Recent Cases and New Developments in Federal Practice and Procedure

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Since the effective date of the Federal Rules of Civil Procedure, decisions construing them have been many and varied. It seems appropriate, therefore, to consider some of the subjects concerning which there has been considerable judicial interpretation.

I

BILLS OF PARTICULARS

To a practitioner in the New York State courts Rule 12(e) dealing with motions for a more definite statement or for a bill of particulars appears somewhat strange. Unlike our state practice, a bill of particulars and a more definite statement under Rule 12(e) are not different forms; they are substantially merged into one device to serve one purpose so far as a motion addressed to a complaint, counterclaim or cross-claim is concerned—namely, to recast a pleading so that the moving party may properly prepare his responsive pleading.

The different functions performed by the bill of particulars in federal practice are accentuated by the fact that while in New York a bill of particulars as a general rule cannot be obtained until issue has been joined, in the federal courts

* Lecture delivered at the Association of the Bar of the City of New York on April 3, 1941, under the auspices of the Committee on Post-Admission Legal Education of the Association (Hon. Bernard L. Shientag, Chairman). Citations of cases published since its delivery have, of course, been added.

1 3 Carmody, N. Y. Practice (Perm. ed. 1930) 2433.
the motion must be made before answering; this is in accord
with the New York rule that a motion for a more definite
statement must be made before answer. 3

This radically different purpose of the federal bill of
particulars was effectively illustrated by Judge Clark of the
Second Circuit about three years ago in an address given at
an annual dinner of the New York County Lawyers' Associa-
tion. 4 He observed that in New York, pleadings had been
confused with the evidence; that attempts had been made to
use bills of particulars to supply proof. It was his belief that
the only proper function of the pleadings was to establish
the general boundaries of the action, to provide a basis for
res judicata or the binding force of the final judgment to be
rendered; and, therefore, the bill of particulars should be
used only to remove indefiniteness in the pleading and not as
a substitute for depositions and discovery. In fact, he thought
the bill could be abolished altogether, leaving the objections
to a pleading to be raised by motion to dismiss on the ground
that the pleading failed to state any claim or defense. 5

In effect, therefore, a motion for a bill of particulars or
for a more definite statement of a complaint under the Fed-
eral Rules corresponds to what is known in New York State
practice as a motion to make the complaint more definite
and certain.

2 Rule 12(e); Trounstine v. Bauer, Pogue & Co., Inc., 1 F. R. D. 363
(S. D. N. Y. 1940); Cary v. Hardy, 1 F. R. D. 355 (E. D. Tenn. 1940);
Howard, 27 F. Supp. 6 (S. D. N. Y. 1939); Westmoreland Asbestos Co., Inc.
v. Johns-Manville Corp., 2 F. R. S. 115 (S. D. N. Y. 1939); Michels v. Ripley,
26 F. Supp. 959 (S. D. N. Y. 1939); Alropa Corp. v. Heyn, 30 F. Supp. 668
(W. D. Pa. 1939).
3 3 CARMODY, N. Y. PRACTICE (Perm. ed. 1930) 2198.
5 See also concurring opinion of the learned judge in Federal Trade Comm.
v. Biddle Purchasing Co., 117 F. (2d) 29, 30 (1941): "But I think it is clear as
to trial courts that where a claim for relief is presented, motions for particulars
almost always serve to delay adjudication, with rarely any benefit in clarity or
in limiting proof * * *"; Schaefer, Current Procedural Objections (1941) 27
A. B. A. J. 364. To eliminate the bill of particulars or more definite statement
completely seems to overlook the fact that in complicated actions where the
plaintiff is prone to plead nothing but generalities as for instance in anti-trust
actions, a bill or a more definite statement is a very helpful and proper machin-
ery for the defendant. Depositions alone will not aid the defendant. See
Caskey and Young, The Bill of Particulars—A Brief for the Defendant (1941)
27 VA. L. Rev. 472; see Lowe v. Consolidated Edison Co., Inc., 1 F. R. D. 559
(S. D. N. Y. 1940).
Judge Knight of the Western District of New York in United States v. Schine Chain Theatres, Inc., explained Rule 12(e) very clearly, by stating:

* * * when Rule 12(e) is considered in connection with the provisions for discovery and interrogatories, it seems plain that the intent of the draftsmen was that the words "to prepare for trial" relate only to matters necessary to be known to a party to put his pleading in such shape that all the issues might understandably be met. The two provisions of the rule are to be read with substantially equal effect. The bill of particulars was not intended to take the old meaning and have the old use of the former bill of particulars. Considering the discovery and interrogatory provision, this would have been a clear duplication. * * * The purpose of each of the separate provisions of Rule 12(e) is the same. * * *

According to Rule 12(e) a party may only obtain a bill of particulars "to enable him properly to prepare his responsive pleading or to prepare for trial". The words "to prepare for trial", in federal procedure, would seem to have a very restricted meaning. They simply cover the situation where a responsive pleading is not permitted. For example, the plaintiff ordinarily may not interpose a reply where the an-

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answer contains only denials and affirmative defenses; the affirmative defenses are automatically deemed denied. Of course, these affirmative defenses may be so indefinitely stated that the automatic denials will not clearly raise the actual issues; in that case the opposing party may need a bill of particulars, that is, a more definite statement of the affirmative defenses, in order to know what real issues must be met at the trial. To give any broader content than this to the words "or to prepare for trial" would seem unjustified in view of the sharp distinction attempted in the Federal Rules between pleadings and proof. Consider Prutinsky v. Commercial Union Assurance Co., Ltd.,7 where Judge Hulbert granted a motion for a bill of particulars of "affirmative" defenses but not of so-called permissive defenses—allegations in affirmative form which merely amplify the denials in the answer and which could have been proved under a general denial.

Since the bill of particulars becomes part of the pleading and supplements the pleading, it follows that evidentiary matter should not be part of a bill of particulars. Indeed, no evidentiary matter could be obtained under the old federal practice.8

Although the reasons given under the new Rules for refusing demands of evidentiary matter differ, namely (1) "this is in fact a motion to make the pleading more definite and certain in order properly to prepare the responsive pleading", or (2) "ample provision for obtaining evidentiary matter is contained in the discovery rules", the cases are practically unanimous in denying a motion asking for evidentiary matter.9

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An interesting question came before Judge Hulbert in *Piest v. Tide Water Oil Co.*10 There, it appeared that prior to answer in a removed case the defendants had applied for a bill of particulars, which motion was granted in its entirety. The bill was served and thus under Rule 12(e) became a part of the complaint and necessarily supplemented the allegations of the complaint. The defendants then interposed an answer which plaintiff asserted denied only the allegations of the complaint, and disregarded the additional statements contained in the bill of particulars. Plaintiff accordingly moved for a more definite statement by the defendants admitting or denying each allegation of the plaintiff's bill of particulars. Judge Hulbert treated defendant's motion for a bill of particulars as one to make the complaint more definite and certain and said accordingly that under the state practice, if the motion were granted it would be necessary for the plaintiff to reframe his complaint and the answer would be directed to the complaint as reframed. His holding, however, was as follows:

Under the practice laid down in the Federal Rules * * * there is no such reframing of a pleading but 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 modified. The Rules being intended to effect a simplification, a statement of a cause of action with the greatest brevity is to be desired. The motion, therefore, is denied * * *.

The rules11 of the District Courts of the Southern and Eastern Districts of New York provide that where an order

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11 E. D. & S. D. Civil Rule 10.

under Rule 12(e) is granted and "the pleading or bill which is served in purported compliance therewith fails to meet the terms of the order, a party before applying for other relief may make a motion for a further statement or bill." It is to be noted that these rules talk about a further "pleading" for which no express provision is found in the Federal Rules.

Although the bill of particulars becomes part of the complaint, the purpose of the bill of particulars is to assist the defendant in framing his answer and not so that the defendant may plead to the particular items which may be contained in the bill of particulars. Furthermore, it seems fairly clear that the primary reason for inserting in Rule 12(e) the provision that the bill of particulars becomes a part of the pleading was to do away with the doctrine found in some jurisdictions that the bill of particulars is not part of the complaint. And also, there is no provision in the rules or generally in state practice requiring a party to plead to a bill of particulars. On this view as to the nature of a bill of particulars, the denial of the motion would seem correct. But still the motion is deemed identical with a motion to make the pleading more definite and certain.

The holding in Piest v. Tide Water Oil, however, may be contrary to the view of the Advisory Committee as indicated by question and answer on page 304 of the N. Y. Symposium on Federal Rules.

Question Rule 12(e) provides that a bill of particulars becomes part of the pleading which it supplements. Must a defendant answer the bill of particulars as well as the complaint?

Answer As the bill of particulars in the ordinary course, comes before the answer, the answer will be so drawn as to admit or deny the averments of the complaint as supplemented (made definite) by the bill of particulars. The answer should refer to the bill of particulars to the extent appropriate in order to comply with the requirements of Rule 8(b).

Furthermore, the possible risk of an implied admission under Rule 8(d) would be avoided under this interpretation.

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12 Commentary, 2 F. R. S. 642, 643.
13 See note 10, supra.
14 Rule 8(b) prescribes the forms of denials, etc. in a pleading; see Ford, Federal Rules of Civil Procedure, Pleadings, Motions, Parties and Pre-Trial Procedure, 1 F. R. D. 315, 322-323.
On the question whether a bill of particulars of a complaint can be used on a motion to dismiss the complaint under Rule 12(b), Judge Leibell in Reilly v. Walcott,\(^\text{16}\) held that a motion to dismiss under Rule 12(b) for failure to state a claim upon which relief can be granted may be directed to the complaint as supplemented by the bill of particulars.

This decision is in conformity with the holdings in the New York State courts that a bill of particulars may be considered on motions for judgment on the pleadings.\(^\text{16}\) However, this line of thought might well in a federal case require the defendant in his answer to plead not merely to the complaint as such, but also to the bill of particulars which was furnished pursuant to his demand to amplify the complaint.

In Mahoney v. Bethlehem Engineering Corp.,\(^\text{17}\) Judge Leibell very properly held that since a motion to dismiss a complaint for failure to state a claim should be decided upon the complaint as supplemented by the bill of particulars (if a bill of particulars has been served), a motion for a bill of particulars should be granted so that defendant may thereafter move to dismiss on the complaint and bill of particulars.

On the other hand, Judge Holly in Smith v. Employers Fire Ins. Co.,\(^\text{18}\) has held that a bill of particulars will not be ordered to enable the moving party thereafter to make a motion to dismiss the complaint for failure to state a claim, apparently on the theory that a motion for a bill of particulars should only be granted to prepare a responsive pleading.

On the question whether it is a defense to a motion for a bill of particulars to say that the information which the defendant seeks is within his own knowledge, the courts have disagreed.\(^\text{19}\) Since the purpose of a bill of particulars is to

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\(^\text{16}\) 1 F. R. D. 103 (S. D. N. Y. 1939).


\(^\text{18}\) 27 F. Supp. 865 (S. D. N. Y. 1939); Sheehan v. Municipal L. & P. Co., 1 F. R. D. 256 (S. D. N. Y. 1940); see also Reilly v. Wolcott, 1 F. R. D. 103 (S. D. N. Y. 1939); Mendola v. Carborundum Co., 26 F. Supp. 359 (W. D. N. Y. 1938); Request for Bill of Particulars to Prepare Motion to Dismiss, 2 F. R. S. 1222.

