a passport, and that the protection of that right has become an urgent matter of national policy as well as of civil liberty. If our preaching is to accord with our practice, that right should be curtailed only for good cause and with that regard for fairness embodied in the phrase "due process." Nothing less will achieve the objective envisioned in the Universal Declaration of Human Rights—free travel in a world society.
THE objective of civil procedure is to provide means to enforce legal rights in the fastest and cheapest way consistent with a just determination on the merits. Procedure should minimize guesswork and technicalities, facilitate preparation, and reduce the duration of trial. Most civil litigants in the federal courts operate under a unified procedure designed to meet these objectives. Admiralty litigants must use a separate and traditionally different mode of enforcing rights. Recent proposals for revising admiralty procedure and welding it with law-equity invite critical evaluation of present admiralty practice and the suggested changes.

   Cases and statutes emphasizing the aims of increased speed and reduced expense in adjudication on the merits in civil cases are to be found in 2 Moore, Federal Practice 55-7 (1948).
   The Civil Rules govern all civil actions formerly cognizable at law and in equity coming before the federal district courts, with the exceptions explicitly declared by Rule 81. Fed. R. Civ. P. 1. They are generally applicable in Bankruptcy (General Orders 36 and 37, promulgated January 16, 1939, 305 U.S. 677 (1938)) and in Copyright proceedings (Copyright Rule 1 as amended June 5, 1939). Suits arising under the patent laws, when brought in the federal district courts, are subject to the Civil Rules. See 2 Moore, Federal Practice 19 (1948).
   The Federal Court's admiralty jurisdiction extends to causes arising on all navigable waters over which interstate and foreign commerce passes. See generally Robinson, Admiralty 31-41 (1939).

In 1789, Congress established the District Courts of the United States, 1 Stat. 73 (1789) and granted them original cognizance of all civil cases of admiralty and maritime jurisdiction, 1 Stat. 76 (1789), pursuant to the Constitutional grant of federal power to the judiciary over all cases arising in admiralty. U.S. Const. Art. III, §2. The Constitution is deemed to have given the federal government all the jurisdiction in admiralty and maritime cases previously exercised by the Confederation and by the individual states. United States v. Flores, 289 U.S. 137, 147-8 (1933).

A balancing of state-federal power in the field was achieved, however, by inserting in the First Judiciary Act the "saving to suitors" clause which grants "suitors in all cases, the right of a common law remedy, where the common law is competent to give it," 1 Stat. 77 (1789). The clause has been interpreted to give the suitor seeking a personal judgment on an admiralty cause his choice of a common law forum, either state or federal (provided that independent federal jurisdiction exists), or the district court
ADMIRALTY PROCEDURE

ORIGIN AND BACKGROUND OF ADMIRALTY PRACTICE

Admiralty is a body of international substantive and procedural law descended from ancient Mediterranean law. The earliest maritime regulations were codified by the Romans into an extensive body of principles and practice. Later, merchant towns and maritime nations revised and recodified Roman law. Because amicable and prosperous international trade demands agreement and uniformity of the law governing maritime disputes, Western nations have incorporated into their domestic admiralty law principles and procedures of the Civil Law.

When the United States became a nation, international maritime trade was essential to its existence. Framers of the Constitution believed that successful sitting in admiralty. But the federal admiralty forum is the sole forum competent to give an in rem remedy in an action against a vessel as debtor or offending thing. DeLovio v. Bait, 7 Fed. Cas. 418, No. 3776 (C.C.D. Mass. 1815); Waring v. Clark, 3 How. 440 (U.S. 1847). But cf. Hendry Co. v. Moore, 318 U.S. 133 (1943) upholding the power of a state court to forfeit a maritime res in illegal use.

