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THE NEW FEDERAL RULES OF CIVIL PROCEDURE

SHERMAN L. COHN *

The amendments to the civil rules continue a process of transition from legal formulas toward adaptation to the practicalities of the various factual situations involved. This process was commenced with the early reform movement when the strictures of common-law, form-of-action pleading were abolished and the artificial separation of law and equity was ended. It continued through the original promulgation of the Federal Rules of Civil Procedure which attempted to eliminate many of the legalistic but artificial restrictions that code practice perpetuated. The current amendments move closer to what Mr. Justice Goldberg termed "the aims of a liberal, nontechnical application" of federal procedural rules, rules that are designed to place before the court the actual substantive issues in the case with the minimum amount of formal procedural restrictions needed to ensure fair and orderly proceedings.

PARTIES

The major area of modification in the current amendments concerns parties. Here there is a restructuring of major proportions to eliminate formalistic labels that restricted many courts from an examination of the practical factors of individual cases. In some respects the new rules codify existing practice.

The first change that bears examination involves the required joinder of parties. The trichotomy of proper-necessary-indispensable, long a problem in understanding and definition, is now overthrown in favor of a consideration of practical factors in light of the question: Should this case go forward without the missing party?

JOINDER OF PARTIES NEEDED FOR JUST ADJUDICATION—RULE 19

The concept of compulsory joinder of parties developed in the equity courts.¹ Indeed, rule 19, as it has read since the inception of

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¹ For a thorough discussion of the background of the rules governing parties to equity

the federal rules, was derived directly from the federal courts' equity rules.² At equity, whether an absent person was required to be present in an action was decided upon a consideration of several factors. The effect that disposition of the action would have on the absentee³ and upon the parties already before the court,⁴ was investigated. Additionally, the courts weighed the public interest of avoiding multitudinous litigation of an issue against the ability of the court to render a meaningful decree.⁵ As compulsory joinder developed, the terms "indispensable," "necessary," and "proper" were coined. "Joint interest" in the subject matter of the action also became common parlance.⁶

These technical concepts were retained in original rule 19.⁷ An "indispensable" party came to mean one who has a "joint interest" in the action, and in whose absence, the action could not proceed.⁸ A "necessary" party was one who had an interest in the action, but whose interest was separable; in its discretion, a court could proceed with or dismiss the action if such person could not be joined.⁹ "Proper" parties were those having an interest in the action but whose presence

suits from the late seventeenth century to the early nineteenth century, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961). For an analysis of the indispensable party rule from the nineteenth century to the present see Reed, *Compulsory Joinder of Parties in Civil Actions* (pts. 1-2), 55 MICH. L. REV. 327, 483 (1957).

² Compare Equity R. 37, 226 U.S. 659 (1912), and Equity R. 39, 226 U.S. 659 (1912), with FED. R. CIV. P. 19(a) and FED. R. CIV. P. 19(b).

³ See, e.g., Northern Ind. R.R. v. Michigan Cent. R.R., 56 U.S. (15 How.) 233, 244-46 (1853); Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216, 219-20 (5th Cir.), cert. denied, 329 U.S. 782 (1946); Roos v. Texas Co., 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928); *Developments in the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 880, 882-84 (1958) [hereinafter cited as *Multiparty Litigation*].

⁴ See, e.g., Independent Wireless Tel. Co. v. RCA, 269 U.S. 459, 468 (1926); Young v. Powell, 179 F.2d 147, 150-52 (5th Cir.), cert. denied, 339 U.S. 948 (1950); *Multiparty Litigation* 880, 881-82.

⁵ 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 512, at 97-98 (Wright ed. 1961) [hereinafter cited as BARRON & HOLTZOFF]; Reed, *supra* note 1, at 330; *Multiparty Litigation* 880, 881-82.

⁶ For an analysis of the numerous definitions of "joint interest" see 2 BARRON & HOLTZOFF § 512. See also WRIGHT, FEDERAL COURTS § 70, at 261-62 (1963).

⁷ FED. R. CIV. P. 19; see *Multiparty Litigation* 879; Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1137-38 (1965).

⁸ 2 BARRON & HOLTZOFF § 511, at 85.

⁹ *Id.* § 511, at 86.

was not prerequisite to granting relief.¹⁰ Joinder of proper parties was regulated by rule 20.¹¹

With the crystallization of these abstract classifications, the policy considerations for joinder of parties were often obscured and distorted. Some courts applied the definition of "indispensable" as a legal formula without consideration of the "equities" of the case.¹² Other courts, after examining relevant factors, would interpret the various definitions in order to provide some relief to parties already before it.¹³ The result was a conflicting and confusing body of precedent on joinder of parties.

The Advisory Committee's Note points out several defects in present rule 19. The description of persons whose joinder was desirable—"persons . . . who ought to be parties if complete relief is to be accorded between those already parties"¹⁴—was inadequate. The equation of "indispensable" with "joint interest" was misleading. "[P]ersons holding an interest technically 'joint' are not always so related to an action that it would be unwise to proceed without joining all of them, whereas persons holding an interest not technically 'joint' may have this relation to an action."¹⁵ Additionally, the Advisory Committee believed that the "legalisms" of the old rule were responsible for the courts' avoidance of controlling pragmatic considerations and their failure to delineate the bases of their decisions.

A misinterpretation, termed a "jurisdictional fallacy," was also caused by the wording of original rule 19, which stated that, to be feasible, joinder of the absent party could not deprive "the court of jurisdiction of the parties." Some courts incorrectly inferred that, if an indispensable party could not be joined, they were thereby deprived of jurisdiction of the parties presently before them.¹⁶ The language responsible for this "fallacy" has been revised. The new rule states explicitly that a person described in rule 19(a)(1)-(2)

¹⁰ *Id.* § 511, at 88-90.

¹¹ FED. R. CIV. P. 20.

¹² *E.g.*, *Fouke v. Schenewerk*, 197 F.2d 234 (5th Cir. 1952). For a discussion of this case see Hazard, *supra* note 1, at 1288-89.

¹³ *E.g.*, *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939); *Benger Labs. Ltd. v. R. K. Laros Co.*, 24 F.R.D. 450 (E.D. Pa. 1959).

¹⁴ FED. R. CIV. P. 19(b).

¹⁵ Advisory Committee's Note to new rule 19.

¹⁶ See, *e.g.*, *Miller v. Mangus*, 125 F.2d 507, 511 (10th Cir.), *rev'd*, 317 U.S. 173 (1942); *Peterson v. Sucro*, 93 F.2d 878, 881 (4th Cir. 1938).

can be joined only if he does not divest the court of jurisdiction over *the subject matter of the action*. It is now clear that the absence of such a person will not affect the court's jurisdiction over the parties before it.

New rule 19 shifts focus from the present indispensable-necessary-proper trichotomy. Its primary concern is the practical feasibility of joinder of parties; the legalisms of the old rule have been discarded.¹⁷ Accordingly, the new rule sets out pragmatic and equitable factors for courts to consider in determining whether to proceed with or dismiss a case. It states:

A person . . . shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.¹⁸

Several policy considerations are expressed in this definition. Subsection (1) points out the desirability of joining all parties necessary for granting complete relief. "The interests that are being furthered here are not only those of the parties before the court, but also that of the public in avoiding repeated lawsuits on the same essential subject matter."¹⁹ The ability of the absent party to protect his interest in the action is stressed in subsection (a)(2)(i), while subsection (a)(2)(ii) calls attention to possible risks to the already present parties if the absent party is not joined.

This definition represents a change from the March 1964 proposal of the Advisory Committee. Subsection (a)(2)(i) of the 1964 proposal reads: "as a practical matter *substantially* impair or impede

¹⁷ In the 1964 proposed amendments, the legal technicalities of the indispensable-necessary-proper party trichotomy were also discarded. However, the term "contingently necessary" party was used in its place. Advisory Comm. on Civil Rules, *Preliminary Draft of Proposed Amendments*, 34 F.R.D. 325, 379 (1964) [hereinafter cited as *Preliminary Draft*]. The new rule uses no labels, but incorporates the definition of "contingently necessary" into its text. For discussions of the 1964 proposals see Fink, *Indispensable Parties and the Proposed Amendment to Federal Rule 19*, 74 YALE L.J. 403 (1965); Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135 (1965); Comment, *Federal Rules of Civil Procedure: Attacking the Party Problem*, 38 SO. CAL. L. REV. 80 (1965).

¹⁸ New rule 19(a).

¹⁹ Advisory Committee's Note to new rule 19(a).

his ability to protect that interest."²⁰ In the new rule, the word "substantially" has been omitted in this subsection, although it has been retained in subsection (a) (2) (ii). Thus, more emphasis seems to be accorded to the effect of disposition of an action upon the absent party than upon those already present. Such a distinction is not surprising, as courts have held that if the risk to the present parties is too remote it may be disregarded and the action may proceed to disposition.²¹

Consistent with the old rule, the court shall order persons described in rule 19(a) (1)-(2) to be joined if they have not already been so. Also, if the absent party should be joined as a plaintiff but refuses, "he may be made a defendant, or in a proper case, an involuntary plaintiff."²² When a party described in these subsections cannot be joined, rule 19(b) directs the court to consider whether "in equity and good conscience"²³ the action should proceed or be dismissed.

²⁰ Preliminary Draft 379.

²¹ E.g., *Wesson v. Crain*, 165 F.2d 6, 10 (8th Cir. 1948).

²² Also, the Advisory Committee notes that the new rule does not affect prior authority holding that "a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with the same liability." Advisory Committee's Note to new rule 19(a). The Advisory Committee's Note also refers to the special problem existing when a party sues a subordinate federal official and the question arises as to whether the defendant's superior has to be joined in the action. *Ibid.* The United States Supreme Court has held, in *Shaughnessy v. Pedreiro*, 349 U.S. 48, 54 (1955), that this determination was to be governed by practical considerations, but that where the superior must play a part in carrying out the relief granted, he *must be joined*. *Williams v. Fanning*, 332 U.S. 490, 493 (1947); see *Boyse, Proposed Reforms in Federal Non-statutory Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus*, 75 HARV. L. REV. 1479, 1493-99 (1962). The new rule does not attempt to deal specifically with the situation, but the Advisory Committee believes that the new rule seems "better adapted to handle [the issue of joinder] . . . than its predecessor provision." Advisory Committee's Note to new rule 19(b). In view of recently enacted 28 U.S.C. § 1391(e) (1964), permitting a suit against a government official anywhere in the United States, and 28 U.S.C. § 1361 (1964), giving all district courts mandamus jurisdiction as against government officials, and in view of the amendments to rule 15(c), permitting an amendment to a complaint to relate back where another defendant is joined in this situation, the problem should no longer be significant.

²³ This phrase is found in *Shields v. Barrow*, 58 U.S. (17 How.) 130, 139 (1854), where the Supreme Court laid down a test to determine whether an absent party was indispensable. For discussions of this landmark case see *Reed, supra* note 1, at 340-56; *Multiparty Litigation* 879-80; Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1139-40 (1965). For an analysis of "equity and good conscience" see *Wright, Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 598-600 (1952).

In favor of balancing the interests of all parties concerned,²⁴ the new rule thus avoids the "pigeoned-holed" determinations that the terms of the old rule required.

Section (b) of rule 19 sets out four "factors to be considered by the court" which the Advisory Committee's Note makes clear are not to be exclusive. The first factor directs inquiry to any prejudice that a judgment might cause the absentee and those parties already present. This is essentially a reiteration of the interests stressed in the definition in subsection (a) (2). The second factor is concerned with the possibility of "shaping relief" to avoid any prejudice found under the first factor. Measures which were used under old rule 19 without express reference, such as protective provisions²⁵ and alternative forms of relief,²⁶ are specifically indorsed by the new rule.²⁷ Also, the Advisory Committee's Note suggests other measures which a party can employ to lessen or avoid prejudice. The defending party who is present might try to bring the absent party into the action by defensive interpleader²⁸ or suggest to him that he may have a counterclaim under rule 13(h).²⁹ The absent party might appear in the

²⁴ Section (c) of rule 19 has also been reworded to reflect the changes in sections (a) and (b). However, it still provides that reasons for nonjoinder and names of parties not joined, if known, must be pleaded. The section appears more forceful now since joinder of parties has been liberalized. Section (d) of the new rule, derived from the first sentence of old rule 19(a), subjects the rule to the provisions of rule 23, dealing with class actions.

In accordance with the change in rule 19, rule 13(h) has been simplified and clarified. The Advisory Committee reasoned that rule 13(h) had "partaken of some of the textual difficulties of Rule 19" and thus should be reworded. Advisory Committee's Note to new rule 13(h). For a discussion of old rule 13(h) see *Multiparty Litigation* 971-72. Similarly, other conforming amendments have been made in rules 4(f), 12(b)(7), 12(h)(2), and 41(b).

²⁵ See, e.g., *Roos v. Texas Co.*, 23 F.2d 171, 173 (2d Cir. 1927), *cert. denied*, 277 U.S. 587 (1928) (impounding part of plaintiff's recovery considered); *Atwood v. Rhode Island Hosp. Trust Co.*, 275 F.2d 513, 519 (1st Cir. 1921), *cert. denied*, 257 U.S. 661 (1922).

²⁶ *Ward v. Deavers*, 92 U.S. App. D.C. 167, 203 F.2d 72 (1953) (damages for fraud awarded against present defendant where rescission not possible due to absence of some parties to contract).

²⁷ Advisory Committee's Note to new rule 19(b).

²⁸ This was suggested in *Gauss v. Kirk*, 91 U.S. App. D.C. 80, 83, 198 F.2d 83, 86 (1952), and in *Hudson v. Newell*, 172 F.2d 848, 852, *modified*, 174 F.2d 546 (5th Cir. 1949). See also *Multiparty Litigation* 882.

²⁹ *Abel v. Brayton Flying Serv., Inc.*, 248 F.2d 713, 716 (5th Cir. 1949); *Multiparty Litigation* 882.

action voluntarily to protect his interests, or he could attempt to intervene on an ancillary basis.³⁰

A third factor for the court to consider is "whether a judgment rendered in the person's absence will be adequate." The inquiry here is whether the court's decree will provide the litigants with a satisfactory remedy. This provision naturally overlaps with the second factor.

The fourth consideration looks to the practical effect on the plaintiff of dismissal for nonjoinder. This is perhaps the most startling change, for in the formulation of the rule to date the one party whose interest was overlooked was the plaintiff. If a party indispensable under the old rule could not be joined, the plaintiff was out of court;³¹ the rule articulated no consideration as to whether there existed an alternative forum in which an action could be brought.³² The court often ameliorated this hardship by either circumventing it³³ or simply ignoring it.³⁴ New rule 19 now makes it a pertinent consideration for the court.

Although the formulation in 19(b) is a definite departure from the format of old rule 19, it is in reality a recitation of the factors that courts considered in applying that rule.³⁵ Codifying these considerations and excising prior legalisms hopefully will free the courts from possible automatic application of labels to situations which upon analysis are inapposite.

One unfortunate aspect of the new rule is the utilization of the old label "indispensable" to represent an apparently new concept. The new rule states that "the court shall determine whether, in equity

³⁰ See *Johnson v. Middleton*, 175 F.2d 535 (7th Cir. 1949); *Kentucky Natural Gas Corp. v. Duggins*, 165 F.2d 1011 (6th Cir. 1948); *McComb v. McCormack*, 159 F.2d 219 (5th Cir. 1947).

