

# UNIFICATION OF THE CIVIL AND ADMIRALTY RULES: WHY AND HOW

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When the federal courts entered the "New Era" in 1938, with the Federal Rules of Civil Procedure and their unification of law and equity, admiralty was left behind. This was ironical, because admiralty had pioneered some of the liberal procedures that were to characterize the new unified rules;<sup>1</sup> because the original great conception had been that there should be a union of all three of the main heads of civil procedure—law, equity, and admiralty; and because on previous occasions when procedure in the federal courts had been under broad consideration the admiralty system had uniformly been treated as co-ordinate with the systems of law and equity.

The unification of law and equity in 1938 is clearly traceable to an address by Chief Justice Taft to the Chicago Bar Association in 1921. On that occasion the Chief Justice called for unification not of law and equity alone but of law, equity, and admiralty:

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 assured by the Constitution and are of the utmost value in the administration of justice.<sup>2</sup>

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<sup>1</sup> To cite only one clear example, Admiralty Rule 56 (Right To Bring in Party Jointly Liable) provided the model for FED. R. CIV. P. 14 (Third-Party Practice).

<sup>2</sup> Taft, *Three Needed Steps of Progress*, 8 A.B.A.J. 34, 35 (1922).

When Congress exercised its option to create inferior federal courts<sup>3</sup> as it did at the first opportunity<sup>4</sup>—it faced a formidable problem that has never since ceased to concern the responsible authorities: that of regulating procedure in the federal courts. The problem was compounded by the fact that the courts were to be invested with jurisdiction of actions at law, suits in equity, and suits in admiralty—and each of the three systems, historically, had its own distinctive procedure. Congress dealt with the problem immediately and comprehensively, but cautiously. The most striking characteristic of its early solutions is that they were temporary expedients; within this limit they were characterized by conformity to existing procedures and continuity with the past.

The first Process Act,<sup>5</sup> approved only a few days after the Judiciary Act, declared that until further provision

the forms of writs and executions . . . and modes of process . . . in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same. And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law. . . .

But this act was to continue in force only “until the end of the next session of Congress, and no longer.” In the following year Congress was prepared to do no more than continue this act in force through another session.<sup>6</sup> Again in 1791 the force of the temporary act was extended for a single session.<sup>7</sup> Finally, in 1792 a “permanent” process act was passed;<sup>8</sup> but if there had been hopes that such an act would provide something radically different from the solutions of the original act they were disappointed. Conformity and continuity were still the watchwords. The models for equity and admiralty procedure were made more precise, but the most significant new departure was a grant of rule-making authority to the courts—particularly the Supreme Court:

. . . the forms of writs, executions and other process . . . and the forms and modes of proceeding in suits in those of common law shall be the same as are now used in the said courts respectively in pursuance of the act, entitled “An act to regulate processes in the courts of the United States,” in those

<sup>3</sup> U.S. CONST. art. III, § 1.

<sup>4</sup> Act of September 24, 1789, ch. XX, 1 Stat. 73. A quorum of the Senate was convened for the first time on April 6, 1789, at which time the votes of the Electors were canvassed and George Washington and John Adams were declared elected President and Vice President, respectively. On the following day a committee was appointed to bring in a bill for organizing the Judiciary of the United States. 1 ANNALS OF CONG. 16, 17 (1789) [1789-1791].

<sup>5</sup> Act of September 29, 1789, ch. XXI, 1 Stat. 93.

<sup>6</sup> Act of May 6, 1790, ch. XIII, 1 Stat. 123.

<sup>7</sup> Act of February 18, 1791, ch. VIII, 1 Stat. 191.

<sup>8</sup> Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject however to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same. . . .<sup>9</sup>

The act was construed as adopting "the admiralty practice of our own country, as grafted upon the British practice."<sup>10</sup>

The Court made no use of its power to regulate the practice in admiralty until the power was reaffirmed by Congress in 1842.<sup>11</sup> Shortly thereafter the Court promulgated the "Rules of Practice of the Courts of the United States in Causes of Admiralty and Maritime Jurisdiction on the Instance Side of the Court," effective September 1, 1845.<sup>12</sup> After

<sup>9</sup> Act of May 8, 1792, ch. XXXVI, § 2, 1 Stat. 276.

