

## Federal Rules of Civil Procedure Interpreted

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# FEDERAL RULES OF CIVIL PROCEDURE INTERPRETED

CARL C. WHEATON

As this is written, the new Federal Rules of Civil Procedure have been in effect for nearly a year. It should be of some interest and value, therefore, to have available an interpretation of these rules as it is discovered in the cases and legal journals.

An earnest effort has been made to present a complete, accurate review of this material, including reasoning when that is found. Occasionally, the writer has expressed his own opinion in instances of conflict of ideas or when a single line of authority seems incorrect.

## RULES GENERALLY

As might be expected, there has been a large number of articles on the rules generally.<sup>1</sup> Sometimes they have attempted a comparison of local procedure with the new rules. They do not cite many authorities, yet they have been of some value in giving lawyers a general idea of what they should do procedurally. They serve a useful purpose prior to the availability of judicial interpretations.

Now, what have the courts told us about the rules generally? They have said a number of things. As was stated in the authorizing statute, the rules do not change the substantive law.<sup>2</sup> But, where effective, they have the same authority as a statute and they are as binding upon the court as upon counsel.<sup>3</sup> They govern proceedings in all actions of a civil nature in the courts in which they are applicable, if such actions are not expressly exempted.<sup>4</sup>

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<sup>1</sup>Clark, *Fundamental Changes Effected by the New Federal Rules* (1939) 15 TENN. L. REV. 551; Dezen Dorf, *The New Federal Rules of Procedure* (1938) 18 ORE. L. REV. 26; Dobie, *Federal Rules of Civil Procedure* (1939) 25 VA. L. REV. 261; Edmunds, *New Federal Rules of Civil Procedure* (1938) 4 JOHN MARSHALL L. Q. 291; Flory and McMahan, *The New Federal Rules and Louisiana Practice* (1938) 1 LA. L. REV. 45; Gavit, *The New Federal Rules and State Procedure* (1939) 25 A. B. A. J. 367; Gilliom and Cole, *The Rules of Civil Procedure in the United States District Courts* (1938) 14 IND. L. J. 149; Hutcheson, *The New Federal Rules of Civil Procedure* (1938) 13 WASH. L. REV. 198, 305; O'Mara, *New Rules of Civil Procedure* (1938) NEW JERSEY S. B. A. 130; Parker, *Handling a Case under the New Federal Rules* (1938) 24 A. B. A. J. 793; Rotwein, *Pleading and Practice under the New Federal Rules—a Survey and Comparison* (1938) 8 BROOKLYN L. REV. 188; Russell, *New Federal Court Rules* (1939) 62 NEW JERSEY L. J. 77; Silverstein, *Federal Rules of Civil Procedure—Conformity in Reverse* (1938) COLO. B. A. 114; Slaymaker, *The Rules for Civil Procedure in the United States District Courts: Appellate Procedure* (1939) 14 IND. L. J. 245; Sunderland, *The New Federal Rules* (1938) 45 W. VA. L. Q. 5. Report of Cincinnati Conference on the New Federal Rules of Civil Procedure as Related to Judicial Procedure in Ohio (1939) 13 U. OF CIN. L. REV. 1. See also Nesbit, *New Federal Rules of Civil Procedure and Defense of Tort Actions Covered by Casualty Insurance* (1939) 25 A. B. A. J. 348; Hughes and Kaftan, *Pleading and Pre-trial Practice* (1938) 13 WIS. L. REV. 517.

<sup>2</sup>Lloyd Moore, Inc. v. Schwartz, 26 F. Supp. 188 (E. D. Pa. 1938).

<sup>3</sup>Barrezueta v. Sword S. S. Line, 27 F. Supp. 935 (S. D. N. Y. 1939).

<sup>4</sup>Martin v. Manufacturers Aircraft Ass'n, Inc., — F. Supp. — (S. D. N. Y. 1939); Moon v. Pacific Mut. Life Ins. Co., 28 F. Supp. 199 (S. D. W. Va. 1939).

The purposes of the rules have been expressed variously. Thus, it is said that the primary purpose of the new rules is, by the simplification of procedure, the expedition of the business in the courts, the elimination of unnecessary expense, and other improved methods, to make the courts more useful instruments for the purposes for which they were created and exist.<sup>5</sup> Somewhat similar ideas are that the purpose of the rules is to secure a just, speedy, and inexpensive determination of every action;<sup>6</sup> to expedite justice and to go directly to the matter under inquiry;<sup>7</sup> to reach decisions on the merits without unreasonable delay, rather than to have dismissals on technicalities;<sup>8</sup> to do substantial justice rather than to decide cases upon technicalities;<sup>9</sup> to obtain simplicity and flexibility, with not too much detail. They should be construed as avenues of justice and not as dead-end streets without direction or purpose.<sup>10</sup> They are designed to enable the disposition of a whole controversy at one time and in one action, provided all parties can be brought before the court and the matter decided without prejudicing the rights of any of the parties.<sup>11</sup>

Probably, because of these basic purposes and to carry them out, the rules require a liberal interpretation,<sup>12</sup> and the courts retain the power to administer the rules in a manner fair to both parties.<sup>13</sup>

#### RULE 1. SCOPE OF RULES

The rules govern procedure in federal District Courts in all pending actions of a civil nature, unless such proceedings are excepted by the rules.<sup>14</sup> They have now been made applicable to the District Court of the United States for Hawaii and to appeals therefrom.<sup>15</sup>

#### RULE 2. ONE FORM OF ACTION

The distinctions between actions at law and in equity have been abolished.<sup>16</sup> Therefore, the question whether an action should have been brought in law

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<sup>5</sup>Wheeler v. Lientz, 25 F. Supp. 939 (W. D. Mo. 1939).

<sup>6</sup>Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co., etc., 25 F. Supp. 598 (D. Del. 1938); Michels v. Ripley, 26 F. Supp. 959 (S. D. N. Y. 1939); Thomas v. Goldstone, 27 F. Supp. 297 (S. D. N. Y. 1939).

<sup>7</sup>Fall Corp. v. Yount-Lee Oil Co., 24 F. Supp. 765 (E. D. Tex. 1938).

<sup>8</sup>Moore v. Ill. Cent. R. Co., 24 F. Supp. 731 (S. D. Miss. 1938).

<sup>9</sup>Walsh v. Conn. Mut. Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939).

<sup>10</sup>Laverett v. Continental Briar Pipe Co., 25 F. Supp. 80 (E. D. N. Y. 1938). See also Bobrecker v. Denebeim, 25 F. Supp. 208 (W. D. Mo. 1938).

<sup>11</sup>U. S. for the benefit of Foster Wheeler Corp. v. American Surety Co., 25 F. Supp. 700 (E. D. N. Y. 1938).

<sup>12</sup>U. S. v. C. M. Lane Lifeboat Co., 25 F. Supp. 410 (E. D. N. Y. 1938); Thompson v. Oil Refineries, Inc., 27 F. Supp. 123 (W. D. La. 1939).

<sup>13</sup>Babcock & Wilcox Co. v. N. C. Pulp Co., 25 F. Supp. 596 (D. Del. 1938).

<sup>14</sup>Martin v. Manufacturers Aircraft Ass'n, Inc., *supra* note 4. For a case in which the rules were, improperly, not applied, though it was begun after the rules became effective, see Dranoff v. Ry. Express Agency, 28 F. Supp. 325 (E. D. Pa. 1939).

<sup>15</sup>Public Laws No. 133, 76th Congress 1st Session.

<sup>16</sup>Frissell v. Rateau Drug Store, Inc., 28 F. Supp. 816 (W. D. La. 1939).

or equity no longer applies.<sup>17</sup> Another way of putting this is that one may sue in a federal court without determining whether the plaintiff had, or had not, an adequate remedy at law.<sup>18</sup> For this same reason one is denied relief only when he is entitled to none under the facts proved, for his right to recover is not based on his allegations, or theory of damages, but on the facts shown in the record.<sup>19</sup>

On the other hand, the abolition of forms of action does not abrogate the statutes of limitations applicable to the several forms of actions theretofore existing.<sup>20</sup> Hence, if a statute of limitation depends on state law and that law refers to a form of action as determinative of the period of limitation, it is still necessary to determine what sort of case the pleader is presenting.<sup>21</sup>

### RULE 3. COMMENCEMENT OF ACTION

Rule 3 supplants Title 28 U. S. C. § 762 relating to the commencement of actions against the United States.<sup>22</sup>

Until a complaint has been filed no action has been commenced.<sup>23</sup> However, the filing of the complaint with the court tolls the statute of limitations, irrespective of the fact that the period of limitation expired before service of summons and complaint on defendant, for an action is commenced by filing the complaint. The language of Rule 3 is too plain to admit of discussion or to leave any doubt as to this.<sup>24</sup> A commentator has said he thinks the filing of a complaint *conditionally* suspends the running of a statute of limitations, provided the summons is issued forthwith and served within a reasonable time thereafter.<sup>25</sup>

### RULE 4. PROCESS

#### (a) Summons; Issuance.

In the absence of an express direction to the contrary, the filing of a petition amounts to an order to the clerk to issue a process in the cause.<sup>26</sup>

#### (c) Same: By whom served.

The attorney for one of the parties should not be designated to make

<sup>17</sup>Catanzaritti v. Bianco, 25 F. Supp. 457 (M. D. Pa. 1938).

<sup>18</sup>Thermex Co. v. Lawson, 25 F. Supp. 414 (E. D. Ill. 1938); Catanzaritti v. Bianco, *supra* note 17; Berger v. McHugh, 26 F. Supp. 107 (M. D. Pa. 1939); Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., 28 F. Supp. 645 (W. D. Pa. 1939).

<sup>19</sup>Nester v. Western Union Telegraph Co., 25 F. Supp. 478 (S. D. Cal. 1938).

<sup>20</sup>Williamson v. Columbia Gas Electric Corp., 27 F. Supp. 198 (D. Del. 1939).

<sup>21</sup>City of El Paso v. West, 104 F. (2d) 96 (C. C. A. 5th 1939).

<sup>22</sup>U. S. for the benefit of Foster Wheeler Corp. v. American Surety Co., *supra* note 11.

<sup>23</sup>C. F. Simonin's Sons, Inc. v. American Can Co., 26 F. Supp. 420 (E. D. Pa. 1939).

<sup>24</sup>Gallagher v. Carroll, 27 F. Supp. 568 (E. D. N. Y. 1939).

<sup>25</sup>Rotwein, *Pleading and Practice under the New Federal Rules* (1939) 73 U. S. L. REV. 21.

<sup>26</sup>Johnson v. Mo. Pac. Transp. Co., 25 F. Supp. 692 (E. D. Mo. 1938).

service of process in an action, for he stands in the same relationship as a party.<sup>27</sup>

Rule 4 (c) provides for service by some person appointed by the court, hence the appointment must be of *one person*, not of a sheriff or any of his deputies.<sup>28</sup>

A request for an order specially appointing the Sheriff of Clark County, State of Washington, for the purpose of serving *process* pursuant to Rule 4 (c), was denied and the appointment was limited, upon institution of suit, to such appointment for the purpose of serving the *summons*.<sup>29</sup>

(d) Same: Personal Service.

(1) Upon Individual Other Than Infant.

In an action against the operator of an automobile, when the state statute in the district where the alleged injury occurred provides that service may be made on the Secretary of State of such state, service may be so made, for, by driving on the public highway, the defendant has done that which is equivalent to an express appointment of the Secretary of State as the defendant's agent to receive the service.<sup>30</sup>

(3) Upon a Corporation or an Unincorporated Association Subject to Suit Under a Common Name.

Service, under this portion of Rule 4, must be made upon an agent or officer of the defendant.<sup>31</sup> But it is proper if effected upon any agent who is so integrated with the defendant as to make it *a priori* supposable that he will realize his responsibilities and what he should do with any legal papers served on him.<sup>32</sup>

Service of a summons and complaint upon a foreign corporation by delivering a copy thereof to an officer of the corporation is not effective unless the corporation is doing business within the state.<sup>33</sup> But, if it is so doing business, it is subject to service of process in a foreign state, though its business is wholly interstate.<sup>34</sup>

A foreign corporation maintaining an office in the Eastern Division of the Northern District of Illinois, inserting its name and address in telephone directories, displaying its wares, and placing a sign on a window that a named individual was its district manager was "doing business" in the district and was subject to service of process therein; whereas, merely sending solicitors

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<sup>27</sup>*In re Evanishyn, Alleged Bankrupt*, — F. Supp. — (S. D. N. Y. 1939).

<sup>28</sup>*Modric v. Ore. and N. W. R. R. Co.*, 25 F. Supp. 79 (D. Ore. 1938).

<sup>29</sup>*Schuldt v. Schumann*, 26 F. Supp. 358 (W. D. Wash. 1939).

<sup>30</sup>*Clancy v. Balacier*, 27 F. Supp. 867 (S. D. N. Y. 1939).

<sup>31</sup>*National Ass'n of Industrial Ins. Agents v. C. I. O.*, 25 F. Supp. 540 (D. C. 1938).

<sup>32</sup>*Cohen v. Physical Culture Shoe Co.*, 28 F. Supp. 679 (S. D. N. Y. 1938).

<sup>33</sup>*Pioneer Utilities Corp. v. Scott-Newcomb, Inc.*, 26 F. Supp. 616 (E. D. N. Y. 1939); *Hedrick v. Canadian Pacific Ry. Co.*, 28 F. Supp. 257 (S. D. Ohio 1939).

<sup>34</sup>*Elgin Laboratories v. Utility Mfg. Co.*, 26 F. Supp. 918 (N. D. Ill. 1939).

into a state, who may do nothing but solicit orders, is not "doing business" in such state, as respects service of process.<sup>35</sup>

Service of process on the managing agent of an alien corporation was sufficient where the return of service recited that no president, vice president, treasurer, assistant treasurer, secretary, assistant secretary, or any other officers, performing corresponding functions of the alien corporation could be found with due diligence within the state where the action was brought.<sup>36</sup> Service thereof on an agent of a foreign corporation who is denominated by the defendant as its "general manager", for purposes of business negotiations, is valid service on the corporation, even though the latter claims that the person served was in fact only "a sales representative".<sup>37</sup>

Again, service of a summons and complaint on a Secretary of State was service on a foreign corporation's agent authorized by law to receive service of process.<sup>38</sup>

(4) Upon the United States.

Rule 4 (d) (4) relating to service *upon* the United States supplants the provisions of the Tucker Act (Sections 5 and 6 of the Act of March 3, 1887, 24 STAT. 506; U. S. C., Title 28, § 763).<sup>39</sup>

(5) Upon an Officer or Agency of the United States.

In a suit against a federal officer, personal service on him is required. This includes delivery of a copy of the summons and complaint to him.<sup>40</sup>

(7) Additional Method of Service on Classes Referred to in Paragraphs 1 and 3.

Service on nonresidents made in the manner provided by statutes of the state in which they were sued in federal District Courts in personal injury actions has been held sufficient.<sup>41</sup> But the fact that a state statute permits an action to be begun by attachment, does not result in that procedure being countenanced in federal courts, for there an attachment is considered only an incident to a suit.<sup>42</sup>

(f) Territorial Limits of Effective Service.

In an action for personal injuries resulting from an automobile accident, service of process on a non-resident defendant by serving the state commissioner of motor vehicles under a state statute is valid, even though the latter resided in another judicial district of the state, for Rule 4 (f) allows process such as this to run any place in the state in which a District Court sits.<sup>43</sup>

<sup>35</sup>*Ibid.*

<sup>36</sup>*Brown v. Canadian Pac. Ry. Co.*, 25 F. Supp. 566 (W. D. N. Y. 1938).

<sup>37</sup>*Cohen v. Physical Culture Shoe Co.*, *supra* note 32.

<sup>38</sup>*Clancy v. Balacier*, *supra* note 30.

<sup>39</sup>U. S. for the benefit of *Foster Wheeler Corp. v. American Surety Co.*, *supra* note 11.

<sup>40</sup>*Mass. Farmers Defense Committee v. U. S.*, 26 F. Supp. 941 (D. Mass. 1939).

<sup>41</sup>See *supra* note 30; *Devier v. George Cole Motor Co.*, 27 F. Supp. 978 (W. D. Va. 1939).

<sup>42</sup>*Rorick v. Devon Syndicate*, 100 F. (2d) 844 (C. C. A. 6th 1939).

<sup>43</sup>*Devier v. George Cole Motor Co.*, *supra* note 41.

However, process may not be served outside of the state in which the action is pending, unless there is a special provision for that.<sup>44</sup>

RULE 5. SERVICE AND FILING OF PLEADINGS SUBSEQUENT TO COMPLAINT AND OF OTHER PAPERS

(a) Service: When Required.

If an amendment asserts a new cause of action, the defendant has a right to demand service of such amended complaint, for Rule 5 (a) provides that every pleading subsequent to the original complaint shall be served on the parties effected thereby, with exceptions relating to numerous defendants and persons in default.<sup>45</sup>

(b) Same: How Made.

A civil contempt proceeding to enforce a judgment is a continuation of the earlier action and hence may be instituted by motion served on attorneys of record.<sup>46</sup>

RULE 6. TIME

(b) Enlargement.

Under Rule 6 (b) it is discretionary with the judge whether or not he will enlarge the time to do an act after the original time to do it has expired.<sup>47</sup>

An order that all proceedings in an action should be stayed during the disposition of an order to show cause why service of summons as to the second of two causes of action was effective to extend the time to answer, even though the ordinary time to answer may have expired. Rule 6 (b) permits such an extension.<sup>47a</sup>

Efforts to file a demand for a jury trial later than ten days after service of the last pleading may be regarded as an application under Rule 6 (b) for leave to enlarge such period and should be granted if it appears that the failure to demand a jury was excusable.<sup>48</sup>

A motion to review the taxing of costs by the clerk under Rule 54 (b) was filed one day after the expiration of the specified period. Since no motion for enlargement of time had been requested under Rule 6 (b), the motion was dismissed.<sup>49</sup>

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<sup>44</sup>*F. & M. Skirt Co. v. A. Wimpfheimer & Bros. Inc.*, 27 F. Supp. 239 (D. Mass. 1939).

<sup>45</sup>*Utility Mfg. Co. v. Elgin Laboratories*, — F. Supp. — (S. D. N. Y. 1939).

<sup>46</sup>*National Labor Relations Board v. Hopwood Retinning Co.*, 104 F. (2d) 302 (C. C. A. 2d 1939).

<sup>47</sup>*Alfred Hofmann, Inc. v. Textile Machine Works*, 27 F. Supp. 431 (E. D. Pa. 1939).

<sup>47a</sup>*Kohloff v. Ford Motor Co.*, 27 F. Supp. 803 (S. D. N. Y. 1939).

<sup>48</sup>*Buggeln & Smith Inc. v. Standard Brands Inc.*, 27 F. Supp. 399 (S. D. N. Y. 1939). Also see, to the same general effect, *Rogers v. Montgomery Ward & Co.*, 26 F. Supp. 707 (S. D. N. Y. 1939), and *Isberg v. Schulz*, — F. Supp. — (W. D. Wash. 1939).

<sup>49</sup>*U. S. v. One Ford Coupe*, 26 F. Supp. 598 (M. D. Pa. 1939).

## RULE 7. PLEADINGS ALLOWED: FORM OF MOTIONS

## (a) Pleadings.

The contents, not the name given to it, determines the nature of a pleading.<sup>50</sup>

A bill in equity for an injunction filed after the effective date of the Federal Rules of Civil Procedure will be considered a complaint in a civil action.<sup>51</sup>

No reply is required to an answer, except to a counterclaim denominated as such, or when a reply is ordered by the court.<sup>52</sup>

## (b) Motions.

An application for an order shall be by motion made in writing, unless made during a hearing or trial. An oral argument on a motion previously made is not the "hearing" at which the necessity for reducing motions to writing may be obviated. Motions made at a hearing are obviously such as are incidental to the hearing itself, such as motions to exclude evidence, or for a directed verdict, or for a mistrial, *etc.* In other words, they are such motions as are recorded in the minutes of the trial or hearing, and it is for that reason that the motion need not be reduced to writing and notice thereof given. Therefore, a motion to dismiss may not be made orally, during argument on another motion.<sup>53</sup>

A motion, in which the requested relief is so interwoven and so indefinitely phrased that its purpose is confusing, constitutes failure to proceed in accordance with the rules, and should be denied without prejudice.<sup>54</sup>

If a third party defendant is brought in by an *ex parte* order, the better practice for contesting the sufficiency of the third party complaint is by a motion to vacate the order granting leave to file it and to strike the complaint, rather than by a motion to dismiss the third party complaint. A motion to dismiss the complaint was, however, treated as a motion to vacate it.<sup>55</sup>

## (c). Demurrers, Pleas, and Exceptions for Insufficiency Abolished.

Demurrers filed since the new rules became effective have received various treatments. They have been stricken,<sup>56</sup> treated as motions to dismiss,<sup>57</sup> as motions for a judgment on the pleadings,<sup>58</sup> and as motions for a more definite statement.<sup>59</sup>

<sup>50</sup>Baker v. Sisk, — F. Supp. — (D. Okla. 1938).

<sup>51</sup>Fried v. Warner Bros. Circuit Management Corp., 26 F. Supp. 603 (E. D. Pa. 1939).

<sup>52</sup>Central Trust Co. v. Second National Bank, — F. Supp. — (W. D. Pa. 1939).

<sup>53</sup>Hammond-Knowlton v. Hartford Connecticut Trust Co., 26 F. Supp. 292 (D. Conn. 1939).

<sup>54</sup>Barrezueta v. Sword S. S. Line, *supra* note 3.

<sup>55</sup>Crim v. Lumbermens Mut. Casualty Co., 26 F. Supp. 715 (D. C. 1939).

<sup>56</sup>N. Y. Life Ins. Co. v. Coldiron, — F. Supp. — (W. D. Wash. 1938).

<sup>57</sup>Ashman v. Coleman, 25 F. Supp. 388 (W. D. Pa. 1938); Lewis v. U. S., 27 F. Supp. 894 (E. D. Tenn. 1938); Sullivan v. U. S., 26 F. Supp. 876 (E. D. Ky. 1937); Gay v. E. H. Moore, Inc., 26 F. Supp. 749 (E. D. Okla. 1939); U. S. v. Smith, 28 F. Supp. 726 (E. D. Pa. 1939); Murphy v. Puget Sound Mtg. Co., — F. Supp. — (W. D. Wash. 1939).

<sup>58</sup>Equitable Life Assur. Society v. Kit, 26 F. Supp. 880 (E. D. Pa. 1939).

<sup>59</sup>Shell Petroleum Corp. v. Stueve, 25 F. Supp. 879 (D. Minn. 1938).



## RULE 8. GENERAL RULES OF PLEADING

## (a) Claims for Relief Generally.

A pleading shall contain, first, a short and plain statement of the grounds upon which the court's jurisdiction depends; second, a short and plain statement of the claim; and, third, a demand for judgment.<sup>60</sup>

## (1) Statement of Jurisdiction.

The jurisdictional amount is sufficiently alleged if Form 2 in the Appendix of Forms is followed.<sup>60a</sup>

An allegation that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000 sufficiently alleges jurisdiction.<sup>61</sup> But an averment that the amount in controversy is more than \$3,000 is an insufficient allegation of jurisdictional amount unless supported by other allegations of definite and concrete facts, for such a statement is only a conclusion.<sup>62</sup>

An allegation in a complaint that "The plaintiff is an individual, and a citizen of the United States, and a citizen of the State of Ohio, and is domiciled in the State of Ohio" was a sufficient allegation of citizenship to support jurisdiction on the ground of diversity of citizenship.<sup>63</sup>

## (2) Statement of Claim.

One suing must comply with the provision of Rule 8 (a) (2) that a pleading must contain a short, simple, and plain statement of his claim.<sup>64</sup> A statement of claim should be self-sustaining and sufficiently definite to enable the court to make the necessary calculations for which judgment could be entered in the event that the affidavit of defense subsequently filed would be held to be insufficient.<sup>65</sup>

While the practice to which the attorneys are accustomed will have weight with the court and will not be disregarded without cause, the court must require that not only the text of the Rules be observed but also the spirit.<sup>66</sup>

This rule requires a statement of facts and follows the usual code provisions in various states, but ultimate facts need not be pleaded.<sup>67</sup> However, it has been said that allegations in a complaint based on conclusions rather than facts are sufficient.<sup>68</sup> The writer believes it will be most unfortunate if the courts interpret the new rule as limiting the vehicles which one may use

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<sup>60</sup>Securities and Exchange Comm. v. Timetrust, Inc., 28 F. Supp. 34 (N. D. Cal. 1939).

<sup>60a</sup>Conn. Gen. Life Ins. Co. v. Cohen, 27 F. Supp. 735 (E. D. N. Y. 1939).

<sup>61</sup>*Ibid.*

<sup>62</sup>Martin v. Moery, — F. Supp. — (E. D. Ill. 1939); Moreschi v. Mosteller, 28 F. Supp. 613 (W. D. Pa. 1939). Cf. Sun Oil Co. v. Pfeiffer, — F. Supp. — (W. D. Okla. 1939). Such statement is sufficient on motion to dismiss, since, on such motion, the allegations are admitted.

<sup>63</sup>Watters v. Ralston Coal Co., 25 F. Supp. 387 (M. D. Pa. 1938).

<sup>64</sup>Shell Petroleum Co. v. Stueve, *supra* note 59.

<sup>65</sup>Miller Co. v. Hyman, 28 F. Supp. 312 (E. D. Pa. 1939).

<sup>66</sup>Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302 (D. Ore. 1939).

<sup>67</sup>Shultz v. Manufacturers & Traders Trust Co., — F. Supp. — (W. D. N. Y. 1939).

<sup>68</sup>Macleod v. Cohen-Erichs Corp., 28 F. Supp. 93 (S. D. N. Y. 1939).

to state causes of action or defenses. Facts, both final and evidentiary, and legal statements should be available for the task.

Numerous cases have been decided since these rules were adopted dealing with the sufficiency of particular combinations of allegations.

