COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
SUPREME COURT BUILDING
WASHINGTON 25, D. C.

ALBERT B MARIS
CHAIRMAN

CHAIRMEN OF ADVISORY COMMITTEES

DEAN ACHESON
CIVIL RULES

PHILLIP FORMAN
BANKRUPTCY RULES

JOHN C PICKETT
CRIMINAL RULES

WALTER L POPE
ADMIRALTY RULES

E BARRETT PRETTYMAN
APPELLATE RULES

January 1, 1964

TO THE CHAIRMAN AND MEMBERS OF THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

At your first meeting, December 22, 1959, you unanimously resolved to "request the Advisory Committee on Admiralty Rules to conduct a preliminary study with respect to the advisability of adopting the proposal that the admiralty procedure be integrated into the civil procedure and to report thereon before proceeding to draft admiralty rules." On August 13, 1962, we reported to you "that it is the sense of this Committee that unification is both feasible and desirable, with the inclusion of certain rules for dealing with special admiralty proceedings." We now recommend the adoption of certain amendments to the Federal Rules of Civil Procedure necessary to effectuate a plan of unification, together with a set of Supplemental Rules for Certain Admiralty and Maritime Cases.

The Rules of Practice in Admiralty and Maritime Cases, dating from 1845, have never been a comprehensive code of procedure. Yet those rules, supplemented by case law and by tradition, formed the core of a practice which in the federal courts was long and justly cherished for its relative liberality, flexibility, and adaptation to the ends of substantial justice. With the promulgation of the Federal Rules of Civil Procedure in 1938, however, the relative position of the admiralty practice in federal civil litigation was materially altered. The distinction between actions at law and suits in equity was abolished, and a modern, comprehensive system of procedure, designed above all "to secure the just, speedy, and inexpensive determination of every action," was established. In the light of the Civil Rules the need for modernization and supplementation of the Admiralty Rules became apparent. Some of the notably successful procedures established by the Civil Rules were formally incorporated into the Admiralty Rules; others were adopted for the admiralty practice by exercise of the rule-making power of the district courts; still others pro-

vided an anology to be employed by judges in admiralty cases to fill gaps in, or to improve upon, the admiralty practice. In 1950, Attorney General McGrath reported to the Judicial Conference:

> In the field of admiralty, I would like to direct your attention to the urgent need for revision of admiralty practice to bring it into accord with modern Federal practice. Specifically, it is the view of my Department, as the chief litigant in admiralty cases, that the time is now ripe for appropriate action by the Supreme Court to make available to the district courts in their admiralty practice the modern procedural advantages of the Federal Rules of Civil Procedure. (Report of the Judicial Conference of the United States, 1950, p.32)

In 1953, the Maritime Law Association of the United States, in its Document 375, proposed a new admiralty rule to the effect that "The Federal Rules of Civil Procedure shall be applicable to cases in Admiralty as near as may be," subject to a number of exceptions. In this proposal the American Bar Association concurred. See 78 Rep. A.B.A. 188 (1953). Thus for ten years there has been general agreement that the Federal Rules should be made applicable to admiralty cases in so far as practicable.

Our recommendation goes beyond this and similar proposals to superimpose the Civil Rules on the existing Admiralty Rules. Not only is there need for a modern and comprehensive set of rules for practice in admiralty cases. There is also need to abolish the formal distinction between civil actions and suits in admiralty, and to provide for one form of civil action, just as the distinction between actions at law and suits in equity was abolished in 1938. This is not a novel proposal. The great conception that resulted in the Federal Rules of Civil Procedure was originally not confined to the merger of law and equity, but included admiralty as well. The late Chief Justice Taft, speaking to the Chicago Bar Association in 1921, said:

> "The second step that should be taken is a simplification of the procedure in all cases in the Federal trial courts. We still retain in those courts the distinction between suits at law, suits in equity, and suits in admiralty. The Constitution refers specifically to them, and in deference to that separation in the Constitution, the distinction is preserved in the Federal practice. It seems to me that there is no reason why this distinction, so far as actual practice is concerned, should not be wholly abolished, and what are now suits in law, in equity and in admiralty, should not be conducted in the form of one civil action, just as is done in the code states. Of course it will

be necessary in such a system to preserve the substantial differences in procedure and right which are insured by the Constitution and are of the utmost value in the administration of justice." (Taft, Three Needed Steps of Progress, 8 A.B.A. J. 34, 35, (1922))