4. Maritime laws may well antedate the dawn of recorded history. One commentator introduces his account of admiralty jurisdiction with the safe arrival of Noah at Ararat. GODOLPHIN, A VIEW OF THE ADMIRALTY JURISDICTION 7-8 (1661). But recorded admiralty has its origins, perhaps as early as 800-900 B.C. in the sea laws of the Rhodians, an eastern Mediterranean sea-faring people. The Rhodian laws are thought to have provided a just and common guide to the settlement of maritime disputes. Id. at 10. See ASHBURNER, THE RHODIAN SEA LAW (1909); 4 BENEDICT § 655 et seq.

5. See Benedict, The Historical Position of the Rhodian Law, 18 YALE L.J. 223 (1909); ASHBURNER, THE RHODIAN SEA LAW (1909); ROBINSON, ADMIRALTY 2 (1939).

6. Admiralty counts among its classic expositions a number of famous early European Maritime Codes. The basic sea code is to be found in the laws of Oleron. A text of the code may be found in 30 Fed. Cas. 1171. Two other celebrated early sea codes, the laws of Wisby and the laws of the Hanse Towns, together with the laws of Oleron constitute the clay from which modern admiralty has been molded. See 4 BENEDICT, § 660 et seq.; ROBINSON, ADMIRALTY 3-4 (1939); COXE, ADMIRALTY LAW, 8 COL. L. REV. 172, 177 (1908).

7. See COXE, ADMIRALTY LAW, 8 COL. L. REV. 172, 176-7 (1908); BRADLEY, J. in The Lottowanna, 21 Wall. 558, 572 (U.S. 1874).

8. The Civil Law has persisted because the earliest commercial nations of the world, whose laws have been incorporated by contemporary maritime nations (see The Magnolia, 61 U.S. 296, 303-4 (1857)), were under the rule of Roman Civil Law. See 4 BENEDICT § 671; COXE, ADMIRALTY LAW, 8 COL. L. REV. 172, 177 (1908). Admiralty procedure has also retained its civil law characteristics. See ROBINSON, ADMIRALTY 2 (1939). England, otherwise a common law country, adopted the rules of the Civil Law for practice in admiralty. Sir Henry Blounts Case, 1 Alk. 295, 26 Eng. Rep. 189 (1737); 2 BROWN, CIVIL AND ADMIRALTY LAW 348, 349 (1840); 4 BENEDICT § 671.

9. See BASSET, THE FEDERALIST SYSTEM 190 (1906); ADAMS, HISTORY OF THE UNITED STATES 26 (1859-91); DAWES in the Massachusetts Convention, 2 ELLIOT'S DEBATES 57-9 (1836).

Before the Constitution was adopted, admiralty cases were handled by the colonies and then by the original states, ostensibly according to the English concepts of jurisdiction and maritime remedies. See 4 BENEDICT §§ 702-25; PUTNAM, HOW THE FEDERAL COURTS WERE GIVEN ADMIRALTY JURISDICTION, 10 CORN. L.Q. 460 (1925). Further exposti-
American participation in international trade required uniformity of doctrine and procedure in admiralty law. Accordingly, the Constitution vested in the Federal Government power—subsequently interpreted to be exclusive—over admiralty matters. And Congress soon established a system of federal courts to hear admiralty suits. To achieve conformity with admiralty courts of other nations, Congress instructed the courts to proceed according to the International Civil Law as it had been developed and modified by the English Admiralty Courts and the Colonial Vice-admiralty Courts.

Since the initial acceptance of the Civil Law, admiralty law has gone through a process of Americanization. In the same way that the substantive maritime law has evolved into a body of domestic law suited to our indigenous maritime and commercial needs, procedure has been transformed by Congress and

1. See, e.g., United States v. Flores, 289 U.S. 137, 148-9 (1933). The act provided that "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." 1 Stat. 93 (1789).