A complaint, in an action on a contract, which alleges the contract, performance by plaintiff and failure to perform on the part of defendant, is good as against a motion to dismiss for insufficiency.<sup>69</sup>

In an action on a contract of employment, a complaint which states the date of the contract, the terms thereof, the amount of compensation to be paid, that the services to be rendered had been performed and that there is money due under the contract, states facts sufficient to constitute a cause of action.<sup>70</sup>

The complaint in an action on an implied contract, was dismissed as insufficient for it did not state facts to support the conclusion of an implied promise to pay, and, therefore, did not contain a statement showing that the plaintiff was entitled to relief.<sup>71</sup>

In a complaint for negligence, a mere general charge of negligence is sufficient, without specification, as indicated by Rule 8 (a) and Form 9 in the Appendix to the Federal Rules of Civil Procedure, and, apparently, anything further than this in a pleading should be stricken.<sup>72</sup>

In an action against the manufacturer of dynamite caps to recover for personal injuries resulting from the explosion of one of the caps during the process of crimping it, the plaintiff alleged the negligent manufacture and distribution of the cap in such a fashion as to make it explode when crimped. The Circuit Court of Appeals, in reversing the order dismissing the complaint for failure to set forth any specific act of negligence, held that the plaintiff need not plead evidence, and approved Form 9 in the Appendix to the Rules.<sup>73</sup>

The new rules have not diminished the allegations necessary to support a claim to set aside a fraudulent conveyance.<sup>74</sup> In an action relating to fraud the mere allegations "conspired" and committed "fraudulent acts" are insufficient.<sup>75</sup>

In a copyright suit, Form 17 was approved, an allegation of ownership, registration of a label, and an infringement of the copyright was held to state a cause of action.<sup>76</sup> In an action to enjoin violation of the Securities Act of 1933, a complaint charging violation of the Act in the language of the statute,

<sup>69</sup>Kraus v. General Motors Corp., 27 F. Supp. 537 (S. D. N. Y. 1939).

<sup>70</sup>Neumann v. Faultless Clothing Co., 27 F. Supp. 810 (S. D. N. Y. 1939).

<sup>71</sup>Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Cal. 1938).

<sup>72</sup>Hardin v. Interstate Motor Freight System, Inc., 26 F. Supp. 97 (S. D. Ohio, 1939).

<sup>73</sup>Sierocinski v. E. I. DuPont DeNemours Co., 103 F. (2d) 843 (C. C. A. 3rd 1939).

<sup>74</sup>Iroquois Oil & Gas Co. v. Hollingsworth, — F. Supp. — (E. D. Ill. 1939).

<sup>75</sup>Shultz v. Manufacturers & Traders Trust Co., *supra* note 67.

<sup>76</sup>Bobreck v. Denebeim, *supra* note 10.

and alleging the details of the plan to defraud is sufficient as a pleading, for it apprises the defendant of the charge against it.<sup>77</sup>

(3) Demand for Judgment.

Although the plaintiff may not be able to prove special damages pleaded by him, he may, nevertheless, recover the sum to which he is entitled under the facts alleged and proved. An allegation of damages in the complaint, while essential, is not the cause of action. Recovery is based, not on allegation of damages or the plaintiff's theory of damages, but on the basis of the facts as to damages shown in the record.<sup>78</sup> Relief in the alternative or of several different types may be demanded.<sup>79</sup>

(b) Defenses; Form of Denial.

Averments in an answer that the defendant is without information sufficient to form a belief as to the truth of certain allegations in the complaint will be given the effect of a denial and should not be stricken out, even if the facts are seemingly within his knowledge.<sup>80</sup> The court is not bound, under this rule, to accept statements in defenses which are, to the common knowledge of all intelligent persons, untrue.<sup>81</sup>

(c) Affirmative Defenses.

In federal courts the plaintiff need not negative or disprove contributory negligence in a personal injury case.<sup>82</sup> The provision of Rule 8 (c) that a party shall plead contributory negligence as an affirmative defense has been held not applicable to a personal injury action in a federal court located in a state the laws of which require the plaintiff, in such actions, to allege and prove freedom from contributory negligence, for the state law deals with substantive, not procedural, law. Rule 8 (c) can only apply in jurisdictions where contributory negligence is a defense, for the Supreme Court has no authority, under Title 28 U. S. C. § 723b, authorizing these rules, to change substantive rights of parties.<sup>83</sup> On the other hand, one writer, at least, has doubted the soundness of this conclusion. One can argue that the federal rules can deal only with substantive matters, but the Supreme Court, in promulgating these rules and in deciding *Erie R. Co. v. Tompkins* as it did, intended to hold that Rule 8 (c) referred to procedural matters. Usually, when the question of pleading and proving contributory negligence arises in a case where the laws of different states are involved, the matter is treated as procedural. Federal courts should approach the question from this viewpoint.<sup>84</sup>

<sup>77</sup>Securities and Exchange Commission v. Timetrust, Inc., *supra* note 60.

<sup>78</sup>Nester v. Western Union Telegraph Co., *supra* note 19. *Accord*, in principle, Gay v. Moore, *supra* note 57.

<sup>79</sup>Catanzaritti v. Bianco, *supra* note 17.

<sup>80</sup>Nordman v. City of Johnson City, — F. Supp. — (E. D. Ill. 1939).

<sup>81</sup>Nieman v. Soltis, 24 F. Supp. 1014 (E. D. Pa. 1938).

<sup>82</sup>Sierocinski v. DuPont De Nemours & Co., 25 F. Supp. 706 (E. D. Pa. 1938).

<sup>83</sup>Francis v. Humphrey, 25 F. Supp. 1 (E. D. Ill. 1938).

<sup>84</sup>Note (1939) 6 U. OF CHI. L. REV. 510.

The defense of the Statute of Frauds should be pleaded as an affirmative defense and may not be raised by a motion to dismiss for insufficiency.<sup>85</sup> The defenses of laches and statute of limitations may not be asserted by motion to dismiss, but should be set forth affirmatively in the answer.<sup>86</sup> But a motion to dismiss for failure to state a claim which raises the issue of the statute may be treated as an answer, though it is designated a motion to dismiss.<sup>87</sup> The defense of *res adjudicata* may not be asserted by motion to dismiss, but should be set forth affirmatively in the answer, if the prior adjudication is not disclosed by the complaint.<sup>88</sup> Misjoinder of parties plaintiff is not a defense, as it is not a ground for dismissal, hence it may not be pleaded in the answer.<sup>89</sup>

(d) Effect of Failure to Deny.

Averments of pleas stand as admitted when not denied after the reversal of a judgment sustaining demurrers to the pleas.<sup>90</sup>

(e) Pleading to be Concise and Direct: Consistency.

(1) Concise and Direct.

It is required that pleadings shall be simple, concise, and direct. A pleading is neither simple, concise, nor direct, and, for that reason, must be stricken, if it contains many allegations which are merely evidence of the essential facts and if inconsistent allegations are not properly separated.<sup>91</sup> It has even been said that a pleading containing evidence is improper, for it is not then a simple, concise, and direct statement.<sup>92</sup> And redundant pleadings do not comply with this rule.<sup>92a</sup>

(2) Consistency.

A claim in the nature of ejectment and one to impress a trust may be joined alternatively though they are inconsistent, for one may set forth two or more statements of claim alternately or hypothetically and he may state as many separate claims as he has, though they are inconsistent and though they are based on legal or equitable grounds or both.<sup>93</sup> A somewhat similar statement is that one may state his case as extensively as he wishes and is not confined

<sup>85</sup>*Piest v. Tide Water Oil Co.*, 26 F. Supp. 295 (S. D. N. Y. 1938).

<sup>86</sup>*Holmberg v. Hannaford*, 28 F. Supp. 216 (S. D. Ohio 1939); *Baker v. Sisk*, *supra* note 50 (as to the statute of limitations).

<sup>87</sup>*Baker v. Sisk*, *supra* note 50.

<sup>88</sup>*Holmberg v. Hannaford*, *supra* note 86.

<sup>89</sup>*Macleod v. Cohen-Erichs Corp.*, *supra* note 68.

<sup>90</sup>*South Florida Securities Inc. v. Seward*, 103 F. (2d) 872 (C. C. A. 5th 1939).

<sup>91</sup>*Catanzaritti v. Bianco*, *supra* note 17.

<sup>92</sup>*Satink v. Township of Holland*, 28 F. Supp. 67 (D. N. J. 1939).

<sup>92a</sup>*Watts Electric & Mfg. Co. v. United-Carr Fastener Corp.*, 27 F. Supp. 277 (D. Mass. 1939).

<sup>93</sup>*Catanzaritta v. Bianco*, *supra* note 17. *Accord*, as to alternate pleading: *Borton v. Conn. General Life Ins. Co.*, 25 F. Supp. 579 (D. Neb. 1938); *Kraus v. General Motors Corp.*, *supra* note 69. *Accord*, as to inconsistent pleading: *U. S. for the benefit of Foster Wheeler Corp. v. American Surety Co.*, *supra* note 11; *Kraus v. General Motors Corp.*, *supra* note 69.

to one theory.<sup>94</sup> Where different parties sued on a written guarantee they were ordered to state their claims in separate paragraphs, as some answers might apply to one claim only.<sup>95</sup>

#### RULE 9. PLEADING SPECIAL MATTERS

##### (a) Capacity.

In an action against the United States, the plaintiff must allege capacity to sue to the extent required to show the jurisdiction of the court, for a federal court has jurisdiction of a suit against the United States only when one has been given the privilege of suing the Federal Government. This type of action is different from a proceeding against a private litigant.<sup>96</sup>

##### (b) Fraud, Mistake, Condition of the Mind.

It has been determined that fraud may not be alleged generally,<sup>97</sup> yet an allegation that transfers were made with intent to hinder, delay, and defraud creditors has been held sufficient.<sup>98</sup> Intent, on the other hand, may be alleged generally.<sup>99</sup> This has been said to be true of an allegation of malice and of conditions of mind generally.<sup>100</sup>

##### (c) Conditions Precedent.

This rule, in covering the occurrence, as well as the performance of conditions precedent broadens the field in which abbreviated pleading of conditions precedent has been permitted. The rule should be available, for example, when the condition precedent is the lapse of a stated period.<sup>101</sup> The rule should not deny the pleader the right to set forth in extenso the performance of conditions precedent.<sup>102</sup>

##### (f) Time and Place.

In an action in which the plaintiff claims wages paid to third persons, the dates when the work was done and the payments were made should be pleaded. They are considered like all other averments of material matter.<sup>103</sup>

##### (g) Special Damage.

Special damage must be stated specifically. Matter which will give a more definite idea of special damage is properly alleged.<sup>104</sup>

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<sup>94</sup>*Crim v. Lumbermen's Mut. Casualty Co.*, *supra* note 55.

<sup>95</sup>*Bicknell v. Lloyd-Smith*, 25 F. Supp. 657 (E. D. N. Y. 1938).

<sup>96</sup>*Jewell v. U. S.*, 27 F. Supp. 836 (W. D. Ky. 1939).

<sup>97</sup>*E. I. DuPont DeNemours Co. v. Dupont Textile Mills, Inc.*, 26 F. Supp. 236 (M. D. Pa. 1939).

<sup>98</sup>*Macleod v. Cohen-Erichs Corp.*, *supra* note 68.

<sup>99</sup>*E. I. DuPont DeNemours Co. v. Dupont Textile Mills, Inc.*, *supra* note 97.

<sup>100</sup>*Love v. Commercial Casualty Ins. Co.*, 26 F. Supp. 481 (S. D. Miss. 1939).

<sup>101</sup>*Prashker, Pleading Performance of Conditions Precedent. New York and Federal Rules (1939)* 13 ST. JOHN'S L. REV. 242.

<sup>102</sup>*Ibid.*

<sup>103</sup>*Miller Co. v. Hyman*, *supra* note 65.

<sup>104</sup>*Brinley v. Lewis*, 27 F. Supp. 313 (M. D. Pa. 1939).

## RULE 10. FORM OF PLEADINGS

## (a) Caption; Names of Parties.

A complaint to appoint a testamentary trustee, which is captioned as to parties "Estate of Gus Morris, Deceased" does not comply with this rule as to the names of the parties.<sup>105</sup>

## (b) Paragraphs; Separate Statements.

The plaintiff, on motion of the defendant, may be required to put all averments of his claim in numbered paragraphs.<sup>106</sup> District Courts may also compel different causes of action to be stated in separate counts.<sup>107</sup> Yet, when a plaintiff states different methods of infringement of a copyright which do not relate to separate transactions or occurrences, all may be set forth in a single count.<sup>108</sup>

## (c) Adoption by Reference; Exhibits.

In determining whether or not an amended complaint stated a cause of action, exhibits referred to in the complaint, and attached to and made a part thereof, must be considered.<sup>109</sup> Where an exhibit filed with a pleading contradicts the pleading, the exhibit controls.<sup>110</sup>

## RULE 11. SIGNING OF PLEADINGS

"BIGHAM, ENGLAR, JONES & HOUSTON,

By W. J. Nunnally, Jr.  
A member of the firm.

Attorneys for Atlantic Basin Iron Works,  
Office & P. O. Address,  
99 John Street,  
New York, N. Y."

is a sufficient signature to a motion, for this permits Mr. Nunnally, Jr., to be held to strict accountability.<sup>111</sup>

## RULE 12. DEFENSES AND OBJECTIONS

## (a) When Presented.

The plaintiff should be required to accept the defendant's answer on the

<sup>105</sup>*In re Morris' Estate*, 25 F. Supp. 454 (D. C. 1938).

<sup>106</sup>*Schoenberg v. Decorative Cabinet Corp.*, 27 F. Supp. 802 (E. D. N. Y. 1939).

<sup>107</sup>*American Fomon Co. v. United Dyewood Corp.*, — F. Supp. — (S. D. N. Y. 1938).

<sup>108</sup>*Cowen v. Braun*, — F. Supp. — (S. D. Iowa 1938).

<sup>109</sup>*Fisher Iron & Steel Co. v. Elgin, J. & E. Ry. Co.*, 101 F. (2d) 373 (C. C. A. 7th 1939).

<sup>110</sup>*Smith v. Board of Education of Ludlow, Ky.*, 23 F. Supp. 328 (E. D. Ky. 1938).

<sup>111</sup>*U. S. for benefit of Foster Wheeler Corp. v. American Surety Co. of N. Y.*, 25 F. Supp. 225 (E. D. N. Y. 1938).

merits after the District Court's decision, dismissing the complaint for failure to state a cause of action, has been reversed by the Circuit Court of Appeals, where the answer was tendered within ten days after the appellate court's ruling, for the defendant should not be penalized for questioning the sufficiency of the complaint in the usual manner.<sup>112</sup>

The court has no power to shorten the prescribed time for answer by one an inhabitant or one found within the state, for the proviso "unless the court directs otherwise when service of process is made pursuant to Rule 4 (e)" refers only to cases of answers by those not inhabitants or found within the state. Moreover, the rules involved envisage lengthening, not lessening, the time prescribed.<sup>113</sup>

(b) How Presented.

All defenses "in law or fact" shall be presented in and by the pleadings, except the named defenses which may be presented by motion.<sup>114</sup>

A motion to strike is not the proper motion to raise the question of the sufficiency of an attempted statement of a cause of action. Such a question should be raised by a motion to dismiss. However, such a motion to strike should be treated as a motion to dismiss.<sup>115</sup> An affidavit of defense has been treated as a motion to dismiss.<sup>116</sup> This is also true as to a rule to show cause<sup>117</sup> and a motion to quash a subpoena on the grounds of defective service and want of jurisdiction.<sup>118</sup> A motion to dismiss which requires consideration of matter not appearing in the complaint is analogous to a speaking demurrer under the early equity practice, and should be overruled.<sup>119</sup>

Rule 12 (b) does not contain an exhaustive enumeration of motions permitted under the new Rules and the fact that it does not mention motions for security for costs does not prevent use of such motions under proper circumstances. It merely enumerates defenses, and a motion for security for costs is not a defense.<sup>120</sup>

On a motion to dismiss a pleading,<sup>121</sup> which includes statements in a bill of particulars thereto,<sup>122</sup> or to strike out parts of a pleading,<sup>123</sup> well-pleaded facts therein are admitted. But this is not so as to conclusions of law.<sup>124</sup>

<sup>112</sup>U. S. v. Revere Copper & Brass Co., 28 F. Supp. 277 (N. D. N. Y. 1939).

<sup>113</sup>Food Machinery Corp. v. Guignard, 26 F. Supp. 1002 (D. Ore. 1938).

<sup>114</sup>U. S. to use *etc.* v. Edward Fay & Son, —F. Supp. — (E. D. Pa. 1939).

<sup>115</sup>*Ibid.*

<sup>116</sup>Knecht v. Castleman River R. Co., 25 F. Supp. 652 (W. D. Pa. 1938); S. & R. Grinding and Machine Co. v. U. S., 27 F. Supp. 429 (W. D. Pa. 1939).

<sup>117</sup>Rosenberg v. Hano & Co., 26 F. Supp. 160 (E. D. Pa. 1938).

<sup>118</sup>International Molders Union of N. A. v. National Labor Relations Board, 26 F. Supp. 423 (E. D. Pa. 1939).

<sup>119</sup>McConville v. District of Columbia, 26 F. Supp. 295 (D. C. 1938).

<sup>120</sup>Wheeler v. Lientz, *supra* note 5.

<sup>121</sup>Mass. Farmers Defense Committee v. U. S., *supra* note 40; Abel v. Munro, 27 F. Supp. 346 (E. D. N. Y. 1939).

<sup>122</sup>Abel v. Munro, *supra* note 121.

<sup>123</sup>Barnidge v. U. S., 101 F. (2d) 295 (C. C. A. 8th 1939).

<sup>124</sup>*Ibid.*

## (1-6) Special Defenses.

A motion to dismiss is the proper method of raising the objection of lack of jurisdiction over the defendants. Such a motion should also be granted, if a necessary party defendant has not been served with process.<sup>125</sup> A motion to dismiss because of lack of jurisdiction over the person may be decided on the complaint and affidavits submitted, or testimony bearing on the question may be heard.<sup>126</sup> After the defense of insufficiency of service of process has been disposed of on motion to quash, such defense may not be again interposed in the answer. But this point may be made on appeal.<sup>127</sup> A motion to dismiss for failure to state a claim may be directed to the complaint as supplemented by a bill of particulars, for the bill becomes a part of the pleading it supplements, and is, in effect, an amendment thereof.<sup>128</sup> A third-party defendant may obtain dismissal for insufficiency, as against it, of both the plaintiff's complaint and the third-party plaintiff's complaint.<sup>129</sup>

Motions to require a plaintiff to pay the costs of a prior action and make a cost bond or to show that attorneys had no interest in the recovery or joined in a pauper's oath and to strike certain paragraphs from the complaint, as well as a previous motion attacking the court's jurisdiction over persons sued, should have been consolidated and the court might have denied all of later motions. Notice the rule says "a" motion making these defenses, *etc.*, suggesting a single motion for all available defenses. Also see Rule 12 (g) providing for consolidation.<sup>130</sup>

A motion to strike a sufficient defense for insufficiency will not be granted though there may be an effective answer to the defense which has not yet been pleaded.<sup>131</sup> A motion to dismiss the complaint was considered timely, although filed subsequently to the filing of the answer, in view of the fact that the right to make such a motion was reserved in the answer.<sup>132</sup> The joinder of a motion to dismiss for lack of jurisdiction over the person with a motion to dismiss for want of equity and for failure to join indispensable parties defendant, does not waive the jurisdictional defense, for Rule 12 (b) provides that no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.<sup>133</sup> The filing of a motion to dismiss on the ground of lack of jurisdiction over the subject

<sup>125</sup>Mass. Farmers Defense Committee v. U. S., *supra* note 40; *accord*, as to first point: Nielson v. Farley, 26 F. Supp. 948 (S. D. N. Y. 1939).

<sup>126</sup>Jiffy Lubricator Co. v. Alemite Co., 28 F. Supp. 385 (D. N. D. 1939).

<sup>127</sup>Molesphini v. Bruno, 26 F. Supp. 595 (E. D. N. Y. 1939).

<sup>128</sup>Reilly v. Wolcott, — F. Supp. — (S. D. N. Y. 1939); Mahoney v. Bethlehem Engineering Corp., 27 F. Supp. 865 (S. D. N. Y. 1939).

<sup>129</sup>Duarte v. Christie Scow Corp., 27 F. Supp. 894 (S. D. N. Y. 1939).

<sup>130</sup>Ayers v. Conser, 26 F. Supp. 95 (E. D. Tenn. 1938).

<sup>131</sup>Abruzzino v. National Fire Ins. Co. of Hartford, Conn., 26 F. Supp. 934 (N. D. W. Va. 1939).

<sup>132</sup>Pesci v. F. A. Vieser & Son, Inc., — F. Supp. — (D. N. J. 1939).

<sup>133</sup>American-Mexican Claims Bureau, Inc. v. Morgenthau, 26 F. Supp. 904 (D. C. 1939).



matter does not constitute a general appearance.<sup>134</sup>

(c) Motion for Judgment on the Pleadings.

Where a complaint failed to state a claim upon which relief could be granted and the defendant failed to move for a dismissal of the complaint at the proper time, the defendant could thereafter make a motion for a judgment on the pleadings.<sup>135</sup>

An affidavit of defense has been treated as a motion for judgment on the pleadings.<sup>136</sup>

Although the defendant admitted having committed acts sought to be enjoined, a motion for judgment on the pleadings, which is like the old demurrer to an answer, should be denied, if the answer also disclaimed all intention of continuing such acts, for the court could not decide that the defendant, unless restrained, would, in the future, do the acts to be enjoined.<sup>137</sup>

If there is an issue to be tried, a motion for judgment on the pleadings should be denied.<sup>138</sup>

After the defendant notifies the clerk that he does not desire to contest the action, the plaintiff's motion for judgment on the pleadings should not be granted, but a default may be entered under Rule 55 (b) upon application therefore by plaintiff.<sup>139</sup>

(d) Preliminary Hearings.

Determination of the question of the sufficiency of a complaint, which was presented on a motion may be deferred until trial where this can best be decided upon trial after development of all the facts.<sup>140</sup> Under the circumstances of the case, the determination of a motion to dismiss, on the ground that the cause of action was not one to enforce a lien on, or claim to, real or personal property located within the district, was deferred until the trial.<sup>141</sup> Also, in an action for negligence by a seaman against a steamship company, the defendant moved to dismiss for lack of jurisdiction over the subject matter and submitted affidavits directed to show that plaintiff was not engaged as a seaman. Determination of the motion was deferred until the trial.<sup>142</sup>

(e) Motion for More Definite Statement or for Bill of Particulars.

*Purpose of Rule*

Rules 26 to 37 inclusive of the new Rules of Civil Procedure show a clear intent on the part of the draftsman to simplify and expedite trial procedure

<sup>134</sup>Toulmin v. James Mfg. Co., 27 F. Supp. 512 (W. D. N. Y. 1939).

<sup>135</sup>Duarte v. Christie Scow Corp., *supra* note 129.

<sup>136</sup>Salus v. Federal Reserve Bank of Philadelphia, — F. Supp. — (E. D. Pa. 1939).

<sup>137</sup>Interstate Commerce Comm. v. Chester, 26 F. Supp. 710 (E. D. Pa. 1939).

<sup>138</sup>Interstate Commerce Comm. v. Frye, 26 F. Supp. 393 (D. Mass. 1939); Phoenix Hardware Co. v. Paragon Paint & Hardware Co., — F. Supp. — (E. D. N. Y. 1939).

<sup>139</sup>Interstate Commerce Comm. v. Daley, 26 F. Supp. 421 (D. Mass. 1939).

<sup>140</sup>Rosenberg v. Hano & Co., *supra* note 117.

<sup>141</sup>Welty v. Clute, — F. Supp. — (N. D. N. Y. 1939).

<sup>142</sup>Hawn v. American S. S. Co., 26 F. Supp. 428 (W. D. N. Y. 1939).

by disposing of non-essentials, undisputed matters, surprise testimony, and uncertainties to the greatest extent possible in advance of trial. These rules, taken in conjunction with the provision for motions for bills of particulars in Rule 12 (e), and with the growing practice of pre-trial conferences under Rule 16, clearly show that an attempt has been made to set up a machinery by the operation of which a cause reaches actual trial stripped to its essentials; with issues defined, clarified and narrowed, with both parties (if properly diligent) thoroughly prepared to meet all possible issues and fortified against surprise, and with a record already complete, except as to those matters which by their inherent nature can only be presented before a Trial Judge.<sup>143</sup>

#### *Motions Included*

There is no distinction between a motion for a more definite statement and for a bill of particulars. This is borne out by the sentence of the rule reading, "The motion shall point out the defects complained of and the details desired."<sup>144</sup> "Specific" in a motion for a more "specific" statement of claim will be considered to read "definite."<sup>145</sup> A motion for a more specific statement of claim was construed to be a motion for a bill of particulars.<sup>146</sup>

#### *When Made*

##### A. TIME

Motions for bills of particulars must be made before issue is joined.<sup>147</sup> This also applies to motions to make a pleading more definite and certain. These motions must be made within 20 days after service of pleadings to which they are directed,<sup>148</sup> except that one has been said to have 20 days after the rule became effective to make such motions, if the 20 day period had expired in a case before the effective date of the new rules.<sup>149</sup>

##### B. CIRCUMSTANCES

A motion for a more definite statement is properly presented only where a pleading is so vague or contains such broad generalizations that the other party cannot frame an answer thereto or understand the nature and extent of the charges, so as generally to prepare for trial, in view of other rules under which defendants can obtain information. The moving party must show that

<sup>143</sup>Teller v. Montgomery Ward & Co., 27 F. Supp. 938 (E. D. Pa. 1939). *Accord*, as to expedition and simplification of proceedings: E. I. DuPont DeNemours & Co. v. Dupont Textile Mills, *supra* note 97.

<sup>144</sup>McKenna v. U. S. Lines, 26 F. Supp. 558 (S. D. N. Y. 1939); Tully v. Howard, 27 F. Supp. 6 (S. D. N. Y. 1939); Adams v. Hendel, 28 F. Supp. 317 (E. D. Pa. 1939).

<sup>145</sup>Miller Co. v. Hyman, *supra* note 65.

<sup>146</sup>Tarbet v. Thorpe, 25 F. Supp. 222 (W. D. Pa. 1938).

<sup>147</sup>Graham v. N. Y. and Cuba Mail S. S. Co., 25 F. Supp. 224 (E. D. N. Y. 1938); Michels v. Ripley, *supra* note 6; Tully v. Howard, *supra* note 144.

<sup>148</sup>McKenna v. U. S. Lines, *supra* note 144; Michels v. Ripley, *supra* note 13; Tully v. Howard, *supra* note 144.