The beneficial effects of the merger of law and equity will hardly be questioned. We believe that comparable effects will follow the merger of suits in admiralty and civil actions, in accordance with the original conception. In 1962, on recommendation of the Board of Governors, the House of Delegates of the American Bar Association adopted the following resolution:

> That the American Bar Association favors unification of the rules of practice of the Supreme Court of the United States in Civil and Admiralty matters, in so far as practicable; and authorizes the Standing Committee on Admiralty and Maritime Law of this Association to co-operate with the Advisory Committee on Admiralty Rules of Practice of the Supreme Court toward that end. (87 Rep. A.B.A. 155 (1962))

Our reasons for recommending unification, or merger, apart from the need to make available in admiralty cases the modern and comprehensive provisions of the Civil Rules, may be briefly summarized. It will be recognized that they are basically similar to the reasons underlying the merger of law and equity:

1. In the words of the late Arnold W. Knauth, a charter member of this Committee, "The near approach of the common law-equity procedure to the relatively simple and untechnical state of the traditional Admiralty practice has produced a new series of traps and pit-falls consisting of the remaining differences, frequently subtle in their nature, to trap the unwary...." (2 Benedict on Admiralty iii-iv (6th ed. (Knauth) 1940)). (Mr. Knauth went on to note that differences between the admiralty and civil practices must persist so long as the Supreme Court lacked, with respect to admiralty rules, the power to supersede inconsistent statutes that it exercised with respect to civil rules. Needless to say, that obstacle to uniformity has been removed by the present enabling legislation. 28 U.S.C. § 2073.)

2. To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the non-specialist lawyer who finds himself--sometimes to his surprise--involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice," said Mr. Justice Jackson, "is a unique system of substantive law and procedure with which members of the Court are singularly deficient in experience." Black Diamond S.S. Corp. v. Stewart & Sons,

336 U.S. 386, 403 (1949) (dissenting opinion). The comment applies generally to all levels of the judiciary. The distinctiveness of substantive maritime law is a matter beyond the competence of this Committee, even if we were disposed to concern ourselves with it; indeed, it is probably too much to hope that we can ever be spared the necessity of more or less recondite bodies of substantive law, whether they relate to maritime affairs, or patents, or copyrights, or combinations in restraint of trade. It is multiplying the burden of the bench and bar, however, to require mastery of unnecessarily distinctive systems of practice and procedure.

3. Procedural differences constitute the main bulwark of a type of thinking that has built a wall of separation into the district court, dividing it into two compartments, or "sides," as if there were two separate courts. Such thinking at worst results in palpably unjust dismissals, and at best in wasteful disputations, amendments, and transfers between dockets. The situation is reminiscent of the practice of dismissing suits brought in equity when they should have been brought at law, and vice versa. See Clark & Moore, A New Federal Procedure: I. The Background 44 Yale L.J. 387 (1935). For example, in 1955 an action at law for wrongful death, based on diversity of citizenship, was dismissed for lack of jurisdiction because the court held it should have been brought as a suit in admiralty. Transfer to the admiralty docket was refused although the action would be time-barred on refiling. Higa v. Transocean Airlines, 230 F. 2d 780 (9th Cir. 1955). As recently as November 2, 1962, a district court dismissed "for lack of jurisdiction" a complaint based on unseaworthiness, because the court construed the complaint as asserting a civil action, and diversity of citizenship was not alleged. Transfer to the admiralty docket was denied. Walker v. Dravo Corp., 210 F.Supp. 386 (W.D. Pa. 1962). See generally Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. Chi. L. Rev. 1 (1959); 5 Moore's Federal Practice 67-70 (2d ed. 1951); Verleger, On the Need for Procedural Reform in Admiralty, 35 Tul. L. Rev. 61 (1960); Comment, Admiralty Procedure and Proposals for Revision, 61 Yale L.J. 204 (1952).