<sup>10</sup> *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473, 489-90 (1825). "We had then [when the Process Act of 1792 was approved] been sixteen years an independent people, and had administered the admiralty jurisdiction, as well in admiralty courts of the states as in those of the general government; and if, in fact, a change had taken place in the practice of the two countries, that of our own certainly must claim precedence." *Id.* at 490. The decision upheld the right to commence suit by attachment although it appeared from an English writer that the practice had been discontinued in the English admiralty courts. Reliance was placed on Clerke's *Praxis* and on a decision by the district court in South Carolina. The reference in the original process act to "the course of the civil law" was treated as still significant: ". . . this process has the clearest sanction in the practice of the civil law, and during the three years that the admiralty courts of these states were referred to the practice of the civil law for their 'forms and modes of proceeding,' there could have been no question that this process was legalized." *Id.* at 491. "Upon the whole, we are of opinion that for a maritime trespass . . . the person injured may have his action *in personam*, and may compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as ingrafted upon the admiralty practice." *Id.* at 496.

<sup>11</sup> Act of August 23, 1842, ch. CLXXXVIII, § 6, 5 Stat. 516, 518. Equity rules had been promulgated in 1822, 20 U.S. (7 Wheat.) v (1822); as to common-law actions the power granted by this act was not exercised. See 2 MOORE, FEDERAL PRACTICE ¶ 2.03 (1964).

<sup>12</sup> 44 U.S. (3 How.) ix-xix (1845). Although all indications point to 1845, the year cannot be determined with certainty from the rules as published in the reports. Rule XLVII provided: "These rules shall be in force . . . from and after the first day of September next," but the rules and the order of promulgation are undated. Volume 3 of Howard's Reports is dated 1845 and contains reports of cases decided at the January Term, 1845; presumably, it was "the next volume of his Reports," in which the Reporter was directed to publish the rules. Any doubts that may have existed have been removed by an investigation of original records in the National Archives, made by Miss Kathleen Malley, of the Class of 1966, Duke University. The rules and the order of promulgation are engrossed in the

being amended from time to time<sup>13</sup> these rules were recompiled and promulgated again on December 6, 1920, as the "Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction," effective March 7, 1921.<sup>14</sup> They have since been amended and supplemented—especially, after 1938, to incorporate piecemeal provisions of the Federal Rules of Civil Procedure; as so amended, they govern the admiralty practice today; and their core is still the set of rules drafted by Mr. Justice Story in 1845.

During the long period when the common-law practice in the federal courts was shackled by the requirement of conformity to state law the admiralty practice was justly cherished for its relative flexibility and liberality; its position was unrivaled except, perhaps, by the equity practice under the modernized Equity Rules of 1912.<sup>15</sup> This position was lost when admiralty was left out of the reforms of 1938. Those reforms had been made possible by legislation enabling the Court, in making rules to govern the practice at law and in equity, to supersede inconsistent statutes;<sup>16</sup> but the power to regulate the admiralty practice did not go so far.

. . . the common law practice—then full of man traps—has been progressively reformed and simplified; indeed, we have witnessed the progress of these reforms to such a point that it has been possible to merge equity procedure with common law procedure. 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. In the following pages, the effort is made to point out not merely the requirements of good present-day admiralty practice, but also the likenesses and differences now existing between admiralty and common law and equity practice, now known as "civil" practice.

These differences are largely due to the fact that the power given to the Supreme Court by Congress to make Admiralty Rules under the Act of 1842 is not as ample as the power given to the Court to make common law and equity rules under the Act of 1934, and the more recent power to make criminal rules under the Act of 1940. Under the Act of 1842, the Court may not trench upon those features of practice which are expressly reg-

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minutes of the Court under date of Wednesday, March 5, 1845. Minutes of the Supreme Court of the United States, Volume L, pp. 5161-82. Miss Malley's investigation also tends to establish, through comparison of handwriting, what many have surmised: that Justice Joseph Story was the principal draftsman of the rules.

<sup>13</sup> See 80 U.S. (13 Wall.) xii (1872) (limitation of liability); 74 U.S. (7 Wall.) v (1870); 66 U.S. (1 Black) 6 (1862); 62 U.S. (21 How.) front matter, not paged (1859); 54 U.S. (13 How.) front matter, not paged (1852); 51 U.S. (10 How.) v (1851).

<sup>14</sup> 254 U.S. 671 (1921).

