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COMMENTS ON SELECTED PROVISIONS OF THE
NEW MINNESOTA RULES

GUNNAR H. NORDBYE*

At the outset, it may be noted that, when the Federal Rules of Civil Procedure were adopted, the prevailing practice in Minnesota played an important part in the formulation of many of the rules. This was due no doubt to the important contribution of William D. Mitchell, a distinguished son of Minnesota, who served as Chairman of the Committee which drafted the rules, and the late Professor Cherry of the Minnesota Law School, who also was a member of that Committee. Moreover, the local Federal Judges, with a Committee of the Minnesota Bar, spent a great deal of time in formulating a proposed set of rules for the consideration of the national Committee. The Minnesota lawyers, therefore, will not find themselves in an entirely strange field in proceeding under the new Minnesota rules which are patterned upon the Federal Rules of Civil Procedure.

For the purpose of clarification, reference may be made in my discussion from time to time regarding the similarity or differences as between the new Minnesota rules and the Federal rules, and also as to the differences between the new Minnesota rules and the superseded Minnesota statutory provisions.

Rule 39.02. Advisory Jury and Trial by Consent

The significant change or modification in this rule over the Minnesota statute, § 546.03, is to be found in the provision of the rule which changes the former Minnesota practice, in that under this rule the court cannot, without the consent of the parties, call a jury in a non-jury case to decide the fact issues. That is, a party can insist in a non-jury case that the issue be determined ultimately by the court even though the court determines that an advisory jury may be called. Under § 546.03, which now is superseded partially, the court of its own motion in a jury-waived case, could order a jury as in ordinary jury trial controversies.

Rule 41. Dismissal of Actions

This rule departs somewhat from the present Federal Rule 41. Under the Federal rule, a dismissal without order of court may be made at any time by plaintiff before answer has been served, or a

*United States District Judge for the District of Minnesota.
motion for summary judgment, whichever comes first. But, under the Minnesota rule, a dismissal may be made without order of court by the filing of a notice of dismissal not less than ten days before the opening of the term, or in counties such as Hennepin and Ramsey, where there are continuous terms of court, not less than ten days before the date on which the case first is set for trial, provided a provisional remedy has not been made or a counterclaim or other affirmative relief demanded in the answer. Provisional remedies, as you know, are injunctions, appointments of receivers, attachments, etc. Under the present Minnesota law, a plaintiff may dismiss an action at any time without leave of court before the trial actually commences. But, under the new rule the dismissal must be made before the ten-day period as outlined in the rule. The Minnesota rule is a sort of compromise between the Federal rule and the prior Minnesota statutory provision. In any event, plaintiff cannot wait until the day of trial and after defendant has been put to the expense of preparing for trial and then dismiss his case without order of court. A dismissal by the plaintiff in accordance with Rule 41.01(1) prior to the ten-day period, as set forth in the rule, is a dismissal without prejudice. But such a dismissal is tantamount to one with prejudice if an action based upon the same claim has once been dismissed in any court in the United States or of any State. You will note that, except as provided in Rule 41.01(1), a dismissal cannot be entered except by order of court under Rule 41.01(2). Under this latter section, the dismissal with the consent of court is usually without prejudice, but may be made on terms that will tend to prevent the laxity with which suits are often prosecuted and the harassment which often results to litigants by suits that are commenced without any intention of actually proceeding to trial. Counterclaims set up in the answer are to remain intact as an independent proceeding regardless of any dismissal in absence of a stipulation providing otherwise. Where a dismissal is made only upon obtaining consent of the Court, conditions may be provided and costs allowed, and those costs should not be only nominal. They should recognize the extent of the preparation that defendant has been subjected to in preparing his answer and getting ready for trial, and if the courts follow the practice of assessing substantial costs, such practice will tend materially to lessen the institution of frivolous and unmeritorious lawsuits.

Comment may be made as to Rule 41.02. This rule adopts Federal Rule 41(b), as amended, and it may be noted that a dismissal
under this section is on the merits unless the Court specifies otherwise; that is, a dismissal for failure to prosecute or to comply with the rules or any order of the court operates as an adjudication upon the merits unless a dismissal is for lack of jurisdiction. Presumably, the right of dismissal for failure to comply with the rule or any order of the court embraces many derelictions on the part of the litigants and their counsel; for instance, if the pleader fails to comply with the rule governing pleading and such requirements as are set forth in Rules 10 and 12 governing forms of pleading, etc. It may also arise on the failure of the plaintiff to produce certain documents or the refusal of the plaintiff to submit to a physical examination or to make answers to interrogatories. Such a dismissal would be on the merits unless the court otherwise provides. But the court would be required to exercise a reasonable and sound discretion. As you will note in Rule 41.02, if plaintiff has rested, a motion for dismissal may be made upon the grounds that, upon the facts and the law, plaintiff has established no grounds for relief. A motion for dismissal on the merits at the end of plaintiff's case may be made in jury as well as in non-jury cases, and there is no need for counsel for defendant to go through the formality of obtaining the consent of the court to rest with the right to reopen if the motion for dismissal is denied. A dismissal at the end of plaintiff's case usually will result in a dismissal on the merits unless the court provides otherwise. Furthermore, at the close of plaintiff's testimony, the trial court in granting such a motion may weigh the testimony and in effect test the credibility of the witnesses, and upon plaintiff's evidence alone, without waiting for defendant's testimony, determine the controversy on the merits if such a disposition seems appropriate. Under such circumstances, the court shall make findings of fact and conclusions of law as provided in Rule 52.01 and the case would be disposed of accordingly.

Rule 42. Consolidation: Separate Trials.