³¹ *Shields v. Barrow*, 58 U.S. (17 How.) 130 (1854); *Schuckman v. Rubenstein*, 164 F.2d 952 (6th Cir. 1947), *cert. denied*, 333 U.S. 875 (1948); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216 (5th Cir.), *cert. denied*, 329 U.S. 782 (1946); *Chadbourne v. Coe*, 51 Fed. 479 (8th Cir. 1892).

³² See JAMES, *CIVIL PROCEDURE* 421-22 (1965).

³³ See *id.* at 422-25; WRIGHT, *FEDERAL COURTS* § 70, at 262-63 (1963).

³⁴ See *Parker Rust-Proof Co. v. Western Union Tel. Co.*, 105 F.2d 976 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939); *Benger Labs. Ltd. v. R. K. Laros Co.*, 24 F.R.D. 450 (E.D. Pa. 1959).

³⁵ See Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317, 336 (1964); Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1147 (1965).

and good conscience the action . . . should be dismissed, the absent person being thus regarded as *indispensable*.”³⁶ The Advisory Committee’s Note explains that the word “indispensable” is used in a conclusory sense only.³⁷ In other words, a person is “indispensable” when, after consideration of the proper factors, the court determines that he cannot be made a party and that the action cannot proceed without him. This explanation seems inadequate, for the word if only conclusory adds nothing to the meaning of the rule, and, despite the disclaimer of the Advisory Committee, it is too easy for courts to use the word “indispensable” as a link to the old rule and its old formalistic concepts. Upon this ground, the bulk of conflicting precedent may be deemed applicable to the new rule, and the special classifications of old rule 19 may survive. Such an approach would certainly be inconsistent with the purpose of the change in the rule.³⁸

New rule 19 gives extensive discretion to the district courts. Under the rule, the district court is to decide whether to proceed with or dismiss a particular case after weighing the relevant factors. This grant of discretion has experienced a mixed reception.³⁹ One effect would seem to be a reduction in appellate review of joinder questions since review would only be justified for an abuse of the district court’s discretion. In addition, more individualized treatment of the particular case will result since there should be fewer summary dismissals due to failure to observe technicalities.

JOINDER OF CLAIMS IN MULTIPARTY ACTIONS—RULE 18(a)

Under old rule 18(a), in a single party action the plaintiff and defendant could join as many claims and counterclaims in their plead-

³⁶ New rule 19(b). (Emphasis added.)

³⁷ Advisory Committee’s Note to new rule 19(b).

³⁸ The Advisory Committee notes that “experience showed that the rule [rule 19] was defective in its phrasing and did not point clearly to the proper basis of decision.” *Ibid.* Moreover, “indispensable” is used in new rule 12(h)(2) with reference to rule 19, and its presence there is not explained in the Advisory Committee’s Note to that subsection, thus leaving another opportunity for the importation of the old concepts.

³⁹ Compare Federal Court Comm. to the Board of Governors, *Report on Proposed Changes in the Civil Rules*, 37 F.R.D. 75, 76 (1965), and Order, 86 Sup. Ct. No. 11, at 204 (1966) (Black, J., dissenting), with Wright, *Proposed Changes in Federal Civil, Criminal, and Appellate Procedure*, 35 F.R.D. 317, 337 (1964), and Note, *Multiparty Litigation: Proposed Changes in the Federal Rules*, 50 IOWA L. REV. 1135, 1149, 1152-53 (1965).

ings as each had against the other.⁴⁰ This policy of liberal joinder extended to multiparty cases. However, some courts inferred from the wording of the original rule⁴¹ that the standards of old rules 19, 20, and 22 related to and limited rule 18(a) in multiple party cases.⁴² A major problem concerned rule 20(a) (permissive joinder) which provided that: "All persons may join in one action . . . if they assert [or there is asserted against them] any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of *them* will arise in the action."⁴³ The phrase "of them" was read as referring to the claims sought to be joined rather than the parties. Consequently, unless each claim arose from a single transaction or series of transactions and involved a question common to all defendants, it could not be joined. A further restriction on joinder resulted from this construction of rule 20(a). Where a defendant attempted to join an independent claim against a third party to the original action in a multiparty case, joinder was not allowed.⁴⁴

The most often cited case propounding a restrictive view of joinder of claims was *Federal Housing Adm'r v. Christianson*.⁴⁵ In that case, an indorsee sued three co-makers of a note. In the same action he sought to join a claim on a second note made by two of the defendants. Joinder of parties on the first claim was proper under old rule 20(a). The court, however, held that joinder of the claim on the second note was improper because that claim arose in a separate transaction and did not involve a question common to all three defendants.

Placing the burden on the trial court at the pleading stage was to

⁴⁰ 2 BARRON & HOLTZOFF § 501, at 66; WRIGHT, FEDERAL COURTS § 78, at 296 (1963); Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 13 (1938).

⁴¹ "There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19 [necessary joinder of parties], 20 [permissive joinder of parties], and 22 [interpleader] are satisfied." FED. R. CIV. P. 18(a).

⁴² For an analysis of authorities see 2 BARRON & HOLTZOFF § 533.1, at 198-202; 3 MOORE, FEDERAL PRACTICE ¶ 18.04(3) (2d ed. 1963). For discussions of the various interpretations of old rule 18(a) see Wright, *Joinder of Claims and Parties Under Modern Pleading Rules*, 36 MINN. L. REV. 580, 582-97 (1952); *Commentary on the Relation Between Joinder of Parties and Joinder of Claims*, 5 FED. RULES SERV. 822 (1942); *Multiparty Litigation* 967-73.

⁴³ FED. R. CIV. P. 20(a). (Emphasis added.)

⁴⁴ *C. W. Humphrey v. Security Alum. Co.*, 31 F.R.D. 41, 44 (E.D. Mich. 1962); *United States v. Scott*, 18 F.R.D. 324 (S.D.N.Y. 1955). *Contra*, *Nolan Co. v. Graver Tank & Mfg. Co.*, 301 F.2d 43 (4th Cir. 1962).

⁴⁵ 26 F. Supp. 419 (D. Conn. 1939).

introduce real possibilities for delay. The *Christianson* court itself did not exclude the possibility that the claims could later be consolidated for trial under rule 42(a); by the same token, if permitted at pleading and later found burdensome, they might be severed at trial under rule 42(b). These alternatives illustrate that the *Christianson* decision promoted unnecessary niceties of pleading, precisely what the federal rules were designed to eliminate. Consequently, rule 18(a) was revised to overcome the *Christianson* decision and similar authority.⁴⁶ Rule 20(a) was also reworded to remove any ambiguity as to the antecedent of the word "them."⁴⁷

New rule 18(a) clearly states that any and all claims of one party against an opposing party may be joined either as independent or alternative claims. The fact that there are multiple parties is to be of no consequence. Joinder of parties, regulated by new rule 19, is an independent consideration. This new rule should not raise any problems. It simply clarifies the interpretation which was intended for the old rule. That any and all claims may be joined at the pleading stage will not unduly confuse the issues in the case, for claims are subject to separation under rule 42(b) when fairness and convenience require.⁴⁸

CLASS SUITS AND RELATED ACTIONS
—RULES 23, 23.1 AND 23.2

Another area in which the procedural requirements for the joinder of parties are greatly altered is the class action, rule 23. Here overly formal classifications have been rejected for pragmatic considerations. The present trichotomy of true, hybrid, and spurious class actions⁴⁹ is put to rest. As the Advisory Committee points out, the expected advantages of this tripartite categorization did not materialize,

⁴⁶ Advisory Committee's Note to new rule 18(a).

⁴⁷ "Of them" with respect to plaintiffs now reads "these persons" and with respect to defendants now reads "defendants." New rule 20(a).

⁴⁸ The new rule "does not purport to deal with questions of jurisdiction or venue." Advisory Committee's Note to new rule 18(a). Under the new rule, all claims "legal, equitable, or maritime" may be joined. This is in accord with the unification of admiralty and civil procedure effected by the amended rules. *Ibid.*

⁴⁹ These terms were originally advanced by Professor Moore. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551 (1937). For discussions of the problems raised by these classifications see Advisory Committee's Note to new rule 23; Note, 46 COLUM. L. REV. 818 (1946); *Multiparty Litigation*; Note, 32 U. CHI. L. REV. 768 (1965); Note, 51 VA. L. REV. 629 (1965).

certainly as to the type of class action brought and the legal consequences.⁵⁰ The exact definitions of the trichotomy proved elusive in application: Some courts contracted and expanded them to arrive at pragmatic solutions whereas other courts strictly applied the formal classifications.⁵¹

This complete overhaul of rule 23 significantly expands the scope of class actions. As with joinder of parties under rule 19, the district judge, unhampered by traditional classifications, is given a large measure of discretion in balancing conflicting interests. Although it has been suggested that the court hearing a class action is in a poor position to determine fairness and adequacy of representation,⁵² the amended rule adopts the position of the many authorities that trust the ability of the trial court to decide these issues when aided by a procedure that contains built-in flexibility.⁵³

Section (a) of the amended rule enumerates four requirements for a class action which are labeled "prerequisites":

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

While failure to meet any of the first three requirements would probably be grounds for immediately stripping the action of its class character, it is suggested that a deficiency with respect to the fourth should be used to rescind class status in most cases only after the class parties have been given an opportunity to bring in additional members—a procedure provided in section (d) of the amended rule.

Meeting these four prerequisites alone, however, is not sufficient for maintaining a class action. One additional requirement must be met, but this may be done by any of four alternative means set forth in section (b). These four alternatives, which may be said to have

⁵⁰ See 2 BARRON & HOLTZOFF § 561, at 259.

⁵¹ Advisory Committee's Note to new rule 23. See generally *ibid.*

⁵² Note, *Binding Effect of Class Actions*, 67 HARV. L. REV. 1059, 1060 (1954).

⁵³ 2 BARRON & HOLTZOFF § 572, at 351-52; CHAFFEE, *SOME PROBLEMS IN EQUITY* 288-95; 76 HARV. L. REV. 1675, 1678-79 (1963); see *Kansas City v. Williams*, 205 F.2d 47, 52 (8th Cir.), *cert. denied*, 346 U.S. 826 (1953); *Tunstall v. Brotherhood of Locomotive Firemen*, 148 F.2d 403 (4th Cir. 1945).

replaced the true-hybrid-spurious trichotomy of the old rule, are as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy

It should be noted that the amended rule abandons any attempt to draw distinctions between joint, common, secondary, or several rights,⁶⁴ thereby abandoning the common-law legalisms that were brought into federal procedure by the old rule.

Subsection (b) (1) appears to encompass the actions that under the old rule could be classified as true or hybrid, in that it emphasizes the possibility of inconsistent or varying adjudications that would dispose of the interests of the members of the class who are not parties to the action. Thus actions which are determinative of the common-law classification of joint rights or which affect specific property in which several persons have claims would fall within this requirement. However, the provision is much broader. For now there is no need to be concerned with fitting the common-law label of joint or secondary right. Nor must the class action tend to create a legal bar to or practically destroy the right of absent members.

⁶⁴The Advisory Committee succinctly stated its objectives in the notes to rule 23:

The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.

Advisory Committee's Note to new rule 23.

Instead it is sufficient if the adjudication would "as a practical matter be dispositive" of the rights of absent members of the class, "or substantially impair or impede their ability to protect their interests."

Subsection (b) (2) is new. It will place into the rule procedures now used in class actions brought to force or prevent action that really concerns members of a class individually—cases concerning racial discrimination, apportionment of legislatures, required prayer sessions in school come immediately to mind. The Advisory Committee suggests that certain antitrust actions also fall within this subsection. Here again the rule appears to be catching up to the present day practice of many courts.

The thoughtfully drafted subsection (b) (3) largely covers the former spurious class action, although portions of the old spurious action are now in subsection (b) (2). For a (b) (3) action, the court must make an affirmative finding that the class action device is superior to other available methods of disposing of the controversy;⁵⁵ this is reminiscent of the equitable origin of the class action in that it may be barred if an adequate remedy at law exists. The court must also determine whether the common questions of law and fact dominate questions affecting the individual members of the class. In making these determinations, the judge is directed to weigh four factors, which are not to be considered exhaustive:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Again the pragmatic approach of the rule can be seen. And again there is an attempt to place into the new rule elements that have often in fact been considered under the old.

Another area of important change can be found in section (c) which establishes significant procedures to be followed in class actions.

⁵⁵ For other specific forms of relief see Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686-91 (1941); Note, 32 U. CHI. L. REV. 768, 784-85 (1965). Discussing New York procedure, one author suggests that the use of a "test case" may be superior to the class action, and that, in some cases, the force of stare decisis would make a simple action as efficacious as a class action. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 446-47 (1960).

First there is a direction that the court shall determine as soon as practicable after the bringing of the suit whether it is to be maintained as a class action.⁵⁶ Thus at the outset the court must actively focus on the most efficacious way of resolving the dispute before it. Should the court determine that the case is properly a (b) (3) action, it must direct that all members of the class be given notice of the action.⁵⁷ This notice is to be sent personally to all members of the class who can be identified through reasonable effort; for others the requirement is satisfied by the "best notice practicable under the circumstances." The notice is to advise each member of the (b) (3) class that he will be excluded from the action if he so requests, but that if he does not exclude himself within the time specified by the court, he will be bound by the judgment. He is also to be advised that if he does not exclude himself he is entitled to enter an appear-

⁵⁶ See 76 HARV. L. REV. 1675, 1678 (1963).

⁵⁷ To insure meeting the requirements of due process, the notice requirement of new rule 23 is patterned after *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). In *Mullane*, the Court considered whether newspaper-published notice to beneficiaries of a consolidated trust was sufficient to make a statutorily required accounting by a state court binding against them. The Court pointed out that "there can be no doubt that at a minimum they [the words of the due process clause] require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.* at 313. Observing that "personal service has not in all circumstances been regarded as indispensable to the process due to residents," the Court stated the notice must be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court found due process required that all known beneficiaries receive notice by mail, but it was indicated that unknown beneficiaries would be bound if newspaper-published notice were given in accordance with state law. *Id.* at 318-19.

It has been submitted that the threat of widespread notice of a lawsuit could be utilized as a coercive device by the plaintiff to extract a settlement from a defendant who did not care to be subjected to adverse publicity. Note, 32 U. CHI. L. REV. 768, 780-82 (1965). The authors also suggest that the automatic inclusion of the entire class under the judgment increases the temptation to utilize court notice for champertous solicitation of clients by lawyers championing the cause of a class. *Ibid.* In *Cherner v. Transitron Electronic Corp.*, 201 F. Supp. 934 (D. Mass. 1962), Judge Wyzanski conceded that the court had the power to order notice be given to absent "members" in a spurious class action, but declined to exercise this power due to the dangers of its being used for client solicitation and of the members thus inferring that the court considered the action well-founded. *Id.* at 936-37. Under the new rule, the problem is one for the local courts and bar associations.

ance.⁵⁸ Whether notice is to be given in (b) (1) or (b) (2) actions is left to the discretion of the court.⁵⁹

Section (c) also gives directions as to the judgment. A judgment in (b) (1) or (b) (2) class actions is to "include and describe those whom the court finds to be members of the class." A judgment in a (b) (3) action is to "include and specify or describe" those to whom notice was directed who are found to be members of the class and who have not excluded themselves. Finally, subsection (c) (4) permits an action to be brought or maintained as a class action with respect to particular issues only, and permits a class to be divided into subclasses with each subclass thereafter treated as a class.⁶⁰

By section (d) of rule 23, the court is given express authority to issue orders controlling the conduct of the class litigation. This authority has undoubtedly existed in the district court prior to the new rule,⁶¹ but by specifying a nonexclusive list of possible orders, the new rule focuses the attention of court and counsel on the proper conduct of a class action. A court may prescribe procedures for the prevention of undue repetition or complication in presentation of evidence or argument; it may require that all or some members of the class be given notice of any step in the proceeding, or of the opportunity to signify during the proceedings whether they consider themselves fairly and adequately represented, or whether they wish to "intervene in" the action to present claims or defenses, "or otherwise to come into the action";⁶² it may require that the pleadings be amended to strike allegations as to representation of absent parties and that the case proceed as a nonclass action.