<sup>15</sup> See 2 MOORE, FEDERAL PRACTICE ¶ 2.03 (1964).

<sup>16</sup> Act of June 19, 1934, ch. 651, 48 Stat. 1064.

ulated by an Act of Congress; and unless and until that limitation upon the Court's rule-making power is broadened, as it has been in the matter of the civil and criminal rules, the admiralty practice will necessarily remain different from the civil practice in the federal courts in various matters.<sup>17</sup>

The power to supersede statutes in regulating the practice in admiralty and maritime cases was finally conferred on the Court by the Judicial Code of 1948.<sup>18</sup> The way was thus cleared for modernization of the admiralty practice, and indeed for its belated unification with the civil practice, although the demand, at first, was only that the highly successful and self-contained Civil Rules be made applicable to the practice in admiralty cases. 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.<sup>19</sup>

In 1953 the Maritime Law Association of the United States 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.<sup>20</sup> In this proposal the American Bar Association concurred.<sup>21</sup> But, while the way had been cleared for action, the machinery for rule-making on a large scale did not exist. In modern times it is hardly feasible for a single justice to draft a comprehensive set of rules; the Civil Rules of 1938 were, after all, the product of prolonged study, work, and consultation by a distinguished Advisory Committee,<sup>22</sup> and the Court's rule-making responsibilities cover a wide range.<sup>23</sup>

In 1958 Congress charged the Judicial Conference with the responsibility of aiding the Court in its rule-making functions:

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those

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<sup>17</sup> 2 BENEDICT, ADMIRALTY iii-iv (6th ed. Knauth 1940).

<sup>18</sup> 28 U.S.C. § 2073 (1964). See Moore, COMMENTARY ON THE U.S. JUDICIAL CODE 633-37 (1949).

<sup>19</sup> REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32 (1950).

<sup>20</sup> MARITIME LAW ASSOCIATION OF THE UNITED STATES, Document 375 (1953).

<sup>21</sup> 78 A.B.A. REP. 188 (1953).

<sup>22</sup> See 1B MOORE, FEDERAL PRACTICE ¶¶ 0.501[2], 0.511 (1965).

<sup>23</sup> *Id.* ¶ 0.512.

rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.<sup>24</sup>

To enable the Conference to discharge this responsibility the Chief Justice established the Committee on Rules of Practice and Procedure (Standing Committee) and the several Advisory Committees, including the Advisory Committee on Admiralty Rules.

At its first meeting on December 22, 1959, the Standing Committee 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." Against the background that has been sketched this was the natural and logical, almost the inevitable, direction for the work of the Advisory Committee to take.

Hardly had the Advisory Committee on Admiralty Rules been organized when it was confronted with an emergency that was to demonstrate graphically the need for a closer correspondence between the civil and admiralty practices. On June 20, 1960, the Supreme Court decided *Miner v. Atlass*,<sup>25</sup> invalidating a local rule of the Northern District of Illinois purporting to apply to admiralty cases the civil rules on discovery depositions. The decision affected some sixteen important maritime districts in which, by local rule or otherwise, the discovery-deposition procedures provided by the Civil Rules had been invoked to fill a gap in the admiralty practice. In the course of the majority opinion the Court said:

Those who advise the Court with respect to the exercise of its rule-making powers—more particularly of course the Judicial Conference of the United States (28 U.S.C. § 331) and the newly created Advisory Committee on the General Admiralty Rules, which it is to be hoped will give the matter their early attention—are left wholly free to approach the question of amendment of the discovery provisions of the rules in the light of whatever considerations seem relevant to them, including of course the experience gained by the District Courts which have had rules similar to the Local Rule here challenged.<sup>26</sup>

Accordingly, the Advisory Committee gave priority to a study of the problem of discovery depositions. A survey of professional and judicial opinion overwhelmingly showed that experience with the civil practice

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<sup>24</sup> 28 U.S.C. § 331, as amended, July 11, 1958, Pub. L. 85-513, 72 Stat. 356.

<sup>25</sup> 363 U.S. 641 (1960).