2. See, e.g., United States v. Flores, 289 U.S. 137, 148-9 (1933). The act provided that "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." 1 Stat. 93 (1789).
the courts from an awkward mime of anglo-admiralty practice to a procedure
more suited to the administration of justice in our own Federal Court system.17
Congress has provided for a mode of proof unlike that of the Civil Law;18
it has changed the scope of appellate review;19 it has empowered the admiralty
court to grant injunctions;20 it has provided a jury trial in admiralty;21 and
it has set up limitation of liability proceedings which have no analogue in the
Civil Law practice of 1789.22 Moreover, within two years of its original

Ship Mortgage Act of 1921, 41 Stat. 1000 (1921), 46 U.S.C. § 885 (1946), Morse Drydock
& Repair Co. v. Northern Star, 271 U.S. 552 (1926); Merchant Marine Act of 1920,
making the Federal Employer's Liability Act applicable to seamen, 41 Stat. 1007
other statutes see U.S.C. titles 46 and 33.

See also Jansson v. Swedish American Line, 185 F.2d 212, 217 (1st Cir. 1950) (an-
alysis of incorporation of common law principles into American admiralty law).

17. Although the Constitution extends judicial power of the federal government to
all cases of admiralty and maritime jurisdiction, the Constitutional provision has t2en
regarded by the Supreme Court, as well as by Congress, as a grant of legislative power.
Definitive judicial acquiescence may be found in Detroit Trust Co. v. The Thomas
Barlum, 293 U.S. 21 (1934); Panama R.R. Co. v. Johnson, 264 U.S. 375 (1924).
For more extended comment consult ROBINSON, ADMIRALTY 8-9 (1939). That Congress
has power to change the mode of proceeding in courts of Admiralty, see The Gennesee
Chief, 12 How. 443, 459-60 (U.S. 1851).

For additional analysis of Congress' power to alter the mode of proceeding in
admiralty, see 4 Moore, FEDERAL PRACTICE 66-7 (1951) and cases there cited.

And see 5 Stat. 518 (1842) which authorized the Supreme Court to regulate the
whole practice in Admiralty, Law and Equity "so as to prevent delays, and to promote
brevity and succinctness in all pleadings and proceedings therein and to abolish all unnec-
 essary costs and expenses in any suit therein."

Adoption of the course of trial prescribed by the Civil Law without modification
or exception was embarrassing and frustrating to the courts. See 4 BENEIDICT §727.

18. Under English Civil Law all the evidence in admiralty was by deposition. The
First Judiciary Act provided that evidence should be given orally in open court. 1 Stat.
89 (1789). The power to take evidence by deposition was returned to admiralty by
the Supreme Court General Admiralty Rules of 1844. 3 BENEDICT §381.

19. For a historical review of the appeals in admiralty see pp. 217-19 infra.

20. 46 U.S.C. §185 (1946); General Admiralty Rule 51; Hartford Accident &

An injunction may issue in preferred ship mortgage foreclosure, 3 BENEDICT § 516,
and in limitation of liability proceedings, Schoenamsgruber v. Hamburg, 294 U.S. 454
(1935); 3 BENEDICT § 516.

trial in admiralty, see 5 Moore, FEDERAL PRACTICE 274-8 (1951). There is no con-
estitutional right to a jury trial in admiralty. See 5 Moore, FEDERAL PRACTICE 66-7
(1951).

22. 9 Stat. 635 (1851) was the first Federal statute to set up limitation of liability
proceedings in this country. For subsequent legislation see 3 BENEDICT §§474-544. At
present procedure is governed by General Admiralty Rules 51-5. Limitation of liability
proceedings provided a system by which owners of vessels are enabled to limit their
liability to the value of their interest in the vessel and freight, plus, in some instances
a forfeitary sum. See 3 BENEDICT § 474; Hartford Accident & Indemnity Co. v. South-
mandate for civil law procedure, Congress gave the Supreme Court rule-making power in admiralty and authorized it to amend and modify the usages of the Civil Law. Under this power, the Supreme Court has substantially modified the original admiralty practice.