Finally, section (e) retains the provision of the old rule that

⁵⁸ There should be no reason why the statute of limitations could have any effect on a class member's entering an appearance, though the judge may limit such appearances as he sees fit.

⁵⁹ An order to this effect is suggested by new rule 23(d) (2).

⁶⁰ This power is analogous to that conferred by FED. R. CIV. P. 42. See Note, 51 VA. L. REV. 629, 643 n.44 (1965), for a discussion of whether a class action conducted as such only as to certain issues interferes with the right to trial by jury.

⁶¹ *E.g.*, *Cherner v. Transitron Electronic Corp.*, 201 F. Supp. 934, 935 (D. Mass. 1962).

⁶² Presumably this could include an invitation to enter an appearance similar to that which the courts are bound to extend to (b) (3) class members. The value of this invitation would depend on what rights the court decided to bestow on a nonparty member who entered an appearance.

a class action is not to be dismissed or compromised without court approval. But under the new rule, the court must direct that notice of such proposed action be given to all members of the class regardless of the nature of the action.⁶³

The new rule poses the dilemma that despite the express disclaimer of expansion of jurisdiction in rule 82, a literal adherence to the commands of rule 23 would extend jurisdiction to citizens not previously within the court's power. That is, inclusion of all members of the former spurious class in the judgment—the clear mandate of rule 23—could be construed as changing the manner of meeting the requirements of diversity of citizenship and jurisdictional amount.

Generally, diversity jurisdiction principles require that the citizenship of each party on one side of the action be diverse to that of each opposing party.⁶⁴ However, under the elusive doctrine of ancillary jurisdiction, federal courts in varying situations have entertained causes without the requisite diversity.⁶⁵ The proximity of an intervenor's claim to the main action determines the availability of ancillary jurisdiction;⁶⁶ the theory generally extends to intervention of right, rule 24(a), but not to permissive intervention under 24(b).⁶⁷ Under the old rule, true or hybrid class members, theoretically, could intervene of right regardless of citizenship if they could show a possibility of inadequate representation.⁶⁸ But since nonparty members of a spurious class would not be bound by a judgment, they could not intervene of right and had to meet the citizenship requirement in most cases.⁶⁹

What formerly were spurious class actions now fall within subsections (b)(2) and (b)(3) of new rule 23. Covered by (b)(2) are actions concerning various types of discrimination. Since the right of a child to nondiscriminatory education and the right of a citizen to equal voting power are individual to the person affected,

⁶³ Under the old rule, the court was required to give notice of proposed dismissal or compromise only in the case of a "true" class action. FED. R. CIV. P. 23(c).

⁶⁴ WRIGHT, FEDERAL COURTS § 24, at 71-72 (1963).

⁶⁵ *Id.* § 9, § 76, at 286. See also Fraser, *Ancillary Jurisdiction and the Joinder of Claims in the Federal Courts*, 33 F.R.D. 27 (1964) (rules do not expand ancillary jurisdiction of federal courts but provide opportunities for invoking it in additional situations).

⁶⁶ WRIGHT, FEDERAL COURTS § 76, at 286 (1963).

⁶⁷ *Id.* § 9, at 19.

⁶⁸ *Id.* § 72, at 271. But see notes 104-07 *infra* and accompanying text.

⁶⁹ See *id.* § 72, at 271-72.

litigation arising from these rights was sometimes treated as a spurious class action.⁷⁰ Many cases falling within this category will create no diversity problem because discrimination in education, reapportionment, and like cases raise federal questions. But where, for example, a suit is maintained by the members of a union for injunctive relief, the diversity question may well arise. The extraction of this type of action from the section corresponding to the old spurious-action subdivision could well be construed to relieve it of the previous complete diversity requirement.

More serious questions concerning diversity will arise in the (b) (3) actions. Under the old rules, a class member is outside the bounds of the spurious-action judgment unless he opts in, at which time the jurisdictional question is posed. However, the scheme of the new rule leaves all members of the class within the judgment unless they opt out.⁷¹ Further, there is no requirement in the new rule for a showing of the citizenship of these absent members. The sole concern now is with adequate representation, notice, and fairness of procedure. Indeed, there appears to be no contemplation that any official record will indicate the citizenship of absent parties—parties who will now be bound by the judgment. Thus again, there is an implication that the diversity requirements imposed under the old rule are to be relaxed.

The result may be that courts, observing that the Advisory Committee's Note indicates no express intent to change jurisdictional requirements, will determine that in (b) (2) and (b) (3) actions,

⁷⁰ *Id.* § 72, at 270-71.

⁷¹ This change has been disapproved in Comm. on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 76-77 (1965). This committee also foresees practical problems resulting from binding absent class members:

If the plaintiffs representing the class receive a favorable decision, in many cases other potential plaintiffs suddenly will be presented with an opportunity to merely prove damages and collect. In the wake of a favorable class action numerous potential plaintiffs may feel compelled to prove damages. Litigation will generally be encouraged; the incentive to settle, diminished. Indeed, under such circumstances, if the potential plaintiffs are corporations, it may constitute an abuse of management powers to fail to proceed against the defendant.

Id. at 81. An answer to this is contained in a letter in the same report: "I cannot imagine District Judges making extensive use of [23(b) (3)] . . . to bind absent parties where there was not ample justification, amounting to virtual compulsion, for doing so and assurance of fair and adequate representation of all interests and parties involved,"

Id. at 91.

there can be no expansion.⁷² Thus as far as diversity is concerned, we could be left substantially where we are now, though only after what one might expect to be rather lengthy litigation necessitating a Supreme Court determination.⁷³

It is to be hoped, however, that if such a determination is reached, it will only be after searching analysis of the present law. The requirement that there be complete diversity is not necessarily derived from the Constitution; rather, it resulted from a Supreme Court construction of the First Judiciary Act.⁷⁴ The Court's decision, *Strawbridge v. Curtiss*,⁷⁵ did not so much as mention the Constitution, but after quoting the statute held:

The court understands these expressions to mean, that each distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts. That is, that where the interest is joint, each of the persons concerned in that interest must be competent to sue, or liable to be sued, in those courts.⁷⁶

That *Strawbridge* does not constitute constitutional doctrine is strengthened by the fact that the interpleader statute⁷⁷ has been held

⁷² The plaintiff carrying his judgment to a sister federal court or a state court may be attacked on the basis that the jurisdiction of the original court did not extend to him. Conceivably, the second court could deny execution or enforcement of a judgment as to a (b) (3) class member unless he could show citizenship diverse to all class-opposing parties.

⁷³ Besides diversity, the question of jurisdictional amount becomes important in those class actions where claims of individual members are insufficient to satisfy this requirement. The general practice under the old rule was to aggregate the claims of the class members for purposes of determining jurisdiction only in a "true" class action; in a "hybrid" or "spurious" action each class member was required independently to allege a sufficient claim to commence an action or to intervene. 2 BARRON & HOLTZOFF § 569, at 321-22. The factor determining the permissibility of aggregation was whether the rights asserted were "joint" or "several." See generally Cohn, *Problems in Establishing Federal Jurisdiction Over an Unincorporated Labor Union*, 47 GEO. L.J. 491, 525 (1959). The repudiation of these classifications and the extension of the judgment to all members of the class regardless of their presence in court undermines the traditional basis for the aggregation distinction. This could possibly lead to the aggregation of the claims of members of all types of classes, or at least all those otherwise properly before the court, for purposes of commencing the action. *Hess v. Anderson, Clayton & Co.*, 20 F.R.D. 466, 477-78 (S.D. Cal. 1957). However, if the judgment includes all members of the class, the problem of meeting the jurisdictional amount in order to intervene would be largely bypassed.

⁷⁴ Judiciary Act of 1789, ch. 20, 1 Stat. 73.

⁷⁵ 7 U.S. (3 Cranch) 267 (1806).

⁷⁶ *Ibid.*

⁷⁷ 28 U.S.C. § 1335 (1964).

constitutional,⁷⁸ though it rests on minimal diversity—only one party on each side of the actual controversy must have citizenship different from that of at least one party on the other side. Moreover, the entire concept of ancillary jurisdiction makes serious inroads on a complete diversity requirement. Indeed, the true and hybrid class actions of old rule 23(a)(1) and (a)(2) constituted exceptions to the requirement.⁷⁹ Thus, where the concept of complete diversity has conflicted with other considerations, it has given way. And at least in the case of ancillary jurisdiction, statutory change was not required. There appears to be little reason why the *Strawbridge* restriction should not be cut back further at this time so far as the new 23(b)(2) and (b)(3) class actions are concerned.⁸⁰

Venue should pose no difficulties under the new rule.⁸¹ As venue is a defense personal to the party who could claim that he is being sued in an improper district, it is of course not available to a plaintiff.⁸² Should a representative of a defendant class raise venue as a defense, he could be dropped, and the class action could continue as such so long as there remained adequate representation by members who could not or would not object to venue. Nonparty members of a 23(b)(3) class who chose to appear would be waiving any venue defense. A problem might arise as to an absent member of a 23(b)(3) class who did not appear but also did not choose to exclude

⁷⁸ Although the Supreme Court has never directly passed on this question, it has entertained an interpleader action in precisely these circumstances. *Dugas v. American Sur. Co.*, 300 U.S. 414, 425 (1937), *affirming* 82 F.2d 953 (5th Cir. 1936). The constitutionality of the statute has been upheld by the lower courts. *Haynes v. Felder*, 239 F.2d 868, 875-76 (5th Cir. 1957); see *Cramer v. Phoenix Mut. Life Ins. Co.*, 91 F.2d 141, 146-47 (8th Cir.), *cert. denied*, 302 U.S. 739 (1937); WRIGHT, FEDERAL COURTS § 74, at 280-81 (1963); *Ilsen & Sardell, Interpleader in the Federal Courts*, 35 ST. JOHN'S L. REV. 1, 14-24 (1960); Note, 63 HARV. L. REV. 861, 866 (1950).

⁷⁹ For a discussion of ancillary jurisdiction see generally WRIGHT, FEDERAL COURTS § 9 (1963).

⁸⁰ It has been argued that *Strawbridge* should be overruled. Note, 75 YALE L.J. 133, 144 (1965); *Multiparty Litigation* 994.

[T]he compelling rationale underlying the statutory grant of diversity jurisdiction today does not seem to be limited to protection from local prejudice. Historical interpretations based on local prejudice alone should not preclude the federal courts from fulfilling their important function in multiparty litigation as far as the constitutional grant allows.

Id. at 995.

⁸¹ Venue is another subject expressly excluded from the scope of the rules, FED. R. CIV. P. 82.

⁸² See WRIGHT, FEDERAL COURTS § 42 (1963).

himself. Here the policy of the rule would be best served by construing his failure to exclude himself as consent to venue.

The change in spurious class actions from the old to new rules is most significant. The mere fact that an absent member must now take the initiative to exclude himself, rather than being excluded unless he opts into the litigation, will result in a much greater range of effectiveness for class actions. It should be noted that under the new rule there is no power to *force* an absent member in a (b) (3) class to be included; a proposal of the Advisory Committee that the request of an absent member to exclude himself could be rejected by the court if his "inclusion is essential to the fair and efficient adjudication of the controversy" was deleted in the final version of the amendment.⁸³

In giving the absent member an express right to enter an appearance, the rule raises some interesting problems. Heretofore one entered an appearance only if he were a party to the action;⁸⁴ on entering an appearance, he assumed all of the rights of a party. Does the right given to an absent member to enter an appearance mean that he will have the rights of a party for all purposes, including the right to present witnesses, cross-examine, and argue? If so, a class action could become quite unwieldy. Section (d), however, gives the court the express power to issue appropriate orders to control the conduct of the proceedings so as to prevent "undue repetition or complication in

⁸³ This deletion was related to another deleted provision which empowered the courts to require that an ordinary action become a class action. *Preliminary Draft* 386. While in many cases it is advantageous to litigate as a class, the power to compel such litigation would be significantly diluted if all those who would thus be affected could arbitrarily exclude themselves. These provisions experienced favorable and adverse criticism. See Comm. on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 82, 84, 91 (1965); Note, 51 VA. L. REV. 629, 651-54 (1965). The Virginia Note contended that the exclusion provisions and the power to alter orders at any time afforded the class members adequate protection.

In the absence of a power to compel inclusion, self-exclusion by a sufficient number of class members could result in the action being stripped of its class character. But this should not affect the rights of the nonclass plaintiff to proceed against named defendants or of named plaintiffs to carry on against the defendant along with those who wished to intervene. In any such action, members who excluded themselves from the original class should not be found to be "indispensable" if only "common questions," and not (b) (1) or (b) (2) criteria, bind them to the remaining parties. See discussion of new rule 19 at pp. 1204-11 *supra*.

⁸⁴ 5 AM. JUR. 2d *Appearance* § 1 (1962); 6 C.J.S. *Appearances* § 1 (1937); BLACK, LAW DICTIONARY 125 (4th ed. 1951). *But see* 6 C.J.S. *Appearances* § 4 (1937).

the presentation of evidence or argument"—a power heretofore inherently possessed by the court. This power of course could not be exercised in contravention of the members' rights.⁸⁵ The significance of permitting an appearance by a rule 23(b)(3) class member is to bestow on him as a practical matter the automatic right to be a party subject to any limitations the court may in its discretion impose. He need not even so much as file a motion to intervene as of right under rule 24(a).

It should be noted that this *right* to appear applies only to (b)(3) actions and not to those brought under (b)(1) and (b)(2). The rule contemplates intervention by members of those classes only at the discretion of the district court, apparently on the theory that greater shared interests between the representatives and absent members of (b)(1) and (b)(2) classes will more readily safeguard the rights of absent members than in (b)(3) actions. Rule 23(d)(2) gives the court the power to invite such intervention in (b)(1) and (b)(2) actions, but a request for intervention as of right may be initiated by the absent member under rule 24(a)(2) only if he can show that his interests may as a practical matter be impeded or impaired and that he is not adequately represented.⁸⁶ Absent the court's inviting class members to come forward and object to jurisdiction, a motion to intervene of right may constitute the most direct means for a (b)(1) or (b)(2) class member to object to the action's class status.⁸⁷

⁸⁵ However, should it develop that the class-representing attorney who is empowered to present evidence and argument does not adequately and fairly protect the interests of a member whose participation in the conduct of the trial is limited by court order, this may indicate that the member does not share a community of interest with the representative in control of the litigation and is therefore not a part of the same class. A division into subclasses authorized by subdivision (c)(4) may then be appropriate. Should the member's complaint be only as to trial tactics and not rise to the dignity of lack of protection of his rights, the district court's control over the proceedings should govern.