<sup>149</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

he is entitled to the information requested on authority of prior cases and also that the motion is made in good faith and not for the purpose of delay.<sup>150</sup> A motion for a bill of particulars should not be denied solely because inquiries are multiple in form, if they are clear and understandable. They are not interrogatories, and the same need for unification and simplification does not exist in the case of inquiries in a motion for a bill of particulars, as in the case of interrogatories.<sup>151</sup>

The fact that names of persons requested to be divulged in a bill of particulars may result in the giving of names of witnesses will not excuse the giving of the information sought.<sup>152</sup>

The "contention" of a party is made by pleadings, or, in a proper case (not explained), by a bill of particulars.<sup>152a</sup> A bill of particulars is not permitted, if an issue may be raised by an answer appropriate to the pleading complained of.<sup>153</sup>

A motion to make a pleading more definite should be denied, if the pleading conforms to the requirements of the Rules of Civil Procedure.<sup>154</sup>

Pleadings should not be unduly expanded by granting motions for more definite statements. To avoid such a result, discovery, when proper, rather than such a motion, should be used.<sup>155</sup>

There should be a marked difference between information that can be elicited under a bill of particulars and that which may be elicited through interrogatories. The latter, under the new rules, is very broad. The former should be limited to such information as would be necessary for the defendant to prepare its pleadings, and generally prepare for trial. A reason for this limitation is that a bill of particulars becomes part of the pleadings.<sup>156</sup> As to the use of such bills for trial preparation, it has been thought they will seldom be needed, because of the availability of the discovery machinery.<sup>157</sup> Furthermore, it has been held that to allow a bill of particulars to aid one in preparation for trial would be inconsistent with Rules 8, 26, and 33.<sup>158</sup> But it

<sup>150</sup>Brinley v. Lewis, *supra* note 104.

<sup>151</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

<sup>152</sup>*Ibid.*

<sup>152a</sup>Norton v. Cooper Jarrett, Inc., 27 F. Supp. 806 (N. D. N. Y. 1939).

<sup>153</sup>Bobrecker v. Denebeim, *supra* note 10; Maryland Casualty Co. v. Havens, 24 F. Supp. 460 (M. D. Pa. 1938).

<sup>154</sup>Lost Trail, Inc. v. Allied Mills, Inc., 26 F. Supp. 98 (E. D. Ill. 1938).

<sup>155</sup>Miller Co. v. Hyman, *supra* note 65.

<sup>156</sup>American La France-Foamite Corp. v. American Oil Co., 25 F. Supp. 386 (D. Mass. 1938). *Accord*, to the effect that a bill of particulars is proper when necessary for the preparation of a responsive pleading or trial: Schmidt v. Going, 25 F. Supp. 412 (W. D. Mo. 1938); Lost Trail, Inc. v. Allied Mills, Inc., *supra* note 154; Berger v. McHugh, *supra* note 18; Orange County Theatres, Inc. v. Levy, 26 F. Supp. 416 (S. D. N. Y. 1938); Abruzzino v. National Fire Ins. Co. of Hartford, Conn., *supra* note 131; Gumbart v. Waterbury Club Holding Corp., 27 F. Supp. 228 (D. Conn. 1938); Rosenblum v. Dingfelder, — F. Supp. — (S. D. N. Y. 1939); Adams v. Hendel, *supra* note 144.

<sup>157</sup>Fried v. Warner Bros. Circuit Management Corp., *supra* note 51.

<sup>158</sup>Tully v. Howard, *supra* note 144. Suggestions of the same result are found in Nord-

should be noticed that the rule under discussion specifically states that the motions provided for may be used to enable a litigant properly to prepare for trial.

Again, it has been said that evidence and proof cannot be made a part of the pleadings under Rule 12 (e), thereby destroying the fundamental distinction between the ultimate facts, which alone should be pleaded, and the evidence and proof upon which these facts are based.<sup>159</sup> Another way of saying approximately the same thing is that, if the complaint is sufficient as a pleading, more definite or detailed information concerning the claim, if needed, should be obtained by means of discovery.<sup>160</sup>

Usually one cannot ask his adversary to disclose the names of his witnesses or the evidence upon which he will rely to prove an allegation, but this does not preclude requiring a more definite statement of the plaintiff's claim, though it includes names of those by whom and to whom alleged defamatory statements were made.<sup>161</sup>

A bill of particulars cannot be used to obtain a judicial construction.<sup>162</sup>

Neither may documents be procured by a motion for a bill of particulars.<sup>163</sup> But compare the holding that the production of records and articles for inspection should, technically, be sought under Rule 34, but, if such discovery has been attempted by a motion for a bill of particulars, no useful purpose is served by denying it, for that would merely cause delay, as a motion under Rule 34 could be made.<sup>164</sup>

#### C. SPECIFIC CASES

There follow several definite decisions as to when a bill of particulars should, and should not, be filed, and as to the contents of required bills.

A claim for damages for breach of contract should set forth specific items and not "lump" the damages. Hence, a plaintiff may be required, by a motion for a more definite statement, to set forth such items.<sup>165</sup>

In an action for breach of a construction contract and to set aside a fraudulent conveyance, defendants' motion for a more definite statement should be allowed as to the dates and amounts of extra work; the time, place, and

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man v. City of Johnson City, *supra* note 80 and in Miller Co. v. Hyman, *supra* note 65.

<sup>159</sup>Mass. Bonding & Ins. Co. v. Harrisburg Trust Co., 27 F. Supp. 987 (M. D. Pa. 1939).

<sup>160</sup>Securities & Exchange Comm. v. Timetrust, Inc., *supra* note 60; Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co., *supra* note 6; Mulloney v. Federal Reserve Bank of Boston, 26 F. Supp. 148 (D. Mass. 1938); Southern Grocery Stores, Inc. v. Zoller Brewing Co., 26 F. Supp. 858 (S. D. Iowa, 1939).

<sup>161</sup>Mulloney v. Federal Reserve Bank of Boston, *supra* note 160.

<sup>162</sup>Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co., *supra* note 6.

<sup>163</sup>Man-Sew Pinking Attachment Corp. v. Chandler Mach. Co., — F. Supp. — (D. Mass. 1939).

<sup>164</sup>Teller v. Montgomery Ward & Co., *supra* note 143; Mulloney v. Federal Reserve Bank of Boston, *supra* note 160.

<sup>165</sup>Miller Co. v. Hyman, *supra* note 65.

manner of the alleged breach of the contract and the time when services were rendered; the conveyance alleged to be fraudulent; and whether plaintiff intends to insist on an interest in leases or the land itself by virtue of the contracts.<sup>166</sup>

In an action on a contract, brought by the beneficiary thereof, a request for a bill of particulars stating where the contract was made and was to be performed was granted, where one state involved did not permit a beneficiary to sue and the other did.<sup>167</sup>

In an action by a receiver of a bank and an individual for a judgment against a defendant under her written guarantee of the payment of corporate bonds, the defendant's motion for an order requiring the plaintiffs to furnish a more definite statement of their complaint or a bill of particulars would be granted as to the item whether the bank had been dissolved and as to details respecting the demands on defendant for payment.<sup>168</sup>

In an action for conversion by a prior registered owner of a stock certificate against the present holder, claiming that the certificate had been wrongfully delivered to defendant without plaintiff's endorsement, knowledge or consent, defendant is entitled to a bill of particulars as to the circumstances under which the certificate left the possession of plaintiff and the particulars of the transfer.<sup>169</sup>

An allegation that the explosion of a dynamite cap was caused solely by the defendant's carelessness and negligence in manufacturing and distributing was not sufficiently specific, and defendant's motion for a more definite statement of claim should be granted, for this was not a *res ipsa* case or a case falling into a similar category.<sup>170</sup>

In an action for personal injuries resulting from an automobile collision and for compensation for the death of the plaintiff's daughter upon whom she depended for support, in which the plaintiff alleged negligence generally, the defendants' motion for a more definite statement, asking in what manner the defendants were negligent and the age of the daughter when killed, was granted.<sup>171</sup>

In an action for personal injuries alleged to have been sustained on board a vessel, defendant is entitled to a bill of particulars stating the time of day of the injury, plaintiff's location at the time, the part of the vessel causing the injury, whether plaintiff was alone or working with other members of the crew, and in what respects the defendant was negligent.<sup>171a</sup>

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<sup>166</sup>*Iroquois Oil & Gas Co. v. Hollingsworth*, *supra* note 74.

<sup>167</sup>*Mahoney v. Bethlehem Engineering Corp.*, *supra* note 128.

<sup>168</sup>*Bicknell v. Lloyd-Smith*, *supra* note 95.

<sup>169</sup>*Meehan v. Sehenley Distillers Corp.*, 27 F. Supp. 989 (S. D. N. Y. 1939).

<sup>170</sup>*Sierocinski v. E. I. Dupont DeNemours Co.*, *supra* note 82.

<sup>171</sup>*Schmidt v. Going*, *supra* note 156.

<sup>171a</sup>*Guerin v. Portland Trawling Co.*, — F. Supp. — (D. Mass. 1939).

In an action for damages to property and injury to health resulting from operation of the defendant's industrial plant, the defendant is entitled to a bill of particulars as to the items of property damages, or destruction, the dates and amount of such damages, the names of persons claimed to have been injured, the nature of the injury and the expenses incurred for medical services, the amount claimed for depreciation of property, and the exemplary damages, but it cannot obtain particulars as to the manner in which it operates its plant or as to what fumes and vapors, if any, result from that operation.<sup>172</sup>

In an action for conspiracy to cause the failure of a bank, the plaintiff may be directed to furnish a bill of particulars, naming specific defendants or their agents who participated in the wrongful acts, specifying times and places of events alleged, and naming persons to whom defamatory statements were made.<sup>173</sup>

The plaintiff in a patent suit may be required, on the defendant's motion for a bill of particulars, to state the date of the alleged invention of the design in suit upon which he will rely at the trial, such writing to be placed in a sealed envelope and delivered to the clerk of the court to be opened at the direction of the trial judge.<sup>174</sup>

In a patent suit the plaintiff was, among other things, ordered to specify the written instruments that constitute the chain of its title to the letters patent in suit.<sup>175</sup> A contrary decision was reached in *Brobecker v. Denebeim*<sup>176</sup> as to requiring the specification of instruments constituting the chain of title. The editor of the federal service concerning these rules believes the question as to whether or not such specification should be demanded depends on whether or not the defendant raises an issue as to the plaintiff's title in his answer. This seems correct.

In a patent suit plaintiff is entitled to a bill of particulars as to the particular patents or publications, together with dates thereof, to be relied upon in support of the defense of anticipation. The furnishing of such information should, however, be made contingent upon plaintiff's first filing a statement of dates when the invention of the patent in suit was first conceived and disclosed. Also, the defendant may be required to serve a bill of particulars as to what patents or publications will be offered in evidence to illustrate the prior state of the art.<sup>177</sup>

In a patent case, the defendant, who is the manufacturer of the device alleged to be infringed, is entitled to a bill of particulars identifying the devices alleged to embody the invention, but the plaintiff should have access

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<sup>172</sup>Murphy v. E. I. DuPont DeNemours & Co., 26 F. Supp. 999 (W. D. Pa. 1939).

<sup>173</sup>Mulloney v. Federal Reserve Bank of Boston, *supra* note 160.

<sup>174</sup>Bloom v. Titus Blatter & Co., — F. Supp. — (S. D. N. Y. 1939).

<sup>175</sup>Rudolph Wurlitzer Co. v. Filben, — F. Supp. — (D. Minn. 1938).

<sup>176</sup>*Supra* note 76.

<sup>177</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

to defendant's plant and defendant's catalogue, in order to make such inspection as would enable him to prepare the bill. He is also entitled to a bill setting forth the claim or claims of the patent upon which the plaintiff expects to rely at the trial, and to a more definite statement as to whether or not any of the infringing acts occurred during the period covered by a license.<sup>178</sup>

It has been decided that the plaintiff may be required to make his complaint more definite and certain by setting forth pertinent dates, from which it may be determined whether or not his claim is barred by the statute of limitations.<sup>179</sup> However, Rule 8 (c), making a statute of limitations an affirmative defense, suggests an opposite conclusion.

It has been decided that, under the circumstances mentioned above in relation to *Bicknell v. Lloyd-Smith*,<sup>180</sup> a bill of particulars would not be granted as to the items concerning the identity of the one to whom the corporation sold and delivered its bonds and the consideration received by it, the identity of the seller of the bonds to the bank, the date of the purchase, and the consideration paid, the same as to the individual, and whether the bank and individual knew of the guaranty at the time of the purchase of the bonds.

In an action for damages to property and injury to health resulting from operation of the defendant's industrial plant, the defendant was not permitted to obtain particulars as to the manner in which it operated its plant or as to what fumes and vapors, if any, resulted from that operation.<sup>181</sup>

The defendant in a patent suit should not be required to specify by a bill of particulars the number and dates and patentees of patents referred to in his answer and the names of the countries in which they were secured, since he must furnish this information 30 days before trial in compliance with R. S. 4920 (U. S. C., Title 35, § 69).<sup>182</sup>

On motion for a more definite statement and bill of particulars in a patent infringement action, the plaintiff should not be required to state where it manufactures and where it sells each of its products, nor to set forth every sale, advertisement, and letter of defendant constituting the alleged infringement, for the defendant did not need this information either to properly prepare his responsive pleading or to prepare for trial. Nor need the plaintiff give further particulars as to the defendant's own fraudulent intent, or show how it computed its damages, for one does not properly raise the question of jurisdictional amount by means of a motion for a bill of particulars.<sup>183</sup>

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<sup>178</sup>*Holske v. Harder Refrigerator Co.*, 28 F. Supp. 344 (N. D. N. Y. 1939).

<sup>179</sup>*Mendola v. Carborundum Co.*, 26 F. Supp. 359 (W. D. N. Y. 1938).

<sup>180</sup>*Supra* note 95.

<sup>181</sup>*Murphy v. E. I. DuPont DeNemours & Co.*, *supra* note 172.

<sup>182</sup>*Bloom v. Titus Blatter & Co.*, *supra* note 174.

<sup>183</sup>*E. I. DuPont DeNemours & Co. v. Dupont Textile Mills, Inc.*, *supra* note 97.

*Lack of Information*

If one has no knowledge of certain facts properly requested in a motion for a bill of particulars, he may so state under oath in lieu of furnishing the information.<sup>184</sup> But, if he later obtains it, he must furnish it as requested.<sup>185</sup>

A motion for a bill of particulars prior to issue joined was granted, notwithstanding the contention that the plaintiff did not possess the sufficient knowledge to furnish the bill of particulars, since the plaintiff could examine the witnesses and defendant's officers before trial and so obtain the necessary information.<sup>186</sup>

*Court's Discretion*

Whether, and to what extent, a bill of particulars will be ordered rests within the court's discretion.<sup>187</sup>

*Burden of Proof*

If one resists giving a bill of particulars, he has the burden of satisfying the court that there is a substantial ground against giving it.<sup>188</sup>

*Splitting Bill*

A party who has moved for a bill of particulars and who is subsequently served by his adversary with notice to take depositions may be entitled to a bill of particulars as to some of the items before the taking of the deposition and the service of a further bill as to the others may be postponed till after such time.<sup>189</sup>

*Answer to Bill*

No answer is required to a bill of particulars, for the rules do not provide for such an answer. After the bill is served, it is left open to conjecture whether or not the denials in an answer are made with reference to the complaint as originally served or as amplified.<sup>190</sup>

*Defects and Details Desired Pointed Out*

A motion for a bill of particulars shall point out the defects in the pleading complained of and the details desired.<sup>191</sup>

*Penalty for Failing to Give Bill*

A party may not refrain from supplying the information by bill of particulars merely because an insufficient answer might be construed as a contempt, for the fear of contempt is groundless. The penalty for failing to obey an order of the court granting a motion under Rule 12 (e) is a possible striking of the pleading to which the motion was directed, or such order as the court

<sup>184</sup>Mahoney v. Bethlehem Engineering Corp., *supra* note 128.

<sup>185</sup>Graham v. N. Y. and Cuba Mail S. S. Co., *supra* note 147.

<sup>186</sup>*Ibid.*

<sup>187</sup>Muench v. U. S., 96 F. (2d) 332 (C. C. A. 8th 1938); McKenna v. U. S. Lines, Inc., *supra* note 144.

<sup>188</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

<sup>189</sup>Varey v. Gaunt, — F. Supp. — (S. D. N. Y. 1939).

<sup>190</sup>Piest v. Tide Water Oil Co., *supra* note 85.

<sup>191</sup>Michels v. Ripley, *supra* note 6; Rosenblum v. Dingfelder, *supra* note 156.



deems just. The penalty of contempt is not indicated in the rule.<sup>192</sup>

Another penalty may be to preclude the disobedient party from presenting evidence at the trial on the questions involved in the motion for the bill of particulars.<sup>193</sup>

Though one at first appears to refuse to obey an order to give a bill of particulars, if, upon the making of a motion to have a penalty inflicted for such conduct, he agrees to file the bill, he may be permitted to do so.<sup>194</sup>

A motion to strike an answer for failure to comply with a demand for a bill of particulars will be denied on condition that the defendant supply all of the particulars of which he has knowledge, and that he serve at least a given number of days before trial such further information which he may have gained by that time.<sup>195</sup>

A bill of particulars becomes a part of the pleading which it supplements.<sup>196</sup>

The same idea has been expressed in other forms. Thus, it has been said that a motion to make a pleading more definite requires the plaintiff to disclose in the complaint itself the information desired,<sup>197</sup> and that a bill of particulars does not supersede the complaint but limits it, and makes its allegations more definite and certain.<sup>198</sup>

(f) Motion to Strike.

#### *Redundant Matter*

Redundant and immaterial allegations are subject to a motion to strike.<sup>199</sup>

In view of Rule 41 (a), which prohibits voluntary dismissals after an answer is filed, a counterclaim seeking declaratory relief on the issues involved in the main action is redundant.<sup>200</sup> Defenses which are not responsive to the pleadings which they attack seem to be redundant,<sup>201</sup> as do those held insufficient at a former trial.<sup>202</sup>

#### *Part of a Pleading*

If the striking of allegedly immaterial matter would render the complaint meaningless and amount to dismissal of the pleading, the court would not strike it.<sup>203</sup> Again, the mere presence of redundant and immaterial matter,

<sup>192</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

<sup>193</sup>Newcomb v. Universal Match Corp., 25 F. Supp. 169 (E. D. N. Y. 1938).

<sup>194</sup>Michels v. Ripley, *supra* note 13.

<sup>195</sup>U. S. for benefit of Foster Wheeler Corp. v. American Surety Co., *supra* note 11.

<sup>196</sup>Jessup & Moore Paper Co. v. W. Va. Pulp & Paper Co., *supra* note 6; Piest v. Tide Water Oil Co., *supra* note 85; McKenna v. U. S. Lines, Inc., *supra* note 144; Abel v. Munro, *supra* note 121; Mahoney v. Bethlehem Engineering Corp., *supra* note 128; Adams v. Hendel, *supra* note 144.

<sup>197</sup>Lost Trail Inc. v. Allied Mills, Inc., *supra* note 154.

<sup>198</sup>Abel v. Munro, *supra* note 121.

<sup>199</sup>Mendola v. Carborundum Co., *supra* note 179; Watts Elec. & Mfg. Co. v. United-Carr Fastener Corp., 27 F. Supp. 277 (D. Mass. 1939).

<sup>200</sup>Stanley Works v. C. S. Mersick & Co., —F. Supp. — (D. Conn. 1939).

<sup>201</sup>Nordman v. City of Johnson City, *supra* note 80.

<sup>202</sup>Phoenix Hardware Co. v. Paragon Paints & Hardware Corp., *supra* note 138.

<sup>203</sup>Mahoney v. Bethlehem Engineering Corp., *supra* note 128.

not affecting the substance, is not in itself sufficient ground for granting a motion to strike, since to grant such a motion would merely result in delay and no harm is done by the existence of the superfluous matter.<sup>204</sup>

*What Stricken*

A motion to strike should usually be directed toward the objectionable parts of a pleading, but this rule gives authority to strike an entire pleading because of the faults mentioned in the rule.<sup>205</sup>

(h) Waiver of Defenses.

The defendant is deemed to have waived all defenses not asserted by motion or answer, except failure to state a cause of action or lack of jurisdiction of the subject matter. Hence, the defense of insufficiency of process may not be raised for the first time on appeal.<sup>206</sup> Yet, the validity of service of summons has been held not to have been waived by the removal of a cause from a state to federal court on the defendant's motion.<sup>207</sup>

A motion for security for costs is not a "defense" nor an "objection" under Rule 12 (h) and is, therefore, not waived if not presented by one of the motions enumerated in Rule 12 (b). Moreover, motions "herein provided for" do not include motions for security for costs.<sup>208</sup>

RULE 13. COUNTERCLAIM AND CROSS-CLAIM

(a) Compulsory Counterclaim.

When a counterclaim arises out of the same transaction as the main action, it must be set up and the court has jurisdiction even though it would not have had jurisdiction if the counterclaim were set forth in an independent suit.<sup>209</sup> Therefore, in a suit by an insurance company to cancel a life insurance policy for fraud, the defendant must plead his counterclaim to recover benefits under the policy, if he ever wishes to assert such claim.<sup>210</sup>

Even in the absence of diversity of citizenship, a counterclaim may be maintained against the plaintiff for a claim arising out of the transactions set forth in the complaint.

A counterclaim is effective, though it contains improper demands for relief.<sup>211</sup>

(b) Permissive Counterclaims.

A supplemental counterclaim is improper, if it deals with matters not

<sup>204</sup>Securities and Exchange Comm. v. Timetrust, Inc., *supra* note 60. *Accord*, in effect: Kraus v. General Motors Corp., *supra* note 69.

<sup>205</sup>Shultz v. Manufacturers & Traders Trust Co., *supra* note 67.

<sup>206</sup>Carter v. Powell, 104 F. (2d) 428 (C. C. A. 5th 1939).

<sup>207</sup>Phillips v. Manufacturers Trust Co., 101 F. (2d) 723 (C. C. A. 9th 1939).

<sup>208</sup>Wheeler v. Lientz, *supra* note 5.

<sup>209</sup>U. S. for benefit of Foster Wheeler Corp. *etc.* v. American Surety Co., *supra* note 11.

<sup>210</sup>Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S. D. N. Y. 1939).

<sup>211</sup>U. S. v. Humboldt Lovelock Irrigation, Light & Power Co., — F. Supp. — (D. Nev. 1939).

covered by the original complaint or counterclaim.<sup>212</sup> It is interesting to notice that the court decided this under Rule 13 (a).

(c) Counterclaim Exceeding Opposing Claim.

A plaintiff, by coming voluntarily into a District Court, subjects himself to the jurisdiction of that court in respect to all possible grounds of counterclaim. Thus, in a patent suit, it is proper to counterclaim for a declaratory judgment to have the patent held invalid and not infringed.<sup>213</sup>

(e) Separate Trials.

A motion by the plaintiff for a separate trial of the cause of action set forth in a counterclaim should not be made before he has replied.<sup>214</sup>

## RULE 14. THIRD-PARTY PRACTICE

### *Purpose of Rule*

The purpose of third-party practice is to avoid two actions which should be tried together.<sup>215</sup>

(a) When Defendant May Bring in Third Party.

#### *Ex Parte Application*

An application may be made *ex parte* by a defendant before service of his answer to serve a third-party summons and complaint.<sup>216</sup>

#### *Diversity of Citizenship*

If there is requisite diversity of citizenship between the original plaintiff and defendant, the latter may bring in a third-party defendant who is a resident of the same state as the plaintiff. Official form 22, a third-party complaint, supports this view, for it omits any allegation of jurisdiction. Again, it has been suggested by the Advisory Committee that a broad interpretation should be given this section.<sup>217</sup> Another reason given for this result is that the third-party proceeding is ancillary to the original suit.<sup>218</sup>

#### *Venue*

It has been held that the third-party defendant may require the statutory venue as to him.<sup>219</sup> This result is questionable, if, as seems true, the third-party proceeding is ancillary.

Yet, in whatever manner this question is decided, it is the third-party

<sup>212</sup>Irving Air Chute Co. v. Switlik Parachute & Equipment Co., 26 F. Supp. 329 (D. N. J. 1939).

<sup>213</sup>Dewey & Almy Chemical Co. v. Johnson, Drake, & Piper, Inc., 25 F. Supp. 1021 (E. D. N. Y. 1939).

<sup>214</sup>*Ibid.*

<sup>215</sup>Crim v. Lumbermen's Mut. Casualty Co., *supra* note 55; Tullgren v. Jasper, 27 F. Supp. 413 (D. Md. 1939).

<sup>216</sup>Satink v. Township of Holland, *supra* note 92.

<sup>217</sup>Crum v. Appalachian Elec. Power Co., 27 F. Supp. 138 (S. D. W. Va. 1939); Bossard v. McGwinn, 27 F. Supp. 412 (W. D. Pa. 1939); Kravas v. Great A. & P. Tea Co., 28 F. Supp. 66 (W. D. Pa. 1939); Satink v. Township of Holland, *supra* note 92.

<sup>218</sup>Satink v. Township of Holland, *supra* note 92.

<sup>219</sup>King v. Shepherd, 26 F. Supp. 357 (W. D. Ark. 1938).

defendant, not the plaintiff, who can object to venue as far as such defendant is concerned, for the plaintiff would not be injured by the joinder of the new party.<sup>220</sup>

*Who May Be Third-Party Defendant*

Third-party practice permits the defendant to bring in a third-party defendant who is liable to either the plaintiff or the defendant. This is true, though the defenses of the defendant and third-party defendant are different. The statutory provision that the third-party defendant may assert the defenses of the defendant does not mean he must be able to do this.<sup>221</sup> Moreover, one may be made a third-party defendant only where he is, or may be, liable to the plaintiff or defendant.<sup>222</sup>

The fact that one is only secondarily liable to the plaintiff in event of the nonpayment of a judgment against the defendant, or that in jury trials it is prejudicial to the defendant to permit the jury to know the defendant is insured, does not protect one against a third-party proceeding.<sup>223</sup>

But the insurer of one of several defendants cannot be made a third-party defendant at the instance of one of the other original defendants with which, at the time of the attempt to commence a third-party proceeding, it had no relationship whatever.<sup>224</sup>

The fact that the state law does not provide for contribution as between joint tortfeasors does not bar the defendant in a tort action from bringing in a joint tortfeasor as a third-party defendant, as the latter may be liable to the plaintiff, and the defendant may add a third-party defendant, whom the plaintiff could have sued originally.<sup>225</sup>

A defendant may bring in one as a third-party defendant, if the latter is, or may be, liable to the former or the plaintiff, though the liability may be based on a contract distinct from the cause of action forming the basis of the plaintiff's suit, for this rule does not provide such an exception.<sup>226</sup>

A workman injured while employed in repair work on a ship elected to sue a third party for negligence rather than receive compensation from his employer under the Longshoremen's and Harbor Workers' Act. The defendant was not entitled to bring in plaintiff's employer by third-party practice, for the plaintiff was claiming that the third party, not the employer, was the one causing his injury, hence there would be no liability of the employer to either the plaintiff or defendant.<sup>227</sup>

<sup>220</sup>Seemer v. Ritter, 25 F. Supp. 688 (M. D. Pa. 1938).

<sup>221</sup>Crim v. Lumbermen's Mut. Casualty Co., *supra* note 55.

<sup>222</sup>Tullgren v. Jasper, *supra* note 215.

