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FEDERAL APPELLATE PRACTICE AS AFFECTED BY THE NEW RULES OF CIVIL PROCEDURE

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ALTHOUGH the title "Rules of Civil Procedure for the District Courts of the United States"¹ might imply that these rules deal solely with the practice and procedure of the federal courts of first instance, the subject of appeals is dealt with therein in considerable detail. When the Advisory Committee² first commenced its deliberations, doubt was expressed whether the Enabling Act³ conferred power upon the Supreme Court of the United States to prescribe rules of appellate procedure. In fact some members of the committee, it has been said, felt that the embodiment of any provisions as to appeals in the rules might be resented as an intrusion on the peculiar rights and prerogatives of the appellate courts.⁴ The conclusion, however, was properly reached that such power was given, if not solely under the particular enabling statute, then—to the extent necessary—under the various other existing statutes extending to the Supreme Court the right to make rules of practice.⁵ As a result, a decided simplifica-

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¹Approved by the Supreme Court of the United States December 20, 1937, effective September 16, 1938. Hereinafter referred to as F.R.C.P. (Federal Rules of Civil Procedure.) The Federal Rules have also been made applicable to civil actions and proceedings in Hawaii, Public Act No. 133, 76th Congress, 1st Session (Approved June 19, 1939).

²Orders of Supreme Court: June 3, 1935, October Term 1934, 295 U. S. 774; February 17, 1936, Oct. Term 1935, 297 U. S. 731.

³28 U. S. C. secs. 723b, 723c.

⁴Dobie, *The Federal Rules of Civil Procedure*, (1939) 25 Va. L. Rev. 261, 305.

⁵Foreword to Preliminary Draft of Rules of Civil Procedure, May, 1936, pp. XI-XII; Clark, *Power of Supreme Court to Make Rules of Appellate Procedure*, (1936) 49 Harv. L. Rev. 1303.

tion of the mechanics of appellate procedure has been attained—a modernization which indeed had long been overdue.

Only procedural matters with respect to appeals have, of course, been covered by the rules. The subject of appellate jurisdiction remains unchanged,⁶ since it was not within the scope of the enabling statute.⁷ The cases in which and the time within which an appeal may be taken or certiorari may be applied for (except as pointed out later) have not and could not be changed, but the mechanical steps to be followed in order to obtain review, and, in fact, the extent of review in certain cases, have been altered to a large degree.

In order properly to determine the changes made in appellate review and procedure, certain rules dealing with the subject of "Trials" will first be considered.

THE RIGHT TO TRIAL BY JURY

The right to trial by jury according to the rules of the common law as directed in the Enabling Act⁸ is of course preserved,⁹ but a method of waiver of jury trial has been provided for—an innovation in federal practice, although it has been followed successfully in many jurisdictions.¹⁰ Thus if a jury trial is desired of all or some of the issues it must be affirmatively demanded,¹¹ but there is no constructive waiver of the right to jury trial of legal issues merely because they are mingled with equitable ones.¹² Failure of any party to make a timely demand

⁶F. R. C. P. 82.

⁷28 U. S. C. secs. 723b, 723c.

⁸28 U. S. C. secs. 723b, 723c.

⁹F. R. C. P. 38(a).

¹⁰F. R. C. P. 38(b); cf. notes of Advisory Committee to this rule. Formerly if trial by jury was waived other than as prescribed in 28 U. S. C. secs. 773, 875, review on the merits was extremely limited, see p. 23, *infra*.

¹¹F. R. C. P. 38(b) and (c); cf. 28 U. S. C. sec. 384 ("suits in equity shall not be sustained . . . in any case where a plain, adequate and complete remedy may be had at law"); sec. 770 (trial of issues of fact . . . in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury"); sec. 773 (requiring written stipulation to be filed to effect waiver of jury, amended May 29, 1930 (46 Stat. at L. 486, ch. 357) so as to allow waiver of jury by oral stipulation in open court); and *Smith v. American Nat'l Bank*, (C.C.A. 4th Cir. 1898) 89 Fed. 828 at 838: "Taking this section [28 U.S.C.A. sec. 384] in connection with [28 U.S.C.A. secs. 770, 773] . . . it is perfectly clear that congress, by this legislation, intended to preserve to all litigants a right deemed both valuable and sacred."

¹²F. R. C. P. 38(a); *Union Central Life Insurance Co. v. Burger* (S.D. N.Y., 1939) 27 F. Supp. 554 holding that defendant pleading a legal counterclaim to an action for equitable relief is entitled to a jury trial

for a jury constitutes a waiver by him of all rights he may have to a jury trial, except that the trial court, in its discretion, despite the failure of a party to make such a demand, may upon motion order a trial by jury of any or all issues in which such demand might have been made of right.¹³

The effect of such a jury trial for purposes of review may cause some divergence of opinion in the appellate courts, since there is no specific provision that the case shall then proceed as if it were tried to the jury as a matter of right.¹⁴ Does the rule, therefore, present a jury form of appellate review to the extent that a jury trial is granted by the court? The answer should be in the affirmative.

In actions not triable of right by a jury, the power of the court to call in an advisory jury is of course preserved.¹⁵ The rule further provides that in all actions (except where the United States is defendant and a statute of the United States provides for trial without jury), the court, on the consent of all parties, may order a trial with a jury whose verdict shall have the same effect as if trial by jury had been a matter of right. Thus, it would seem that a jury form of review is required.¹⁶ Provision is also made that the parties, in cases in which a jury is guaranteed by the seventh amendment and demand therefor has been duly made, may consent, by stipulation made in open court and entered in the record, to trial by the court sitting

of his counterclaim. Cf. *American Mills Co. v. American Surety Co.*, (1922) 260 U. S. 360, 43 Sup. Ct. 149, 67 L. Ed. 306, case under Equity Rule 30; *Auerbach v. Chase Nat'l Bank*, (1937) 251 App. Div. 543, 296 N. Y. S. 487, holding that where plaintiff joined two causes of action, one at law and the other in equity, he has waived his right to a jury.

¹³F. R. C. P. 38(d), 39(b); *Gunther v. H. W. Gossard Co.*, (S.D. N.Y. 1939) 27 F. Supp. 995; see *Alfred Hoffman Inc. v. Textile Machine Wks.*, (E.D. Pa. 1939) 27 F. Supp. 431, 432, where the court in denying leave to file jury demand after the time had expired said: "In spite of the lack of unanimity among the various courts which have had occasion to pass upon the validity of the patent, which may be a ground for the plaintiff's apparent faith that the technical injuries involved will be better understood by the average citizen than by a judge, this seems to me to be a conspicuous example of the kind of case which ought not to be tried by a jury." See also *Rogers v. Montgomery Ward & Co.*, (S.D. N.Y. 1939) 26 F. Supp. 707 and *Buggeln & Smith v. Standard Brands, Inc.*, (S.D. N. Y. 1939) 27 F. Supp. 399. Although there has been no decision on the point, it would seem that a jury demand may be filed within ten days after the service of a pleading amended as of right; to hold otherwise would be to construe "last pleading" in F. R. C. P. 38(b) to mean "last original pleading."

¹⁴F. R. C. P. 39(b).

¹⁵F. R. C. P. 39(c).

¹⁶F. R. C. P. 39(c).

without a jury.¹⁷ Furthermore, a court, upon motion or sua sponte, may, where it finds that the right to trial by jury of some or all of the issues does not exist under the constitution or statutes of the United States, direct that the trial be without a jury as to those issues, although demand therefor had been made.¹⁸ In other words, service of the demand for a jury trial cannot create a right to jury trial not existing at common law. There is also a provision to protect the unwary, which states that a demand for trial by jury made as prescribed by the rules, may not be withdrawn without the consent of the parties.¹⁹

In the Preliminary Draft of the Rules of Civil Procedure of May, 1936,²⁰ there was a requirement which is not in the present rules, to the effect that where certain of the issues are to be tried by the jury and others by the court, the court may determine the sequence in which such issues should be tried. Does this omission imply that the former practice of trying so-called equitable issues, first, is to be continued? The answer should be in the affirmative.²¹

TESTIMONY AND OBJECTIONS

No change has been made in the requirement that in all trials, whether formerly denominated law or equity, the testimony of witnesses must be taken orally in open court.²² Formal exceptions to rulings or orders of the court are no longer necessary.²³ The rule to this extent is a wise one. But it continues by stating that, "for all purposes for which an exception has heretofore been necessary" it shall be sufficient that a party at the time the ruling or order was made or sought, makes known to the court

¹⁷F. R. C. P. 39(a).

¹⁸F. R. C. P. 39(a).

¹⁹F. R. C. P. 38(d).

²⁰Rule 46.

²¹*Liberty Oil Co. v. Condon Nat'l Bank*, (1922) 260 U. S. 235, 43 Sup. Ct. 118, 67 L. Ed. 232: "Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury." See also *F. R. C. P. 42(b)*, and *Union Central Life Ins. Co. v. Burger*, (S.D. N.Y. 1939) 27 F. Supp. 554, holding that when a legal counterclaim is set up in an equity action, the equitable issue should be disposed of first, after which, the trial of the legal issues may proceed; *Frissell v. Rateau Drug Store, Inc.* (W.D. La. 1939) 28 F. Supp. 816; 3 Moore, *Federal Practice* (1938) 3032. Query, whether the decision in *Enelow v. New York Life Ins. Co.*, (1935) 293 U. S. 379, 55 Sup. Ct. 310, 79 L. Ed. 440, is still law that an order directing trial of equitable defenses first is appealable under 28 U. S. C., Sec. 227, as an interlocutory decree granting an injunction.

²²F. R. C. P. 43(a); cf. 28 U.S.C. sec. 635 and Equity Rule 46.

²³F. R. C. P. 46.

the action which he desires the court to take or his objection to the action of the court and his grounds therefor. This provision as an instrument of trial procedure seems nothing more than a change in name,²⁴ and in respect of appellate review, an exception under the changed name of "objection" may be and probably will be held as formerly, a necessary prerequisite to appellate review.²⁵ Furthermore, it still seems to be necessary that an objection must be tendered at the time of the ruling or order of the court complained of, and not thereafter. If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.²⁶

In jury cases, precise objections to the court's charge to the jury are continued.²⁷ No party may assign as error the giving or failing to give an instruction to the jury unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.²⁸ The rule also provides that opportunity must be given to make the objection out of the hearing of the jury. Of course, no provision is made in respect of the extent of the comment the trial judge may make to the jury. The well-established federal practice still continues that the judge must instruct the jury as to the law and may advise it as to the evidence.²⁹

GENERAL VERDICTS, SPECIAL VERDICTS, GENERAL VERDICTS WITH INTERROGATORIES, DIRECTED VERDICTS AND JUDGMENTS NOTWITHSTANDING THE VERDICT

Three methods of fact determination by juries are established: (1) by a general verdict only; (2) by a general verdict with written interrogatories upon one or more material issues of fact;³⁰ or

²⁴Cf. New York C. P. A. secs. 445, 553, sub. 2.

²⁵See *infra*, notes 263-265 and text.

²⁶F. R. C. P. 46.

²⁷F. R. C. P. 51.

²⁸F. R. C. P. 51; *Fairmount Glass Works v. Cub Fork Coal Co.*, (1933) 287 U. S. 474, 53 Sup. Ct. 252, 77 L. Ed. 439; cf. *New York C. P. A. sec. 446*, which apparently permits exceptions to be taken at any time before the jury have rendered their verdict.

²⁹Federal Rules of Procedure and Proceedings of the American Bar Association (Cleveland, 1938) 320; *Vicksburg, etc., Railroad Co. v. Putnam*, (1886) 118 U. S. 545, 7 Sup. Ct. 1, 30 L. Ed. 257, see *Capital Traction Company v. Hof*, (1899) 174 U. S. 1, 13, 19 Sup. Ct. 580, 43 L. Ed. 873; *Herron v. Southern Pacific Co.*, (1931) 283 U. S. 91, 95, 51 Sup. Ct. 383, 75 L. Ed. 857. Bills have been introduced in Congress denying federal judges the power to comment on the evidence, except to the extent authorized by state practice. H.R. 4721 (75th Congress), H.R. 8892 (76th Congress). It is hoped that this change will not be adopted.

³⁰F. R. C. P. 49(b): "*Issue of fact* the decision of which is necessary to a verdict." See *infra*, note 31.

(3) by written findings only on each issue of fact, i.e., a "special verdict."³¹ The court has discretion as to whether a special or general verdict with or without interrogatories is to be returned.

1. *General Verdict*.—There is nothing new contained in the rules with respect to the general verdict. As previously stated, no party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict.³²

2. *Special Verdict*.—Possibly one of the more significant changes in appellate practice results from the special verdict. The rules state that the court may submit written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence, or may use such other method of submitting the issues and requiring the written findings as it deems most appropriate.³³ One of the unfortunate developments in the former federal practice was the increasingly infrequent use of the special verdict³⁴ for, although it had outlived its original purpose—to relieve jurors of liability for mistakes of law³⁵—yet its importance as a device for obtaining more truthful and just decisions than is possible by use of the general verdict and its utility in localizing errors and exempting sound portions of a verdict from the necessity of retrial has been recognized.³⁶

³¹F. R. C. P. 49(a): "The court may require a jury to return only . . . a special written finding upon each *issue of fact*." That the answers of a special verdict must be statements of material facts, *Monticello Bank v. Bostwick*, (C.C.A. 8th Cir. 1896) 77 Fed. 123: "A special finding of fact, to be of any avail, must be a statement of the ultimate facts . . . rather than the evidence on which the ultimate facts rest. A special finding is necessarily imperfect and insufficient if it devolves upon the court the duty of deducing from the evidence the ultimate conclusion on a material issue of fact which the jury ought to draw." If the findings under 49(a) must be of material facts, it would seem that answers to interrogatories proposed under 49(b) must also be statements of material fact, for not only does 49(b) emphasize that the interrogatories are to be based on issues necessary to a verdict, but it is contemplated that where the answer to an interrogatory is inconsistent with the general verdict, the latter may be ignored and judgment entered upon the answers. And in that case it would seem that the answers would have to meet the specifications of findings under 49(a).

³²F. R. C. P. 51; U. S. Sup. Ct. Rule 8, 306 U. S. (1939); see *supra*, p. 5 and note 28.

³³F. R. C. P. 49(a).

³⁴The disuse was caused by the strict requirements as to form which were closely adhered to by the federal courts. See p. 7, *infra*.

³⁵*Morgan, A Brief History of Special Verdicts and Special Interrogatories*, (1933) 32 Yale L. J. 575, 599.

³⁶*Sunderland, Verdicts General and Special*, (1920) 29 Yale L. J. 253, 257, et seq.

The Advisory Committee, by using the Wisconsin statutory scheme as a model,³⁷ has attempted to relieve special verdicts of the unnecessary hazards to which they have heretofore been subjected upon appeal. Under the former federal practice, appellate courts made no presumptions in favor of judgments based on special verdicts; defects no matter how insubstantial were sufficient for reversal.³⁸ Findings as to all material issues of the action were necessary,³⁹ even though there were sufficient evidentiary facts stated in the verdict to establish a material fact,⁴⁰ and in those verdicts where a material fact was omitted, the courts did not distinguish between cases where the jury failed to make a finding on a material issue actually submitted to it and cases where, through inadvertence of the court and counsel, one or more material issues were not presented to the jury for its determination,⁴¹ even though the issue was undisputed as long as it was not admitted by the pleadings.⁴² The courts have gone so far as to say that the silence of the special verdict on a material issue was the equivalent of an express finding against the party having the burden of proof.⁴³

It may be that this attitude was based on the strict construction of the seventh amendment preserving the right to trial by jury.⁴⁴

³⁷Notes of Advisory Committee to F. R. C. P. 49(a); Green, *A New Development in Jury Trial*, (1927) 13 A. B. A. J. 715; Sunderland, *The New Federal Rules*, (1938) 45 W. Va. L. Q. 5. The Wisconsin practice in regard to special verdicts has been reported as successful, Tolman's Discussion of Rule 49 at New York Symposium of Civil Procedure, Proceedings of Institutes (1938), p. 280. With F. R. C. P. 49(a) compare Wis. Stat. (1933), secs. 270.27, 270.28, 270.30. See generally *The Special Verdict Under the Federal Rules of Civil Procedure*, (1939) 34 Ill. L. Rev. 96.