⁸⁶ The amended rule should have little effect on present practice regarding meeting the statute of limitations by intervenors. In order to share in a spurious class action judgment, a nonparty class member had to intervene; but whether he had to meet the statute of limitations in doing so was a disputed question. 2 BARRON & HOLTZOFF § 568, at 315-16. If the new rule operates as intended, binding absent class members, the problem will largely be bypassed since the need for intervening to share in the judgment will no longer exist. And, if the court accepts the theory that one who will be bound by the judgment should be permitted to intervene notwithstanding the running of the statute of limitations, the statute should be no bar to intervention for any other purpose.

⁸⁷ If the class action will as a practical matter affect the movant's rights, the question

The new rule eliminates the unfairness of what the Advisory Committee terms one-way intervention by a spurious class member, who, under the old rule, could remain uncommitted until the termination of the litigation. Then, if the outcome were favorable to the class, many courts permitted the judgment to remain open for a period of time to allow absent members to intervene and take advantage of it. Should the outcome be unfavorable to the class, absent members were not bound and could commence subsequent actions since they were not parties to the original action. Under the new rule, however, it is contemplated that the judgment will bind all members of a (b) (3) class who do not request exclusion. Since the court is to set a time limit for this request, it is clearly contemplated that a class member who does not opt out early in the litigation will be bound no matter what the outcome of the suit.⁸⁸

The rule requires that a judgment in a (b) (1) or (b) (2) action shall "include and describe those whom the court finds to be members of the class." In a (b) (3) action the court is to "include and specify or describe those to whom the notice . . . was directed, and who have not requested exclusion, and whom the court finds to be members of the class." The requirement as to (b) (3) may prove somewhat

of adequacy of representation will be put squarely in issue. If the class action will not affect the movant's interests, a denial of the motion could serve to assure the movant that the court's definition of the class will not encompass him. Thus, a potential class member is guaranteed court consideration of his position. One writer has suggested that the combined effect of rules 23 and 24 is to impose an obligation to intervene on a class member who thinks he is not being adequately represented. Stopher, *Proposed Changes in the Rules of Civil Procedure for the United States District Courts*, 31 INS. COUNSEL J. 681, 686 (1964).

⁸⁸ That the one-way effect of the present rule is to be eliminated raises an interesting problem where mutuality is no longer a prerequisite to collateral estoppel. The doctrine of mutuality requires that, in order to take advantage of collateral estoppel, the plaintiff must show he would have been bound by an adverse judgment in the prior case. See generally Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961). In at least one jurisdiction this requirement has been eliminated. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 811-13, 122 P.2d 892, 894-95 (1942). See generally Note, 51 VA. L. REV. 629, 652 n.69 (1965). If the court applies collateral estoppel without the mutuality requirement, a member of a (b) (3) class who chooses to be excluded from the action may in a subsequent action still take advantage of a judgment favorable to the class, although he would not be bound in any way if the class judgment were unfavorable. Thus the desire to permit one to benefit from a judgment only if he would also be subject to that judgment will at least in part be frustrated. The proposal empowering the court to deny a (b) (3) class member's exclusion could have eliminated this contingency. See *ibid.*

troublesome. It expressly requires that the court list the name of each person to whom notice was sent unless he properly excluded himself. Also, the court must abstractly describe a group of any unknown persons as to whom two requirements have been satisfied: first, the "best notice practicable under the circumstances" was directed to them, and second, they fall within the court's definition of the class. But more than this obvious requirement may be required in some cases to reach a definition of the group intended to be covered, for if some who excluded themselves are embraced by the abstract definition of the class, the court will have to list them expressly as excluded from the class included in the judgment.

*Derivative Suits and Unincorporated
Association Actions*

Derivative actions by shareholders were treated with class actions under section (b) of the old rule. It has been argued that the shareholder's derivative action has little in common with a real class action and therefore deserved separate treatment.⁸⁹ New rule 23.1 affords this separate treatment,⁹⁰ while retaining the elements of a derivative action with little change.⁹¹

It is clear that some proper derivative suits could not meet the prerequisites for a class action,⁹² and indeed derivative suits were not

⁸⁹ Note, *Shareholder Derivative Suits: Are They Class Actions?*, 42 IOWA L. REV. 568 (1957). This article was sharply criticized. LOUISELL & HAZARD, *CASES ON PLEADING AND PROCEDURE* 721 (1962). Professor Wright called the article "heretical and unhistorical." WRIGHT, *FEDERAL COURTS* § 72, at 268 n.15 (1963).

⁹⁰ The Judicial Conference of the Ninth Circuit disapproved this treatment. Comm. on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 71-72 (1965).

⁹¹ New rule 23.1 specifies in part:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort.

⁹² An example of this is a case in which the plaintiff owns all the stock. See generally 42 IOWA L. REV. 568, 570-72 (1957).

subject to the requirements of old 23(a).⁹³ Although separation is desirable, certain of the procedural safeguards attaching to a class action must be carried over. The amended rule provides: "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Apparently recognizing that it was frequently minority interests which were being represented, the Advisory Committee adopted the above in lieu of the parallel provision in the preliminary draft: "The derivative action may be maintained only if the court is satisfied that the plaintiff will adequately represent the interest of the corporation or association."

Substantially the same protection accorded class members with respect to dismissal or compromise is given to the shareholders or members by the new rule: "The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."⁹⁴ However, a provision in the preliminary draft incorporating section 23(d) on orders in conduct of actions, was not included in the final 23.1 proposal. Presumably the rationale for this is that the orders suggested for class actions are not particularly adapted to derivative suits, and the courts inherently possess the power to issue similar orders.⁹⁵

In the Advisory Committee's Note to new rule 23.2 it is pointed out that actions by and against unincorporated associations have been considered class actions primarily to accord them "entity treatment." The common elements in the two have led the Advisory Committee to incorporate by reference the order provisions of 23(d) and the dismissal and compromise protections of 23(e). It would seem that neither 23.1 nor 23.2 contain anything that could be construed to expand or otherwise significantly alter these actions,⁹⁶ since the additions are primarily aimed at eliminating the anomalies of the old rule while insuring that procedural safeguards will be retained.

⁹³ 2 BARRON & HOLTZOFF § 561, at 257.

⁹⁴ The changes in 23(e) and 23.1 from the Preliminary Draft to the final proposals made these dismissal and compromise sections essentially the same. It seems that the provisions of 23(e) could have been incorporated into 23.1 by reference as was done in 23.2.

⁹⁵ See 51 VA. L. REV. 629 (1965).

⁹⁶ Although separated from other class actions, new rule 23.2 applies only to class

Reactions to the Rule 23 Scheme

In his dissent to the transmittal of the amendments, Mr. Justice Black indicated his particular dissatisfaction with rule 23.

It seems to me that they [amendments to rule 23] place too much power in the hands of the trial judges and that the rules might almost as well provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it wise.' The power given to the judge to dismiss such suits or to divide them into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

And the Judicial Conference of the Ninth Circuit attacked the proposed revision on the ground that it "repudiates the historic opinion that the legal system operates on an individualized and personal basis."⁹⁷ The weight of authority to the contrary has urged these amendments.

That the amended rule introduces more certainty into this area is obvious. But its practical effects—largely dependent on the application of the rule by the district judges—remain to be seen.⁹⁸ The attention and comment directed to this rule and its obvious flexibility should serve as a caution to the bench to consider carefully all the factors and interests involved when confronted with a class action.⁹⁹

actions brought against the unincorporated association "by naming members as representative parties." Actions by or against unincorporated associations are considered true class actions, thus obviating the complete diversity requirement. WRIGHT, FEDERAL COURTS § 72, at 269-70 (1963). The class method of suing unincorporated associations has been criticized. Note, 75 YALE L.J. 138, 143-44 (1965). But the preservation of this remedy is necessary, since when other than federal questions are involved (in which case rule 17(b)(1) may apply), the unincorporated association may not sue or be sued in federal courts unless the citizenship of *all* its members is diverse from that of the opposing party. *United Steelworkers v. R. H. Bouligny, Inc.*, 382 U.S. 145 (1965). Indicating a desire to see jurisdiction expanded in this area, the Supreme Court has assigned the responsibility for making any changes in this diversity requirement to Congress. *Id.* at 153.

⁹⁷ Comm. on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Supplemental Report*, 37 F.R.D. 71, 76-77 (1965).

⁹⁸ It has been suggested that the amended rules 23, 23.1, and 23.2 be adopted "on a frankly experimental basis." Letter From John R. McDonough to J. E. Simpson, March 8, 1965, in *id.* at 91. Although this was not done, future adjustment can be anticipated if abuses develop.

⁹⁹ The success or failure of the broad, new rule depends on the courts. "Practical procedural effects rather than the abstract substantive right ought to govern. A satisfactory rule can only lay down broad guidelines for the courts and bar, depending upon the tradition and good sense of our judges to prevent abuse." Weinstein, *supra* note 55, at 470.

INTERVENTION—RULE 24(a)

The changes to rule 24, providing for intervention of nonparties, illustrate once again that the focus of the current amendments is on the abandonment of formal, legalistic restrictions and the utilization of pragmatic solutions that guarantee fairness and orderly procedure.

The amended rule retains the dichotomy between intervention as of right (rule 24(a)) and permissive intervention (rule 24(b)), but extensive changes are made in section (a). The old rule set forth three situations in which intervention was of right. The first, where a statute provides for intervention as of right, is unchanged. The second and third, however, have been completely rewritten.

Old rule 24(a)(2) gave a party an absolute right to intervene "when the representation of the applicant's interests is or may be inadequate and the applicant is or may be bound by a judgment in the action." Thus the rule, applicable mainly to class actions, required a showing of two elements—inadequate representation and the possibility that the applicant will be bound. As a practical matter the courts usually passed over the question of adequate representation to consider first whether a party "is or may be bound."¹⁰⁰ The crucial question then arose as to the meaning that should be given to the word "bound." Although many cases adopted a more liberal view,¹⁰¹ the weight of authority construed the term in its strict *res judicata* sense.¹⁰² Thus a party was required to show that he would be legally bound by the judgment. It was not enough to show that, as a practical matter, his interests would be materially prejudiced by an adverse judgment in the present action.¹⁰³

¹⁰⁰ 1 CLARK, CODE PLEADING 425 (2d ed. 1947); Note, *Intervention and the Meaning of "Bound" under Federal Rule 24(a)(2)*, 63 YALE L.J. 408, 410 n.14 (1954).

¹⁰¹ *E.g.*, Clark v. Sandusky, 205 F.2d 915 (7th Cir. 1953); Mack v. Passaic Nat'l Bank & Trust Co., 150 F.2d 474 (3d Cir. 1945); Tatum v. Cardillo, 11 F.R.D. 585 (S.D.N.Y. 1951); United States v. C. M. Cane Life Boat Co., 25 F. Supp. 410 (E.D.N.Y. 1938), *aff'd on other grounds*, 118 F.2d 793 (2d Cir.), *appeal dismissed*, 314 U.S. 579 (1941).

¹⁰² *E.g.*, Sam Fox Publishing Co. v. United States, 366 U.S. 683 (1961); Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951); Formlabs, Inc. v. Hartley Pen Co., 275 F.2d 52 (9th Cir.), *cert. denied*, 363 U.S. 830 (1960); Cameron v. President and Fellows of Harvard College, 157 F.2d 993 (1st Cir. 1946). See generally Note, *Intervention of Private Parties Under Federal Rule 24*, 52 COLUM. L. REV. 922 (1952); Note, 63 YALE L.J. 408 (1954).

¹⁰³ See, *e.g.*, Allen Calculators, Inc. v. National Cash Register Co., 322 U.S. 137 (1944); Durkin v. Pet Milk Co., 14 F.R.D. 374 (W.D. Ark. 1953). However, it has been persuasively argued that this interpretation of "bound" was not intended by the original draftsmen. Comment, *Intervention of Right in Class Actions: The Dilemma of Federal*

The immediate motivation for the change in the rule was the Supreme Court's decision in *Sam Fox Publishing Co. v. United States*.¹⁰⁴ There the Court noted that an earlier decision, *Hansberry v. Lee*,¹⁰⁵ had held that due process would not permit a member of a class who was inadequately represented from being bound by a judgment to which he was not a party.¹⁰⁶ In short, the Court pointed out in *Sam Fox* that the two elements required by 24(a)(2) could never coexist and thus the section was a nullity in class actions.¹⁰⁷

Old rule 24(a)(3) granted a right to intervene "when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." The practice among the courts prior to the drafting of the original rule was to allow intervention if the court was in possession of any type of property that could be loosely termed a "fund."¹⁰⁸ The liberality of this approach was not changed by the seemingly stricter language of the original rule

Rule of Civil Procedure 24(a)(2), 50 CALIF. L. REV. 89, 92-100 (1962). The author contends that it was the intention of the draftsmen to codify existing federal practice and that the *res judicata* interpretation of "bound" represents a departure from the traditional tests for intervention as of right. Cf. 4 MOORE, FEDERAL PRACTICE ¶¶ 24.03-.04, at 9-23 (2d ed. 1963). The term should be interpreted to allow intervention as of right by any person who stands to gain or lose by operation of the judgment. 2 BARRON & HOLTZOFF § 597, at 381; 7 CYCLOPEDIA OF FEDERAL PRACTICE § 24.17, at 21-22 (3d ed. 1951); Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65 n.4 (1940).

¹⁰⁴ 366 U.S. 683 (1961).

¹⁰⁵ 311 U.S. 32 (1940).

¹⁰⁶ "Although the *Hansberry* case deals only with a class action, [*Fox*] . . . seems to apply [the *Hansberry*] . . . principle to all suits involving representation of absent interests." Comment, 50 CALIF. L. REV. 89, 91 n.13 (1962).

¹⁰⁷ "[A]ppellants . . . face this dilemma: the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation . . . yet intervention as of right presupposes that an intervenor's interests are or may not be so represented." 366 U.S. at 691.

¹⁰⁸ Writing in 1936 Moore and Levi stated:

If a trust cannot be shown, a favorite device to support intervention is the fund theory. Here the emphasis shifts to a determination of whether the court is in possession of property, or something less than property. The concept of a fund has been applied so loosely that it is possible for a court to find a fund in almost any *in personam* action.

Moore & Levi, *Federal Intervention*, 45 YALE L.J. 565, 589-90 (1936). It is interesting to note that the above quoted sentences appear unchanged in 4 MOORE, FEDERAL PRACTICE ¶ 24.09, at 55 (2d ed. 1963).

and the 1946 amendments.¹⁰⁹ The Advisory Committee notes that "some decided cases virtually disregarded the language of this provision."¹¹⁰ The reason for the strained reading of the rule was the reluctance of many courts to change the more permissive practice that existed prior to the drafting of the federal rules. This reluctance was understandable in view of the stated purpose of the draftsmen and the Supreme Court that rule 24(a) was to be a codification of intervention practice then existing.¹¹¹

The current amendments to rule 24 substitute one subsection for former subsections (a) (2) and (a) (3). It now allows intervention of right

when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.¹¹²

The new rule seems to have solved the res judicata problem under the old rule while retaining the requirement of inadequate representation.¹¹³ It appears to be more in line with the practice prior to the federal rules and with the original intent of the draftsmen and the court to codify and amplify that practice.

¹⁰⁹ "The 1946 amendment to Rule 24(a)(3) clarified the question of court control. Under the amendment property need not be actually in the custody of the court or an officer thereof if it is 'subject to the control or disposition' of the court." 4 *id.* ¶ 24.09, at 58.

¹¹⁰ Advisory Committee's Note to new rule 24(a).

