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Amendments to the Federal Rules of Civil Procedure

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Introduction

The Constitution, in Article III, Section 2, in providing that the judicial power of the United States "shall extend to all Cases in Law and Equity," of certain defined categories, recognizes the distinction between actions at law and suits in equity. Amendment VII emphasizes the distinction by providing that "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," and so on. In an early case[1] the Supreme Court pointed out that the acts of Congress had distinguished between remedies at common law and equity, and that to effectuate the purposes of the legislature, "the remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles." This statement has been quoted and emphasized many times.[2]

Again, the Supreme Court has said that "the equity jurisdiction conferred on the federal courts is the same as that which the High Court of Chancery in England possesses."[3] The remedies available are those which had been devised and were being administered by the English High Court of Chancery at the time of the separation of the countries.[4] Following English precedents, the Judiciary Act

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[1] Robinson v. Campbell, 3 Wheat. 212 (U.S. 1818).

[2] Bennett v. Butterworth, 11 How. 669 (U.S. 1850); Thompson v. Central Ohio R.R., 6 Wall. 134 (U.S. 1868); Matthews v. Rodgers, 284 U.S. 521 (1932).

[3] Mississippi Mills v. Cohn, 150 U.S. 202 (1893).

[4] Atlas Life Ins. Co. v. W. I. Southern, Inc., 306 U.S. 563 (1939)

of 1789 provided that "suits in Equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law."[5]

Upon the historical foundation so often referred to by the Supreme Court we erected our federal judicial edifice. The building was separated into two compartments by a dead wall extending from the basement to the roof. On one side of the wall was the compartment labelled "law," and on the other the compartment designated "equity," and for 126 years, until the Act of March 3, 1915,[6] there was no means of intercommunication between the two compartments. The suitor who mistakenly entered the wrong compartment was forcibly ejected, and was obliged to reframe his pleadings and enter the proper compartment from the outside.[7]

The procedure at law was required by various process acts to be the same as that used in the supreme courts of the various states in which federal courts were held,[8] and finally the Conformity Act required, generally, that it conform "as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State in which such district courts are held, any rule of court to the contrary notwithstanding."[9]

For suits in equity the Supreme Court prescribed, from time to time, its Equity Rules.[10]

This dual system caused confusion. In 1848 New York adopted the Field Code of Procedure. Many western states enacted codes modeled largely after the Field Code, while others, notably Illinois and Michigan, preserved the procedural distinction between law and equity and the forms of common law pleading. In requiring conformity "as near as may be" — a phrase upon which every federal court, in time, exercised its dialectics — the Conformity Act added to the confusion of practice.

About the year 1910, the American Bar Association undertook the study of this situation and the possible means of remedying it. Its Committee on Uniform Procedure prepared a bill authorizing the Supreme Court to prescribe by general rules for the district

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[5] 1 STAT. 73 (1789), 28 U.S.C. §384 (1940).

[6] 38 STAT. 956 (1915), 28 U.S.C. §397 (1940).

[7] Thompson v. Central R.R., 6 Wall. 134 (U.S. 1868).

[8] Temporary Process Act, Act of Sept. 29, 1789, 1 STAT. 93; Permanent Process Act of May 8, 1792, 1 STAT. 275; Process Act of May 8, 1792, 4 STAT. 278, providing for federal courts in states admitted since 1789; Act of August 1, 1842, 5 STAT. 499, extending the provisions of the Process Act of 1828 to courts of the United States held in states admitted since 1828.

[9] Conformity Act of June 1, 1872, 17 STAT. 197.

[10] First Equity Rules, 7 Wheat. 5 (U.S. 1822); Equity Rules of 1842; Equity Rules, 1866-1911; Equity Rules, 1912; see HOPKINS, FEDERAL EQUITY RULES ANNOTATED (8th ed. 1933).

courts the forms of process, writs, pleadings, and motions, and the practice and procedure in actions at law. For fourteen years, the bill, or one similar to it, was introduced in every session of Congress, but in every session it failed of passage either because of active opposition or by reason of lack of interest. In 1927 there was added to the bill a section giving the Supreme Court the power to unite the general rules prescribed by it for suits in equity with those in actions at law. The Senate committee reported the bill favorably, but it died in the Judiciary Committee of the House.[11]