Rule 42.01, which provides for consolidation, and Rule 42.02, which provides for separate trials, are broader and more liberal than the superseded Minnesota statute, § 546.04, which provides for consolidation and separate trials. Under the new Minnesota rule, in order to permit consolidation, the actions need not be between the same parties, a condition which must have existed under the Minnesota statute before there could be a consolidation. Consequently, under the new rule, it is sufficient for consolidation if
the actions pending before the court involve common questions of law and fact. And it is not necessary that the causes of action might have been joined, because under the new rule any actions having common questions of law and fact may proceed before the court under a joint hearing, or with a trial of one or more of the issues in common, or a complete consolidation.

Rule 42.01, which is the consolidation section, may be utilized where there are a large number of plaintiffs suing a railroad, for instance, for personal injuries growing out of the same railroad accident. Under such circumstances, the court may order a joint trial in that the negligence issue would be the same, and arrange for separate verdicts being returned for each plaintiff as to the damages. Then there may be suits which involve claims by several passengers in an automobile collision against the same defendant. No good reason will appear generally why these actions should not be consolidated. Or there may be stockholder actions brought by different plaintiffs. Then, again, take, for instance, condemnation suits. Where a group of landowners have the same type of land under condemnation it would be expeditious to require a consolidation of a reasonable number of these claims so that one jury might pass upon all claims and render separate awards to each landowner.

Separate trials under § 546.04 of the Minnesota statutes may be ordered between plaintiff and any of the several defendants in the same action only when in the opinion of the court justice may be promoted thereby. The new rule 42.02 requiring separate trials seems particularly necessary in view of the liberality which the rules provide for joinder of claims, parties and actions. Attention may be directed to Rule 21, Minnesota Rules of Civil Procedure, which provides that misjoinder of parties is not a ground for dismissal of an action and that any claim against a party may be severed and proceeded with separately. Then we have third-party proceedings which may at times suggest the necessity of a separate trial. Again, there may be legal and equitable issues joined, with legal issues triable to a jury and equitable issues to the court. Avoidance of prejudice may suggest separation of trial. Furthermore, there may be occasions when separate trials should be ordered upon counter-claims or cross-bills. If the defense of res adjudicata or the statute of limitations is interposed, and the lawsuit involves a long, protracted trial, there is no good reason, of course, why separate trials could not be afforded on these defenses which may avoid the necessity of proceeding with a long trial.
Rule 43. Evidence

This rule pertains to the broad subject of "Evidence," which includes admissibility of evidence, competency of witnesses; scope of examination and cross-examination; record of excluded evidence; affirmation in lieu of oath; evidence, both oral and written, on the hearing of motions; and res ipsa loquitur.

The question of the admissibility of proffered evidence in a hotly contested lawsuit often presents a perplexing problem to the trial judge. New and novel questions of evidence frequently arise during the trial without any opportunity for the court to give the matter considered study before ruling. Trial judges must recognize that they are not so gifted or so infallible as the baseball umpire about whom the story is told that when he was asked about his experiences as a major league umpire and the decisions made during an important ball game, the observation was made that no doubt the umpire called them as he saw them. But the response of the umpire was, "No, sir. I calls them as they are."

At the outset, it may be noted that the subject of "Evidence" is touched upon, as one commentator expressed it, "quite gently." Certainly, there is nothing new or startling in Rule 43.01 which pertains to the form and admissibility of evidence. It may be stated, however, that the intent and purpose of the rule is to favor the reception of evidence if the statute or rules favor it. Liberality in admitting evidence is assumed to be the very evident purpose of this rule. Undoubtedly, the framers of the Minnesota rules were confronted with the same problem which disturbed the framers of the Federal rules. Everyone recognized that a comprehensive and detailed set of rules of evidence would be helpful, but the task would be a formidable one and undoubtedly it would be difficult to obtain a satisfactory working rule on such a comprehensive subject. It would be more of a treatise than a rule.

Then we come to Rule 43.02, and this rule, of course, pertains to the familiar practice of calling an adverse party for cross-examination under the statute. However, the rule supersedes § 595.03 of our statutes and there are some significant changes to be noted. As under the 1949 amendment to the Minnesota statute, not only a managing agent, but an employee of an adverse party may now be called for cross-examination. This broadens and materially liberalizes the scope of calling for cross-examination a representative of an adverse party. The test as to whether the witness is a managing agent, superintendent, or officer of a corporate defendant
no longer applies under the new rule. Perhaps more of an innovation is the procedure which permits the adverse party to likewise cross-examine the witness called under the rule. And not only may such witness be cross-examined by the adverse party, but where the witness is an officer, director, managing agent, or employee, he may be contradicted and impeached by or on behalf of the adverse party also. Note, however, that the contradiction and impeachment of such a witness is limited to situations where the witness is an officer, director, managing agent, or employee. Evidently, therefore, where an adverse party as such, that is, an individual adverse party, or members of a partnership are called for cross-examination, they may be cross-examined by the adverse party but the impeachment and contradiction of such a witness is not permitted.

It is singular that most trial lawyers do not seem to appreciate the changes in this rule; that is, the changes that exist in comparison to the Minnesota statutory rule in permitting the cross-examination of an adverse party. Even under our Federal practice the lawyers do not seem to sense the liberality which is permitted in cross-examination by both parties as well as the contradiction and impeachment of the witness as the rule permits. So often when a witness is called for cross-examination under the Federal rule, and when such witness is turned over to the adverse party for cross-examination, it is assumed that the adverse party is limited to so-called direct examination upon the subject matter of his examination in chief. Obviously, however, the rule permits either party to cross-examine any witness called for cross-examination under the rule.

