Procedure—Federal Rules of Civil Procedure—Right to Present Evidence Where Appellate Court Decides Motion to Dismiss Improperly Granted—[Federal].—Suit was brought in a district court to set aside an allegedly fraudulent transfer from a bankrupt to his wife. The plaintiff's motion for summary judgment was denied because the affidavits of the litigants indicated the existence of issues of fact. After the plaintiff had presented his evidence, the court sustained the defendant's motion to dismiss for want of equity, and entered a decree for the defendant. Upon appeal, the plaintiff alleging as error the district court's action in denying his motion for summary judgment, in granting the defendant's motion to dismiss, and in entering a decree for the defendant, the circuit court reversed the lower court's decree, and entered judgment for the plaintiff. *McKey v. Roetter*.[1]

The circuit court's disposition of the case resulted in judgment against the defendant without his having presented evidence other than that contained in the affidavits which he had produced to defeat the plaintiff's motion for summary judgment.

Had the circuit court rendered judgment for the plaintiff on the ground that the district court had erred in refusing the plaintiff's motion for summary judgment, in that no issues of fact were presented, this result would seem to be sound. Trial on the merits would then have been unnecessary, and the defendant would have no ground for contending that he should be allowed to present his evidence. But it is difficult to explain the case on this basis, for the pleadings and affidavits presented in the district court showed that a valid dispute as to a number of material facts existed, and that, therefore, the plaintiff's motion had been rightly denied. Moreover, the circuit court's opinion does not even mention the motion for summary judgment.

Nor is it likely that the circuit court, in giving judgment to the plaintiff without the presentation of the defendant's evidence, felt justified because the defendant's affidavits were in the record. There was no reason to assume that the defendant had set out all his evidence in the affidavits,[2] for he had had to show only enough of his evidence to indicate that there were issues of fact and that he had more than a sham defense.[3] If in fact the affidavits influenced the court, a dangerous precedent may have been set, for the opinion does not mention them, and in similar future cases such affidavits may not be before the court.

The circuit court's action in giving judgment for the plaintiff without the defendant's having been heard, resembles the practice under the old equity procedure, by which a defendant who moved to dismiss the complaint for want of equity at the close of the presentation of the plaintiff's evidence[4] was held to have submitted his

[1] 114 F. (2d) 129 (C.C.A. 7th 1940), cert. den. 61 S. Ct. 72 (1940).

[2] It appears, however, from a conversation with one of the attorneys for the defendant, that all of the defendant's evidence was included in the affidavits.

[3] Maryland Casualty Co. v. Sparks, 76 F. (2d) 929 (C.C.A. 6th 1935); Irving Trust Co. v. American Silk Mills, 72 F. (2d) 288 (C.C.A. 2d 1934); Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110 (1926). See Federal Rule 56(c).

[4] A motion to dismiss was generally considered properly presented only when made before the hearing. United States v. Railway Employés' Dept., AFL, 286 Fed. 228, 230 (D.C. Ill. 1923); Krouse v. Brevard Tannin Co., 249 Fed. 538, 548 (C.C.A. 4th 1918). Equity Rule 29 (1913) contemplated that the motion be made before the filing of the answer. A motion to dismiss was to be heard and decided upon the allegations of the bill as upon demurrer. Conway v.

cause to the chancellor.[5] The new Rules of Civil Procedure for District Courts, however, provide that "after the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal. . . ."[6] It may be argued that, since the rule states only that the defendant does not waive his right to introduce evidence "in the event the motion is not granted," the negative implication is that he does waive his right when the motion is granted and this ruling is later declared error. But it is more probable that the drafters of the rule were exclusively visualizing proceedings in the trial court, where a motion to dismiss is made, and where the defendant has no need to present evidence if his motion is granted. To construe this rule as having such a negative implication would destroy its effectiveness as a means of terminating needlessly lengthy trials. A defendant would not rely on his motion's being upheld on appeal, and so would not make it after the plaintiff had presented his evidence, but would wait until he had presented his own evidence.

That the defendant should be allowed to produce his evidence in the present case may also be argued from the strong resemblance between the motion for an involuntary dismissal, as provided for by Federal Rule 41(b), and the motion for a directed verdict, which is provided for by Federal Rule 50(a).[7] Both motions are alike in being conclusive, since a motion for an involuntary dismissal, like a directed verdict, now calls for a dismissal with prejudice,[8] and in being properly made by the defendant at the close of the plaintiff's case.[9] If a judgment entered upon a directed verdict is reversed on appeal, the defendant having moved for a directed verdict at the close of the plaintiff's case, a new trial is granted,[10] and the problem of whether to allow the de-

---

White, 292 Fed. 837, 840 (C.C.A. 2d 1923); United States v. Railway Employés' Dept., AFL, 286 Fed. 228, 230 (D.C. Ill. 1923); Krouse v. Brevard Tannin Co., 249 Fed. 538, 548 (C.C.A. 4th 1918).

[5] Abel v. Flesher, 296 Ill. 604, 130 N.E. 353 (1921); Thorworth v. Scheets, 269 Ill. 573, 576, 110 N.E. 42, 44 (1915); Koebel v. Doyle, 256 Ill. 610, 614, 100 N.E. 154, 156 (1912); Street v. Chicago Wharfing Co., 157 Ill. 605, 610, 41 N.E. 1108, 1111 (1895); Laursen v. Memering & Co., 260 Ill. App. 515, 524 (1931); cf. Carter v. Studdard, 118 Miss. 345, 352, 79 So. 225, 226 (1918); Sundlun v. Volpe, 2 A. (2d) 875 (R.I. S.Ct. 1938).

[6] Federal Rule 41(b).

[7] Federal Rule 50(a): "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted. . . ."

[8] Federal Rule 41(b): ". . . . a dismissal under this subdivision and any dismissal not provided for in this rule . . . . operates as an adjudication upon the merits."

[9] A motion for a directed verdict can properly be made: (1) at the conclusion of the opening statement, Oscanyan v. Arms Co., 103 U.S. 261 (1880); Houk Mfg. Co. v. Cowen Co., 267 Fed. 787 (C.C.A. 2d 1920); (2) at the conclusion of the plaintiff's evidence, Merchants' Bank v. State Bank, 10 Wall. (U.S.) 604, 637 (1870); or (3) at the conclusion of all the evidence, A. B. Small Co. v. Lamborn & Co., 267 U.S. 248, 254 (1925). See note 7 supra, Federal Rule 50(a).

[10] Maher v. Chicago, M. & St. P. R. Co., 278 Fed. 431 (C.C.A. 7th 1921); Laurens Glass Works v. Childs, 49 Ga. App. 590, 176 S.E. 665 (1934); Lakin v. Duncan, 95 Ind. App. 188, 180 N.E. 676 (1932); Ellis v. Slagle, 147 Ga. 315, 93 S.E. 895 (1917). Federal Rule 59(a)

fendant to present his evidence is thereby settled in the defendant's favor. And, furthermore, since a second appeal can be perfected after the new trial which follows the reversal of a directed verdict, the defendant should not be refused an opportunity to present his evidence in the instant case merely on the ground that "piecemeal appeals" might result. If the circuit court had desired to prevent this result, it could have allowed the defendant to offer his evidence there.

Procedure—Liability of Government Corporation for Costs—Authorization to "Sue and Be Sued"—[Federal].—The Reconstruction Finance Corporation brought suit in a federal district court to protect trade marks which had been assigned to it as security for loans, and later purchased at a bankruptcy sale. The RFC was incorporated by act of Congress[1] and is empowered to "sue and be sued" in any court of competent jurisdiction.[2] The trade marks litigation was decided against the RFC,[3] but costs for the defendant were denied, the district court asserting that costs may be imposed against a governmental agency only to the extent permitted by law, and that no law permits costs to be assessed against the RFC.[4] On appeal, *held*, since costs are a normal incident of suit, Congressional authorization for the RFC to "sue and be sued" indicates an intention to permit costs to be assessed against it. Reversed and remanded. *RFC v. J. G. Menihan Corp.*[5]

This is the first case holding that the forty government-owned corporations which Congress chartered with power to "sue and be sued"[6] are subject to assessment by a court for costs where Congress has not so expressly provided. In two previous cases other circuit courts of appeals have reached the opposite result.[7]

It has uniformly been held that as a part of the Federal Government's immunity from suit without consent in a federal court, the government may be assessed for costs only when it assents.[8] This traditional immunity of the sovereign is based both on the patent impracticability of enforcing judicial decrees against a predominating organization which may refuse to submit, and on the desirability of permitting the government to function unencumbered by adverse private claims.[9] Since any portion of the immunity may be waived, when explicit Congressional authorization to assess

---

provides: "A new trial may be granted to all or any of the parties . . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States. . . . ."

[1] 47 Stat. 5 (1932), 15 U.S.C.A. § 601 (1939).

[2] 47 Stat. 6 (1932), 15 U.S.C.A. § 604 (1939).

[3] RFC v. J. G. Menihan Corp., 28 F. Supp. 920 (N.Y. 1939).

[4] RFC v. J. G. Menihan Corp., 29 F. Supp. 853 (N.Y. 1939).

[5] 111 F. (2d) 940 (C.C.A. 2d 1940), cert. granted 61 S. Ct. 26 (1940).

[6] Keifer & Keifer v. RFC, 306 U.S. 381, 390 (1939).

[7] Nat'l Home v. Wood, 81 F. (2d) 963 (C.C.A. 7th 1936); FDIC v. Barton, 106 F. (2d) 737 (C.C.A. 10th 1939).

[8] Shewan & Sons v. United States, 267 U.S. 86, 87 (1925). No distinction between the government and its agencies in the matter of costs appears to have been made in Rule 54(d) of the Federal Rules of Civil Procedure.

[9] United States v. Shaw, 309 U.S. 495, 501 (1940).