³⁸Comment, (1936) 15 Tex. L. Rev. 396.

³⁹*Chesapeake Ins. Co. v. Stark*, (1810) 6 Cranch (U.S.) 268, 3 L. Ed. 220; 3 Moore, *Federal Practice* (1938) 3097.

⁴⁰*Barnes v. Williams*, (1826) 11 Wheat. (U.S.) 415, 6 L. Ed. 508; *Monticello Bank v. Bostwick*, (C.C.A. 8th Cir. 1896) 77 Fed. 123.

⁴¹With *Barnes v. Williams*, (1826) 11 Wheat. (U.S.) 415, 6 L. Ed. 508, compare *Hodges v. Easton*, (1882) 106 U. S. 408, 1 Sup. Ct. 307, 27 L. Ed. 169, and *Daube v. Philadelphia & R. Coal & Iron Co.*, (C.C.A. 7th Cir. 1897) 77 Fed. 713.

⁴²*Daube v. Philadelphia & R. Coal & Iron Co.*, (C.C.A. 7th Cir. 1897) 77 Fed. 713.

⁴³*Daube v. Philadelphia & R. Coal & Iron Co.*, (C.C.A. 7th Cir. 1897) 77 Fed. 713.

⁴⁴See *Hodges v. Easton*, (1882) 106 U. S. 408, 412, 1 Sup. Ct. 307, 27 L. Ed. 169, where the court said: "The court could not, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. . . . It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver."

The federal rules, however, appear to reverse this previously existing attitude so that now waiver of trial by jury is to be encouraged.⁴⁵

It is by an extension of this new doctrine that means have been found to remedy the harsh treatment formerly accorded judgments entered on special verdicts. The rules provide that if there is a failure to submit a material issue to the jury, waiver of trial by jury as to that issue is implied and the trial court may make the essential findings of fact; but should the judge fail to perceive the omission and make no finding, it shall then be implied that the trial court made the finding in accord with the judgment on the special verdict.⁴⁶ Thus, by the use of these two fictions, it may no longer be urged on appeal for the purpose of obtaining a reversal that the special verdict is defective because of failure to submit a material issue to the jury.⁴⁷ If there is, however, a failure to find all the material facts because the jury answers some issues by stating evidentiary facts or conclusions which are but conclusions of law, a special verdict may still be defective.⁴⁸ If the jury fails to return any answer to a material issue actually submitted to them, the defeated party would be entitled to a new trial,⁴⁹ but only as to that issue,⁵⁰ unless a sepa-

⁴⁵Supra, p. 2 et seq.

⁴⁶F. R. C. P. 49(a): "If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. [Cf. N. Y. C. P. A., (1938) sec. 445.] As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict." *Hinshaw v. New England Mut. Life Ins. Co.*, (C.C.A. 8th, 1939) 104 F. (2d) 45.

⁴⁷For the convenience of appellate courts, it is quite important that the answers of the jury together with the findings of the trial judge should cover all the material issues and should be properly formulated; also, it would seem desirable that the trial judge submit with his findings or the special verdict a recital of all the facts which he deems material to the judgment, which are brought out by the pleadings but admitted therein. The making of such a recital would relieve appellate courts of the burden of examining the pleadings to discover these essential facts.

⁴⁸*Monticello Bank v. Bostwick*, (C.C.A. 8th Cir. 1896) 77 Fed. 123 (evidentiary facts); *Sunderland, Verdicts General and Special*, (1920) 29 Yale L. J. 253, at 261.

⁴⁹*Chesapeake Ins. Co. v. Stark*, (1810) 6 Cranch (U.S.) 268, 3 L. Ed. 220.

⁵⁰F. R. C. P. 59: "A new trial may be granted . . . on all or part of the issues;" see *Gasoline Products, Inc. v. Champlin Ref. Co.*, (1913) 283 U. S. 494, 498, 51 Sup. Ct. 513, 75 L. Ed. 1188 where it is stated: "If in the present case the jury has found, in accordance with the applicable legal rules, the amount due to petitioner on the contract for royalties and all the elements fixing its liability on the treating plant contract, there is no

rate trial on that issue alone would be prejudicial.⁵¹ Likewise, for a special verdict to withstand attack on appeal, the answers must be consistent.⁵²

Although the rule as to special verdicts eliminates many problems, some new ones may arise. A jury case, where the complaint purports to state two "claims"⁵³ in one count⁵⁴ based on the same factual situation but differing as to some of their material issues and the trial court fails either to submit to the jury the material issues distinguishing the two claims from one another or fails to make its own express findings on such issues, may cause difficulties at times. Assume a case arising in California where plaintiff has been induced through defendant's fraud, in misrepresenting the value of the collateral, to purchase an in-

constitutional requirement that those issues should again be sent to a jury, merely because the exigencies of the litigation require that a separable issue be tried again;" *Schuerholz v. Roach*, (C.C.A. 4th Cir. 1932) 58 F. (2d) 32, 33; *Simmons v. Fish*, (1912) 210 Mass. 563, 565, 97 N. E. 102, 103; *Tuttle v. Tuttle*, (1907) 146 N. C. 484, 59 S. E. 1008; but see *Hodges v. Easton*, (1882) 106 U. S. 408, 412 et seq., 1 Sup. Ct. 307, 27 L. Ed. 169.

⁵¹*Gasoline Products Co. v. Champlin Ref. Co.*, (1913) 283 U. S. 494, 500, 51 Sup. Ct. 513, 75 L. Ed. 1188: "Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"; 3 Moore, *Federal Practice* (1938) 3248-9.

⁵²*Mounger v. Wells*, (C.C.A. 5th Cir. 1929) 30 F. (2d) 521, where the court also made the comment: "It is unfortunate that the case was submitted to the jury for a special verdict. No doubt they were confused in answering the questions clearly, as, if either was answered, 'yes,' the other should have been answered, 'no,' to be consistent. It would have been simpler and more conclusive to have left the whole case to the jury for a general verdict;" cf. F. R. C. P. 49(b) (general verdict accompanied by answer to interrogatories), which provides that when "the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial."

⁵³F. R. C. P. 8: "claim" is the substitute but not necessarily a synonym for "cause of action;" cf. *Shulman and Jaegerman*, *Some Jurisdictional Limitations of Federal Procedure*, (1936) 45 Yale L. J. 393, 397: "A vast amount of legal scholarship has been expended on attempts to define a generalized concept of 'cause of action.' Apparently, the search has been vain,—or rather, successful in establishing that 'a cause of action' may mean one thing for one purpose and something different for another." cf. *Elliott v. Mosgrove*, (Or., 1939) 93 P. (2d) 1070, for extended discussion of construction to be given "claim for relief" and "cause of action." Likewise, Judge Clark in a recent concurring opinion emphasizes the variable character of "claim" and that under the federal rules the extent of a "claim" should depend not on legal rights, but upon a lay view of the past events which have given rise to the litigation, that the outer limits of this variable concept should depend to a considerable extent upon the purpose for which the concept is being immediately used. *Collins v. Metro-Goldwyn Pictures Corporation*, (C.C.A. 2d Cir. 1939) 106 F. (2d) 83, 87.

⁵⁴F. R. C. P. 10(b).

instalment promissory note, the payment of which is guaranteed by defendant, and thereafter the mortgagor or pledgor defaults in the payment of a \$2,000 instalment. The purchaser sues the guarantor for recovery of the instalment, and for damages resulting from the fraud, and asks for \$5,000 total damages.⁵⁵ These claims differ as to several issues, including: (a) measure of damages;⁵⁶ (b) time within which an action may be commenced after the claim arises;⁵⁷ and (c) intent to defraud,⁵⁸ which issue, of course, is material only to the claim based on fraud. If such case is sent to the jury for a special verdict but the issues on how long the claims have been in existence and as to the intent to defraud are not submitted to the jury, and the court makes no findings thereon but the jury finds that plaintiff's damages were \$3,000, the question then arises whether the court should imply findings of fact consistent with the amount of damages awarded or remand the case for further findings. It is submitted that the latter alternative is proper, for to adopt the first suggestion might blind the appellate court to possible errors of law committed by the trial court. For instance, the amount of damages awarded might be based on either: (1) a misconception as to the measure of damages established by law for each of the two theories; (2) an error as to the length of time within which plaintiff may maintain either of the claims; or (3) an error in determining whether intent is an essential element in a claim based on fraud; rather than on a factual determination of the time when the transaction occurred, or when the fraud was discovered by plaintiff, or whether there was intent to defraud on the part of defendant.⁵⁹

⁵⁵F. R. C. P. 8(e) (2) "A party may set forth two or more statements of a claim . . . alternatively. . . ."

⁵⁶Calif. Civ. Code (Deering, 1937) sec. 3302 ("The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon."); sec. 3333 ("For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all of the detriment proximately caused thereby, whether it could have been anticipated or not."); sec. 3294 ("In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of . . . fraud . . . the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant").

⁵⁷Cal. Code Civ. Pro. (Deering, 1937), sec. 337 (action on a written contract must be commenced within four years); sec. 338 (action for relief on the ground of fraud must be commenced within three years after discovery of the facts constituting the fraud).

⁵⁸Hall v. Mitchell, (1922) 59 Cal. App. 743, 211 Pac. 853; see Hodgkins v. Dunham, (1909) 10 Cal. App. 690, 698, 103 Pac. 351, 355.

⁵⁹This case seems a fair example; many situations presenting this problem of implied findings will no doubt arise.

In this connection a peculiar interpretation of a Texas statute which similarly provides for implied findings on omitted issues might well be noted.⁶⁰ The Texas courts will imply only such findings on "omitted issues as are in accord with, and supplemental or incidental to, and which support, the issues of fact which were submitted and found by the jury, upon which the judgment is based."⁶¹ They will not imply findings on "issues in the case which are independent causes of action in themselves or controlling and independent grounds of recovery, or independent grounds of defense."⁶² As might well be expected it is rather difficult at times to determine what constitutes an independent ground of recovery or defense.⁶³

There is nothing in Rule 49(a) to justify such an interpretation. On the contrary, it is provided that the remedial fictions are to be operative if the court, in submitting the case, omits any issue. The Wisconsin courts, in interpreting a similar statute, which, as previously stated, has served as a model for the federal rule,⁶⁴ have held that such provision applies to any omitted issue, even though the evidence is conflicting⁶⁵ or though the omitted issue constitutes a separate ground of recovery or defense;⁶⁶ the judge may make also an express finding on any issue omitted, and such finding is not a violation of the right to jury trial, since the failure to request a finding on an issue operates as a waiver of jury trial.⁶⁷ This, it seems, is the better method of functioning under special verdicts, since it would appear more desirable to dispose of appeals according to the peculiar problems of each case and to refrain from implying findings only in those instances where the result would be to hide errors of law from view.

Another problem as to the type of judgment to be rendered by the appellate court arises when there has been an erroneous ex-

⁶⁰Texas, Vernon's Ann. Civ. Stat. (Supp., 1936) Art. 2190: ". . . an issue not submitted and not requested is deemed as found by the court in such manner as to support a judgment if there is evidence to sustain such finding."

⁶¹Ormsby v. Ratcliffe, (1928) 117 Tex. 248, 1 S. W. (2d) 1084.

⁶²Ormsby v. Ratcliffe, (1928) 117 Tex. 248, 1 S. W. (2d) 1084.

⁶³See Comment, (1936) 14 Tex. L. Rev. 538.

⁶⁴Supra, note 37.

⁶⁵Smith v. Reed, (1910) 141 Wis. 483, 124 N. W. 489; Kline v. Washington Nat'l Ins. Co., (1935) 217 Wis. 21, 258 N. W. 370.

⁶⁶Smith v. Reed, (1910) 141 Wis. 483, 124 N. W. 489 (counter-claim); Gegare v. Fox River Land & Loan Co., (1913) 152 Wis. 548, 140 N. W. 305 (negligence of broker in failing to procure insurance); Gist v. Johnson-Carey Co., (1914) 158 Wis. 188, 147 N. W. 1079, Ann. Cas. 1916E 460 (accord and satisfaction).

⁶⁷Wisconsin Stat. (1933) sec. 270.28; cf. F. R. C. P. 49(a).

clusion of evidence on a material issue, as to which issue there has been an implied waiver of trial by jury by virtue of Rule 49(a). Shall the trial court be directed to take testimony and amend its findings, or shall a retrial be ordered, thus permitting the parties to determine according to Rule 38 whether the retrial shall be by jury? The latter course seems preferable. The purpose of the implied waiver was to protect judgments on technically defective special verdicts,⁶⁸ and not to deprive litigants of trial by jury.

3. *General Verdict Accompanied by Answer to Interrogatories.*

—Provision is also made for the court in its discretion to submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict.⁶⁹ The court must give such explanation as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and must direct the jury both to make written answers and to render a general verdict. This is a very helpful rule, since the procedure as outlined will operate to check the correctness of the general verdict and compel the jury to give a detailed consideration to one or more important issues.⁷⁰ If the general verdict and the answers to the interrogatories are consistent, the court must direct the entry of the appropriate judgment.⁷¹

The rules also take care of cases where there is inconsistency. Under the former practice, it was generally the rule that if the answers to interrogatories were inconsistent with the general verdict, the answers were controlling,⁷² when they clearly compelled a different judgment from that which would follow the general verdict. The rule, however, goes a step further and states that if the answers are consistent with each other, but one or more is inconsistent with the general verdict, the court has the

⁶⁸Supra, p. 8.

⁶⁹F. R. C. P. 49(b).

⁷⁰Wicker, *Special Interrogatories in Civil Cases*, (1926) 35 Yale L. J. 296: "Where special interrogatories are submitted, jurors are compelled to do more than toss a coin and keep still about it or give plaintiffs verdicts largely on principle that the plaintiff is indigent and needs the money and defendant is unpopular and able to pay." Wicker, *Trials and New Trials Under the New Federal Rule*, (1939) 15 Tenn. L. Rev. 551, 570.

⁷¹F. R. C. P. 49(b).

⁷²*Victor-American Fuel Co. v. Peccarich*, (C.C.A. 8th Cir. 1913) 209 Fed. 568; *United States v. McPhee*, (C.C.A. 9th Cir. 1929) 31 F. (2d) 243; 3 Moore, *Federal Practice* (1938) 3100; cf. *Walker v. Southern Pacific Railroad*, (1897) 165 U. S. 593, 17 Sup. Ct. 421, 41 L. Ed. 837, (holding that entry of judgment on the special findings does not impair the rights of trial by jury).

choice of (1) directing entry of judgment in accordance with the answers notwithstanding the general verdict, (2) returning the jury for further consideration of the answers and verdict, or (3) ordering a new trial.⁷³ It would seem, however, that the court cannot properly direct entry of judgment in accordance with the answers unless they are sufficiently complete to compel a judgment different from that which would follow the general verdict.⁷⁴ In other words, findings will not be implied as is prescribed in the subdivision dealing with special verdicts,⁷⁵ except possibly where it is clear that the interrogatories were intended to and did to a great extent cover "each issue of fact" in the action. Under no circumstances should the court make an express finding as to an issue omitted by the interrogatories, since it does not appear that there has been any waiver by the parties of their right of trial by jury. On the contrary, the parties were relying upon the general verdict of a jury, in addition to the jury's answers to special interrogatories.

If the answers are also inconsistent with each other and one or more is likewise inconsistent with the general verdict, it follows that the court cannot enter judgment upon the basis of the answers to the interrogatories, but must return the jury for further consideration of its answers and verdict or order a new trial.⁷⁶

The restrictions on reexamination of the facts in general and special verdicts and interrogatories are necessarily continued under the federal rules, since the seventh amendment to the constitution provides that:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."⁷⁷

⁷³F. R. C. P. 49(b).

⁷⁴See note 72, *supra*.