All these efforts of the American Bar Association proving unavailing, the committee, in 1930, recommended that the Association "cease to press this bill by general agitation all over the country," but that it confine itself to having the bill introduced regularly in Congress and to keeping in touch with it.[12] Then, in 1934, the bill, in substantially the same form in which it had been introduced in 1927, was again introduced, and with the backing of the new administration, passed both houses of Congress and became a law on June 19, 1934.[13]

On June 3, 1935, the Supreme Court announced that pursuant to Section 2 of the Act it would "undertake the preparation of a unified system of general rules for cases in equity and actions at law" in the district courts of the United States, "so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights." To assist it in this undertaking the Court appointed an Advisory Committee made up of eminent practitioners and teachers of law.[14]

The Committee prepared and submitted to the bar in May, 1936, and in April and November, 1937, drafts of the rules proposed by it. The final draft was adopted by the Supreme Court on December 20, 1937, and the Chief Justice was directed to transmit the proposed rules to the Attorney General with the request that he report them to Congress at the beginning of its regular session in January, 1938. This was done, and in accordance with the terms of the Enabling Act the Federal Rules of Civil Procedure took effect after the close of the session on September 16, 1938.

On November 6, 1939, the Supreme Court requested the Advisory Committee to prepare and submit to the Court such amendments as they might deem advisable,[15] and on January 5, 1942, it

[11] 52 A.B.A. REP. 396-401 (1927).
[12] 55 A.B.A. REP. 91 (1930).
[13] 48 STAT. 1064 (1934), 28 U.S.C. §723b, c (1940).
[14] 295 U.S. 774 (1935).
[15] 308 U.S. 641 (1939).

ordered that the surviving members of the Advisory Committee, or so many of them as would be willing to serve, "be designated as a continuing Advisory Committee to advise the Court with respect to proposed amendments or additions to the Rules."[16] This was very necessary. In the years since the Rules went into effect the courts — the Supreme Court, the circuit courts of appeals and the district courts — have handed down almost 10,000 reported opinions construing and interpreting the Rules. Following the Court's order, the Advisory Committee studied the operation of the Rules and published reports of proposed amendments in May 1944, May 1945, and June 1946. Amendments covering 33 of the original 86 rules were adopted by the Supreme Court,[17] and were reported to the Eightieth Congress at the opening of the first regular session beginning on January 3, 1947. They went into effect three months after the adjournment of that session,[18] or on March 19, 1948.

Policy of the Rules

The Rules govern the procedure in the district courts of the United States "in all suits of a civil nature whether cognizable as cases at law or in equity."[19] Their general policy requires that a cause be adjudicated on the merits, and that technicalities of procedure and form be not allowed to determine the rights of litigants.[20] The time is past, it has been said, when inadvertent or technical failures, or omissions that can be supplied, will wreck the right decision and a case,[21] and courts have warned that we should no longer look upon a lawsuit "as if it were in the nature of a cockfight so that the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and sharpest spurs";[22] and that the Rules have superseded "the sporting theory of justice."[23]

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[16] 314 U.S. 720 (1942).

[17] The amendments adopted relate to the following rules and subdivisions: 6 (b), (c); 7 (a); 12 (a), (b), (c), (d), (e), (f), (g), (h); 13 (a), (g), (i); 14 (a); 17 (b); 24 (a), (b); 26 (a), (b); 27 (a), (b); 28 (a); 33; 34; 36 (a); 41 (a), (b); 45 (b), (d); 52 (a); 54 (b); 56 (a), (c); 58; 59 (b), (e); 60 (a), (b); 62 (b), (h); 65 (c); 66; 68; 73 (a), (g); 75 (a), (b), (d), (g), (h), (m), (n), (o); 77 (d); 79 (a), (b), (c), (d); 80 (a), (b); 81 (a), (c), (f); 84; 86 (b). Amendments proposed by the Committee to the following rules were not adopted: 25 (a); 30 (b); 50 (a), (b).

[18] See House Concurrent Resolution 127 (Dec. 19, 1947).

[19] Rule 1, Federal Rules of Civil Procedure, 28 U.S.C. following §723 (1940).

[20] Victory v. Manning, 128 F. 2d 415 (C.C.A. 3d 1942).

[21] Knutson v. Metallic Slab Form Co., 132 F. 2d 231 (C.C.A. 5th 1942).

[22] Barnett v. Jaspan, 124 F. 2d 1005 (C.C.A. 2d 1942).