<sup>26</sup> *Id.* at 651.

in admiralty cases in the districts in which that practice had been employed was satisfactory, and amendment of the general Admiralty Rules to incorporate the practice was strongly recommended. Lawyers in selected districts in which the civil practice had not been used reported consequent inconvenience in the preparation and trial of cases, and a substantial majority recommended adoption of the civil practice for admiralty. In due course the Advisory Committee recommended, and the Supreme Court on April 17, 1961, adopted, new admiralty rules embodying the substance of Civil Rules 26-32.<sup>27</sup> At the same time the admiralty practice was conformed to the civil in three other important respects: Civil Rules 45 (Subpoena), 56 (Summary Judgment), and 59 (Declaratory Judgment) were in substance adopted as admiralty rules.

The Advisory Committee resumed its basic study of integration, or unification, of the two practices. Broadly, the study was divided into two questions: whether unification was feasible and whether it was desirable. The process involved the painstaking examination of each separate civil rule to determine its appropriateness as a unified rule and of each admiralty rule to determine the extent, if any, to which it need be preserved. Earlier similar studies, especially that of the Maritime Law Association of the United States, the results of which were embodied in Document 375, were helpful. Close communication was maintained with interested professional groups, especially the subcommittee of the Maritime Law Association's Committee on Supreme Court Admiralty Rules, the chairman of which was, at first, John W. Castles, 3d, and later John W. R. Zisgen. From the beginning the Chairman of the Advisory Committee, Judge Walter L. Pope, made it clear that the study must be a pragmatic one: different procedures could not be justified on the basis of tradition alone, and, especially since all the relevant rules must emanate from a

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<sup>27</sup> Admiralty Rule 30A, corresponding to Civil Rule 26, departed from its civil counterpart in one respect that is significant because it is retained in the current plan of unification. To the provision of Rule 26 that "Depositions shall be taken only in accordance with these rules" Admiralty Rule 30A adds: "except that 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 deviation is thus explained in the Advisory Committee's Note to the currently proposed amendment of Rule 26: "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. . . ." Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to Rules of Procedure for the United States District Courts* 23 (March 1964).

single source — the Supreme Court — there was no room for inconsistent philosophies. Distinctive rules for maritime cases must be justified by differences of substantive law or by factual exigencies of maritime transactions and litigation.

As the rule-by-rule study progressed it became increasingly evident that unification was feasible with a greater degree of uniformity than had previously been supposed. There were already large areas of agreement between the two sets of rules. Critical evaluation of suggestions for differential treatment led to the rejection of many on the ground that they could not be justified in terms of the pragmatic criteria laid down by Judge Pope. The goal was never complete uniformity, but rather a minimum of disuniformity in a simplified set of rules appropriate to both civil and admiralty cases. The area of uniformity is perhaps most significantly indicated by a recital of the instances of differential treatment.

There are four maritime remedies that should be preserved and that are not envisioned at all by the Civil Rules. They are:

- (1) The action in rem;
- (2) Maritime attachment and garnishment;
- (3) Petitory, possessory, and partition proceedings; and
- (4) Actions for exoneration from or limitation of liability.

The action in rem gives meaning to the maritime lien and the substantive rights associated with it. Attachment and garnishment have historically been the creditor's most reliable remedy against the nonresident debtor — a person frequently encountered in admiralty. Disputes between co-owners are no doubt less important than they were in the days when entrepreneurs typically owned fractional shares of merchant vessels, but they still occur, especially with respect to fishing vessels. The rules on limitation of liability implement a valued statutory right given to vessel-owners exclusively. Because the rules relating to these remedies grow out of a body of distinctive substantive law and out of the exigencies of maritime commerce they should be preserved; but because they do not concern nonmaritime litigation they have been collected in a set of Supplemental Rules for convenience. The existing Admiralty Rules, except in so far as they have been amended to incorporate portions of the Civil Rules, are in the main concerned with these remedies.

Apart from the Supplemental Rules, there are just five instances of differential treatment, and not all of these are of the same order. Two are included not because of an independent determination by the Advisory Committee that admiralty cases should be treated differently, but because the Committee has no disposition to interfere with differential treatment already accorded by Congress in areas to which the judicial rule-making authority does not extend, or has not been extended. Be-

fore examining the five instances briefly it is convenient to notice the device that has been adopted for distinguishing the cases subject to the Supplemental Rules and the differential treatment for admiralty cases from civil actions generally.