CRITIQUE OF PRESENT ADMIRALTY PRACTICE

Admiralty procedure today is governed by statutes and by three sets of rules—the Supreme Court General Admiralty Rules, written rules of practice.

23. 1 Stat. 275, 276 § 2 (1792). The statute provided that the forms and modes of proceedings in suits in admiralty and maritime jurisdiction should be according to the "principles, rules and usages which belong to courts of... Admiralty as contrasted with courts of common law;... subject however to such alterations and additions as said [District] courts 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."

24. Rev. Stat. § 917 (1875) based on 5 Stat. 518 (1842), directed the Supreme Court to prescribe from time to time "in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of proceedings to obtain relief, of drawing up, entering and enrolling decrees, and of proceedings before trustees appointed by the court, and generally to regulate the whole practice to be used in suits in equity or admiralty by the Circuit and District Courts."

25. Pursuant to the Act of 1842, the Supreme Court promulgated a system of General Admiralty Rules in 1844 and again in 1921. Both sets of rules were substantial revisions of the preexisting practice. 4 BENEDICT § 732. From time to time revision has been made of the General Admiralty Rules of 1921, notably with the addition, beginning in 1939, of some of the Federal Rules of Civil Procedure. Effective September 1, 1939, the Supreme Court added seven of the Civil Rules to Admiralty (307 U.S. 653 (1939) as follows: Civil Rule 33, Interrogatories to Parties, became General Admiralty Rule 31; Civil Rule 34, Discovery and Production of Documents, became Admiralty Rule 32; Civil Rule 35, Physical and Mental Examination of Persons, became General Admiralty Rule 32A; Civil Rule 36, Admission of Facts and Genuineness of Documents, became General Admiralty Rule 32B; Civil Rule 37, Refusal to make Discovery; Consequences, became General Admiralty Rule 32C; two rules, one on scope of examination and cross-examination, and the second on the record of excluded evidence, General Admiralty Rules 46A and 46B, were taken from Civil Rule 43(b) and the last sentence of Civil Rule 43(c). By order of May 4, 1942, Civil Rule 16 on pre-trial procedure and formulation of issues was added as General Admiralty Rule 44½. 316 U.S. 716 (1942).


Statutes which govern admiralty proceedings can be found in U.S.C. titles 46 and 33.
formulated by each district court,27 and "settled admiralty practice"—case law reiteration of Civil Law procedures.28 Although many procedures available under these rules accord with modern procedural theory,29 judges have levelled criticism at three areas: deposition and discovery provisions, docket-clearing devices, and appeal procedure.30

Depositions and Interrogatories

The de bene esse statutes govern the taking and use at trial of depositions in admiralty.31 Under these statutes the deposition of a witness may be taken or

27. 28 U.S.C. § 2071 provides that courts may prescribe rules for the conduct of their business so long as the rules are consistent with Acts of Congress and Supreme Court rules. Many of the district courts have promulgated some rules for admiralty cases. Local admiralty rules of the district courts and the Courts of Appeals are collected in 5 BENEDICT. The rules of the local courts are widely variant in number and kind. Compare Local Rules of Southern District of New York, 5 BENEDICT 70-84, Supp. 6-7 (6th ed. Whitman, 1951) with Local Rules for District of Maine, 5 BENEDICT 28-30 and with the District of Massachusetts, 5 BENEDICT 31-2, Supp. 6 (6th ed. Whitman, 1951). In the Southern District of New York the local rules cover much of the practice while in Massachusetts, which has few local rules, a great percentage of the practice is governed by case law.

A parallel table comparing Civil Rules with admiralty procedure, in 2 BENEDICT § 222a, indicates that roughly one sixth of admiralty practice is governed by local court rules.