⁷⁵F. R. C. P. 49(a).

⁷⁶F. R. C. P. 49(b); in F. R. C. P. 49(a) the word "interrogatory" is not used; in 49(b) the expressions "written findings" and "special verdict" do not appear. The device of a general verdict and answers to interrogatories is of course distinct from a special verdict. In most cases, the legal problems arising under the two subdivisions of Rule 49 will be different. It would be conducive to accurate analysis if the federal judges would adopt the careful method of the Advisory Committee and confine the formulative terms to the meanings originally ascribed to them by 49(a) and 49(b). Unfortunately, the district courts have already started the process of careless terminology. See *Manufacturers Cas. Ins. Co. v. Roach*, (D. C. Md., 1939) 25 F. Supp. 852.

⁷⁷United States constitution, seventh amendment; F. R. C. P. 38(a); see *Parsons v. Bedford*, (1830) 3 Pet. (U.S.) 433, 448, 7 L. Ed. 732.

Obviously, there are no provisions in the federal rules governing the scope of review in jury cases.⁷⁸

Appellate review in jury cases extends solely to questions of law, including inquiry as to whether the facts are supported by any substantial evidence (which is deemed a question of law)⁷⁹ but not to the question whether the verdict is against the weight of the evidence.⁸⁰

If the Supreme Court decides that the permissible degree of reexamination of facts under Rule 52 (findings of fact by the court in non-jury cases)⁸¹ differs from that prevailing as to jury findings, judgments based on special verdicts, together with findings (actual or implied) on issues as to which there was implied waiver of trial by jury under 49 (a), will raise an additional question as to scope of review. Where there is by virtue of Rule 38⁸² a deliberate waiver of trial by jury on some of the material issues in the action, the judge's findings on those issues should be reviewed according to Rule 52,⁸³ but where find-

⁷⁸With respect to non-jury cases, however, a change has been made, since it was felt that a failure to establish the scope of review for non-jury actions would result in a continuation of the previously existing distinction in the classification of non-jury cases. See note to the Supreme Court following Proposed Rule 68 (Preliminary Draft, 1936) and Proposed Rule 59 (Draft of 1937).

⁷⁹See *Lancaster v. Collins*, (1885) 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373, where the court said, "This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered;" *Boatmen's Bank v. Trower Bros. Co.*, (C.C.A. 8th Cir. 1910) 181 Fed. 804, 806, where the following quotation appears: "The only instance in which the finding of a fact by a jury may be re-examined and avoided by a court is where there is no substantial evidence to sustain it, and the review of the findings of fact in an action at law by a court, or a consent referee, is limited by the same restriction;" *Bank of Waterproof v. Fidelity & Deposit Co.*, (C.C.A. 5th Cir. 1924) 299 Fed. 478, 481. That a motion for a directed verdict is necessary to raise the question of the sufficiency of the evidence to support the verdict of a jury, see *Baten v. Kirby Lumber Corporation*, (C.C.A. 5th Cir. 1939) 103 F. (2d) 272, 273, 274.

⁸⁰See *Erie R. R. v. Winter*, (1892) 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71; *Aetna Life Ins. Co. v. Ward*, (1891) 140 U. S. 76, 91, 11 Sup. Ct. 720, 35 L. Ed. 371, where the court said: "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." See also *Lancaster v. Collins*, (1885) 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373.

⁸¹See *infra* pp. 33-34.

⁸²See *supra* p. 2.

⁸³See *infra* p. 20.

ings are made because of an implied waiver there is legitimate ground for doubt; for although on a conceptual basis Rule 52 might be considered as applicable inasmuch as these findings are "findings by the court," yet the effect of applying Rule 52 would be to subject material issues to a form of review not contemplated by the parties and thus cause Rule 49 to go beyond the purpose of the remedial provisions therein incorporated.

On the other hand, due to the liberal provisions for joinder of claims⁸⁴ and the provisions for the form of trial,⁸⁵ it should be a common occurrence for some issues in an action to be tried to a jury and other issues to be tried to the court and, therefore, such cases as to scope of review on appeal will be governed by two sets of rules.⁸⁶ That being the case, it hardly seems desirable or expedient to introduce new complexities in appellate practice by distinguishing between findings on the basis of whether they exist because of Rules 38 and 39 or because of Rule 49.

It seems that the problem which will occur most frequently in connection with verdicts will be whether the written findings or answers to interrogatories state material facts rather than evidentiary facts or conclusions of law. This difficulty is hard to avoid, because the courts and counsel usually have not sufficient time during a trial to a jury carefully to study and analyze the proposed findings. It has been suggested that, inasmuch as pleadings have been simplified under modern rules of practice, the pleadings themselves be used as a foundation for the questions to be put to the jury.⁸⁷ If this were done, much error could be eliminated, because the parties have adequate time to test the sufficiency of the pleadings before the case reaches trial. Accordingly, if the pleadings are used as the basis of findings or answers, there would be no objections to the form of the verdict in most cases unless the pleadings themselves were fatally defective. No provision for such method of procedure has, however, been specifically prescribed.⁸⁸

4. *Directed Verdict*.—The technical provisions governing motions for a directed verdict have been eliminated, since the formality of an express reservation of rights against waiver is no

⁸⁴F. R. C. P. 8(a) (3), 8(e) (2), 10(b), 18(a).

⁸⁵F. R. C. P. 38 and 39.

⁸⁶F. R. C. P. 52; although this rule refers to ". . . all actions tried upon the facts without a jury . . ." it would seem that the word "issues" is intended. See *infra* p. 20.

⁸⁷Sunderland, *Verdicts General and Special*, (1920) 29 Yale L. J. 253, 262 *et seq.*

⁸⁸F. R. C. P. 49 and 52.

longer necessary.⁸⁹ It is now provided that a party who moves for a directed verdict at the close of the evidence offered by the opponent may offer evidence in the event the motion is denied without having reserved the right so to do, and to the same extent as if the motion had not been made;⁹⁰ and 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 the plaintiff has shown no right to relief upon the facts and the law.⁹¹ Furthermore, the rule states that 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.⁹² Thus, the unnecessary formalities formerly required in the federal courts and still required in many state courts have been abolished. For the protection of the parties and the assistance of the trial and appellate courts it is wisely prescribed that a motion for a directed verdict must state the specific grounds therefor.⁹³ Although there need be no reservation in order that a party may offer evidence if his motion for a directed verdict or for a dismissal made at the close of his opponent's evidence is denied, it would seem that the motions must be renewed at the close of all the evidence in order to obtain review of the trial judge's denial of such motions.⁹⁴

5. *Judgments Notwithstanding the Verdict.*—The rules also deal with the right of a trial judge in a jury case to take verdicts subject to the ultimate ruling on the questions reserved—the reservation carrying with it authority to make such ultimate disposition of the case as may be essential to the ruling under the

⁸⁹F. R. C. P. 50; cf. *Sampliner v. Motion Pictures Patents Co.*, (1920) 254 U. S. 233, 41 Sup. Ct. 79, 65 L. Ed. 240; *Union Indemnity Co. v. United States*, (C.C.A. 6th Cir. 1935) 74 F. (2d) 645.

⁹⁰F. R. C. P. 50.

⁹¹F. R. C. P. 41(b).

⁹²F. R. C. P. 50(a).

⁹³F. R. C. P. 50(a); *Virginia-Carolina Tie & Wood Co. v. Dunbar*, (C.C.A. 4th Cir. 1939) 106 F. (2d) 383; this requirement settles the conflict in the federal cases. See *Simkins, Federal Practice* (1934) sec. 189; *Kennedy Lumber Co. v. Rickborn*, (C.C.A. 4th Cir. 1930) 40 F. (2d) 228; *Standard Oil Co. v. Noakes*, (C.C.A. 6th Cir. 1932) 59 F. (2d) 897; *Balaklala Consol. Copper Co. v. Reardon*, (C.C.A. 9th Cir. 1915) 220 Fed. 584; *Adams v. Shirk*, (C.C.A. 7th Cir. 1900) 104 Fed. 54, rehearing denied, (1901) 105 Fed. 659.

⁹⁴*Concordia Fire Ins. Co. v. Commercial Bank*, (C.C.A. 8th Cir. 1930) 39 F. (2d) 826; *United States v. Alberty*, (C.C.A. 10th Cir. 1933) 63 F. (2d) 965; *Mutual Life Ins. Co. v. Wells Fargo Bank & Union Trust Co.*, (C.C.A. 9th Cir. 1936) 86 F. (2d) 585; 3 *Moore, Federal Practice* (1938) 3106.

reservation, such as entering a verdict or judgment for a party where the jury has given a verdict for the other or ordering a new trial.⁹⁵ Thus it is provided that 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 ten days after the verdict has been received or within ten days after the jury has been discharged if no verdict has been returned, the moving party may move for a directed verdict in his favor and to set aside the verdict if a verdict was returned. A motion for a new trial may be joined with this motion, or a new trial may be asked for in the alternative. Whenever a motion for a directed verdict is made under these circumstances the court may (1) if a verdict was returned (a) allow the verdict and judgment to stand or (b) reopen the judgment and direct the entry of judgment as if the requested verdict had been directed or order a new trial; (2) if no verdict was returned (a) direct the entry of judgment as if the requested verdict had been directed or (b) order a new trial.

The case of *Slocum v. New York Life Ins. Co.*⁹⁶ was the cause of a great deal of uncertainty in connection with judgments notwithstanding the verdict. At common law the judgment always followed the verdict unless the record itself disclosed that a contrary judgment was required as a matter of law. If the verdict was wrong as a matter of law on the evidence rather than on the pleadings, the only remedy was a new trial. Various states enacted statutes to remedy this defect. One of these was adopted in Pennsylvania which read as follows:

“That whenever, upon the trial of any issue, a point requesting binding instructions has been reserved or declined, the party presenting the point may, within the time prescribed for moving for a new trial, or within such other or further time as the court shall allow, move the court to have all the evidence taken upon the trial duly certified and filed so as to become part of the record, and for judgment non obstante veredicto upon the whole record; whereupon it shall be the duty of the court, if it does not grant a new trial, to so certify the evidence, and to enter such judgment as should have been entered upon that evidence, at the same time granting to the party against whom the decision is rendered an exception to the action of the court in that regard. From the judgment thus entered either party may appeal to the Supreme

⁹⁵F. R. C. P. 50 (b); *Bachnor v. Eickhoff* (S.D. N.Y. Mar. 29, 1939, not yet reported).

⁹⁶(1913) 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879.

Court, as in other cases, which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court."⁹⁷

This statute was applied by the circuit court of appeals in the *Slocum Case* under the Conformity Act. The circuit court of appeals reversed a judgment entered on a verdict of a jury, and directed judgment for the other party as permitted by the statute just quoted. The Supreme Court, by Mr. Justice Van Devanter, stated that the real question involved was whether in this direction by the circuit court of appeals there was an infraction of the seventh amendment to the constitution, and in a five to four decision (Mr. Justice Hughes writing the dissenting opinion) held that there had been an interference with that right, and accordingly modified the judgment of the circuit court of appeals by eliminating the direction to enter judgment for the defendant notwithstanding the verdict and by substituting a direction for a new trial. The theory expounded by the Supreme Court was that when the court rejects the jury's findings of fact it reopens the issues of fact, and if it enters a judgment contrary to that of the jury, by itself determining those issues, it contravenes the provisions of the seventh amendment. This case was with reason severely criticized.⁹⁸ The federal courts found ways to escape the effect of this decision by falling back on the common law method of reservation by the court of decision of a question of law until the jury had rendered its verdict.⁹⁹

Then came the case of *Northern Ry. Co. v. Page*,¹⁰⁰ where the Supreme Court approved without discussion the action of the district court of Massachusetts in directing the jury that in case it found for one party it also bring in an alternative finding for the other—a procedure permitted by the Massachusetts state practice which permitted such an alternative finding to be used in the event that the court was of the opinion that as a matter of law the party in whose favor the primary finding was made was not entitled to recover. The district court had entered judgment in favor of the defendant on the alternative verdict on the ground that there was no evidence to support the primary finding in favor of the plaintiff. The circuit court of appeals had reversed

⁹⁷Pennsylvania Laws 1905, p. 286, ch. 198.

⁹⁸For a bibliography, see Dobie, *Cases on Federal Procedure* (1935) 439; generally, see Clark and Moore, *A New Federal Procedure: I, The Background*, (1935) 44 *Yale L. J.* 387.

⁹⁹Note, (1935) 45 *Yale L. J.* 166.

¹⁰⁰(1927) 274 U. S. 65, 47 *Sup. Ct.* 491, 71 *L. Ed.* 929.

the district court and had directed the district court to enter judgment in favor of the plaintiff. Upon the facts in this case it can properly be said that where a jury returns alternative verdicts, the consent of the jury was obtained by the court for directing judgment non obstante veredicto and that therefore the Supreme Court was only recognizing the old common law procedure of obtaining jury consent in such circumstances.

The third case is *Baltimore & Carolina Line v. Redman*,¹⁰¹ in which the practice allowed by a New York statute¹⁰² was approved. The facts were as follows: At the close of the evidence the defendant moved for a directed verdict in its favor on the ground that the evidence was insufficient to support a verdict in favor of the plaintiff. The court reserved decision, submitted the case to the jury subject to its opinion on the questions reserved, and received from the jury a verdict for the plaintiff. No objection was made to the reservation or to this mode of procedure. Thereafter the court held that the evidence was sufficient and entered judgment for the plaintiff on the verdict. An appeal was taken to the circuit court of appeals, which held the evidence insufficient and reversed the judgment with a direction for a new trial. The defendant urged that the direction should be for a dismissal of the complaint, but the circuit court of appeals held that under the *Slocum Case* the direction had to be for a new trial. The Supreme Court, having granted certiorari, held by Mr. Justice Van Devanter that, in reversing because as a matter of law the evidence was insufficient to sustain the verdict, the judgment of the circuit court of appeals should embody a direction for a judgment of dismissal on the merits, and not for a new trial, and that such judgment of dismissal would be the equivalent of a judgment for the defendant on a verdict directed in its favor.

The Supreme Court distinguished the *Slocum Case* on the ground that there the defendant's request for a directed verdict was denied without reservation of the question of the sufficiency of the evidence or of any other matter and that the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence, while in the present case the trial court expressly reserved its ruling on defendant's motion, the verdict for the plaintiff was taken pending the court's rulings on the motion and subject to those rulings, and no objection was made to the reservation or to this mode of procedure. The court

¹⁰¹(1935) 295 U. S. 654, 55 Sup. Ct. 890, 79 L. Ed. 1636.

¹⁰²N. Y. C. P. A. sec. 461.

accordingly stated that the parties must be regarded as having tacitly acceded to them. The main basis of this decision, it seems, was that at common law there was an established practice of reserving law questions arising in trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved

“and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other or making other essential adjustments.”

If the court had rested its opinion solely on this ground, it is submitted that there would have been little doubt of the propriety of such procedure. The court, however, also emphasized the fact that the plaintiff's counsel made no objection to the reservation of the court and, therefore, it might be contended that if the plaintiff had made a timely objection the holding would have been different. The weight of authority seems to be that the consent of the parties is not necessary to reserving a question of law, but the doubt remained.

In view of these decisions the Advisory Committee in presenting the new rules raised the question whether the practice of rendering judgment on the evidence contrary to the verdict should be sustained regardless of whether the jury or the parties, or both, consented thereto. As Rule 49(b) clearly shows, the Supreme Court has answered that the court may submit a case subject to a later decision on questions of law without the consent of either the jury or the parties and thus the old problems have been eradicated.

FINDINGS OF FACT IN ISSUES TRIED BY THE COURT

The federal rules provide that “in all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.”¹⁰³ As stated, this rule applies not only to causes formerly placed in the equity category but also to cases formerly denominated law cases tried without a jury¹⁰⁴—the jury having been waived, by failure to demand one¹⁰⁵

¹⁰³F. R. C. P. 52(a).

¹⁰⁴That this was the intent of the committee, see Note to the Supreme Court following proposed rule 59, Report of the Advisory Committee (1937), 148.