Professor Moore makes the following comment regarding Federal rule 43 (b):

"The clause 'and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief' is to protect the corporation or partnership in the case where one of its officers, directors, etc., has been called by the adverse party, and has, so to speak, gone over to the enemy. The corporation or partnership has the same latitude to contradict or impeach such an officer, etc., as the adverse party enjoyed, but 'only upon the subject matter of his examination in chief.'"

It would seem, however, that where there is no showing that the officer, director, or employee called for an adverse examination "has gone over to the enemy," reasonable limits or restriction might

1. See 5 Moore, Federal Practice 1348 (2d ed. 1951).
properly be placed by the court on leading questions or questions which suggest answers which may be used by counsel in examining the officers and representatives of his own client who were called for cross-examination under this rule. But, in any event, in considering Rule 43.02, counsel must bear in mind that when a witness is called for cross-examination under this rule, he in effect becomes a free lance witness subject to cross-examination by either side and subject to contradiction and impeachment by either side in the event he is an officer, managing agent, director, or employee, and not an individual adverse party. The situation under this rule reminds one of the query that was propounded to one of the commentators when the Federal rules were being considered as to the cross-examination of a hostile witness, and the questioner wanted to know under these circumstances whose witness the witness became. The response was that it was something like the situation which existed during Biblical times when the Pharisees had the custom that a widow was required to marry the brother of her deceased husband in the event any unwed brothers remained, and in this particular instance there were seven brothers and the widow had the good fortune, or the bad fortune, of having the respective brothers that she married pass on until she had married all seven. And the Master was interrogated as to whose wife she would be at the Resurrection.

This brings me to Rule 43.03, Record of Excluded Evidence. There is nothing new in this provision regarding the customary offer of proof; that is, when the court sustains the objection to a question in a case tried with a jury. But in non-jury cases, the court on sustaining an objection to a question, on request, must take and report the proffered evidence in full unless it clearly appears that the evidence is not admissible on any ground or the witness is privileged. When an offer of proof is made, it is often couched in broad, general language which renders the offer difficult to appraise as constituting admissible or non-admissible evidence. When, however, the witness is permitted to answer the question, and the evidence is reported in full, the details of the offer are in the form of testimony and enables the trial court to determine its admissibility more clearly. Then, on appeal, in the event any question is raised as to the admissibility of this testimony, the appellate court has the testimony before it and can determine whether any prejudicial error has been committed by its admission or its exclusion. If it was excluded, and if the appellate court determines that it should have been received, then the appellate court may consider the evi-
dence in determining whether or not the ruling of the trial court was justified and whether a reversal should be made because of such error. Obviously, if an offer of proof pertains to testimony which would involve a futile ceremony or is clearly inadmissible, the court should not encumber the record, but should limit counsel to his offer of proof. Where, however, testimony has been taken and an objection to the testimony sustained, and if on appeal it appears that the trial court erred, the appellate court then may send the matter for further consideration by the trial court on the proffered evidence and such practice may obviate an entire new trial.

Rule 43.05 refers to Evidence and Motions. Motions which are not based upon the record are usually presented upon affidavits, but this section provides flexibility in this regard so that the court may determine that the matter be heard wholly or partly on oral testimony or depositions. There are frequent occasions when the court should hesitate to determine questions of fact on mere affidavits; for instance, on the hearing of a motion for summary judgment or the question as to whether a defendant is doing business in the State so as to be amenable for service, or motions to quash service of summons, motions for restraining orders or preliminary injunctions, or motions for new trial. All of these motions may be submitted upon affidavits or may be heard wholly or partially on oral testimony or depositions. This rule should be of service to the court and to counsel in obviating the often unsatisfactory method of determining motions on affidavits.\(^2\)

Rule 43.06 comments on the doctrine of Res Ipsa Loquitur. The inclusion of this rule is a noticeable departure from the Federal rule under the general title of “Evidence” in that the Minnesota rule includes an exposition of the doctrine of res ipsa loquitur. In simple, concise language the rule states that res ipsa is nothing more than a form of circumstantial evidence which creates a permissive inference of negligence. The rule also sets at rest any question regarding the use of the doctrine even though plaintiff has pleaded or proven specific acts of negligence.\(^3\) According to the notes of the Advisory Committee, which presented the tentative draft of the Minnesota Rules, res ipsa arises in Minnesota where (1) the accident is of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it is caused by an instru-

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\(^2\) See Eccles v. Peoples' Bank, 333 U. S. 426 (1948) which cautions against the use of affidavits in the determination of motions “because of its proven insufficiencies.”

mentality within the exclusive control of the defendant; and (3) the possibility of contributing conduct which would make plaintiff responsible is eliminated. You will note that the requirement that evidence as to the explanation of the accident is more readily accessible to the defendant than to the plaintiff is not included in the above. Apparently the better reasoned decisions do not make that requirement essential as long as the circumstances of the accident give rise to a reasonable inference of negligence. Some courts hold that the plea of specific acts of negligence prohibits the application of res ipsa. But in Minnesota it now seems clear that if negligence is alleged in general terms as to the care and maintenance of the particular instrumentality which caused the accident, the doctrine is available even though specific acts of negligence may be set forth. Of course, this rule, 43.06, does not change the present law in the State of Minnesota. Rather, it serves to clarify and simplify the rule and emphasizes that the rule, after all, is nothing more than a permissible inference of negligence which may arise under certain circumstances. However, as you well know, the inference does not shift the burden of proof. It may be rebutted and overcome by the defendant, but the burden of proof to establish negligence always rests upon the plaintiff. In the last analysis, it is generally for the jury to say whether the inference of negligence sustains the burden of proof which rests upon the plaintiff. Obviously, the inference is not conclusive of the defendant’s liability.

Rule 44. Proof of Official Record

Section 600.13 of the Minnesota statutes is not superseded but merely supplemented by this rule. The rule may be referred to as largely mechanical in that it is designed to provide a “simple and uniform method of proving public records or the entry or lack of entry therein.” Rule 44 does not purport to deal with the admissibility of such documents or records, but rather the manner in which they may be proved if they are admissible.

Rule 45.04. Subpoena for Taking Depositions; Place of Examination

Under this rule it will be noted that a resident of this State is required to attend an examination only in the county wherein he resides or is employed or transacts his business in person or at

such other convenient place as is fixed by order of court. However, a non-resident of the State may be required to obey a subpoena and attend a hearing in any county of the State. This section apparently supersedes § 597.11 of the statutes which is to the effect that any witness may be subpoenaed and give his depositions at any place within 20 miles of his abode.

**Rule 46. Exceptions Unnecessary**

This rule does not change the current Minnesota rule as set forth in § 547.03 of the Minnesota statutes. All that counsel needs to do during the trial is to make his objection to any ruling or order of the court, or to make known to the court the action that he desires the court to take and in all instances to state his grounds therefor. Upon so proceeding, he need not take an exception to every ruling. Sometimes I appreciate that, in order to emphasize his utter disagreement and sometimes his contempt of the court’s lack of understanding of the elementary rules of evidence, counsel cannot restrain himself from audibly taking an exception. However, having thus vented his feelings on one or more occasions, he should recognize that in a jury case especially where his persistence may be misunderstood, he should not persist in doing a futile thing.

**Rule 47. Jurors**

*Rule 47.01* supersedes Rule 27(a) of the District Court Rules. That rule, as you remember, required the court to first examine jurors and thereafter he was authorized to permit counsel to proceed with additional inquiry. In all probability, the present rule will not substantially change the practice in the examination of jurors. If the court does conduct the preliminary examination, the new rule provides that the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as the court deems proper. There is, of course, the prerogative of the court to limit the supplemental examination, but if counsel proceeds in an expeditious and sensible manner in asking pertinent and appropriate questions not already covered by the court’s examination, it may be assumed that he will not be unduly restricted in this regard. It may not be amiss to remind counsel, however, that no litigant is entitled to a jury of his liking. He is only entitled to an impartial jury. Many times in the examination of jurors, it is apparent that counsel, by the very nature of the questions asked, are not bent upon obtaining an impartial jury, but rather twelve
men and women whom they believe will be more favorable to their side of the litigation than to their adversaries. If the court's questions fairly cover the necessary examination of the jurors, counsel are apt to weaken their position before the jury by propounding duplicitous or frivolous questions.

Rule 47.02, Alternate Jurors. There is an important change in this rule. It is to be found in the provision which permits the court to replace the regular juror or jurors with alternate jurors not only when a juror dies or becomes disabled through illness, but also to replace those jurors who may become disqualified or unable to perform their duties for any reason. Therefore, if it should appear during the trial that a juror is disqualified by reason of prejudice, or if the juror is tampered with, or if it is discovered during the trial that there are facts and circumstances which if known when the juror was selected would have disqualified him, the court in its discretion could appoint an alternate juror to replace him. Consequently, the danger of mistrial would thus be obviated and unnecessary loss of time and expense prevented. For some reason not entirely apparent, the superseded Minnesota statute, § 546.095, provided in the selection of alternate jurors that the plaintiff should be entitled to one peremptory challenge and the defendant to two. The present rule, however, allows only one challenge to either party.

Rule 49. Special Verdicts and Interrogatories

This rule may justify an extended comment. The term "special verdict" is sometimes loosely used and is confused with written interrogatories which accompany a general verdict. Special interrogatories are often helpful in that they require the jury to answer certain key questions of fact which should not be overlooked in arriving at a general verdict. But under such practice, the court will charge the jury as to the law and generally proceed in giving his instructions as he would without such interrogatories. On the other hand, the special verdict submitted to the jury either as a verdict in the form of special written findings upon each issue of fact or written questions as to issues of fact susceptible of categorical or other brief answers, differs markedly from the procedure followed when special interrogatories are used. Under the special verdict practice, the court would not discuss the law except as it would be necessary to explain or amplify the questions submitted. Nor would the court inform the jury as to the effect of their answer on the ultimate disposition which would be made of the case. Under this
practice, the jury would make findings of ultimate facts, not evidentiary facts or immaterial issues, and then the court would apply the law to such facts and enter judgment accordingly. In theory, at least, under the special verdict practice, the jury is called upon to perform the duties of arbiters of fact, free from prejudice, bias, or sympathy, which often results when they are taking ballots on whether the verdict should be in favor of the plaintiff or the defendant. And illustrative of the purpose to emphasize the facts in submitting a special verdict rather than the parties, the court is not required to instruct the jury as to which party has the burden of proof. The jury is simply asked to determine whether by the greater weight of the evidence certain facts are true; that is, it is recognized that the better practice is to point out where the burden lies, not upon whom. It is quite apparent, therefore, that the whole thought behind the special verdict practice is to free the jury from any procedure which would inject the feeling of partisanship in their minds and limit their deliberations to the specific fact questions submitted. Furthermore, the jury will be relieved of the often difficult task of endeavoring to apply involved principles of law to the issues of fact, which must be done in the event a general verdict is called for. Assume, for instance, that the matter under consideration involved a suit on a fire insurance policy in which the defense of the company was as follows: First, that the plaintiff permitted gasoline to be stored on the premises contrary to the provisions of the policy, and second, that plaintiff swore falsely in the proof of loss. Assume further that the fire and the amount of the loss were admitted, so that the only fact issues were the ones above stated. The court under the special verdict practice would probably submit the first question in a form substantially as follows:

Does it appear from the greater weight of the evidence that plaintiff permitted gasoline to be stored on the premises? Answer "Yes" or "No".

