAKEN.} When an appeal is permitted by law from a district court to a circuit court of appeals (and within the time prescribed), (a) the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States is a party the time shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. A party may appeal from a judgment by filing with the district court a notice of appeal within the time provided. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant. The running of the time for appeal as provided in this subdivision is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under Rule 50 (b); or granting or denying a motion under Rule 52 (b) or Rule 59 (e) to amend or made additional findings of fact or to alter or amend the judgment in more than purely formal or mechanical aspects; or denying a motion for a new trial under Rule 59 (b).

\footnotetext{140}{Armstrong, Second Draft of Proposed Amendments to Federal Rules of Civil Procedure (1945) 31 A.B.A.J. 500, 533.}
(g) DOCKETING AND RECORD ON APPEAL. The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the (action) appeal there docketed within 40 days from the date of filing the notice of appeal; except that, when more than one appeal is taken from the same judgment to the same appellate court, the district court may prescribe the time for filing and docketing, which in no event shall be less than 40 days from the date of filing the first notice of appeal. In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the (action) appeal, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order, but the district court shall not extend the time to a day more than 90 days from the date of filing the first notice of appeal.

The proposed change in the first sentence of Rule 73 (a) fixes the usual time within which one may appeal a case at thirty days from the entry of the judgment appealed from unless a statute provides for a shorter time, except that the United States shall have sixty (60) days from such entry, and except that one may have not to exceed thirty (30) more days in which to appeal, if his failure to appeal within the usual time in which to do so has been caused by excusable failure to learn of the entry of judgment.

Since one may initiate an appeal merely by filing a notice, thirty (30) days should usually be ample time within which to appeal. After three years in government work at Washington I am content to let the government have sixty (60) days in which to appeal, for I know how many supervisions there must be of a decision to appeal. I doubt that the committee members are very well versed in government practice or they would have made the sixty (60) days six months. Of course, it would not be right to place real responsibility on the person whose business it is initially to determine whether a case should be appealed and to provide for a single supervision of that decision.

The exception in case of a delay in appealing caused by an excusable failure to discover that a judgment has been entered is justifiable. This will eliminate the need of a court’s vacating and reentering a judgment, as the court did in Hill v. Hawes\(^{141}\) in order to give relief in such a case.

\(^{141}\) See 320 U. S. 520 (1944) which reversed the decision in 132 F. (2d) 569 (App. D. C. 1942), which had, in turn, decided that the action of the district judge did not lengthen the time in which appeal could be taken.
The first sentence which the committee recommends should be added at the end of Rule 73 (a) allows a district court to approve the dismissal of an appeal after an appeal has been taken, but before it is docketed. This is contrary to present law which is that a district court, after an appeal has been taken, has no authority to act in derogation of the appeal.\textsuperscript{142} The change is advisable, since it will obviate the trouble and expense of docketing the case in the appellate court and dismissing it there.

The final sentence which the committee advises should be added to Rule 73 (a) provides that the running of the time for appeal is tolled by motions under Rules 50 (b), 52 (b), 59 (b), and 59 (e) and that the full time for appeal begins to run anew from the entry of orders made in connection with such motions. This incorporates the usual law in rule form.\textsuperscript{143} This rule does not enlarge the time for taking action under any of the rules referred to.\textsuperscript{144}

The proposed changes in Rule 73 (g) provide that the periods referred to therein shall begin to run from the \textit{day a notice of appeal is filed not from the date of the notice}. This surely was what was intended by the rule as it was originally written. Otherwise one might, for example, date an appeal much later than the day on which it was filed and thereby have much more time in which to file the record on appeal and to docket said appeal than was intended to be given him. Indeed, the dangers of a literal interpretation of the present form of this rule have been seen, and it has been treated as though it contained the word "filing" at the points where it is now suggested that that word should be inserted.\textsuperscript{145} This result has also been reached on the grounds that Rule 75 (g) provides that the record shall include the notice of appeal \textit{with the date of filing} and that the advisory committee's form of notice of appeal does not provide for the notice to be dated.\textsuperscript{146}


\textsuperscript{144} Second Preliminary Draft, pp. 87-88.