[23] Hoffman v. Palmer, 129 F. 2d 976, 996 (C.C.A. 2d 1942).

PLEADINGS

In 1808 Mr. Joseph Chitty published in London his famous work on Pleading. By the year 1851 it had gone through eleven American editions. Together with Blackstone's Commentaries it provided the basic training for lawyers for the greater part of the last century.

Mr. Chitty defines pleading in the following terms:

> Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action, or the defendant's ground of defense; it is the formal mode of alleging that on the record, which would be the support of the action or the defense of the party in evidence. . . . *The grand object contemplated by the system is the production of a certain and material issue between the parties,* upon some important part of the subject-matter of dispute between them.[24]

Bates, which is the Bible of the Ohio pleader, says:

> There must be pleadings *and an issue made up by them.*[25]

But the quest for an issue frequently defeated justice, and the Supreme Court, in a recent case, commented that under the former practice the function of issue formulation was performed "primarily and inadequately by the pleadings."[26]

The Rules, the Court said, "restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial."

It is a question, however, whether this statement does not go too far. Loose pleading and mere notice-giving may be just as productive of delays and uncertainties as the quest for an issue. Cer-

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[24] CHITTY, PLEADING 213 (11th Am. ed. 1851) (emphasis supplied).

[25] BATES, PLEADING, PRACTICE, PARTIES, AND FORMS 147 (3d ed. 1923) (emphasis supplied).

[26] Hickman v. Taylor, 329 U.S. 495 (1947). It is interesting to note that as long ago as 1713, that genius of satire, Jonathan Swift, had ridiculed the system:

> But, with rejoinders or replies,
> Long bills and answers stuffed with lies,
> Demur, imparlance, and assoign,
> The parties ne'er could issue join:
> For sixteen years the cause was spun,
> And then stood where it first begun.
>
> *Cadenus and Vanessa.*

It was even worse in 1852 when Charles Dickens, in Bleak House, satirized the case of Jarndyce and Jarndyce "with its bills, cross-bills, answers, rejoinders, and the mountains of costly nonsense that had accumulated on it." Meanwhile, as Dickens says, innumerable children had been born into the cause; innumerable young people had married into it; innumerable old people had died out of it—and no one knew what the cause was about or who the real parties were; no one had ever seen them .

tainly a person or corporation brought before a federal court is entitled to know the claim asserted by the opposing party, and should not be compelled to search through a mass of depositions to ascertain on just what theory the controversy will be submitted for adjudication.[27]

The only pleadings now permitted are those (1) which set forth claims for relief, whether original claims, counterclaims, cross-claims, or third-party claims; (2) answers thereto; and (3) replies to counterclaims "denominated as such." No other pleadings are allowed, except that the court may order a reply to an answer or a third-party answer.[28]

Certain defenses may be made by motion, namely: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted; and now, by amendment, (7) failure to join an indispensable party.[29]

Rule 12 (b), as originally adopted, was construed by the majority of courts as not permitting "speaking motions," that is, motions to dismiss for failure to state a claim supported by affidavits and other evidence.[30] Other courts held that such extraneous evidence was proper, and treated the motion to dismiss, with its accompanying evidence, as a motion for summary judgment under Rule 56.[31] This latter practice has now been approved by amendment.[32] A similar change has been made in subdivision (c), Motion for Judgment on the Pleadings.[33]

Probably no part of the Rules as originally adopted has caused the spilling of so much judicial ink as the first sentence of Subdivision (e). It originally read:

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[27] It is to be noted that Mr. Justice Jackson, in his concurring opinion, does not touch upon the function of pleadings under the Rules. His opinion is devoted to the practical trial aspects of giving the processes of discovery the scope which plaintiff sought. Mr. Justice Frankfurter joined in Mr. Justice Jackson's opinion.

[28] Rule 7 (a), as amended, Federal Rules of Civil Procedure, 28 U.S.C. following §723 (1940).

[29] Rule 12 (b), as amended.

[30] Cohen v. United States, 129 F. 2d 733 (C.C.A. 8th 1942); Carroll v. Morrison Hotel Corp., 149 F. 2d 404 (C.C.A. 7th 1945); Kuhn v. Pacific Mutual Life Ins. Co., 37 F. Supp. 102 (S.D. N.Y. 1941); Boro Hall Corp. v. General Motors Corp., 37 F. Supp. 999 (S.D. N.Y. 1941); Monjar v. Higgins, 39 F. Supp. 633 (S.D. N.Y. 1941); Snowhite v. Tide Water Associated Oil Co., 40 F. Supp. 739 (D.C. N.J. 1941).