The second question would be submitted in substantially the same form so as to read:

Does it appear from the greater weight of the evidence that plaintiff swore falsely in the proof of loss? Answer "Yes" or "No".

If either question were answered in the affirmative, plaintiff's cause of action would be defeated. The jury, however, would not render a general verdict. The court would enter judgment accordingly on the answers submitted. Many law writers, as well as jurists in Wisconsin and Texas, where the special verdict practice has been
followed for years, believe that their practice is far superior to the general verdict system which, according to them, is singularly adapted to the burying of some of the gravest errors which occur in the entire gamut of litigation. But the history of this practice in the States which have followed it will not justify the conclusion that it is a panacea for the many shortcomings of our jury trials. The reversals and mistrials in cases following the special verdict procedure appear to be fully as many as in trials where a general verdict is returned. The defender, however, of the special verdict practice could probably reply that the errors occurring where the special verdict is used are brought out in the open, but that no one can determine the many errors which have crept into the shelter afforded by the general verdict system. The special verdict practice is authorized by the Minnesota statute, §§ 546.19 and 546.20, the latter being superseded by Rule 49.01 and 49.02. Section 546.19 provides, in part:

"A special verdict is one by which they [the jury] find the facts only, and it shall so present the conclusions of fact as established by the evidence that nothing remains to the court but to draw from them conclusions of law."

And § 546.20 provides, in part:

"In every action for the recovery of money only or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict in writing upon all or any of the issues."

But the special verdict practice has not been used in this State to any extent. There have been so many pitfalls and uncertainties encountered under the present Minnesota statute that its use has not been justified. However, under Rule 49.01 the court is vested with the sole discretion in requiring a jury to follow special verdict procedure. The Minnesota statute apparently followed the common law rule of placing the control in the hands of the jury as to whether a special or general verdict should be returned in every action for the recovery of money only or specific real property. However, attention may be called to Morrow v. St. Paul City Railway Co., where the Supreme Court held that it was discretionary with the court to permit or refuse a special verdict. In Wisconsin, for instance, under statute a special verdict must be rendered if requested by either party or directed by the court.

Under the present special verdict rule, which was adapted after

5. 74 Minn. 480, 77 N. W. 303 (1898).
the Federal rule, some of the pitfalls experienced in the States which have adopted this practice, seem to be obviated; for instance, if any issue of fact raised by the pleadings or evidence is not submitted, each party waives his right of trial by jury as to such issue, unless before the jury retires, he demands submission of such issue or issues, and as to any such issues omitted without such demand, the court may make a finding, and if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

The use of special verdicts has not been frequent in the Federal Court of this District since the rule was adopted. And it probably will not be until the Bar of the State in state court practice becomes familiar with its use and utilizes the rule. Federal courts are hesitant to depart materially from state practice. After all, we are in most cases merely administering Minnesota law and applying it to the issues before us. And then again, in many cases, it seems that little is to be gained from the use of the special verdict procedure. In the ordinary personal injury case, for instance, under the special verdict practice, the jury would be required to make a finding as to plaintiff's charges of negligence, as to proximate cause, as to the question of contributory negligence, and also make a finding as to damages in the event plaintiff is to recover. It does not seem that much would be gained by adopting the special verdict procedure in such litigation. The same danger of partisanship and sympathy would arise under the special verdict procedure as under the so-called general verdict procedure.

I have followed in a few matters the special verdict practice. Some time ago, a switchman employed by the Great Northern brought an action against his employer seeking damages under the Federal Employers Liability Act upon the grounds that the employer had failed to exercise reasonable care to afford him a reasonably safe place to work. He was engaged at the time of the accident in performing his switching duties and it was at night time when he was walking under the Seventh Street Bridge in Minneapolis, which is erected over the Great Northern tracks, when a timber fell from the bridge and struck him on the head. The bridge was being constructed by the State, which had let the contract to a general contractor and the general contractor had sublet the steel work to a sub-contractor. There was evidence that the Great Northern had notice of the timbers and other debris falling off the bridge and thus from time to time endangering the workmen of the rail-
road who were required to perform their switching duties under the bridge. The Great Northern brought in both contractors as third-party defendants in that it was contended that their negligence was the dominant negligence which caused the accident. I should say that the Great Northern had nothing to do with the construction of the bridge. At the trial I submitted a general verdict as between the switchman and the Great Northern, but as to the issue between the Great Northern and the sub-contractor, which after the evidence was in was the only third party remaining, I submitted two questions in the form of a special verdict; first, as to whether or not a timber did fall off the bridge and strike the switchman as he contended, and secondly, whether or not the timber's falling off the bridge was the proximate result of the negligence of the sub-contractor. The jury were not asked to return any general verdict as to any recovery over by the Great Northern as against the sub-contractor and upon the questions submitted to the jury the court will make findings and determine the liability over of the contractor to the Great Northern.

There is much to be said for the use of the special verdict. The indubitable advantage of the special verdict is the formulation and submission of special fact issues which enable the jury to have before them the particular issues which they must determine rather than a jumbling of all of the alleged issues or defenses with an omnibus question for them to determine. The trial of jury cases will never be an exact science, nor will it approach mathematical perfection. The special verdict may bring us to a closer approximation of that ideal.