<sup>223</sup>*Ibid.*

<sup>224</sup>*Ibid.*

<sup>225</sup>Satink v. Township of Holland, *supra* note 92.

<sup>226</sup>Kravas v. Great A. & P. Tea Co., *supra* note 217.

<sup>227</sup>Calvino v. Farley, 26 F. Supp. 431 (S. D. N. Y. 1939).

A third-party complaint may be maintained jointly against the third-party defendant and the original plaintiff,<sup>228</sup> and, when suable, the United States may be made a third-party defendant.<sup>229</sup>

#### *Discretion of Court*

Leave to bring in a third-party defendant is not mandatory, but is in the sound discretion of the court.<sup>230</sup>

#### *Amendments*

The plaintiff, after a third-party defendant has been brought in, may amend his complaint to state alternative causes of action, one against the defendant and the other against the third-party defendant.<sup>231</sup>

#### *Service of Third-Party Defendant*

Personal service upon a third-party defendant is not necessary before a court may grant permission to serve a third-party summons and complaint. Neither Rule 13 (h) or Rule 14 make such a provision.<sup>232</sup>

#### *Security for Costs*

Although the Federal Rules of Civil Procedure contain no provision requiring a non-resident third-party plaintiff to deposit security for costs, the court may order him to do so.<sup>233</sup>

#### *Judgment*

Where the third-party defendant is liable to the third-party plaintiff in contribution or indemnity, the third-party defendant is bound by the adjudication of the third-party plaintiff's liability to the plaintiff.<sup>234</sup>

If a plaintiff, after a third-party defendant is joined in a proceeding, amends his complaint to state alternate claims against the defendant and the third-party defendant, a judgment for the plaintiff against one cannot be collected from the other.<sup>235</sup> If there is no amendment by the plaintiff, there being no action by the plaintiff against the third-party defendant, judgment can not be rendered in favor of the plaintiff against such defendant.<sup>236</sup>

### RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

#### (a) Amendments.

#### *As of Course*

A party may amend a pleading as of course only before a responsive pleading is filed.<sup>237</sup> But he may serve an amended pleading after that time,

<sup>228</sup>Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc., *supra* note 213.

<sup>229</sup>U. S. for benefit of Foster Wheeler Corp. v. American Surety Co., *supra* note 11.

<sup>230</sup>Tullgren v. Jasper, *supra* note 215.

<sup>231</sup>Crim v. Lumbermen's Mut. Casualty Co., *supra* note 55.

<sup>232</sup>Dewey & Almy Chemical Co. v. Johnson, Drake and Piper, Inc., *supra* note 213.

<sup>233</sup>Alderman v. Whelan Drug Co. — F. Supp. — (D. C. 1939).

<sup>234</sup>Crim v. Lumbermen's Mut. Casualty Co., *supra* note 55.

<sup>235</sup>*Ibid.*

<sup>236</sup>*Ibid.*

<sup>237</sup>Rohde v. Dighton, 27 F. Supp. 149 (W. D. Mo. 1939); Buggeln & Smith, Inc. v. Standard Brands Inc., *supra* note 48.

if the adverse party accepts it without objection.<sup>238</sup>

*Permissive Amendments*

Though one does not amend soon enough to do it as of right, the court should freely grant leave to amend pleadings when justice so requires.<sup>239</sup> Therefore, an order dismissing an original complaint, because an appended exhibit disproved an averment in the petition, is not necessarily an adjudication in the defendant's favor which would forbid a court from permitting the plaintiff from serving an amended complaint.<sup>240</sup>

It has also been held that, following the dismissal of a petition for restitution of alleged profits accruing to a power company during a delay in construction of a competing public power project, which delay was alleged to have been caused by a wrongful suit to enjoin construction of the public project, the county should be granted leave to amend its original petition so as to eliminate the theory of unjust enrichment.<sup>241</sup>

(c) Relation Back of Amendments.

Properly allowed amendments relate back to the date of the original complaint, if the claim asserted in the amended pleading arose out of the same conduct, transaction, or occurrence as was attempted to be set forth in the original complaint. This is so even in suits against the United States.<sup>242</sup> But there is no such relation back, if the new claims set forth in the amendment do not arise out of the same conduct, transaction, or occurrence.<sup>243</sup> In the latter case, the proper statute of limitation may be applied to any action set forth in such an amendment.<sup>244</sup>

Thus, there was said to be no relation back when the original claim was brought by the plaintiff as administrator on a statutory cause of action for the benefit of the surviving wife, and the causes of action added by amendment were brought for the benefit of the estate of the deceased.<sup>245</sup> It is not certain that this decision is correct, for all the causes of action seem to have their genesis in the same acts of the defendant.

(d) Supplemental Pleadings.

A supplemental pleading should always be filed for relief in respect of any matter that has arisen after a suit is commenced.<sup>246</sup>

<sup>238</sup>Buggeln & Smith, Inc. v. Standard Brands, Inc., *supra* note 48.

<sup>239</sup>Moore v. Ill. Cent. R. Co., *supra* note 8; Downey v. Palmer, 27 F. Supp. 993 (S. D. N. Y. 1939); Holland v. Majestic Radio & Television Corp., 27 F. Supp. 990 (S. D. N. Y. 1939).

<sup>240</sup>Earhart v. Valerius, 25 F. Supp. 754 (W. D. Mo. 1938).

<sup>241</sup>Duke Power Co. v. Greenwood County, 25 F. Supp. 963 (W. D. S. C. 1939).

<sup>242</sup>Hubsch v. U. S., — F. Supp. — (S. D. N. Y. 1939).

<sup>243</sup>*Ibid.* Ronald Press Co. v. Shea, 27 F. Supp. 857 (S. D. N. Y. 1939).

<sup>244</sup>Ronald Press Co. v. Shea, *supra* note 243.

<sup>245</sup>L. E. Whitham Construction Co. v. Remer, 105 F. (2d) 371 (C. C. A. 10th 1939).

<sup>246</sup>Texarkana, Tex., v. Arkansas, Louisiana Gas Co., 306 U. S. 188, 83 L. Ed. 435, 59 S. Ct. 448 (1939); Basevi v. Edward O'Toole Co., 26 F. Supp. 41 (S. D. N. Y. 1939).

## RULE 16. PRE-TRIAL PROCEDURE; FORMULATING ISSUES

*Purpose of Rule*

This rule was adopted to enable courts to call the parties before them and cut away, by agreement and admission of parties, all encumbrances to a speedy trial on simplified issues.<sup>247</sup>

Judge Sweeney has outlined a practical and effective use of pre-trial procedure which has resulted in much saving of time and expense.<sup>248</sup>

## (3) Obtaining Admissions.

After counsel for one party has incurred expenses in preparing evidence and subpoenaing witnesses to prove certain facts which could have and should have been admitted at the pre-trial conference, opposing counsel should not be permitted, over the objection of the former, to admit such facts at the trial thereby eliminating proof on the questions involved. There is an element of surprise in such a move, and surprise is to be eliminated where possible under the new rules.<sup>249</sup>

## (5) Preliminary reference to Master.

A preliminary reference of issues to a master was made, where the evidence of an account between parties was voluminous, and to present it to a jury would take much time, would be expensive, and would seriously interfere with the business of the defendant.<sup>250</sup>

## (6) Matters Generally to Aid in Disposition of Action.

At a pre-trial conference, the court may take evidence on the question of jurisdiction, and, if it is found that jurisdiction is lacking, the action may be dismissed with prejudice.<sup>251</sup>

The court may also, in advance of a second trial of an action, make rulings as to the use of testimony given by a witness at the first trial. The one made here was a direction to the court reporter to certify testimony given by a witness at a former trial, to be used at a second trial, if the witness be not in the state at the time of the second trial.<sup>252</sup>

## RULE 17. PARTIES: CAPACITY

## (a) Real Party in Interest.

A real party plaintiff may bring an action to his use in the name of the legal plaintiff without the latter's consent, or even against his wishes.<sup>252a</sup> The requirement that every action shall be prosecuted in the name of the real party

<sup>247</sup>Nichols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938).

<sup>248</sup>Sweeney, *Expert Use of Pretrial Docket in Federal Court* (1939) 23 J. AM. JUD. Soc. 11.

<sup>249</sup>Byers v. Clark & Wilson Lumber Co., 27 F. Supp. 302 (D. Ore. 1939).

<sup>250</sup>Newcomb v. Universal Match Corp., *supra* note 193.

<sup>251</sup>Fink v. U. S., 28 F. Supp. 556 (W. D. Wash. 1939).

<sup>252</sup>Penn. v. Automobile Ins. Co., 27 F. Supp. 337 (D. Ore. 1939).

<sup>252a</sup>Hawkinson v. Carnell & Bradburn, 26 F. Supp. 150 (E. D. Pa. 1938).

in interest does not necessarily preclude the bringing of an action by one party "to the use" of another, in cases in which actions were heretofore brought in that manner.<sup>253</sup>

(b) Capacity to Sue or Be Sued.

A partnership may *sue* in its common name for the purpose of enforcing a substantive right existing under the Constitution or laws of the United States.<sup>254</sup> Further, it has been decided that an unincorporated labor organization is subject to suit in its common name, though no substantive federal law is involved.<sup>255</sup>

(c) Infants or Incompetent Persons.

A general guardian appointed in one state may not bring suit in a federal court in another state, if, by the laws of the latter state, such guardian does not have capacity to sue. Rule 17 (c) allowing a general guardian to sue must be read in connection with Rule 17 (b) providing that capacity of a representative to sue is determined by the law of the state where the action is brought.<sup>256</sup>

A federal court may not appoint a guardian *ad litem* if an incompetent is represented by a committee or guardian appointed by a court of the state in which the federal court is held, for the rule only provides for a guardian to conduct a suit when an incompetent is unrepresented.<sup>257</sup>

#### RULE 18. JOINDER OF CLAIMS AND REMEDIES

(a) Joinder of Claims.

A party may set forth two or more claims alternatively and hypothetically, and as many claims as he has, regardless of consistency, and he may demand relief in the alternative.<sup>258</sup>

A claim for damages for breach of contract may be joined with a claim to set aside a fraudulent conveyance.<sup>259</sup>

Although, when this case was decided, the Federal Rules of Civil Procedure did not apply to proceedings in copyright, it was held to be within the spirit of the Rules to permit the joinder of two counts in tort under the Copyright Statute with a count in contract, even though, under the Conformity Act, such joinder would not have been permitted.<sup>260</sup>

<sup>253</sup>Lloyd Moore, Inc. v. Schwartz, 26 F. Supp. 188 (E. D. Pa. 1938).

<sup>254</sup>Gregory and Gregory Motors, a partnership, v. Royal Typewriter Co., 27 F. Supp. 160 (S. D. N. Y. 1939).

<sup>255</sup>National Ass'n of Industrial Ins. Agents v. C. I. O., *supra* note 31.

<sup>256</sup>Southern Ohio Sav. Bank & Trust Co. v. Guaranty Trust Co. of N. Y., 27 F. Supp. 485 (S. D. N. Y. 1939).

<sup>257</sup>*Ibid.*

<sup>258</sup>Shell Petroleum Corp. v. Stueve, *supra* note 59. *Accord*, as to consistency: Michelson v. Shell Union Oil Corp., 26 F. Supp. 594 (D. Mass. 1939); Bergman v. Joe Morris Music Co., 27 F. Supp. 985 (S. D. N. Y. 1939).

<sup>259</sup>Iroquois Oil and Gas Co. v. Hollingsworth, *supra* note 74.

<sup>260</sup>Michelson v. Shell Union Oil Corp., *supra* note 258.



A claim on a promissory note against three defendants may not be joined with a claim on another promissory note against two of the defendants, as they do not present a common question of law or fact. By Rule 18 (a), when a joinder involves multiple parties, Rule 20 applies, and there may be a joinder only if there is a common question of law or fact involved in the different causes.<sup>261</sup>

One may, in his reply to a defense of release, plead rescision of the release as a cause of action, though it would have been better to have pleaded both the cause based on release and that founded on the original claim in the complaint.<sup>262</sup>

(b) Joinder of Remedies.

An action on a fidelity bond will lie without waiting for an accounting to determine the amount for which the principal is liable, in view of the rule which permits the joinder of claims in the same action, though one of them is cognizable only after another claim has been prosecuted to a conclusion.<sup>263</sup>

RULE 19. NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder.

Indispensable parties must be joined.<sup>264</sup>

(b) Effect of Failure to Join.

If several of a number of joint tortfeasors are subject to the court's jurisdiction, the action may proceed without joining other tortfeasors, as they are not indispensable parties. Rather, they are merely necessary parties, as their liabilities are separate, as well as joint. Rule 19 distinguishes between these types of parties, and provides that indispensable parties must be joined, whereas necessary parties need not be, if their interests are so far separable that a final decree can be entered without affecting their rights and liabilities.<sup>265</sup> To the uninitiated, the terms indispensable and necessary are confusing, as they appear to be synonymous. It seems to the writer that a better term than "necessary" should be provided to distinguish parties covered by it from indispensable parties. Perhaps "permissible" would be an acceptable word to replace "necessary".

The following cases further illustrate the so-called necessary (permissible) party doctrine.

Some of the directors of a corporation as defendants in stockholders' representative suit for restitution for losses caused by alleged mismanagement and dissipation of assets are not entitled to order that other persons be joined as defendants. Stockholders have not seen fit to bring such persons into the action

<sup>261</sup>Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

<sup>262</sup>Downey v. Palmer, *supra* note 239.

<sup>263</sup>Utesch v. U. S. Fidelity & Guaranty Co., 27 F. Supp. 933 (N. D. Iowa 1939).

<sup>264</sup>Paasche v. Atlas Powder Co., — F. Supp. — (N. D. Ill. 1939).

<sup>265</sup>Wyoga Gas & Oil Corp. v. Schrack, 27 F. Supp. 35 (M. D. Pa. 1939).

and ask for damages against them either in their official or personal capacity.<sup>266</sup>

Majority stockholders, who make a contract for the benefit of the corporation, are not indispensable parties, although they may be necessary parties, to an action by a trustee in bankruptcy of the corporation, for breach of such contract. Hence, failure to join them is not ground for dismissal.<sup>267</sup>

Those injured by an automobile covered by a liability insurance policy are necessary parties to a proceeding by the insurer for a declaratory judgment that it is not responsible under the policy.<sup>268</sup>

#### RULE 20. PERMISSIVE JOINDER OF PARTIES

##### (a) Permissive Joinder.

In an action for injuries sustained by children passengers in an automobile collision, the children's mother who was driving the automobile at the time of the collision and who sought damages for loss of services of the children and for medical and other expenses incurred as a result of their injuries might join as plaintiff.<sup>269</sup>

In a proceeding to restrain violation of a statute, persons charged with aiding and abetting such violation may be joined as defendants, for there are common questions of fact and law involved.<sup>270</sup>

Parties may be joined as defendants against whom the right to relief exists in the alternative, if the plaintiff is uncertain from which he may recover.<sup>271</sup>

A collector of taxes for three political subdivisions gave a single fidelity bond. The state law imposed on each political subdivision a liability for its proportionate share of the bond premium. The surety could join these three parties as defendants in an action to recover the premium even though a separate judgment would be rendered against each for one-third of the premium, for Rule 20 (a) permits separate demands against several defendants to be determined in one action.<sup>272</sup>

In an action for patent infringement, a corporation operated by the original defendant and alleged to be infringing the same patents, may be brought in by the plaintiff as an additional defendant.<sup>273</sup>

Claims for damages against several of a number of joint tortfeasors may be joined in one action. It is not necessary either that each of them must be sued separately or that all must be sued jointly.<sup>274</sup>

<sup>266</sup>Sauer v. Newhouse, 24 F. Supp. 911 (D. N. J. 1938).

<sup>267</sup>Mahoney v. Bethlehem Engineering Corp., *supra* note 128.

<sup>268</sup>Maryland Casualty Co. v. Consumers Finance Service, Inc., of Pa., 101 F. (2d) 514 (C. C. A. 3d 1938).

<sup>269</sup>Middleton v. Coxen, 25 F. Supp. 632 (M. D. Pa. 1938).

<sup>270</sup>Securities and Exchange Comm. v. Timetrust, Inc., *supra* note 60.

<sup>271</sup>Crim v. Lumbermen's Mut. Casualty Co., *supra* note 55.

<sup>272</sup>National Surety Corp. v. City of Allentown, 27 F. Supp. 515 (E. D. Pa. 1939).

<sup>273</sup>Boysell Co. v. Franco, 26 F. Supp. 421 (N. D. Ga. 1939).

<sup>274</sup>Wyoga Gas & Oil Corp. v. Schrack, *supra* note 265.

In an action to recover for personal injuries sustained while unloading a freight car, the plaintiff may join, as parties defendant, the resident delivering carrier and the non-resident initial carrier, if both of them were responsible for the accident.<sup>274a</sup>

A claim on a promissory note against three defendants may *not* be joined with a claim on another promissory note against two of the defendants, as they do not present a common question of law or fact.<sup>275</sup>

(b) Separate Trials.

Where several persons who are not indispensable parties are joined in an action, the court may order separate trials of claims against some of them.<sup>276</sup>

#### RULE 21. MISJOINDER AND NON-JOINDER OF PARTIES

Neither misjoinder of parties plaintiff nor misjoinder of parties defendant is a ground for dismissal.<sup>277</sup> Nor can misjoinder be pleaded in the answer, as it is not a defense.<sup>278</sup> The proper remedy is to permit the various claims of the different parties to be severed and proceeded with separately, if the severance will not prejudice any substantial right.<sup>279</sup>

#### RULE 22. INTERPLEADER

Rule 22 provides both for strict interpleader and for actions in the nature of interpleader. Hence, the plaintiff may have an interest in the *res* involved in an interpleader.<sup>280</sup> The very essence of a strict bill of interpleader is (1), that it shall allege that two or more are demanding the same thing of which, (2), the plaintiff is an indifferent stakeholder.

An essential of a bill *in the nature of a bill of interpleader* is that there shall be conflicting claimants to the same fund or subject matter held by the plaintiff, and a second essential is that the plaintiff shall have some right to equitable relief as against the defendants or some of them with respect to the same fund or subject matter. Therefore, a complaint in interpleader cannot be maintained by the surety on a bond given to protect those dealing with the principal against loss on account of wrongful acts, for the purpose of determining the respective rights of the surety and multiple claimants under the bond, since the multiple liability is not on the same obligation, hence, there is no single fund in which various parties claim an interest.<sup>281</sup>

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<sup>274a</sup>Whately v. Mo. Pac. R. R. Co., 27 F. Supp. 980 (W. D. La. 1939).

<sup>275</sup>Federal Housing Administrator v. Christianson, *supra* note 261.

<sup>276</sup>Wyoga Gas & Oil Corp. v. Schrack, *supra* note 265.

<sup>277</sup>Holmberg v. Hannaford, *supra* note 86; Federal Housing Administrator v. Christianson, *supra* note 275. Cf. Berke v. United Paperboard Co., 26 F. Supp. 412 (S. D. N. Y. 1938) not allowing dismissal, if an issue of fact as to whether or not a person is a proper party is raised by a motion to dismiss.

<sup>278</sup>Macleod v. Cohen-Erichs Corp., *supra* note 68.

<sup>279</sup>Federal Housing Administrator v. Christianson, *supra* note 261.

<sup>280</sup>John Hancock Mut. Ins. Co. v. Kegan, 22 F. Supp. 326 (D. Md. 1938).

<sup>281</sup>Standard Surety & Casualty Co. of N. Y. v. Baker, 26 F. Supp. 956 (W. D. Mo. 1939).

## RULE 23. CLASS ACTIONS

## (b) Secondary Action by Shareholders.

It has been declared that plaintiffs in a representative stockholder's suit against the company and its directors for an accounting for mismanagement and conspiracy to defraud the company and its stockholders must allege and prove that plaintiffs were shareholders at the time of the transactions of which complaint is made or that their holdings have since come to them by operation of law. There can be no recovery based on transactions occurring prior to the time when they became stockholders.<sup>282</sup> Yet, should not the last sentence apply only to those whose holdings do not come to them by operation of law?

## (c) Dismissal or Compromise.

A class action cannot be dismissed except upon notice to all members of the class and with the approval of the court.<sup>283</sup> But the mailing to all stockholders, pursuant to the order of the court, of a copy of a rule to show cause why the suit should not be dismissed with prejudice, constitutes the notice of the proposed dismissal required by Rule 23 (c).<sup>284</sup>

There could also be a dismissal with prejudice of a representative stockholder's suit for alleged mismanagement and dissipation of assets after an offer and acceptance of a settlement had been confirmed, all the plaintiffs and the majority of the preferred stockholders had sold their stock to a corporation created for that purpose, and a notice had been sent to all of the stockholders to show cause at a certain time why the action should not be dismissed.<sup>285</sup>

## RULE 24. INTERVENTION

## (a) Intervention of Right.

Application for intervention must be timely.<sup>286</sup> An application is not timely if made more than two and one-half years after occurrence of events of which applicant seeks to complain and after considerable money was expended in carrying out the transactions, of all of which applicant had notice.<sup>287</sup> The same is true where a case was calendared for trial on June 8, 1938 and the motion to join other parties was filed September 16, 1938.<sup>288</sup>

## (2) Inadequate Representation.

Intervention as a matter of right is permitted only if the representation of the applicant's interest by existing parties is, or may be, inadequate and if the applicant is, or may be, bound by the judgment in the action.<sup>289</sup>

<sup>282</sup>Rinn v. Asbestos Mfg. Co., 101 F. (2d) 344 (C. C. A. 7th 1938).

<sup>283</sup>Delahanty v. Newark Morning Ledger Co., 26 F. Supp. 327 (D. N. J. 1939).

<sup>284</sup>Sauer v. Newhouse, 26 F. Supp. 326 (D. N. J. 1939).

<sup>285</sup>*Ibid.*

<sup>286</sup>U. S. v. Columbia Gas & Elec. Corp., 27 F. Supp. 116 (D. Del. 1939).

<sup>287</sup>*Ibid.*

<sup>288</sup>Battista v. Capital Transit Co., — F. Supp. — (D. C. 1938).

<sup>289</sup>Sloan v. Appalachian Elec. Power Co., 27 F. Supp. 108 (S. D. W. Va. 1939). *Accord*:

The question of adequacy of representation does not arise unless the applicant is represented in the action.<sup>290</sup> Thus, in an action by the United States to compel a defendant to divest itself of stock of another corporation, neither the latter corporation, nor a shareholder thereof, other than the defendant, is so represented in the action as to entitle them to intervene as of right.<sup>291</sup>

An attorney under a contingent fee agreement does not have a sufficient interest to support a motion to intervene in opposition to a proposed stipulation of dismissal executed by all of the parties.<sup>291a</sup>

A representation, though inadequate, exists in an insurer, who has compensated the plaintiff as an injured employee, in an action against the one injuring the employee.<sup>292</sup>

If the attorney representing the defendant is unfriendly to the one petitioning to intervene as a defendant, and if a judgment against the defendant, though not binding the petitioner, would enable the defendant to proceed against the petitioner, the petitioner's interest is not adequately represented, and, in a broad sense, the petitioner might be bound by the judgment against the defendant.<sup>293</sup>

### (3) Adversely Affected by Distribution of Property.

Clause 3 of subdivision (a) relates to cases in which the applicant will be adversely affected by a disposition of property in the custody of the court in which the applicant asserts an interest. Early in the English law a third person claiming an interest in property under the control of the court was permitted by interrogatories to establish his claim to or lien upon such property. This principle found expression in old Equity Rule 37. The new rule does not specifically set forth the nature of the interest in the property which a person must have in order to establish his claim to intervention as a matter of right. It is improbable that the Supreme Court in promulgating this new rule intended to destroy well established principles as the basis of intervention as of right. It would produce chaos to require the courts to recognize the absolute right to intervention of strangers who had no legal or equitable interest in the subject matter of the action. Clause 3 contemplates a legal interest in property in custody of the court.

In an action by the United States to compel defendant to divest itself of stock of another corporation, another shareholder of the latter corporation will not be so adversely affected by the disposition of defendant's shares as to

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Tachna v. Insuranshares Corp. of Del., 25 F. Supp. 541 (D. Mass. 1938) ; U. S. v. Columbia Gas & Elec. Corp., *supra* note 286.

<sup>290</sup>U. S. v. Columbia Gas & Electric Corp., *supra* note 286.

<sup>291</sup>*Ibid.*

<sup>291a</sup>Culmerville Coal Co. v. Downing, — F. Supp. — (N. D. Ohio 1938).

<sup>292</sup>Sloan v. Appalachian Elec. Power Co., *supra* note 289.

<sup>293</sup>U. S. v. C. M. Lane Lifeboat Co., *supra* note 12.

entitle it to intervention of right.<sup>294</sup>

Where corporate stock is in the hands of a trustee appointed to enforce compliance with a judgment directing disposition of such stock by its owner, if the trustee must vote the stock as directed by the cestui and turn dividends over to it, such stock is not in the custody of the court, for the trustee is not an administrative officer; he is a mere watchman to see that the provisions of the decree are carried out.<sup>295</sup>

(b) Permissive Intervention.

Application for intervention must be timely.<sup>296</sup> Permissive intervention is allowed when an applicant's claim or defense and the main action have a question of law or fact in common. Under this rule, an insurer who has compensated the plaintiff as an injured employee may intervene in the plaintiff's suit against the one injuring him.<sup>297</sup>

In an action brought by a subcontractor in the name of the United States against the surety on a general contractor's bond, the general contractor was permitted to intervene as a defendant and file a counterclaim against the subcontractor, for the general contractor is subject to recovery over.<sup>298</sup>

In cases of permissive intervention, the court in exercising its discretion, should consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.<sup>299</sup>

Hence, in an anti-trust action brought by the Federal Government, in which a decree is being sought ordering one gas company to divest itself of control of another, the court will not permit intervening complaints raising rate issues to be filed.<sup>300</sup> Again, because of the delay that would be occasioned by the opposite rule, intervention is limited to the field of litigation open to the original parties.<sup>301</sup> The court may use its discretion in allowing permissive intervention, and it may consider other matters than undue delay and prejudice to the adjudication of the rights of the parties which might be occasioned by intervention.<sup>302</sup> Stated conditions may be attached to the right to intervene.<sup>303</sup>

(c) Procedure.

An intervener must file a pleading stating the claim or defense for which intervention is sought.<sup>304</sup>

<sup>294</sup>U. S. v. Columbia Gas & Elec. Corp., *supra* note 286.

<sup>295</sup>*Ibid.*

<sup>296</sup>*Ibid.*

<sup>297</sup>Sloan v. Appalachian Elec. Power Co., *supra* note 289.

<sup>298</sup>U. S. for benefit of Foster Wheeler Corp. v. American Surety Co., *supra* note 11.