[31] Central Mexico Light and Power Co. v. Munch, 116 F. 2d 85, 87 (C.C.A. 2d 1940); Gallup v. Caldwell, 120 F. 2d 90 (C.C.A. 3d 1941); Victory v. Manning, 128 F. 2d 415 (C.C.A. 3d 1942).

[32] Rule 12 (b), as amended.

[33] Rule 12 (c), as amended.

> Before responding to a pleading, or, if no responsive pleading is permitted by these rules, within 20 days after the service of the pleading upon him, a party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.

Many courts took it upon themselves to eliminate the words "to prepare for trial," confining the application of the motion to pleadings which were not sufficiently definite to enable the movant "to prepare his responsive pleading."[34] A minority, with better reason, applied the rule as it stood, and granted the motion where the pleading was not sufficiently definite to enable a party "to prepare for trial."[35] The subdivision, as amended, now limits the motion to the purpose of pleading.[36]

Extension of Deposition-Discovery Practice

Rule 26 (a), as amended, as distinguished from the rule as it originally stood, now permits a defendant to proceed at once, upon the commencement of the action, and without leave of court, to serve his notices and to take depositions.[37]

To subdivision (b) there has been added this sentence:

> It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.[38]

The subdivision, as amended, also establishes the scope of examination under Rule 33, Interrogatories to Parties, Rule 34, Discovery and Production of Documents and Things for Inspection, Copying, or Photographing, and Rule 45 (d), Subpoena for Taking Depositions, because all these other rules and subdivisions refer back to it. The only limitations in the rule are (1) that the matter sought *relates* to the claim or defense of the examining party, and (2) that it be "not privileged."

What is the scope of the term "privilege" under this subdivision?

The Supreme Court answered this question in *Hickman v. Tay-*

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[34] See, for example: Kuhn v. Pacific Mutual Life Ins. Co., 37 F. Supp. 100 (S.D. N.Y. 1940); Fleming v. Mason and Dixon Lines, 42 F. Supp. 230 (E.D. Tenn. 1941).

[35] See, for example: Fleming v. Enterprise Box Co., 36 F. Supp. 607 (S.D. Fla. 1940); Fleming v. Dierks Lumber and Coal Co., 39 F. Supp. 237 (W.D. Ark. 1941); Carcelli v. Order of United Commercial Travelers, 47 F. Supp. 433 (W.D. Pa. 1942).

[36] Rule 12 (e), as amended.

[37] Rule 26 (a), as amended.

[38] Rule 26 (b), as amended.

lor,[39] a case which may well go down as promulgating the lawyer's bill of rights. The action was one for injuries arising from the death of a member of the crew of a tug caused by the sinking of the tug. The tug owners employed Mr. Fortenbaugh, an attorney, to defend the action, and he interviewed persons who he believed had knowledge of the accident, and in some cases he made memoranda of what they told him. The plaintiff thereafter filed interrogatories. One of these read:

> State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car afloat and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

The tug owners admitted that statements had been taken, but declined to summarize or set forth the contents on the ground that plaintiff's requests called for "privileged matter obtained in preparation for litigation" and constituted "an attempt to obtain indirectly counsel's private file." They claimed that answering these requests "would involve practically turning over not only the complete files, but also the telephone records, and almost, the thoughts of counsel."

The district court held that the requested matters were not privileged and ordered that the tug owners and Mr. Fortenbaugh, as counsel and agent for the tug owners, forthwith "answer Plaintiff's 38th interrogatory and supplemental interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit these memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Upon their refusal, the court adjudged them in contempt and ordered them imprisoned until they complied.

The circuit court of appeals reversed the judgment of the district court, and its judgment was affirmed by the Supreme Court. The Supreme Court pointed out that the memoranda and statements demanded were not within the scope of the attorney-client privilege and that they were not protected on that basis. They did, however, fall outside the arena of permissible discovery in that they contravened "the public policy underlying the orderly prosecution and defense of legal claims." The court went on:

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[39] Hickman v. Taylor, 329 U.S. 495 (1947).