Rule 49.02 pertains to the use of a General Verdict Accompanied by Answers to Interrogatories. The apparent difference between the use of interrogatories which accompany a general verdict under the Minnesota statute and this rule is to be found in the provision of the rule which purports to meet the difficulties which arise when the answers are inconsistent with one another or with the general verdict. The rule provides that if they are consistent with each other, but one or more is inconsistent with the general verdict, the court may direct judgment in accordance with the answers notwithstanding the general verdict, or he may send the jury back for further deliberations or order a new trial. Generally, I assume under these circumstances the court would call to the attention of the jury the inconsistencies between their answers and the general verdict and send them back for further deliberation. However, where the
answers are not only inconsistent with each other, but one or more is inconsistent with the general verdict, the court is required to send the jury back for further consideration or to discharge the jury and order a new trial. The submission of interrogatories to a jury with a general verdict is often desirable in that it centers attention of the jury on the important issues which they must pass upon before they determine the general verdict that should be returned. Further, it aids them in checking the soundness of the general verdict which they have agreed upon. Too often juries tend to generalize in their deliberations and merely determine whether the plaintiff or defendant should recover without deliberating upon the crucial questions which are conditions precedent to the general verdict.

Rule 50.01. Directed Verdict; When Made; Effect

This rule follows in substance the Federal rule and sets at rest any question as to the right of the court to direct a verdict at the close of plaintiff's case. Apparently there has been some doubt about the propriety of that practice. As late as 1938, in Willard v. Kohen the Supreme Court said:

"It is a common practice in this State for the court to direct a verdict for the defendant, when the plaintiff rests without proving a cause of action. The practice is unauthorized by statute and objectionable. It is the clear intent of our statute that upon the failure of plaintiff to prove a cause of action, a dismissal should be ordered rather than a verdict directed. The latter course should be followed only after defendant rests and there has been an actual contest upon the merits."

It will be noted further that under Rule 50.01 when a party moves for a directed verdict at the close of the testimony of the opponent, if the motion is denied the party making the motion has the right to offer evidence in the same manner as if the motion had not been made. Consequently, there is no necessity for the moving party to obtain leave of the court to proceed with testimony if the motion is denied. Some courts have taken the position that where both parties make a motion for directed verdicts, it is tantamount to a waiver of a jury trial because both parties contend that there are no issues of fact for the jury to determine. Under such circumstances it has been the practice in some courts to discharge the jury and proceed as in a jury-waived matter. This was the practice, at least, in Federal Court for many years. However, the present

7. 202 Minn. 626, 629, 279 N. W. 553, 554 (1938) quoting from 6 Dunnell's Minn. Digest § 9751 (2d ed. 1928).
Minnesota rule leaves no doubt as to the right of jury trial, even though all parties to the action have moved for a directed verdict, if the motions are denied.

Rule 50.02 covers the procedure which must be followed with reference to the granting of a motion for judgment notwithstanding the verdict. It differs materially from the present Federal rule and also from the former Minnesota practice. In other words, it is not necessary to move for a directed verdict at the close of the evidence in order to be entitled to present a motion non obstante after verdict or disagreement. Heretofore, a motion for a directed verdict at the close of the evidence was essential in order to be heard on any motion for judgment notwithstanding. It may be suggested that where a motion for directed verdict is not made at the close of the testimony, a litigant may be lulled into a feeling of security thinking that there is an issue for the jury, and where a motion for a directed verdict is made he might be afforded the opportunity by the court to supply some technical bit of evidence which was lacking in his proof. There may be some merit to this view. However, a trial court can always grant a new trial if an injustice will be done by such an incident. In view of the fact that a motion for directed verdict need not be made at the close of the evidence, the tendency may be for counsel to forego such a motion and allow more cases to go to the jury because they will always have the right to make a motion for judgment notwithstanding in the event the jury's verdict is adverse. And likewise there may be a tendency for trial courts to allow more cases to go to the jury, and persuasive argument may be made for such a practice because if the case goes to the jury and a verdict is returned for the plaintiff, for instance, the court can grant on a motion judgment for defendant, and if an appeal is taken, the appellate court, if it disagrees with the trial court, can reinstate the verdict and thus obviate the expense of a new trial, while if a directed verdict is granted, then, of course, if the court erred, the only alternative would be to grant a new trial. You will observe that when a motion is made in the alternative after the verdict, the rule provides that if the court grants the motion for judgment notwithstanding, the court shall at the same time grant or deny the motion for a new trial, and in such a situation the order on the motion for a new trial shall become effective only if judgment notwithstanding the verdict is reversed, vacated, or set aside. Where

8. It is to be gathered that this rule is patterned after the practice advocated by Montgomery Ward & Co. v. Duncan, 311 U. S. 243 (1943). See also McGinley v. Chicago, Milwaukee & St. P. Ry. Co., 152 Minn. 48, 187 N. W. 829 (1922).
the trial court grants judgment notwithstanding the verdict and
denies a new trial, the appellate court on appeal may reverse
the judgment notwithstanding and reinstate the verdict. If the trial
court denies a motion for judgment notwithstanding the verdict
and denies a new trial, the losing party may appeal and assign as
error both the failure to grant judgment as requested, or the alterna-
tive, a new trial. Thus the appellate court may determine, first,
whether judgment should have been entered notwithstanding the
verdict, and if not, whether a new trial should be granted. How-
ever, it should be observed that under this rule the court is only re-
cquired to rule on the motion for a new trial if it grants the motion
for judgment notwithstanding the verdict.