\textsuperscript{146} Ilsen and Hone, \textit{Federal Appellate Practice as Affected by the New Rules of Civil Procedure} (1939) 24 MINN. L. REV. 1, 45.
It is properly suggested that the word "appeal," which applies more exactly to the subject matter of Rule 75 (g) than does the word "action" should replace the latter word.

RULE 75. RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) DESIGNATION OF CONTENTS OF RECORD ON APPEAL. Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, unless the appellee has already served and filed a designation. Within 10 days thereafter any other party to the appeal may serve and file a designation of additional portions of the record, proceedings, and evidence to be included. If the appellee files the original designation, the parties shall proceed under subdivision (b) of this rule as if the appellee were the appellant.

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

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

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

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

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

(n) APPEALS WHEN NO STENOGRAPHIC REPORT WAS MADE. In the event no stenographic report of the evidence or proceedings at a hearing or trial was made, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection, for use instead of a
stenographic transcript. This statement shall be served on the appellee who may serve objections or propose amendments thereto within 10 days after service upon him. Thereupon the statement, with the objections or proposed amendments, shall be submitted to the district court for settlement and approval, and as settled and approved shall be included by the clerk of the court in the record on appeal.

(o) RULE FOR TRANSMISSION OF ORIGINAL PAPERS. Whenever a circuit court of appeals provides by rule for the hearing of appeals on the original papers, the clerk of the district court shall transmit them to the appellate court in lieu of the copies provided by this Rule 75. The transmittal shall be within such time or extended time as is provided in Rule 73 (g), except that the district court by order may fix a shorter time. The clerk shall transmit all the original papers in the file dealing with the action or the proceeding in which the appeal is taken, with the exception of such omissions as are agreed upon by written stipulation of the parties on file, and shall append his certificate reasonably identifying the papers transmitted. If a transcript of the testimony is on file the clerk shall transmit that also; otherwise the appellant shall file with the clerk for transmission such transcript of the testimony as he deems necessary for his appeal subject to the right of an appellee either to file additional portions or to procure an order from the district court requiring the appellant to do so. After the appeal has been disposed of, the papers shall be returned to the custody of the district court. The provisions of subdivisions (h), (j), (k), (l), (m), and (n) shall be applicable but with reference to the original papers as herein provided rather than to a copy or copies.

By the recommended changes in Rule 75 (a) an appellee is permitted to serve and file the initial designation of materials to be contained in the record on appeal. This would be an antidote to delaying tactics of an appellant. At the same time the appellant is protected, as he is deemed an appellee under Rule 75 (b), if an appellee serves and files the initial designation.147

The sole change in Rule 75 (b) is to require the filing of only one copy of the transcript unless the rules of a circuit court require the filing of a second copy. It appears to be the belief of a majority of circuit court clerks that only one copy is necessary.148 Of course, this is true when the record is printed. The advisory committee gives no explanation of its

147. Second Preliminary Draft, p. 93.
148. Ibid.
reason for deleting the provision that the copy of the transcript which is filed shall be available for the use in the appellate court in printing the record but for retaining the provision that such record shall be available for the use of the parties who have not filed it. It will be noticed that the phrase "for use in printing the record" has also been deleted from Rule 75 (g). I am advised by Mr. E. E. Koch, Clerk of the United States Circuit Court for the eighth circuit, that the original certified typewritten transcript of the record from the district court is used in printing the record. A second copy of the transcript of the record has not, he says, been required in his circuit for some time.

It is proposed to commence Rule 75 (d) with a statement that assignments of error need not be incorporated in the record on appeal. Apparently the word "shall" rather than "need" should be used if the intention of the advisory committee is to be accurately stated, for the comment on this rule reads: "The phrase added at the beginning of subdivision (d) emphasizes that assignments of error are not to be required or included in the record on appeal." It would be well for the committee to make the suggested change in its proposal, if its purpose is not to permit assignments of error.