At the present time substantial procedural consequences—the potential range of which is measured by all the differences between the Civil and the Admiralty Rules—turn upon whether the action is filed as a civil action or as a suit in admiralty. This in turn depends, first, upon whether the claim is within the admiralty and maritime jurisdiction, and, second, upon the choice of the pleader. Unless the claim is within the admiralty and maritime jurisdiction it cannot be asserted in a suit in admiralty; on the other hand, if it is within the exclusive admiralty and maritime jurisdiction of the district court, or if no independent, non-maritime ground of federal jurisdiction exists, it cannot be asserted in a civil action. Thus far the pleader has no choice. In many cases, however, a claim within the admiralty and maritime jurisdiction may be asserted in a civil action at the choice of the pleader; for, while the admiralty and maritime jurisdiction of the district courts has always been stated initially in exclusive terms, it has also been subject to the “saving-to-suitors” clause:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.<sup>28</sup>

For practical purposes the only actions within the exclusive jurisdiction are those made so by statute and private actions in rem.<sup>29</sup> The ordinary claim in personam for money damages may be brought in a state court, or on the “civil side” of the district court if a nonmaritime ground of federal jurisdiction, such as diversity of citizenship and the requisite amount, exists.<sup>30</sup> Hence, in many cases the pleader has power to determine the applicable procedure, and he determines it by his decision to file a civil action or a suit in admiralty.

Under unification procedural differences will be minimized but some will remain; and the purpose is to make the distinctively maritime pro-

<sup>28</sup> 28 U.S.C. § 1333 (1964).

<sup>29</sup> *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1867); *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1867); *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943); *Madruga v. Superior Court*, 346 U.S. 556 (1954).

<sup>30</sup> The argument that any claim based on the maritime law is one that “arises under the Constitution, laws, or treaties of the United States” and is thus cognizable on the “law side” by virtue of 28 U.S.C. § 1331 has now been authoritatively rejected. *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959). See GILMORE & BLACK, *THE LAW OF ADMIRALTY* 33 (1957).

visions applicable as they now are applicable: that is, to cases that can only be regarded as admiralty cases, and to those which the pleader wishes to treat as admiralty cases so that those procedures will apply. But unification abolishes the distinction between civil actions and suits in admiralty, providing for one form of action, to be known as civil action.<sup>31</sup> How, then, is the pleader to exercise the control over procedure that we wish to preserve for him?

The Advisory Committee's solution, found in a new subdivision (h) of Rule 9 (Pleading Special Matters), is essentially a simple one although it must be confessed that the Committee experienced no little difficulty in fashioning it to the satisfaction of all concerned. In essence, it allows the pleader, who has the power to determine procedural consequences, to say that he prefers the distinctively maritime procedures. He files a civil action; but in his complaint he may identify his claim as an admiralty and maritime claim. If he does this, the Supplemental Rules and the five other distinctive provisions apply. If he does not, the case is treated as any other civil action—as an action now brought under the saving-to-suitors clause. The inclusion or omission of such an identifying statement is not an irrevocable election; the statement may be added or withdrawn according to the principles of Rule 15.

One aspect of the drafting problem associated with Rule 9 (h) deserves mention because there has been some criticism of the present draft and its final form is not entirely free from doubt. The basic formula approved by the Advisory Committee was: "A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty and maritime claim. . . ." There was a difference of opinion whether this formulation aptly described a claim under the Jones Act, which of course is among the claims with respect to which the pleader should continue to have power to determine the procedure. There is strong reason to believe that the basic formula does include such a claim. In *Panama R. R. v. Johnson*,<sup>32</sup> the Court expressly held that a claim based on the Jones Act was cognizable at law as a case arising under federal law.<sup>33</sup> The doubt arises from the fact that in *Romero v. International Terminal Operating Co.*<sup>34</sup> the Court used broad language in holding that a claim based on the maritime law is not cog-

<sup>31</sup> FED. R. CIV. P. 1, 2.

<sup>32</sup> 264 U.S. 375 (1924).

<sup>33</sup> "The case arose under a law of the United States and involved the requisite amount, if any was requisite; so there can be no doubt that the case was within the general jurisdiction conferred on the District Courts by § 24 of the Judicial Code. . . ." *Id.* at 383-84.

<sup>34</sup> 358 U.S. 354 (1959).

nizable by virtue of the "arising under" jurisdiction; but the claim there in question—one for maintenance and cure—was based on the general, or nonstatutory, maritime law; the conflict between circuits that was resolved by the decision had also concerned nonstatutory claims; and the decision seems properly regarded as limited to such claims rather than as an implied overruling of the *Johnson* case, which was not cited.<sup>35</sup> At all events, the Advisory Committee's intention is clear; whether Rule 9 (h) ultimately contains language specially designed to refer to the Jones Act depends upon whether such language is thought necessary in order to state the intention clearly.