<sup>299</sup>Carpenter v. Wabash Ry Co., 103 F. (2d) 996 (C. C. A. 8th 1939); U. S. v. Columbia Gas & Elec. Corp., *supra* note 286.

<sup>300</sup>U. S. v. Columbia Gas & Elec. Corp., *supra* note 286.

<sup>301</sup>*Ibid.*

<sup>302</sup>Tachna v. Insuranshares Corp. of Del., *supra* note 289.

<sup>303</sup>Dolcater v. Manufacturers & Traders Trust Co., 25 F. Supp. 637 (W. D. N. Y. 1938).

<sup>304</sup>Paasche v. Atlas Powder Co., *supra* note 264.

## RULE 25. SUBSTITUTION OF PARTIES

## (a) Death.

Though the petition to substitute an administrator as plaintiff did not affirmatively show that the original plaintiff died within two years of the petition, it was granted, for that fact was conceded by the defendant.<sup>305</sup> This provision should be made clearer as to what point in the proceedings the two years may extend. Is it to the serving, filing, or granting of the petition?

## (c) Transfer of Interest.

The court, upon the transfer by a party of his interest, may order him eliminated as a party.<sup>306</sup>

## RULE 26. DEPOSITIONS PENDING ACTION

*In General*

Several articles have been written concerning these rules.<sup>307</sup> The deposition rules stay within the authority conferred by Congress upon the Supreme Court.<sup>308</sup>

*Purpose of Rules*

The present theory of procedure, as exemplified by the discovery rules, is not only to present the ultimate facts, but to grant the privilege of compelling the parties to disclose before trial the detailed items of evidence.<sup>309</sup>

Depositions are to be brought, as nearly as practicable, into line with the testimony of a witness examined orally in open court.<sup>310</sup>

The discovery rules are designed to secure the just, speedy, and inexpensive determination of every action,<sup>311</sup> hence they should be interpreted liberally.<sup>312</sup>

These rules have also been said to have as their purpose the narrowing of the issues and the promoting of justice, so that a trial should not be a game of chance or wits,<sup>313</sup> the full disclosing of the nature and scope of the controversy,<sup>314</sup> the providing of a systematic and complete scheme, on a very liberal basis, for discovery of various kinds before trial,<sup>315</sup> and the easy procur-

<sup>305</sup>Feinberg v. U. S., 25 F. Supp. 905 (D. Conn. 1938).

<sup>306</sup>Irving Air Chute Co. v. Switlik Parachute & Equipment Co., *supra* note 212.

<sup>307</sup>Pike and Willis, *The New Federal Deposition-Discovery Procedure* (1938) 38 COL. L. REV. 1179, 1436; *Comparison of the New Federal Rules 26 to 37 Inclusive on Depositions and Discovery with the Colorado Code, Statutes, and Decisions* (1938) 41 COLO. B. A. 182.

<sup>308</sup>Columbia Metaloy Co. v. Bank of America, *etc.*, 26 F. Supp. 765 (N. D. Cal. 1938).

<sup>309</sup>Dixon v. Sunshine Bus Lines, Inc., 27 F. Supp. 797 (W. D. La. 1939).

<sup>310</sup>U. S. v. Aluminum Co. of America, 27 F. Supp. 820 (S. D. N. Y. 1939).

<sup>311</sup>National Bondholders Corp. v. McClintic, 99 F. (2d) 595 (C. C. A. 4th 1938); Babcock & Wilcox Co. v. N. C. Pulp Co., *supra* note 13.

<sup>312</sup>National Bondholders Corp. v. McClintic, *supra* note 311; Unlandhern v. Park Contracting Corp., 26 F. Supp. 743 (S. D. N. Y. 1938).

<sup>313</sup>Laverett v. Continental Briar Pipe Co., *supra* note 10.

<sup>314</sup>Dixon v. Sunshine Bus Lines, Inc., *supra* note 309.

<sup>315</sup>Grauer v. Schenley Products Co., 26 F. Supp. 768 (S. D. N. Y. 1938); Unlandhern v. Park Contracting Corp., *supra* note 312.

ing of evidentiary details.<sup>316</sup>

(a) When Depositions May Be Taken.

*Motion—When Necessary*

A motion for an order to take a deposition is necessary before an answer is filed.<sup>317</sup> But, after such filing, that is unnecessary.<sup>318</sup> It may then be taken merely on notice.<sup>319</sup> It has even been suggested that, after issue is joined, a motion for a deposition cannot be granted,<sup>320</sup> but there is a more reasonable holding to the contrary.<sup>321</sup> Rule 26 at no point declares against such a practice.

*Who May Be Examined?*

Anyone, whether a party or not, may be examined.<sup>322</sup>

*Who May Examine?*

Yet, it is a party who examines.<sup>323</sup>

*Affirmative of Issue*

One need not have the affirmative of the issue on which an examination by deposition is sought.<sup>324</sup>

*Amended Answer*

Notice to take depositions given by plaintiff after answer has been filed, should not be set aside on the assertion that defendant intends to file an amended answer.<sup>325</sup>

*Order of Examination*

When plaintiff moves for leave to examine defendant before issue joined, such examination should not be deferred until completion of the examination of plaintiff previously ordered on defendant's motion, in view of the requirement that the rules be construed to secure a just, speedy, and inexpensive determination of every action.<sup>326</sup>

*Examination Abroad*

One who serves notice of taking depositions abroad on written interrogatories, may have a direct and redirect examination orally, or he may adhere to his interrogatories on direct examination and have an oral redirect. The defendant may be permitted to cross-examine orally.<sup>327</sup>

<sup>316</sup>Dixon v. Sunshine Bus Lines, Inc., *supra* note 309.

<sup>317</sup>Lyons v. Bronx Touring Line, Inc., — F. Supp. — (S. D. N. Y. 1939).

<sup>318</sup>Schultz v. State Mut. Life Assur. Co., — F. Supp. — (D. Ore. 1938); Columbia Metaloy Co. v. Bank of America, *supra* note 308; Lyons v. Bronx Towing Line, Inc., *supra* note 317; Barrezueta v. Sword S. S. Line, *supra* note 3; Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y. 1939).

<sup>319</sup>Barrezueta v. Sword S. S. Line, *supra* note 3.

<sup>320</sup>Lyons v. Bronx Towing Line, Inc., *supra* note 317.

<sup>321</sup>Schultz v. State Mut. Life Assur. Co., *supra* note 318.

<sup>322</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318.

<sup>323</sup>National Bondholders Corp. v. McClintic, *supra* note 311.

<sup>324</sup>Laverett v. Continental Briar Pipe Co., *supra* note 6.

<sup>325</sup>Saviolis v. National Bank of Greece, 25 F. Supp. 966 (S. D. N. Y. 1938).

<sup>326</sup>Thomas v. Goldstone, 27 F. Supp. 297 (S. D. N. Y. 1939).

<sup>327</sup>Winograd Bros., Inc. v. Chase Bank, — F. Supp. — (S. D. N. Y. 1939).



*Simultaneous Remedies*

A party may simultaneously examine his adversary before trial and require him to respond to a request for admission concerning the same matters.<sup>328</sup>

*Costs*

Ordinarily each party to a deposition bears his own expenses. The other rule is often applied when one moves to take oral depositions abroad.<sup>329</sup>

*Appeal*

When a court does not abuse his discretion in refusing the right to take a deposition his holding will not be revised on appeal.<sup>329a</sup>

## (b) Scope of Examination.

*In General*

The fact that a bill of particulars has been served does not bar an examination before trial, for, under Rule 26 (b), the scope of such examination is broader than the procedure under Rule 12 (e).<sup>330</sup> Thus, evidence and proof may be obtained by depositions.<sup>331</sup>

The basic idea relating to the scope of depositions is that the deponent may be examined regarding any matter not privileged which is relevant to the subject matter involved unless, after the notice is served, upon application of the party to be examined, the court otherwise directs as provided in Rule 30 (b) and (d).<sup>332</sup>

*Privilege*

The attorney-client privilege applies under this rule.<sup>333</sup>

The scope of examinations before trial does not extend to information, collateral to the issues, sought for the sole purpose of cross-examining and impeaching a witness who may testify for the adverse party. However, such examinations may be had to obtain information upon which to cross-examine a party or witness, if the examination is on matter relative to the subject involved in the pending action.<sup>334</sup> On the other hand, one does not have a privilege against disclosing one's case.<sup>335</sup> Nor, it has been decided, may he refuse to answer questions concerning matter within the knowledge of

<sup>328</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318.

<sup>329</sup>Winograd Bros. Inc. v. Chase Bank, *supra* note 327.

<sup>329a</sup>Tenn. Elec. Power Co. v. Tenn. Valley Authority, — U. S. —, 83 L. Ed. 341, 59 S. Ct. 366 (1939).

<sup>330</sup>Orange County Theatres, Inc. v. Levy, *supra* note 156.

<sup>331</sup>Mass. Bonding & Ins. Co. v. Harrisburg Trust Co., *supra* note 159.

<sup>332</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318. *Accord*: Bennett v. The Westover, Inc., 27 F. Supp. 10 (S. D. N. Y. 1938); Stankewicz v. Pillsbury Flour Mills Co., 26 F. Supp. 1003 (S. D. N. Y. 1939); Michels v. Ripley, *supra* note 6; Bough v. Lee, 26 F. Supp. 1000 (S. D. N. Y. 1939); Union Cent. Life Ins. Co. v. Burger, 27 F. Supp. 556 (1939); Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence* (1939) 34 ILL. L. REV. 1.

<sup>333</sup>Grauer v. Schenley Products Co., *supra* note 315; Rowe v. Union Central Life Ins. Co., — F. Supp. — (D. C. 1939).

<sup>334</sup>Lynch v. Pollak, — F. Supp. — (S. D. N. Y. 1939).

<sup>335</sup>Pike, *supra* note 332.

his opponent.<sup>336</sup> In support of the contrary view, at least under the circumstances, in a suit for a patent infringement in which a specifically designated composition was charged with infringing, the plaintiff was not required to answer interrogatories asking for an analysis of the composition. It was thought that the purposes of the new rules required this result.<sup>337</sup>

It has also been said that a party is not entitled to examination before trial on matters admitted in his adversary's pleadings.<sup>337a</sup> An editor's note attached to this case, as reported by the Attorney General's office, states that, in view of the broad language of Rule 26 (b) and in view of the fact that one of the purposes of an examination before trial is to secure evidence in support of the examining party's case and another is to ascertain the claims and assertions of the adverse party, it may, perhaps, be successfully contended that it is an undue limitation of Rule 26 (b) not to permit such an examination, merely because the facts are within the knowledge of the examining party. This seems correct.

Ordinarily, a request for the names of an opponent's witnesses and for the privilege of interrogating them before trial should be granted. However, in an action on fire insurance policies, in which the answer alleges arson as a defense, plaintiff's motion for an order directing defendant to supply the names of all persons having knowledge to support the defense, for the purpose of enabling plaintiff to examine the witnesses before trial, should be denied, if it appears that to permit such procedure would interfere with an impending criminal prosecution of plaintiff on the charge of arson, for public policy demands such a holding.<sup>338</sup>

#### *Special Uses of Deposition*

Depositions may be taken, not only to help dispose of main issues in a case, but also to discover whether or not the court has jurisdiction,<sup>339</sup> or the case is *res judicata*,<sup>340</sup> or a witness is credible.<sup>341</sup>

#### *Producing Things*

A witness, whose deposition is being taken orally, though he is not a party, may be required, in the discretion of the court, to submit to inspection by examining counsel any papers produced in response to a subpoena *duces tecum*. Rule 45 (d), which deals with ordering the production of documents on the taking of depositions, does not limit the production to documents in the hands of a party.<sup>342</sup>

<sup>336</sup>Benevento v. A. & P. Food Stores, Inc., 26 F. Supp. 424 (E. D. N. Y. 1939).

<sup>337</sup>B. B. Chemical Co. v. Cataract Chemical Co., 25 F. Supp. 472 (W. D. N. Y. 1938).

<sup>337a</sup>Norton v. Cooper Jarrett, Inc., *supra* note 152a.

<sup>338</sup>Penn v. Automobile Ins. Co., 27 F. Supp. 337 (D. Ore. 1939).

<sup>339</sup>Jiffy Lubricator Co. v. Alemite Co., *supra* note 126.

<sup>340</sup>Berke v. United Paperboard Co., *supra* note 277; Lip Lure v. Bloomingdale Bros., 27 F. Supp. 811 (S. D. N. Y. 1939).

<sup>341</sup>Floridin Co. v. Attapulugus Clay Co., 26 F. Supp. 968 (D. Del. 1939).

<sup>342</sup>Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 27 F. Supp. 121 (S. D. N. Y. 1938). *Accord*, in principle: Bough v. Lee, *supra* note 332.

## (d) Use of Depositions.

*In General*

Depositions cannot be used against a party who had no notice of the taking thereof.<sup>343</sup>

## (2) Deposition of Party or Agent.

Usually, if one uses a deposition not taken by him, he makes the deponent his witness, but this is not, apparently, true of depositions of a party or an officer, director, or managing agent of a party.<sup>344</sup>

## (4) Part of Deposition Demandable.

One offering a deposition in evidence may be required by the adverse party to read all questions and answers thereto that are relevant to the part already introduced.<sup>345</sup>

## (e) Objections to Admissibility.

The better practice, in respect to objections to the admissibility of evidence sought on examination before trial, is to raise them during the examination by motion under Rule 30 (d) or when the deposition is used at the trial pursuant to Rule 26 (e), rather than to make the objection before examination in an attempt to limit the scope of the deposition under Rule 30 (b).<sup>346</sup>

## RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

## (a) Before Action.

There may be a discovery by deposition before an action is commenced.<sup>347</sup>

Discovery by depositions before action under Rule 27 should be limited to the taking of testimony of persons, for the rule makes provision only for this. Therefore, a petitioner, in a proceeding to perpetuate testimony in anticipation of an action for damages for wrongful death which occurred on board a tug, may not be permitted to inspect and survey the tug.<sup>348</sup>

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

## (a) Within the United States.

A deposition taken by the stenographer of the opposing attorney cannot later be objected to on the ground she was disqualified to take it, where there was a stipulation that it might be taken by any one of five named persons of whom the stenographer was one. By proceeding to take the deposition, there was a waiver as to any disqualification of the five persons named.<sup>349</sup>

## (b) In Foreign Countries.

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<sup>343</sup>U. S. v. Aluminum Co. of America, 27 F. Supp. 820 (S. D. N. Y. 1939).

<sup>344</sup>Pike, *supra* note 332.

<sup>345</sup>U. S. v. Aluminum Co. of America, *supra* note 310.

<sup>346</sup>Union Cent. Life Ins. Co. v. Burger, *supra* note 332.

<sup>347</sup>C. F. Simonin's Sons, Inc., v. American Can Co., *supra* note 23.

<sup>348</sup>Egan v. Moran Towing & Transp. Co., 26 F. Supp. 621 (S. D. N. Y. 1939).

<sup>349</sup>Laverett v. Continental Briar Pipe Co., 25 F. Supp. 790 (E. D. N. Y. 1938).

As a matter of discretion, an open commission may be issued to take the oral depositions of witnesses residing abroad, if the claim arose abroad and substantially all of the witnesses reside there. Undue expense to the opposite party may justify the denial, or qualification, of an oral examination.<sup>350</sup>

#### RULE 29. STIPULATIONS REGARDING TAKING DEPOSITIONS

If a party consents in advance to an examination in a certain city, he cannot object to the examination being held there.<sup>351</sup>

An examination before trial should not take place in the office of the attorney for either party.<sup>352</sup>

But, though a party stipulates as to the officer before whom a deposition shall be taken, he should be relieved of his stipulation as to further taking of testimony, if it appears subsequently that such officer is disqualified and there are misgivings as to the fidelity with which the functions of the office have been performed.<sup>353</sup>

#### RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

##### (a) Notice of Examination: Time and Place.

The party desiring to take testimony upon oral examination is required to serve a notice in writing to every other party, designating the name of the person before whom, the place where, and time when, and the name and address of each person to be examined, and, if the name is unknown, a general description sufficient to identify him.<sup>354</sup> This is essential to make Rule 45 effective.<sup>355</sup>

It is not sufficient if the notice merely states that it is to examine a corporate party "by the officers, directors, managing agents or employees having knowledge thereof".<sup>356</sup> Neither is a notice to take the depositions of "such other officer or officers as may have knowledge of the matters hereinafter referred to" sufficient, as it is too general a notice to require a party to produce anyone for examination, for the statute provides for a more definite naming of persons to be examined.<sup>357</sup>

Although neither Rule 30 nor Rule 45 specifically require that notice of examination before trial shall state the name of the person before whom the examination is to take place, the better practice is that the notice should name such person.<sup>358</sup>

<sup>350</sup>Gitto v. "Italia" Societa' Anonima Di Navigazione, Genova, 28 F. Supp. 309 (E. D. N. Y. 1939).

<sup>351</sup>Norton v. Cooper Jarrett, Inc., *supra* note 152a.

<sup>352</sup>*Ibid.* See also discussion under Rule 28 (a).

<sup>353</sup>Laverett v. Continental Briar Pipe Co., *supra* note 349.

<sup>354</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318; Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Supp. 303 (S. D. N. Y. 1939).

<sup>355</sup>Freeman v. Hotel Waldorf-Astoria Corp., *supra* note 354.

<sup>356</sup>*Ibid.*

<sup>357</sup>Orange County Theatres, Inc. v. Levy, *supra* note 156.

<sup>358</sup>Norton v. Cooper Jarrett, Inc., *supra* note 152a.

Notice to take deposition need not state the matters upon which the examination is sought, for the wording of the rule makes no such requirement.<sup>359</sup>

(b) Order for Protection of Parties and Deponents.

Any party or the person to be examined may challenge the right to the examination or seek to limit its scope.<sup>360</sup> But a party proceeding to take depositions may not move to limit the scope of the examination, for Rule 30 (b) inures only to the benefit of his opponent.<sup>361</sup>

*Scope of Protection*

Rule 30 (b) makes it clear that all phases of depositions on oral examination are to be subject to control by the court, to the end, among others, that a witness may be immune from undue annoyance, embarrassment, or oppression.<sup>362</sup> And it is only where such bad faith, annoyance, embarrassment, oppression, or the like are the purpose of the examination, or other special circumstances occur, that the court should be asked to intercede.<sup>363</sup> Such improper motives will not be assumed, in the absence of proof, because several days will be required to take the deposition.<sup>364</sup>

In a proper case, the court may limit or set aside the taking of depositions.<sup>365</sup> Thus, the taking of depositions by a party who is guilty of laches should be conditioned on its causing no delay in the trial.<sup>365a</sup> Yet, a motion to vacate a notice to take a deposition, on the ground that the evidence sought would not be admissible, will not be granted unless it clearly appears that the evidence is privileged or irrelevant.<sup>366</sup>

The court may fix a place for hearing other than that stated in the notice, and may include terms in its order.<sup>367</sup>

Though the court may order a deposition to be taken on written interrogatories rather than orally, as suggested in the notice to examine, it will not do this when the suggested testimony is to cover a wide range, which cannot be adequately covered by written interrogatories.<sup>368</sup>

The court did not permit inspection by examining counsel of papers produced in response to a subpoena duces tecum by a witness whose deposition

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<sup>359</sup>*Saviolis v. National Bank of Greece*, *supra* note 325; *Bennett v. The Westover, Inc.*, *supra* note 332; *Freeman v. Hotel Waldorf-Astoria*, *supra* note 354.

<sup>360</sup>*Union Central Life Ins. Co. v. Burger*, *supra* note 332.

<sup>361</sup>*Barreuzetta v. Sword S. S. Line*, *supra* note 3.

<sup>362</sup>*Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, *supra* note 342. *Accord*, in effect: *Cumberland Corp. v. McLellan Stores Co.*, 27 F. Supp. 994 (S. D. N. Y. 1939).

<sup>363</sup>*Laverett v. Continental Briar Pipe Co.*, *supra* note 10; *Stankewicz v. Pillsbury Flour Mills Co.*, *supra* note 332.

<sup>364</sup>*Michels v. Ripley*, *supra* note 6.

<sup>365</sup>*Bough v. Lee*, *supra* note 332; *Stankewicz v. Pillsbury Flour Mills Co.*, *supra* note 332.

<sup>365a</sup>*Norton v. Cooper Jarrett, Inc.*, *supra* note 152a.

<sup>366</sup>*Union Central Life Ins. Co. v. Burger*, *supra* note 332.

<sup>367</sup>*Clair v. Philadelphia Storage Battery Co.*, 27 F. Supp. 777 (E. D. Pa. 1939).

<sup>368</sup>*Ibid.*

is being taken and who is not a party to the action, nor unfriendly to the one taking the deposition, if the papers are not valuable as evidence and their disclosure might seriously embarrass or prejudice the witness.<sup>369</sup>

This power to limit or set aside the taking of a deposition is discretionary.<sup>370</sup>

*Order of Multiple Examinations*

When both parties serve notices to take depositions, the one who first serves his notice should ordinarily be permitted to complete his examinations before the other begins.<sup>371</sup> But occasionally the court reverses the order of the examinations.<sup>372</sup>

(c) Record of Examination, *etc.*

*In Lieu of Participation in Examination*

As a matter of discretion, if depositions are taken abroad, and undue traveling expenses are involved, the adverse party may employ local counsel or, after the depositions have been taken and examined, address written cross-interrogatories to the deponents. If the answers to the first set of cross-interrogatories are incomplete, leave to file further cross-interrogatories may be sought.<sup>373</sup>

(d) Motion to Terminate or Limit Examination.

The better practice in respect to objections to the admissibility of evidence sought on examination before trial is to raise them during the examination or when the deposition is used at the trial.<sup>374</sup> Hence, the fact that the giving of the testimony sought by notice to take depositions will require disclosure of secret processes is not a ground for vacating the notice.<sup>375</sup> It is also said objection to the testimony may be taken during the examination by a motion to terminate or limit the examination.<sup>376</sup>

A motion to terminate the taking of the deposition of a party or in the alternative to limit such examination to written interrogatories concerning certain specified matters should be denied if the party seeking the examination is entitled to a general examination of his adversary, and if the examination had proceeded for only a short time.<sup>376a</sup>

RULE 31. DEPOSITIONS UPON WRITTEN INTERROGATORIES

(d) Protective Orders.

The court's discretion to require that a deposition be taken on oral examina-

<sup>369</sup>Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342.

<sup>370</sup>National Bondholders Corp. v. McClintic, *supra* note 311; Stankewicz v. Pillsbury Flour Mills Co., *supra* note 332; Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342.

<sup>371</sup>Grauer v. Schenley Products Co., *supra* note 315; Bough v. Lee, *supra* note 332.

<sup>372</sup>Unlandhern v. Park Contracting Corp., *supra* note 312.

<sup>373</sup>Gitto v. "Italia", Societa' Anonima Di Navigazione, Genova, *supra* note 350.

<sup>374</sup>Union Central Life Co. v. Burger, *supra* note 332.

<sup>375</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318.

<sup>376</sup>*Ibid.*

<sup>376a</sup>Newcomb v. Universal Match Co., 27 F. Supp. 937 (E. D. N. Y. 1939).

tion should be exercised, when direct interrogatories are so numerous and involved as to make it practically impossible to frame cross interrogatories.<sup>377</sup>

RULE 32. EFFECT OF ERRORS AND IRREGULARITIES IN DEPOSITIONS

(c) (2) Waiver.

Formal objections to deposition proceedings are waived, if they are not objected to, and the same may be true of substantial errors, if they could be avoided, if objected to.<sup>378</sup>

RULE 33. INTERROGATORIES TO PARTIES

*Purpose of Rule*

One of the purposes of Rule 33 is to limit the subjects of controversy and avoid unnecessary testimony.<sup>379</sup> Therefore, it is proper in a patent case to address an interrogatory to the plaintiff as to whether the drawing contained in the patent correctly represents the invention, for it calls for an admission, thereby tending to limit the subjects of controversy and avoid unnecessary testimony. For the same reason, it is proper in a patent case to address an interrogatory to the plaintiff asking whether a drawing annexed to the interrogatory correctly represents the alleged infringing device, provided defendant stipulates that it represents the device he is actually producing. This proviso is essential, so that matters unrelated to the particular case will not be introduced.<sup>380</sup>

*Construction*

This rule should be liberally construed.<sup>381</sup>

*When Effective*

Rule 33 may be invoked at any time after a civil action has commenced but not sooner.<sup>382</sup> This seems correct, for the rule says "parties" may serve interrogatories. Before suit there would be no parties.

*Actions Covered*

The rule applies to law, as well as equity, actions.<sup>383</sup>

*Interrogatories Addressed to Whom?*

Interrogatories under Rule 33, shall be addressed only to an adverse party.<sup>384</sup>

*Discretion of Court*

The extent of the interrogatories is within the court's discretion.<sup>385</sup> It may

<sup>377</sup>Fall Corp. v. Yount-Lee Oil Co., 24 F. Supp. 765 (E. D. Tex. 1938).

<sup>378</sup>Pike, *supra* note 332.

<sup>379</sup>Schwartz v. Howard Hosiery Co., 27 F. Supp. 443 (E. D. Pa. 1939).

<sup>380</sup>*Ibid.*

<sup>381</sup>Nichols v. Sanborn Co., 24 F. Supp. 908 (D. Mass. 1938).

<sup>382</sup>C. F. Simonin's Sons, Inc. v. American Can Co., *supra* note 23.

<sup>383</sup>*Ibid.*

<sup>384</sup>*Ibid.*

<sup>385</sup>Loft, Inc. v. Corn Products Refining Co., 103 F. (2d) 1 (C. C. A. 7th 1939).

even exercise that discretion in determining whether or not to order further answers than those already given.<sup>385a</sup>

#### *Scope of Interrogatories*

Interrogatories to parties under Rule 33 may be used to elicit information broader in scope than that which may be elicited by a motion for a bill of particulars under Rule 12 (e).<sup>386</sup> But all interrogatories must be material to the issues framed by the pleadings.<sup>387</sup> Evidentiary, as well as ultimate, facts may be demanded by interrogatories.<sup>388</sup> But it has been stated that this is not true if evidence was obtained after the action was brought, for then the defendant had equal opportunity with the plaintiff to advertise for the information to serve as evidence.<sup>389</sup> This is somewhat doubtful, for there is no good reason why one should not interrogate instead of advertising.