4. Similarly, the maintenance of separate procedures, and the attendant compartmentalization of the court, prevents full utilization of some of the most fundamental principles of modern procedure. Many a claim that, on principle, ought to be joined with another cannot be so joined if one is cognizable only in admiralty. Many a claim that, on principle, ought to be asserted as a counterclaim cannot be so asserted if one of the claims is cognizable only in admiralty. The same is true of cross-claims and third-party claims. It is ironical that the separation of admiralty should lead to such a result, since it was admiralty, along with equity,

that provided the model for liberalization of the strict joinder rules of the common law, and it was specifically Admiralty Rule 56 that provided the model for FRCP 14 on third-party practice. For present purposes one illustration must suffice: In a well-known and complex suit in admiralty, the owners of vessels recovered demurrage from the consignees of coal, but the consignee was denied the right to seek indemnity from the seller because the contract of sale was nonmaritime. Yet there was plainly diversity of citizenship between seller and consignee. Yone Suzuki v. Central Argentine Ry, 27 F.2d 795 (2d Cir. 1928). "In matters of justice . . . the benefactor is he who makes one lawsuit grow where two grew before." Wright, Joinder of Claims and Parties under Modern Pleading Rules, 36 Minn. L. Rev. 580 (1952). See also Millar, Civil Procedure of the Trial Court in Historical Perspective 8, 10 (1952).

Unification does not mean complete uniformity. There are certain distinctively maritime remedies that must be preserved, as distinctively equitable remedies were preserved in the merger of 1938. In addition, history or the exigencies of maritime litigation occasionally require procedures different from those now provided by the Civil Rules. The problems of unification and the methods employed for resolving them may be briefly summarized:

1. A number of the Admiralty Rules are already identical, or substantially identical, with Civil Rules.

2. A large number of the Civil Rules are appropriate without modification for application to what are now suits in admiralty.

3. In several instances modifications of the Civil Rules recommended by this Committee have been found appropriate for application to what are now civil actions.

4. In a few instances special provision has been made in the Civil Rules for what are now proceedings in admiralty, the distinction being drawn in terms of the jurisdictional basis for the claim.

5. The distinctively maritime remedies (attachment and garnishment, process in rem, possessory and petitory actions, and limitation of liability) are treated in a set of Supplemental Rules.

Of necessity, our recommendations are based primarily on the Civil Rules as amended July 1, 1963. However, we have considered also the currently proposed amendments, approved by the Advisory Committee on Civil Rules at its meeting October 31-November 2, 1963, and those proposed amendments have our approval as unified rules.

The amendments to the Federal Rules of Civil Procedure here proposed have been approved by the Advisory Committee on Civil Rules.

We therefore recommend that the Federal Rules of Civil Procedure be amended as follows:

RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

I. SCOPE OF RULES--ONE FORM OF ACTION

RULE 1. SCOPE OF RULES. These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Advisory Committee's Note

This is the fundamental change necessary to effect unification. Just as the 1938 rules abolished the distinction between actions at law and suits in equity, this change would abolish the distinction between civil actions and suits in admiralty. See also Rule 81.

RULE 8. GENERAL RULES OF PLEADING

* * *

(e) PLEADING TO BE CONCISE AND DIRECT; CONSISTENCY.

* * *

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal ~~or on equitable grounds or on both.~~ , equitable, or admiralty and maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.

* * *

Advisory Committee's Note

The change here is consistent with the broad purposes of unification.

RULE 9. PLEADING SPECIAL MATTERS

* * *

(h) ADMIRALTY AND MARITIME CLAIMS. A pleading or a count setting forth a claim for relief within the admiralty and maritime jurisdiction which formerly would have been cognizable whether asserted in a civil action or in admiralty may contain a statement identifying the claim as an admiralty and maritime claim for the purposes of Rules 26(a), 38(e), 73(i), 82, and the Supplemental Rules for Certain Admiralty and Maritime Cases. If the claim would formerly have been cognizable only in admiralty it is an admiralty and maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

Advisory Committee's Note

Certain distinctive features of the admiralty practice must be preserved for what are now suits in admiralty. This raises the question: After unification, when a single form of action is established, how will the counterpart of the present suit in admiralty be identifiable? In part the question is easily answered. Some claims for relief can only be suits in admiralty, either because the admiralty jurisdiction is exclusive or because no non maritime ground of federal jurisdiction exists. Many claims, however, are cognizable by the district courts whether asserted in admiralty or in a civil action, assuming the existence of a nonmaritime ground of jurisdiction. Thus at present the pleader has power to determine procedural consequences by the way in which he exercises the classic privilege given by the saving-to-suitors clause (28 U.S.C. § 1333) or by equivalent statutory provisions. For example, a longshoreman's claim for personal injuries suffered by reason of the unseaworthiness of a vessel may be asserted in a suit in admiralty or, if diversity of citizenship exists, in a civil action. One of the important procedural consequences is that in the civil action

either party may demand a jury trial, while in the suit in admiralty there is no right to jury trial except as provided by statute.