¹⁰⁵F. R. C. P. 38(d), 39(b).

or by express stipulation,¹⁰⁶—or where the court finds that there is no constitutional right to a jury, although demanded.¹⁰⁷

It has been stated that under the Rules the distinction is between jury and non-jury actions instead of between law and equity;¹⁰⁸ it would seem more accurate to say that the new distinction is between jury and non-jury *issues* rather than actions;¹⁰⁹ for if the word "action" in Rule 52(a) is construed literally, the situation will then arise that there will be no findings of fact on some material issues in actions where as to particular issues a jury trial has been demanded. This result would be inconsistent with one of the purposes of Rule 52, for in those cases what constituted the grounds¹¹⁰ of the trial court's judgment would not be readily apparent to the appellate courts. This inconsistency is emphasized by the analogous situation with regard to special verdicts where the trial court is directed to make findings of fact on material issues that inadvertently are not submitted to the jury.¹¹¹ Hence, Rule 52 should be construed to require findings on the court tried issues even though part of the issues in an action are tried to a jury.¹¹²

¹⁰⁶F. C. R. P. 39(a).

¹⁰⁷F. R. C. P. 39(a).

¹⁰⁸3 Moore, Federal Practice (1938) 3118; Sunderland, The New Federal Rules, (1938) 45 W. Va. L. Q. 5.

¹⁰⁹Although F. R. C. P. 52(a) provides that "In all *actions* tried upon the facts without a jury, the court shall find the facts," yet Rules 38 and 39 (regulating the form of trial) speak primarily of *issues* and expressly contemplate that in a single action some issues may be tried by a jury while the others are tried by the court. See especially Rule 39(b) ("*Issues* not demanded for trial by jury . . . shall be tried by the court") (italics added).

¹¹⁰F. R. C. P. 52(a) ("*the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action*") (italics added).

¹¹¹F. R. C. P. 49(a); although this subdivision says that "the court may make a finding," it would seem that the word "may" in this connection means that the court has been given a power which it had not previously possessed, and that if the omission is pointed out to the court before judgment or not later than 10 days after entry of judgment, (52(b); cf. 59 (a)) it is under a duty to make such a finding if it is necessary to the judgment; that the trial court's failure to make such findings ordinarily will not be a defect in the judgment, see p. 8 *supra*.

¹¹²Federal Rules of Civil Procedure, Proceedings of Institutes (New York 1938) at 331. That the word "action" shall be construed as a synonym for "issue" does not indicate that its obvious meaning is without significance. The Judicial Code authorizes appeals as of right to the circuit courts of appeal from all final judgments of the district courts, 28 U. S. C. sec. 225(a), but in the case of interlocutory orders, which are obtained on motion in an action rather than as the result of the trial of an action, this absolute right to appeal is limited to orders denying or granting certain types of extraordinary relief (interlocutory orders concerning injunctions and receiverships and interlocutory decrees in admiralty) 28 U. S. C. sec. 227. The Federal Rules

This duty of making special findings of fact is mandatory, not discretionary.¹¹³ Failure to make findings was a sufficient ground, in equity, to remand a case with direction for the trial court to comply with Equity Rule 70½.¹¹⁴ However, the failure to make a particular finding of fact ordinarily should not make the judgment defective, for to do so would revive and make applicable to actions tried by a court the technical requirements which, so far as special verdicts are concerned, have been abolished by Rule 49(a).¹¹⁵ In this connection, a reaffirmation of the modern equitable principle, that the purpose of findings of fact is to enable appellate courts to ascertain the basis for the determination below and that where the appellate court can readily understand the questions presented, precise findings are not absolutely essential on all material issues,¹¹⁶ may be a helpful guide in cases which do not fully comply with Rule 52. Since the district courts have no discretion as to whether or not they should make findings, it would seem to follow that where issues are submitted to an advisory jury¹¹⁷ the trial court must either adopt the jury's findings or make its own,¹¹⁸ and "state separately its conclusions of law."¹¹⁹

The new rules have eliminated several formalities which frequently prevented the presentation of certain questions on appeal.

do not apply to admiralty proceedings, F. R. C. P. 81(a)(1). Of these forms of relief Rule 52 expressly applies to only one class—orders "granting or refusing interlocutory injunctions." Thus it seems that findings of fact are not essential prerequisites in taking an appeal from an interlocutory judgment on the subject matter of receivership.

¹¹³This follows from the terms of Rule 52 that special findings shall be made "In *all* actions . . . tried without a jury" (italics added).

¹¹⁴*Interstate Circuit, Inc. v. United States*, (1938) 304 U. S. 55, 58 Sup. Ct. 768, 82 L. Ed. 1146; *Oil Shares, Inc. v. Commercial Trust Company*, (1938) 304 U. S. 551, 58 Sup. Ct. 1359, 82 L. Ed. 1522, for the facts of this case see the opinion of the court below, sub nom., *Oil Shares v. Kahn*, (C.C.A. 3rd Cir. 1938) 94 F. (2d) 751; *Southwestern Bell Telephone Co. v. City of San Antonio*, (C.C.A. 5th Cir. 1935) 75 F. (2d) 880, cert. denied, (1935) 295 U. S. 754, 55 Sup. Ct. 835, 79 L. Ed. 1698.

¹¹⁵*Supra*, p. 8; cf. *Sunderland, Findings of Facts and Conclusions of Law in Cases Where Juries are Waived*, (1937) 4 U. Chi. L. Rev. 218, 226 ("it [special finding in a jury-waived case] is held to serve the same purpose, and to be judged by the same standards, as a special verdict").

¹¹⁶Cf. *Brown v. Metropolitan Life Ins. Co.*, (1938) 69 App. D. C. 233, 100 F. (2d) 98; *Shellman v. Shellman*, (1938) 68 App. D. C. 197, 95 F. (2d) 108; *Toledo, P. & W. R. R. v. Peoria & P. Union Ry. Co.*, (C.C.A. 7th Cir. 1934) 72 F. (2d) 745.

¹¹⁷F. R. C. P. 39(c).

¹¹⁸Moore, *Federal Practice* (1938), at p. 3119, n. 1; that the verdict of an advisory jury is not binding on the court, see *Watt v. Starks*, (1879) 101 U. S. 247, 252, 25 L. Ed. 826.

¹¹⁹F. R. C. P. 52 (a).

Now, in order to question the sufficiency of the evidence it is not essential that appellant shall have raised that question in the trial court.¹²⁰ The provision that "Requests for findings are not necessary for purposes of review"¹²¹ has been interpreted as abolishing a formal restriction that otherwise would bar review of the question whether there was evidence to support the findings of fact.¹²² However, it seems more probable that the dispensation with respect to requests for findings was intended to permit a party to assert on appeal that there was an error of law by the trial court—i.e., that the facts as found do not support the judgment¹²³—without complying with the old rule in jury-waived cases. Under the former federal practice if an action at law was tried without a jury, it was left to the discretion of the court whether the findings of fact should be general or special;^{123a} if the court only made a general finding, the appellate court would not review the question of law whether the facts supported the judgment.¹²⁴ That question of law would be considered only if appellant presented propositions of law to the trial court for it to rule on or succeeded in having the trial court make special findings of fact.¹²⁵ While the insertion of this provision in Rule 52(a) was a wise precaution, it does not seem necessary because the trial court must always make special findings of fact on issues tried by it without a jury, a general finding being insufficient. However, the provision may have an unexpected utility in avoiding incorporation of the New

¹²⁰F. R. C. P. 52(b) ("the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment").

¹²¹F. R. C. P. 52(a).

¹²²Federal Rules of Civil Procedure & Proceedings of Amer. Bar Ass'n Institute, Cleveland (1938), 317; 3 Moore, Federal Practice (1938) 3120.

¹²³See *Jackson County v. Alton R. Co.*, (C.C.A. 8th Cir. 1939) 105 F. (2d) 633, 638.

^{123a}28 U.S.C. sec. 773 ("The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury").

¹²⁴*British Queen Mining Company v. Baker Silver Mining Company*, (1891) 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147.

¹²⁵See *Norris v. Jackson*, (1869) 76 U. S. 125, 128, 19 L. Ed. 608 ("if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict [special findings], which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them"); *Law v. United States*, (1925) 266 U. S. 494, 496, 45 Sup. Ct. 175, 69 L. Ed. 401. Even though the trial court refused to pass upon the propositions of law, the question was effectively raised and if counsel duly excepted to the judge's refusal the appellate court would review the question of law whether the facts as found supported the judgment. See *Seep v. Ferris-Haggarty Copper Mining Co.*, (C.C.A. 8th Cir. 1912) 201 Fed. 893, 896.

York state doctrine that the only way to raise the question on appeal that certain facts have been conclusively proved is to submit requests for findings to the trial court,¹²⁶ and therefore a motion for judgment on the specific ground that certain facts are conclusively proved should be sufficient to preserve the question.¹²⁷

Of vital significance to appellate practice, in actions tried without a jury, is the meaning of the word "facts" in Rule 52(a). Prior to the adoption of the Rules by the Supreme Court,¹²⁸ the federal decisions were in accord in stating or assuming that a special finding of fact should be a statement of a *material* or *ultimate*¹²⁹ fact as distinguished from an *evidentiary* fact.¹³⁰

¹²⁶Thompson v. Bank of British North America, (1880) 82 N. Y. 1; Cohen, The Powers of The New York Court of Appeals, (1934) 317, but see Grace v. Corn Exchange Bank Trust Co., (1939) 14 N. Y. S. (2d) 400, 410, (where the court ordered judgment to be entered on its written and signed opinion and stated that it was unnecessary to pass upon the proposed findings of fact and conclusions of law because of the provisions of N. Y. C. P. A. sec. 440); see *infra* note 160.

¹²⁷But see Federal Rules of Civil Procedure, Proceedings of Institutes (Washington 1938) 144.

¹²⁸Order Re Rules of Procedure, dated Dec. 20, 1937, 302 U. S. 783.

¹²⁹The federal decisions use "ultimate fact" and "material fact" synonymously, but apparently have preferred the former term. However, the term "ultimate fact" is not a wholly satisfactory one. It is employed to characterize that statement of fact which determines a material issue raised by the pleadings. In this connection, the courts attempt to draw a distinction between ultimate facts and evidentiary facts, the latter being statements or reports of observation resulting from exercise of the human sensory powers and treated, from a lawyer's point of view, as not involving any exercise of the logical powers of the human intellect. The ultimate fact is supposed to be achieved by inference from a mass of evidentiary facts. Thus, there is implicit in the word "ultimate" an assumption that the answer to a material issue is always a statement based upon a line of inference from reports of human observation. That assumption, however, is not always true, because while some material issues may be determined by the statement of an ultimate fact, some may be answered, depending upon the circumstances, by either ultimate or evidentiary facts and yet other material issues can only be answered by the statement of an evidentiary fact. For instance, where the death of a particular person is a material issue, the question raised may be answered either by the report of a witness that he saw the lifeless body, or by a line of inference from testimony indicating that the person disappeared under circumstances where it was highly probable there was no chance of escaping alive (person falling overboard at sea) and testimony that the person was never seen again. Then, in an action for slander per se, a material issue is whether or not certain words, which the law characterizes as defamatory, were spoken; this issue can only be determined by the testimony of a witness that he heard the words spoken. Hence, to avoid the emphasis of the word "ultimate" (that a line of inference is *always* involved) and to emphasize the essential point that a finding of fact or answer in a special verdict should respond to a material issue raised in the pleadings, it seems desirable to refer to such findings as findings of *material* facts rather than of *ultimate* facts.

¹³⁰Jud. Act (1789) sec. 19, 1 Stat. at L. 83 ("it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime juris-

In 1930, the Supreme Court adopted Equity Rule 70 $\frac{1}{2}$ ¹³¹ which provided:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; . . . Such findings and conclusions shall be entered of record and if an appeal is taken from the decree, shall be included by the clerk in the record which was certified to the appellate court. . . ."

Although this rule did not contain an assimilation of special findings of fact to the answers in a special verdict¹³² nor specify their form,¹³³ yet the conclusion does not follow that the Supreme Court intended that findings of fact should be of a different nature, since the failure of earlier statutes to provide for the form and content of findings apparently has never been given any signifi-

ca-tion, to cause the facts on which they found their sentence or decree, fully to appear upon the record." Sec. 19 was altered in 1803, 2 Stat. at L. 244, and among various changes the requirements of findings was omitted); *Wiscart v. D'Auchy*, (1796) 3 Dall. (U.S.) 320, 1 L. Ed. 619, (statement of facts held sufficient though only stating material facts; the court indicated that doubt as to sufficiency would have been reasonable only if there had been merely a general finding. (1865) 13 Stat. at L. 501, 28 U. S. C. secs. 773, 875 (findings of fact in jury-waived actions at law): *Norris v. Jackson*, (1869) 76 U. S. 125, 19 L. Ed. 608; *Anglo-American Land M. & A. Co. v. Lombard*, (C.C.A. 8th Cir. 1904) 68 C. C. A. 89, 132 Fed. 721, cert. denied (1904) 196 U. S. 638, 25 Sup. Ct. 793, 49 L. Ed. 630; *Packer v. Whittier*, (C.C.A. 1st Cir. 1899) 91 Fed. 511, cert. denied (1899) 174 U. S. 802, 19 Sup. Ct. 887, 43 L. Ed. 1187. Supreme Court Rule 41(1), (2), (3), (4) (findings of fact in suits before Court of Claims, first adopted in 1865; for the language of this rule at various times see (1865) 3 Wall. (U.S.) VII; (1873) 17 Wall. (U.S.) XVII (term "ultimate facts" omitted); (1925) 266 U. S. 683; (1928) 275 U. S. 627; (1932) 286 U. S. 627; (1939) 306 U. S. Appendix: *United States v. Clark*, (1876) 94 U. S. 73, 24 L. Ed. 67; see *United States v. Anciens Etablissements*, (1912) 224 U. S. 309, 329, 32 Sup. Ct. 479, 56 L. Ed. 778. (1875) 18 Stat. at L. 315 (findings of facts in admiralty): See *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, (1882) 107 U. S. 485, 501, 1 Sup. Ct. 582, 27 L. Ed. 337; the provisions of this statute became inoperative by virtue of Circuit Court of Appeals Act, (1891) 26 Stat. at L. 826, see *Frankfurter and Landis*, *The Business of Supreme Court* at October Term, 1929, (1930) 44 Harv. L. Rev. 1, 30, 31 and notes.

The above cited statutes and court rules were more than mere expressions of a desire for procedural refinement; they resulted from bitter political and intra-professional disputes. For an excellent exposition of this historical controversy, see *Clark and Stone*, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190.

¹³¹(1930) 281 U. S. 773, amended (1935) 296 U. S. 671.

¹³²Cf. (1865) 13 Stat. at L. 501 (in jury-waived cases, the "finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury"); (1865) 3 Wall. (U.S.) VII (the Court of Claims shall make findings "in the nature of a special verdict").

¹³³Cf. (1865) 3 Wall. (U.S.) VII (the Court of Claims shall make findings of "the ultimate facts . . . and not the evidence on which these ultimate facts are founded").

cance.¹³⁴ While knowledge of the court's intent in the phrasing of Rule 70½ is not available, the more plausible rationalization for the omission of the analogy to a special verdict is that the court wanted to avoid the harsh technicalities connected with a special verdict. Undoubtedly, an additional reason was the influence of the historical concept that the equity form of review was a re-examination of the entire case.¹³⁵ However, the circuit courts of appeal have been somewhat vague in their treatment of Equity Rule 70½, though it has been held that the findings should be of material facts.¹³⁶

The Supreme Court has had the matter of the findings under Equity Rule 70½ before it on several occasions in the past years but has not been completely in accord as to the form of the findings. Thus, in *Tax Commissioner v. Jackson*,¹³⁷ we find the following statement:

"The district court failed to make findings of fact and law as are now required by Equity Rule 70½, but contented itself with a partial summary of the facts and certain general conclusions of law. Had the rule been in force at the time of the trial, we should feel constrained to remand the case with directions to make such findings."¹³⁸

In a case involving a temporary injunction, decided before Equity Rule 70½ required findings of fact and conclusions of law in such a situation the court said:¹³⁹

"While an application for an interlocutory injunction does not involve a final determination of the merits, it does involve the exercise of a sound judicial discretion. . . . The result of the court's inquiry into the issues and into the facts presented upon the interlocutory application, . . . should be set forth by the court in a statement of the facts and law constituting the grounds of its decision."¹⁴⁰

¹³⁴*Wiscart v. D'Auchy*, (1796) 3 Dall. (U.S.) 320, 1 L. Ed. 619; *United States v. Clark*, (1876) 94 U. S. 73, 24 L. Ed. 67.

¹³⁵*Clark and Stone, Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190.

¹³⁶*Oil Shares, Inc. v. Kahn*, (C.C.A. 3d Cir. 1938) 94 F. (2d) 751 cert. granted and case remanded with directions to make findings of fact, sub. nom. *Oil Shares, Inc. v. Commercial Trust Company*, (1938) 304 U. S. 551, 58 Sup. Ct. 1059, 82 L. Ed. 1522; *Boss v. Hardee*, (1937) 68 App. D. C. 75, 93 F. (2d) 234; see *Shellman v. Shellman*, (1938) 68 App. D. C. 197, 95 F. (2d) 108; but compare the attitude of uncertainty as to the form of findings manifested in *Southwestern Bell Telephone Co. v. City of San Antonio*, (C.C.A. 5th Cir. 1935) 75 F. (2d) 880, and in *Brown v. Metropolitan Life Ins. Co.*, (1938) 69 App. D. C. 233, 100 F. (2d) 98.

¹³⁷(1931) 283 U. S. 527, 51 Sup. Ct. 540, 75 L. Ed. 1248.

¹³⁸At p. 533.

¹³⁹*Public Serv. Com'r v. Wisconsin Tel. Co.*, (1933) 289 U. S. 67, 53 Sup. Ct. 514, 77 L. Ed. 1036.

¹⁴⁰At p. 70.

Again, in a rate confiscation case¹⁴¹ the majority opinion seems to have been satisfied with the findings but the dissenting opinion says:¹⁴²

"The lower court's decree and opinion taken together may not reasonably be construed to comply with Equity Rule 70½. In confiscation cases, the rule should be strictly enforced. The trial court should make a definite and complete statement of the facts on which it rests its judgment. . . . [On] June 2, 1930, we promulgated the rule, [quoting Equity Rule 70½]. . . . The command that the trial court 'shall find the facts specially' means at least that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary. . . . The direction 'and state separately its conclusions of law thereon' shows that discussion of facts and law in the course of explanation, reasoning or opinion to clarify or support the conclusion or judgment reached, is not sufficient. . . . The rule was intended to make unnecessary, analysis or extended examination for the ascertainment of the facts and propositions of law on which rest decrees of the courts of first instance. The opinion of the majority does not purport to 'find the facts specially' or to 'state separately its conclusions of law thereon.' . . . *Public Service Comm'n v. Wisconsin Tel. Co.*, . . .¹⁴³ decided after the argument of this case, is of special interest. The commission appealed from an interlocutory decree declaring that enforcement of telephone rates prescribed by the commission would result in confiscation of the company's property. The district court filed no opinion and made no special findings of fact. The company moved to affirm. The commission's contention was that the decree should be reversed for lack of specification of the facts on which it rested. The company maintained that the decree was abundantly sustained by the facts shown in the record. We held that Rule 70½ does not apply to decisions on applications for temporary injunctions and made it clear that the duty of the court in passing on such applications was not altered by the adoption of the rule. . . . And we refused, even when aided by adequate brief and argument of counsel, to consider whether the temporary injunction was warranted by the facts shown in the record. We vacated the decree . . . and remanded the case for findings and conclusions appropriate to a decision upon the application for an interlocutory injunction. And it is the purpose of this court to promulgate a rule definitely requiring district courts to make special findings of fact in such cases. . . ."¹⁴⁴

¹⁴¹*Los Angeles Gas Co. v. Railroad Comm'n*, (1933) 289 U. S. 287, 53 Sup. Ct. 637, 77 L. Ed. 1180.

¹⁴²The dissenting opinion was written by Butler, J., and concurred in by Sutherland, J.

¹⁴³(1933) 289 U. S. 67, 53 Sup. Ct. 514, 77 L. Ed. 1036.

¹⁴⁴*Los Angeles Gas Co. v. Railroad Comm'n*, (1933) 289 U. S. 237, 327 et seq., 53 Sup. Ct. 637, 77 L. Ed. 1180.

Where a decree of a three judge court dismissed a suit to enjoin enforcement of an order of the Interstate Commerce Commission the majority opinion said:

"This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained."¹⁴⁵

Mr. Justice Stone in a dissent, after stating the facts which he felt had been found, said:

"These findings are thus the complete and obvious equivalent of a finding. . . . They are ample to raise the question of law decided below and presented here. . . ."¹⁴⁶

In 1938, a direct appeal to the United States in a suit in equity to enjoin an alleged conspiracy between distributors and exhibitors of motion pictures in restraint of interstate commerce was remanded by the Supreme Court to the district court for further findings.¹⁴⁷ The decree of the district court in this case,¹⁴⁸ apart from the recital of the proceedings and the terms of the judgment, contained four paragraphs. The first three paragraphs stated in substance that the defendant distributors, by including at the request of the defendant exhibitors, provisions in license agreements with subsequent run exhibitors fixing admission prices and prohibiting double feature programs "have engaged in a combination, conspiracy and agreement with said" defendant exhibitors "to restrain trade and commerce in said motion picture films, in violation of an act of Congress." The fourth paragraph stated that the provisions as to minimum admission prices and the prohibition of double featuring were "illegal and void." These statements in the decree would seem to be only conclusions of law. There was an opinion by the district court¹⁴⁹ but no other findings were made. The Supreme Court in remanding the case to the district court held that the district court had not complied with Equity Rule 70 $\frac{1}{2}$ and said:

¹⁴⁵*Atchison Ry. v. United States*, (1935) 295 U. S. 193, 201, 55 Sup. Ct. 748, 752, 79 L. Ed. 1382. Although this decision does not interpret Equity Rule 70 $\frac{1}{2}$, it does present the same problem.

¹⁴⁶At p. 202.

¹⁴⁷*Interstate Circuit, Inc. v. United States*, (1938) 304 U. S. 55, 58 Sup. Ct. 768, 82 L. Ed. 1146.

¹⁴⁸*Record on Appeal (Interstate Circuit v. United States)*, (1939) 306 U. S. 208, 59 Sup. Ct. 467.

¹⁴⁹*United States v. Interstate Circuit, Inc.*, (N.D. Tex. 1937) 20 F. Supp. 868.

"The court made no formal findings. The court did not find the facts specially and state separately its conclusions of law as the rule required. The statements in the decree that in making the restrictive agreements the parties had engaged in an illegal conspiracy were but ultimate conclusions and did not dispense with the necessity of properly formulating the underlying findings of fact. The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case . . . and compliance with the rule is particularly important in an anti-trust case which comes to this court by direct appeal from the trial court."¹⁵⁰

Justices Stone and Black stated that they thought that the findings in the opinion and decree below

"while informal, are sufficient for purposes of decision, and that the case should therefore be decided now without further proceedings below; the more so because of the public interest involved."¹⁵¹

When the case again reached the Supreme Court¹⁵² we find the majority through Mr. Justice Stone, stating as follows:

"The case is now before us on findings of the District Court specifically stating that appellants did in fact agree with each other to enter into and carry out the contracts, which the court found to result in unreasonable and therefore unlawful restraints of interstate commerce."¹⁵³

The dissenting opinion written by Mr. Justice Roberts, states as follows:

"The district court made ten findings (numbered from 12 to 21, inclusive) of subsidiary or evidentiary facts and based upon these specific findings one conclusion of ultimate fact,—that the distributor defendants conspired amongst themselves to take uniform action upon the proposals of Interstate and conspired with each other and with Interstate to impose the restrictions requested by Interstate upon all subsequent run exhibitors in Dallas, Fort Worth, Houston and San Antonio. The appellants contend, and I think their contention is sound, that the subsidiary findings are insufficient to support the fact conclusion and that these subsidiary findings are, in a number of vital instances, contrary to, or unsupported by, the agreed statement of facts and, in other

¹⁵⁰Interstate Circuit, Inc. v. United States, (1938) 304 U. S. 55, 58 Sup. Ct. 768, 82 L. Ed. 1146.

¹⁵¹Interstate Circuit, Inc. v. United States, (1938) 304 U. S. 55, 58 Sup. Ct. 768, 82 L. Ed. 1146.

¹⁵²Interstate Circuit, Inc. v. United States, (1939) 306 U. S. 208, 59 Sup. Ct. 467.

¹⁵³At p. 213.

instances, are in the teeth of uncontradicted and unimpeached testimony."¹⁵⁴

After the *Interstate Circuit Case* was remanded, the Supreme Court received a petition for a writ of certiorari to review the judgment in *Oil Shares, Inc. v. Kahn*.¹⁵⁵ This was a suit in equity to have plaintiff's directors and the Commercial Trust Company declared trustees ex malificio of plaintiff's assets on the ground that the directors had conspired to get control of and loot the plaintiff of its assets and that the trust company had participated in the conspiracy. The findings of the district court were found solely in its opinion to the effect that a conspiracy had existed but that the trust company had not been a party to it.¹⁵⁶ The circuit court of appeals had held that there had been a compliance with Equity Rule 70½. The Supreme Court without opinion granted the writ of certiorari, but remanded the case to the district court for it to set forth its findings of fact and conclusions of law.¹⁵⁷ It would seem that the finding that the trust company was not a party to the conspiracy was a finding of a material fact. The finding that a conspiracy had existed may well be termed a conclusion of law. Again, the findings of the district court were not contained in a document separate and distinct from the opinion and decree of the district court. Both the petitioner and respondent considered that the main question was whether the findings should be of the evidentiary or of the material facts.¹⁵⁸ An examination of the new findings made by the district court shows that counsel and the district court prepared and adopted findings which contained in addition to material or ultimate facts a considerable number of what should properly be termed evidentiary facts.¹⁵⁹

Although the decisions above mentioned raise some doubt it would seem that a proper interpretation of these holdings is

¹⁵⁴At p. 233. Note that Roberts, J., apparently uses the expressions "subsidiary or evidentiary facts" and "conclusions of ultimate fact" as synonyms for "material or ultimate facts" and "conclusions of law," respectively. To maintain uniformity of phraseology, it seems preferable to use only the latter expressions, which have been more generally employed by the federal courts, particularly in view of the terms in *F. R. C. P.* 52, *supra*, p. 20.

¹⁵⁵*Oil Shares v. Kahn*, (C.C.A. 3rd Cir. 1938) 94 F. (2d) 751.

¹⁵⁶At p. 752; see also Record on Appeal, Vol. 1, p. 624.

¹⁵⁷*Oil Shares, Inc. v. Commercial Trust Company*, (1938) 304 U. S. 551, 58 Sup. Ct. 1059, 82 L. Ed. 1522.

¹⁵⁸Petitioner's Brief in support of Petition for Writ of Certiorari, Point III, at p. 26; Respondent's Brief in Opposition to Application for Writ of Certiorari, at pp. 16, 17. The argument before the circuit court of appeals was to the same effect, Brief for Appellee at p. 68.

¹⁵⁹Record on Appeal, vol. 3, pp. 983-1018.

that the findings and conclusions of law should (1) cover all the material issues in the case, (2) not be sought for in an extended opinion written by the trial judge, and (3) be of the material facts and not of the evidentiary facts.^{159a} In both the original *Interstate Case* and the *Oil Shares Case* the findings were only found in the opinion of the district court, and the findings, such as they were, were in part of ultimate facts; but they were incomplete to the extent that they did not cover all the material issues in the case. The mere fact, however, that findings and conclusions are found solely in the opinion of the trial court should not of itself justify the remanding of the case.¹⁶⁰ The better practice, however, to be followed, it is submitted, is to prepare a separate document in which will be found all the material facts plus the conclusions of law of the court thereon. In this way an appellate court is not compelled to search through an opinion in its endeavor to discover (1) the material facts found by the trial court and (2) whether all the material facts have been found. Furthermore, the appellate courts will then be free to devote a greater share of their time to the important task of considering the questions of law which the material facts involve and to limit the necessity of read-

^{159a}Partridge v. Ainley, (S.D. N.Y. 1939) 28 F. Supp. 472.

¹⁶⁰See *Brusselback v. Cago Corporation*, (S.D. N. Y. 1938) 24 F. Supp. 524, 528, where the *Interstate* decision is cited as indicating that a judge's opinion, in and of itself, is an insufficient compliance with Equity Rule 70½, and that there must be a separate and formal statement of the findings of fact and conclusions of law apart from the judge's opinion. The language of the Supreme Court in the *Interstate Case*, it is submitted, does not demand this conclusion, in view of the language of the Supreme Court, see *supra* p. 29. It would seem that the Supreme Court found fault merely with the fact that the district court's opinion failed to contain findings upon *all* the material issues and not because the opinion was the document in which the findings were made. The court which decided the *Brusselback Case* continues to require findings and conclusions distinct from the judge's opinion, but now only Rule 52 is cited as requiring that practice, see *Partridge v. Ainley*, (S.D. N.Y., 1939) 28 F. Supp. 472, 474. In the district of Massachusetts, the judge's opinion has been considered a sufficient compliance with Rule 52. *Proctor v. White*, (D. Mass., 1939) 28 F. Supp. 161. In the state of New York, the decision of the court, in a case tried to the court without a jury, may be either oral or written and must set forth the essential facts, N.Y. C.P.A. sec. 440, and in the second judicial district of New York the trial justices of the supreme court (the trial court of general jurisdiction) have adopted an express rule that if decision is reserved, the court has discretion to make either a formal decision containing findings of fact and conclusions of law or a written and signed opinion, cf. *Grace v. Corn Exchange Bank Trust Co.*, (1939) 14 N. Y. S. (2d) 400, 410. Although no express rule has been adopted, the practice is the same in first judicial district of New York. For the history of the New York law on findings of fact and conclusions of law, see Report of the Judicial Council of the State of New York (1936) 201 et seq.

ing the evidence in the case to those portions the adequacy of which to support the material facts are actually in question.¹⁶¹

Under the previous practice it was generally stated: that, in actions at law, review of the facts was limited to the inquiry as to whether they were supported by any substantial evidence;¹⁶² that in an equity appeal, the entire record was open to reexamination on the facts and the law.¹⁶³ While this distinction arose because the appeal in equity, as distinguished from the writ of error at law, was a process of civil law origin,¹⁶⁴ yet it was justified during most of the period when there was a separate equity system in the federal courts because the evidence before the trial judge in equity was mostly documentary¹⁶⁵ and the opportunity of the appellate court accurately to weigh the evidence was equal to that of the trial judge since the behavior of witnesses was not involved. This justification disappeared in 1912 with the restoration of the requirement of proof by oral testimony.¹⁶⁶ From then on the trial courts on the equity side also have had the advantage of being able to judge of the credibility of the witnesses. The appellate courts then developed self-denying rules of review in equity causes limiting the scope of their re-examination of the facts (findings of fact will stand in the appellate court unless clearly erroneous; findings of fact made on conflicting evidence are presumptively correct unless obvious error has intervened in the application of the law to the facts) which have had the effect of making reversals for errors of fact rare.¹⁶⁷

Thus the appellate courts in reviewing equity causes were becoming influenced to a greater extent by the principles governing appeals in cases at law, and as it has been persuasively contended, the appellate courts in actions at law have shown a tendency to review the facts in examining the sufficiency of the facts to sustain the judgment.¹⁶⁸

¹⁶¹Frankfurter and Landis, *The Business of the Supreme Court* (1927) 291.

¹⁶²Supra notes 79, 80. *McCaughn v. Real Estate Co.*, (1936) 297 U. S. 606, 56 Sup. Ct. 604, 80 L. Ed. 879 (jury waived action at law).