In addition to the Supplemental Rules, the five instances of special treatment for "admiralty and maritime claims" are:

(1) *Rule 14(c) (Third Party Practice)*. Admiralty Rule 56 differs from Rule 14 in that it permits a defendant to tender a new adversary to the plaintiff and to insist that the plaintiff proceed to judgment, if possible, against him. The civil rule, modeled on the admiralty rule, originally included this feature, but it was removed by amendment in 1948 for reasons peculiar to the civil practice: common citizenship of the plaintiff and the third-party adversary was held to defeat jurisdiction of the claim when jurisdiction depended on diversity, and the civil rule, unlike the admiralty rule, contained no provision making it compulsory for the plaintiff to proceed to judgment. Perhaps another reason for the amendment was that the practice was not rooted in the relevant substantive law, as it was rooted in the maritime law. In the civil practice it may have been thought that the power of the defendant to tender another adversary to the plaintiff served only the purposes of trial strategy; however this may be, it serves in admiralty to implement a valued right given by the substantive law. According to the maritime law the liability of joint tortfeasors, at least in cases of collision, is joint and several only in a qualified sense. If one of the parties at fault is sued alone and loses he will suffer judgment for the entire amount of the loss; but if judgment is recovered against both of the parties at fault, the judgment against each is only contingently for the full amount. Each is liable in the first instance only for a moiety of the loss, and is liable for the whole only in the event that the plaintiff is unable to recover from the other. Preserving the traditional admiralty practice that implements this conditional liability seems clearly justified by the distinctive substantive law.

(2) *Rule 26(a) (Depositions Pending Action)*. As has already been explained,<sup>36</sup> witnesses in admiralty and maritime cases are highly mobile,

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<sup>35</sup> See Wetherington, *Jurisdictional Bases of Maritime Claims Founded on Acts of Congress*, 18 U. MIAMI L. REV. 163 (1963).

<sup>36</sup> See note 27 *supra*.

and the requirement that leave of court be obtained if the plaintiff wishes to serve notice of the taking of a deposition within 20 days after commencement of the action has caused difficulties in some districts. Hence, the rule provides that in the counterpart of the present suit in admiralty depositions may be taken and used in accordance with the *de bene esse* statutes, which do not require leave of court. It is hoped that the current field study of discovery may provide the basis for a uniform rule in the future. In the meantime, the factual exigencies of maritime litigation appear to justify the differential treatment.

(3) *Rule 38(e) (Jury Trial of Right)*. The most important of the procedural consequences that now turn on the pleader's decision to proceed in a civil action or in a suit in admiralty is the right to jury trial, since there is no such right in admiralty except as it is conferred by statute.<sup>37</sup> It is no part of the purpose of unification to inject jury trial into what are now admiralty cases, any more than it was a purpose of the merger of law and equity to inject that mode of trial into what had been suits in equity. The problem of avoiding that result is sufficiently different in the case of admiralty to require a special technique that was not necessary in the case of equity. Broadly speaking, the modern counterpart of the suit in equity is identifiable by the nature of the relief sought; but, except in the cases that are within the exclusive jurisdiction, the relief sought in a suit in admiralty is typically money damages, or is otherwise indistinguishable from the relief available in nonmaritime cases. Hence, a technique must be provided for distinguishing the case in which jury trial is available as a matter of right from that in which it is not; and the solution is that, just as he does today, the pleader makes the choice. He can no longer make it by deciding to file a suit in admiralty as distinguished from a civil action, since these forms of action are abolished; but he makes it by designating his claim as an admiralty or maritime claim—or not. Here constitutional provisions, history, and an established mode of proceeding that no one is disposed to disturb combine to require differential treatment and a reliable mode of differentiating.

(4) *Rule 73(h) (Appeal to a Court of Appeals)*. Section 1292 (a) (3) of the Judicial Code makes broader provision for interlocutory appeals in admiralty cases than is made for civil cases generally. There is no disposition to disturb this provision, and, indeed, the provision is beyond the reach of the rule-making power, since the statute defines the jurisdiction of the courts of appeals rather than regulates procedure in the district courts. The new provision seeks only to prevent unwarranted change or confusion by identifying the post-unification counterpart of "admiralty cases."