Instructions to the jury and objections thereto are covered
by Rule 51. This rule as adopted differs from the Federal rule and
also departs from and supersedes § 546.14 of the Minnesota statutes,
which states, in part:

"The court of its own motion may, and upon request of either
party, shall, lay before the parties before the commencement of
the argument any instructions which it will give in its charge,
and all such instructions may be read to the jury by either party
as a part of his argument."

It is to be doubted that this portion of the statute has been utilized
to any extent by counsel except to have the court in an informal
manner acquaint counsel as to the charge to be given as to any par-
ticular issues. This requirement is absent from Rule 51 and all
that is now required is that at the close of the evidence, but before
arguments, or at such earlier time as the court reasonably directs,
written requests as to instructions may be presented to the court
by counsel. Then the court as before should note on the request
the ruling as, given, given as modified, or refused. It should be
noted that the rule provides that unintentional misstatements in the
charge or omissions or verbal errors must be objected to before the
jury retires, with the grounds of the of the objection distinctly
indicated. Otherwise, any such objection is waived and no party
may assign errors thereon. However, errors with respect to funda-
mental law or controlling principles may be assigned as error on a
motion for new trial without objections being made at the close
of the charge. This latter provision with respect to the distinction
between unintentional misstatements, etc., and controlling principles
follows the present Minnesota practice.

Referring to Rule 51 on the general subject of "Instructions to
Jury," it perhaps would not be amiss to remind counsel that no case
of any importance, and I suppose all cases in a sense are important, should go to the jury without counsel having prepared written requests covering the instructions on all controlling principles of law. Not only is this practice generally necessary in order to preserve your record, but it also tends to bring to the attention of the court principles of law which may have escaped it, and it will generally result in more complete and satisfactory instructions on the part of the court. Unprepared counsel in the trial of a lawsuit often results in an unprepared judge. But in formulating your requests for instructions, avoid partisanship on factual issues or argumentative instructions, and also avoid as far as possible requests on routine and formal matters which as a general rule the court will cover without any requests therefor. The presentation to the court of some 20 or 30 requests covering elementary instructions and rulings thereon are time-consuming to both court and counsel.

Rule 52 pertains to Findings by the Court, and Rule 52.01 is entitled "Effect." This rule fairly conforms to the present Minnesota statute except the provision with reference to the requirement that the judges dispose of their decisions within five months or incur the penalty of non-payment of their salaries. Then, you will note that findings are necessary in granting or refusing interlocutory injunctions. This provision of the rule must be strictly followed in order to avoid error notwithstanding that many interlocutory injunctions are granted or denied upon affidavits and it is often difficult to formulate satisfactory findings on a showing of that kind. Observe further that requests for findings are not necessary for the purposes of review. The rule provides further that findings are not required where judgments on the pleadings are granted or in case of summary judgment, but the court must make findings where a dismissal on the merits is granted at the end of plaintiff's testimony as permitted in Rule 41.02.

Rule 52.02 covers motions for amendments to findings. Generally, it may be stated that the primary purpose of Rule 52.02 is to enable the appellate court to obtain a correct understanding of the fact issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. A motion under this section may look to a modification of the findings, or additional findings with a modification of the judgment if necessary. But is it proper for the moving party to seek a complete reversal of the judgment which has been entered? There has been divergence of opinion on that question. Professor Moore is commenting upon
Federal Rule 52(b), which is substantially the same as Minnesota Rule 52.02, had this to say:

"A motion for amendment of findings or for additional findings should be limited to modification of the judgment entered or to amplification or expansion of the facts found; it is not proper for the moving party to seek a reversal of the judgment entered or a finding of contrary facts."

He cited, among other decisions, Matyas v. Feddish, where the District Court of Pennsylvania had before it a motion for amended findings and the purport of the motion was to ask the court to amend its findings of fact and conclusions of law with the effect that it would amount to a reversal of the judgment. Judge Watson of that court made the following comment:

"The purpose of Rule 52 is to clarify matters for the appellate court's better understanding of the basis of the decision of the trial court. Tulsa City Lines v. Mains, 10 Cir., 107 F. 2d 377. The rule permits the Court in its discretion to 'amend' findings of fact or to 'make additional findings,' thus amplifying and expanding the facts. The rule does not provide for a reversal of the judgment or for a denial of the facts as found, which is what the plaintiff requests at present.

"The plaintiff might have proceeded by motion for a new trial or by appeal to the Circuit Court of Appeals from the judgment entered in the trial court. It is clear that Rule 52(b) does not provide for that which is sought by the plaintiff here, and plaintiff's request will be denied."

Moreover, when the Minnesota Supreme Court Advisory Committee prepared the proposed Minnesota rules, it included Professor Moore's comment quoted above with reference to the tentative Rule 52.02, which is the same as the present Minnesota Rule 52.02. However, in a later edition, Professor Moore makes the following comment on Federal Rule 52(b):

"There is also authority that it is not proper for a party to move for amendments or additional findings that in effect seek a reversal of the judgment. [Citing Matyas v. Feddish.] But this, also, is too narrow a view, particularly in light of the close relationship of Rule 52(b) and the power of the court under Rule 59(b) and (d) to grant a new trial and its power under Rule 59(e) to alter or amend a judgment. If the trial court has entered an erroneous judgment it should correct it. This doctrine is subject, of course, to the proposition that action directed to that end be taken 'not later than 10 days after entry of judgment' for the purpose of promoting the finality of judgments, . . . ."

9. See 3 Moore, Federal Practice 178 (Supp. 1950 to 1st ed.).
11. Id. at 386.
It will be observed, therefore, that Professor Moore has departed from the view expressed in his 1950 edition as to the propriety of a motion under this rule for a complete reversal of the judgment entered. The Minnesota rules do not include Federal Rule 59(e), to which Professor Moore referred, and which reads:

“A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.”