¹¹¹ The original Advisory Committee's Note states that the rule "amplifies and restates the present federal practice at law and in equity." ADVISORY COMMITTEE ON CIVIL RULES, NOTES 25 (March 1938). The Supreme Court has said that rule 24(a) was meant to be a "codification of general doctrines of intervention." *Missouri-Kansas Pipe Line Co. v. United States*, 312 U.S. 502, 508 (1941).

¹¹² New rule 24(a).

¹¹³ The requirement that an applicant show that existing parties do not adequately represent his interest now applies to all intervention situations which formerly came under rule 24(a)(2) and (3). One result of the change is that those parties who before the change could have intervened under rule 24(a)(3) will now have to show inadequate representation as an additional element. However this effect is not believed to be significant since almost any applicant under old rule 24(a)(3) presumably could have shown inadequate representation. "The most decisive way of proving inadequacy of representation obviously is to show that petitioner's interests are not represented at all." Note, *Intervention of Private Parties Under Federal Rule 24*, 52 COLUM. L. REV. 922, 924-25 (1952).

The present Advisory Committee recognized that the wording of old rule 24(a)(3) "was unduly restrictive." The principle underlying the deletion of subsection (a)(3) was that "if an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene and his right to do so should not depend on whether there is a fund to be distributed or otherwise disposed of."¹¹⁴

The obvious overall effect of the changes is to liberalize the right to intervene in federal civil actions. It is interesting to note that the early draft of the committee's proposals allowed intervention when the disposition of the action would "as a practical matter *substantially* impair or impede" the applicant's protection of his interest.¹¹⁵ The final draft deleted the word "substantially." Although nowhere explained, the omission apparently stems from a fear that the courts would distort the intended meaning of the rule by placing too much stress on substantiality and thereby deny intervention in some meritorious cases.¹¹⁶

In the usual intervention question, there are three interests to be considered—the protection of the nonparties, trial convenience, and the protection of the original parties. The concept of intervention as of right carries with it an implicit judgment that justice demands that the first interest should predominate over the other two.¹¹⁷ Some commentators have predicted that the present liberalization of rule 24 would upset this balance and result in injustice to the original parties and needless confusion in the courts through the interjection of collateral issues.¹¹⁸ It remains to be seen to what extent this is an idle fear. The Advisory Committee with this problem in mind adds to the end of their note "an intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings."¹¹⁹

¹¹⁴ Advisory Committee's Note to new rule 24(a).

¹¹⁵ *Preliminary Draft* 396. (Emphasis added.)

¹¹⁶ The same alteration has been noted in connection with rule 19(a)(2). See text accompanying note 20 *supra*.

¹¹⁷ Berger, *Intervention by Public Agencies in Private Litigation in the Federal Courts*, 50 YALE L.J. 65 (1940). For certain class actions this interest so predominates that not even a motion for intervention as of right is required. An appearance is automatically permitted under amended rule 23(c)(2)(C).

¹¹⁸ "Any rule superficially more liberal will only prove illiberal in its effect upon federal procedure and the rights of original parties." Note, 63 YALE L.J. 408, 417 (1954).

¹¹⁹ Advisory Committee's Note to new rule 24(a).

PLEADINGS

WAIVER OF DILATORY DEFENSES—
RULE 12(g) AND (h)

Divergent interpretations of the provision—"A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer"¹²⁰—were the impetus for the amendment of rules 12(g) and (h). The division arose with respect to pleadings in which an available dilatory defense was omitted from a preanswer motion. Could this defense be included in the answer although it was not permissible in another motion? Cases following *Phillips v. Baker*¹²¹ answered in the affirmative.¹²²

In *Phillips*, the defendants first moved for a more definite statement and then in their answer asserted the defense of improper venue, to which the plaintiffs claimed waiver since the defense was not included in the prior motion. The court of appeals, hypothesizing that if this were a waiver, "subdivision (h) would be given a narrow, rigid, and illiberal construction, which frequently would result in injustice,"¹²³ went on to say: "Evidently, the paragraph was intended to provide that any defense permitted to be made by motion at the option of the defendant, and which is not raised *either* by motion *or* by the answer, will be deemed to have been waived."¹²⁴

The *Phillips* decision was criticized in *Keefe v. Derounian*,¹²⁵ the leading case in support of waiver.¹²⁶ There, the defendant moved to dismiss the complaint for failure to state a cause of action and, in the alternative, to strike a paragraph. He then attempted to raise in his

¹²⁰ FED. R. CIV. P. 12(h).

¹²¹ 121 F.2d 752 (9th Cir.), *cert. denied*, 314 U.S. 688 (1941).

¹²² *E.g.*, *Crum v. Graham*, 32 F.R.D. 173 (D. Mont. 1963) (following *Phillips* solely on basis of *stare decisis*); *Birnbaum v. Birrell*, 9 F.R.D. 72 (S.D.N.Y. 1948).

¹²³ 121 F.2d at 755.

¹²⁴ *Ibid.*

¹²⁵ 6 F.R.D. 11 (N.D. Ill. 1946). The court indicated that the effect of the *Phillips* case would be to burden the plaintiff unduly, and it would "inject a different type of formalism into the rules—by allowing dilatory matter, which can no longer be raised by motion because it was not joined with the first motion, to be made by another type of pleading called the answer." *Id.* at 14.

¹²⁶ See, *e.g.*, *Elbinger v. Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D. Wis. 1956); *P. Beiersdorf & Co. v. Duke Labs., Inc.*, 10 F.R.D. 232 (S.D.N.Y. 1950).

answer an objection to service of process. The court, holding that he had waived this defense, reasoned that:

In order to prevent the waste of time resulting from the filing of successive motions, subdivision (g) requires the consolidation of motions It hardly seems reasonable first to deny that a defendant can raise this dilatory defense at this stage by one type of pleading called a motion, and then allow him to raise it by another type called the answer. To lay such emphasis on formalism seems contrary to the purpose for which the Rules of Civil Procedure were adopted.¹²⁷

To establish conclusively and clearly the correct *Keefe* interpretation,¹²⁸ rule 12(h) has been rewritten to specify that the dilatory defenses of (1) lack of jurisdiction over the person, (2) improper venue, (3) insufficiency of process, and (4) insufficiency of service of process are unequivocally waived if they are omitted from a preanswer motion. Rule 12(g) was changed solely to remain consistent with 12(h).

The changes in the rules will remedy the present discord and should not create any future problems in this regard. One point deserves comment however. It has been suggested that the phrase in subsection (h) (1)—“to be made as a matter of course”—should be deleted.¹²⁹ It would be anomalous to do so since that would contradict the goal of rules 12(g) and (h) to obviate unnecessary delay and expense during a trial. Rule 15(a) permits two types of amendments to pleadings: (1) those “as a matter of course,” and (2) those with the consent of opposing counsel or by leave of court. Should the phrase be omitted, the listed dilatory defenses could be raised at any time that an amended pleading is consented to or permitted, and this may be during or at the end of the trial. The better rule is to prohibit raising such dilatory matters except at the opening stage of the litigation.

One other matter may cause some difficulties. The amended rule as finally adopted uses the term “indispensable under rule 19.” As previ-

¹²⁷ 6 F.R.D. at 13.

¹²⁸ The cases which have followed this view [*Keefe*] seem to represent a sound and proper interpretation of the rule. Thus where a party has made a Rule 12 motion, he should not be permitted, either by subsequent motion or in his answer, to raise any defense or objection which could have been raised in the original motion.

1A BARRON & HOLTZOFF § 370, at 525. “This result [*Keefe* interpretation] is supported both by the literal language of Rule 12(h) and by the desirability of requiring all dilatory matters to be asserted in advance if a preliminary motion is made.” WRIGHT, FEDERAL COURTS § 66, at 244 (1963); see 2 MOORE, FEDERAL PRACTICE ¶ 12.23, at 2327-28 (2d ed. 1964).

¹²⁹ SUBCOMMITTEE ON THE RULES OF CIVIL PROCEDURE, FEDERAL BAR ASS'N, REPORT ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS 3 (1964).

ously discussed,¹³⁰ "indispensable" has been given a different meaning in the amended rules than it has had heretofore. The use of this term may therefore provide a pitfall for the unwary who might carelessly rely on its old and now discarded meaning.

SUBSTITUTION OF PARTIES AND RELATION BACK—

RULE 15(c)

Old rule 15(c) provided that an amendment to a pleading related back to the date of the original pleading "whenever the claim or defense [it] asserted . . . arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original" The rule was chiefly important in furthering the federal rules' policy of deciding cases on the merits.¹³¹ Where the amendment merely clarified or altered the cause of action or the theory of the case, or stated a different claim arising out of the same cause of action, relation back was uniformly allowed.¹³² But serious problems resulted in those instances in which the complaint named the wrong defendant and the statute of limitations expired prior to an amendment correcting the error. Where the newly named defendant was in no way connected with the previously named defendant and had no notice that he was in fact being sued, prohibiting a relation back that would fall within the limitations period was a proper result.¹³³ But where the newly named defendant received notice of the action and knew or should have known that he was the intended defendant, the same result seemed unjust. This was particularly true when the suit was against the United States or an officer or agency thereof.¹³⁴

¹³⁰ See text accompanying notes 36-38 *supra*.

¹³¹ It is axiomatic that this is a central aim of the federal rules, and that rule 15(c) helps to foster it. See, *e.g.*, *Copeland Motors Co. v. General Motors Corp.*, 199 F.2d 566, 567-68 (5th Cir. 1952); *Brown v. Dunbar & Sullivan Dredging Co.*, 189 F.2d 871, 874-75 (2d Cir. 1951); WRIGHT, FEDERAL COURTS § 66, at 240 (1963).

¹³² *E.g.*, *Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574 (1945); *New York Cent. & H.R.R.R. v. Kinney*, 260 U.S. 340 (1922); *Green v. Walsh*, 21 F.R.D. 15 (D. Wis. 1957); see *Developments in the Law—Statute of Limitations*, 63 HARV. L. REV. 1177, 1241-42 (1950). The purpose of relation back is to preserve the "invulnerability of the claim" created by the original pleading. 1A BARRON & HOLTZOFF § 448, at 757.

¹³³ See *ibid.*

¹³⁴ Nevertheless most cases refused to allow relation back. *E.g.*, *Cohn v. Federal Security Administration*, 199 F. Supp. 884, 885 (W.D.N.Y. 1961); *Hall v. HEW*, 199 F. Supp. 833 (S.D. Tex. 1960); *Sandridge v. Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959); *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958); *Jacobson v. United*

Illustrative are four cases which involved suits under Section 205 (g) of the Social Security Act¹³⁵ and which held sub silentio that such amendments did not relate back because they failed to meet the 15 (c) same "conduct, transaction, or occurrence" requirement.¹³⁶ In each case, instead of the Secretary of Health, Education, and Welfare, the plaintiffs timely, but mistakenly, named as defendant either a non-existent agency,¹³⁷ the Department of Health, Education, and Welfare,¹³⁸ a Secretary who had retired from office nineteen days before,¹³⁹ or the United States.¹⁴⁰ The courts, in denying leave to amend, relied on either *Davis v. L. L. Cohen & Co.*¹⁴¹ or *Mellon v. Arkansas Land & Lumber Co.*,¹⁴² both of which were decided before the adoption of the federal rules. They reasoned that to change the name of the defendant to the Secretary would be to commence a new proceeding, a situation in which relation back is not permitted.¹⁴³ These courts ignored the fact that the ultimate defendant, the United States,¹⁴⁴ was put on notice of the claims in each case, and that the policy of the limitation period was not offended.¹⁴⁵

States, 160 F. Supp. 491 (E.D. Pa. 1958); *Lomax v. United States*, 155 F. Supp. 354 (E.D. Pa. 1957); *Figle v. United States*, 157 F. Supp. 81 (D. Mont. 1957).

¹³⁵ 53 Stat. 1370 (1939), as amended, 42 U.S.C. § 405(g) (1964). In order to have review under the act, the plaintiff had to file suit against the Secretary of Health, Education, and Welfare within sixty days after he received notice of the latter's decision.

¹³⁶ Not one of the opinions indicated whether rule 15(c) had been considered in deciding the cases.

¹³⁷ *Cohn v. Federal Security Administration*, 199 F. Supp. 884 (W.D.N.Y. 1961).

¹³⁸ *Hall v. HEW*, 199 F. Supp. 833 (S.D. Tex. 1960).

¹³⁹ *Sandridge v. Folsom*, 200 F. Supp. 25 (M.D. Tenn. 1959).

¹⁴⁰ *Cunningham v. United States*, 199 F. Supp. 541 (W.D. Mo. 1958).

¹⁴¹ 268 U.S. 638 (1925).

¹⁴² 275 U.S. 460 (1928). As mentioned previously, note 136 *supra*, there was no indication that rule 15(c) was given consideration. It has been suggested that, since these cases had never been questioned by the Supreme Court, the district courts were "reluctant to try to second-guess the . . . Court" and were content to "travel the quick, easy, and safe route of stare decisis." Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals For Reform*, 77 HARV. L. REV. 40, 52 (1963).

¹⁴³ See *Cohn v. Federal Security Administration*, 199 F. Supp. 884, 885 (W.D.N.Y. 1961).

¹⁴⁴ See *Zeller v. Folsom*, 150 F. Supp. 615, 617 (N.D.N.Y. 1956), where, in a § 205(g) suit, the court said: "No authority is necessary to support the statement that this action is in effect an action against the government . . ."

¹⁴⁵ The new claim, naming the Secretary, clearly arose out of the same "conduct, transaction, or occurrence" set out in the original pleading. Since these cases, the Social

The amended rule provides that an amendment changing a party against whom a claim is asserted relates back when, in addition to meeting the other requirements of rule 15(c), the "new" party "within the period provided by law for commencing the action against him," (1) received such notice as to preclude his being "prejudiced in maintaining his defense of the merits, and (2) knew or should have known that" he would have been the named party but for a mistake concerning his identity.¹⁴⁶ The rule further provides that the requirements of "notice" and "knowledge" are satisfied "with respect to the United States or any agency or officer thereof to be brought into the action as a defendant" if process is delivered or mailed to either "the United States Attorney, or his designee, or the Attorney General of the United States, or any agency or officer who would have been a proper defendant if named."¹⁴⁷

By codifying the heretofore implied policy behind the rule, the revision seems to accomplish its purpose and is consistent with the recognition of the United States as the true defendant in suits against federal agencies or officers. Moreover, in the government cases, the rule will further advance the objectives of the 1961 amendment of rule 25(d).¹⁴⁸

REAL PARTY IN INTEREST—RULE 17(a)

Removal of certain restrictions on substitution of plaintiffs is accomplished by an amendment that adds an additional sentence to rule 17(a):

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or sub-

Security Administration has amended § 404.954 of its regulations to provide that if, instead of the Secretary, suit is brought against "the United States or any agency, officer, or employee thereof," the complainant will be notified of his mistake, and the sixty-day limit shall be extended to run from the day "following the date of mailing of such notice." 20 C.F.R. § 404.954 (1965). But this does not solve the problem in the case of private parties or other agencies of the government.

¹⁴⁶ This approach is supported by some prior cases. *E.g.*, *Taylor v. Reading Co.*, 23 F.R.D. 186 (E.D. Pa. 1958); *Green v. Walsh*, 21 F.R.D. 15 (E.D. Wis. 1957).

¹⁴⁷ The relation back of amendments changing plaintiffs is not expressly mentioned in new rule 15(c). But, since the problem is generally easier, the Advisory Committee's Note indicates that the rule extends to such amendments by analogy.