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<sup>37</sup> Perhaps the most significant statute conferring the right to jury trial in admiralty cases is the Great Lakes Act, 28 U.S.C. § 1873 (1964).

(5) *Rule 82 (Jurisdiction and Venue Unaffected)*. The general venue statutes do not apply to admiralty cases, and much of the utility of the maritime remedies would be destroyed if they did. Yet they apply in terms to civil actions, and without some saving provision and some technique for distinguishing the post-unification counterpart of the suit in admiralty an undesired and unintended change in the law would result. Accordingly, Rule 82 is amended to provide that an admiralty or maritime claim within the meaning of Rule 9(h) is not to be treated as a civil action for purposes of the general venue statutes.

The degree to which uniformity has been attained is impressive. The Supplemental Rules do no more than preserve in somewhat modernized form a few distinctive maritime remedies, comparable to the equitable remedies; and of the five provisions for differential treatment in the main body of the rules, no one would press for uniformity as to three: those relating to jury trial, interlocutory appeals, and venue. Only with respect to third-party practice and discovery depositions have different procedures been preserved when uniformity was to be desired; and in these two instances, while there is hope that uniformity may ultimately be achieved, the differences are justified by differences in the substantive law and in the circumstances to which the procedures relate.

On August 13, 1962, the Advisory Committee reported to the Standing Committee "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." In March, 1964, a plan of unification was published for criticism by the bench and bar. The plan has since been revised and refined in the light of constructive criticism. In November, 1964, the Maritime Law Association of the United States, while adhering to its preference for a separate set of admiralty rules, noted seven specific reservations.<sup>38</sup> When these had been carefully considered by the Advisory Committee, and several modifications in response to them had been adopted, the Association in May, 1965 (without abandoning its preference for separate rules) found the plan acceptable. In August, 1965, the plan was approved by the American Bar Association with certain suggestions for improvement of the draft. As this comment goes to press the suggestions are undergoing study.

Much that has already been said bears on the question of the desirability of unification. One may understand and respect the preference of the admiralty bar for a separate set of rules; yet I must say that, given the demonstration of the extent to which uniformity is feasible, unification seems compelled by the logic of history. Clearly, the admiralty practice needs to be modernized and to be stated so that all may know it; just

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<sup>38</sup> MARITIME LAW ASSOCIATION OF THE UNITED STATES, Document 479 (1964); Document 482 (1965).

as clearly, the modern rules that are needed are to be found in the Federal Rules of Civil Procedure. There can be no justification for non-functional procedural differences. Concededly, the necessary modernization might be accomplished without unification, by maintaining a separate set of admiralty rules borrowing heavily from the civil rules. It would even be possible by appropriate provisions to maintain separate rules and still to eliminate the worst aspects of the present practice: dismissal of actions filed on the wrong "side" of the court, or the waste motion of transfers from one docket to another; the inability to join admiralty with non-admiralty claims, or to maintain counterclaims, cross-claims, and third-party claims where jurisdictional bases are different.<sup>39</sup> But when so much can be accomplished it would seem indefensible to stop short of unification. It is not only that two sets of nearly identical rules would be cumbersome, nor even that it would be difficult to preserve their identity. Simplification through unification has been the path of procedural progress since the codes of the mid-nineteenth century; the remarkable success of the Federal Rules of Civil Procedure is such that, when at last we are given the opportunity to extend the principle of simplification through unification to admiralty, the burden should be on the opposition to demonstrate why that should not be done.

The shipping industry does not dominate our economy as it did in the first century of our independence, nor do admiralty cases constitute so important a part of the work of our district courts as they formerly did. Hence, the union of civil and admiralty procedures will not be an event comparable in magnitude with the merger of law and equity, and the impact will not be felt equally in all parts of the country. Nevertheless, an important victory for effective law administration will have been won. Water transportation is still important industrially and recreationally, and the litigation it spawns involves very real human rights. The neglect of the procedure that governs that litigation will have ended. The mystery of that procedure will have been largely dissipated. The wall of separation that too often divides a single district court into two different courts will have crumbled. Admiralty will have been admitted to the New Era of procedure on an equal footing with law and equity.

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<sup>39</sup> See Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959); 5 MOORE, 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).