Along the same line is the holding that interrogatories as to the contents of a communication should not be allowed, since adequate means exist for the production of the communication and opportunity to copy it.<sup>390</sup> One should also notice the important statement that a well-recognized limitation on the use of interrogatories is that they may not be used to obtain information which is or should be known by the party propounding the interrogatories.<sup>391</sup> In contrast to this line of cases, one discovers a decision to the effect discovery is not confined to matters exclusively or peculiarly within the knowledge or control of the adverse party.<sup>392</sup>

Interrogatories requiring a party to state his contentions or legal conclusions are improper.<sup>393</sup> Therefore, in an action for an alleged wrongful termination of a lease of an oil station, objections should be sustained to the plaintiff's interrogatories asking whether the defendant contended that the plaintiff was in default and whether defendant considered plaintiff an "Independent Dealer".<sup>394</sup> For the same reason, in a patent suit the plaintiff was not required to "identify" the respective claims of the patents in suit applicable to his various installations of the patented article.<sup>394a</sup>

<sup>385a</sup>Lowe v. Greyhound Corp., 25 F. Supp. 643 (D. Mass. 1938).

<sup>386</sup>American La France-Foamite Corp. v. American Oil Co., *supra* note 156.

<sup>387</sup>Wilcolator Co. v. Sears, Roebuck & Co., 24 F. Supp. 952 (D. Del. 1938); Stanley Works v. C. S. Mersick & Co., *supra* note 200; Teller v. Montgomery Ward & Co., *supra* note 143; Caggiano v. Socony Vacuum Oil Co., 27 F. Supp. 240 (D. Mass. 1939); McInerney v. Wm. P. McDonald Construction Co., 28 F. Supp. 557 (E. D. N. Y. 1939).

<sup>388</sup>Nichols v. Sanborn Co., *supra* note 381; Dixon v. Sunshine Bus Lines, Inc., *supra* note 309; Adams v. Hendel, *supra* note 144; Mass. Bonding & Ins. Co. v. Harrisburg Trust Co., *supra* note 159.

<sup>389</sup>Stanley Works v. C. S. Mersick & Co., *supra* note 200.

<sup>390</sup>O'Rourke v. RKO Radio Pictures, Inc., 27 F. Supp. 996 (D. Mass. 1939).

<sup>391</sup>Loft, Inc. v. Corn Products Refining Co., *supra* note 385. *Accord*, in effect: Babcock & Wilcox Co. v. N. C. Pulp Co., *supra* note 13.

<sup>392</sup>Nichols v. Sanborn Co., *supra* note 381.

<sup>393</sup>Caggiano v. Socony Vacuum Oil Co., *supra* note 387. *Accord*: Babcock & Wilcox Co. v. N. C. Pulp Co., *supra* note 13; Stanley Works v. C. S. Mersick & Co., *supra* note 200.

<sup>394</sup>Caggiano v. Socony Vacuum Oil Co., *supra* note 387.

<sup>394a</sup>Babcock & Wilcox Co. v. N. C. Pulp Co., *supra* note 13.



In a similar vein is the declaration that interrogatories calling for constructions of writings or for legal conclusions are improper.<sup>395</sup>

Interrogatories concerning matters admitted by the pleadings should not be allowed.<sup>396</sup>

We discover the same general test applied to the refusal to permit interrogatories that was set forth in Rule 30 (d), when it is said that the mere fact that interrogatories are many and complex does not establish that they are unreasonable, vexatious, or improper.<sup>397</sup>

In a non-jury action, interrogatories addressed to the amount of damages, it is said, are premature prior to the determination of liability.<sup>398</sup>

Ordinarily, interrogatories requesting names and addresses of persons having information or knowledge supporting the case of the adverse party are proper, for the rules nowhere require a contrary result. However, in an action on fire insurance policies, in which the answer alleges arson as a defense, plaintiff's motion for an order directing defendant to supply the names of all persons having knowledge to support the defense, for the purpose of enabling plaintiff to examine the witnesses before trial, should be denied, if it appears that to permit such procedure would interfere with the impending criminal prosecution of the plaintiff on the charge of arson.<sup>399</sup>

#### *Special Cases*

In a patent suit in a district court, the plaintiff was held not to be entitled to answers to interrogatories relating to apparatus alleged to have been manufactured for the United States in view of the fact that the Court of Claims has sole and exclusive jurisdiction over such claims.<sup>400</sup>

In another patent suit, on the plaintiff's objections to the defendant's interrogatories for the dates on which the inventions were made, it was held that such dates should be supplied in exchange for a contemporaneous statement by defendant of dates relied on for showing anticipation of prior use. It was also said the plaintiff should be required to answer the defendant's interrogatories seeking information as to installations by plaintiff said to embody inventions of patents in suit.<sup>401</sup>

In an action for slander, interrogatories seeking the names and addresses of the plaintiff's employers before and after the alleged slander and dates when the former employers ceased to employ plaintiff should be answered, where the nature of special damage alleged make such interrogatories pertinent.<sup>401\*</sup>

<sup>395</sup>Teller v. Montgomery Ward & Co., *supra* note 143.

<sup>396</sup>O'Rourke v. RKO Radio Pictures, Inc., *supra* note 390.

<sup>397</sup>Loft, Inc. v. Corn Products Refining Co., *supra* note 385.

<sup>398</sup>O'Rourke v. RKO Radio Pictures, Inc., *supra* note 390.

<sup>399</sup>Penn v. Automobile Ins. Co., *supra* note 338; F. & M. Skirt Co. v. A. Wimpfheimer & Bro., Inc., *supra* note 44 (on general point).

<sup>400</sup>Pierce v. Submarine Signal Co., 25 F. Supp. 862 (D. Mass. 1939).

<sup>401</sup>Babcock & Wilcox Co. v. N. C. Pulp Co., *supra* note 13.

<sup>401\*</sup>Whitkop v. Baldwin, — F. Supp. — (D. Mass. May 1, 1939).

*Opportunity to Inspect*

The plaintiff should be accorded an inspection of the apparatus alleged to infringe and of adequate drawings before being required to answer interrogatories asking whether drawings submitted show defendant's apparatus and its operation.<sup>402</sup>

*Type of Answer*

Answers to interrogatories may state the "belief" or "understanding" of the person answering, when his answer depends upon what others tell him, but when they are based on his own knowledge he must give his own recollection.<sup>403</sup> If one lacks knowledge to give an answer, he may so state, unless such knowledge is legally required of him.<sup>404</sup>

*Burden of One Interrogated*

One interrogated need merely do what is necessary to make the requested information available to the interrogator. But the mere fact that that information is obtainable only from books and records of the interrogated party does not relieve such party from the burden and expense of giving an answer.<sup>405</sup>

*Part of Record*

Information furnished under this rule may become part of the trial record.<sup>406</sup>

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

*Purpose of Rule*

This rule was adopted to simplify the issues.<sup>407</sup>

*Independent of Deposition*

It deals with the discovery and inspection of documents independently of deposition.<sup>408</sup>

*When Effective*

It is declared that this rule may be invoked at any time after a civil action has commenced, but not sooner, for the rule says the motion for discovery shall be made by a party. There can be no party until after suit.<sup>409</sup> But we find it said that discovery of documents should not be permitted until answer is filed, since, until issue is joined, it cannot be determined whether or not the requested documents contain evidence material to any issue. This view seems to be the correct one.<sup>409a</sup>

<sup>402</sup>*Ibid.*

<sup>403</sup>*F. & M. Skirt Co. v. A. Wimpfheimer & Bro., Inc.*, *supra* note 44.

<sup>404</sup>*Loft, Inc. v. Corn Products Refining Co.*, *supra* note 385.

<sup>405</sup>*Ibid.*

<sup>406</sup>*Adams v. Hendel*, *supra* note 144.

<sup>407</sup>*Gielow v. Warner Bros. Pictures, Inc.*, 26 F. Supp. 425 (S. D. N. Y. 1939).

<sup>408</sup>*Eastern States Petroleum Co. v. Asiatic Petroleum Corp.*, *supra* note 342.

<sup>409</sup>*C. F. Simonin's Sons, Inc. v. American Can Co.*, *supra* note 23.

<sup>409a</sup>*Piest v. Tide Water Oil Co.*, *supra* note 85.

*Actions Covered*

This rule applies to law, as well as to equity, actions.<sup>410</sup>

*Motion Addressed to Whom?*

Only adverse parties, in effect, may be required to comply with a court order under this rule.<sup>411</sup> But counsel for an opposing party may be directed to obtain documents from his client and make them available for copying or photographing by the moving party.<sup>412</sup>

In the ordinary infringement case, the Federal Government would be subject to the same rules as other litigants, but in a patent case the plaintiff's motion for inspection of drawings of alleged infringing devices manufactured by the defendant under a military order of secrecy solely for the use of the Government was denied as privileged when it appeared that the Government opposed such inspection.<sup>413</sup>

*By Whom?*

Permission to enter the land or other property of another for the purpose of inspecting, surveying, photographing, *etc.*, under Rule 34, should be limited in its application to parties to pending actions, for the rule specifically refers to motions by parties to pending actions.<sup>414</sup>

*Scope of Rule*

The court may order any party to produce and permit the inspection and copying or photographing of any designated tangible things, not privileged, which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody, or control.<sup>415</sup>

One properly requesting the production of a document should not be required to rely upon the statement of its contents by the party possessing it, for the document is the best evidence of its contents.<sup>416</sup> This result also seems proper, because the rule specifically provides for an inspection of documents.

A party seeking a discovery of documents need not prove their materiality, but need only establish that it is reasonably probable that the documents constitute or contain material evidence. Further than that, a stipulation by the parties requiring the production, and permitting the inspection, of certain books, records, and documents constitutes a waiver of the requirement of showing reasonable probability of materiality.<sup>417</sup> The question of materiality

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<sup>410</sup>*Ibid.*

<sup>411</sup>*Ibid.*

<sup>412</sup>*Monks v. Hurley*, 28 F. Supp. 600 (D. Mass. 1939).

<sup>413</sup>*Pollen v. Ford Instrument Co.*, 26 F. Supp. 583 (E. D. N. Y. 1939).

<sup>414</sup>*Egan v. Moran Towing & Transp. Co.*, *supra* note 348.

<sup>415</sup>*Bough v. Lee*, *supra* note 332. *Accord*, as to materiality: *Pierce v. Submarine Signal Co.*, *supra* note 400; *Floridin Co. v. Attapulgn Clay Co.*, *supra* note 341; *Lip Lure v. Bloomingdale Bros.*, *supra* note 340.

<sup>416</sup>*Murphy v. N. Y. & Porto Rico S. S. Co.*, 27 F. Supp. 878 (S. D. N. Y. 1939).

<sup>417</sup>*Belser v. Savarona Ship Corp.*, 26 F. Supp. 599 (E. D. N. Y. 1939).

is, in the case of any doubt as to that matter, determined by the court, before documents may be inspected.<sup>418</sup>

Rule 34 in terms does not seem to countenance production of data which might be necessary for an amended cause of action, but a party is entitled to the production of documents which appear to be material to issues already joined, though he states that he seeks them for the purpose of enabling him to amend his pleading. This is probably correct, since, as stated before, the rule only permits discovery concerning material matter. Before amendment it would be difficult to determine what new issue was involved.<sup>419</sup>

One need produce only such documents or objects which are in his possession, custody, or control, for the last clause of subdivision (1) of this rule so provides.<sup>420</sup> It was decided that documents at the office of the foreign branch of a bank were not in the control of the main office of the bank, since statutes provided that accounts with the foreign branch were to be conducted independently of the home office.<sup>421</sup> However, if one actually has control of documents, he may be ordered to produce them, though they are kept in a place beyond the territorial jurisdiction of the court that issues the subpoena.<sup>422</sup> Of course, if the document requested is not in existence, it is not within the control of anyone.<sup>423</sup> Moreover, discovery will not be ordered, if the demandant has in his possession whatever the documents would show.<sup>424</sup>

#### *Special Cases*

In an action against the Collector of Internal Revenue for refund of taxes, in which plaintiff alleges over valuation of part of the inventory and defendant alleges that other parts of the inventory were undervalued, defendant's motion for inspection of plaintiff's records relating to the entire inventory should be granted.<sup>425</sup>

In an action for conspiracy the defendant may require copies of writings alleged to be defamatory.<sup>426</sup>

Production of material original manuscripts of stories and musical compositions was required in a proceeding to bar the use of a moving picture scenario alleged to be based on a story of the plaintiff's.<sup>427</sup>

The Federal Government was ordered to produce for copying, but not for

<sup>418</sup>U. S. v. Aluminum Co. of America, 26 F. Supp. 711 (S. D. N. Y. 1939).

<sup>419</sup>U. S. v. Doudera, 28 F. Supp. 223 (E. D. N. Y. 1939).

<sup>420</sup>Orange County Theatres, Inc. v. Levy, *supra* note 156. *Accord*: Bough v. Lee, *supra* note 332; Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342; *In re Harris*, 27 F. Supp. 480 (S. D. N. Y. 1939); Flynn v. Magraw, 27 F. Supp. 936 (S. D. N. Y. Apr. 17, 1939); Calanos v. United States, 27 F. Supp. 298 (D. Mass. 1939).

<sup>421</sup>*In re Harris*, *supra* note 420.

<sup>422</sup>*Ibid.*

<sup>423</sup>Schoenberg v. Decorative Cabinet Corp., *supra* note 106.

<sup>424</sup>Pacific Mills v. Nichols, — F. Supp. — (D. Mass. 1939).

<sup>425</sup>*Ibid.*

<sup>426</sup>Mulloney v. Federal Reserve Bank of Boston, *supra* note 160.

<sup>427</sup>Gielow v. Warner Bros. Pictures, Inc., *supra* note 407.

removal for photographing, records of a government hospital in an action on a war risk insurance contract.<sup>427a</sup>

#### *The Order*

The order directing production of documents should specify the time, place, and manner of making inspection and copies thereof.<sup>428</sup>

#### *Preliminary Examination*

If one wishes a discovery of articles and doesn't know what articles there are, he may hold a preliminary oral examination regarding their existence and location. A subpoena duces tecum then is used to get them into court.<sup>429</sup>

#### *Appeal*

An order of the District Court under Rule 34 for the production of documents for inspection, *etc.*, is an interlocutory order and, therefore, not appealable.<sup>430</sup>

### RULE 35. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

#### (a) Order for Examination.

It has been decided that a motion for an order to require the plaintiff to submit to a physical and mental examination should be overruled in an action for libel stating that the plaintiff was suffering from various physical and mental conditions, and in which the defense is the truth, for the physical and mental conditions in question are not immediately and directly in controversy. Their connection is incidental and collateral. Moreover, historically this type of law has dealt with personal injury cases.<sup>431</sup> This holding is questionable. Doesn't the issue of truth of a statement relating to one's condition put that condition directly in controversy?

The giving of an order under this rule is discretionary with the court, for the rule says it "may" be given.<sup>432</sup>

If one consents to be examined, no order is necessary.<sup>433</sup>

#### (b) Report of Findings.

The fact that a party to an action submits to a medical examination on behalf of his adversary without an order of the court does not deprive him of his right to a copy of the report of such examination.<sup>434</sup>

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

#### (a) Request for Admission.

<sup>427a</sup>Calanos v. United States, *supra* note 420.

<sup>428</sup>Rosenblum v. Dingfelder, *supra* note 156.

<sup>429</sup>Sunderland, *supra* note 1.

<sup>430</sup>Apex Hosiery Co. v. Leader, 102 F. (2d) 702 (C. C. A. 3d 1939).

<sup>431</sup>Wadlow v. Humberd, 27 F. Supp. 210 (W. D. Mo. 1939).

<sup>432</sup>The Italia, 27 F. Supp. 785 (E. D. N. Y. 1939); Gitto v. "Italia" Societa' Anonima di Navigazione, Genova, *supra* note 350.

<sup>433</sup>Kelleher v. Cohoes Trucking Co., 25 F. Supp. 965 (S. D. N. Y. 1938).

<sup>434</sup>*Ibid.*

Rule 36 relates to the admission of facts as well as to the genuineness of documents.<sup>435</sup>

*Relevancy*

If the pleadings show that facts, the admission of which is requested, are not relevant, no admission thereof is required.<sup>436</sup>

*Knowledge*

Nor should a party be required to admit or deny facts which are not within his knowledge but which are provable by testimony of third parties.<sup>437</sup>

*"Therein"*

The word "therein" in the first sentence of Rule 36 (a) refers to matters of fact relevant to the pleadings and contained in the request for admissions and does not refer merely to matters of fact set forth in a document concerning which an admission of genuineness is requested. A narrower interpretation would be strained and unjustifiable. The wording of Rule 37 (c) also supports this view, for it reads "served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact".<sup>438</sup>

*Extending Time*

The court may extend, but not shorten, the period mentioned in Rule 36 to answer a request for an admission.<sup>439</sup>

*The Answer*

One called upon to make admissions under Rule 36 (a) must either do so or serve a sworn statement that he is unwilling, and detail the reasons therefor.<sup>440</sup>

*Motion to Strike*

A request under Rule 36 (a) is not subject to a motion to strike.<sup>441</sup>

*Admission*

A party served with a request for admissions of fact is deemed to have admitted all relevant facts if he does not within the time allowed by the Rules specifically deny them or set forth reasons why he cannot truthfully admit or deny them.<sup>442</sup>

(b) Effect of Admission.

An admission is made solely for the purpose of the action in which it is requested and does not constitute an admission for any other purpose, nor

<sup>435</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318.

<sup>436</sup>Walsh v. Conn. Mut. Life Ins. Co., 26 F. Supp. 566 (E. D. N. Y. 1939).

<sup>437</sup>Booth Fisheries Corp. v. General Foods Corp., 27 F. Supp. 268 (D. Del. 1939).

<sup>438</sup>Walsh v. Conn. Mut. Life Ins. Co., *supra* note 436; McCrate v. Morgan Packing Co., 26 F. Supp. 812 (N. D. Ohio 1939).

<sup>439</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318; Walsh v. Conn. Mut. Life Ins. Co., *supra* note 436.

<sup>440</sup>Nekrasoff v. U. S. Rubber Co., *supra* note 318.

<sup>441</sup>*Ibid.*

<sup>442</sup>Walsh v. Conn. Mut. Life Ins. Co., *supra* note 436; McCrate v. Morgan Packing Co., *supra* note 438.

may it be used against the one making the admission in any other proceeding.<sup>443</sup>

#### RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES

##### (b) Failure to Comply with Order.

If a refusal to answer questions or produce documents at an examination before trial is not willful but was based on advice of counsel, the witness should be directed to answer, and a motion to punish him for contempt should be denied.<sup>443\*</sup>

##### (d) Failure to Attend or Serve Answers.

The remedy provided in Rule 37 (d) for wilful failure to appear after being served with notice to take depositions, applies only to parties or officers or managing agents of parties and not to employees.<sup>444</sup>

Upon the failure of a party to appear in compliance with a notice to take depositions, the court may order him to appear on a day certain or make proper proof of his physical inability to do so. If a party wilfully fails to appear for examination before trial in compliance with order of the court, his pleading may be stricken and his adversary permitted to proceed to judgment.<sup>445</sup>

#### RULE 38. JURY TRIAL OF RIGHT

##### (a) Right Preserved.

A defendant pleading a legal counterclaim to an action for equitable relief is entitled to a jury trial of his counterclaim.<sup>446</sup> The same is true when an issue of fraud is raised.<sup>447</sup>

##### (b) Demand.

The time within which a party may demand a trial by jury as of right terminates at the expiration of ten days after the service of the last original pleading and the subsequent service of amended pleadings does not extend such period.<sup>448</sup>

A demand for trial by jury filed after expiration of the ten-day period prescribed by Rule 38 (b) should, in the discretion of the court, be stricken, if it appears that the case is of such nature that it ought not to be tried by a jury.<sup>449</sup>

##### (d) Waiver.

In civil cases, one who does not seasonably demand a jury may not have one, whether he consents or not.<sup>450</sup>

<sup>443</sup>Walsh v. Conn. Mut. Life Ins. Co., *supra* note 436.

<sup>443a</sup>Newcomb v. Universal Match Corp., 27 F. Supp. 937 (E. D. N. Y. 1939).

<sup>444</sup>Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Supp. 303 (S. D. N. Y. 1939).

<sup>445</sup>Cohn v. Annunziata, 27 F. Supp. 805 (S. D. N. Y. 1939).

<sup>446</sup>Union Central Life Ins. Co. v. Burger, 27 F. Supp. 554 (S. D. N. Y. 1939).

<sup>447</sup>Hollingsworth v. General Petroleum Corp. of Cal., 26 F. Supp. 917 (D. Ore. 1939).

<sup>448</sup>Buggeln & Smith, Inc. v. Standard Brands, Inc., *supra* note 48.

<sup>449</sup>Hofmann, Inc. v. Textile Machine Works, 27 F. Supp. 431 (E. D. Pa. 1939).

<sup>450</sup>U. S. v. Strewl, 99 F. (2d) 474 (C. C. A. 2d 1938).

## RULE 39. TRIAL BY JURY OR COURT

## (b) By the Court.

If, in an action in which the defendant interposed a counterclaim arising out of the same transactions as the plaintiff's claim, the plaintiff files a demand for a jury trial in due time in respect to the counterclaim, but which is too late in respect to the plaintiff's claim, the court in the exercise of discretion may order a jury trial of all the issues.<sup>451</sup>

## RULE 41. DISMISSAL OF ACTIONS

*In General*

The purpose of Rule 41 is to prevent the delays in litigation by numerous dismissals without prejudice.<sup>452</sup>

## (a) Voluntary Dismissal: Effect Thereof.

## (1) By Plaintiff; By Stipulation.

*In General*

The plaintiff has the right, without an order of court, to dismiss by filing a motion of dismissal at any time before service of the answer. Such a dismissal is without prejudice unless otherwise stated in the notice.<sup>453</sup>

*Second Dismissal*

The filing of notice of a second voluntary dismissal of a claim operates as an adjudication upon the merits although the previous dismissal was secured before the effective date of the new Rules, provided the second dismissal is after such date. However, two voluntary dismissals before such date do not have that effect, for the rule does not affect them, there being no dismissal thereafter.<sup>454</sup>

## (2) By Order of Court.

*In General*

After service of an answer, the plaintiff has not the right to dismiss save upon order of court and upon such terms and conditions as the court deems proper. Dismissal without prejudice is then a matter within the court's discretion.<sup>455</sup>

*Notice*

A motion by a plaintiff for leave to dismiss should not be granted *ex parte*, but should be heard on notice to adverse parties.<sup>456</sup>

<sup>451</sup>Gunther v. H. W. Gossard Co., 27 F. Supp. 995 (S. D. N. Y. 1939).

<sup>452</sup>Cleveland Trust Co. v. Osher & Reiss, Inc., — F. Supp. — (E. D. N. Y. 1939).

<sup>453</sup>Baker v. Sisk, *supra* note 50.

<sup>454</sup>Cleveland Trust Co. v. Osher & Reiss, Inc., *supra* note 452.

<sup>455</sup>Baker v. Sisk, *supra* note 50; Delahanty v. Newark Morning Ledger Co., *supra* note 283; Stanley Works v. C. S. Mersick & Co., *supra* note 200; Chandler Building Corp. v. Shannon, — F. Supp. — (D. C. 1939); Cincinnati Traction Building Co. v. Pullman-Standard Car Mfg. Co., 25 F. Supp. 322 (D. Del. 1938).

<sup>456</sup>Bloomfield v. Measuring Device Corp., — F. Supp. — (S. D. N. Y. 1939).



*Granting Motion*

In the absence of a showing requiring the court to dismiss the action upon special terms and conditions, the plaintiff's motion to dismiss without prejudice should be granted, apparently upon no special terms.<sup>457</sup>

*Special Cases*

After the defendant in a patent suit filed answer and prepared for trial at great expense, the plaintiff's motion to dismiss without prejudice should be denied.<sup>458</sup>

A representative stockholder's suit which has proceeded to final hearing should not be dismissed without prejudice, after the officers of the defendant have been examined under widest latitude, employees of defendant company called to testify, and the defendant has been obliged to make preparations for the trial.<sup>459</sup>

A plaintiff's motion to dismiss without prejudice, filed after service of an answer which discloses that the suit is barred by the statute of limitations, should be denied. To hold otherwise would violate every purpose of the new rules, as expressed in Rule 1.<sup>460</sup>

And finally, if a counterclaim is pleaded before the intervenor's motion for a voluntary dismissal, the motion should be denied.<sup>461</sup> Thus, in an action for patent infringement, plaintiff's motion to strike a counterclaim for declaratory judgment, which alleged non-infringement and invalidity, should be denied since, without such counterclaim, plaintiff could dismiss his action and thus leave undetermined the issue of validity.<sup>461a</sup>

(b) Involuntary Dismissal: Effect Thereof.

*Non-appearance at Pre-trial Conference*

The plaintiff's failure to appear at a pre-trial conference ordered by the court, advance notice of which was given to the attorneys for both parties, constitutes a failure to prosecute and failure to comply with the rules, and the defendant's motion to dismiss the action on the merits should be granted.<sup>462</sup>

*Case Not Made Out*

An involuntary dismissal is also proper, if the plaintiff has not made out a case against the defendant. Such a dismissal operates as an adjudication upon the merits.<sup>463</sup>

(d) Costs of Previously-Dismissed Action.

The plaintiff may be required to reimburse the defendant for costs paid by

<sup>457</sup>*U. S. v. Commercial Solvents Corp. of Del.*, 25 F. Supp. 653 (D. Del. 1938).

<sup>458</sup>*Cincinnati Traction Building Co. v. Pullman-Standard Car Mfg. Co.*, *supra* note 455.

<sup>459</sup>*Delahanty v. Newark Morning Ledger Co.*, *supra* note 283.

<sup>460</sup>*Baker v. Sisk*, *supra* note 50.

<sup>461</sup>*Russo-Asiatic Bank v. Guaranty Trust Co. of N. Y.*, 27 F. Supp. 382 (S. D. N. Y. 1939).

<sup>461a</sup>*Gregory v. Royal Typewriter Co.*, 27 F. Supp. 808 (S. D. N. Y. 1939).

<sup>462</sup>*Wisdom v. Texas Co.*, 27 F. Supp. 992 (N. D. Ala. 1939).

<sup>463</sup>*Southwell v. Robertson*, 27 F. Supp. 944 (E. D. Pa. 1939).

the latter in a previous action which was voluntarily nonsuited, and the pending action may be *dismissed* if such payment is not made.<sup>464</sup>

Also, the trial of an action in a District Court of the United States, and any further proceedings, may be *stayed* by order of the court until payment by the plaintiff of costs in a prior action in a state court, which was based on the same claim against the defendant, and was dismissed by the plaintiff.<sup>465</sup>

But a motion to require the plaintiff to pay the costs of a prior action voluntarily dismissed, wherein the cause of action and the parties were the same, should be denied, if it appears that the prior action was dismissed because of the interposition by the defendant of objections in respect of service for the purpose of delaying or preventing the service of process. The proper action under this rule is discretionary with the court.<sup>466</sup>

#### RULE 42. CONSOLIDATION: SEPARATE TRIALS

##### *In General*

Whether or not issues shall be tried separately is within the court's discretion.<sup>467</sup>

##### (a) Consolidation.

When numerous parties bring separate actions for negligence against the same defendant to recover damages for increased flow of water, the defense being that the damages were caused by an act of God, such actions should not be consolidated for the trial of issues as to whether the negligence was the proximate cause of each plaintiff's injury or as to the amount of damages, for to consolidate them would burden any jury.<sup>468</sup>

##### (b) Separate Trials.

##### *Claim and Counterclaim*

Separate trials of a plaintiff's claim and a defendant's counterclaim may be ordered.<sup>469</sup>

##### *Equitable and Legal Issues*

When an equitable demand is joined with a claim for damages, the equitable issue should be disposed of first, after which the trial of the legal issues may proceed, if necessary.<sup>470</sup> The same is true when a legal counterclaim is set up in an equity action.<sup>471</sup>

##### *Tort Actions*

In an action for personal injuries against a municipality, in which the

<sup>464</sup>Martin v. Southern Ry. Co., — F. Supp. — (E. D. Tenn. 1939).

<sup>465</sup>Graham v. John Kerns Construction Co., — F. Supp. — (N. D. Iowa 1939).

<sup>466</sup>Ayers v. Conser, *supra* note 130.

<sup>467</sup>Karolkiewicz v. City of Schenectady, 28 F. Supp. 343 (N. D. N. Y. 1939).

<sup>468</sup>Klager v. Inland Power & Light Co., — F. Supp. — (W. D. Wash. 1939).

<sup>469</sup>Seagram-Distillers Corp. v. Manos, 25 F. Supp. 233 (W. D. S. C. 1938).

<sup>470</sup>Frissell v. Rateau Drug Store, Inc., *supra* note 16.

<sup>471</sup>Union Central Life Ins. Co. v. Burger, *supra* note 446.

defendant alleged failure to file notice of claim within the time prescribed by statute, but conceded that the running of the statute would be tolled during the incapacity of the plaintiff and for a reasonable time thereafter, a motion for a separate trial of the issue of incapacity was granted, on condition that the defendant pay the plaintiff's expenses in connection with such trial.<sup>472</sup>

An automobile liability insurer, made a third-party defendant, would probably be allowed a separate trial of its controversy with its insured.<sup>473</sup>

#### RULE 43. EVIDENCE

##### (a) Form and Admissibility.

It has been said that Rule 43 provides that evidence at a trial shall be oral, except as otherwise provided in the rules. Therefore, evidence of a deceased witness cannot be given, if the rule is to be taken literally, except when that evidence is in the form of a deposition, since only deposition rules provide for offering such evidence. However, the court suggested that, if there was proper privity between the parties in the first and second actions, the evidence would be admissible.<sup>474</sup> The writer believes this part of the rule should not be taken so literally. The first portion thereof should be read in connection with that part of it which admits evidence admissible under federal statutes, federal equity law, or state law. This view is supported by the holding in *Penn v. Automobile Insurance Co.* to the effect that the testimony of a witness who is out of the state, given at a former trial, is admissible at the second trial of the action, if such testimony is admissible under the law of the state in which the court is held, for Rule 43 (a) provides that evidence admissible under state law is admissible in federal courts covered by the rule.<sup>475</sup>

It has also been decided that Rule 43 does not deal with the law as to what testimony should be *excluded*. It deals only with what is admissible under the law of the United States or the law of the state in which the particular court sits. It is intended to liberalize admissibility of testimony, but has nothing to do with what should be excluded. The consequence is that state decisions, with respect to what shall be excluded, do not by force of Rule 43 control the action of federal courts, and questions of exclusions are perfectly open ones without any governing authority whatsoever for the guidance of federal courts.<sup>476</sup> To the author, this decision is incomprehensible. A rule which speaks of admissibility naturally includes the idea of inadmissibility, for admissibility should be interpreted broadly.

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<sup>472</sup>*Karolkiewicz v. City of Schenectady*, *supra* note 467.

<sup>473</sup>*Tullgren v. Jasper*, *supra* note 215.

<sup>474</sup>*U. S. v. Aluminum Co. of America*, — F. Supp. — (S. D. N. Y. Nov. 28, 1938).

<sup>475</sup>*Penn v. Automobile Ins. Co.*, *supra* note 338.

<sup>476</sup>*U. S. v. Aluminum Co. of America*, — F. Supp. — (S. D. N. Y. 1939).

Even if the federal decisions leave doubt as to whether certain testimony is admissible, nevertheless, if the decisions of the courts of the state in which the federal court is sitting favor its admissibility, such testimony should be admitted.<sup>477</sup>

This rule applies to examinations before trial, as it has been said that such examinations should conform to rules of evidence.<sup>478</sup>

Depositions not properly taken for use as ordinary evidence may be used to impeach, for this has been permitted universally heretofore and Rule 43 (a) will permit this, even if Rule 26 (e) were not interpreted to allow it.<sup>479</sup>

(b) Scope of Cross-Examination.

It is decided that it is proper to confine cross-examination to the scope of the direct examination.<sup>480</sup> This, of course, does not apply to impeachment.

(c) Record of Excluded Evidence.

Where excluded evidence was said, by the one offering it, to relate to evidence expected to be offered later by the other side, and to be given by a witness residing at a great distance and recallable only at considerable expense, the proffered evidence was taken provisionally. Full opportunity was given to cross-examine, and it was provided that, if the proper foundation were thereafter laid, the evidence might be admitted.<sup>481</sup>

#### RULE 45. SUBPOENA

(b) For Production of Documentary Evidence.

The force of a subpoena for production of documentary evidence generally reaches all documents under the control of the person or corporation ordered to produce, saving questions of privilege and unreasonableness, and it makes no difference that a particular document is kept at a place beyond the territorial jurisdiction of the court that issues the subpoena. The test is one of control, not of location. But a bank may not be required by a subpoena duces tecum to produce a transcript of the account between a foreign branch of said bank and a customer of the branch, since such records are not within the control of the main office. Such branches are, for many purposes, considered separate entities.<sup>482</sup>

Again, a subpoena duces tecum under Rule 45 (b) may be invoked only for the production of documents for use as evidence and not documents to be used to refresh a witness' recollection.<sup>483</sup>

<sup>477</sup>U. S. v. Aluminum Co. of America, — F. Supp. — (S. D. N. Y. June 30, 1939).

<sup>478</sup>Union Central Life Ins. Co. v. Burger, *supra* note 332.

<sup>479</sup>Pike, *supra* note 332.

<sup>480</sup>Aetna Life Ins. Co. of Hartford, Conn. v. Conway, 102 F. (2d) 743 (C. C. A. 10th 1939).

<sup>481</sup>U. S. v. Aluminum Co. of America, — F. Supp. — (S. D. N. Y. May 17, 1939).

<sup>482</sup>*In re Harris*, *supra* note 420.

<sup>483</sup>U. S. v. Aluminum Co. of America, — F. Supp. — (S. D. N. Y. Apr. 3, 1939).

The validity of a subpoena duces tecum must be judged by the particular facts arising from the subpoena and other proper sources.<sup>484</sup>

Although a subpoena for the production of documents may be procured and served on the attorney for a party, he has the right to a determination by the court of the question of privilege.<sup>485</sup>

The subpoena duces tecum must be limited to a reasonable period, so that it will not be too broad,<sup>486</sup> but the limitation may appear from the allegations of the complaint.<sup>487</sup>

Such a subpoena must also specify with reasonable particularity the subject to which the desired writings relate.<sup>488</sup>

A motion under Rule 45 (b) to quash a subpoena for the production of documents, on the ground that such subpoena is unreasonable and oppressive, should be granted in the absence of a showing that the documents called for are material or probably material. The limitations of Rule 34, requiring that documents must be material before a court may order a party to produce them, apply to Rule 45 (b). If this were not true, a clerk would have greater power than a court in ordering the production of documents.<sup>489</sup>

But a subpoena commanding the production of documentary evidence on the taking of a deposition should not be quashed, if the materiality of the documents demanded is shown by the pleadings.<sup>490</sup>

Moreover, documents produced in response to a subpoena should be examined by the court, before submission to opposing counsel, and a hearing granted to the producing party on the question as to whether they contain evidence which is material or probably material.<sup>491</sup>

The court, as an aid to the determination of the question whether or not documents called for by a subpoena duces tecum must be revealed, may compel the witness to permit their inspection.<sup>492</sup>

(d) Subpoena for Taking Depositions.

#### *A Party*

If the deposition of a *party* to the action is to be taken orally, it is not necessary to serve a subpoena or to pay fees and mileage.<sup>493</sup>

#### *Subpoena Duces Tecum*

One not a party, when called upon to give a deposition, may be required, at the hearing, to produce documents in his possession.<sup>494</sup>

<sup>484</sup>U. S. v. Medical Soc. of D. C., 26 F. Supp. 55 (D. C. 1938).

<sup>485</sup>Bough v. Lee, *supra* note 332.

<sup>486</sup>U. S. v. Medical Soc. of D. C., *supra* note 484; 403-411 E. 65th St. Corp. v. Ford Motor Co., 27 F. Supp. 37 (S. D. N. Y. 1939).

<sup>487</sup>403-411 E. 65th St. Corp. v. Ford Motor Co., *supra* note 486.

<sup>488</sup>U. S. v. Medical Soc. of D. C., *supra* note 484.

<sup>489</sup>U. S. v. Aluminum Co. of America, —F. Supp. — (S. D. N. Y. Feb. 9, 1939).

<sup>490</sup>403-411 E. 65th St. Corp. v. Ford Motor Co., *supra* note 486.

<sup>491</sup>U. S. v. Aluminum Co. of America, *supra* note 489.

<sup>492</sup>Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342.

<sup>493</sup>Whitaker v. McFadden Publications, Inc., — F. Supp. — (S. D. N. Y., 1939).

<sup>494</sup>Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342.

## (1) Notice of Examination; Contents.

The notice of examination, service of which is authorization for the issuance of a subpoena, must state the name and address of the person to be examined and a general description, if the name is not known.<sup>495</sup>

## (2) Place of Examination.

A resident of the district in which a deposition is to be taken, who resides and transacts his business in person in one county, cannot be required to attend an examination in any other county.<sup>496</sup> On the other hand, the court may fix the place of examination before trial as to non-residents of the district, and the place of their residence is immaterial so long as they may be reached by the process of the court, but it will not order attendance at a place the going to which will put an unfair burden on the witness.<sup>497</sup>

## RULE 46. EXCEPTIONS UNNECESSARY

No formal exceptions need be taken to rulings. Thus, it has been said exceptions would be assumed as taken.<sup>498</sup> It has been enough for the court to advise a party that exceptions would be allowed to any adverse rulings.<sup>499</sup>

## RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

*In General*

This rule applies to actions for declaratory judgments.<sup>500</sup>

## (a) Special Verdicts.

If the court requires a special verdict in the form of answers to interrogatories, then, as to all issues not submitted to the jury, the court is assumed to have made findings in accordance with the judgment rendered.<sup>501</sup>

## (b) General Verdicts and Special Findings.

A general verdict will not be set aside because of special findings, unless the findings are in irreconcilable conflict with the general verdict. Presumptions and intendments will not be used to establish such a contradiction, but the findings and verdict must be reconciled by the court, if that is reasonably possible.<sup>502</sup>

## RULE 50. MOTION FOR A DIRECTED VERDICT

## (a) When Made.

This rule does not abolish, but emphasizes, the necessity of a motion for

<sup>495</sup>Freeman v. Hotel Waldorf-Astoria Corp., *supra* note 444.

<sup>496</sup>Laverett v. Continental Briar Pipe Co., *supra* note 10.

<sup>497</sup>Norton v. Cooper Jarrett, Inc., *supra* note 152a.

<sup>498</sup>U. S. v. National Biscuit Co., 25 F. Supp. 329 (S. D. N. Y. 1938).

<sup>499</sup>First Nat. Bank of Chicago v. U. S., 102 F. (2d) 907 (C. C. A. 7th 1939).

<sup>500</sup>Manufacturers Casualty Ins. Co. v. Roach, 25 F. Supp. 852 (D. Md. 1939).

<sup>501</sup>Hinshaw v. New England Mut. Life Ins. Co., 104 F. (2d) 45 (C. C. A. 8th 1939).

<sup>502</sup>Bass v. Dehner, 103 F. (2d) 28 (C. C. A. 10th 1939).

a directed verdict to raise the legal question as to the sufficiency of the evidence.<sup>503</sup>

(b) Reservation of Decision on Motion.

When a party moves for a directed verdict at the conclusion of the evidence, the court may discharge the jury from further consideration of the case to permit the court to consider questions of law. The court may, within ten days after discharge of the jury, also grant a judgment in accordance with the motion for a directed verdict.<sup>504</sup>

When such a motion is made, but not granted, and a verdict is rendered for the adverse party, such verdict should be sustained, and motions to set it aside and for a new trial should be denied, if there is substantial evidence to support the verdict.<sup>505</sup>

If a case has been fully developed and, under the evidence, a motion for judgment notwithstanding the verdict should be sustained, judgment will be entered for the moving party in accordance with rules of practice.<sup>506</sup>

#### RULE 52. FINDINGS BY THE COURT

(a) Effect.

In cases tried without a jury, the court must file findings of facts and conclusions of law separately numbered.<sup>507</sup> Such findings of facts should contain only essential facts, not evidence.<sup>508</sup> Findings, to be a part of the record, must be signed by the court.<sup>509</sup>

An opinion of the court is not a proper, nor effective, place to put findings, according to some authorities,<sup>510</sup> but the contrary view seems also to have been expressed.<sup>511</sup>

Cross findings to those of the winning party need not be presented by the defeated party for acceptance by the court.<sup>512</sup> Neither are requests for essential findings necessary.<sup>513</sup>

<sup>503</sup>Baten v. Kirby Lumber Corp., 103 F. (2d) 272 (C. C. A. 5th 1939).

<sup>504</sup>Blue Bird Taxi Corp. v. American Fidelity & Casualty Co., 26 F. Supp. 808 (E. D. S. C. 1939).

<sup>505</sup>Sampson v. Channell, 27 F. Supp. 4 (D. Mass. 1939).

<sup>506</sup>Duncan v. Montgomery Ward & Co., 27 F. Supp. 4 (E. D. Ark. 1939).

<sup>507</sup>Schwartz v. Hygo Musical Products Co., 25 F. Supp. 408 (S. D. N. Y. 1938). *Accord*, in effect: Hill v. Ohio Casualty Ins. Co., 104 F. (2d) 695 (C. C. A. 6th 1939); Basevi v. Edward O'Toole Co., *supra* note 246; Blessing v. Consolidated Trimming Corp., 26 F. Supp. 112 (S. D. N. Y. 1939).

<sup>508</sup>Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., 27 F. Supp. 86 (S. D. N. Y. 1939).

<sup>509</sup>Merriam v. Wimpfheimer, 25 F. Supp. 405 (S. D. N. Y. 1938); Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., *supra* note 508.

<sup>510</sup>Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., *supra* note 508; Detective Comics v. Bruns Publications, Inc., 28 F. Supp. 399 (S. D. N. Y. 1939).

<sup>511</sup>Wellman v. U. S., 25 F. Supp. 868 (D. Mass. 1939); Cook v. U. S., 26 F. Supp. 253 (D. Mass. 1939); Mass. Farmers Defense Committee v. U. S., *supra* note 40.

<sup>512</sup>Penmac Corp. v. Esterbrook Steel Pen Mfg. Co., *supra* note 508; Detective Comics, Inc. v. Bruns, *supra* note 510.

<sup>513</sup>Hill v. Ohio Casualty Ins. Co., *supra* note 507.

Findings of fact by the court should not be disturbed on appeal when the evidence is conflicting and the credibility of witnesses is involved, unless it appears that the trial judge was clearly wrong.<sup>514</sup> This rule applies, though experts have given varying views.<sup>515</sup>

But it has been said not to be effective, if the cause is submitted to the trial court on stipulations, records, and written statements.<sup>516</sup>

The court need not make findings of fact and conclusions of law in passing on the report of a referee, which contains findings, for Rule 52 (a) speaks of adoption of findings of referees. This indicates that a court merely states he adopts the findings and does not restate them.<sup>517</sup>

#### RULE 53. MASTERS

##### (b) Reference.

References to masters should seldom be made and, if at all, only when unusual circumstances exist.<sup>518</sup> Much the same idea is expressed in the declaration that it is better practice for the court to try cases, where the determination of the issues depends upon the credibility of witnesses, except where the stress of work or other good cause is shown.<sup>519</sup>

However, references have been made in actions on a salesman's contract involving many thousands of transactions covering a period of six years,<sup>520</sup> on a veteran's insurance contract,<sup>521</sup> and in a patent suit.<sup>522</sup> But a fraud issue has been said to be ordinarily an improper one for reference to a special master.<sup>523</sup>

##### (e) (2) Report in Non-Jury Actions.

In actions tried before a master the court shall accept the master's findings of fact unless clearly erroneous.<sup>524</sup>

##### (e) (4) Weight Given Master's Report.

The rule as to the weight to be given to the report of a special master was not changed by the new rules.<sup>525</sup>

<sup>514</sup>*Malloy v. N. Y. Life Ins. Co.*, 103 F. (2d) 439 (C. C. A. 1st 1939). *Accord*, in effect: *Guilford Const. Co. v. Biggs*, 102 F. (2d) 46 (C. C. A. 4th 1939).

<sup>515</sup>*McKeever v. Fontenot*, 104 F. (2d) 326 (C. C. A. 5th 1939).

<sup>516</sup>*U. S. v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 101 F. (2d) 156 (C. C. A. 10th 1939). *Accord*, in effect: *U. S. v. Mitchell*, 104 F. (2d) 343 (C. C. A. 8th 1939).

<sup>517</sup>*U. S. v. Bethlehem Steel Corp.*, 26 F. Supp. 259 (E. D. Pa. 1938).

<sup>518</sup>*In re Irving-Austin Building Corp.*, 100 F. (2d) 574 (C. C. A. 7th 1938).

<sup>519</sup>*Coyner v. U. S.*, 103 F. (2d) 629 (C. C. A. 7th 1939).

<sup>520</sup>*Newcomb v. Universal Match Corp.*, 25 F. Supp. 169 (E. D. N. Y. 1938).

<sup>521</sup>*Coyner v. U. S.*, *supra* note 519.

<sup>522</sup>*Stentor Elec. Mfg. Co. v. Klaxon Co.*, — F. Supp. — (D. Del. 1939).

<sup>523</sup>*In re Irving-Austin Building Corp.*, *supra* note 518.

<sup>524</sup>*In re Pullmatch, Inc.*, 27 F. Supp. 884 (S. D. Ohio 1939).

<sup>525</sup>*Ibid.*



## RULE 54. JUDGMENTS: COSTS

## (a) Form.

It has been decided that a judgment in a civil action which would have been a suit in equity under the old procedure must comply with Equity Rule 71.<sup>526</sup> This seems wrong, for the Equity Rules have been superseded in these cases by the new rules.

## (b) Judgment at Various Stages.

Suit was brought on bonds for the principal and interest due thereon. The Circuit Court of Appeals decided that it could affirm the District Court's judgment for the principal, but set aside its judgment for interest and direct further proceedings in relation to the interest.<sup>527</sup>

## (c) Demand for Judgment.

One may obtain a judgment, not by default, for the proper relief, though his request has not been for the proper remedy. He may, therefore, obtain that relief without amending a complaint which has failed to request it.<sup>528</sup> Nor is failure to demand a correct judgment the basis of a motion to dismiss a complaint.<sup>529</sup>

## (d) Costs.

Costs may be awarded in favor of an officer of the United States though there is no law relating to the matter, for there is no special rule concerning officers. Costs are permitted in favor of *any* prevailing party.<sup>530</sup>

An appeal from the taxing of costs by the clerk will be treated as a motion to review. In the absence of a reasonable excuse for the delay, such a motion was dismissed, as it was filed one day after the specified period.<sup>531</sup>

## RULE 55. DEFAULT

## (a) Entry of.

Under this rule, a default should be entered by the clerk as of course without any application to the court. Yet, the court has power to enter an order of default.<sup>532</sup>

## (b) (2) Judgment by the Court.

When the judgment requested is not for a sum certain, or which can be made certain by computation, if the defendant notifies the clerk of court that he does not wish to contest the action, the judgment by default may be entered by the court upon application therefor by the plaintiff.<sup>533</sup>

<sup>526</sup>*Tri Plex Shoe Co. v. Cantor*, 27 F. Supp. 295 (E. D. Pa. 1939).

<sup>527</sup>*Board of Public Instruction for Brevard County v. Osbourn*, 101 F. (2d) 919 (C. C. A. 5th 1939).

<sup>528</sup>*Borton v. Conn. General Life Ins. Co.*, *supra* note 93.

<sup>529</sup>*Catanzaritti v. Bianco*, *supra* note 17; *Gay v. E. H. Moore, Inc.*, *supra* note 57; *Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp.*, *supra* note 18.

<sup>530</sup>*Solomon v. Welch*, — F. Supp. — (S. D. Cal. 1939).

<sup>531</sup>*U. S. v. One Ford Coupe*, *supra* note 49.

<sup>532</sup>*U. S. v. Jackson*, 25 F. Supp. 79 (D. Ore. 1938).

<sup>533</sup>*Interstate Commerce Commission v. Daley*, *supra* note 139.

## RULE 56. SUMMARY JUDGMENT

*In General*

## CONSTITUTIONALITY

The granting of a summary judgment does not really deprive the losing party of his right to a jury trial, if such party has the burden of proof on the only issue raised and fails to show that it is able to adduce any proof in discharge of such burden.<sup>534</sup>

Neither does it deprive him of his right to cross-examine the affiants for the moving party, if it appears that even if the case went to trial it would be unnecessary for the prevailing party to call them as witnesses.<sup>535</sup>

## FORM OF MOTION

A motion to dismiss a complaint on the ground of lack of jurisdiction and of failure to state a claim, which is in effect a motion for a summary judgment, was considered such a motion.<sup>536</sup>

## CASES COVERED

There is no restriction on the type of actions in which a summary judgment may be rendered. Hence, summary judgment procedure may be invoked in a suit against the United States under the Tucker Act.<sup>537</sup> But a motion for a summary judgment should be denied in relation to a claim over which the court lacks jurisdiction.<sup>538</sup>

## (a) For Claimant.

The plaintiff's motion for a summary judgment in an action for goods sold and delivered should be granted, even though counterclaims are pending, when the defendant admits his indebtedness but secures repeated continuances of the trial. There may be a summary judgment in relation to part of the issues.<sup>539</sup>

## (b) For Defending Party.

A plaintiff may move for a summary judgment dismissing the counterclaim of a third-party defendant, if the latter is not entitled to recover on the counterclaim.<sup>540</sup>

## (c) Motion and Proceedings Thereon.

*Existence of an Issue*

Where the pleadings, depositions, and affidavits on file show no genuine issue as to any material fact, the plaintiff's motion for a summary judgment should be granted, if his complaint alleges a valid cause of action.<sup>541</sup> Where

<sup>534</sup>Port of Palm Beach Dist. v. Goethals, 104 F. (2d) 706 (C. C. A. 5th 1939).

<sup>535</sup>*Ibid.*

<sup>536</sup>Nielson v. Farley, 26 F. Supp. 948 (S. D. N. Y. 1939).

<sup>537</sup>Boerner v. U. S., 26 F. Supp. 769 (E. D. N. Y. 1939).

<sup>538</sup>Pierce v. Submarine Signal Co., *supra* note 400.

<sup>539</sup>Seagram-Distillers Corp. v. Manos, *supra* note 469; Larson v. Holten, — F. Supp. — (D. Minn. 1939).

<sup>540</sup>Eastern States Petroleum Co. v. Asiatic Petroleum Corp., *supra* note 342.

<sup>541</sup>U. S. v. McCulloch, 26 F. Supp. 7 (E. D. N. Y. 1939).

no issue exists, the complaint might be treated as amended to conform to affidavits going beyond it, if necessary to make it effective to support a summary judgment.<sup>542</sup>

The existence of a lack of issue may not only be shown in the fashion suggested in the first sentence of the preceding paragraph, but it may appear by reason of a party's failure to deny statements contained in a request for admissions.<sup>543</sup>

There have been many cases decided during the last year in relation to the lack of issue. There has been no issue, for instance, because of a failure to refute the defenses of statute of limitations,<sup>544</sup> laches,<sup>545</sup> and *res judicata*.<sup>546</sup> Types of cases in which the lack has existed have been actions on a judgment, the judgment being admitted,<sup>547</sup> actions to recover an additional estate tax from an executrix, liability of the estate being granted,<sup>548</sup> to get back preferential payments to a bankrupt's creditors, such payments being clearly shown by affidavits on file<sup>549</sup> or by a previous judgment,<sup>550</sup> to obtain damages because of the defendant's negligent action, there being insufficient evidence of negligence to go to a jury,<sup>551</sup> and to recover for breach of an insurance policy not covering railroad employees of which the plaintiff was one.<sup>552</sup>

On the other hand, if there is a real issue of a material fact involved in the record, there can be no summary judgment granted.<sup>553</sup>

It may be of interest to call attention to the cases in which summary judgments have been refused because of the existence of such an issue of fact. This has occurred in suits on an account stated, the parties not having agreed upon the balance due,<sup>554</sup> on a contract, the parties not having been in accord as to the existence of an implied waiver,<sup>555</sup> for infringement of patents, the

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<sup>542</sup>*Seaboard Terminals Corp. v. Standard Oil Co. of N. J.*, 104 F. (2d) 659 (C. C. A. 2d 1939).

<sup>543</sup>*Walsh v. Conn. Mut. Life Ins. Co.*, *supra* note 436.

<sup>544</sup>*Baker v. Sisk*, *supra* note 50; *Means v. McFadden Publications, Inc.*, 25 F. Supp. 993 (S. D. N. Y. 1939).

<sup>545</sup>*Monroe v. Ordway*, 103 F. (2d) 813 (C. C. A. 8th 1939).

<sup>546</sup>*Marbardy v. Ry. Exp. Agency*, 26 F. Supp. 25 (D. Mass. 1939). For a case in which this defense was not effective, because the claim involved was based on facts transpiring subsequently to the prior judgment, see *Phoenix Hardware Co. v. Paragon Paint & Hardware Corp.*, *supra* note 138.

<sup>547</sup>*Barnett v. Buchman*, 25 F. Supp. 751 (E. D. N. Y. 1938).

<sup>548</sup>*U. S. v. Wolff*, 26 F. Supp. 940 (S. D. N. Y. 1938).

<sup>549</sup>*Culhane v. Jackson Hardware Co.*, 25 F. Supp. 324 (D. S. D. 1938).