¹⁴⁸ FED. R. CIV. P. 25(d) provides for automatic substitution of the successor public officer.

stitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

As the Advisory Committee points out, the purpose of rule 17(a) as originally promulgated was to permit the real party in interest to bring a suit. "That having been accomplished, the modern function of the rule in its negative aspect is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata."¹⁴⁹ But in this aspect, the rule can be used to deny justice as well, for a legitimate mistake can be made as to who is the real party in interest.¹⁵⁰ In such a case it would be unjust to dismiss the suit, particularly where the statute of limitations would prevent the institution of a new suit. The amendment would prevent such an injustice by providing a relation back of the joinder or substitution of the real party in interest.¹⁵¹

The Advisory Committee's Note makes it clear that this provision is to be limited to those instances where an honest mistake has been made in choosing the name in which the original action was filed.¹⁵² It is unfortunate that the rule itself does not contain some limiting language, for as written the bare language appears to give the district court no alternative but to permit a relation back. One can almost be sure that some courts will apply the rule literally, arguing that since there is no ambiguity, there is no reason to go behind the rule to its "legislative" history for a clarification. Such a result would of course violate the purpose of the rule and should be avoided if possible.¹⁵³

¹⁴⁹ Advisory Committee's Note to new rule 17(a).

¹⁵⁰ This change was suggested because of the unification of the civil and admiralty procedure. "Such provision is thought necessary because in some maritime situations, the person entitled to sue cannot be readily determined and the statute of limitations is short." 2 BARRON & HOLTZOFF (Supp. 1965, at 9). But its impact is not limited to admiralty cases.

¹⁵¹ The Advisory Committee remarked that the change, in its impact on the general civil practice, is designed to keep "pace with the law as it is actually developing." Advisory Committee's Note to new rule 17(a).

¹⁵² *Ibid.*

¹⁵³ Two additional changes are made in rule 17(a). One, the elimination of a "but," is designed to indicate that the fiduciaries listed are not exceptions to the rule that a suit is to be brought by the real party in interest. Rather the fiduciaries listed are only illustrations of the rule. *Ibid.*; see 2 BARRON & HOLTZOFF § 482, at 8-9; Atkinson, *The Real Party in Interest Rule: A Plea for its Abolition*, 32 N.Y.U.L. REV. 926, 958 (1957).

TRIALS

There are four changes made in the rules that will affect the actual conduct of the trial. One, a minor change, permits the court to appoint an interpreter, including interpreters for the deaf, fix his compensation, and direct who shall pay it.¹⁵⁴ The major changes concern proving foreign documents and foreign law.

PROOF OF OFFICIAL RECORD—RULE 44

Under old rule 44(a), both foreign and domestic official records had to be proved and authenticated in the same manner. Such records could "be evidenced by [either] an official publication . . . or by a copy attested by the officer having legal custody of the record . . . and accompanied with a certificate that such officer [had] . . . the custody." The first alternative presented no problem. But since the rule "was drafted with domestic official records primarily in mind,"¹⁵⁵ compliance with the second alternative in the case of foreign documents was, in many instances, extremely arduous. While official records in the United States have customarily been retained by a custodian who is impliedly authorized to issue attested copies, many other countries do not have such custodians. Thus, the rule has precluded the admissibility of many otherwise acceptable foreign documents.¹⁵⁶

The requirement of an accompanying certification by a representative of the United States "stationed in the foreign . . . country in which the record [was] . . . kept" presented further difficulties. It was impossible to certify copies from countries in which there was no appropriate United States official. Moreover, assuming that a proper official was present, it was a formidable, if not impossible, task for him

The other change is to add the term "bailee" to the illustrative enumeration of real parties in interest. The Advisory Committee commented that this was "primarily to preserve the admiralty practice whereby the owner of a vessel as a bailee of the cargo sues for damage to either property interest or both." Advisory Committee's Note to new rule 17(a). In general civil practice a bailee has generally been understood to have the right to sue as a real party in interest, *Bradley v. St. Louis Terminal Warehouse Co.*, 189 F.2d 818, 823 (8th Cir. 1951), on the ground that the substantive law of the states gives him this right. *Atkinson, supra* at 949-50.

¹⁵⁴ New rule 43(f).

¹⁵⁵ 2B BARRON & HOLTZOFF § 992, at 275. See generally Smit, *International Aspects of Federal Civil Procedure*, 61 COLUM. L. REV. 1031 (1961).

¹⁵⁶ *E.g.*, *United States v. Grabina*, 119 F.2d 863 (2d Cir. 1941) (extract of records certified by mayor of township inadmissible because mayor not certified as custodian).

"to certify to the authority of the foreign official attesting the copy as well as the genuineness of his signature and his official position."¹⁵⁷ The authority of the attester and his official position raised questions of foreign law about which the certifying official often had insufficient knowledge, with the result that he could not issue a certificate.

To remedy these unsatisfactory conditions, rule 44(a) has been reorganized and amplified to provide separate procedures for authenticating foreign and domestic copies of official records. The domestic rules remain substantively the same, the only change being a more specific designation of the geographical areas covered. The foreign rules no longer require that the attesting officer must also be the custodian of the record. The certification problem has been alleviated by eliminating the necessity for confirming the authority of the attester. In the alternative, a chain certification method is permitted whereby all that is necessary is certification of (1) the genuineness of the signature and (2) the lawfulness of the incumbency of a foreign official, other than the attester, who at someplace in a string relating to the original attestation certified the genuineness of the original.¹⁵⁸ The final certification can be made by "a diplomatic or consular official of the foreign country assigned or accredited to the United States" as well as by an American official. Finally, to mitigate any of the shortcomings of these changes, it is provided:

If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.¹⁵⁹

The Advisory Committee notes that this should be allowed only after reasonable efforts to comply with the other rules are unsuccessful.

¹⁵⁷ Advisory Committee's Note to new rule 44(a)(2); see Smit, *supra* note 155, at 1063; SCHLESINGER, *COMPARATIVE LAW* 57 (2d ed. 1959).

¹⁵⁸ See, e.g., *The Denny*, 127 F.2d 404 (3d Cir. 1942); *New York Life Ins. Co. v. Aronson*, 38 F. Supp. 687 (W.D. Pa. 1941). Chain certification was not allowable under the old rule because the United States official's certification had to refer to the attester. Professor Smit had asserted before the amendment that the probability of veracity was not any less in chain certification than in direct certification. Smit, *supra* note 155, at 1068.

¹⁵⁹ New rule 44(a)(2). Previously summaries were not admissible. *United States v. Grabina*, 119 F.2d 863 (2d Cir. 1941); cf. *Delmore v. Brownell*, 135 F. Supp. 470 (D.N.J. 1955), *aff'd*, 236 F.2d 598 (3d Cir. 1956). Significantly, certain countries issue only summaries of some official records. Smit, *supra* note 155, at 1070.

The new rule brings greater flexibility to this procedural area by striking a balance between the often conflicting goals of unimpeachable authenticity and easy certification. The discretionary admission of copies or summaries *without* final certification, however, may lead to confusion and lack of uniformity in the courts. Nevertheless, this must be weighed against the policy of deciding cases on the merits, a seemingly worthier object. By providing that certification may be dispensed with where all parties have had a reasonable opportunity to investigate the authenticity and accuracy of the documents, the rule permits the court to place the burden upon opposing counsel to show that there is a question concerning the document. Lacking such question, there seems to be no need for the formality of final certification.¹⁶⁰

PROVING FOREIGN LAW—RULE 44.1

A need has arisen for a procedure to extricate the courts from the inapposite common-law-evolved methods for determining foreign law.¹⁶¹ New rule 44.1 is such an endeavor. By providing specific rules for that which previously had been within the periphery of rules 8 (a), 43 (a), and 52 (a), it proposes a uniform and extensive procedure for "raising and determining" issues of foreign law. To appreciate the scope of this new rule, an understanding of how the common-law rules and their modifications have affected the federal courts is essential.

The foundation of the common-law doctrine is the principle that foreign law must be proved as a fact.¹⁶² Although treating law as

¹⁶⁰ Rule 44(b), relating to proof of lack of record, is changed solely to remain consistent with the changes in section (a). Rule 44(c), relating to other proof, is changed to include United States international agreements which provide "for reception of copies or summaries of foreign official records."

¹⁶¹ See generally SCHLESINGER, *COMPARATIVE LAW* 31-142 (2d ed. 1959); Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664 (1950); Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957); Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60 (1954); Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941); Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23 (1957); Note, 72 HARV. L. REV. 318 (1958).

¹⁶² The reason for the rule is practical. The judge must be informed of the unfamiliar law and the easiest method is to have it proved as a fact is proved. See SCHLESINGER, *op. cit. supra* note 161, at 39-40; Keeffe, Landis & Shaad, *supra* note 161, at 674. Although in accord with the reason for the rule, critics have expressed dissatisfaction with the treatment of foreign law as a fact for all purposes. See authorities cited note 161 *supra*.

fact is unique, it has undesirably fallen within the scope of rules designed to cover normal situations. Thus the particularly onerous effects of this "fact doctrine" in the federal courts are threefold: (1) foreign law must be raised in the pleadings; (2) it must be proved in accordance with the applicable rules of evidence; and (3) since it is a fact, it is rarely subject to appellate review.¹⁶³

That a party must give notice of reliance on foreign law is a necessary concomitant of the "fact doctrine." Since foreign law is a factual basis for relief, the adversary must be informed to prevent unfair surprise, and the court must be informed to permit independent investigation.¹⁶⁴ This has traditionally been done in the pleadings. The practice in the federal courts before the adoption of the federal rules was that if it was unknown at the time of pleading that foreign law would be relied on at trial and thus not pleaded, the party was thereafter precluded from raising it.¹⁶⁵

The liberal pleading requirements of rule 8(a) evoked divergent views rather than a reversal of the old policy. The first cases decided under the rules followed the traditional interpretation.¹⁶⁶ However, the Court of Appeals for the Second Circuit stated in *Siegelman v. Cunard White Star, Ltd.*,¹⁶⁷ that "pleading the foreign law . . . [is] clearly unnecessary" since "under Rule 8, [all that] a pleading must contain [is] a short and plain statement of the claim showing that the pleader is entitled to relief"; "it is not necessary to set out the legal theory on which the claim is based."¹⁶⁸

Realizing that raising an issue of foreign law is distinguishable from the normal situation envisaged by the framers of 8(a), the new rule specifically covers pleading of foreign law. It states that "a party who intends to raise an issue concerning the law of a foreign

¹⁶³ SCHLESINGER, *op. cit. supra* note 161, at 42-44.

¹⁶⁴ Keeffe, Landis & Shaad, *supra* note 161, at 685.

¹⁶⁵ *E.g.*, *Liverpool & Great W. Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 445 (1889).

¹⁶⁶ *E.g.*, *Harris v. American Int'l Fuel & Petroleum Co.*, 124 F. Supp. 878 (W.D. Pa. 1954); *Finne v. Koninklijke Luchtvaart Maatschappij N.V.*, 11 F.R.D. 336 (S.D.N.Y. 1951); *United States v. National City Bank of New York*, 7 F.R.D. 241 (S.D.N.Y. 1946); *Empresa Agricola Chicama Ltda. v. Amtorg Trading Corp.*, 57 F. Supp. 649 (S.D.N.Y. 1944); *Chemacid, S.A. v. Ferrotar Corp.*, 3 F.R.D. 45 (S.D.N.Y. 1942); *Keasbey & Mattison Co. v. Rothensies*, 1 F.R.D. 626 (E.D. Pa. 1941). The rationale of these cases was criticized as contrary to the liberal pleading policy of rule 8(a). Keeffe, Landis & Shaad, *supra* note 161, at 685.

¹⁶⁷ 221 F.2d 139 (2d Cir. 1955).

¹⁶⁸ *Id.* at 196; see *Pederson v. United States*, 191 F. Supp. 95 (D. Guam 1961).

country shall give notice in his pleadings or other reasonable notice." This recognizes that although giving notice of intent to rely on foreign law is essential, it is not necessary to plead such law.

The words "other reasonable notice" insure that the proponent will give timely notice at peril of nonrecognition of his foreign law claim, but notice is not necessarily late if it is given subsequent to the pleadings.¹⁶⁹ The Advisory Committee mentions that notice need only be given by one party; either party can thereafter raise foreign law issues. This appears to make sense. The danger of unfair surprise is foreclosed once the original notice has been given.

Under common-law concepts the applicable rules of evidence determine the correct procedure. The federal courts, under rule 43(a), apply either federal or state rules depending on which favors admissibility.¹⁷⁰ However, the peculiarity of proving law as a fact renders normal evidentiary rules inappropriate, and as a result many meritorious cases have been denied fair adjudication.

In the adversary system, the methods allowed by the rules of evidence for proving foreign law are limited. If the foreign law is unwritten, in the absence of statutory modification, it must be proved orally by expert witnesses.¹⁷¹ If it is written, it may additionally be evidenced by official documents or their copies.¹⁷² The use of expert witnesses presents three problems, all of which hamper presentation of the foreign law issue. The first is the difficulty of finding a qualified expert. Since experts are apt to be located in large cities, their availability is often dependent upon proximity to such urban areas. Moreover, if the foreign country is an obscure one, the chances of finding

¹⁶⁹ In determining what is reasonable, the Advisory Committee notes that the court should consider, among other factors, the stage of the case at the time notice is given, the reason for failure to give earlier notice, and the importance of the foreign law issue to the case.

¹⁷⁰ This includes evidence admissible under the statutes of the United States or under the rules of evidence heretofore applied in the federal courts on the hearing of suits in equity. There are few United States statutes or federal decisions concerning equity evidence, and therefore, state rules of evidence are most often invoked. Keeffe, Landis & Shaad, *supra* note 161, at 686. See generally WRIGHT, FEDERAL COURTS § 93 (1963).

¹⁷¹ A few jurisdictions allow proof by means of decisions of foreign courts or distinguished treatises. Stern, *supra* note 161, at 26-27.

¹⁷² See generally Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941).

an expert are minimal.¹⁷³ The second, and most significant, is the prohibitive cost of such experts, a fact which leaves the impecunious plaintiff at a great disadvantage.¹⁷⁴ The third is the chance that a skillful cross examiner can frequently destroy the testimony of the expert. Since foreign law experts often lack complete command of the English language, their oral version of the law can easily be confused and rendered ineffective.¹⁷⁵ There are various problems in using documentary evidence as well; these have been discussed previously under rule 44. It can be seen, then, the rules of evidence make it difficult, if not impossible, to present an issue of foreign law to the court.

If a party is unable to prove the law, the failure may be determinative of his cause. In *Cuba R.R. v. Crosby*,¹⁷⁶ an American, in Cuba, lost his hand as the result of the negligence of his American employer. The impecunious plaintiff was unable to prove Cuban law, but the district court held that in the absence of such proof, the law of the forum applied and the jury found for the plaintiff. The Supreme Court reversed, holding that if the foreign law cannot be proved, the complaint must be dismissed. The federal courts still follow this case when they are not bound to apply a different state rule of evidence.¹⁷⁷ Several states apply the law of the forum, as did the district court in *Crosby*.¹⁷⁸ Other states statutorily permit the courts to take judicial notice of foreign law, unfettered by rules of evidence;¹⁷⁹ however, in many cases the courts have refused to invoke the statutes.¹⁸⁰

New rule 44.1 was adopted in awareness of the inequitable results a failure to prove foreign law often produces. It provides that "the

¹⁷³ *Id.* at 1029. For a discussion of the problems of qualifying an expert see SCHLESINGER, *op. cit. supra* note 161, at 59-111.