\(^\text{19}\) 1 F. R. D. 251 (N. D. Ill. 1940); see also Gumbart v. Waterbury Club Holding Corp., 27 F. Supp. 228 (D. Conn. 1938).

obtain not evidence but rather the proper formulation of the pleadings, knowledge on the part of the moving party should not be a bar. The better rule in the State courts, of course, has been that the purpose of a bill of particulars is to discover what the plaintiff claims the facts to be and that it is immaterial that the moving party has knowledge of the facts.20

"If an order for a bill of particulars is not obeyed" the Rule provides that the court may strike the pleading to which the motion was directed or make such order as it deems just. The courts have interpreted this provision differently.

We find one court holding that a motion to dismiss the action is proper;21 another court holding that the appropriate motion is to strike the pleading and not to non-suit the delinquent party nor to strike the bill of particulars;22 and another court holding that the motion should be one to strike out the non-complying portions of the bill of particulars.23

Since the motion under Rule 12(e) is to make the complaint more definite, an order striking the non-complying portions of the bill of particulars does not seem very efficacious. It is submitted that an order dismissing the action in the ordinary case is too drastic; all that should be done is to strike the allegations of the pleading, of which a bill of particulars was ordered and not properly furnished, which in some cases, of course, may lead to the dismissal of the complaint.


II

DEPOSITIONS AND DISCOVERY

A closely related subject—that of Depositions and Discovery\textsuperscript{24}—constitutes perhaps the most revolutionary reform accomplished by the Federal Rules.

Several years before the effective date of the new Rules, Mr. Justice Cardozo made this observation: "The law of discovery has been invested at times with unnecessary mystery. There are few fields where considerations of practical convenience should play a larger role."\textsuperscript{25}

Although the New York Court of Appeals in \textit{Public National Bank v. National City Bank}\textsuperscript{26} in 1933 reaffirmed its earlier holding that an examination before trial need not be restricted to matters upon which the examining party has the burden of proof, it left the problem to the discretion of the various judicial departments. Thus no change was effected by this decision and the First and Second Departments have remained conservative and the Third and Fourth Departments somewhat liberal.

The Association of the Bar of the City of New York has gone on record in favor of wider examinations before trial and Senator Pack accordingly introduced a bill in Albany\textsuperscript{27} drafted by the Association's Committee on Law Reform (Charles H. Meyer, Chairman). The measure does not go quite so far as the Federal Rules but is a step in the right direction. The Association states that the usefulness and benefits of examinations before trial are well established and that the experience under the new Federal Rules justifies the adoption of at least a less restricted system in the state courts.


\textsuperscript{26} 261 N. Y. 316, 185 N. E. 395 (1933).

\textsuperscript{27} S. Int. 494, Pr. 872. The bill unfortunately failed to pass.
The limitations placed on discovery under the old federal procedure are well known. Perhaps the general view prevalent in the state courts as well as in the federal courts that discovery, if available at all, could only be obtained in support of the examining party's case, stems from the general attitude of Anglo-American procedural law, i.e., the desire for secrecy and surprise. Furthermore, the argument against enlarged discovery that has been repeatedly advanced is that such enlargement would encourage perjury. It is difficult, however, to see how an examination before trial which is mutual, not limited by the affirmative case doctrine, broad enough to bring out the facts, and with proper provision for the protection of parties and witnesses, can produce such a result.

"There is no objection that I know why each party should not know the other's case." Such was the statement made back in 1887 by William Howard Taft when he was a Superior Court judge in the State of Ohio. It was he who, as president of the American Bar Association, suggested in 1922 that the Supreme Court write rules uniting the common law and equity principles of procedure so as to secure one form of civil action. The framers of the Federal Rules have proceeded on the same assumptions. Thus, Rule 26 provides that not only parties and employees are subject to examination, but any witness without regard to a showing of his present or prospective unavailability. The deposition may be taken on oral examination or on written interrogatories (1) for the purpose of discovery, (2) for use as evidence in the action, or (3) for both purposes. Subject to orders for the protection of parties and deponents [Rule 30(b) and (d)], the examining party may

28 Cf. the de bene and other deposition provisions of the Revised Statutes; 28 U. S. C. §§ 636, 639–641, 643–648 and 653–655; Carpenter v. Winn, 221 U. S. 533 (1911); discovery in equity by way of written interrogatories and production of documents (Equity Rules 47, 54 and 58); Hanks Dental Ass'n v. Int'l Tooth Crown Co., 194 U. S. 303 (1904); Ex parte Fisk, 113 U. S. 713 (1885); Hawks v. Yancey, 2 F. (2d) 471 (N. D. Tex. 1924); Pressed Steel Car Co. v. Union Pac. R. R., 241 Fed. 964 (S. D. N. Y. 1917), where Judge Learned Hand said, after defining the limited scope of a bill of discovery: "Much the most convenient way would be for the parties to agree upon a master and allow plaintiff an oral examination. This, however, I cannot compel."


The Rule on its face provides for complete mutuality of discovery and permits such discovery not only for use as evidence at the trial but also solely for discovery, and in one of the first cases construing this Rule, Judge Moscowitz very properly commented as follows:

For years students of procedure have awaited the day when a somewhat antiquated system of Federal procedure might be supplanted by a more facile, less rigid structure better adapted to the swift and just disposition of legal disputes. ** **

Construed together [26(a) and 26(b)], these two clauses permit the broadest type of examination. Limitations which have been placed upon deposition-taking by state courts, such as the necessity of having the affirmative upon the issue on which examination is sought, find no basis in the new Rules. It will not avail a party to raise the familiar cry of "fishing expedition". ** ** The purpose of the examination contemplated by these Rules is to narrow the issues, promote justice, and thus not make the trial of a law suit a game of chance or wits. It is in that spirit that these new Rules should be construed.31

This expression of liberality is also found in a number of other cases,32 and truly represents the purpose of the Rules,

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but there are other cases which reveal the influence of the old federal discovery practice and the restrictive discovery procedure in some states. Indeed, we find Judge Hulbert saying in *Schweinert v. Insurance Co. of North America*:

After all that has been written in the interpretation of the new Rules, it is surprising that there should be so much confusion in their operation.

It is not clear whether the learned Judge was attributing this confusion solely to lawyers or whether the courts were also included in his statement.

There is in addition to the oral and written discovery procedure provided in Rule 26 a further method of discovery to be found in Rule 33. This rule is limited to *parties* and provides for the service upon any adverse party of interrogatories to be answered by the party served. The note of the Advisory Committee says that Rule 33 restates the substance of Equity Rule 58 with qualifications to conform to the Federal Rules. Since Rule 33 is silent as to the scope of the examination, the contention was made that Rule 33 was to be construed like old Equity Rule 58. This argument was promptly rejected, the courts holding that the scope of the examination under Rule 33 should be the same as defined in Rule 26. However, certain limitations have been


prescribed by some courts. Judge Chesnut in Coca-Cola v. Dixi-Cola Lab., Inc.,\textsuperscript{36} has stated:

** * * * that it will be only the exceptional case where more than 15 or 20 interrogatories can conveniently and efficiently be submitted. Where a more comprehensive examination of the adverse party is desired, it should ordinarily be done by taking his deposition.

Judge Reeves, however, in J. Schoeneman, Inc. v. Brauer,\textsuperscript{37} has held as follows:

Rule No. 33 of the Rules of Federal Procedure, ** * * * has been interpreted by the courts as being just as broad in its implications as in the case of depositions. This means that the distinction between a search for evidentiary facts and an inquiry into ultimate facts has been abolished.

It makes no difference, therefore, how many interrogatories are propounded. If the inquiries are pertinent the opposing party cannot complain.

The question has come up whether the fact that the matters concerning which discovery is sought are within the knowledge of a party seeking discovery should be a bar to discovery. An answer in the negative seems proper. At least one of the objects of deposition procedure under the Rules is the shortening and simplification of trials. Knowledge of the facts by a party does not prove his case. He must obtain and submit proof of these facts and deposition testimony may well help to supply such proof. Otherwise, he may have to resort to other proof at the trial which may entail considerable trouble and expense in its production. The courts for the Northern and Western Districts of New York, however, have held that the examination must be confined to facts unknown to the examining party.\textsuperscript{38}

The preferable view would seem to be that of Judge


\textsuperscript{37} 1 F. R. D. 292 (W. D. Mo. 1940).

\textsuperscript{38} B. B. Chemical Co. v. Cataract Chemical Co., 25 F. Supp. 472 (W. D. N. Y. 1938), where the learned judge said, "Answer was not required under the old rule [Equity Rule 58] * * * and it should not under the new"; Norton v. Cooper Jarrett, Inc., 1 F. R. D. 92 (N. D. N. Y. 1938); see also Babcock & Wilcox v. North Carolina Pulp Co., 25 F. Supp. 596 (D. Del. 1938).
Mandelbaum in *Kingsway Press, Inc. v. Farrell Pub. Corp.*, where he held that interrogatories under Rule 33 are not limited to matters solely within the knowledge of the adverse party, and that of Judge Campbell of the same district, who has held that the fact that the items called for are or should be within the knowledge of the moving party does not constitute a valid objection to an interrogatory.

It would seem that in this instance, at least, the state judges in the Third and Fourth Departments and the federal judges for southern New York display a liberal attitude while the state judges in the southern part of the state and the federal judges in northern and western New York tend to a narrow view.

A problem upon which the courts have expressed rather divergent opinions is this: May discovery be had of matters which may be inadmissible as original evidence? Rule 26 (b) justifies an affirmative answer. This Rule, as previously mentioned, seems clearly to indicate a twofold purpose, one of which is to aid the examining party to prepare for trial without limitations on such examination except those of relevancy and privilege. Judge Hincks of the District of Connecticut in *Lewis v. United Airlines Transportation Corp.*, has held that Rule 26

** contemplates examination not merely for the narrow purpose of adducing testimony which shall be offered in evidence at the trial, but also for the broad discovery of information which may be useful in preparation for trial. ** The only limitation is to matters “relevant to the subject matter involved in the pending action” ** The examination, under the rule, is not to be restricted to matters which are material or admissible.

Judge Hincks is not alone in giving this proper construction to Rule 26.

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42 27 F. Supp. 946 (D. Conn. 1939).
43 American Lecithin Co. v. W. A. Cleary Corp., 1 F. R. D. 603 (D. N. J. 1941); Laird v. United Shipyards, Inc., 1 F. R. D. 772 (S. D. N. Y. 1941); Steingut v. Guaranty Trust, 1 F. R. D. 723 (S. D. N. Y. 1941); Byers Thea-
There are, however, a number of apparently contrary decisions making admissibility in evidence the controlling factor.\textsuperscript{43}

The objection of irrelevancy has been frequently sustained where the answers will require the expressions of opinion. This is particularly noticeable in patent suits where one party asks in effect in what manner he is infringing on the other's patent. The reasons for the refusal are not given by the courts.\textsuperscript{44}

However, a few patent decisions have allowed interrogatories which might technically be considered as calling for expressions of opinion. In the Eastern District of New York it has been held in a patent suit that where the answer pleads failure to comply with the statute or rule, the plaintiff is entitled to ascertain by interrogatories in which respect he was deemed to have failed to comply, and also that a defendant may be required to point out the defect or act to which the defense is directed.\textsuperscript{45}

Questions in negligence actions as to what constituted contributory negligence have also been deemed improper...
either on the ground that they call for an expression of opinion, or on the ground that such a question is an ultimate issue in the case and would not be admissible at the trial.