<sup>550</sup>*Levinson v. Cohen*, — F. Supp. — (S. D. N. Y. 1939).

<sup>551</sup>*Hufner v. Erie R. Co.*, 26 F. Supp. 855 (S. D. N. Y. 1939).

<sup>552</sup>*Whiteman v. Federal Life Ins. Co.*, — F. Supp. — (W. D. Mo. 1939).

<sup>553</sup>*Boerner v. U. S.*, *supra* note 537; *Nielson v. Farley*, *supra* note 536; *Whiteman v. Federal Life Ins. Co.*, *supra* note 552; *Phoenix Hardware Co. v. Paragon Paint & Hardware Co.*, *supra* note 138; *U. S. v. Charles*, — F. Supp. — (W. D. N. Y. 1939); *Port of Palm Beach Dist. v. Goethals*, *supra* note 534.

<sup>554</sup>*Warner v. Marsh & McLennan*, 26 F. Supp. 814 (S. D. N. Y. 1939).

<sup>555</sup>*Ottinger v. General Motors Corp.*, 27 F. Supp. 508 (S. D. N. Y. 1939).

parties not having been of one mind as to question of infringement,<sup>556</sup> and for invasion of privacy by publication of the plaintiff's picture, the parties having disagreed as to the question of authorization of use.<sup>557</sup>

(e) Affidavits.

The affidavits on a motion for a summary judgment shall be made on the personal knowledge of the affiant and shall state facts admissible in evidence, hence, the court should disregard all statements in such affidavits which are based on hearsay.<sup>558</sup>

RULE 57. DECLARATORY JUDGMENTS

*Jury Trials*

Questions that would be triable by a jury in an action for money damages are also triable by jury in an action for a declaratory judgment.<sup>559</sup>

*Other Adequate Remedy*

The remedy by declaratory judgment is not foreclosed by the existence of other equally effective remedies.<sup>560</sup>

RULE 58. ENTRY OF JUDGMENT

Judgment shall be entered at once upon the verdict of a jury.<sup>560a</sup>

RULE 59. NEW TRIALS

(a) Grounds.

When the facts are clear and undisputed and, upon a proper application of law, cannot authorize a recovery, the expense of another trial should be avoided.<sup>561</sup>

Proper relief from a non-suit or its equivalent under Rule 41 (b) is a new trial.<sup>561a</sup>

A new trial may be granted on a single issue, such as damages.<sup>562</sup>

Before entry of judgment in an action tried without a jury, the court may, on motion for new trial on ground of newly discovered evidence, allow the opening of the case for the reception of such evidence.<sup>562a</sup>

(b) Time for Motion.

A motion for a new trial should be denied, if over ten days expire between the entry of the decree and the filing of the motion.<sup>563</sup>

<sup>556</sup>Charles Blum Advertising Corp. v. L. & C. Mayers Co., 25 F. Supp. 934 (E. D. Pa. 1938); Refractolite Corp. v. Prismo Holding Corp., 25 F. Supp. 965 (S. D. N. Y. 1938).

<sup>557</sup>Banks v. King Features Syndicate, Inc., — F. Supp. — (S. D. N. Y. 1939).

<sup>558</sup>Boerner v. U. S., *supra* note 537.

<sup>559</sup>Pacific Indemnity Co. v. McDonald, 25 F. Supp. 522 (D. Ore. 1938).

<sup>560</sup>E. W. Bliss Co. v. Cold Metal Process Co., 102 F. (2d) 105 (C. C. A. 6th 1939); Ohio Casualty Ins. Co. v. Richards, 27 F. Supp. 18 (D. Ore. 1939).

<sup>560a</sup>Southwell v. Robertson, *supra* note 463.

<sup>561</sup>Conner v. Great A. & P. Tea Co., 25 F. Supp. 855 (W. D. Mo. 1939).

<sup>561a</sup>Southwell v. Robertson, *supra* note 463.

<sup>562</sup>Chesevski v. Strawbridge, 25 F. Supp. 325 (D. N. J. 1938).

<sup>562a</sup>United States v. Colangelo, 27 F. Supp. 921 (E. D. N. Y. 1939).

<sup>563</sup>Nachod & U. S. Signal Co. v. Automatic Signal Corp., 26 F. Supp. 418 (D. Conn. 1939).

## (d) On Initiative of Court.

The limitations of Rule 59 (d) governing new trials on the initiative of the court are not applicable to an application to reopen a case for the purpose of taking additional testimony, while it is under advisement, for there has been no judgment.<sup>564</sup>

## RULE 61. HARMLESS ERROR

In an action for wrongful death, the erroneous refusal of the trial court to admit the deposition of the deceased on an important point is not a harmless error and judgment should be reversed on appeal.<sup>565</sup>

## RULE 64. SEIZURE OF PERSON OR PROPERTY

Either at the time of the commencement of, or during the course of, an action, all remedies provided by state laws for the seizure of property are available.<sup>566</sup>

## RULE 65. INJUNCTIONS

## (b) Temporary Restraining Order.

*Verification*

The complaint in an action for injunctive relief praying for a preliminary injunction is not subject to dismissal for lack of verification, if the prayer for the preliminary injunction is not pressed. However, should the court be asked to grant such interlocutory relief, the plaintiff could not rely upon its unverified complaint but would be compelled to adduce sworn proof.<sup>567</sup>

## (c) Security.

Nor need such a complaint be dismissed because no indemnity bond has been given. This is not required until the preliminary injunction is ready to be granted.<sup>568</sup>

## RULE 69. EXECUTION

This rule provides for enforcing money judgments by methods provided by state law.<sup>569</sup>

## RULE 70. JUDGMENTS FOR SPECIFIC ACTS: VESTING TITLE

Provision is made by Rule 70 for employing another than the defendant to execute documents *he* should have executed. The court is allowed to transfer title to property in its jurisdiction by its decree.<sup>570</sup>

<sup>564</sup>Schick Dry Shaver, Inc. v. General Shaver Corp., 26 F. Supp. 190 (D. Conn. 1938).

<sup>565</sup>Cervin v. W. T. Grant Co., 100 F. (2d) 153 (C. C. A. 5th 1938).

<sup>566</sup>Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., *supra* note 18.

<sup>567</sup>Thermex Co. v. Lawson, *supra* note 18.

<sup>568</sup>*Ibid.*

<sup>569</sup>Evans, *Problems in the Enforcement of Federal Judgments* (1939) 4 Mo. L. REV. 19.

<sup>570</sup>*Ibid.*

## RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS

*In General*

## BANKRUPTCY PROCEEDINGS

Prior to February 13, 1939, the effective date of the amendment of Order 36 of the General Orders in Bankruptcy which made the Federal Rules of Civil Procedure applicable in bankruptcy proceedings, an appeal from an interlocutory decree, taken both as provided by Sec. 8 (c) of the Bankruptcy Act and Rule 73 (a), was proper.<sup>571</sup>

*Time to Appeal*

The Federal Rules of Civil Procedure have not changed the rule that the time within which an appeal may be taken begins to run from the entry of the judgment and not from the date of the service of notice thereof upon a party.<sup>572</sup>

## (a) How Taken.

The timely filing of a waiver of service of notice of appeal and the entry of an appearance to an appeal, together with a designation of the record on appeal by both parties, is sufficient to give the appellate court jurisdiction of the appeal, although no notice of appeal was actually filed in time. These acts sufficiently carry out the purpose of the rule, which is intended to set an appeal in motion without judicial action, and to provide a complete equivalent of a notice of appeal.<sup>573</sup>

## (b) Notice of Appeal.

A notice of appeal is sufficient, even though it reverses the names of the parties in the description of the judgment, if it contains sufficient information to acquaint the appellee of the identity of the judgment appealed from.<sup>574</sup>

Appellants need not appeal from an entire judgment. This is clearly suggested by the words "shall designate the part appealed from."<sup>575</sup>

When such a partial appeal is taken, the court of appeals may consider only that portion of the judgment or order which is designated in the notice of appeal, for Rule 73 (b) requires the notice of appeal to designate the judgment or part thereof appealed from.<sup>576</sup>

## (d) Supersedeas Bond.

The government service on these rules says that it has been decided that Rule 81 (a) (2), which makes the Federal Rules of Civil Procedure applicable to appeals in habeas corpus proceedings, does not extend to such proceedings the provisions of Rule 73 (d) relating to supersedeas bonds. The

<sup>571</sup>Jordan v. Palo Verde Irr. Dist., 105 F. (2d) 601 (C. C. A. 9th 1939).

<sup>572</sup>Siegel v. Margiotta, 102 F. (2d) 525 (C. C. A. 2d 1939).

<sup>573</sup>Crump v. Hill, 104 F. (2d) 36 (C. C. A. 5th 1939).

<sup>574</sup>Martin v. Clarke, 105 F. (2d) 685 (C. C. A. 7th 1939).

<sup>575</sup>Carter v. Powell, *supra* note 206.

<sup>576</sup>*Ibid.*

question of custody of a prisoner pending appeal in a habeas corpus proceeding is still governed by Rule 45, paragraph 2, of the Rules of the Supreme Court.<sup>577</sup> This statement is, in one respect, questionable, for the order read, in part, "the appeal shall act as a supersedeas upon the Relator filing the statutory cost bond in the sum of \$250.00, as provided by Rule 73 of the Federal Rules of Practice."

(g) Record on Appeal.

#### *Filing*

Rule 6 (b), relating to the authority of the District Court to enlarge the times provided by these rules for doing specified things, applies to the filing of the record on appeal. Thus, a District Court may permit the filing of such a record after the period fixed by rule to file it or after the extended time fixed by court order. But the extension must be allowed only when the failure to file within the time previously allowed is because of excusable neglect, and the filing of the record can not be permitted more than 90 days from notice of appeal, for the last sentence of Rule 73 (g) specifically sets such a time limit. Another ground for permitting this extension of time is that part of Rule 73 (a) which says that the appellant's failure to take any further steps to secure a review of his case, other than to file a notice of appeal, does not affect the validity of the appeal.<sup>578</sup>

#### RULE 74. JOINT APPEALS: SUMMONS AND SEVERANCE

Rule 74 abolishes summons and severance in joint and several appeals and permits any one or more of the parties interested jointly, severally, or otherwise in a judgment to appeal without summons or severance.<sup>579</sup> This was held in a case against two alleged tortfeasors in which judgment was rendered for one defendant and against the other. The plaintiff was permitted to appeal the decision in favor of the defendant without summons or severance.

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

(c) Form of Testimony.

#### *Bills of Exceptions*

It has been said that this rule does not abolish bills of exceptions. They are still permitted, though not required.<sup>580</sup> This is not at all certain. An order of October 11, 1938, relating to appeals from District Courts to the Court of Appeals for the District of Columbia at least suggests that such bills are abolished. It says they are no longer required and that testimony designated

<sup>577</sup>U. S. *ex. rel.* Bowers v. Dishong, — F. Supp. — (S. D. Fla. 1938).

<sup>578</sup>Ainsworth v. Gill Glass & Fixture Co., 104 F. (2d) 83 (C. C. A. 3d 1939).

<sup>579</sup>Schaffer v. Pennsylvania R. R. Co., 101 F. (2d) 369 (C. C. A. 7th 1939).

<sup>580</sup>Slaymaker, *The Rules of Procedure in the United States District Courts* (1939) 14 IND. L. J. 245.

for inclusion in the transcript *shall* be prepared as prescribed by Rule 75 (c).

(d) Statement of Points.

The appellant must serve a statement of the points intended to be relied on, if he designates as the record on appeal only a portion of the trial record. In this case only that part of the record referring to a motion was designated.<sup>581</sup>

(h) Power of Court to Correct Record.

The reviewing court may assume facts to be true which were so treated by parties during a trial, though the record does not specifically show that the jury found their existence, since the record may be supplemented and corrected by the court.<sup>582</sup>

A motion to supplement and correct the appellate record by adding thereto, when neither side contended such evidence had been produced, will be denied.<sup>582a</sup>

#### RULE 77. DISTRICT COURTS AND CLERKS

(b) Trials and Hearings.

*In Open Court*

While a case is under submission, a motion for leave to file additional documentary evidence may not be entertained, for all trials upon the merits must be conducted in open court. However, the court may reopen the case for the introduction of additional proof.<sup>583</sup>

#### RULE 81. APPLICABILITY IN GENERAL

(a) To What Proceedings Applicable.

(1) Bankruptcy and Copyright Proceedings.

By an Amendment of General Orders in Bankruptcy, numbers 36 and 37, effective February 13, 1939, it was provided that, "except as otherwise provided in the Act," appeals should be regulated by the rules governing appeals in civil actions in federal courts, including the Rules of Civil Procedure for the District Courts of the United States. These rules were also made applicable as to original proceedings "in so far as they are not inconsistent with the Act or with these general orders. . . . But the court may shorten the limitations of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

Rule 1 of the Copyright Rules was amended, effective September 1, 1939, to provide that original and appellate proceedings in copyright cases should be governed by these rules, as far as they are not inconsistent with the copyright rules.

But even before these rules had become applicable to copyright cases, it

<sup>581</sup>Carter v. Powell, *supra* note 206.

<sup>582</sup>Traglio v. Harris, 104 F. (2d) 439 (C. C. A. 9th 1939).

<sup>582a</sup>Speer v. Rural Special School, etc., 100 F. (2d) 202 (C. C. A. 8th 1938).

<sup>583</sup>U. S. v. 3,376.1 Acres of Land, 27 F. Supp. 1023 (E. D. Ky. 1939).



was held that, where a claim for a copyright infringement was joined with a claim for accounting under a contract, the new rules applied to the latter claim.<sup>584</sup> Also Rule 26 regarding examinations before trial has been held applicable in copyright cases on the ground that Rule 1 of the Copyright Rules provides that existing rules of equity practice, which are now contained in the Federal Rules of Civil Procedure, shall be enforced so far as they may be applicable in copyright suits.<sup>585</sup>

(7) Condemnation Proceedings.

These rules do not apply to condemnation proceedings, except on appeal.<sup>586</sup>

Food and drug condemnation proceedings should be conducted under admiralty rules, unless an answer to the libel is filed. After the filing of an answer, the new rules of civil procedure apply.<sup>587</sup>

(b) Scire Facias and Mandamus.

Under this rule one does not proceed by *scire facias* to revive and continue the lien of a judgment, for that remedy is abolished. Rather, he files a complaint.<sup>588</sup> Writs of mandamus have also been abolished.<sup>589</sup>

(c) Removed Actions.

*Rules Apply*

The Federal Rules of Civil Procedure should be applied to removed actions pending on the effective date of the rules, unless their application would not be feasible or would work an injustice.<sup>590</sup>

*Repleading*

Repleading is unnecessary after renoval, unless ordered.<sup>591</sup>

*Right to Jury*

In an action removed from a state to a federal court, a demand for trial by jury made in the state court before removal is sufficient reservation to entitle the party to a jury trial in the federal court.<sup>592</sup>

RULE 82. JURISDICTION AND VENUE

These rules apply only to procedural matters and do not effect substantive rights.<sup>593</sup> Neither do they affect questions of jurisdiction or venue.<sup>594</sup>

<sup>584</sup>Bergmann v. Joe Morris Music Co., *supra* note 258.

<sup>585</sup>White v. Reach, 26 F. Supp. 77 (S. D. N. Y. 1939).

<sup>586</sup>U. S. v. Dieckmann, 101 F. (2d) 421 (C. C. A. 7th 1939); U. S. v. Certain Lands in Jo Daviess Co., Ill., — F. Supp. — (N. D. Ill. 19—); Order of Judge Trimble (E. D. Ark. 1939).

<sup>587</sup>U. S. v. 23 Bottles of Chloron-Ize, — F. Supp. — (D. Ore. 1938).

<sup>588</sup>Brooks v. Caruthers, 25 F. Supp. 413 (W. D. Pa. 1938).

<sup>589</sup>*In re Stewart*, — F. Supp. — (N. D. Cal. 1939).

<sup>590</sup>Moore v. Ill. Central R. Co., *supra* note 8; Borton v. Conn. General Life Ins. Co., *supra* note 93; Shell Petroleum Oil Co. v. Stueve, *supra* note 59; Gay v. E. H. Moore, Inc., *supra* note 57.

<sup>591</sup>Borton v. Conn. General Life Ins. Co., *supra* note 93; Murphy v. E. I. De Nemours & Co., *supra* note 172.

<sup>592</sup>Angel v. McLellan Stores Co., 27 F. Supp. 893 (E. D. Tenn. 1939).

<sup>593</sup>Tullgren v. Jasper, *supra* note 215.

<sup>594</sup>King v. Shepherd, 26 F. Supp. 357 (W. D. Ark. 1938); F. & M. Skirt Co. v. A. Wimpfheimer & Bro., Inc., *supra* note 44.

## RULE 83. RULES BY DISTRICT COURTS

District Courts may establish procedural rules not inconsistent with the new rules.<sup>595</sup> Such a rule is one requiring a non-resident plaintiff to file security for costs.<sup>596</sup>

## RULE 84. FORMS

The forms contained in the Appendix to the rules merely indicate the simplicity and brevity of statement which the rules contemplate, and the verbatim use of one of the forms of complaint does not obviate the requirement that a claim for relief shall contain a statement of the claim showing that the pleader is entitled to relief.<sup>597</sup>

## RULE 86. CASES AFFECTED

The new rules govern cases pending when they became effective, unless the court feels their application is not feasible or will work injustice.<sup>598</sup>

The question whether or not the new rules shall be applied to such cases is a matter of the court's discretion.<sup>599</sup>

The courts have, under certain circumstances, applied Rules 2,<sup>600</sup> 7-15,<sup>601</sup> 7 (c),<sup>602</sup> 8-15,<sup>603</sup> 8 (a),<sup>604</sup> 10 (b),<sup>605</sup> 12 (a),<sup>606</sup> 12 (b),<sup>607</sup> 12 (c),<sup>608</sup> 12 (e),<sup>609</sup> 12 (f),<sup>610</sup> 15 (a, b),<sup>611</sup> 18 (a),<sup>612</sup> 20,<sup>613</sup> 20 (a),<sup>614</sup> 22,<sup>615</sup> 24,<sup>616</sup>

<sup>595</sup>Wheeler v. Lientz, *supra* note 5.

<sup>596</sup>Schuldt v. Schumann, *supra* note 29; Leake v. N. Y. Cen. R. Co., 26 F. Supp. 416 (N. D. N. Y. 1939); Alderman v. Whelan Drug Co., *supra* note 233; Cavicchi v. Mohawk Mfg. Co., 27 F. Supp. 981 (S. D. N. Y. 1939).

<sup>597</sup>Washburn v. Moorman Mfg. Co., 25 F. Supp. 546 (S. D. Cal. 1938).

<sup>598</sup>Town of Lantana, Fla. v. Hopper, 102 F. (2d) 118 (C. C. A. 5th 1939); Hill v. Ohio Casualty Ins. Co., *supra* note 507; C. F. Simonion's Sons, Inc. v. American Can Co., *supra* note 23.

<sup>599</sup>National Bondholders Corp. v. McClintic, *supra* note 311.

<sup>600</sup>Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., *supra* note 18; Catanzaritti v. Bianco, *supra* note 17.

<sup>601</sup>Moore v. Ill. Cent. R. Co., *supra* note 8.

<sup>602</sup>Shell Petroleum Corp. v. Stueve, *supra* note 59; U. S. v. Smith, 28 F. Supp. 726 (E. D. Pa. 1939).

<sup>603</sup>Announcement by Judge Boynton (W. D. Tex. 1938).

<sup>604</sup>Francis v. Humphrey, *supra* note 83; Kraus v. General Motors Corp., *supra* note 69.

<sup>605</sup>American Fomon Co. v. United Dyewood Corp., *supra* note 107.

<sup>606</sup>McPherson v. Pacific Indemnity Co., — F. Supp. — (D. Ore. 1938); Columbia Metaloy Co. v. Bank of America, *supra* note 308.

<sup>607</sup>Francis v. Humphrey, *supra* note 83; Knecht v. Castleman River R. Co., *supra* note 116; Kraus v. General Motors Corp., *supra* note 69.

<sup>608</sup>McCarty v. Gault, 24 F. Supp. 977 (D. Ore. 1938).

<sup>609</sup>Tarbet v. Thorpe, 25 F. Supp. 222 (W. D. Pa. 1938); Mass. Bonding & Ins. Co. v. Harrisburg Trust Co., *supra* note 159.

<sup>610</sup>Shultz v. Manufacturers & Traders Trust Co., *supra* note 67.

<sup>611</sup>Moore v. Ill. Cent. R. Co., *supra* note 8.

<sup>612</sup>Borton v. Conn. General Life Ins. Co., *supra* note 93; Frissell v. Rateau Drug Store, Inc., *supra* note 16.

<sup>613</sup>National Surety Corp. v. City of Allentown, 27 F. Supp. 515 (E. D. Pa. 1939).

<sup>614</sup>Boysell Co. v. Franco, 26 F. Supp. 421 (N. D. Ga. 1939).

<sup>615</sup>Century Ins. Co. v. First Nat. Bank, Hughes Springs, Tex., 102 F. (2d) 726 (C. C. A. 5th 1939).

<sup>616</sup>U. S. v. Certain Lands, *etc.*, *supra* note 586.

26 (a),<sup>617</sup> 26 (d),<sup>618</sup> 30 (b),<sup>619</sup> 34,<sup>620</sup> 41 (a),<sup>621</sup> 54 (c),<sup>622</sup> 54(d),<sup>623</sup> 57,<sup>624</sup> 59,<sup>625</sup> 65 (b, c),<sup>626</sup> 75<sup>627</sup> to cases pending, but not finally disposed of, when the rules became effective. On the other hand, the courts, under particular circumstances, did not apply Rules 2,<sup>628</sup> 3,<sup>629</sup> 6 (c),<sup>630</sup> 8-15,<sup>631</sup> 8 (a),<sup>632</sup> 8 (b),<sup>633</sup> 12 (a),<sup>634</sup> 12 (b),<sup>635</sup> 12 (e),<sup>636</sup> 13,<sup>637</sup> 18,<sup>638</sup> 19 (a),<sup>639</sup> 24 (b),<sup>640</sup> 26-33,<sup>641</sup> 26 (d),<sup>642</sup> 33,<sup>643</sup> 41 (a),<sup>644</sup> 41 (b),<sup>645</sup> 50,<sup>646</sup> 52 (a),<sup>647</sup> 54 (d),<sup>648</sup> 55 (b),<sup>649</sup> 73-76,<sup>650</sup> 73 (a),<sup>651</sup> 74,<sup>652</sup> 75.<sup>653</sup>

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- <sup>617</sup>Columbia Metaloy Co. v. Bank of America, *supra* note 308.  
<sup>618</sup>U. S. v. Aluminum Co. of America, *supra* note 343.  
<sup>619</sup>Clair v. Philadelphia Storage Battery Co., *supra* note 367.  
<sup>620</sup>Gielow v. Warner Bros. Pictures, Inc., *supra* note 407.  
<sup>621</sup>Chandler Building Co. v. Shannon, *supra* note 455.  
<sup>622</sup>Gay v. E. H. Moore, Inc., *supra* note 57.  
<sup>623</sup>Solomon v. Welch, *supra* note 530.  
<sup>624</sup>E. W. Bliss Co. v. Cold Metal Process Co., *supra* note 560.  
<sup>625</sup>Town of Lantana, Fla. v. Hopper, *supra* note 598.  
<sup>626</sup>Thermex Co. v. Lawson, *supra* note 18.  
<sup>627</sup>Court Order U. S. Court of Appeals for Dist. of Col. (D. C. 1938).  
<sup>628</sup>U. S. v. Elliott, 27 F. Supp. 253 (E. D. N. Y. 1939).  
<sup>629</sup>C. F. Simonin's Sons, Inc. v. American Can Co., *supra* note 23.  
<sup>630</sup>Sorenson v. Sutherland, 27 F. Supp. 44 (S. D. N. Y. 1939).  
<sup>631</sup>City of El Paso v. West, *supra* note 21.  
<sup>632</sup>Brennan v. Lumbermen's Mut. Casualty Co., 26 F. Supp. 305 (D. Mass. 1938).  
<sup>633</sup>Nieman v. Soltis, *supra* note 81.  
<sup>634</sup>U. S. v. Revere Copper & Brass Co., *supra* note 112.  
<sup>635</sup>Leach v. Ross Heater & Mfg. Co., 104 F. (2d) 88 (C. C. A. 2d 1939).  
<sup>636</sup>Teller v. Montgomery Ward & Co., *supra* note 143.  
<sup>637</sup>Buck v. Trianon Co., 26 F. Supp. 96 (W. D. Wash. 1939).  
<sup>638</sup>*Ibid.*  
<sup>639</sup>Hawkinson v. Carnell, 26 F. Supp. 150 (E. D. Pa. 1938).  
<sup>640</sup>Dolcater v. Manufacturers & Traders Trust Co., *supra* note 303.  
<sup>641</sup>Martin v. Manufacturers Aircraft Ass'n, Inc., *supra* note 4.  
<sup>642</sup>U. S. v. Aluminum Co. of America, 27 F. Supp. 820 (S. D. N. Y. 1939).  
<sup>643</sup>C. F. Simonin's Sons, Inc. v. American Can Co., *supra* note 23.  
<sup>644</sup>Cleveland Trust Co. v. Oshero Reiss, Inc., *supra* note 452.  
<sup>645</sup>N. Y. Life Ins. Co. v. Morris, 26 F. Supp. 604 (W. D. Pa. 1939).  
<sup>646</sup>Aetna Casualty & Surety Co. v. First Nat. Bank, Weatherly, Pa., 103 F. (2d) 977 (C. C. A. 3d 1939).  
<sup>647</sup>Hill v. Ohio Casualty Ins. Co., *supra* note 507.  
<sup>648</sup>Johnson Metal Products Co. v. Lundell-Eckberg Mfg. Co., 25 F. Supp. 937 (W. D. N. Y. 1938).  
<sup>649</sup>N. J. Fed. Y. M. & Y. W. Hebrew Ass'ns v. Hoffman, 26 F. Supp. 556 (M. D. Pa. 1939).  
<sup>650</sup>Hadley Falls Trust Co. v. U. S., 22 F. Supp. 346 (D. Mass. 1938); Houghton v. Hassett, — F. Supp. — (D. Mass. 1939).  
<sup>651</sup>McCrone v. U. S., 307 U. S. 61, 83 L. Ed. 752, 59 Sup. Ct. 685 (1939).  
<sup>652</sup>Tighe v. Maryland Casualty Co., 24 F. Supp. 49 (N. D. Cal. 1938); Standard Accident Ins. Co. v. U. S., *etc.*, 103 F. (2d) 501 (C. C. A. 1st 1939).  
<sup>653</sup>Harris v. Biszkowicz, 100 F. (2d) 854 (C. C. A. 8th 1939).