

unaccepted offer, the offeree must pay the costs incurred after the offer was made.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

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.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 68 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

COMMITTEE NOTES ON RULES—2009 AMENDMENT

Former Rule 68 allowed service of an offer of judgment more than 10 days before the trial begins, or—if liability has been determined—at least 10 days before a hearing to determine the extent of liability. It may be difficult to know in advance when trial will begin or when a hearing will be held. The time is now measured from the date set for trial or hearing; resetting the date establishes a new time for serving the offer.

The former 10-day periods are extended to 14 days to reflect the change in the Rule 6(a) method for computing periods less than 11 days.

Rule 69. Execution

(a) IN GENERAL.

(1) *Money Judgment; Applicable Procedure.* A money judgment is enforced by a writ of exe-

cution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, but a federal statute governs to the extent it applies.

(2) *Obtaining Discovery.* In aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.

(b) AGAINST CERTAIN PUBLIC OFFICERS. When a judgment has been entered against a revenue officer in the circumstances stated in 28 U.S.C. §2006, or against an officer of Congress in the circumstances stated in 2 U.S.C. §118, the judgment must be satisfied as those statutes provide.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

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 superseades, 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.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 69 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Amended Rule 69(b) incorporates directly the provisions of 2 U.S.C. § 118 and 28 U.S.C. § 2006, deleting the incomplete statement in former Rule 69(b) of the circumstances in which execution does not issue against an officer.

Rule 70. Enforcing a Judgment for a Specific Act

(a) PARTY'S FAILURE TO ACT; ORDERING ANOTHER TO ACT. If a judgment requires a party to convey land, to deliver a deed or other document, or to perform any other specific act and the party fails to comply within the time specified, the court may order the act to be done—at the disobedient party's expense—by another person appointed by the court. When done, the act has the same effect as if done by the party.

(b) VESTING TITLE. If the real or personal property is within the district, the court—instead of ordering a conveyance—may enter a judgment divesting any party's title and vesting it in others. That judgment has the effect of a legally executed conveyance.

(c) OBTAINING A WRIT OF ATTACHMENT OR SEQUESTRATION. On application by a party entitled to performance of an act, the clerk must issue a writ of attachment or sequestration against the disobedient party's property to compel obedience.

(d) OBTAINING A WRIT OF EXECUTION OR ASSISTANCE. On application by a party who obtains a judgment or order for possession, the clerk must issue a writ of execution or assistance.

(e) HOLDING IN CONTEMPT. The court may also hold the disobedient party in contempt.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Compare [former] Equity Rules 7 (Process, Mesne and Final), 8 (Enforcement of Final Decrees), and 9 (Writ of Assistance). To avoid possible confusion, both old and new denominations for attachment (sequestration) and execution (assistance) are used in this rule. Compare