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble the information, sift what he considers to be the relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such material open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

We do not mean to say that all written materials obtained or prepared by an adversary's counsel are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of these facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order. That burden, we believe, is necessarily implicit in the rules as now constituted.[40]

[40] Hickman v. Taylor, 329 U.S. 495, 510 (1947).

LIMITATIONS OF TIME

In *Bronson v. Schulten*,[41] decided in 1881, the Supreme Court said:

> In this country all courts have terms or vacations. The time of the commencement of every term, if there be half a dozen a year, is fixed by statute, and the end of it by the final adjournment of the court for that term. This is the case with regard to all the courts of the United States, and if there be exceptions in the State courts, they are unimportant. It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court.
>
> But it is a rule equally well established, that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist, they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court.

This is the rule in Ohio, and the rule has in no way been regulated or abridged by statute.[42]

Rule 6 (a) empowers the court, for cause shown, to enlarge the time fixed in the rules for doing certain things, and subdivision (b) of the rules, as originally adopted, said that "the period of time provided for the doing of any act is not affected or limited by the expiration of a term of court." The subdivision has now been amended by the insertion of the words *"continued existence or"* before the word "expiration." The final sentence of the subdivision, as amended, now reads:

> The *continued existence or* expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.[43] (Italics supplied.)

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[41] Bronson v. Schulten, 104 U.S. 410 (1881); see also Exporters v. Butterworth-Judson Co., 258 U.S. 365 (1922); Delaware L. & W. R.R., v. Rellstab, 276 U.S. 1 (1928); Realty Acceptance Corp. v. Montgomery, 284 U.S. 547 (1932).

[42] Martinka v. Cleveland R.R., 133 Ohio St. 359, 13 N.E. 2d 910 (1938).

[43] Rule 6 (b), as amended.

This practically eliminates, so far as the district courts are concerned, the old concept of terms of court, and limits the power of courts to do certain things to stated periods of time, regardless of terms. Thus under subdivision (a) the times limited in Rule 25, Substitution of Parties, Rule 50 (b), the time prescribed for filing a motion for judgment notwithstanding the verdict, Rule 52 (b), the time for making a motion to amend the findings of the court, Rule 59 (b), (d), (e), time limits for motion for new trial, for order for new trial *sua sponte* and for motion to alter or amend the judgment, Rule 60 (b), motion to correct mistakes, and Rule 73 (a), the time for filing the record on appeal and for docketing the appeal, cannot be enlarged by a district court except to the extent and under the conditions stated in these rules; the fact that the term of court has not expired does not permit the court to enlarge the time.

MOTION FOR DIRECTED VERDICT; MOTION FOR JUDGMENT N.O.V. IN ACCORDANCE WITH MOTION FOR DIRECTED VERDICT

No change has been made in Rule 50 (a) and (b) which deal with motions for directed verdict and reservation of decision thereon.[44]

Here attention must be directed to the importance of the motion for judgment notwithstanding the verdict under federal practice. In the practice of some states it is sufficient to make a motion for a directed verdict after the close of all the evidence. If the motion is erroneously denied, the reviewing court must enter the judgment which the trial court should have rendered.[45]

Under Rule 50 (b) the motion for a directed verdict is not, in itself, sufficient to require the reviewing court to render final judgment; a party who has moved for a directed verdict must also, within 10 days after the reception of the verdict, "move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict"; otherwise the reviewing court cannot enter final judgment, but can only reverse and remand for further proceedings.[46]

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[44] The amendments submitted by the Advisory Committee were not adopted by the Supreme Court. See: REPORT OF PROPOSED AMENDMENTS, June, 1946; Amendments adopted by the Supreme Court, December 27, 1946.

[45] Metzger Seed & Oil Co. v. Berg, 84 Ohio St. 485, 95 N.E. 1152 (1911); Sobolovitz v. Oil Co., 107 Ohio St. 204, 140 N.E. 634 (1923); Riley v. Commissioners, 109 Ohio St. 29, 141 N.E. 656 (1923); Majoros v. Cleveland Interurban R.R., 127 Ohio St. 255, 187 N.E. 857 (1933).

[46] Cone v. West Va. Pulp & Paper Co., 330 U.S. 212 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948).