It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute. Similarly, as will be more specifically noted below, there is no disposition to change the present law as to interlocutory appeals in admiralty, or as to the venue of suits in admiralty; and, of course, there is no disposition to inject into the civil practice as it now is the distinctively maritime remedies (maritime attachment and garnishment, process in rem, possessory and petitory actions, and limitation of liability). The unified rules must therefore provide some device for preserving the present power of the pleader to determine whether these historically maritime procedures shall be applicable to his claim or not; the pleader must be afforded some means of designating his claim as the counterpart of the present suit in admiralty, where its character as such is not clear.

The problem is different from the similar one concerning the identification of claims that were formerly suits in equity. While that problem is not free from complexities, it is broadly true that the modern counterpart of the suit in equity is distinguishable from the former action at law by the character of the relief sought. This mode of identification is possible in only a limited category of admiralty cases. In large numbers of cases the relief sought in admiralty is simple money damages, indistinguishable from the remedy afforded by the common law. This is true, for example, in the case of the longshoreman's action for personal injuries stated above. After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedure invoked. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the saving-to-suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forgo mention of all available jurisdictional grounds.

Other methods of solving the problem have been carefully explored, but the Advisory Committee has concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty and maritime claim.

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty and maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15.

RULE 14. THIRD-PARTY PRACTICE

(a) WHEN DEFENDANT MAY BRING IN THIRD PARTY. At any time after commencement of the action a ~~defendant~~ defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided

in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo or other property subject to admiralty and maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, the claimant of the property arrested.

(b) WHEN PLAINTIFF MAY BRING IN THIRD PARTY. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) SPECIAL INSTANCES OF APPORTIONED LIABILITY. A defendant, as third-party plaintiff, may bring in a third-party defendant in the manner provided in this rule when the plaintiff's claim against the third-party plaintiff is such that, had the plaintiff commenced an action thereon against the third-party plaintiff and the third-party defendant, and had both been held liable, the liability would, as a matter of law, be apportioned in the judgments against them. When a third-party defendant is brought in on this basis, the third-party plaintiff may demand judgment in favor of the plaintiff against the third-party defendant, and the action shall proceed as if the

plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Advisory Committee's Note

Rule 14 was modeled on Admiralty Rule 56. An important feature of Admiralty Rule 56 is that it allows impleader not only of a person who might be liable to the defendant by way of remedy over, but also of any person who might be liable to the plaintiff. The importance of this provision is that the defendant is entitled to insist that the plaintiff proceed to judgment against the third-party defendant. In certain cases this is a valuable implementation of a substantial right. For example, in a case of ship collision where a finding of mutual fault is possible, one shipowner, if sued alone, faces the prospect of an absolute judgment for the full amount of the damage suffered by an innocent third party; but if he can implead the owner of the other vessel, and if mutual fault is found, the judgment against the original defendant will be in the first instance only for a moiety of the damages; liability for the remainder will be conditioned on the plaintiff's inability to collect from the third-party defendant.

This feature was originally incorporated in Rule 14, but was eliminated by the amendment of 1946, so that under the present rule a third party may not be impleaded on the basis that he may be liable to the plaintiff. One of the reasons for the amendment was that the Civil Rule, unlike the Admiralty Rule, did not require the plaintiff to go to judgment against the third-party defendant. Another reason was that where jurisdiction depended on diversity of citizenship the impleader of an adversary having the same citizenship as the plaintiff was not considered possible.

Retention of the admiralty practice in those cases in which liability may be apportioned if others potentially liable to the plaintiff are before the court is clearly desirable. This is true of cases governed by the substantive admiralty and maritime law whether the claim is asserted (to use present terminology) in a civil action or in admiralty. The general principle seems equally applicable to any nonmaritime case in which the original defendant may suffer a liability which, as a matter of law, would be diminished or qualified if another party had been joined and found liable. The principle does not extend to the ordinary case of joint tort-feasors, each liable to the plaintiff for the full amount of the judgment, even though there may be a substantive right to contribution. It covers only the case in which, if both defendants are held liable, their liability to the plaintiff will be apportioned.