¹⁷⁴ See generally Nussbaum, *Proof of Foreign Law in New York: A Proposed Amendment*, 57 COLUM. L. REV. 348 (1957).

¹⁷⁵ *Ibid.*

¹⁷⁶ 222 U.S. 473 (1912).

¹⁷⁷ *E.g.*, *Ozanic v. United States*, 165 F.2d 738 (2d Cir. 1948).

¹⁷⁸ SCHLESINGER, *op. cit. supra* note 161, at 127; see Note, 42 CALIF. L. REV. 701 (1954). Although this may often eliminate the harsh results of *Crosby*, it nevertheless enables a party who can prove the foreign law to forum-shop. By comparing the probable outcomes under both rules of law, a party, who can afford the cost of proving the foreign law, may decline to do so if the law of the forum would be more favorable. See generally SCHLESINGER, *op. cit. supra* note 161, at 128.

¹⁷⁹ *E.g.*, N.Y. CIV. PRAC. LAW § 4511.

¹⁸⁰ *E.g.*, *Arams v. Arams*, 182 Misc. 328, 45 N.Y.S.2d 251 (1943).

court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43." This clause permits federal courts to free themselves of the heretofore inhibiting rules of evidence.

The rule is unquestionably salutary. Under it, the court can engage in its own research and raise its own issues (as it does in the case of domestic law), without being limited to properly admitted evidence. A party unable to afford or acquire an expert will not be automatically at a disadvantage. In short, the court will be able to do justice to the extent the available facilities allow.¹⁸¹

While the Advisory Committee recognizes that ordinarily the court should inform the parties of extrarecord material that it proposes to use,¹⁸² so as to give them the opportunity to analyze and counter, it did not wish to add an "element of undesirable rigidity" by requiring such procedure. Here lies the greatest danger in the rule. For unless a court has the duty to find *all* the foreign law, permitting it to pick a fragment of foreign law, to construe the fragment as pertinent, and then to apply it without advising counsel could lead to an unjust result. As long as counsel is still bound by evidentiary rules in foreign law matters, he would be unable to counter a fragment of foreign law not in evidence. This, it is submitted, is an unhealthy mixture of requiring proof by counsel on the one hand and allowing

¹⁸¹ The rule states that the court may consider testimony other than that submitted by the parties; this means court-appointed experts. However, the courts had authority to do this previously. SCHLESINGER, *op. cit. supra* note 161, at 110. The problem then was that the court had no authority to pay experts and, thus, they were rarely called. The same problem will exist under the new rule. It has been suggested by Professor Nussbaum that the court could include the cost of an expert as part of the court's business, in which case the losing party will ultimately pay the price. Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 66-67 (1954). Professor Schlesinger suggests, however, that this would possibly be beyond a judge's power, absent a statute, and that the only answer to the problem is a statutory provision, whereby experts could receive remuneration out of public funds or some other source. If a statute is needed to permit routine use of court-appointed experts, it should be seriously considered, since use of such experts would greatly enhance the possibility of deciding foreign law issues in those cases in which the court is unable to avail itself of any pertinent information as to the foreign law.

¹⁸² Advisory Committee's Note to new rule 44.1; see SCHLESINGER, *op. cit. supra* note 161, at 142. He states that it is arguable that a duty to give notice exists "even in the absence of express statutory language, and that a violation of this judicial duty constitutes reversible error."

the court to take judicial notice on the other.¹⁸³ The only safeguard in such a system would be court-made permission for counsel to offer in his post-trial motions or appellate briefs additional evidence of where the district court's fragment resulted in an erroneous conclusion. This of course presupposes that he learns of what fragment the district court used.

The third effect of the common law "fact doctrine" is the limited review in foreign law matters. If an issue of foreign law necessitated proof by experts, the determination of such law was a function of the jury.¹⁸⁴ The rule gradually was dissipated by statute and judicial decision so that today, in a majority of states, it is a question for the courts.¹⁸⁵ Several federal courts, unaided by statute have reached the same conclusion,¹⁸⁶ but in many it still remains a jury question. Whether this was considered a jury or court function, an issue of foreign law was still a question of fact in the federal courts subject to appellate review only if "clearly erroneous" under rule 52(a).¹⁸⁷

This fact evoked the criticism of several writers.¹⁸⁸ They contended that if subject to appellate review, issues of foreign law would be decided more consistently with the prior decisions of the forum as well as those of the foreign country. Their view is consonant with the reality that foreign law is more than mere fact.¹⁸⁹

¹⁸³ See generally SCHLESINGER, *op. cit. supra* note 161, at 129-43. The Committee notes that use of the concept of judicial notice is avoided to prevent an "extreme burden" on the court and to escape the uncertainty of that concept as applied to foreign law. The new rule itself vitiates the latter aim, since the court can, in effect, take judicial notice by means of its own research.

¹⁸⁴ SCHLESINGER, *op. cit. supra* note 161, at 43; Keeffe, Landis & Shaad, *supra* note 161, at 674; Stern, *supra* note 161, at 27.

¹⁸⁵ SCHLESINGER, *op. cit. supra* note 161, at 43-44.

¹⁸⁶ *Daniel Lumber Co. v. Empresas Hondurenas, S.A.*, 215 F.2d 465, 470 (5th Cir. 1954); *Liechti v. Roche*, 198 F.2d 174, 177 (5th Cir. 1952); *Jansson v. Swedish American Line*, 185 F.2d 212, 216 (1st Cir. 1950).

¹⁸⁷ *E.g.*, *Remington Rand, Inc. v. Societe Internationale Pour Participations Industrielles et Commerciales, S.A.*, 38 U.S. App. D.C. 275, 277, 188 F.2d 1011, 1013 (1951).

¹⁸⁸ See Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018, 1033 (1941); Note, 72 HARV. L. REV. 318, 323 (1958). *But see* SCHLESINGER, *op. cit. supra* note 161, at 44 n.8. Twenty-seven states have adopted Section 3 of the Uniform Judicial Notice of Foreign Law Act, 9A U.L.A. 562 (1965), which provides for appellate review.

¹⁸⁹ Further, the change in the new rule itself, permitting independent judicial investigation, increases the need for appellate review. Now that the chances of proving foreign law are greater, uniformity is desirable to the same extent it is with respect to domestic law.

The new rule responds to that reality; it provides that "the court's determination shall be treated as a ruling on a question of law." As noted by the Advisory Committee, the new rule does not control who should make the determination since the rules do not regulate allocation between judge and jury.¹⁹⁰ Therefore, although implicitly favoring court determination of foreign law, the new provision will only have effect where this is presently permitted.

JURORS—RULE 47

To reduce the incidence of the often calamitous mistrial caused by a diminished jury, rule 47 has been amended to increase the maximum number of alternate jurors from two to six. Concomitant to this change is an increase in the number of possible peremptory challenges from one to three, depending upon the number of alternate jurors that are impanelled. The only other change allows the replacement of jurors who "become or are found to be unable or disqualified to perform their duties." This is to indicate clearly that a mistrial need not be declared when it is first discovered during the trial that a juror was disqualified at the time he was sworn.¹⁹¹ An alternate juror may be called to replace him.

JUDGMENTS

NEW TRIAL—RULE 59

To rule 59(d) is added a sentence giving a judge the power to grant a new trial on a ground not mentioned in a timely motion for new trial. This change was occasioned by the decision of the United States Court of Appeals for the District of Columbia in *Freid v. McGrath*.¹⁹² In that case the court held that although a judge could grant a new trial on grounds other than those mentioned in a motion for new trial, in so doing he was acting on his own initiative and

¹⁹⁰ Such determinations must be made in light of the seventh amendment, and therefore, it is not proper to do so by way of a new federal rule. 28 U.S.C. § 2072 (1964).

¹⁹¹ See *United States v. Goldberg*, 330 F.2d 30 (3d Cir. 1964). This was a criminal case in which the appellant argued that under FED. R. CRIM. P. 24(c), which had the same provision as rule 47(b), a mistrial resulted because a juror, who was disqualified at the time she was sworn in, was not discovered and dismissed until during the trial. The denial of the motion for a mistrial was affirmed. 330 F.2d at 43.

¹⁹² 76 U.S. App. D.C. 388, 133 F.2d 350 (1942).

was thus bound by the restriction in old rule 59(d):¹⁹³ "Not later than ten days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party"¹⁹⁴ The effect of the holding was that when a judge was considering a timely motion for new trial and the ten-day period had expired, he was limited to the specific grounds urged in the motion. He was without power to grant a new trial on any other grounds, no matter how meritorious.¹⁹⁵ Similarly, later cases held that when a timely motion had been made and the ten-day period provided by rule 59(b) had run, the party making the motion could not move to amend to add new grounds.¹⁹⁶ From its inception, this interpretation of rules 59 (b) and (c) was criticized as preventing the court from doing substantial justice.¹⁹⁷

In attempting to change the "undesirable" result reached under the old rule, the Advisory Committee first proposed a change in rule 59(b) which would have allowed both amendment of a timely motion and the granting of the motion on grounds not stated therein.¹⁹⁸ The amendment as adopted omits any provision for amendment of

¹⁹³ *Id.* at 393, 133 F.2d at 355.

¹⁹⁴ FED. R. CIV. P. 59(d).

¹⁹⁵ *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962); *National Farmers Union Auto & Cas. Co. v. Wood*, 207 F.2d 406 (10th Cir. 1953); *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140 (10th Cir.), *cert. denied*, 311 U.S. 677 (1940). See also 6 MOORE, FEDERAL PRACTICE ¶ 59.09 [3], at 3851 n.9 (2d ed. 1953), and cases cited therein.

¹⁹⁶ *Russell v. Monongahela Ry.*, 262 F.2d 349 (3d Cir. 1958); *Francis v. Southern Pac. Co.*, 162 F.2d 813 (10th Cir. 1947), *aff'd*, 333 U.S. 445 (1948); *Brest v. Philadelphia Trans. Co.*, 24 F.R.D. 47 (E.D. Pa. 1959); *Marks v. Philadelphia Wholesale Drug Co.*, 125 F. Supp. 369 (E.D. Pa. 1954), *aff'd*, 222 F.2d 545 (3d Cir. 1955).

¹⁹⁷ There is no logical or legal difficulty in granting for one reason a motion made for another reason. And it seems to me a contradiction in terms to say, when a judge grants a party's motion, that he nevertheless acts upon his own motion; or, what comes to the same thing, that he acts of his own initiative.

Freid v. McGrath, 76 U.S. App. D.C. 388, 394, 133 F.2d 350, 356 (1942) (Edgerton, J., dissenting). See also *Steinberg v. Indemnity Ins. Co. of North America*, 36 F.R.D. 253 (E.D. La. 1964), where the court examined the authorities in favor of the general rule and declined to follow it.

¹⁹⁸ (b) Time for Motion. A motion for new trial shall be served not later than 10 days after the entry of judgment. *After a motion has been thus timely served, the court in its discretion may (1) upon application and notice while the motion is pending, permit the moving party to amend the motion to state different or additional grounds; (2) grant the pending motion upon grounds not stated by the moving party and in that case the court shall specify the grounds in its order.* *Preliminary Draft* 404-05 (new matter in italics).

a motion for new trial after the running of the ten-day period. The change between the early and final drafts was probably motivated by a fear that allowing amendment of the new trial motion after the running of the ten-day period would prolong and complicate consideration of the motion. However, in light of the provision in the new rule that each party must be given notice and an opportunity to be heard before the judge may grant a new trial on grounds not urged in the motion, there appears to be little reason why the court should not be permitted discretion to allow this same process to be commenced by an application to amend the original motion.¹⁹⁹

PROVISIONAL AND FINAL REMEDIES

INJUNCTIONS—RULE 65

Rule 65 has been changed in three respects: (1) A new paragraph has been added to 65(a) giving express authority to consolidate a hearing for a preliminary injunction with trial on the merits; (2) new matter has been added to 65(b) requiring that every practical step be taken to give the opposition a chance to be heard before issuance of a temporary restraining order; and (3) the language in 65(c) providing for summary proceedings against sureties has been transferred substantially verbatim to new rule 65.1.

The amendment to 65(a), in the words of the Judicial Conference of the Ninth Circuit, "merely gives express authority for what is already sometimes done."²⁰⁰ The Advisory Committee itself says: "The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception."²⁰¹ Consolidation, the committee feels, will avoid the wasted time and energy sometimes involved when evidence introduced at the hearing must be reintroduced at the trial.²⁰²

¹⁹⁹ In the note to the original draft the Committee said:

It is not contemplated that the revised rule shall be availed of to permit an amendment which merely elaborates upon the grounds stated in the original motion. An application for permission to amend the motion should in all events be made as promptly as possible. As the grant or denial of an application is in the court's discretion, it may take into account all relevant considerations, including delay in making the application.

Ibid.

²⁰⁰ Comm. on Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Report*, 36 F.R.D. 209, 235 (1964).

²⁰¹ Advisory Committee's Note to new rule 65(a).

²⁰² *Ibid.*

In addition, the new rule provides, "even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes a part of the record on the trial and need not be repeated upon the trial." It should be noted that this sentence is permissive only; and if necessary to give coherence to the presentation at trial, as it often must be, the evidence may be repeated. While the amendment, as noted above, in no way changes presently permissible practice, it is thought that it will have the salutary effect of encouraging a wider use of the consolidation procedure.²⁰³

New 65(b) favors notifying the opposing party of a petition for a temporary restraining order. It attempts to encourage the giving of informal notice whenever possible, if formal notice is impossible or impractical. The old rule required that notice be given unless it appears that "immediate and irreparable injury . . . will result to the applicant before notice can be served and a hearing had thereon." To some, the old rule indicated that if for some reason it was impossible to serve formal notice on a party, there was no obligation to telephone information of the impending hearing to the party or his attorney. The new rule requires the applicant's attorney to certify in writing "the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required."

The fairness of giving the opposing party a right to be heard coupled with the potentially serious effects of an unwisely granted temporary restraining order, makes the amendment desirable. Further, it appears in line with the little judicial comment available.²⁰⁴

The amendment to 65(c) is of no practical significance. It merely gathers in one new section substantially identical provisions formerly found in rules 65 and 73, and makes provision for applicability to maritime actions.

APPEALS

The Advisory Committee on Appellate Rules issued in March 1964 a Preliminary Draft of Proposed Uniform Rules of Federal Appellate Procedure. Apparently acting on the conclusion that authority does

²⁰³ Comm. on the Federal Rules of Civil Procedure, Judicial Conference—Ninth Circuit, *Report*, 36 F.R.D. 209, 235 (1964).

²⁰⁴ See *Lummas Co. v. Commonwealth Oil Ref. Co.*, 297 F.2d 80, 83 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Pennsylvania R.R. v. Transport Workers Union*, 278 F.2d 693, 694 (3d Cir. 1960); *Arvida Corp. v. Sugarman*, 259 F.2d 428, 429 (2d Cir. 1958).

not now exist to promulgate uniform rules for the federal appellate courts,²⁰⁵ the Supreme Court did not issue such rules along with the amendments to the federal rules of civil and criminal procedure. But in the promulgated amendments to the civil and criminal rules, changes are made that alter district court procedure attendant to the appeal process.