MOTION FOR DISMISSAL IN ACTION TRIED BY COURT

Rule 41 (b) provides, in part:

> After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

This general provision, by its terms, applies both to cases tried by a jury, and to cases tried by the court, and some courts have held that the motion is the equivalent of a motion for a directed verdict under Rule 50 (a), with this difference, namely, that a motion for a directed verdict under the latter rule must "state the specific grounds therefor," while a motion to dismiss under Rule 41 (b) need only state the ground "that upon the facts and the law the plaintiff has shown no right to relief."[47] Other courts have held that the motion to dismiss is not the equivalent of a motion for a directed verdict; that upon a motion to dismiss the court is not confined to a consideration of whether plaintiff has made a prima facie case, but may make findings upon the evidence, which must be accepted by the reviewing court unless "clearly erroneous."[48]

This confusion has been partly, though not entirely, cleared up by the following sentences inserted in subdivision (b):

> In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a).[49]

Different consideration must apply to jury and non-jury cases. In a jury case the court may not make findings and direct a verdict, even though upon the evidence presented by the plaintiff the court would be justified in finding against him, or could, in its discretion, grant a motion for a new trial, if the jury found in plaintiff's favor.[50]

The sentences added by amendment recognize the power of the court, in a non-jury case to make findings and to render judgment

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[47] Federal Deposit Ins. Corp. v. Mason, 115 F. 2d 548 (C.C.A. 3d 1940); Shaw v. Missouri P.R.R., 36 F. Supp. 651 (W.D. La. 1941); Maryland Gas Co. v. Sauers, 38 F. Supp. 656 (W.D. Pa. 1941).

[48] Gary Theatre Co. v. Columbia Pictures Corp., 120 F. 2d 891 (C.C.A. 7th 1941); Barr v. Equitable Life Assur. Soc., 149 F. 2d 634 (C.C.A. 9th 1945); Young v. United States, 111 F. 2d 823 (C.C.A. 9th 1940).

[49] Rule 41 (b), as amended.

[50] Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943); Bailey v. Central Vermont R.R., 319 U.S. 350 (1943); De Zon v. American President Lines, Inc., 318 U.S. 660 (1943); Taylor v. Mississippi, 319 U.S. 583 (1943).

against the plaintiff. Of course, findings are not necessary if the motion to dismiss is denied.

But for a case tried by a jury the motion for a directed verdict, with all that it implies, and with all the restrictions upon the granting of such a motion which have been developed under the guaranty of jury trial contained in the Seventh Amendment to the Constitution, still applies.

Capacity of Receivers

Rule 17 (b), relative to capacity to sue or be sued, has had added to it the provision:

> That the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Rule 66.

Rule 66 has been amended to include the following:

> A receiver shall have the capacity to sue in any district court without ancillary appointment; . . .

It has long been the law that the courts of the several states are foreign to each other.[51] This is also true of the district courts of the several districts, and before the adoption of the Rules a receiver appointed in another state or by the court of another district was without capacity to sue or be sued in a foreign district court.[52] Rule 17 (b), by providing generally that "capacity to sue or be sued shall be determined by the law of the state in which the district court is held," enabled a receiver appointed in a foreign state court to sue in a district court if the law of the state in which the district court was held vested him with capacity;[53] this, however, did not apply to receivers appointed by the district courts of other states; they still lacked capacity to sue or be sued in a foreign district court;[54] to vest them with capacity ancillary appointment was necessary. The amendments of Rules 17 (b) and 66 now dispense with what has been described as "the altogether idle ceremony of ancillary appointment."[55]

Judgment Upon Multiple Claims

Rule 54 (b) has been entirely rewritten and the subdivision as rewritten disposes of harassing uncertainties which in the past have

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[51] Bassett v. Massman Constr. Co., 120 F. 2d 230 (C.C.A. 8th 1941); Horn v. Pere Marquette R.R., 151 Fed. 626, 631 (E.D. Mich. 1907); Applegate v. Applegate, 39 F. Supp. 887, 889 (E.D. Va. 1941).

[52] Booth v. Clark, 17 How. 322 (U.S. 1854); Sterrett v. Second Nat. Bank, 248 U.S. 73 (1918); McCandless v. Furlund, 293 U.S. 67 (1934).

[53] Bicknell v. Lloyd-Smith, 109 F. 2d 527 (C.C.A. 2d 1940), *cert. denied*, 311 U.S. 650 (1940).

[54] Kelley v. Queeney, 41 F. Supp. 1015 (W.D. N.Y. 1941).