Thus far we have not considered the problem of the production of documents. There are two methods by which documents may be required to be produced: (1) by subpoena duces tecum, which is provided for in a rather backhanded way in Rule 45(d) (1) which says, "A subpoena commanding the production of documentary evidence on the taking of a deposition shall not be used without an order of the court"; no express mention is made in Rule 26(a) of the production of documents or the subpoena duces tecum, the only provision being that "the attendance of witnesses may be compelled by the use of a subpoena as provided in Rule 45"; and (2) by order under Rule 34, the main discovery and inspection rule, which bears similarity to Section 324 of the New York Civil Practice Act.

When documents are sought to be produced under Rule 26 and Rule 45, Rule 34 must also be considered since, as first stated, there is no express provision in Rule 26 for the production of documents.

Rule 34 so far as applicable to this discussion provides that upon motion of any party on notice to all other parties the court may order any party to produce and permit the inspection and copying or photographing of any designated documents, papers, etc., not privileged which constitute or contain evidence material to any matter involved in the action and which are in his possession, custody or control. Thus, we have the problem: When a subpoena duces tecum under Rule 45 is sought in conjunction with an examination under Rule 26, is Rule 26 which stresses relevancy to be read in conjunction with Rule 34 which refers to matters which constitute or contain evidence, and if so which Rule shall modify the other?

In an oral ruling during the course of the trial of United States v. Aluminum Corp., Judge Caffey held (1) that Rule

48 1 F. R. D. 62 (S. D. N. Y. 1939); see also same case 26 F. Supp. 711, 712, where the learned judge stated: "I conclude, therefore, that it is essential
45(b) must be interpreted in *pari materia* with Rule 34, and (2) that the documents called for by the subpoena *duces tecum* must constitute and contain evidence which is material or probably material. The contention was made that the evidence called for would be useful in refreshing the recollection of the witness. Judge Caffey said:

As I see it, the usefulness of a document for the purpose of refreshing the memory of a witness is no ground whatsoever for requiring its production. * * * * the rules restrict the power of the court in respect to enforcing such production by means of a subpoena *duces tecum*, to documents which are or probably are evidence. Their value for refreshing recollection is wholly outside the definition of the sole authority of the court to compel their production. [Citing *People ex rel. Lemon v. Supreme Court of State of New York*, 245 N. Y. 24, 156 N. E. 84 (1927), and *Kring v. State of Missouri*, 107 U. S. 221, 2 Sup. Ct. 443 (1883).]

It is true that this application for a subpoena *duces tecum* was made at the trial under Rule 45(b) and was not made under Rule 45(d) (1) which provides for the issuance of a subpoena *duces tecum* on the taking of a *deposition* under Rule 26. But this difference is probably not material. Judge Leibell, however, in *Bough v. Lee*, has indicated that where a subpoena *duces tecum* is issued in conjunction with the taking of a deposition, the only question to be determined was the relevancy of the documents and whether they were privileged or not. And the Circuit Court of Appeals for the Ninth Circuit has held that where it appears on the trial that a state statute permits a witness to refresh his memory by reference to certain types of documents, such a statute is applicable in the federal courts under Rule 43a and the court may order the production of such documents for that purpose.

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51 United States v. Smith, 117 F. (2d) 911 (1941).
As for the second method of compelling production of documents—by order of court under Rule 34—there appears to be no doubt but that the applicant for the production of documents under this Rule must (1) designate the documents sought with reasonable particularity, and (2) show that the documents are in the possession, custody or control of the party against whom the application is made. The third requisite, namely to show that the documents are “evidence material to any matter involved in the action” has received various interpretations.

Is relevancy sufficient or is admissibility in evidence essential under Rule 34? Judge Coxe in *Kenealy v. Texas Co.* has adhered to the strict admissibility in evidence rule, holding:

**The plaintiff says that he should be permitted to have the statements in order that he may properly cross-examine the various witnesses as they are produced. This is substantially the argument advanced and rejected by Chief Judge Cardozo in *People ex rel. Lemon v. Supreme Court,* *and I do not think that it is even open under the language of Rule 34.**

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I realize that there are expressions to the contrary in a number of recent District Court cases, Bough v. Lee, S. D. N. Y., March 28, 1939, 28 F. Supp. 673; Bough v. Lee, S. D. N. Y., June 24, 1939, 29 F. Supp. 498; Kulich v. Murray, S. D. N. Y., June 13, 1939, 28 F. Supp. 675; Price v. Levitt, E. D. N. Y., Aug. 18, 1939, 29 F. Supp. 165; and although I have great respect for the opinions of the judges who decided those cases, I still think that statements such as the ones now in question are without the letter as well as the spirit of Rule 34. **

The simple relevancy requirement was applied by Judge Hincks of the District of Connecticut in the case of Connecticut Importing Co. v. Continental Distilling Corp. In that case the plaintiff had alleged in its complaint that it had sustained damages and loss of profits as a result of the unlawful acts by the defendant beginning in January, 1937. On the issue of damages the defendant demanded production of copies of plaintiff's income tax returns, both before and after that time. The court held:

On this issue of damages surely the plaintiff's income both before and after the critical time is highly relevant, and plaintiff's tax returns normally might be expected to contain information as to such income.

The court then holds that Rules 34 and 45 must be construed in pari materia with Rule 26 disapproving of Judge Caffey's distinction between probable materiality and relevancy and goes on to say:

the returns might conceivably be admissible, if offered by the defendant, as admissions contradicting certain aspects of the plaintiff's proofs. Similarly they might prove useful to the defendant on the cross-examination of plaintiff's witnesses.

Another recent case which necessarily implies that Rules 26 and 34 are to be construed together is Mackerer v. N. Y. Central R. R. There the plaintiff alleged that the intes-

54 1 F. R. D. 190 (D. Conn. 1940).
state's death was caused by the overturning of a steam crane which he was operating while in the defendant's employ and demanded production of all papers and records showing repairs made to the steam crane subsequent to the accident. These documents, of course, would be inadmissible as part of the plaintiff's case at trial. Judge Moscowitz allowed plaintiff's request, saying:

It cannot be decided as a matter of law in advance of the trial that the subject of plaintiff's inquiries is wholly irrelevant or immaterial. It is possible as contended by plaintiff that the repairs which were made after the accident disclose certain defects in the crane which by their very nature will appear to have been in existence before the accident. Furthermore, it is conceivable that such documents might be used to rebut defendant's evidence. See Choctaw, Oklahoma & Gulf Railroad Company v. McDade, 191 U. S. 64, 24 S. Ct. 24, 48 L. Ed. 96. It is possible that such evidence might be admissible for other reasons.

It is submitted that when the production of documents is sought, whether under Rule 45 in conjunction with Rule 26 or under Rule 34, all these Rules should be read together. Accordingly, it is proper to construe the meaning of the words to be found in Rule 34, namely, "not privileged which constitute or contain evidence material to any matter involved in the action" in the light of the relevancy provision contained in Rule 26(b). Furthermore, the words "any matter involved in the action" seem to be rather broad and flexible and should be given some effect. Fine distinctions between probable materiality and relevancy should not be recognized.\footnote{See Note (1941) 50 Yale L. J. 708. But cf. Commentary 4 F. R. S. 919.}

method would be under Rules 26 or 34.  

A number of decisions have been handed down, chiefly involving negligence cases, where attempts have been made to examine affidavits and similar materials secured by another party by independent investigation incident to the preparation of the latter's case for trial. The courts have as a general rule denied such applications. Judge Moscowitz in *McCarthy v. Palmer*, held as follows:

To use them in such a manner would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended.

In *French v. Zaltem-Zalessky*, Judge Hulbert laid down the same rule and refused to require witnesses to produce the inter-office correspondence file, but gave this warning:

I confine my ruling, however, upon this point to this particular case lest it might become the practice to conceal information which might otherwise be obtainable, in the inter-office correspondence file, on the supposition that it would thus not be subject to production.

Furthermore, it has been properly held under Rule 33 that interrogatories which require a party to make investigations, research or compilation of data for his adversary are improper.

The right to physical and mental examinations is also covered by the Rules.

Physical examinations are permitted in a number of

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60 1 F. R. D. 240 (S. D. N. Y. 1940).


states and under the Conformity Act and the decision of the U. S. Supreme Court in *Camden Suburban Ry. v. Stetson* 63 were allowed in personal injury actions in the federal courts embracing New York State, since the enactment of the Civil Practice Act permitting a physical examination without oral testimony. 64 Rule 35, however, does not deal solely with physical examinations but also permits mental examinations. The examination also is not confined to personal injury cases. In fact, the Rule states that “in an action in which the mental or physical condition of a party is in controversy, the court * * * may order him to submit to a physical or mental examination by a physician.” Blood grouping tests have already been permitted under Rule 35 by the Court of Appeals for the District of Columbia in a matrimonial case involving the parentage of a child who was not strictly a party. 65

The U. S. Supreme Court in *Sibbach v. Wilson & Co., Inc.* 66 on January 13, 1941, Mr. Justice Roberts writing the majority opinion, held that Rule 35 is a regulation of procedure, not a matter of substance, and therefore within the authority conferred upon the Supreme Court by the Enabling Act and, also, not an invasion of freedom from personal restraint. The Court accordingly upheld the lower courts in directing a physical examination of the plaintiff. Four justices dissented, making the final count Justices Roberts, McReynolds, Hughes, Stone and Reed versus Justices Frankfurter, Black, Douglas and Murphy.

Mr. Justice Frankfurter, speaking for the four-man minority, argued that a drastic change in public policy “in a

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63 177 U. S. 172, 20 Sup. Ct. 617 (1900).
65 Beach v. Beach, 114 F. (2d) 479 (1940); cf. N. Y. Civ. Prac. Act § 306-a authorizing blood-grouping tests whenever relevant to the prosecution or defense of an action or proceeding and Hayt v. Brewster, Gordon & Co., 199 App. Div. 68; 191 N. Y. Supp. 176 (4th Dep't 1921), decided before the enactment of C. P. A. § 306-a, where the court directed a blood-grouping test on the ground that the words “physical examination” were broad enough to include a medical examination embracing blood-grouping tests; on the question whether a district court on a motion for a new trial may require the appellee to submit to a mental or physical examination, see Teche Lines, Inc. v. Boyette, 111 F. (2d) 579 (C. C. A. 5th, 1940).
66 312 U. S. 1, 61 Sup. Ct. 422 (1941).
matter deeply touching the sensibilities of people or even their prejudices as to privacy ought not to be inferred from a general authorization to formulate rules,” and concluded that the change introduced by Rule 35 required explicit legislation.

To a New York lawyer the conclusion reached by Mr. Justice Roberts seems clearly sound and “the inviolability of a person” argument of Mr. Justice Frankfurter is not persuasive. An order for a physical examination is merely for the purpose of ascertaining facts and therefore seems to be no more drastic than an ordinary order for discovery and inspection which is also intended to attain that objective. The problems of constitutional immunity from self-incrimination and invasion of personal privacy are not involved.67

Several other matters concerning the subject of depositions should here be considered. As mentioned above, the depositions of witnesses may be taken without regard to a showing of their present or prospective availability—quite different from the circumscribed practice under the New York Civil Practice Act. It is only when the use of a deposition is in question that the availability of a witness comes to the foreground. This is clearly set forth in paragraph (d) of Rule 26, which outlines in detail when the testimony taken before trial may be offered in evidence at the trial.

