

posit, the procedure gives other litigants assurance that any judgment will be collectable. The amendment is intended to accomplish that.

The second change is the addition of a requirement that the order of deposit be served on the clerk of the court in which the sum or thing is to be deposited. This is simply to assure that the clerk knows what is being deposited and what his responsibilities are with respect to the deposit. The latter point is particularly important since the rule as amended contemplates that deposits will be placed in interest-bearing accounts; the clerk must know what treatment has been ordered for the particular deposit.

The third change is to require that any money be deposited in an interest-bearing account or instrument approved by the court.

REFERENCES IN TEXT

Act of June 26, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), 31 U.S.C. §725v, referred to in text, was repealed by Pub. L. 97-258, §5(b), Sept. 13, 1982, 96 Stat. 1074, the first section of which enacted Title 31, Money and Finance. Insofar as not superseded by sections 2041 and 2042 of Title 28, Judiciary and Judicial Procedure, the Act of June 26, 1934, §23, as amended (31 U.S.C. 725v) was reenacted as sections 572a and 2043 of Title 28 by Pub. L. 97-258, §2(g)(3), (4).

Rule 68. Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

See 2 Minn. Stat. (Mason, 1927) §9323; 4 Mont. Rev. Codes Ann. (1935) §9770; N.Y.C.P.A. (1937) §177.

For the recovery of costs against the United States, see Rule 54(d).

NOTES OF ADVISORY COMMITTEE ON RULES—1946 AMENDMENT

The third sentence of Rule 68 has been altered to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible.

The two sentences substituted for the deleted last sentence of the rule assure a party the right to make a second offer where the situation permits—as, for example, where a prior offer was not accepted but the plaintiff's judgment is nullified and a new trial ordered, whereupon the defendant desires to make a second offer. It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained. These provisions should serve to encourage settlements and avoid protracted litigation.

The phrase “before the trial begins”, in the first sentence of the rule, has been construed in *Cover v. Chicago Eye Shield Co.* (C.C.A.7th, 1943) 136 F.(2d) 374, cert. den. (1943) 320 U.S. 749.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

This logical extension of the concept of offer of judgment is suggested by the common admiralty practice of determining liability before the amount of liability is determined.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 69. Execution

(a) IN GENERAL. Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a collector or other officer of revenue under the circumstances stated in Title 28, U.S.C., §2006, or against an officer of Congress in an action mentioned in the Act of March 3, 1875, ch. 130, §8 (18 Stat. 401), U.S.C., Title 2, §118, and when the court has given the certificate of probable cause for the officer's act as provided in those statutes, execution shall not issue against the officer or the officer's property but the final judgment shall be satisfied as provided in such statutes.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). This follows in substance U.S.C., Title 28, [former] §§727 (Executions as provided by State laws) and 729 [now Title 42, §1988] (Proceedings in vindication of civil rights), except that, as in the

similar case of attachments (see note to Rule 64), the rule specifies the applicable State law to be that of the time when the remedy is sought, and thus renders unnecessary, as well as supersedeas, local district court rules.

Statutes of the United States on execution, when applicable, govern under this rule. Among these are:

U.S.C., Title 12:

§91 (Transfers by bank and other acts in contemplation of insolvency)

§632 (Jurisdiction of United States district courts in cases arising out of foreign banking jurisdiction where Federal reserve bank a party)

U.S.C., Title 19:

§199 (Judgments for customs duties, how payable)

U.S.C., Title 26:

§1610(a) [former] (Surrender of property subject to distraint)

U.S.C., Title 28:

§122 [now 1656] (Creation of new district or transfer of territory; lien)

§350 [now 2101] (Time for making application for appeal or certiorari; stay pending application for certiorari)

§489 [now 547] (District Attorneys; reports to Department of Justice)

§574 [now 1921] (Marshals, fees enumerated)

§786 [former] (Judgments for duties; collected in coin)

§811 [now 1961] (Interest on judgments)

§838 [former] (Executions; run in all districts of State)

§839 [now 2413] (Executions; run in every State and Territory)

§840 [former] (Executions; stay on conditions), as modified by Rule 62(b).