Full utilization of this type of impleader may not be possible in cases

in which jurisdiction rests upon diversity of citizenship. That, however, is not a good reason for withholding the remedy in those cases in which it can usefully be applied. The other reason for the abandonment of this remedy in 1946--that such impleader was futile because the plaintiff could not be compelled to amend and assert a claim against the third-party defendant--is obviated here by resort to the formula of Admiralty Rule 56: when process is duly served on the third-party defendant, the action is to proceed as if he had originally been made a party.

A minority of the Advisory Committee is of the opinion that the principle of Admiralty Rule 56, allowing impleader on the ground that the third-party defendant is liable to the plaintiff, should be more clearly and more broadly preserved. This question will be further considered in the light of public reaction to the proposed plan of unification.

RULE 17. PARTIES PLAINTIFF AND DEFENDANT: CAPACITY.

(a) REAL PARTY IN INTEREST. Every action shall be prosecuted in the name of the real party in interest; ~~but~~ a An executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action for loss or misdelivery of, or damage to, maritime cargo, or for general average contribution to such cargo, or for salvage, and no action for personal injury or death governed by section 33 of the Longshoremen's and Harborworkers' Compensation Act, as amended [Act of March 4, 1927, c. 509, § 33; 44 Stat. 1440, 33 U.S.C. § 933], shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

* * *

Advisory Committee's Note

The minor change in the existing text of the rule is designed to make it clear that the specific instances enumerated are not exceptions to, but illustrations of, the rule.

A recurring factual situation in maritime cases may lead to injustice if the requirement as to real party in interest is rigidly applied. When there are claims to be asserted on behalf of maritime cargo some or all of the following conditions may be present: (1) There are numerous lots of cargo and hence numerous potential claimants. (2) The true owner or other person entitled to sue cannot be readily determined. This results in part from the employment of diverse commercial instruments giving rise to problems of the passing of title. These may involve problems in the conflict of laws, including the laws of foreign countries. Questions also arise as to when the rights of an insurer as subrogee have been perfected. (3) The time for filing suit is short, either because of a short limitation period, such as the one-year period of the Carriage of Goods by Sea Act, or because the only practicable remedy is arrest or attachment of a vessel whose departure is imminent.

The same considerations apply to actions to recover general average contributions owing to cargo interests.

Similar considerations apply to actions for personal injury or death brought against persons other than the employer under section 33 of the Longshoremen's and Harborworkers' Compensation Act. The provisions of that section relating to assignment of the injured employee's claim to the employer can give rise to situations in which it is not clear which is entitled to sue, and in which a mistake of judgment can result in forfeiture of a just claim. Cf. Czaplicki v. The Hoegh Silvercloud, 351 U.S. 525 (1956). The specific reference to such claims is not intended, however, to have any negative implications for judicial avoidance of forfeitures in other cases. Cf. Levinson v. Deupree, 345 U.S. 648 (1953).

It has been traditional practice in admiralty for suits for salvage to be filed by the owner or master on behalf of all those potentially entitled to share in the award. The evident convenience of this procedure has led to its general acceptance although the judgment in such a case would not seem to give complete theoretical protection to the defendant. See 1 Benedict § 123; The Lowther Castle, 195 Fed. 604 (D.N.J. 1912); The Neptune, 277 Fed. 232 (2d Cir. 1921). It is therefore reasonable to provide that in such cases the action may be commenced by a potentially interested party. The interests of the defendant are adequately protected if the real party in interest is made a party of record within a reasonable time after the objection is raised.

RULE 18. JOINDER OF CLAIMS AND REMEDIES

(a) JOINDER OF CLAIMS. The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims, ~~either~~ legal, ~~or~~ equitable, or ~~both~~ maritime, as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied.

* * *

Advisory Committee's Note

Free joinder of claims and remedies is one of the basic purposes of unification.

RULE 20. PERMISSIVE JOINDER OF PARTIES

(a) PERMISSIVE JOINDER. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

* * *

Advisory Committee's Note

A basic purpose of unification is to reduce barriers to joinder.