[55] Bicknell v. Lloyd-Smith, *supra* note 53.

troubled lawyers. The Supreme Court declared in a recent case that "the Rules make it clear that it is 'differing occurrences or transactions which form the basis of separate units of judicial action' . . . If a judgment has been entered which terminates the action as to such a claim, it is final for the purposes of appeal under Section 123 of the Judicial Code."[56] The difficulty lay in determining what were "differing occurrences or transactions," and an erroneous determination might result in allowing the time for appeal to pass, and thus the opportunity for review might be lost.[57] The subdivision as amended disposes of these doubts. It reads:

> JUDGMENT UPON MULTIPLE CLAIMS. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.[58]

TIME FOR APPEAL — 30 DAYS

The statute provides, generally, that an appeal must be taken "within three months after the entry of such judgment or decree."[59] But Rule 73 (a), as amended, now provides, with certain exceptions and provisos, that an appeal from a district court to a circuit court of appeals must be taken within "30 days from the entry of the judgment appealed from." Rule 77 (d) requires that "immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear." The subdivision has been amended by the addition of this sentence: "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a)." This disposes of a recent ruling of the Supreme Court to the effect that a party is entitled to rely upon the requirement that notice be given.[60]

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[56] Reeves v. Beardall, 316 U.S. 283 (1942); see discussion in Zalkind v. Scheinman, 139 F. 2d 895 (C.C.A. 2d 1943).

[57] Jones v. St. Paul Fire & Marine Ins. Co., 108 F. 2d 123 (C.C.A. 5th 1939).

[58] Rule 54 (b), as amended.

[59] 45 STAT. 54 (1928), 28 U.S.C. §230 (1940).

[60] Hill v. Hawes, 320 U.S. 520 (1944).

CONCLUSION

Attention has already been directed to the policy of the Rules and to the realistic approach which they represent to the problem of judicial administration. Equally significant are recent decisions of the Supreme Court restoring and applying the guaranties of freedom of speech and of the press, contained in the First Amendment, to judicial proceedings, thus restricting in large measure the scope of criminal contempt and the power of all courts, both state and federal, to punish for such contempt.

The departure from these constitutional guaranties in cases involving criticism of judicial action in pending proceedings received its first authoritative sanction in *Toledo Newspaper Co. v. United States*,[61] decided in 1918. In this case the Supreme Court, after declaring that the Act of 1831[62] and its successor act, now codified in United States Code, Title 28, Sec. 385,[63] "conferred no power not already granted and imposed no limitations not already existing," said that the test was not whether the alleged contemptuous publication had been made in the presence of the court, or so near thereto as to obstruct the administration of justice, but whether such obstruction was the "reasonable tendency" of the publication complained of. Mr. Justice Holmes and Mr. Justice Brandeis dissented, and, as has happened in many other situations, their dissent became the law when, in 1941, in *Nye v. United States*,[64] the *Toledo Newspaper Company* case was overruled, the court holding that the words "so near thereto" must be given a geographical, rather than a causal connotation.

In *Gitlow v. New York*[65] the Supreme Court for the first time declared that freedom of speech and of the press, which are protected by the First Amendment from abridgment by Congress, are among the fundamental personal rights and liberties protected by the due process clause of the Fourteenth Amendment from impairment by the states. This declaration became important in the cases of *Bridges v. California*[66] and *Pennekamp v. Florida*.[67] Both cases

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[61] 247 U.S. 402 (1918).

[62] 4 STAT. 487 (1831).

[63] This section provides, in part, that "The said courts (United States courts) shall have the power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish for contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice . . . ." 36 STAT. 1163 (1911), 28 U.S.C. §385 (1940).

[64] 313 U.S. 33 (1941).

[65] 268 U.S 652 (1925).

[66] 314 U.S. 252 (1941).

[67] 328 U.S. 331 (1946).

involved sentences for contempt imposed by state courts. Applying the principle announced in the *Gitlow* case the court held that the guaranties of freedom of speech and of the press imposed restraints upon the power of state courts, no less than upon that of federal courts, to punish for contempt. Neither "inherent tendency" nor "reasonable tendency", it declared, is enough to justify a restriction of free expression. For these tests it substituted the rule of the "clear and present danger" cases; "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[68] The court continued:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always wtih perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[69]

This is a realistic appraisal of the position of the judiciary in a free society. May it always stand.

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[68] Bridges v. California, 314 U.S. 252, 263 (1941).

[69] *Id.* at 270.