§841 [former] (Executions; stay of one term), as modified by Rule 62(f)

§842 [now 2006] (Executions; against officers of revenue in cases of probable cause), as incorporated in *Subdivision (b)* of this rule

§843 [now 2007] (Imprisonment for debt)

§844 [now 2007] (Imprisonment for debt; discharge according to State laws)

§845 [now 2007] (Imprisonment for debt; jail limits)

§846 [now 2005] (*Fieri Facias*; appraisal of goods; appraisers)

§847 [now 2001] (Sales; real property under order or decree)

§848 [now 2004] (Sales; personal property under order or decree)

§849 [now 2002] (Sales; necessity of notice)

§850 [now 2003] (Sales; death of marshal after levy or after sale)

§869 [former] (Bond in former error and on appeal) as incorporated in Rule 73(c)

§874 [former] (Supersedeas), as modified by Rules 62(d) and 73(d)

U.S.C., Title 31:

§195 [now 3715] (Purchase on execution)

U.S.C., Title 33:

§918 (Collection of defaulted payments)

U.S.C., Title 49:

§74(g) [former] (Causes of action arising out of Federal control of railroads; execution and other process)

Special statutes of the United States on exemption from execution are also continued. Among these are:

U.S.C., Title 2:

§118 (Actions against officers of Congress for official acts)

U.S.C., Title 5:

§729 [see 8346, 8470] (Federal employees retirement annuities not subject to assignment, execution, levy, or other legal process)

U.S.C., Title 10:

§610 [now 3690, 8690] (Exemption of enlisted men from arrest on civil process)

U.S.C., Title 22:

§21(h) [see 4060] (Foreign service retirement and disability system; establishment; rules and regulations; annuities; nonassignable; exemption from legal process)

U.S.C., Title 33:

§916 (Assignment and exemption from claims of creditors) Longshoremen's and Harborworkers' Compensation Act)

U.S.C., Title 38:

§54 [see 5301] (Attachment, levy or seizure of moneys due pensioners prohibited)

§393 [former] (Army and Navy Medal of Honor Roll; pensions additional to other pensions; liability to attachment, etc.) Compare Title 34, §365(c) (Medal of Honor Roll; special pension to persons enrolled)

§618 [see 5301] (Benefits exempt from seizure under process and taxation; no deductions for indebtedness to United States)

U.S.C., Title 43:

§175 (Exemption from execution of homestead land)

U.S.C., Title 48:

§1371o (Panama Canal and railroad retirement annuities, exemption from execution and so forth)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 SUPPLEMENTARY NOTE

With respect to the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] §501 *et seq.*) see Notes to Rules 62 and 64 herein.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

The amendment substitutes the present statutory reference.

NOTES OF ADVISORY COMMITTEE ON RULES—1970 AMENDMENT

The amendment assures that, in aid of execution on a judgment, all discovery procedures provided in the rules are available and not just discovery via the taking of a deposition. Under the present language, one court has held that Rule 34 discovery is unavailable to the judgment creditor. *M. Lowenstein & Sons, Inc. v. American Underwear Mfg. Co.*, 11 F.R.D. 172 (E.D.Pa. 1951). Notwithstanding the language, and relying heavily on legislative history referring to Rule 33, the Fifth Circuit has held that a judgment creditor may invoke Rule 33 interrogatories. *United States v. McWhirter*, 376 F.2d 102 (5th Cir. 1967). But the court's reasoning does not extend to discovery except as provided in Rules 26–33. One commentator suggests that the existing language might properly be stretched to all discovery, 7 *Moore's Federal Practice* ¶69.05[1] (2d ed. 1966), but another believes that a rules amendment is needed. 3 *Barron & Holtzoff, Federal Practice and Procedure* 1484 (Wright ed. 1958). Both commentators and the court in *McWhirter* are clear that, as a matter of policy, Rule 69 should authorize the use of all discovery devices provided in the rules.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

Rule 70. Judgment for Specific Acts; Vesting Title

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other doc-