If the Supreme Court wishes definitely to abolish assignments of error, the addition to Rule 75 (d) of the suggested clause is advisable. Though some courts have held that the rule as now drafted has abolished the use of assignments of error,149 at least one court has held to the contrary. It has said that the present provision as to the serving of a statement of points on which an appellant intends to rely is merely to assist an appellee to decide what further portions of the proceedings he wishes to have included in the record. This the court declares does not bar a court from requiring assignments of error for the purpose of protecting the interests of the appellee and of facilitating the work of the court.150

The committee also intends, by addition of the assignment of errors clause, to abolish cross-assignments of error which would otherwise be in order under such a rule as 50 (b).151 For instance, if the defendant was granted a judgment non obstante veredicto, on appeal by the plaintiff the


151. Second Preliminary Draft, p. 94.
defendant might wish to assign legal errors so that he could possibly obtain a new trial, if the plaintiff won on his appeal. The right to cross-assignments is projected into the picture by a sentence in Montgomery Ward & Company v. Duncan to the effect that, in the type of case just suggested, the court saw no reason why the appellee might not, and should not, cross-assign error in the appellant's appeal to rulings of law at the trial, so that, if the appellate court reversed the order for judgment notwithstanding the verdict, it might pass on the errors of law which the appellee asserted nullified the judgment on the verdict.\(^\text{152}\)

The recommended deletion in the third sentence of Rule 75 (g), the substitution of the word "when" therefor, and the addition of a sentence to that rule are made because of the change in Rule 75 (b) requiring but one copy of the transcript except when a further copy is required by a rule of the circuit court to which an appeal is taken.\(^\text{153}\)

The suggested addition to the title of Rule 75 (h) of the word "modify" is to more accurately indicate the full breadth of the rule than does the present title.\(^\text{154}\)

Because of the proposed addition to the rules of Rules 75 (m) and (n), which, in certain cases, require approval by district courts of the record on appeal, the addition to Rule 75 (b) of the phrase "except as provided in subdivisions (m) and (n) of this rule" is necessary.

The recommended addition of the new sentence at the end of Rule 75 (h) is to make clear the boundary between the authority of the district courts and circuits of appeals in connection with the making of decisions concerning the content and form of records.\(^\text{155}\) The idea of such a provision is admirable, but it should come at the end of Rule 75 rather than in Rule 75 (h), since later subdivisions of Rule 75 contain provisions for decisions by district courts concerning the content and form of records on appeal.

The proposal to add subdivision (m) to this rule is commendable, for it is well to specifically provide that district courts may make orders which will make effective the privilege given to appellants to appeal as paupers. In some cases district courts, after extending such a privilege, have temporarily negatived the effect thereof by ordering the appellant to file reporter's


\(^{153}\) Second Preliminary Draft, p. 94.

\(^{154}\) Ibid.

\(^{155}\) Ibid.
transcripts. If it had not been that the appellate courts involved reversed those orders,\(^\text{156}\) the appellants, because of lack of funds, could not have appealed.

It would probably be wise to adopt proposed Rule 75 (n). Although provision is now made for court reporters in district court cases, it is possible under the new law that in civil cases, by agreement of the parties with court approval, the proceedings will not be officially reported.\(^\text{157}\) Hence, some method should be provided for preparing a record in such cases.

The suggested provision by Rule 75 (o) for appeal by transmission of original papers is also advisable. Sometimes such an appeal would be very helpful, as in cases involving the appearance of vital documents. Also, in some cases it may be desirable to avoid the delay and expense involved in the preparation of copies. This addition to the rules has been suggested by some circuit judges.\(^\text{158}\)

RULE 77. DISTRICT COURTS AND CLERKS.

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

The addition to Rule 77 of the sentence set forth above is to make clear that the mere fact that a clerk has failed to send a party a notice of an entry of judgment will not relieve the party of the duty to appeal within the time provided for by rule or statute. The suggested addition to this rule seems to have been prompted by the decision in Hill v. Hawes,\(^\text{159}\) which has already been discussed in connection with Rule 73 (a). It will

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158. Second Preliminary Draft, pp. 95-96.
159. 320 U. S. 520 (1944).
be recalled that the Supreme Court held in that case that the district court effectively lengthened the time for appeal by vacating the judgment after the time for appeal had passed and by then entering another judgment. It is feared that, if this is permitted, now that courts have control of judgments after the terms at which they are rendered, the right to appeal may be indefinitely extended and the finality of judgments may be unduly delayed. 160 This fear is not unfounded.

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERKS AND ENTRIES THEREIN.