RULE 26. DEPOSITIONS PENDING ACTION

(a) WHEN DEPOSITIONS MAY BE TAKEN. Any party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. After commencement of the action the deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after commencement of the action. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. Depositions shall be taken only in accordance with these rules, except that in admiralty and maritime claims within the meaning of Rule 9(h) depositions may also be taken under and used in accordance with sections 863, 864, and 865 of the Revised Statutes (see note preceding 28 U.S.C. § 1781). The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

* * *

Advisory Committee's Note

The requirement that the plaintiff obtain leave of court in order to serve notice of taking of a deposition within 20 days after commencement of the action gives rise to difficulties when the prospective deponent is about to become unavailable for examination. The problem is not confined to admiralty, but has been of special concern in that context because of the mobility of vessels and their personnel. When Rule 26 was adopted as Admiralty Rule 30A in 1961, the problem was alleviated by permitting depositions de bene esse, for which leave of court is not required. See Advisory Committee's Note to Admiralty Rule 30A (1961).

Efforts have been made to devise a modification of the 20-day rule

acceptable to both the Civil and Admiralty Committees, to the end that Rule 26(a) might state a uniform rule applicable alike to what are now civil actions and suits in admiralty. These efforts have so far been unsuccessful; and the Admiralty Committee has concluded that the exigencies of maritime litigation require preservation, for the time being at least, of the traditional de bene esse procedure for the post-unification counterpart of the present suit in admiralty. Accordingly, the draft provides for continued availability of that procedure in admiralty and maritime claims within the meaning of Rule 9(h). The possibility of a uniform rule will be further explored when current studies of the actual operation of the discovery rules has been completed.

[RULE 33. INTERROGATORIES TO PARTIES.

The Advisory Committee on Admiralty Rules proposed that Rule 33 be amended to read as follows:

RULE 33. INTERROGATORIES TO PARTIES. Any party may serve upon any adverse party written interrogatories to be answered by the party served, or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served with the complaint or at any time after commencement of the action and without leave of court, ~~except that,~~ but if service is made by the plaintiff before defendant serves interrogatories and within ~~10~~ 20 days after such commencement, ~~leave of court granted with or without notice must first be obtained.~~ the time for answering or objecting to the plaintiff's interrogatories shall run from the time the defendant serves interrogatories or from 20 days after such commencement, whichever is the earlier. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

* * *

The Advisory Committee on Civil Rules did not concur in this proposal. While continuing to believe the proposed amendment preferable, the Admiralty Committee also believes that unification is feasible and desirable with Rule 33 in its present form, and in the interests of unification does not insist on its proposal at this time. The Civil Committee is now reviewing the whole field of discovery, both analytically and by field study. The Admiralty Committee will continue to consult with the Civil Committee with a view to the possibility of joint approval of an amendment along the lines of the one proposed.]

RULE 38. JURY TRIAL OF RIGHT

* * *

(e) ADMIRALTY AND MARITIME CLAIMS. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty and maritime claim within the meaning of Rule 9(h).

Advisory Committee's Note

See Note to Rule 9(h), supra.

Rule 43. Evidence

(a) ~~FORM OF~~ ADMISSIBILITY. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, ~~or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity~~, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the district court is held. In any case, the statute or rule which favors the admissibility of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

* * *

Advisory Committee's Note

According to tradition, the rules of evidence in admiralty are distinguished for their liberality; strict common-law rules of exclusion are not binding. See, e.g., The Spica, 289 Fed. 436 (2d Cir. 1923) (Judge Hough). Proof of the tradition exists primarily in the experience of trial lawyers and judges; there is little in the reported cases to support it by way of direct holding as distinguished from dictum, and it seems based in large part simply on the fact that admiralty cases are typically tried to the court without a jury. An exceptional case is Taylor v. Crain, 224 F.2d 237 (3d Cir. 1955), wherein the court, per Judge Goodrich, not feeling the constraint it would feel if Rule 43(a) had been applicable to suits in admiralty, was able to hold that the Pennsylvania Dead Man Statute was inapplicable in such a suit.

The spirit of Rule 43(a) is one of maximum admissibility. It would therefore be unfortunate if, after unification, that rule, while continuing to refer to the liberal practice in equity, were to omit reference to the practice in admiralty. The rule should contain no intimation of hostility to a respected

tradition of liberality. The draft therefore eliminates the reference to equity, making the rule sufficiently broad to encompass the practice in the federal courts in admiralty as well.

RULE 53. MASTERS

(a) APPOINTMENT AND COMPENSATION. Each district court with the concurrence of a majority of all the judges thereof may appoint one or more standing masters for its district, and the court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor, ~~and~~ an examiner~~;~~ , a commissioner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account~~;~~ and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

* * *

Advisory Committee's Note

These changes are designed to preserve the admiralty practice whereby difficult computations are referred to a commissioner or assessor, especially after an interlocutory judgment determining liability.