¹⁶³Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190; Isen, *The Preliminary Draft of Federal Rules of Civil Procedure*, (1937) 11 St. John's L. Rev. 212, 257.

¹⁶⁴See *Wiscart v. D'Auchy*, (1796) 3 Dall. (U.S.) 320, 327, 1 L. Ed. 619.

¹⁶⁵2 Stat. at L. 156, 166. Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190, 204; Isen, *The Preliminary Draft of Federal Rules of Civil Procedure*, (1937) 11 St. John's L. Rev. 212, 257.

¹⁶⁶Equity Rule 46.

¹⁶⁷For a full discussion of this development see Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190, 207-209.

¹⁶⁸Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L.

Despite this apparent judicial trend the distinction in formulae (at law, no reversal unless there is *no substantial evidence*;¹⁶⁹ in equity, no reversal unless the finding is *against the clear weight of evidence*)¹⁷⁰ still weighs heavily. Thus, although it may take as obvious an error in equity as at law to move the court, yet the tendency in equity has been to incorporate the whole transcript of evidence in narrative form into the record on appeal for the appellate court to review.¹⁷¹ Though statistics are unavailable, it is believed that appeals in equity and admiralty were proportionately more numerous than in actions at law because of the hope of obtaining reversals on the facts.¹⁷²

The Advisory Committee was in disagreement as to the limitation of review to be provided for issues tried by the court without a jury. Dean Clark (now Circuit Judge in second circuit) advocated the extension of the law type of review to court findings of fact,¹⁷³ but a majority of the committee favored extension of the equity review to all issues tried by the court.¹⁷⁴ Instead of submitting alternative rules and permitting the Supreme Court to make its own choice as was done in other instances,¹⁷⁵ the equity formula—"The findings of the court in such cases shall have the same effect as that heretofore given to findings in suits in equity"—was advocated.¹⁷⁶ In transmitting the first

Rev. 190, at 210; cf. the following equity cases: *Lawson v. United States Mining Co.*, (1907) 207 U. S. 1, 12, 28 Sup. Ct. 15, 19, 52 L. Ed. 65 ("It is our duty to accept a finding of fact, unless clearly and manifestly wrong"); *Malloy v. New York Life Ins. Co.*, (C.C.A. 1st Cir. 1939) 103 F. (2d) 439; *Brislin v. Killanna Holding Corporation*, (C.C.A. 2d Cir. 1936) 85 F. (2d) 667, 669; *Johnson v. Umsted*, (C.C.A. 8th Cir. 1933) 64 F. (2d) 316, 318; *Coats v. Barton*, (C.C.A. 8th Cir. 1928) 25 F. (2d) 813, 815; *United States v. Grass Creek Oil & Gas Co.*, (C.C.A. 8th Cir. 1916) 236 Fed. 481, 484.

¹⁶⁹Supra, notes 78, 79.

¹⁷⁰Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190, 207-209; note 168, supra.

¹⁷¹Cf. *Silver King Coalition Mines Co. v. Silver King C. M. Co.* (C.C.A. 8th Cir. 1913) 204 Fed. 166, 177 ("The Court below was compelled to ascertain the amount and value of this ore from more than 4,000 printed pages of evidence. . . . Each of the findings of fact . . . is vigorously assailed . . . in oral argument and in briefs which contain many hundreds of printed pages. Each of them has been carefully examined . . . and in the light of the evidence to which they refer, and has been found to have been deduced from conflicting testimony.")

¹⁷²Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, (1936) 22 A. B. A. J. 533, 540.

¹⁷³Clark and Stone, *Review of Findings of Fact*, (1937) 4 U. Chi. L. Rev. 190, 191-192.

¹⁷⁴Note to the Supreme Court following Proposed Rule 68, Preliminary Draft (1936).

¹⁷⁵See Proposed Rules 3, 6(6), 56, 74, 85, 92, Preliminary Draft (1936).

¹⁷⁶Proposed Rule 68, Preliminary Draft (1936).

published draft of the rules to the Supreme Court, the chairman of the committee stated that it was obvious that the law type of review must be rejected.¹⁷⁷ Its rejection was not treated as obvious in the Note to the Supreme Court following Proposed Rule 68. The rule was changed in the second published draft;¹⁷⁸ the language of the second draft so far as it pertains to the scope of review of facts is the same as that in Rule 52, as adopted by the Supreme Court, which provides:

"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."

It has been assumed that Rule 52 provides for the equity review, but there is a possibility that the scope of review called for by this rule may be an open question for the Supreme Court to settle, for not only has the express equity characterization been deleted in favor of language which, although found in modern federal equity cases,¹⁷⁹ would seem to be an accurate statement of the effect to be given to jury verdicts,¹⁸⁰ but also the Committee Note¹⁸¹ states, not that Rule 52 adopts, but merely that it is in accord with the modern federal equity practice.¹⁸²

¹⁷⁷Preliminary Draft (1936), at XIV.

¹⁷⁸Proposed Rule 59, Report of the Advisory Committee (1937).

¹⁷⁹Supra, note 168.

¹⁸⁰Clark and Stone, Review of Findings of Facts (1937) 4 U. Chi. L. Rev. 190, 210, note 90.

¹⁸¹Following Rule 52.

¹⁸²But see *Guilford Const. Co. v. Biggs*, (C.C.A. 4th Cir. 1939) 102 F. (2d) 46, 47 where Parker, C. J., said: "As to the value of the stock distributed to the receiver and credited upon the claim of the bank, there is nothing in the record which would justify our disturbing the findings of the district judge with regard thereto. The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U. S. C. A. following section 723c) is but the formulation of a rule long recognized and applied by courts of equity. . . ." If Rule 52 is interpreted as codifying the equity rule as to scope of review, consider the incentive to jockeying for position in cases which can be brought either in the court of claims or in the district court under the Tucker Act (28 U.S.C. secs. 41 subd. 20, 764); *Wessel v. United States*, (C.C.A. 8th Cir. 1931) 49 F. (2d) 137 (suit, in nature of action at law, in district court under Tucker Act to recover income tax payments; the circuit court of appeals held that review of the special findings of fact, made pursuant to 28 U. S. C. sec. 764, was limited to questions of law; thus, prior to adoption of the Federal Rules, the scope of review under the Tucker Act was the same whether a suit was commenced in a district court or in the Court of Claims, *United States v. Wells*, (1931) 283 U. S. 102, 51 Sup. Ct. 446, 75 L. Ed. 867; and as to claims for tax refunds made either in a district court or directly from the board of tax appeals to the circuit court of appeals (26 U.S.C.

It has been argued that the real equity review is preferable because it affords an opportunity not only to correct errors of law but to do justice on the facts, and the English practice has been looked to as a worthy model.¹⁸³ However, the English practice is not an entirely appropriate analogy. The problems of federal procedure are complicated because of American notions as to the function of the judiciary. Not only is access to the federal courts substantially less expensive than in England from the standpoint of court costs, thus tending to increase the frequency of resort to litigation, but the potential amount of litigation is greater in the United States because the scope of judicial activity here extends not only to private disputes, but there is also thorough supervision of administrative agencies and control of executive and legislative actions under the guise of statutory construction and constitutional interpretation. To make this extensive judicial control workable, it is essential that the courts keep reasonably up to date in their work, and, of course, one of the obvious ways of ensuring this is to make proper adjustments in procedure. So far as the approximately three score judges and justices who render the intermediate and ultimate decisions are concerned, the scope of review under Rule 52 is the strategic point for adjustment. To the extent that the traditional concepts of law review are applied under Rule 52, to that extent will their burden be lightened. It seems particularly desirable that the Supreme Court be freed from the necessity of analyzing confused and conflicting testimony and passing upon the weight of evidence.¹⁸⁴ To this end, it is not beyond expectation that the Supreme Court may find Rule 52 ambiguous and resolve the question in favor of the common law rather than the equity formula.

APPEAL PROCEDURE

As an indication of the professed spirit of the rules we find the abolition of the outmoded summons and severance doctrine of appellate procedure.¹⁸⁵ The Supreme Court of the United States

secs. 617 f. 641, 641 c; 28 U. S. C. sec. 41 (20), *Helvering v. Rankins*, (1935) 295 U. S. 123, 55 Sup. Ct. 732, 79 L. Ed. 1343).

¹⁸³Sunderland, *The Scope of Judicial Review*, (1929) 27 Mich. L. Rev. 416; see also Blume, *Review of Facts in Non-Jury Cases*, (1936) 20 J. Am. Jud. Soc. 68.

¹⁸⁴Frankfurter and Landis, *The Judiciary Act of 1925*, (1928) 42 Harv. L. Rev. 1, 23.

¹⁸⁵F. R. C. P. 74; cf. *Masterson v. Herndon*, (1870) 10 Wall. (U.S.) 416, 19 L. Ed. 953; *Hartford Accident & Indemnity Co. v. Bunn*, (1932) 285 U. S. 169, 52 Sup. Ct. 354, 76 L. Ed. 685, and the recent circuit court

by its new rules has also expressly discarded this ancient rule.¹⁸⁶ Furthermore, in like tenor there is an important provision that no judgment or order shall be vacated, modified or otherwise disturbed unless an error has been committed going to the fundamental rights of the parties.¹⁸⁷

A recent decision^{187a} of the circuit court of appeals for the second circuit presents a ruling in federal appellate practice, which will require cautious exercise of the powers lodged in district judges by virtue of Rule 54(b) which permits the entry of separate judgments as to each claim contained in the pleadings as they are disposed of by the trial court. The complaint stated two claims; one for copyright infringement, the other for unfair competition. A motion to dismiss the first claim, for failure to make averments upon which relief could be granted, was granted by the district court. Before disposing of the second claim, the plaintiff immediately appealed from the order dismissing the first claim. The circuit court of appeals held that the order was a final judgment and immediately appealable although the district court had not disposed of the other claim. The court found its authority to entertain the appeal in Rule 54(b).^{187b} The circuit court of appeals considered the basic question to be one of convenience; that is, an appeal from a partial disposition of an action ought to be allowed if it expedited the ultimate determination of a controversy but should not be allowed if the effect was to complicate the litigation and multiply reviews. The decision, by implication, acknowledged that the courts have no authority to

decisions of *Tighe v. Maryland Casualty Co.*, (C.C.A. 9th Cir. 1938) 99 F. (2d) 727; *Standard Accident Ins. Co. v. United States*, (C.C.A. 1st Cir. 1939) 103 F. (2d) 501. The salutary effect of this rule is recognized in *Schaffer v. Pennsylvania R. R. Co.*, (C.C.A. 7th Cir. 1939) 101 F. (2d) 369.

¹⁸⁶United States Supreme Court Rule 48, 306 U. S. appendix.

¹⁸⁷F. R. C. P. 61. Technically this Rule only applies to the district courts, but it should have a decided psychological influence on the appellate courts. Cf. Clark, *Fundamental Changes Effected by the New Federal Rules*, (1939) 15 Tenn. L. Rev. 551; 3 Moore, *Federal Practice* (1938) 3289; but see *Cervin v. W. T. Grant Co.*, (C.C.A. 5th Cir. 1938) 100 F. (2d) 153, and in conjunction with F. R. C. P. 61, see 28 U. S. C. secs. 391, 777 and F. R. C. P. 1, 8(f) and 15.

^{187a}*Collins v. Metro-Goldwyn Pictures Corporation*, (C.C.A. 2d Cir. 1939) 106 F. (2d) 83.

^{187b}Rule 63(b) of the Preliminary Draft (1936) expressly provided that a split-judgment should be final for all purposes including the right to appeal therefrom. That provision was eliminated in Rule 54 (b) of the Report of the Advisory Committee (1937), possibly for the reason that such a provision might have been considered as affecting the jurisdiction of the appellate courts and, therefore, not within the Committee's power.

delay appeals but found that district judges have a practical discretion and power to control such appeals. There can be no quarrel with the ruling based as it is upon expediency, but the question of how the district judges can exercise discretion was not discussed, that problem not being essential to the decision of the case. In those cases where a demand for a split-judgment probably will occur most frequently, this practical discretion can be exercised on a motion to dismiss claims for lack of jurisdiction, for failure to state a claim upon which relief can be granted, etc., or for judgment on the pleadings^{187c} by deferring hearing and determination until time of trial,^{187d} or where a claim involving only non-jury issues has been determined, the court may withhold the findings of fact and conclusions of law until other claims involving jury issues have been decided.

I. FROM A DISTRICT COURT TO A CIRCUIT COURT OF APPEALS

A. Notice of appeal, bond on appeal and stay of judgment.

Except as to certain proceedings to which the rules have no application¹⁸⁸ a simplified procedure has been provided for in regard to appeals from a district court to a circuit court of appeals.¹⁸⁹ Petition for appeal, allowance of appeal and citation are abolished. In their place we have a simple notice of appeal¹⁹⁰ which must be filed in the district court within the time prescribed by law. The notice of appeal must specify the parties taking the appeal, the judgment¹⁹¹ or part thereof appealed from and the court to which the appeal is taken; copies of the notice of appeal are mailed by the clerk to all parties to the judgment other than the appellant.¹⁹² The notice must be signed in his individual

^{187c}F. R. C. P. 12(b), (c).

^{187d}F. R. C. P. 12(d).

¹⁸⁸F. R. C. P. 81. This rule has been modified so that now the Federal Rules apply to: (1) bankruptcy proceedings, see General Orders in Bankruptcy, effective February 13, 1939, 36 and 37, 305 U. S. Supp. p. 1; 11 U. S. C. secs. 47, 48; (2) copyright proceedings, see Rule 1 of the Copyright Rules, 17 U. S. C. following sec. 53.

¹⁸⁹F. R. C. P. 73(a).

¹⁹⁰This procedure is common in a great many code states; see list in Advisory Committee's Note to F. R. C. P. 73.

¹⁹¹The term "judgment" as used in the rules includes a decree and any order from which an appeal lies. F. R. C. P. 54(a).

¹⁹²F. R. C. P. 73(b); Appendix of Forms, Form 27. This duty of notification of the filing of a notice of appeal is similar to the general duty of the district court clerk to serve copies of all orders and judgments with notice of entry (F. R. C. P. 77(d)). The failure of the clerk to notify the parties that an appeal has been taken does not affect the validity of the appeal (F.R.C.P. 73(b)). The district court rules for the southern district

name by at least one attorney of record for the appellant.¹⁹³ It should be noted that the rules as promulgated wisely omit the provision contained in the Preliminary Draft (May, 1936) that the notice of appeal had to contain the appellant's assignment of errors.¹⁹⁴ In fact no assignment of errors is required as a prerequisite to an appeal. It would seem, therefore, that the strict limitation formerly placed by the appellate courts on its power of review, i.e. to the assignment of errors of the appellant, will no longer be controlling.¹⁹⁵ The jurisdictional requirement is the filing of the notice. Failure of the appellant to take any further steps to secure review does not affect the validity of the appeal, and is ground only for such remedies as are specified in the rule, or when no remedy is specified for "such action as the appellate court deems appropriate which may include dismissal of the appeal."¹⁹⁶

The rules probably make a slight change in respect of the time within which an appeal may be taken. The United States Judicial Code provides that appeal or writ of certiorari must be applied for within a specified number of months after the entry of the judgment or decree to be reviewed.¹⁹⁷ The federal courts have uniformly held that while they may construe their own rules equitably and extend the time specified therein, they have no such power as to statutes and that when the act is to be done within a time fixed by statute and the last day thereof falls on a Sunday or other holiday, that day will not be excluded and, therefore,

of New York (Civil Rule 25) require that the notice of appeal must exhibit the names and addresses of the respective attorneys of record and that the appellant must file a sufficient number of copies of the notice of appeal for mailing by the clerk.

¹⁹³F. R. C. P. 11 and 7(b)(2).

¹⁹⁴Preliminary Draft (May, 1936), Rule 72(b); cf. Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, (1937) 11 *St. John's L. Rev.* 212, 260.

¹⁹⁵3 Moore, *Federal Practice* (1938) 3406; *Sonzinsky v. United States*, (1937) 300 U. S. 506, 514, 57 Sup. Ct. 554, 81 L. Ed. 772: "We do not discuss petitioner's contentions which he failed to assign below." Cf. old Rule 10 of the circuit court of appeals for the second circuit and new Rule 10 of the same circuit, which requires an assignment of errors to be contained in the brief. This is the proper place for it.

¹⁹⁶F. R. C. P. 73(a).

¹⁹⁷28 U. S. C. secs. 227, 230 and 350; as to what constitutes "entry" see F. R. C. P. 58 and 79(a); *Siegel v. Margiotta*, (C.C.A. 2d Cir. 1939) 102 F. (2d) 525. But "It [the time for taking an appeal] is stopped by a motion for new trial, a motion to amend the findings, or by a motion for judgment notwithstanding the verdict, pursuant to rule 50(b) and begins running anew upon the determination of such motions. But a motion pursuant to Rule 60 to gain relief from a judgment or order has no effect upon appeal time." 3 Moore, *Federal Practice* (1938) 3393 (the author's footnotes omitted).

the time will expire on the preceding day which is not a Sunday or a holiday.¹⁹⁸ The rules provide that "in computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute," the last day of such period is to be included unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a legal holiday.¹⁹⁹ The Preliminary Draft (May, 1936) stated that the court could not enlarge the time for taking an appeal, and then specifically stated that the extension provided for (when the last day fell on a Sunday or holiday) also included "the time for taking an appeal."²⁰⁰ This phrase was omitted in the promulgated rules and in its place there was inserted the broader term "any applicable statute." It would, therefore, seem that there is a clear intention to change the rule of definition laid down in the decisions above referred to; but until the Supreme Court passes on this question the wiser course to follow is not to take advantage of this apparent extension of time.²⁰¹

The provisions as to the requirements of the costs bond (called the bond on appeal) and the supersedeas bond are clear. Ordinarily the costs bond must be in the sum of \$250 with adequate surety (conditioned to pay the costs if the appeal is dismissed or the judgment affirmed or to pay such costs as the appellate court may award if the judgment is modified) and must be filed with the notice of appeal. If a bond on appeal for \$250 is given, no court approval is necessary.²⁰² After a bond is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the district court clerk.²⁰³ When

¹⁹⁸*Siegelschiffer v. Penn Mutual Life Ins. Co.*, (C.C.A. 2d Cir. 1917) 248 Fed. 226, cert. denied, *Ex parte Siegelschiffer*, (1918) 246 U. S. 654, 38 Sup. Ct. 572, 62 L. Ed. 923; *Walters v. Baltimore & O. R. Co.*, (C.C.A. 3d Cir. 1935) 76 F. (2d) 599.

¹⁹⁹F. R. C. P. 6(a); the expression "legal holiday" seems ambiguous, since it does not clearly indicate whether both state and federal holidays are included; cf. 1 Moore, *Federal Practice* (1938) 405-6, *Ilsen*, *The Preliminary Draft of Federal Rules of Civil Procedure*, (1937) 11 *St. John's L. Rev.* 212, 220.

²⁰⁰Preliminary Draft (May, 1936) Rule 7.

²⁰¹1 Moore, *Federal Practice* (1938) 406-408; *Simkins*, *Federal Practice* (1938) 603. But see *Jordan v. Palo Alto Verde Irr. Dist.*, (C.C.A. 9th Cir. 1939) 105 F. (2d) 601, 603 extension of time, provided for by F. R. C. P. 6(a) where last day for doing some act falls on a Sunday, applies to the filing of a notice of appeal. This rule probably does not apply to filing petitions for writs of certiorari or appeals from the district courts or state courts direct to the United States Supreme Court, 28 U. S. C. secs. 350, 723(b) and 723(c).

²⁰²F. R. C. P. 73(c); cf. 28 U. S. C. secs. 227, 832, 869, 870 and 6 U. S. C. sec. 6; see Notes of Advisory Committee to F. R. C. P. 73(c).

²⁰³F. R. C. P. 73(c).

a supersedeas bond is filed no separate bond on appeal is required, the supersedeas bond necessarily containing a provision covering costs.²⁰⁴

It is also provided that no execution shall issue upon a judgment nor shall any proceedings be taken for its enforcement until the expiration of ten days after its entry. Thus there is a short automatic stay which, however, does not apply to judgments (interlocutory or final) in an action for an injunction or in a receivership action, or to a judgment directing an accounting in an action for infringement of letters patent. In cases of this sort the judgment or order is not stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal except by special order by the court.²⁰⁵ There is a further provision that in any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor has the right, in the district court held therein, to such stay as would be accorded him had the action been maintained in the courts of that state. Thus in certain jurisdictions the judgment debtor under these circumstances may be able to obtain a longer automatic stay than ten days.²⁰⁶ Neither the United States nor any officer or agency thereof acting as such is required to furnish security; an order granting a stay is sufficient.²⁰⁷

As its name implies, a supersedeas bond is given to effect a stay of the judgment appealed from.²⁰⁸ The rules prescribe sev-

²⁰⁴F. R. C. P. 73(c), (d).

²⁰⁵F. R. C. P. 62(a). The ten day stay begins to run on the day when judgment is entered (*Board of Commr's v. Gorman*, (1873) 19 Wall. (U.S.) 661, 22 L. Ed. 226). As to what constitutes "entry" see F. R. C. P. 58 and 79(a); as to time computation, see F. R. C. P. 6(a); cf. *Danielson v. Northwestern Fuel Co.*, (C.C. Minn. 1893) 55 Fed. 49, aff'd. (C.C.A. 8th Cir. 1893) 57 Fed. 915 interpreting 28 U. S. C. sec. 874 (supersedeas). The automatic stay applies to an order in a bankruptcy proceeding directing trustees in bankruptcy to deliver certain personal property to petitioner which was in bankrupt's possession by virtue of a bailment lease; the order having been excepted to by one of the opponents, the trustees were justified in refusing to comply with the terms of the order before expiration of the ten day period prescribed in Rule 62(a), United States, now for the Use of *Manufacturers Equipment Co.*, (W. D. Pa., 1939) 29 F. Supp. 40.

²⁰⁶F. R. C. P. 62(f); cf. N. Y. C. P. A. sec. 615 ". . . Execution of a judgment for the recovery of money only shall not be stayed without security for more than thirty days after the service upon the attorney for the appellant of a copy of a judgment and written notice of the entry thereof." Such stay, however, must be granted in open court at the close of the trial or by special order procured and served, N. Y. C. P. R. 203; *The Island Queen*, (D.C.W.D. Pa. 1907) 152 Fed. 470.

²⁰⁷F. R. C. P. 62(e).

²⁰⁸*Hovey v. McDonald*, (1883) 109 U. S. 150, 159, 3 Sup. Ct. 136, 27 L. Ed. 888.

eral different methods of obtaining a stay of a judgment pending appeal. The choice of method depends upon the type of judgment appealed from. The significant categories are:

a. *Judgments for the recovery of money not otherwise secured.* The rule first lays down the generally recognized practice that if the appellant desires a stay on appeal, he must present to the court for approval a supersedeas bond conditioned (a) for the satisfaction of the judgment in full together with costs, (b) interest and (c) damages for delay, if for any reason the appeal is dismissed or the judgment affirmed, and (d) to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award.²⁰⁹ This rule also contains an eminently fair provision, which is entirely new, giving the court after notice and hearing and for good cause shown the power to fix a different amount or order security other than the bond.²¹⁰

b. *Judgments determining the disposition of the property in controversy as in (a) real actions, (b) replevin, (c) actions to foreclose mortgages, or (d) when such property is in the custody of the marshal, or (e) when the proceeds of such property or a bond for its value is in the custody or control of the court.* In such cases the amount of the supersedeas bond must be fixed at such sum as will secure (1) the amount recovered for the use and detention of the property, (2) the costs of the action, (3) costs on appeal, (4) interest and (5) damages for delay.²¹¹

c. *Judgments (interlocutory or final) in an action for an in-*

²⁰⁹F. R. C. P. 73(d). The local rules of the Southern District of New York prescribe the amount of the bond as follows: (1) the face amount of the judgment, (2) 11 per cent of the judgment (to cover interest and damages on delay) and \$250 (to cover costs); there are also detailed provisions as to the method of applying for the bond, notice to the appellee and that the bond may be executed by the surety only (S.D. N.Y. Civil Rule 28).

²¹⁰F. R. C. P. 73(d). "That last clause was put in there to cover cases (some of which were brought to the attention of the Advisory Committee) where money judgments had been entered against defendants in enormous sums and they were utterly unable to give a supersedeas bond to stay the execution of the judgment—they did not have sufficient assets. Their right of appeal and stay was practically destroyed, and this allows the court in a case of hardship of that kind, on notice and hearing, to determine what the security ought to be. I should think that in such a case the court would probably find out the size of appellant's pocketbook and fix the bond accordingly. Certainly if he pledges every penny he has in the world, he oughtn't to be restrained in his right of appeal." General Mitchell in Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute (Cleveland, 1938) 361: Such a provision is not contained in the new Supreme Court Rules (306 U.S. Appendix), cf. Rule 36 (2).

²¹¹Cf. Sup. Ct. Rule 36 (2).

junction or in a receivership action or a judgment or order directing an accounting in an action for infringement of letters patent. With respect to judgments in receivership actions and judgments or orders directing an accounting in actions for infringements of letters patent, the rules provide for no automatic stay and further state that no stay can be granted, except by order of the court.²¹² When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, there is likewise no automatic stay, but the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the adverse party.²¹³ Special provision is made for judgments by a three-judge court.²¹⁴

The supersedeas bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal.²¹⁵ A stay pending appeal is not effective until the bond has been approved by the district court or an order granting a stay and approving a bond (if a bond is required by the court) has been entered.²¹⁶ These provisions demand a prompt appeal if a stay is desired, as they preclude the giving of a supersedeas bond or the granting of a stay order with or without bond as the case may be, until the appeal has been taken.²¹⁷ Otherwise, execution may issue or other proceedings for enforcement may be begun (dependent upon the character of the judgment) either after the expiration of ten days²¹⁸ or of the state stay provisions²¹⁹ or immediately upon entry of the judgment.²²⁰ A stay is not retroactive and does not void prior levies or proceedings.²²¹

If the bond on appeal or the supersedeas bond is not filed

²¹²F. R. C. P. 62(a).

²¹³F. R. C. P. 62(c); *Shinholt v. Angle*, (C.C.A. 5th Cir. 1937) 90 F. (2d) 297, 298, cert. denied (1937) 302 U. S. 719, 58 Sup. Ct. 40, 82 L. Ed. 555; cf. Equity Rule 74, which did not "include cases when an injunction, or a restraining order has been refused," *New York Life Ins. Co. v. Marshall* (E.D. La. 1927) 21 F. (2d) 172, aff'd without discussion of the point (C.C.A. 5th Cir. 1928) 23 F. (2d) 225, cert. denied (1928) 277 U. S. 587, 48 Sup. Ct. 434, 72 L. Ed. 1001.

²¹⁴F. R. C. P. 62(c); cf. *Cumberland Telephone Co. v. Public Service Commission* (1922) 260 U. S. 212, 219, 43 Sup. Ct. 75, 67 L. Ed. 217, 3 Moore, Federal Practice (1938) 3298-9.

²¹⁵F. R. C. P. 62(d).

²¹⁶F. R. C. P. 62(a), (c) and (d).

²¹⁷F. R. C. P. 62(a), (c) and (d); cf. stay on motions for new trial or judgment F. R. C. P. 62(b).

²¹⁸F. R. C. P. 62(a).

²¹⁹F. R. C. P. 62(f).

²²⁰F. R. C. P. 62(a), (c) and (d).

²²¹3 Moore, Federal Practice (1938) 3300 and cases cited.

within the time specified or if the bond is found insufficient, a bond may be filed before the action is docketed in the appellate court within a time limit fixed by the district court; after the action is so docketed, application for leave for filing a bond may be made only in the appellate court.²²² But as previously stated, insufficiency of bond or failure to furnish bond does not affect the validity of the appeal.²²³

The power of the appellate court or of a judge thereof to stay proceedings are not limited by the provisions of Rule 62, and it is further provided that

"these rules do not supersede the provisions of section 210 of the Judicial Code, as amended, U. S. C. Title 28, sec. 47a, or of other statutes of the United States to the effect that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof."²²⁴

A new remedy, cumulative and not exclusive, has been provided for, to the effect that by entering into an appeal or supersedeas bond²²⁵ the surety submits himself to the jurisdiction of the court so that his liability may be enforced on motion without the necessity of an independent action.²²⁶ The motion, upon such notice as the court may prescribe, may be served on the district court clerk, who must forthwith mail copies to the surety if his address is known.²²⁷

B. Docketing and Preparation of Record on Appeal.

The disability of district courts in actions at law to settle a bill of exceptions after the term or any extension thereof for that purpose had expired,²²⁸ has been removed. The rules laid down in respect of equity cases as to the time a record on appeal should be prepared did not state that it had to be done within the term or

²²²F. R. C. P. 73(e). "This is incorporated to make clear the extent of the jurisdiction of the district court to entertain motions for failure to file or for insufficiency of a bond on appeal or a supersedeas bond." (Notes of Advisory Committee to this Rule). As to "the time specified" see F. R. C. P. 62(c) and (d).

²²³Supra, p. 38.

²²⁴F. R. C. P. 62(g).

²²⁵F. R. C. P. 73(c) and (d).

²²⁶F. R. C. P. 73(f); see generally 6 U. S. C., which contains complete provisions for sureties, and Notes of Advisory Committee to F. R. C. P. 73(f).

²²⁷F. R. C. P. 73(f).

²²⁸Michigan Ins. Bank v. Eldred, (1892) 143 U. S. 293, 12 Sup. Ct. 450, 36 L. Ed. 162; O'Connell v. United States, (1920) 253 U. S. 142, 40 Sup. Ct. 44, 64 L. Ed. 827; Exporters v. Butterworth-Judson Co., (1922) 258 U. S. 365, 42 Sup. Ct. 331, 66 L. Ed. 663; United States v. Rasmussen, (C.C.A. 10th Cir. 1938) 95 F. (2d) 842.

any extension thereof, but local court rules caused some difficulty.²²⁹ Any such question has also been removed. It is now stated that the period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court furthermore in no way affects the power of the court to do any act or take any proceeding.²³⁰ Thus a technical rule of procedure has been laid to rest.

The new rules place emphasis on the docketing in the appellate court and not on the term of court in which the judgment was rendered, and provide that within forty days from the date of the notice of appeal unless otherwise ordered, the record on appeal must be filed with the circuit court of appeals and the action there docketed.²³¹ If more than one appeal is taken from the judgment, the district court may prescribe the time for filing and docketing, which in no event shall be less than forty days from the date of the first notice of appeal.²³² Regardless of the number of appeals from the same judgment, the district court has discretion before the expiration of any period, with or without notice, to extend the time for filing and docketing but not beyond a day more than ninety days from the date of the first notice of appeal.²³³ The ninety day limitation should not, however, prevent the circuit court of appeals from granting an extension beyond this period.²³⁴

²²⁹Equity Rule 75; *Barber Asphalt Co. v. Standard Co.*, (1928) 275 U. S. 372, 48 Sup. Ct. 183, 72 L. Ed. 318; but see old General Rules of the district court of the southern district of New York, Rule 35(b) and *Woodbury v. Jergens*, (C.C.A. 2d Cir. 1932) 61 F. (2d) 736.

²³⁰F. R. C. P. 6(c); see *Sprague v. Taconic Nat'l Bank* (1939) 59 Sup. Ct. 777, 781.

²³¹F. R. C. P. 73(g).

²³²F. R. C. P. 73(g).

²³³F. R. C. P. 73(g); compare F. R. C. P. 6(b), which provides that the district court, for cause shown, "at any time" may upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect. This possible variance in the language has been explained as an oversight, and it has been suggested that F. R. C. P. 6(b) should govern so long as the 90-day limitation of F. R. C. P. 73(g) is complied with. 1 Moore, *Federal Practice* (1938) 411 et seq. Whether a circuit court of appeals will grant an extension of time terminating within the 90-day period prescribed by F. R. C. P. 73(g) depends on its own rules. In the Second Circuit, the court will not hear such a motion, unless an extension of time for filing and docketing the record has first been denied by the district court. Rule 15 of Rules for the circuit court of appeals for the second circuit.

²³⁴For instance, the circuit court of appeals for the second circuit (Rule 15) will extend the time beyond the 90-day limitation, if application on due notice is made, however, such extension will be granted only upon a showing that the delay is due to a cause beyond the control of the moving party, or,

It will be noted that the rule states that the period is to be computed from the "date" of the notice of appeal.²³⁵ Inasmuch as another rule²³⁶ (specifying the contents of the record on appeal) provides that the notice of appeal "with the date of filing" shall be included in the record on appeal, and the Advisory Committee's form of notice of appeal does not provide for the notice to be dated,²³⁷ it would seem that "date" means the date of filing.²³⁸

Promptly²³⁹ after notice of appeal has been filed, the appellant must 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.²⁴⁰ This designation should contain copies of (1) the material pleadings without unnecessary duplication; (2) the verdict or the findings of fact and conclusions of law together with direction for the entry of judgment thereon; (3) in an action tried without a jury, the master's report, if any; (4) the opinion; (5) the judgment or part thereof appealed from; (6) the notice of appeal with date of filing; and (7) the designations as to other matter to be included in the record.²⁴¹

Testimony of witnesses designated for inclusion need not be in narrative form, but may be in question and answer form.²⁴² Thus the narrative form of record formerly prescribed (except where verbatim testimony was necessary to a right appreciation thereof)²⁴³ and properly criticized²⁴⁴ is no longer mandatory.

if there is a substantial question to be presented on appeal, that the delay is due to excusable neglect.

²³⁵F. R. C. P. 73(g).

²³⁶F. R. C. P. 75(g).

²³⁷Appendix of Forms, Form 27.

²³⁸In accord with this conclusion, but based upon different reasoning, see *In the Matter of Guanajuato Reduction and Mines Company, Debtor*, (D. N.J. Oct. 1939, not yet reported). Cf. 3 Moore, *Federal Practice* (1938) 3396 (footnote) where an opposite view seems to be taken: "Since subd. (g) makes the period of time for docketing the case and filing the record with appellate court run from the date (not filing) of the notice of appeal, careful counsel will see that the notice bears date as of the day of filing."

²³⁹Keeping in mind the time within which the record must be docketed, see F. R. C. P. 73(g).

²⁴⁰F. R. C. P. 75(a).

²⁴¹F. R. C. P. 75(g). These documents must be transmitted to the appellate court whether or not designated.

²⁴²F. R. C. P. 75(c).

²⁴³*Old United States Supreme Court Rule VIII and Equity Rules 75 and 76; Barber Asphalt Paving Co. v. Standard Asphalt & Rubber Co.*, (1928) 275 U. S. 372, 48 Sup. Ct. 183, 72 L. Ed. 318; *Alexander v. Cosden*, (1934) 290 U. S. 484, 54 Sup. Ct. 292, 78 L. Ed. 452.

²⁴⁴Lane, *Federal Equity Rules*, (1922) 35 Harv. L. Rev. 276; Griswold and Mitchell, *The Narrative Record in Federal Equity Appeals*,

The United States Supreme Court has also adopted this change in its new rules.²⁴⁵ An appellant may, however, still prepare and file with his designation a condensed statement in narrative form of all or part of the testimony and any other party to the appeal, if dissatisfied with the narrative statement, may require testimony in question and answer form to be substituted.²⁴⁶ For the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs, and costs may be imposed upon offending attorneys or parties.²⁴⁷

It is further provided that all matter not essential to the decision of the questions presented shall be omitted as well as formal parts of all exhibits; more than one copy of any document must likewise be excluded.²⁴⁸ The penalty is the same as where an appellee unnecessarily counter-proposes testimony in question and answer form where a fair narrative form has already been proposed.

If any evidence or proceedings at a trial or hearing was stenographically reported, the appellant must file with his designation two copies of the reporter's transcript of the evidence or proceedings included in his designation and also two copies of the transcript of the evidence or proceedings not included in his designation.²⁴⁹ One of such copies must be available for use (1) of the other parties and (2) in the appellate court in printing the record.²⁵⁰

A quasi assignment of errors still survives. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he must serve with his designation a concise statement of the points on which he intends to rely on the appeal.²⁵¹

(1929) 42 Harv. L. Rev. 483; Lane, *Twenty Years under the Federal Equity Rules*, (1933) 46 Harv. L. Rev. 638; Severn, *Practical Results of Federal Equity Rule 75(b) as to Restatement of Testimony in Narrative*, (1936) 34 Mich. L. Rev. 1093; Stone, *The Record on Appeal in Civil Cases*, (1937) 23 Va. L. Rev. 766.

²⁴⁵This provision has been incorporated by reference in United States Supreme Court Rule 10(2).

²⁴⁶F. R. C. P. 75(c).

²⁴⁷F. R. C. P. 75(e); U. S. Sup. Ct. Rule 10(2).

²⁴⁸F. R. C. P. 75(e); there is no provision for the abridgment of formal parts of any pleadings or judgments; cf. F. R. C. P. 10(a), Equity Rule 76.

²⁴⁹F. R. C. P. 75(b).

²⁵⁰F. R. C. P. 75(b).

²⁵¹F. R. C. P. 75(d); that this subdivision should not be considered to be an assignment of errors for appellate review see 3 Moore, *Federal Practice* (1938) 3406. The proper place for an assignment of errors is in the brief in the appellate court.

Within ten days after the appellant has served and filed his designation as above described, any other party to the appeal may serve and file a designation of any additional portions of the record, proceedings and evidence to be included.²⁵²

It is not necessary for the record on appeal to be approved by the district court or judge; if, however, any difference arises as to whether the record truly discloses what occurred in the district court, the difference is to be submitted to and settled by that court and the record made to conform to the truth.²⁵³ Provision is also made for the insertion of anything material to either party which has been omitted from the record on appeal by error or accident or is misstated therein.²⁵⁴ Furthermore, whenever the district court is of opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may provide so by order.²⁵⁵

Duplication of records is also avoided by the provision that when more than one appeal is taken to the same court from the same judgment, a single record on appeal must be prepared containing all the matter designated or agreed upon by the parties, without duplication.²⁵⁶

A simple method of preparing the record on appeal (and one that should be followed in most appeals) is for the parties, with-

²⁵²F. R. C. P. 75(a). The southern and eastern districts of New York have made unwarranted additions to this rule (Civil Rules 29 to 31); cf. General Mitchell in Federal Rules of Civil Procedure and Proceedings of the Institutes, Washington and New York, Published by Amer. Bar Ass'n referring to Civil Rule 31 (providing for service of the record on appeal in printed or typed form within 30 days after appeal, and motion to correct record within ten days thereafter) at p. 326 ". . . there is one relating to the record on appeal that disturbs me very considerably. I think it is safe to say that this authority to the district court to supplement the Supreme Court Rules with local rules was not intended to authorize the enactment of supplemental rules on matters where the field was adequately covered and all the necessary steps provided for in the rules promulgated by the Supreme Court. If you construe the authority to make local rules to be that broad, . . . the district court could tack onto the federal rules all the meticulous details of the New York Civil Practice Act that could be carried out without running directly contrary to the Supreme Court Rules. . . . Now you see [after quoting Civil Rule 31], the district court in this district in addition to all the steps provided for in the Supreme Court Rule has tacked on additional steps that have to be taken. . . . It tends to destroy uniformity in practice throughout the United States. The lawyers in this district will have to comply with this district court rule as long as it stands, because otherwise a record will not be certified by the clerk." Cf. Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, (1937) 11 *St. John's L. Rev.* 212, 268.

²⁵³F. R. C. P. 75(h); this subdivision has been incorporated by reference in U. S. Sup. Ct. Rule 10(2).

²⁵⁴F. R. C. P. 75(h); cf. Equity Rule 76.

²⁵⁵F. R. C. P. 75(i).

²⁵⁶F. R. C. P. 75(k).

out serving designations as above provided, to stipulate in a writing filed with the district court clerk the parts of the record, proceedings and evidence to be included in the record on appeal.²⁵⁷

When all this has been done, and it is in fact quite simple, the district court clerk under his hand and the seal of the court transmits to the appellate court the designated or stipulated matter which constitutes the record on appeal.²⁵⁸ An additional copy must be transmitted for use in printing the record on appeal if a copy is required by the rules of the circuit court of appeals.²⁵⁹

It is also provided that if by reason of death, sickness or other disability,²⁶⁰ a judge before whom an action has been tried is unable to perform his required duties after a verdict is returned or findings of fact or conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.²⁶¹

Except for abolishing the compulsory narrative statement, the procedure outlined is almost precisely the system prescribed by the old Equity Rules and supersedes U. S. C. Title 28, sec. 876 providing for bills of exceptions, authentication and signing by the trial judge. The old distinction in law cases between the record proper and the proceedings and evidence on the trial is abolished and the method of bringing matters not of "strict record" into the record on appeal²⁶² becomes unnecessary. This change is a decided improvement. As has been previously shown²⁶³ the "exception" as such has been eliminated but in its place we find the "objection." Thus "for all purposes for which an exception has heretofore been necessary" (this would seem to include some of the requirements of a bill of exceptions) it will be sufficient that a party at the time the ruling or order was made or sought, makes

²⁵⁷F. R. C. P. 75(f).

²⁵⁸F. R. C. P. 75(g).

²⁵⁹F. R. C. P. 75(g).

²⁶⁰"Disability" includes inability because of resignation, *McIntyre v. Modern Woodmen of America*, (C.C.A. 6th Cir. 1912) 200 Fed. 1, but does not include mere absence from the district (*Western Dredging & Improvement Co. v. Heldmaier*, (C.C.A. 7th Cir. 1901) 111 Fed. 123.

²⁶¹F. R. C. P. 63; this Rule supersedes 28 U. S. C. sec. 776; see also 28 U. S. C. sec. 25.

²⁶²Cf. *Baltimore & Pot. R. R. Co. v. Trustees, etc.*, (1875) 91 U. S. 127, 130, 23 L. Ed. 260; *Reed v. Gardner*, (1873) 84 U. S. 409, 411, 21 L. Ed. 665.

²⁶³*Supra*, p. 5.

known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor. In view of this provision it seems probable that a necessary prerequisite to review by the appellate court will be a proper objection "for all purposes for which an exception has heretofore been necessary" and, therefore, such exception or "objection" as it is now called, will be as formerly a necessary prerequisite to review by an appellate court.²⁶⁴ The bill of exceptions, furthermore, has not been entirely abolished by the new rules of the Supreme Court of the United States.²⁶⁵

Even though the record on appeal is prepared by the district court clerk²⁶⁶ he does not supervise its printing. What part of the record on appeal filed in the appellate court must be printed and the manner of the printing and the supervision thereof is to be prescribed in the rules of the court to which the appeal is taken.²⁶⁷ Thus it is left to the determination of the appellate courts whether the appeal is to be heard on typewritten or printed records. The type, paper and dimensions of printed matter in the circuit court of appeals, however, must conform to the rules of the Supreme Court relating to records on appeal to that court, notwithstanding any rules of the circuit courts of appeal to the contrary.²⁶⁸

A skeleton record for preliminary use in the appellate court is also provided for where a party desires to move for dismissal,

²⁶⁴Stone, *The Record on Appeal in Civil Cases*, (1937) 23 Va. L. Rev. 766; *Suydam v. Williamson*, (1857) 20 How. (U.S.) 427, 15 L. Ed. 978; *Phelps v. Mayer*, (1853) 15 How. (U.S.) 159, 14 L. Ed. 643; and *Johnson v. Garber*, (C.C.A. 6th Cir. 1896) 73 Fed. 523; but see 3 Moore, *Federal Practice* (1938) 3406. As to evidence in equity cases, see *United States Supreme Court Rule 16* and *Hoyt v. Hanbury*, (1888) 128 U. S. 584, 9 Sup. Ct. 176, 32 L. Ed. 565.

²⁶⁵Supreme Court Rule 8: "Bills of Exceptions—Charges to Jury—Omission of Unnecessary Evidence." It does not seem probable that this rule requires a bill of exceptions in all jury cases where the parties contemplate review by the Supreme Court. F. R. C. P. 75(h) has been incorporated by reference in Supreme Court Rule 10(2). One possibility is that at times the parties may still desire a bill of exceptions and if so, the rule must be complied with; but some doubt is justified. The more reasonable explanation of the reference in Supreme Court Rule 8 to bills of exceptions is the fact that in some criminal cases a bill of exceptions is still necessary and must conform to the provisions of Supreme Court Rule 8. See Rule IX of the Rules of Practice and Procedure in criminal cases in the district courts.

²⁶⁶F. R. C. P. 75(g).

²⁶⁷F. R. C. P. 75(1).

²⁶⁸F. R. C. P. 75(1); see copious notes of the Advisory Committee to this subdivision; cf. Rules 13, 22 and 25 of the circuit court of appeals for the second circuit, which require printing and that party filing record on appeal "shall cause the same to be printed."

stay pending appeal, for additional security on the bond (appeal or supersedeas) or for any intermediate order.²⁶⁹

Finally, the rules give the parties the right to use an agreed statement showing how the questions arose and were decided in the district court and setting forth only such facts averred and proved or sought to be proved as are essential to a decision of the questions. But this statement must include (a) a copy of the judgment appealed from, (b) a copy of the notice of appeal with its filing date, and (c) a concise statement of the points to be relied on by the appellant, and must be approved by the district court, together with such additions as the court may consider necessary fully to present the questions raised by the appeal, before it can be certified to the appellate court as the record on appeal.²⁷⁰ Of course no hypothetical cases may be submitted.

II. FROM A DISTRICT COURT TO THE SUPREME COURT

The provisions heretofore considered, except as indicated, applied only to review of district court cases by the circuit courts of appeal. The rules, however, in a limited way also deal with appeals from a district court to the Supreme Court. In this respect, the practice existing prior to the effective date of the rules, has been codified.²⁷¹ Thus, under this rule, we still have petition for appeal accompanied by an assignment of errors, allowance of appeal, issuance of citation, filing of jurisdictional statement, taking of appeal bond and supersedeas bond, making and certification of the record as prescribed by law and the rules of the Supreme Court. The Advisory Committee had hoped that this procedure would be abolished by the Supreme Court when it would revise its rules, so as to conform to the simple method prescribed for criminal appeals.²⁷² Its hope, however, has not been fulfilled, since the new rules of the United States Supreme Court have not been changed in this respect.²⁷³ The Supreme

²⁶⁹F. R. C. P. 75(j).

²⁷⁰F. R. C. P. 76. This Rule sets out in clearer terms the provisions of Equity Rule 77; see also 3 Moore, *Federal Practice* (1938), 3409, and Mitchell, *Federal Rules of Procedure and Proceedings of the American Bar Ass'n Institute* (Cleveland, 1938) 367-368.

²⁷¹F. R. C. P. 72.

²⁷²Note of Advisory Committee to Rule 62 of Draft of April, 1937; see also Clark, *Fundamental Changes Effected By The New Federal Rules*, II, (1939) 15 *Tenn. L. Rev.* 579.

²⁷³Rules 10, 12, 46 and 47 of the Sup. Ct. (1939) 306 U. S. appendix; as to statutes continued in effect see Notes of Advisory Committee to F. R. C. P. 72.

Court in its revised rules has made only those alterations with respect to summons and severance and the record which have been previously noted.²⁷⁴

From the foregoing discussion it would appear self-evident that the procedure relating to appellate review as laid down by the new rules is a decided improvement over the federal practice theretofore existing. Simplicity and the elimination of the old pitfalls have been the objectives sought. Much, indeed, has been accomplished in that direction. It is to be hoped that the courts in applying and interpreting the Federal Rules of Civil Procedure will recognize the great importance of that goal.

²⁷⁴Some other revision, of course, has been made, not affecting however this discussion.