28. "Settled admiralty practice" is a term which refers to practice decisions under the Civil Law tradition which American admiralty courts have been following since 1789. The label is used in BENEDICT passim to describe the practice for which there is no governing written rule. Some of the procedures which are determined by "settled admiralty practice" include procedures for obtaining personal service, service and filing of papers, when and in what form motions for additional pleadings should be made, how to plead affirmative defenses and special matters, and the practice with regard to capacity and joinder. Consult 2 BENEDICT § 222a for parallel table of Federal Civil Rules and General Admiralty Rules and practice, indicating that about one half of admiralty's procedures, though similar to the Federal Civil Rules, are not in rule form. Since local court rules provide for some of the practice, the statement needs modification.

The standard work on American admiralty practice is BENEDICT, ADMIRALTY (6th ed., Knauth, 1940) (herein cited as BENEDICT). Accounts of the practice of earlier years can be found in BETTS, SUMMARY OF ADMIRALTY PRACTICE IN THE ADMIRALTY COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (1838); DUNLAP, A TREATISE ON THE PRACTICE OF ADMIRALTY (2d ed., New York, 1850).

29. Many admiralty procedures are identical with Civil Rules procedures. See 2 BENEDICT § 222a; note 25 supra; notes 98, 100 supra. That Civil Rules accord with modern procedural theory, see 2 MOORE FEDERAL PRACTICE 456-7 (1948); Clark, The Proper Function of the Supreme Court's Federal Rules Committee, 23 A.B.A.J. 521 (1943); Cummings, Modernizing Federal Procedure, 24 A.B.A.J. 625, 626 (1938).

30. See, e.g., Mercado v. United States, 184 F.2d 24, 29 (2d Cir. 1950); United States v. Kirkpatrick, 186 F.2d 393, 397 (3d Cir. 1951); Petterson Lighterage & T. Co. v. New York Central R. Co., 126 F.2d 592, 596 (2d Cir. 1942).

31. 28 U.S.C. note preceding § 1781 (Supp. 1948). The de bene esse statutes are the former 28 U.S.C. §§ 639-41. When the Judicial Code (28 U.S.C.) was enacted into
admitted in evidence (1) when the witness lives more than 100 miles from the place of trial; or (2) is bound on a voyage to sea; or (3) is about to go out of the United States; or (4) is about to go out of the district in which the case is to be tried to a greater distance than 100 miles from the place of trial; or (5) when the witness is ancient or infirm.

Restrictions imposed by the statutes on the use of a witness' deposition at trial might occasionally cause a party to lose the witness' testimony. If, for instance, the witness refused to respond to a subpoena or avoided service, his deposition would be inadmissible under the statutes. If the witness is in jail within 100 miles of the place of trial, he might not be able to testify nor could his deposition be used.

In addition to restriction on use of depositions at trial, their availability as a device for pre-trial disclosure is unsettled. The District Court for the Southern District of New York, in 1948, the de bene esse statutes were neither carried forward nor listed in the schedule of laws repealed. Act of June 25, 1948, c. 646, § 39, 62 STAT. 992, 993 (1948).


But Admiralty Rule 46 of the District Court for the Southern District of New York, 5 Benedict, Supp 7, provides that the taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure, subject, however, to restrictions on use at trial which substantially reiterate the de bene esse statutes.

32. In order to use the witness' deposition the party must show that one of the five conditions prevails. 28 U.S.C. note preceding § 1781 (1948); former 28 U.S.C. § 641. This means that a party may take the witness' deposition for use at trial, and still be unable to use it. See, e.g., Mercado v. United States, 184 F. 2d 24 (2d Cir. 1950) where the deposition of the witness was lawfully taken, but could not be used because the witness was, at the time of trial, within 100 miles of the place of trial. Other situations in which the deposition of a witness might lawfully be taken under the de bene esse statutes, but not available for use at trial would be where the witness had gone to sea prior to trial but returned to the district during the trial; or where the witness was available for trial and attended under subpoena of the adverse party. The statutes follow the policy of Admiralty Rule 46, which seeks to ensure testimony in open court.