RULE 65. INJUNCTIONS

* * *

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

~~A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.~~ The provisions of Rule 65A apply to a surety upon a bond or undertaking under this rule.

Advisory Committee's Note

Rules 65 and 73 contain substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There is fragmentary coverage of the same subject in the admiralty rules. Clearly, a single comprehensive rule is required, and is proposed as Rule 65A.

RULE 65A. SECURITY: PROCEEDINGS AGAINST SURETIES. Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Cases, require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Advisory Committee's Note

See Note to Rule 65.

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 him for the money or property or to the effect specified in his 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 prior to the commencement of proceedings to determine the amount or extent of liability.

Advisory Committee's Note

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.

RULE 73. APPEAL TO A COURT OF APPEALS

(a) WHEN AND HOW TAKEN. Except as provided in Title 28, U.S.C. § 1292(b) and Title 45, U.S.C. § 159, Wwhen an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from ~~unless a shorter time is provided by law~~, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on ~~a~~ failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed. The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.

A party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps

to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal. If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

* * *

(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause showr fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in

[illegible]

[illegible] the amount [illegible] party, [illegible] costs of the action, [illegible] appeal, interest, and damages for delay. <u>A separate supersedeas [illegible] be given, unless otherwise or- [illegible] security [illegible].</u>

* * *

[illegible] ~~By entering into an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule, the surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his address is known.~~ <u>The provisions of Rule 65A apply to a surety upon an appeal or supersedeas bond given pursuant to subdivisions (c) and (d) of this rule.</u>

* * *

<u>(-) EXTENSION OF TIME FOR CROSS-APPEAL. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 7 days of the date on which the first notice of appeal was filed, or within</u>

the time otherwise prescribed by this rule, whichever period last expires.

(i) INTERLOCUTORY APPEALS IN ADMIRALTY AND MARITIME CASES. These rule do not affect the appealability of interlocutory judgments in admiralty cases pursuant to Title 28, U.S.C., § 1292(a)(3). The reference in that statute to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h).

Advisory Committee's Note

Subdivision (a). Unified rules should so far as reasonably possible provide a uniform time in which notice of appeal must be filed instead of the various times now provided.

Subdivision (d). The added sentence reflects a practice common in distinctively maritime proceedings.

Subdivision (f). See Note to Rule 65, supra.

Subdivision (h). The proposal protects the rights of a party who has no occasion to appeal unless another party does so, when the other party files his notice of appeal so near the end of the time for filing as to preclude his filing of a timely notice.

Subdivision (i). See Note to Rule 9(h), supra.

RULE 81. APPLICABILITY IN GENERAL

(a) TO WHAT PROCEEDINGS APPLICABLE

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7651-81. They do not apply to proceedings in bankruptcy or proceedings in copyright under Title 17, U.S.C., except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to probate, adoption, or lunacy proceedings in the United States District Court for the District of Columbia except to appeals therein.

(2) In the following proceedings appeals are governed by these rules, but they are not applicable otherwise than on appeal except to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in actions at law or suits in equity: admission to citizenship, habeas corpus, and quo warranto, ~~, and forfeiture of property for violation of a statute of the United States.~~ The requirements of Title 28, U.S.C., § 2253, relating to certification of probable cause in certain appeals in habeas corpus cases remain in force.

* * *

Advisory Committee's Note

See Note to Rule 1, supra.

Statutory proceedings to forfeit property for violation of the laws of the United States, now governed by the admiralty rules, should be governed by the unified and supplemental rules. See Supplemental Rule A.

RULE 82. JURISDICTION AND VENUE UNAFFECTED. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty and maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.

Advisory Committee's Note

Title 28, U.S.C., § 1391(b) provides: "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." This provision cannot appropriately be applied to what are now suits in admiralty. The rationale of decisions holding it inapplicable rests largely on the use of the term "civil action": i.e., a suit in admiralty is not a "civil action" within the statute. It is proposed, however, that Rule 1 will convert suits in admiralty into civil actions. The added sentence is necessary to avoid an undesirable change in existing law.

RULE 86. EFFECTIVE DATE

[A suitable provision as to the effective date will be made either in Rule 86 or in the order of the Supreme Court transmitting the amendments.]

We further recommend that the Federal Rules of Civil Procedure be amended by adding thereto the following Supplemental Rules for Certain Admiralty and Maritime Cases: