

should be made if the motion is sustained. Three circuits hold that as the judge is the trier of the facts in such a situation his function is not the same as on a motion to direct a verdict, where the jury is the trier of the facts, and that the judge in deciding such a motion in a non-jury case may pass on conflicts of evidence and credibility, and if he performs that function of evaluating the testimony and grants the motion on the merits, findings are required. *Young v. United States* (C.C.A.9th, 1940) 111 F.(2d) 823; *Gary Theatre Co. v. Columbia Pictures Corporation* (C.C.A.7th, 1941) 120 F.(2d) 891; *Bach v. Friden Calculating Machine Co., Inc.* (C.C.A.6th, 1945) 148 F.(2d) 407. *Cf. Mateas v. Fred Harvey, a Corporation* (C.C.A.9th, 1945) 146 F.(2d) 989. The Third Circuit has held that on such a motion the function of the court is the same as on a motion to direct in a jury case, and that the court should only decide whether there is evidence which would support a judgment for the plaintiff, and, therefore, findings are not required by Rule 52. *Federal Deposit Insurance Corp. v. Mason* (C.C.A.3d, 1940) 115 F.(2d) 548; *Schad v. Twentieth Century-Fox Film Corp.* (C.C.A.3d, 1943) 136 F.(2d) 991. The added sentence in Rule 41(b) incorporates the view of the Sixth, Seventh and Ninth Circuits. See also 3 *Moore's Federal Practice* (1938) Cum. Supplement §41.03, under "Page 3045"; Commentary, *The Motion to Dismiss in Non-Jury Cases* (1946) 9 Fed.Rules Serv., Comm.Pg. 41b.14.

NOTES OF ADVISORY COMMITTEE ON RULES—1963
AMENDMENT

Under the present text of the second sentence of this subdivision, the motion for dismissal at the close of the plaintiff's evidence may be made in a case tried to a jury as well as in a case tried without a jury. But, when made in a jury-tried case, this motion overlaps the motion for a directed verdict under Rule 50(a), which is also available in the same situation. It has been held that the standard to be applied in deciding the Rule 41(b) motion at the close of the plaintiff's evidence in a jury-tried case is the same as that used upon a motion for a directed verdict made at the same stage; and, just as the court need not make findings pursuant to Rule 52(a) when it directs a verdict, so in a jury-tried case it may omit these findings in granting the Rule 41(b) motion. See generally *O'Brien v. Westinghouse Electric Corp.*, 293 F.2d 1, 5-10 (3d Cir. 1961).

As indicated by the discussion in the *O'Brien* case, the overlap has caused confusion. Accordingly, the second and third sentences of Rule 41(b) are amended to provide that the motion for dismissal at the close of the plaintiff's evidence shall apply only to nonjury cases (including cases tried with an advisory jury). Hereafter the correct motion in jury-tried cases will be the motion for a directed verdict. This involves no change of substance. It should be noted that the court upon a motion for a directed verdict may in appropriate circumstances deny that motion and grant instead a new trial, or a voluntary dismissal without prejudice under Rule 41(a)(2). See 6 *Moore's Federal Practice* §59.08[5] (2d ed. 1954); *cf. Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 91 L.Ed. 849 (1947).

The first sentence of Rule 41(b), providing for dismissal for failure to prosecute or to comply with the Rules or any order of court, and the general provisions of the last sentence remain applicable in jury as well as nonjury cases.

The amendment of the last sentence of Rule 41(b) indicates that a dismissal for lack of an indispensable party does not operate as an adjudication on the merits. Such a dismissal does not bar a new action, for it is based merely "on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim." See *Costello v. United States*, 365 U.S. 265, 284-288, 81 S.Ct. 534, 5 L.Ed.2d 551 & n. 5 (1961); *Mallow v. Hinde*, 12 Wheat. (25 U.S.) 193, 6 L.Ed. 599 (1827); Clark, *Code Pleading* 602 (2d ed. 1947); *Restatement of Judgments* §49, comm. a, b (1942). This amendment corrects an omission from the rule

and is consistent with an earlier amendment, effective in 1948, adding "the defense of failure to join an indispensable party" to clause (1) of Rule 12(h).

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

The terminology is changed to accord with the amendment of Rule 19. See that amended rule and the Advisory Committee's Note thereto.

NOTES OF ADVISORY COMMITTEE ON RULES—1968
AMENDMENT

The amendment corrects an inadvertent error in the reference to amended Rule 23.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendment is technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

Language is deleted that authorized the use of this rule as a means of terminating a non-jury action on the merits when the plaintiff has failed to carry a burden of proof in presenting the plaintiff's case. The device is replaced by the new provisions of Rule 52(c), which authorize entry of judgment against the defendant as well as the plaintiff, and earlier than the close of the case of the party against whom judgment is rendered. A motion to dismiss under Rule 41 on the ground that a plaintiff's evidence is legally insufficient should now be treated as a motion for judgment on partial findings as provided in Rule 52(c).

Rule 42. Consolidation; Separate Trials

(a) CONSOLIDATION. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(b) SEPARATE TRIALS. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Subdivision (a) is based upon U.S.C., Title 28, [former] §734 (Orders to save costs; consolidation of causes of like nature) but insofar as the statute differs from this rule, it is modified.

For comparable statutes dealing with consolidation see Ark.Dig.Stat. (Crawford & Moses, 1921) §1081; Calif.Code Civ.Proc. (Deering, 1937) §1048; N.M.Stat.Ann. (Courtright, 1929) §105-828; N.Y.C.P.A. (1937) §§96, 96a, and 97; American Judicature Society, Bulletin XIV (1919) Art.26.

For severance or separate trials see Calif.Code Civ.Proc. (Deering, 1937) §1048; N.Y.C.P.A. (1937) §96; American Judicature Society, Bulletin XIV (1919) Art. 3, §2 and Art. 10, §10. See also the third sentence of Equity Rule 29 (Defenses—How Presented) providing for discretionary separate hearing and disposition before trial of pleas in bar or abatement, and see also Rule

12(d) of these rules for preliminary hearings of defenses and objections.

For the entry of separate judgments, see Rule 54(b) (Judgment at Various Stages).

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

In certain suits in admiralty separation for trial of the issues of liability and damages (or of the extent of liability other than damages, such as salvage and general average) has been conducive to expedition and economy, especially because of the statutory right to interlocutory appeal in admiralty cases (which is of course preserved by these Rules). While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth. Cf. Weinstein, *Routine Bifurcation of Negligence Trials*, 14 Vand.L.Rev. 831 (1961).

In cases (including some cases within the admiralty and maritime jurisdiction) in which the parties have a constitutional or statutory right of trial by jury, separation of issues may give rise to problems. See e.g., *United Air Lines, Inc. v. Wiener*, 286 F.2d 302 (9th Cir. 1961). Accordingly, the proposed change in Rule 42 reiterates the mandate of Rule 38 respecting preservation of the right to jury trial.

Rule 43. Taking of Testimony

(a) FORM. In every trial, the testimony of witnesses shall be taken in open court, unless a federal law, these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court provide otherwise. The court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location.

[(b) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.] (Abrogated Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975)

[(c) RECORD OF EXCLUDED EVIDENCE.] (Abrogated Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975)

(d) AFFIRMATION IN LIEU OF OATH. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

(e) EVIDENCE ON MOTIONS. 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.

(f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

(As amended Feb. 28, 1966, eff. July 1, 1966; Nov. 20, 1972, and Dec. 18, 1972, eff. July 1, 1975; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 23, 1996, eff. Dec. 1, 1996.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). The first sentence is a restatement of the substance of U.S.C., Title 28, [former] § 635 (Proof in common-law actions), § 637 [see 2072, 2073] (Proof in equity and admiralty), and [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). This rule abolishes in patent and trade-mark actions, the prac-

tice under [former] Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and *Subdivision (b)* on contradiction and cross-examination modify U.S.C., Title 28, § 725 [now 1652] (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callihan and Ferguson, *Evidence and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 622 (1936), and *Same*: 2, 47 Yale L.J. 195 (1937). The last sentence modifies to the extent indicated U.S.C., Title 28, [former] § 631 (Competency of witnesses governed by State laws).

Note to Subdivision (b). See 4 *Wigmore on Evidence* (2d ed., 1923) § 1885 *et seq.*

Note to Subdivision (c). See [former] Equity Rule 46 (Trial—Testimony Usually Taken in Open Court—Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v. Lochren*, 143 Fed. 211 (C.C.A.8th, 1906). See also *Blease v. Garlington*, 92 U.S. 1 (1876); *Nelson v. United States*, 201 U.S. 92, 114 (1906); *Unkle v. Wills*, 281 Fed. 29 (C.C.A.8th 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Note to Subdivision (d). See [former] Equity Rule 78 (Affirmation in Lieu of Oath) and U.S.C., Title 1, § 1 (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

NOTES OF ADVISORY COMMITTEE ON RULES—1946
SUPPLEMENTARY NOTE REGARDING RULES 43 AND 44

These rules have been criticized and suggested improvements offered by commentators. 1 *Wigmore on Evidence* (3d ed. 1940) 200-204; Green, *The Admissibility of Evidence Under the Federal Rules* (1941) 55 Harv.L.Rev. 197. Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v. United States* (C.C.A.2d, 1941) 117 F.(2d) 387, cert. den. (1941) 313 U.S. 587; *Mosson v. Liberty Fast Freight Co.* (C.C.A.2d, 1942) 124 F.(2d) 448; *Hartford Accident & Indemnity Co. v. Olivier* (C.C.A.5th, 1941) 123 F.(2d) 709; *Anzano v. Metropolitan Life Ins. Co. of New York* (C.C.A.3d, 1941) 118 F.(2d) 430; *Franzen v. E. I. DuPont De Nemours & Co.* (C.C.A.3d, 1944) 146 F.(2d) 837; *Fakouri v. Cadais* (C.C.A.5th, 1945) 147 F.(2d) 667; *In re C. & P. Co.* (S.D.Cal. 1945) 63 F.Supp. 400, 408. But cf. *United States v. Aluminum Co. of America* (S.D.N.Y. 1938) 1 Fed.Rules Serv. 43a.3, Case 1; Note (1946) 46 Col.L.Rev. 267. While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See Armstrong, *Proposed Amendments to Federal Rules of Civil Procedure*, 4 F.R.D. 124, 137-138.

NOTES OF ADVISORY COMMITTEE ON RULES—1966
AMENDMENT

This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of Rule 28 of the Federal Rules of Criminal Procedure.

NOTES OF ADVISORY COMMITTEE ON RULES—1972
AMENDMENT

Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no