Furthermore, at the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition so far as admissible under the rules of evidence may be used against any party who was present or represented at the taking of the deposition or who had notice thereof, subject, of course, to the availability requirements set forth in Rule 26(d), reference to which has just been made. Thus, the problem presented in New York State courts is obviated where it has been held that while a deposition of a party may be read in evidence upon the trial against him as being an admission against interest, it cannot be read against a co-defendant unless such co-defendant had plain notice that it would be read against him. Mere service of the notice or of the motion on the co-defendant has not been

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deemed sufficient. Otherwise, it has been said in New York that as to the co-defendant the defendant was being examined as a witness only.\textsuperscript{68}

The amendments proposed by the Association of the Bar of the City of New York, to which reference has already been made,\textsuperscript{69} were expected to remove this problem in New York.

The notice to take the deposition need not,\textsuperscript{70} and, it is submitted, should not state the matters upon which the examination is sought.

The name and address of the person sought to be examined if known, and, if the name is not known a general description sufficient to identify him must be given in the deposition notice. It has been held that a notice stating that a deposition would be taken of “such other officer or officers as may have knowledge of the facts” is defective in that it does not sufficiently identify such persons.\textsuperscript{71} The name of the person before whom the deposition is to be taken need not be given,\textsuperscript{72} although one case has unnecessarily held that it was better practice to do so.\textsuperscript{73}

Contrary to the New York State rule which holds that a municipality which is a party to an action may not be examined before trial,\textsuperscript{74} the federal courts under the new rules

\textsuperscript{68} Simpson v. Johnson, Drake & Piper, Inc., 249 App. Div. 827, 292 N. Y. Supp. 84 (2d Dep't 1937); Van Schaick v. Sullivan, 241 App. Div. 268, 271 N. Y. Supp. 537 (1st Dep't 1934); Nixon v. Beacon Transportation Co., 239 App. Div. 830, 264 N. Y. Supp. 114 (2d Dep't 1933); it has, however, been held that failure to give such express notice to a co-defendant does not deny to such co-defendant the right to appear and participate in the examination; Freisinger v. Reibach, et al., 254 App. Div. 575, 2 N. Y. S. (2d) 817 (2d Dep't 1938).

\textsuperscript{69} Cf. note 27, supra.


\textsuperscript{72} Rule 30(a).

\textsuperscript{73} Norton v. Cooper Jarrett, Inc., 1 F. R. D. 92 (N. D. N. Y. 1938).

\textsuperscript{74} Kasitch v. City of Albany, 283 N. Y. 622, 28 N. E. (2d) 30 (1940); Bush Terminal Co. v. City of New York, 259 N. Y. 509, 182 N. E. 158 (1932).

Since the taking over by New York City of the Subway Transit Lines, an
have held that a municipality is not immune from exami-
nation.75

A subpoena need not be served upon a *party* whose depo-
sition is sought to be taken if he fails to appear, the service of the notice upon
his attorney being sufficient.76 Of course, a party cannot be
punished for contempt if a subpoena is not served, but the
possible striking out of his pleading, dismissal of the action,
or entry of a default judgment should ordinarily be sufficient
deterrents.77 However, if documents are to be produced a
subpoena *duces tecum* must be obtained from the court.78

On the other hand, the attendance of a *witness*, including an
"employee", to appear for discovery can only be compelled
by the service of a subpoena.79

It has also been held by Judge Hulbert and by Judge
Cooper of the Northern District of New York that it is
improper to set the examination in the office of the attorney
for the examining party.80 Judge Hulbert suggests that the
examination be made returnable in the regular motion part
and that on the return date the court may then assign the
place in the courthouse where the deposition may be taken.
This requirement seems unnecessarily restrictive. Why can-

amendment to the New York Civil Practice Act has been made authorizing a
court to grant an order, on notice, providing for the examination of a municipal
corporation before trial on any issue involved in an action arising out of the
ownership, operation or maintenance of a public utility by the municipal corpo-
ration or its transferor or assignor. The new law also applies to pending
actions and causes of action which have heretofore accrued. N. Y. Civ. Prac.
Act § 292-a. "Public utility" has been held to embrace utilities as defined by
the New York Public Service Law when such utilities are operated by municipali-

75 Conneway v. City of New York, 32 F. Supp. 54 (E. D. N. Y. 1940); Joy
76 Rules 30(a) and 37(d); Spaeth v. Warner Bros. Pictures, Inc., 1 F. R. D.
729 (S. D. N. Y. 1941); French v. Zalstem-Zalessky, 1 F. R. D. 240 (S. D. N.
77 Rule 37(d); Millinocket Theatre, Inc. v. Kurson, 35 F. Supp. 754 (D. Me.
1940); French v. Zalstem-Zalessky, 1 F. R. D. 240 (S. D. N. Y. 1940);
Cohn v. Amunziata, 27 F. Supp. 805 (S. D. N. Y. 1939); Madison v. Cobb,
78 Rule 45(d); cf. local rules S. D. N. Y. and E. D. N. Y. Civil Rule 15;
Cooney v. Guild Co., 1 F. R. D. 246 (S. D. N. Y. 1940); Whitaker v. MacFad-
79 Freeman v. Hotel Waldorf-Astoria Corp., 27 F. Supp. 303 (S. D. N.
1941).
not the examination be held in the office of the attorney for
the examining party if the testimony is taken before and
under the supervision of an officer properly qualified under
Rule 28(a) and (c)? Ordinarily, holding the examination
at the attorney's office before a properly qualified officer,
would be much more convenient for all persons involved than
going to the courthouse where the facilities for conducting an
examination before trial are rather limited.

Occasionally the courts seem not to keep in mind the
twofold purpose of Rule 26 which gives rise to two types of
cases that must be carefully distinguished. This misleading
failure to distinguish occurred in Dellefield v. Blockdel
Realty Co.,81 where the defendant took plaintiff's deposition
by oral examination. During the examination plaintiff, on
counsel's advice, refused to answer certain questions. The
court, on defendant's motion to punish plaintiff for contempt
for disobeying a subpoena and for an order directing plain-
tiff to return to the jurisdiction for examination, denied
plaintiff's cross-motion to vacate the subpoena and to termi-
nate the examination and directed plaintiff to appear for
examination.

Although there was nothing in the opinion to indicate
that defendant was taking the deposition only for use as
evidence and not for purposes of discovery, the court, in a
dictum,82 went on to say that there was an "underlying error"
in the manner of taking the deposition, that plaintiff's refusal
to answer "needlessly complicated the matter" and that the
"questions should have been answered with objections duly
noted." This statement, it is submitted, ignores the distinc-
tions in a deponent's self-protective procedure made neces-
sary by the double purpose of Rule 26 which expressly pro-
vides, as previously shown, that depositions may be taken
not only to obtain information "for use as evidence" but also
"for the purpose of discovery * * * or for both purposes." For
purposes of discovery on an oral examination, a deponent is
obliged to testify even though such testimony would be
inadmissible in evidence at the trial or hearing. In general
there are only three limitations upon a party seeking discov-

82 Id. at 213.
ery by oral examination: he is not entitled to information irrelevant to the subject matter of the action, or information that is privileged, and only in the exercise of the court’s discretion may he obtain knowledge respecting “secret processes, developments, or research.” After the examination has commenced, the only way deponent can rely on these limitations is by refusal to answer, thereby compelling proponent to make application to the court if he considers himself entitled to answers, for once they are given the harm is irreparably committed.

Considering Article V of the Rules as an entirety, it seems to contemplate as the proper practice that a deponent shall refuse to answer if he believes proponent is not entitled to discovery but shall answer if the only objection is to the subsequent use of the answer as evidence. If deponent believes the examining party has no right to discovery, he may apply for an order “that certain matters shall not be inquired into, or that the examination shall be limited to certain matters, * * * or that secret processes, developments, or research need not be disclosed.” If the proponent is taking the deposition only to “annoy, embarrass, or oppress the deponent” the latter may move to terminate the examination or to limit the scope or the manner of taking the deposition. Moreover, if dispute as to the propriety of proponent’s questions arises during the examination, then upon “demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to” move for a limitation of the examination. Where deponent merely refuses to answer without making application to the court, the proponent has the choice of continuing the examination

83 F. R. C. P. 26(b).
85 After service of the notice, any party (except proponent) or the deponent may move to limit the examination, F. R. C. P. 30(b); Barre-Zueta v. Sword Steamship Line, Inc., 27 F. Supp. 935 (S. D. N. Y. 1939). However, the courts seem to prefer that deponent move under F. R. C. P. 30(d) as the need appears during the course of the examination rather than to apply under F. R. C. P. 30(b) before the examination has commenced, Nekrasoff v. U. S. Rubber Co., 27 F. Supp. 953 (S. D. N. Y. 1939); Brockway Glass Co. v. Hartford-Empire Co., 35 F. Supp. 470 (W. D. N. Y. 1941).
86 F. R. C. P. 30(b).
87 F. R. C. P. 30(b), (d).
88 F. R. C. P. 30(d).
on other matters or immediately adjourning the examination while he moves for an order compelling an answer.\textsuperscript{89} To prevent these applications from being used for delay and harassment, the courts are given full discretion to impose costs upon the offending party or witness.\textsuperscript{90}

But if proponent is seeking information for use as evidence, the Rules envisage a different procedure. Rule 30(c) states that "Evidence objected to shall be taken subject to the objections" which "shall be noted by the officer upon the deposition." Where deponent's only objection is that the knowledge sought, though relevant and not privileged, is otherwise inadmissible in evidence, no harm is done by giving immediate answers, inasmuch as such objections may be made and ruled upon at the subsequent trial or hearing.\textsuperscript{91} Moreover, this course will eliminate unnecessary delay in the taking of the deposition.

In view of these provisions, the dictum in the Dellefield case seems proper only in respect of deponent's refusal to answer on the ground that the answer could not be used as evidence. The dictum is contrary to Rules 30 and 37 providing for applications to the court where the objections are based on the ground that proponent is not entitled to the information even for purpose of discovery, that is "to prepare for trial" as distinguished from "use on the trial."\textsuperscript{92}

III

CHOICE OF LAW AND THE FEDERAL RULES

There are several recent decisions indicating that, in the matter of state and federal relations generally, the rule of \textit{Erie R. R. v. Tompkins},\textsuperscript{93} may become materially restricted,\textsuperscript{94}

\textsuperscript{89} F. R. C. P. 37(a).
\textsuperscript{90} F. R. C. P. 30(d), 37(a).
\textsuperscript{91} F. R. C. P. 26(e). Objections, including those to the qualification of the officer taking the deposition, which might be obviated if promptly presented are waived unless made before or at the taking of the deposition, F. R. C. P. 32(b), (c).
\textsuperscript{92} Cf. Vassardakis v. Parish, 4 F. R. S. 481 (S. D. N. Y. 1941), "The purpose of these depositions is to prepare for trial as well as for use on the trial. In other words, the examination may be exploratory for the purpose of preparation and investigation, * * *".
\textsuperscript{93} 304 U. S. 64, 58 Sup. Ct. 817, 114 A. L. R. 1487 (1938).
\textsuperscript{94} Doctrine not applicable to tort claims against common carriers in inter-
but the attack, based on this doctrine, upon the Federal Rules seems to be increasing. Consequently, it is appropriate to review the effect upon the Rules of the doctrine that, in actions maintained in the federal courts because of diversity of citizenship, the national courts shall look to the law of the states, decisional as well as statutory, for rules of decision.\footnote{96}

Although principles of statutory construction and constitutional requirements were relied upon by the Supreme Court\footnote{97} in overruling \textit{Swift v. Tyson},\footnote{98} it seems a fairly safe assumption that the more persuasive ground of decision was the Court's notion of what constituted good judicial statecraft under our dual form of government.\footnote{99} But that was also the ground of decision in \textit{Swift v. Tyson}, overruled because the method adopted—creation of a federal common

state commerce that have been subjected to extensive federal regulation, O'Brien v. Western Union Tel. Co., 113 F. (2d) 539 (C. C. A. 1st, 1940); Illinois Cent. R. R. v. Moore, 112 F. (2d) 959 (C. C. A. 5th, 1940), rev'd, 312 U. S. 630, 61 Sup. Ct. 754 (1941) without passing upon the question whether, because of the interstate character of the subject matter of the action, the claim for relief was to be governed by federal law and not by state law; Vaigneur v. Western Union Telegraph Co., 34 F. Supp. 92 (E. D. Tenn. 1940); cf. Vandenhark v. Owens-Illinois Glass Co., 311 U. S. 538, 349 (1941) emphasizing that the claim involved, as in \textit{Erie R. R. v. Tompkins}, was based on a tort. But see Geist v. Prudence Realization Corp., 122 F. (2d) 503 (C. C. A. 2d, 1941), Frank, C. J. dissenting, p. 507.

\footnote{96}{On claims for relief in civil actions, which historically would be classified as actions at law, relevant state statutes are controlling, \textit{Judiciary Act of 1789}, c. 20, § 34, 1 Stat. 92, Rev. Stat. § 721, 28 U. S. C. § 725; see Swift v. Tyson, 16 Pet. 1, 17-18, 58 L. ed. 1290 (U. S. 1842). Now on such claims, state court decisions also are conclusive; \textit{Erie R. R. v. Tompkins, supra note 92.}}

\footnote{97}{Claims for relief, historically of an equitable nature, are governed by state statutes and decisions, Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860, 20 L. ed. 1290 (1938), but not because of § 34 of the Judiciary Act of 1789; see Mason v. United States, 304 U. S. 202, 58 Sup. Ct. 860, 20 L. ed. 1290 (1938), and \textit{Swift v. Tyson}, supra note 92.}}

\footnote{98}{\textit{Erie R. R. v. Tompkins, supra note 92.}}

\footnote{99}{Erie R. R. v. Tompkins, 304 U. S. 64, 72-73, 77-80, 58 Sup. Ct. 817 (1938).}
law—failed to fulfill its purpose and has been supplanted by a different principle—supremacy of state law—but only to attain the same objective. An objective sought in both cases was conformity in rules of decision. Swift v. Tyson failed in this respect because state courts persisted in exercising their own independent judgment. Now the federal courts, leaving the fate of uniformity to other forces are to seek conformity by following the decisions of state courts, including the opinions of trial and intermediate courts. The circuit courts of appeal must even conform to any change of state law occurring after entry of judgment in the district court but before determination of an appeal.

In the application of this new principle of conformity to cases involving the Federal Rules, the policy question to be resolved is one of degree—how far shall the principle of conformity be carried. Some federal courts seem to have con-

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99 The dominant policy basis for the decision in Swift v. Tyson was the desirability of uniformity of rules of decision with respect to commercial transactions regardless of the place where enforcement might be sought—"The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke v. Lyde, 2 Burr. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world", 16 Pet. 1, 18. The facts of the Swift case gave additional impetus to an expression of the desire for uniformity for not only was there diversity of citizenship but the transaction was interstate, having several contacts with Maine as well as New York. Cf. Shulman, The Demise of Swift v. Tyson (1938) 47 YALE L. J. 1336, 1340. Because Mr. Justice Story believed, as he demonstrated in the Swift case, that judicial decisions were only evidence of law and not the law, it is not unreasonable to believe he assumed the state courts would treat the Supreme Court's decisions on commercial law as highly persuasive with the result that there would be not only national uniformity but also conformity of rules of decision between federal and state courts.

100 See Erie R. R. v. Tompkins, 304 U. S. 64, 74, 58 Sup. Ct. 817 (1938).


102 Six Companies v. Highway Dist., 311 U. S. 180, 61 Sup. Ct. 186 (1940); West v. A. T. & T. Co., 311 U. S. 223, 61 Sup. Ct. 179 (1940); Stoner v. N. Y. Life Ins. Co., 311 U. S. 464, 61 Sup. Ct. 336 (1940); Fidelity Union Trust Co. v. Field, 311 U. S. 169, 61 Sup. Ct. 176 (1940), the facts of this case indicate that the federal courts are bound by the decisions of trial courts of general jurisdiction; for a thorough explanation of the organization of the Court of Chancery in New Jersey, the court involved in the Fidelity Union case, see Gregory v. Gregory, 67 N. J. Eq. 7, 58 Atl. 287 (1904), cited in the Fidelity Union case.

103 Vandenbark v. Owens-Illinois Glass Co., 311 U. S. 538, 61 Sup. Ct. 347 (1941). Although a state supreme court may not regard itself as bound by a decision upon a second appeal, the circuit courts of appeal do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. See Moore v. Illinois Cent. R. R., 312 U. S. 630, 633, 61 Sup. Ct. 754, 755 (1941).
cluded that they must conform to state law to whatever extent may be necessary to prevent a judge or jury, in any particular case, finding the law or facts differently in the federal courts than in the state courts.\textsuperscript{104} The Supreme Court's cursory opinion in \textit{Cities Service Oil Co. v. Dunlap},\textsuperscript{105} lent weight to this view, for it was there held that a district court should follow the state law as to burden of proof on the issue of bona fide purchaser for value without notice, because the reliance of the holder of the recorded legal title on this local rule (that burden of proof was upon the person asserting a superior equity) was a "substantial right".\textsuperscript{106} However, it is doubtful that the actual holding in \textit{Erie v. Tompkins}\textsuperscript{107} and the elimination of the "political and social" defects\textsuperscript{108} enumerated in that case require so broad an interpretation. These necessarily lead only to the conclusion that the evil to be extirpated was the conflict of law that often made a person's conduct, in a particular place at any given time, both lawful and unlawful; the final characterization depending on the unpredictable factor of what sovereign's aid might finally be invoked.\textsuperscript{109} In this view of the policy of


\textsuperscript{105} 308 U. S. 208, 60 Sup. Ct. 201 (1939).

\textsuperscript{106} But see infra pp. 39-40; Sibbach v. Wilson & Co., 312 U. S. 1, 13-14, 61 Sup. Ct. 422, 426 (1941).

\textsuperscript{107} Upon strict interpretation the case stands only for the proposition that in diversity cases the federal courts should refer to the decisional law of the state to determine whether plaintiff was a licensee or merely a trespasser. The decision in Ruhlin v. N. Y. Life Ins. Co., 304 U. S. 202, 58 Sup. Ct. 860 (1938) extending the doctrine of the \textit{Erie} case to suits in equity adds nothing in this respect for it simply held that the terms of an insurance contract should be interpreted according to state law.

\textsuperscript{108} The defects were threefold: "the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties. ** * * \textit{Swift v. Tyson} introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the 'unwritten 'general law' vary according to whether enforcement was sought in the state court or in the federal court; and the privilege of selecting the court ** * was conferred upon the non-citizen." \textit{Erie R. R. v. Tompkins}, 304 U. S. 64, 74-75, 58 Sup. Ct. 817 (1938).

\textsuperscript{109} This seems true for the other defects listed by Mr. Justice Brandeis, \textit{supra} note 108, flow solely from the most obvious one that a state court and
the Tompkins case, adoption of the traditional definition of "substantive law"—"The rules that determine the legal relations when all of the facts have been made known to the Court"—would serve as a fairly obvious line of demarcation between the area controlled by state law and that subject to the Federal Rules of Civil Procedure. I am not imputing any intrinsic soundness to this particular definition but suggest only that it will efficiently subserve the policies of the Erie case and of the Enabling Act.

If this definition is not applied and it is held that Rule 1 doesn't mean what it says:

These rules govern procedure in all suits of a civil nature there is no reason to expect less confusion than arose in the attempt to give certainty to the words "as near as may be" of the Conformity Act, or that there will not be "a new well of uncertainties" to clog the administration of justice, arising from the fact that the validity of many provisions of the Rules will be in doubt.

Moreover, in order to rule, in cases based on diversity of citizenship, that certain provisions of the Federal Rules shall be replaced by local rules of practice varying from state to state, the Supreme Court must first consider the objection that the resulting lack of uniform procedure would run counter to the determination of Congress implicit in the Enabling Act that uniformity of procedure throughout all

the federal court, sitting in that state, could and did arrive at opposite conclusions on the legality of a particular act or omission; discrimination against citizens arose because with the non-citizen rested the privilege of selecting the forum applying the more favorable of two contradictory rules of decision; the well of uncertainties developed from the inability to predict whether the federal courts in a given situation would follow local law or announce their own rule.

Note (1924) 33 Yale L. J. 308, 310.


See Clark, The Tompkins Case and the Federal Rules (1941) 24 J. Am. Jud. Soc. 158, 161, "if some of the rules already attacked are properly to be questioned, there are other rules left in a very precarious position. more than half the rules can be questioned if some of the views already in print as to the wide content of 'substance' are sound."
federal courts was desirable. The court must also consider whether it has the power to amend, by the process of decision, those rules which it has recently stated have "the force of a federal statute".\textsuperscript{115}

In the absence of a decision by the Supreme Court clearly indicating that the Federal Rules are independent of, or an exception to, the doctrine of the \textit{Erie} case, several of the rules have been attacked—successfully in a number of instances.

Rule 3 provides that a "civil action is commenced by filing a complaint with the court." The Supreme Court has held that state statutes of limitations were applicable to actions at law in the federal courts\textsuperscript{116} under the Rules of Decision Act.\textsuperscript{117} At present the policy of the \textit{Erie} case would seem to command that local statutes of limitations be classified as "substantive", irrespective of the manner in which a particular statute may be worded—that is whether it "extinguishes the right" or merely "bars the remedy".\textsuperscript{118} The fact that such statutes may be characterized as "substantive" does not eliminate all problems. For example, in New York an action is "commenced by the service of a summons."\textsuperscript{119} This New York rule as to the commencement of an action raises the question, under \textit{Erie v. Tompkins}, whether filing the complaint will toll the statute of limitations. There would seem to be no violation of the policy of the \textit{Erie} case by holding that compliance with Rule 3 stops the running of the statute

\textsuperscript{115}See Sibbach v. Wilson & Co., 312 U. S. 1, 13, 61 Sup. Ct. 422, 426 (1941). But see dissenting opinion of Mr. Justice Frankfurter, at p. 18, "Plainly the Rules are not acts of Congress and cannot be treated as such. Having due regard to the mechanics of legislation and the practical conditions surrounding the business of Congress when the Rules were submitted, to draw any inference of tacit approval from non-action by Congress is to appeal to unreality."


\textsuperscript{117}28 U. S. C. § 725.

\textsuperscript{118}\textit{Cf.} Sampson v. Channell, 110 F. (2d) 754, 756 (C. C. A. 1st, 1940); Commentary (1940) 4 F. R. S. 884; see, Generally, 3 BEALE, CONFLICT OF LAWS (1935) 1620-1629.

\textsuperscript{119}N. Y. Civ. Prac. Act (1941) § 218.
in any state where local practice provides some method of tolling the statute such as substituted service.\textsuperscript{120} In New York, as against resident defendants, in cases where the statute is about to run and personal service on the defendant may be difficult, attorneys may avoid the risks of litigating the validity of this construction of Rule 3 under the Tompkins case by first filing the complaint as prescribed by Rule 3 and then by virtue of Rule 4(d), which authorizes service in the manner prescribed by state law, delivering the summons and complaint to the United States Marshal for service in accordance with New York Civil Practice Act § 17. Under § 17, there is a sixty-day period of grace within which to serve the summons on defendant personally within or without the State of New York, or to make substituted service or to commence service by publication. However, there is the possibility that the federal courts may hold that unless they acquire jurisdiction over the person of the defendant, the statute will not be tolled. If the defendant is served within the State of New York, within the sixty-day period, by the United States Marshal for the district in which defendant last resided, it would seem that such personal jurisdiction has been acquired and that the statute is tolled.\textsuperscript{121} Although the New York courts consider “substituted” service the equivalent of personal service for the purpose of determining that they have jurisdiction over the person of a resident defendant,\textsuperscript{122} the federal courts following the analogy of Big Vein Coal Company v. Read,\textsuperscript{123} might hold that such “substituted” service would be insufficient to toll the statute. But this seems unlikely because Rule 4(d) (1) expressly permits a similar type of service (that is, leaving

\textsuperscript{120} But see Commentary (1940) 4 F. R. S. 884.


\textsuperscript{122} Huntley v. Baker, 33 Hun 578 (N. Y. 1884); see Rawstone v. Maguire, 265 N. Y. 204, 207, 192 N. E. 294 (1934). Contrary to the rule in other jurisdictions, in New York the words “substituted service” have a limited meaning and do not include service by publication and personal service without the state, N. Y. Civ. Prac. Act § 231.

\textsuperscript{123} 229 U. S. 31, 33 Sup. Ct. 694 (1913). It was held in this case that in an action commenced in a federal court, jurisdiction over defendant's property in the district could not be acquired by attachment without personal service of the summons upon the defendant within the district.
copy of the summons and complaint at defendant's usual place of abode with some person of suitable age and discretion) without requiring all the safeguards for insuring actual notice that are part of "substituted" service in New York. However, service of the summons without the state and service by publication will probably be considered insufficient.

In *Gallagher v. Carroll*, Judge Byers of the Eastern District of New York stated that *Erie v. Tompkins* was inapplicable and that Rule 3 was controlling in view of the fact that the applicable statute of limitations of Pennsylvania was silent on the method of commencing suit. In a recent decision in Michigan, it was held without discussing the applicability of the *Erie* doctrine, but citing both state and federal decisions, that the local statute of limitations was tolled when the complaint had been filed and the summons issued.

The most frequently discussed provision is Rule 8(c) requiring generally that in answering a pleading any matter constituting an avoidance or affirmative defense shall be set forth affirmatively. Certain defenses, including contributory negligence, are specifically mentioned. Because the burden of proof often follows the burden of pleading and in view of federal decisions prior to *Erie v. Tompkins* it has been argued that Rule 8(c) also implicitly establishes the rule as to burden of proof of the issues therein mentioned.

The question of conflict between Rule 8(c) and the *Erie* case has been raised several times with respect to the burden of pleading and of proof of contributory negligence. Under *Swift v. Tyson* the rule on that issue was treated as a matter of substance and of general law and the federal courts established their independent rule that such burden was upon

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126 9 Wigmore, Evidence (3d ed. 1940) § 2486.
128 Moore, Federal Practice (1938) 571; 3 id. 3071; cf. Sampson v. Channell, 110 F. (2d) 754, 757 (C. C. A. 1st, 1940), "Rule 8(c) speaks of contributory negligence as an 'affirmative defense', a phrase implying that the burden of proof is on the defendant."
129 16 Pet. 1, 10 L. ed. 865 (U. S. 1842).
the defendant. Since the *Erie* decision, several cases have held that burden of proof as to contributory negligence was a matter of substantive law and the local rule was to be followed. In *Francis v. Humphrey*, Judge Wham of the Eastern District of Illinois dismissed the complaint because plaintiff had failed to plead freedom from contributory negligence, in accordance with the Illinois rule.

The most persuasive decision to date is the opinion of Judge Magruder in *Sampson v. Channell*, decided in the First Circuit. The claim for relief arose out of an automobile collision in Maine. The action was brought in the federal district court of Massachusetts. The trial judge instructed the jury in accordance with Maine law that plaintiff had the burden of proving freedom from contributory negligence. The jury returned a general verdict for defendant but found specially that plaintiff's injury was caused by the negligence of defendant's testator. On appeal the judgment was reversed for error in the instructions given the jury on the burden of proof. Judge Peters dissented and Judge Wilson concurred only in the result, so Judge Magruder's opinion has only the weight of its intrinsic merit.

The rationale of the case was as follows: Rule 8(c) is only a rule of pleading; therefore, the rule as to burden of proof must be gleaned from other sources. On re-examination of federal decisions in the light of the new federal policy, it is clear that the incidence of burden of proof may determine "the outcome of the case"; therefore, for the purposes of the *Tompkins* case the federal courts must classify the rule as to burden of proof of contributory negligence as a rule of substantive law and follow state law. But the federal court must again characterize the rule as either "substantive" or "procedural" and this time the classification must be made according to the conflict of laws decisions of the state in which the


federal court is sitting to determine whether the local rule or the rule of the place where the claim for relief accrued shall be applied.\textsuperscript{134} This must be done for three reasons: (1) it is the purpose of the \textit{Erie} case to obtain conformity in rules of decision between a particular federal court and the state wherein it exercises jurisdiction, not between that federal court and the state in which the claim for relief arises; (2) the state court decisions on characterization of legal rules for choice of law purposes are part of the common law of that state, hence within the prescription of \textit{Erie v. Tompkins}; and (3) to carry out the policy of the \textit{Erie} case to prevent disparity in the outcome of actions, the federal court must apply the same rules that the state court would have applied. For the purpose of determining whether to apply the rule of the forum or the rule of the place where the claim for relief arose, the state courts of Massachusetts classify the rule as to burden of proof on the issue of contributory negligence as "procedural" and apply their own rule that such burden is upon the defendant. Consequently, the federal court sitting in Massachusetts should have followed the Massachusetts rule and instructed the jury that the burden of proof was upon the defendant, its contrary instruction

\textsuperscript{134} Sampson v. Channell, supra note 133, at 760-762. The question whether conflict of laws decisions of state courts were to be followed under \textit{Erie v. Tompkins} was expressly left open in \textit{Ruhlin v. N. Y. Life Ins. Co.}, 304 U. S. 202, 208, n.2, 58 Sup. Ct. 860, 82 L. ed. 1290 (1938) ("Under the general doctrine the interpretation of an insurance contract depends on the law of the place where the policy is delivered. * * * We do not now determine which principle must be enforced if the Pennsylvania [state where case was tried; place of delivery was unknown, the insurance company was a New York corporation] courts follow a different conflict of laws rule"). But cf. Sibbach v. Wilson & Co., 312 U. S. 1, 10-11, 61 Sup. Ct. 422, 425 (1941) discussed in Commentary (1941) 4 F. R. S. 921. See Commentary (1940) 2 F. R. S. 627, 628. The defects of the doctrine of \textit{Swift v. Tyson}, cited supra note 94, cannot be obviated unless the conflict of laws decisions of state courts are held to be within the scope of \textit{Erie v. Tompkins}. Note (1941) 29 Calif. L. Rev. 228, 321. In \textit{Stentor Electric Mfg. Co. v. Klaxon Co.}, 115 F. (2d) 268 (C. C. A. 3d, 1940) the Circuit Court of Appeals decided a conflict of laws problem without referring to the conflict of laws decisions of the state in which the District Court was sitting. Because of the conflict of approach to this problem between the opinion in the \textit{Stentor} case and Judge Magruder's opinion in \textit{Sampson v. Channell}, the Supreme Court granted certiorari and, following Judge Magruder's reasoning, held that, under \textit{Erie v. Tompkins}, the conflict of laws rules to be applied by a federal court must conform to those prevailing in the state courts of the state in which the federal court is sitting, otherwise "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." Klaxon Co. v. Stentor Electric Mfg. Co., 313 U. S. —, 61 Sup. Ct. 1020 (1941).
(following the Maine rule that such burden was upon the plaintiff) was erroneous.

It should be noted that the Circuit Court's direction to the District Court was wholly consistent with a holding that Rule 8(c) also establishes the rule that burden of proof of contributory negligence is upon the defendant and that it was to be applied to the case. In *MacDonald v. Central Vermont Ry.*, Judge Hincks of the District of Connecticut held that a complaint failing to allege plaintiff's freedom from contributory negligence was not defective, for, although the burden of pleading freedom from contributory negligence was upon the plaintiff under Connecticut law at that time (except in wrongful death cases), the federal courts were free to follow Rule 8(c) because the state courts of Connecticut considered the incidence of the burden of proof on this issue to be merely a matter of procedure and not a part of the substantive law of that state. The situation in New York is similar. Though the plaintiff need not plead freedom from contributory negligence, he has the burden of proof on that issue, except in death actions and in actions for injuries caused by employer's negligence. As in Connecticut, the courts of New York consider the rule a matter of procedure for the purpose of determining that a statute changing the rule will have retroactive effect and also in holding that they will apply the local rule to causes of action accruing outside the state.

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135 It has been suggested that the court could have reached this conclusion directly on the theory that the courts of Massachusetts have not indicated that any question of vital policy of the state was involved in its rule, placing on the defendant the burden of proving plaintiff's contributory negligence. Clark, *Procedural Aspects of the New State Independence* (1940) 8 Geo. Wash. L. Rev. 1230, 1235-8; Clark, *The Tompkins Case and the Federal Rules* (1941) 24 J. Am. Jud. Soc. 158, 159.


This theory of the MacDonald case, approved by Judge Charles E. Clark,\(^\text{142}\) does not effectively dispose of the reasoning in the Sampson case because it is based on a different understanding of the purpose of the Tompkins case than that assumed by Judge Magruder. The basic purpose of the Erie case is not to protect states' rights—to uphold rules of law considered expressions of vital state policy by the courts and legislatures of the states.\(^\text{143}\) Rather it was the purpose of the Erie case to aid the persons inhabiting the states in conducting and planning their activities by reducing the area of unpredictability of the law governing their daily conduct. Conformity to state law is a method to do that, not a means of enhancing the sovereign irresponsibility of the several states. The reasoning of Sampson v. ChannelZ and its choice of law to resolve each question seems correct. The only question about the Sampson case is this: Did it misinterpret the underlying policy of the Tompkins case by requiring too great a degree of conformity to state law.

In Cities Service Oil Co. v. Dunlap,\(^\text{144}\) which did not involve the Federal Rules nor interpret any provision of the Equity Rules, the Supreme Court held that the district court should have applied the local rule as to burden of proof on the issue of bona fide purchaser for value without notice—by Texas law this burden is on the person asserting an equity superior to the record title to land. Mr. Justice McReynolds, speaking for the Court, said that the questions related to a "substantial right upon which the holder of recorded legal title to Texas land may confidently rely". This decision is, of course, not conclusive as to the operation of Rule 8(c). More-

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\(^{142}\) Supra note 135.

\(^{143}\) That portion of the dissenting opinion of Mr. Justice Field in Baltimore & Ohio R. R. v. Baugh, 149 U. S. 368, 401 (1893), quoted in Erie v. Tompkins, 304 U. S. 64, 78-79, 58 Sup. Ct. 817, lends itself to the opposite interpretation: "** * * * there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—indeed in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.""