This subdivision is new in the Federal Rules, and apparently it was added in order to make it clear that the District Court possessed the power to alter or amend a judgment in a situation which arose in Boas v. Mutual Life Ins. Co. of New York.\(^1\) It appeared in that case that the court dismissed the action without prejudice at the close of plaintiff’s case. Two days thereafter, however, upon motion of the defendant, the dismissal was amended so as to be a judgment of dismissal with prejudice. The Court of Appeals for the Eighth Circuit held that the court had this power. But the question, however, which arose in that case seemed to justify the amendment to the rule in adding 59(e). It is to be doubted that 59(e) is determinative of the scope of the relief which a motion under 52.02 may invoke. This rule specifically provides that there may be a modification of the judgment, and obviously if the moving party can convince the trial court that it should reverse itself, no good reason is suggested why such power does not rest in the trial court under the present Minnesota rule empowering the trial court to modify its findings or make additional findings with a modification of the judgment.\(^1\)

Granted, therefore, that a motion under Rule 52.02 which in effect seeks a reversal of the judgment is permitted, it must be remembered that such relief is not the primary purpose of the rule. If the losing party intends to appeal, he should direct the court’s attention to the additions or modifications of the findings which will disclose the basis for the court’s conclusions more clearly to the appellate court and not attempt merely to supplant in toto the court’s findings with findings favorable to the losing party.

**Rule 54.02. Judgment upon Multiple Claims**

This rule was adopted for the purpose of obviating doubt as to

\(^{13}\) 146 F. 2d 321 (8th Cir. 1944).
\(^{14}\) See also Leishman v. Associated Wholesale Electric Co., 318 U. S. 203 (1943) where the Supreme Court apparently assumed that a motion under Federal Rule 52(b) to amend findings of fact and conclusions of law in a patent case which would result in a reversal of the judgment entered properly invoked the court’s jurisdiction under that rule and tolled the time for appeal until an order was made disposing of the motion.
the finality of any determination of one or more initial phases of litigation and to avoid the possible injustice which might be occasioned by delay in the entry of a final judgment on account of awaiting the determination of the entire controversy. The Minnesota rule conforms to the present Federal rule as amended in 1948. Prior to this amendment of the Federal rule, considerable confusion arose as to whether an order disposing of a separate claim was a final decision in the case, and hence appealable. The test seemed to be that the claim had to be separate and distinct. Thus, in an order disposing of a permissive counterclaim, it was held that it was appealable because the counterclaim did not necessarily arise out of the transaction which formed the basis for the main action, while a compulsory counterclaim did arise out of the same occasion or transaction and hence was not distinct and separate, and hence not appealable. But now, as the Federal and Minnesota rule is framed, an order disposing of part of the controversy is only appealable in case the court makes an express direction for the entry of judgment and an express determination that there is no just reason for delay. Therefore, the court may now direct entry of a final judgment upon one or more but less than all the claims if the rule is complied with as required. The Federal court has recognized many claims as being separate and distinct although they are combined in an action with other claims. For instance, there was a complaint setting out two counts, one for recovery on an insurance policy and the other for the reformation of the policy, and judgment was entered dismissing the first count. This order of dismissal was appealable even though no final judgment had been entered disposing of the entire controversy.\textsuperscript{15}

And in connection with this rule, see Rule 62.06, which covers stay of judgment in multiple claims.

\textit{Rule 58.01. Entry}

Generally, under the present Minnesota practice, a judgment is not entered upon the verdict of the jury until costs are taxed upon application of one of the parties. However, I believe that the clerk under the present Minnesota practice may enter judgment on a verdict without order of court, or without the application of one of the parties. The practice, however, has been, as you know, to await the taxation of costs before judgment is entered on a jury verdict. However, under the present rule, the clerk, unless the court directs

\textsuperscript{15} Hanney v. Franklin Fire Ins. Co. of Philadelphia, 142 F. 2d 864 (9th Cir. 1944).
otherwise, enters judgment forthwith on the verdict of the jury. The clerk, therefore, does not wait for an entry of costs if an appeal is taken, and the appeal goes forward. If, later on, the prevailing party enters costs, the judgment reflects such additions, but the appeal is not stayed or delayed by reason of any failure of the prevailing party to go forward with his taxation of costs.

Rule 58.02. Stay

The Minnesota statute, § 547.023, provides that, upon the filing of a verdict or a decision by the court, an order may be entered staying the proceedings not to exceed 40 days, but that the stay may be extended upon notice where the court reporter is unable for good cause to prepare a transcript. It is further provided that a stay of proceedings may be extended upon application of either party upon notice and good cause shown therefor where a transcript of the testimony was ordered from the court reporter within a reasonable time after the verdict or decision. Rule 58.02 supersedes the present Minnesota statute, and now a stay may be entered, as you will note, for a period not exceeding the time required for hearing and determination of a motion for new trial, or judgment notwithstanding the verdict, or a motion to dismiss the action or for amended findings, and after such determination the court may order a stay of entry of judgment for not more than 30 days.

My final observation on the rules under "Trials" will refer to Rule 63.01. You will note that this rule regarding the disability of a judge is considerably broader in its scope than the prior pertinent statutory provisions. Under this rule any judge assigned to the court may perform the duties of a judge who is disabled and unable to perform the duties assigned to him under the rules after a verdict is returned or findings and conclusions are filed. Section 542.16 of the Minnesota statutes is now superseded by Rules 63.03 and 63.04 and a practical method is provided for the assignment of another judge by the Chief Justice to a district where a judge is disqualified by reason of bias or prejudice or by reason of an affidavit of prejudice being filed.