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the (Attorney General under the authority of the Act of June 30, 1906, e. 3914, § 1 (34 Stat. 754), as amended, U. S. C. Title 28, § 568, or other statutory authority,) Director of the Administrative office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be noted chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The notation of an order or judgment shall show the date the notation is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

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

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

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

The proposed changes in Rule 79 (a) are necessitated by enactment of statutes providing for the creation of the Administrative Office of the United States Courts, the director of which, under the supervision and direction of the conference of senior circuit judges, has charge of all administrative matters relating to the offices of court clerks.161

The recommended changes in Rule 79 (b) are the result of the statutes just referred to and to the fact that the advisory committee believes that the records referred to in his rule should not necessarily be kept in books, but that space-saving methods of recording, such as micro-photography, should be permitted.162

The suggested change in Rule 79 (c) deleting the words "order book" and substituting the words "judgments and orders of the nature referred to in subdivision (b) of this rule" is necessitated by the proposed change in Rule 79 (b), which permits records to be kept in something other than books. Deletion of the words "separate and" is the result of the conclusion by the advisory committee that to require separate indices of the docket, judgments, and orders is too rigid a rule, which may unduly increase the labor needed to make the indices and to search them. It believes that the number of indices to be used should be left to administrative discretion.163 The addition to Rule 79 of subdivision (d) is advisable, since the Administration Office should be able to keep records not mentioned in this rule.164

Subdivisions (a) and (b) of Rule 80 have been abrogated because,
as stated in connection with the discussion of Rule 75 (n), statutory provision has now been made for official reporters in federal courts.\[165\]

The questions have arisen as to what procedure should be used in a proceeding to enforce a subpoena and in an appeal from a decision in such a proceeding. It has been held that the new federal Rules of Civil Procedure apply in the original proceeding,\[166\] unless there is a special statute covering a particular type of case,\[167\] and that those rules apply in all cases of appeals.\[168\] The sentence added to Rule 81 (a) (3) is in accord with these rulings.

The change in the section number in Rule 81 (a) (6) is necessary because Section 405 of Title 8 of U. S. C. has been repealed and section 738 has replaced it. Subdivision (b) thereof gives a defendant in a proceeding to cancel his certificate of naturalization on the ground of fraud or illegality sixty days after personal notice of the proceeding in which to answer and provides for notice by publication in the manner provided for publication in the state or place in which the proceeding is brought, if the naturalized person is absent from the United States or from the judicial district in which he had his last residence. The committee rightly believes that reference to the applicable portion of the proper statute is sufficient and therefore suggests the deletion of the words setting forth the term of the statute relating to the length of time given one to file an answer.\[169\]

The cause of he proposed addition to Rule 81 (c) of the clause limiting the time in which to answer the petition in a case which is removed from a state to a federal court is the existence of some state laws permitting one to delay answering a petition for a term unless the petition is filed within a certain time before a term begins. In some localities, if one removes a case a shorter time before the beginning of term than is required to force one to answer at the next term, the answer may be delayed for several months. Incorporation in the rule of this clause is advisable.

Though many courts have held that the forms in the appendix to the

\[166\] Martin v. Chandis Securities Co., 128 F. (2d) 731, 734 (C.C.A. 9th, 1942).
\[169\] Second Preliminary Draft, p. 107.
rules are sufficient some have held that they may not be. The recommended addition to Rule 84 is intended to make clear that the forms are adequate under the rules.

This is the story of the proposed amendments to the Rules of Civil Procedure for the District Courts. And a very important story it is, not only for the lawyers who practice in our federal courts, but for all Missouri lawyers, for so many of the suggested changes are in rules which are very much like our local statutes. Thus federal Rules 6(b), 6(c), 7(a), 12(b), 12(c), 12(e), 12(f), 12(h), 13(i), 14(a), 24(a), 24(b), 33, 34, 36, 41(b) and 50(b), in all of which substantial changes are proposed by the advisory committee, are very much like the corresponding sections 6(b), 6(c), 32, 61, 68, 63, 64, 66, 20, 21(a), 21(b), 85, 86, 88, 100, and 113 of our present procedure code. We are now considering changes in that code. We should consider very carefully whether the changes recommended by the advisory committee of the United States Supreme Court, or others, should be made in the sections above referred to. I am sure that our own Supreme Court committee on civil procedure would be grateful to the lawyers of this state if they would suggest any changes in our civil procedure which they think are advisable. The chairman of that committee is Mr. Ray Bond of Joplin, Missouri.