\(^{144}\) 308 U. S. 208, 60 Sup. Ct. 201 (1939).
over, it is not certain that the Supreme Court would today rule that a "substantial right" is sufficient to invoke the Tompkins case. In Sibbach v. Wilson & Co.,\textsuperscript{145} in deciding that Rule 35, authorizing physical examination of parties, was a valid exercise of the rule-making power, the majority of the Supreme Court indicated that the test of a "substantive right" within the meaning of the Enabling Act\textsuperscript{146} was identical with the test of substantive law under Erie v. Tompkins, and rejected plaintiff's contention that the word "substantive" in the Enabling Act meant merely "important" or "substantial". The majority then adopted, for the purpose of construing this Act, the traditional distinction between "substance" and "procedure".\textsuperscript{147}

In some states, of which New York is one,\textsuperscript{148} it is not essential that the plaintiff in a stockholder's action allege in his complaint, as he must under Federal Rule 23(b), that he "was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law".\textsuperscript{149} This provision was taken from Equity Rule 27, formerly Equity Rule 94,\textsuperscript{150} adopted shortly after the decision of Hawes v. Oakland\textsuperscript{151} and is simply a codification of the requirements set up in that decision. Prior to the Erie case and the adoption of the Federal Rules, Equity Rule

\begin{footnotes}
\textsuperscript{145} 312 U. S. 1, 61 Sup. Ct. 422 (1941).
\textsuperscript{146} 28 U. S. C. § 723b.
\textsuperscript{147} "Is the phrase 'substantive rights' confined to rights conferred by law to be protected and enforced in accordance with the adjective law of judicial procedure? It certainly embraces such rights. One of them is the right not to be injured in one's person by another's negligence, to redress infraction of which the present action was brought. The petitioner says the phrase connotes more; that by its use Congress intended that in regulating procedure this court should not deal with important and substantial rights theretofore recognized. * * * If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded. The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." Sibbach v. Wilson & Co., 312 U. S. 1, 13-14, 61 Sup. Ct. 422, 426 (1941).
\textsuperscript{148} Pollitz v. Gould, 202 N. Y. 11, 94 N. E. 1088 (1911); for the rule in other states, see Note (1938) 38 Col. L. Rev. 1472, 1480, n.53.
\textsuperscript{149} F. R. C. P. 23(b) also requires plaintiff to allege that he demanded appropriate action by the directors or stockholders, the reasons for failure to obtain such action or the reasons for not making such effort.
\textsuperscript{150} 104 U. S. ix (Jan. 23, 1882).
\textsuperscript{151} 104 U. S. 450 (1882).
\end{footnotes}
27 had been viewed in some federal cases as a substantive principle of equity and in others as only a procedural device to prevent collusive suits in the federal courts.\textsuperscript{162} Even the opinion in \textit{Hawes v. Oakland} is equivocal, although the purpose of the rule—to prevent collusion in conferring jurisdiction—is clearly expressed.

This requirement of Rule 23(b) was one of the first provisions to be considered of doubtful validity under \textit{Erie v. Tompkins},\textsuperscript{153} but the Circuit Court of Appeals for the Sixth Circuit recently held in \textit{Cohen v. Young}\textsuperscript{164} that Rule 23(b) should be applied until the Supreme Court takes some action because it has been recognized as a rule of procedure by the Supreme Court and Congress in the promulgation and adoption of the Rules, saying:

Equity Rule 27 was, however, a rule of procedure, so recognized by the Supreme Court and by the Congress in the promulgation and adoption of the Federal Rules of Civil Procedure which re-enacted it as Rule 23. We are not at liberty, therefore, to depart from it. Whether the doctrine of \textit{Erie R. Co. v. Tompkins} will lead ultimately to a modification of the rule or to recognition of the right as one of substantive law, to be controlled by state statutes and decisions, is beyond our ability to forecast, not being endowed with the gift of prophecy. We still conceive it to be our function to apply the law as we find it.

It has also been suggested that Rule 23(b) can be upheld on the ground that it is a jurisdictional requirement.\textsuperscript{155}

To determine the effect to be given Rule 23(b) three types of cases must be considered:

\begin{enumerate}
\item \textit{Actions commenced in or removed to a federal court because of the existence of a federal question}
\end{enumerate}

Where a secondary action is brought to assert a federal right, state law has no application for the Supreme Court
necessarily excepted from the doctrine of the *Erie* case such matters as are governed by the Constitution or acts of Congress.\footnote{156} Even if Rule 23(b) be considered substantive, there is no problem under the Enabling Act for the rule makes no change in the previous federal law.\footnote{157}

(2) *Actions commenced in a federal court because of diversity of citizenship*  

Different purposes have been ascribed to Equity Rule 27 and its predecessor Rule 94 by the Supreme Court; some of these purposes clearly indicated that the rule had a substantive content. Of course, these views were expressed under an entirely different situation than that with which the courts are faced since the decision of *Erie* v. *Tompkins*. Consequently, the method of Judge Magruder in *Sampson v. Channell* \footnote{158} is appropriate—the decisions by the Supreme Court construing Equity Rule 27 should be re-examined in view of the new federal policy. There is no question but that one purpose of Equity Rule 27 was to prevent collusive transfers of stock to obtain federal diversity jurisdiction.\footnote{159} Collusive transfer of stock to confer jurisdiction is possible in actions either commenced in or removed to a federal court because of diversity of citizenship. Such collusion is easy of accomplishment for actions commenced in the federal courts and apparently was of frequent occurrence. Though not impossible, such collusion is improbable in actions removed to the federal court by the defendant because of diversity of citizenship. In actions commenced in federal courts because of diversity of citizenship—the cases where collusion to confer jurisdiction is more probable—Rule 23(b) can be sustained as a "procedural" device to exclude many of them through the requirement of prior ownership. An additional reason for sustaining the rule is the fact that it aids the

\footnote{156}{See *Erie R. R. v. Tompkins*, 304 U. S. 64, 78, 58 Sup. Ct 817 (1938).}  
\footnote{157}{Equity Rule 27; Advisory Committee Note to Rule 23.}  
\footnote{158}{110 F. (2d) 754, 756 (1940).}  
\footnote{159}{Hawes v. Oakland, 104 U. S. 450 (1882); Note (1938) 38 Col. L. Rev. 1472, 1481–2.}
federal courts in avoiding interference with the internal affairs of corporations not organized under federal law.\textsuperscript{160}

(3) Actions removed from state to federal court because of diversity of citizenship

In removed cases the probability of collusion to confer jurisdiction is too remote to justify Rule 23(b) as "procedural" but the other purpose—to avoid interference with the internal affairs of corporations not organized under federal law might be sufficient to justify the rule. However, to apply Rule 23(b) as a procedural rule to removed cases would operate to deprive plaintiffs of rights that are unquestionably substantive, for by removal the defendant could prevent plaintiff from enforcing rights granted by state law in those instances where plaintiff cannot comply with Rule 23(b), because the federal courts in such cases will dismiss actions instead of remanding.\textsuperscript{161}

There is another possible solution of the problem of the effect to be given Rule 23(b) under the Tompkins case. The courts might sustain Rule 23(b) as a jurisdictional requirement applicable to all diversity cases—jurisdictional, not in the strict sense of statutory and constitutional power, but rather in a broader sense connoting any situation which would induce the federal courts to remand a removed case. This analysis would probably require an overruling of Venner v. Great Northern Ry.\textsuperscript{162} and a reassertion of the principle of Cates v. Allen,\textsuperscript{163} that even though the statutory requirements of jurisdiction are satisfied, a federal court which is unable to give relief may remand the case for lack of jurisdiction.\textsuperscript{164}


\textsuperscript{161} Venner v. Great Northern Ry., 209 U. S. 24, 28 Sup. Ct. 328 (1908). Even though a particular plaintiff might not be able to enforce the substantive rights of the class of stockholders, the rule of Erie v. Tompkins may not be applicable unless no member of the class is in a position to comply with Rule 23(b). See Piccard v. Sperry Corp., 36 F. Supp. 1006, 1010 (S. D. N. Y. 1941) ("Undoubtedly a right without a remedy has no substance, and if the invocation of Rule 23(b) would result in a complete bar to all persons in the class, the Erie case might be applicable." The court in this case denied motions to intervene for failure to comply with Rule 23(b) but without prejudice to future applications by any stockholder who could comply with the rule).

\textsuperscript{162} Ibid.

\textsuperscript{163} 149 U. S. 451, 13 Sup. Ct. 883 (1893).

\textsuperscript{164} See, generally, Note (1941) 41 Col. L. Rev. 104.
Of all the available solutions, sustaining Rule 23 (b) as jurisdictional in the broad sense seems the most desirable for it leaves the Rules intact, maintains the federal policy of discouraging maintenance of secondary actions in the federal courts and prevents defendant from depriving plaintiff of his substantive rights by removal, for if Rule 23 (b) is treated as a jurisdictional requirement the federal courts would remand the cases instead of dismissing them, Cates v. Allen.166

Rule 38(a), following the limitation in § 2 of the Enabling Act,166 states that the right to trial by jury as declared by the Seventh Amendment shall be preserved inviolate. Nevertheless, there have been district court decisions to the effect that, under Erie v. Tompkins, the right to trial by jury in personal injury actions of the issue of fraudulent release shall be determined by state law.167 It would seem that reference to state law to determine the right to trial by jury is clearly improper, not only on the theory that this is a federal constitutional question to be decided on the authority of federal cases,168 but also on the accepted conflict of laws doctrine that for choice of law purposes the right of trial by jury is a procedural matter.169

IV

Summary Judgment

The State of New York was one of the first jurisdictions in this country to adopt the device of summary judgment; its constitutionality was upheld in General Investment Co. v.

165 Cates v. Allen, supra note 163.
Interborough Rapid Transit Co.,\textsuperscript{170} and, under the Conformity Act, was employed in the federal courts in New York in actions at law.\textsuperscript{171} This useful procedure has since been made a part of the new federal practice where it has a much broader field of operation than in New York.

Federal Rule 56 permits any party to move for summary judgment, whether he is seeking to recover upon or to oppose a claim, counterclaim or cross-claim for relief, including declaratory relief. The judgment sought shall be rendered forthwith if (1) the pleadings, (2) the depositions and (3) the admissions on file, together with (4) any affidavits show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

This rule is applicable in all actions, including those against the United States or an officer or agency thereof,\textsuperscript{172} and—to the extent that it is available in any action—it is a departure from the existing New York rules.\textsuperscript{173} The motion may be made with or without supporting affidavits. Supporting or opposing affidavits used on the motion must, as specifically prescribed in Rule 56, fulfil the following requirements:

(1) They must be on personal knowledge or they will not be considered.\textsuperscript{174}

(2) The facts stated therein must be admissible in evidence. A motion under Rule 12(f) to strike has been held a proper method of attacking an affidavit containing inadmissible statements of fact.\textsuperscript{175}

(3) The affidavits must show affirmatively that the affiant is competent to testify to the matters therein stated; the

\textsuperscript{170} 235 N. Y. 133, 139 N. E. 216 (1923).
\textsuperscript{171} Maslin v. Columbia Nat. Life Ins. Co., 3 F. Supp. 368 (S. D. N. Y. 1932), and cases cited therein.
\textsuperscript{172} Notes of Advisory Committee to Rule 56; Boerner v. United States, 26 F. Supp. 769 (E. D. N. Y. 1939).
\textsuperscript{173} Rules 113, 114, N. Y. RULES CIVIL PRACTICE. For thorough discussion of these Rules cf. Shientag, Summary Judgment (1935) 4 FORDHAM L. REV. 186.
\textsuperscript{175} Fox v. Johnson & Wimsatt, 31 F. Supp. 64 (D. C. 1940).
affidavits of persons coming within Section 347 of the New York Civil Practice Act treating of personal transactions or communications between witness and decedents or lunatics, and similar sections of the Civil Practice Act, therefore, cannot be used over proper objections. But an affidavit is not rendered inadmissible solely because the affiant may not be compelled to testify.\textsuperscript{176}

The courts should be exacting as to the quantum of proof required to support a motion for summary judgment. For example, a \textit{prima facie} showing sufficient to sustain the granting of a temporary injunction will not justify the granting of summary judgment in an action for copyright infringement.\textsuperscript{177} This seems a proper holding considering that summary judgment is a final disposition of apparent issues raised by the pleadings.