This section will present an examination of those changes affecting appeals taken in civil cases. However, it should be noted that when uniform appellate rules are promulgated, they will be applicable in general to both civil and criminal proceedings. Changes in criminal appellate procedure at the district court level are treated at pages 1276 through 1318 below. Although there will be some comparison with present practice, a full development of the comparisons will be omitted since it was recently presented by the author in other pages of this same volume.²⁰⁶

It should be emphasized that, as there is no statutory authority to promulgate generally applicable rules of appellate procedure, the rules adopted by the Supreme Court pertain solely to the district courts. Thus, as concerns appeals, they regulate the taking of an appeal up to its docketing in the appellate court. Beyond that point, procedure is controlled by the rules of the various courts of appeals. Nevertheless, these amendments work some significant alterations in today's procedure as well as codify some practice that has arisen despite contrary provisions in the existing civil and criminal rules.

The period for noting an appeal specified by rule 73(a) is left unchanged in ordinary civil cases.²⁰⁷ But the time period in admiralty cases is now changed to conform with civil cases generally.²⁰⁸

²⁰⁵ Cohn, *The Proposed Federal Rules of Appellate Procedure*, 54 GEO. L.J. 431, 436-38 (1966) [hereinafter cited as Cohn].

²⁰⁶ *Id.* at 431-31.

²⁰⁷ In civil cases, the time is thirty days unless the government or an agency or officer thereof is a party, in which case the time is sixty days. FED. R. CIV. P. 73(a). These time limits are also instituted by 28 U.S.C. § 2107 (1964).

²⁰⁸ Previously, the time to appeal in admiralty cases was ninety days after final orders and fifteen days after interlocutory orders. 28 U.S.C. § 2107 (1964).

Other exceptions remain. Bankruptcy appeals are not governed by these rules. FED. R. CIV. P. 81(a)(1). Rather, they are governed by separate time limits: thirty days after notice to the losing party of the entry of judgment or order if proof of service of that notice is filed within five days of the service itself. If there is no such service or proof of service, appeal time is forty days. Bankruptcy Act of 1938, 52 Stat. 855, 11 U.S.C. § 48 (1964). Another exception is appeal of arbitration board awards under

In both the civil and criminal rules, there is a widening of the court's power to extend the time period for appeals. This power in civil cases was limited by the old rule to cases of "excusable neglect based upon a failure of a party to learn of the entry of the judgment."²⁰⁹ However, some decisional law permitted extensions in cases considered extraordinary even though this condition was not met.²¹⁰ The amended civil rule will now permit district courts to grant thirty-day extensions of time to note an appeal if there is "excusable neglect" but without limitation as to the reason for this neglect.²¹¹ The Advisory Committee's Note to rule 73, however, makes it clear that:

In view of the ease with which an appeal may be perfected, no reason other than failure to learn of the entry of judgment should ordinarily excuse a party from the requirement that the notice be timely filed. But the district court should have authority to permit the notice to be filed out of time in extraordinary cases where injustice would otherwise result.

Although the amended criminal rules allow the court to extend the time for noting an appeal *sua sponte* either before or after the time has expired,²¹² in civil cases, this power must be exercised before the

the Railway Labor Act, for which only ten days are provided. 44 Stat. 585 (1926), as amended, 45 U.S.C. § 159 (1964).

This author has noted elsewhere his belief that it would be of significant advantage to end these exceptions to an otherwise uniform rule. See generally Cohn 447-48. An express exception for interlocutory appeals under 28 U.S.C. § 1292(b) (1964), Fed. R. Civ. P. 73(a)(4), does not fall within this reasoning, for a statutory scheme has fostered much appellate court rulemaking to govern this matter. See generally Note, 54 Geo. L.J. 940 (1966). It is hoped that when appellate rules are adopted, differences between the courts of appeals' rules governing 1292(b) appeals can also be eliminated.

²⁰⁹ This provision of the old rule was based on 28 U.S.C. § 2107 (1964).

²¹⁰ *Wolfsohn v. Hankin*, 376 U.S. 203 (1964) (per curiam, 5-to-4 decision); *Thompson v. Immigration & Naturalization Serv.*, 375 U.S. 384 (1964) (5-to-4 decision); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) ("unique circumstances").

²¹¹ Although the amended rule thus widens the exception so as to include these extraordinary instances in which the Supreme Court sanctioned the grant of an extension, the author believes that the possible injustice prevented is purchased at too high a price. See generally Cohn 446-47.

It should be noted that the Advisory Committee's Note to the amended criminal rule contains no such limiting language. This difference may not have been intentional since we are dealing with two different advisory committees. But it would be justified if it were intentional, for there is less reason for a flexible rule in civil cases than in criminal cases. The necessity for ending litigation so that private persons may act on the judgment is not present in criminal cases.

²¹² New criminal rule 37(a)(2).

period for noting an appeal has expired. After this period, the rule remains that the time may be extended only on motion.²¹³

Perhaps the most startling change ends the opportunity in civil cases for one party to prevent other parties from taking cross appeals by filing his notice of appeal on the last permissible day. Meeting the time requirement is necessary to confer jurisdiction on the appellate court.²¹⁴ And unless the period for noting an appeal were extended for the narrowly circumscribed reasons under the old rule,²¹⁵ the noting of an appeal after the expiration of that time could not bestow jurisdiction to hear the case on the court of appeal.²¹⁶ An appellee may generally not attack an independent holding favorable to the appellant or seek to better his own position on appeal without having filed a cross appeal.²¹⁷ Thus, when one party waits until the last moment to appeal, or for some other reason the appellee does not learn of the appeal until the time has expired, the appellee may be precluded from seeking affirmative relief that he would otherwise desire on appeal.²¹⁸

²¹³ Advisory Committee's Note to new rule 73; FED. R. CIV. P. 6(b).

²¹⁴ WRIGHT, FEDERAL COURTS § 104, at 406 (1963).

²¹⁵ See note 210 *supra* and accompanying text.

²¹⁶ Spengler v. Hughes Tool Co., 169 F.2d 166, 167 (10th Cir. 1948); see Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215, 216 (1962); FDIC v. Congregation Poiley Tzedek, 159 F.2d 163, 166 (2d Cir. 1946).

²¹⁷ International Milling Co. v. Brown S.S. Co., 264 F.2d 803, 804 (2d Cir. 1959) (admiralty proceeding); see Guiberson Corp. v. Equipment Engineers Inc., 252 F.2d 431, 432 (5th Cir. 1958) (patent); WRIGHT, FEDERAL COURTS § 104, at 408 (1963).

He may, of course, defend the judgment on any ground, including one rejected by the district court. Jaffke v. Dunham, 352 U.S. 280, 281 (1957); Langnes v. Green, 282 U.S. 531, 538 (1931) (admiralty proceeding); United States v. American Ry. Express Co., 265 U.S. 425, 435 (1924).

²¹⁸ The Supreme Court now has pending before it a similar question involving its own jurisdiction. In the case of Florida E.C. Ry. v. United States, 348 F.2d 682 (5th Cir. 1965), *cert. granted*, 35 U.S.L. WEEK 3253-54 (U.S. Jan. 25, 1966) (Nos. 750, 782, 783), on the eighty-seventh day after the Fifth Circuit decided partially in favor of the United States and partially in favor of the railroad, the Government appealed to Mr. Justice Black for an extension of time in which to file a petition. (The time for filing a petition, ninety days, like the time for filing an appeal, is jurisdictional, Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923), but it may be extended upon application, 28 U.S.C. § 2101(c) (1964). Although the statute does not preclude it, previous reported motions have been within the time to petition.) The government's motion was granted. On the ninety-eighth day, after the expiration of the time to petition, the railroad requested that the order extending the time for the Government to petition be amended so as to include all other parties. On this application, Mr. Justice Black, on November 6, 1965, ruled: "Motion granted if within my

The amended rule 73(a)(3) permits "any other party"²¹⁹ to file an appeal of his own "within 14 days of the date on which the first notice of appeal was filed," if the first appellant files an appeal less than fourteen days from the end of the period for appeal.²²⁰ Thus, once an appeal is filed, all other parties are guaranteed fourteen days in which to learn of that fact²²¹ and file their own appeals if they so desire.²²²

Changes have been made relating to service of notice of appeal. This is still to be accomplished by the clerk of the district court; and in civil cases, the rule remains that the attorney of record for all parties other than the appellant (or a party if pro se) is to be served. But a change in 73(b) requires that the copy served reflect the date of filing. The Advisory Committee notes that this requirement is "for the convenience of counsel";²²³ this will serve to notify other parties of the time they have to appeal if the first appellant filed his appeal within fourteen days of the end of the normal or previously extended period.

Certain changes are made to the civil rules pertaining to security for costs. Rule 73(c) adds to the alternatives available for providing for costs on appeal. Besides the previously available supersedeas bond, appellant may file any "other undertaking which includes security" or "deposit other equivalent security" for costs. This

power to do so." In support of the Justice's power to so amend the order, counsel for the railroad argued that (1) the Court has in the past considered causes of appellees who had not filed cross-appeals, (2) the statute does not prohibit such amendment, (3) by granting an extension as to one party, the Court preserved its jurisdiction over all parties to the original action, and (4) judges have the inherent power to amend orders. Petitions filed by the government, the railroad, and the union were granted on January 24, 1966, and argument was had on April 20, 1966.

²¹⁹ Thus this right is not restricted to opposing parties. See Advisory Committee's Note to new rule 73.

²²⁰ As a statute prescribes the time to appeal, note 207 *supra*, it may be contended that this change is beyond the rulemaking power of the Supreme Court. However, since the enabling act permits the rules to override statutes on procedural matters, 28 U.S.C. § 2072 (1964), this author has argued that the change is valid. See generally Cohn 445-46.

²²¹ The clerk of the district court is directed by new rule 73(b) to mail a copy of the notice to counsel of all other parties.

²²² The Advisory Committee on Appellate Rules originally proposed a seven-day period. Advisory Comm. on Appellate Rules, *Preliminary Draft of Proposed Federal Rules*, 34 F.R.D. 263, 273 (1964).

²²³ Advisory Committee's Note to new rule 73.

change incorporates common admiralty practice. The amendment also adds a provision that no security will be required when the appellant is not subject to costs. Cases are thus covered in which the party is exempted from paying costs, not by law, but by rule of the particular appellate court. An addition to rule 73(d), consonant with amended rule 73(c), provides that no separate supersedeas bond is required when sufficient security has already been given in the district court. Again, this reflects the common practice in maritime proceedings.

The last changes of significance in civil rule 73 occur in section (g). Language is altered to make clearer the affirmative duty of appellant to see that the court of appeals received the record and that the appeal is docketed within the time permitted. This includes the payment of the docket fee if one is required. The limitation of forty days for the sending of the record and the docketing of the case is retained,²²⁴ but the flexibility allowed the district courts in granting extensions of this time is in one respect expanded and in others reduced. It is expanded in that the district court can now issue an order extending the time to docket after that time has expired if it is acting on a motion made before the time expired. But, if the district court acts *sua sponte*, it must act within the original forty-day period.²²⁵ Extension is restricted in that a motion for extension of time in which to docket must now show that the appellant's inability to file and docket in time "is due to causes beyond his control or to circumstances which may be deemed excusable neglect."²²⁶

²²⁴ It is unfortunate that the original recommendation of the Advisory Committee on Appellate Rules is not reflected at this point in the amended rules. That Committee recommended that the rule be altered to provide only that the record be "transmitted" rather than requiring it to be filed at the appellate court within the time period. Proposed Fed. R. Appellate P. 11(a). By this language, the Committee intended it to be sufficient that the record be sent to the appellate court by the end of forty days, rather than requiring it to leave the district court in time to travel to the appellate court and be filed there within forty days. Thus, district courts located substantial distances from their appellate courts (for example, Alaska to San Francisco) would not have been required to send the record substantially before the expiration of the time, and counsel would have known with certainty how long the record would be available for their use at the district court.

²²⁵ In this respect, the rule for extension of time to docket is more stringent than that pertaining to extension of time in which to file a notice of appeal. As was noted previously the latter time may be extended on motion made after the time has expired.

²²⁶ As this author has noted previously, Cohn 452, there is reason for retaining the present unlimited discretion to grant extensions in civil cases. Counsel frequently use

Civil rule 75 regulating the record on appeal has been completely rewritten due in large part to the fact that the old provisions are now obsolete.²²⁷ Sections (a) through (g) of the old rule provided for the forwarding to the court of appeals of certified copies of designated portions of the district court record, but the former 75(o) gave the courts of appeals the alternative of permitting the appeal to be heard on the original papers. Since every circuit chose the latter alternative, the first five subdivisions have been stricken from the rule. In their stead, new rule 75(a) provides that the record on appeal shall consist of the original papers and exhibits filed in the district court, the transcript of the proceedings, if any, and the district court docket entries.

Reinforced by sections (e) and (f), new rule 75(a) provides that, on stipulation of the parties or by order of the district court, all or a part of the record need not be sent to the appellate court thus making it available for use by the district court or for preparation of the appellate briefs. These records shall still be considered part of the record on appeal and are subject to transmittal at the order of the appellate court. Each party also has the right to request the transmittal of designated portions of the record at any time.

This is a salutary provision. Since some district courts are hundreds and even thousands of miles from their appellate courts, the record would be unavailable to counsel for preparation if the original papers were sent to the appellate court. For this reason the geographically large Eighth Circuit has permitted the record to stay in the district court. It is unfortunate, however, that the amended rule requires an order which must be entered in every case, rather than permitting a district court far removed from the seat of the appellate court to accomplish the same result in a singular manner by general rule of court.

To reduce the necessity for extensions of time in which to file the record and docket the appeal, the Committee adopted in 75(b) the

much of the ninety-day period (the maximum extension a judge can order) to resolve the question of whether the appeal will be pursued. Often bearing on this question is the possibility of settlement without appeal. Although the necessity of docketing and paying the requisite fee may force some litigation to end at an earlier date, restricting the grant of extension motions may well cause an increase in the transmittal of records in cases for which appeals will never be prosecuted.

²²⁷ Advisory Committee's Note to new rule 75; WRIGHT, FEDERAL COURTS § 104, at 408 (1963).

Fifth Circuit requirement²²⁸ that the appellant, if he requires the transcript for appeal, must order it within ten days of noting the appeal. If he does not order the whole transcript, he must serve on the appellee a designation of that portion which he has ordered and a statement of the issues he intends to raise on appeal. If the appellant intends to argue that the decision of the district court is unsupported by the evidence, he is required to order a transcript containing all evidence relevant to that finding. The appellee is given the right to cross-designate additional portions of the transcript he deems to be necessary within ten days. Provision is also made that, should the transcript not be available or should there be no report of the evidence, the appellant may prepare a statement of the evidence from whatever sources he has at hand, subject to settlement of disagreements by the district court.

The Advisory Committee's Note makes clear the intent that the statement of issues to be raised on appeal, required by 75 (b) when a partial designation of the transcript is made, is not to be deemed the equivalent of the once required but now obsolete assignment of errors; nor are the issues on appeal limited to those set forth in the statement.²²⁹

Other provisions of new rule 75 provide for the simplified correction or modification of the record, the treatment of bulky documents and physical exhibits, the transmittal of a partial record needed for a preliminary hearing, and the return of the record to the district court after the appeal has been disposed of.

Thus the provisions of the civil rules have been revised so as to bring the rules concerning the district court portion of appellate practice into conformity with present practice and to solve several problems that have developed under the old rules.

These amendments are not a substitute for uniform rules of appellate procedure; they neither purport nor have the authority to affect procedure within the appellate courts themselves. The solution of problems raised by the always diverse, sometimes anachronistic, and often expensive practice of the appellate courts remains for another day.

²²⁸ 5TH CIR. R. 23(3).

²²⁹ As previously noted by this author, this situation raises a question of costs. See generally Cohn 451 n.116.