In a case which came before the Second Circuit\textsuperscript{178} the defendant had moved for summary judgment. The plaintiff interposed affidavits which went beyond the limits of its complaint. On the theory that a party is limited to the confines of his pleading, the District Judge stated that these affidavits could not be considered on the motion. The Circuit Judges refused to commit themselves, however, to the proposition that on a motion for summary judgment affidavits going beyond the complaint can under no circumstances be considered, saying:

The judgment finally disposes of the action, and if facts appear in affidavits which would justify an amended complaint, there may be ground for treating the complaint as though it were already amended to conform.

This liberality of allowing a party to submit proof not provable under his pleading should not, however, be permitted if the affidavits of the \textit{moving party} in contradistinction to the \textit{opposing party} go beyond the limits of his pleading, despite the provisions of Rule 54(c) that every final judg-

\textsuperscript{177} Houghton Mifflin Co. v. Stackpole Sons, Inc., 113 F. (2d) 627 (C. C. A. 2d, 1940).
ment shall grant the full relief to which the party is entitled, even though not demanded.\textsuperscript{179}

Contrary to the New York rule that a motion for summary judgment can only be made after joinder of issue, a defending party under Rule 56 (b) may move before answering. A party seeking to recover upon a claim, whether an original claim or counterclaim, etc., can only move after service of a responsive pleading.\textsuperscript{180} That such a party can only move after service of a responsive pleading has been deemed to be a defect in the Rules which should be remedied.\textsuperscript{181}

In \textit{Hooven, Owens, Rentschler Co. v. Royal Indemnity Co.},\textsuperscript{182} the court held, without desiring to establish a precedent, that a defendant should answer before his motion for summary judgment would be considered, since it appeared that defendant was in default in answering at the time summary judgment was made and in view of plaintiff's contention that defenses of laches and illegality which were the sole grounds of defendant's motion for summary judgment could only be invoked by answer; but in \textit{Miller v. Hoffman V. Matthews}\textsuperscript{183} the court held that a party against whom a counterclaim was asserted might move for summary judgment on the ground that a release had been given although no answer to the counterclaim had been filed. This seems to be the preferable holding.

The courts have hesitated to grant summary judgment


\textsuperscript{180} F. R. C. P. 56(a); Viking Press, Inc. v. Goldman, 38 F. Supp. 1014 (S. D. N. Y. 1941).

\textsuperscript{181} Dissenting opinion United States v. Adler's Creamery, Inc., 107 F. (2d) 987 (C. C. A. 2d, 1939); cf. Charles E. Clark, \textit{A Proposed Rule of Court, Judicial Administrative Monographs}, Series A, No. 5 (A. B. A. 1941), reprinted in (1941) 25 J. AM. JUD. Soc. 20, permitting either party to move for summary judgment at any time after adverse parties have appeared and adding provision to make sure that the old rule against speaking demurrers is done away with, providing that any form of attack upon the legal sufficiency of a claim or defense may be supported by affidavits or other material extrinsic to the pleadings.

\textsuperscript{182} I F. R. D. 526 (S. D. Ohio 1940).

\textsuperscript{183} I F. R. D. 290 (D. N. J. 1940).
in patent cases, apparently because the factual situation is usually so complicated that the distinction between formal and genuine issues is not obvious in the absence of all the proof that would be offered at a trial.

As previously stated, a motion for summary judgment may be granted on “the pleadings, depositions and admissions on file” together with affidavits complying with the requirements set forth in paragraph (e) of Rule 56. Thus, admissions in depositions under Rule 26 as well as those made at opponent’s request under Rule 36 may be considered.

Answers to interrogatories under Rule 33 should likewise be included as admissions despite the contrary holding in Town of River Junction v. Maryland Casualty Co.

The Preliminary Draft of the Rules (1936, Rule 42) permitted the consideration of oral testimony on a motion for summary judgment. Reference to oral testimony is omitted in Rule 56 although Rule 43(e) provides that

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Despite the general provisions in Rule 43, Rule 56 should control since it seems improper and beyond the function of summary judgment to permit the taking of oral testimony. When testimony is taken there is more likely to exist in the mind of the court an unconscious tendency to weigh the evidence rather than a desire to determine whether any material issue of fact exists. The taking of oral testimony on such

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185 It is interesting to note that in a patent suit, Milburn Mills, Inc. v. Meister, 4 F. R. S. 741 (S. D. N. Y. 1940), summary judgment was granted on “ocular examination” of the objects concerning which infringement was asserted, the court making findings of fact and conclusions of law.


187 110 F. (2d) 278 (C. C. A. 5th, 1940).

a motion has been called "irregular" in one case, but apparently was permitted and considered without comment in two other cases.

Paragraph (d) of Rule 56 further provides that if summary judgment cannot be recovered upon the whole case or for all the relief asked, the court on the proof before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controversial. Thereupon, an order shall be made specifying the facts that appear without substantial controversy—including the extent to which the amount of damages or other relief is not in controversy—which shall be deemed established upon the trial of the action, and directing further proceedings in the action as may be just. Thus, where a judgment in a copyright case was reversed on the ground that there was an issue of fact as to the execution of an assignment of copyright, the appellate court directed that the new trial be limited to that one issue.

Also, in an action by the United States Government against numerous defendants to enforce compliance with an order of the Secretary of Agriculture regulating the handling of milk in a certain area, the court granted summary judgment for the plaintiff but reserved for subsequent determination questions as to the status of certain of the defendants and the amount due from each of them.

It has also been held that summary judgment should be

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192 United States v. David Buttrick Co., 28 F. Supp. 878 (D. Mass. 1939); see also Delaney v. Markham & Callow, Inc., 2 F. R. S. 538 (D. Ore. 1939), and Associates Disc. Corp. v. Crow, 110 F. (2d) 126 (App. D. C. 1940), holding that where both parties moved for summary judgment it was the trial court's duty to specify in a finding the facts that appear to be without substantial controversy and to go forward with the trial in respect to those facts which remain in dispute and that at the close of trial upon the disputed facts to make findings with respect to them and to make conclusions of law upon the whole case; the holding in Sporks v. England, 1 F. R. D. 688 (W. D. Mo. 1941) that summary judgment should not be granted on a minor part of the issue, seems to overlook completely the pre-trial nature of Rule 56(d).
denied if the opposing party has no actual knowledge of the facts in respect to the allegations in the moving papers.\textsuperscript{193}

The problem presents itself whether summary judgment should be granted on plaintiff's claim if defendant has interposed a counterclaim. To answer this question it seems necessary to distinguish between compulsory and permissive counterclaims.

Rule 13 defines (1) a \textit{compulsory counterclaim} as any claim not the subject of a pending action, which the pleader has against the opposing party at the time of filing of the responsive pleading which arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, which \textit{must be pleaded} unless its adjudication requires the presence of third parties of whom the court cannot acquire jurisdiction, and (2) a \textit{permissive counterclaim} as any claim against an opposing party \textit{not} arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A simple example of a compulsory counterclaim would be a case where A sues B for the price of goods sold and delivered and B counterclaims for breach of warranty. An example of a permissive counterclaim is one where A sues B for breach of contract X, and B counterclaims for breach of contract Y.

If A moves for summary judgment in a case involving a compulsory counterclaim, what should be the court's holding if there is no question of fact as to the sale and delivery and the contract price of the goods but the question of breach of warranty presents a genuine issue of fact? It would seem that under such circumstances a motion for summary judgment under Rule 56 should be entertained but a judgment should not be entered in favor of the plaintiff. All that the court should do in that situation is to follow the prescriptions laid down in paragraph (d) of Rule 56, which covers the situation where a case cannot be fully adjudicated on motion (although no specific reference is made to counterclaims, compulsory or permissive). The court should, therefore, ascertain the facts which exist without substan-

tial controversy; that is, the sale and delivery of the goods and the price thereof, and what material facts are actually and in good faith controverted, that is, the matters involving the alleged breach of warranty. An order would then be entered specifying the facts which are without substantial controversy—which facts would be deemed established on the trial—and directing the trial solely on the facts specified as in controversy. This method of procedure is further justified by Rule 54(b), which provides that the court at any stage of an action where more than one claim for relief is presented may enter judgment only upon a determination of the issues material to a particular claim and all counterclaims arising out of the transaction or occurrence which is the subject matter of the claim. In the order granting this relief, the court might well direct a prompt trial of the issues in controversy. Following the procedure just outlined would also avoid the situation which now seems to exist in the New York state courts which would deny the plaintiff's motion in toto, at least where the apparently valid counterclaim demands damages in excess of that sought by the plaintiff.\textsuperscript{194}

The only reported case under Rule 56 which seems to have been decided to date involving what appears to have been two compulsory counterclaims is Seagram-Distillers Corp. v. Manos,\textsuperscript{195} where the court found that the plaintiff was entitled to summary judgment but that defendant's counterclaims required a trial. The amount of damages demanded in the counterclaims apparently exceeded the plaintiff's claim.

The court found that defendant had not acted in good faith in obtaining several continuances of the trial and ac-


cordingly granted plaintiff a summary judgment. No stay of execution was imposed, the court only requiring the plaintiff to post a $1,000 bond to protect defendant against possible loss. The decision does not seem correct, in view of the provisions of Rule 56(d) and Rule 54(b) and can be justified, only because of the peculiar circumstances of the case.

If, however, A moves for summary judgment in a case where a permissive counterclaim is interposed—there should be no question but that A should be entitled to judgment for the full amount of his claim if no genuine issue as to any material fact is raised as to his claim, even though substantial issues of fact exist as to B's counterclaim. Whether A should be permitted to proceed to collect his judgment or whether a stay should be granted, pending the determination of the counterclaim, should be left to the sound discretion of the court dependent upon the circumstances of each case. Matters such as the amounts claimed by the plaintiff and defendant, respectively, the financial responsibility of the parties and the probability of defendant's recovering on his counterclaim should be taken into consideration by the court. In this connection I suggest consideration of the holding of the New York Court of Appeals in Irving Trust Co. v. Leff,196 where summary judgment was granted in favor of the plaintiff to the extent that his claim exceeded the defendant's counterclaim and the counterclaim and the claim for the balance due plaintiff were reserved for trial.

Of course, an order denying summary judgment being interlocutory is not appealable in civil actions.197 Decisions apparently to the contrary are distinguishable either because they were made in bankruptcy proceedings where interlocutory orders are appealable198 or because they are made by the District Court for the District of Columbia which has a special statute authorizing appeals upon certain conditions from interlocutory orders in civil actions.199

WERNER ILSEN.

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196 253 N. Y. 359, 171 N. E. 569 (1930); for further proceedings in this action see 137 Misc. 834, 837, 243 N. Y. Supp. 728 (1930).