33. This is true if he lived within one hundred miles of the place of trial. No reported case is found in which this situation arose. But if it did occur, a party would either be unable to take the deposition or he would have to bear the expense and delay of relocating the witness. See 4 Moore, Federal Practice 1194 (1948) for a discussion of the problem.


But see Admiralty Rule 46 of the Southern District of New York, 5 Benedict, Supp. 7 providing that the deposition of a witness might be used at trial were he in jail within 100 miles of the place of trial. In Republic of France v. Belships Co. supra, the court conceded that there might be some conflict between this rule and the de bene esse statutes.

ern District of New York by local rule has made available for admiralty the total deposition and discovery provisions of the Federal Civil Rules. And several other courts have permitted examination of the adverse party (but not witnesses) on any relevant matter. But the scope of inquiry by deposition has

36. Local Admiralty Rule 46 for the District Court of the Southern District of New York, 5 Benedict, Supp. 7. Dispute over the validity of the rule has already arisen. In Republic of France v. Belships Co., 91 F. Supp. 912 (S.D.N.Y. 1950) the rule was attacked on the ground that it contravened General Admiralty Rule 46, which provides that testimony of witnesses is to be taken orally in open court except where a statute provides otherwise or where the parties have agreed to the contrary. The court held that General Admiralty Rule 46 regulated the manner in which trial is to be conducted, and not matters preliminary to trial.

Although the court disposed of the conflict with General Admiralty Rule 46, there remains the question of possible conflict between the local rule and the de bene esse statutes. Under Local Rule 46 the deposition of any party or witness may be taken. See 5 Benedict, Supp. 7. The de bene esse statutes, on the other hand, provide that the deposition of a witness may be taken in the situations therein enumerated. See pp. 269-10 supra. The de bene esse statutes can be regarded as defining the situation, exclusive of all others, in which a deposition might be taken. Before the Federal Rules of Civil Procedure superseded them, the de bene esse statutes were so regarded. See 4 Moore, Federal Practice 1007 (1948). Furthermore, the Supreme Court, in adding Civil Rules 33-7 to the General Admiralty Rules failed to add the basic deposition and discovery rule (Fed. R. Civ. P. 26) in admiralty, presumably because it was in doubt as to its authority to prescribe these rules. At the time the Civil Rules were added in Admiralty, the Supreme Court did not have the power to make rules of practice in admiralty which would contravene any law of the United States. Rev. Stat. § 917 (1875). The basis of the Court's doubt must have been that the de bene esse statutes contradicted Rule 26. Cf. Clark, J., in Mercado v. United States, 184 F.2d 24, 27, 28 (2d Cir. 1950).

In support of the Southern District's local rule it can be argued that the de bene esse statutes were intended to provide a means by which a witness' testimony, which might otherwise be lost, could be preserved for use at trial. The Federal Civil Rules, so the argument runs, prescribed disclosure procedures intended to elicit facts, and are therefore complementary, not contradictory to, the provisions of the de bene esse statutes.

As yet neither argument has been raised. In Republic of France v. Belships Co. supra, the Southern District upheld the rule on another ground, but asserted by way of dicta, that the local rule did not conflict with the statutes. Libellant petitioned the Court of Appeals for a writ of mandamus, Belships Co. v. Republic of France, 184 F.2d 119 (2d Cir. 1950), The Court of Appeals, in refusing to grant the mandamus petition, decided nothing about the validity of the Local Rule. Since there is no appeal from an order denying a motion to vacate notice of oral examination, see Dowling v. Isthmian S.S. Co., 184 F.2d 758 (3d Cir. 1950), it appears that the only way to test the validity of the local rule is for the witness to refuse to answer and risk citation for contempt. See Belships Co. v. Republic of France, supra.


Courts grant the right to take the adverse party's deposition upon oral examination for disclosure on two rationales: (1) an implied right to take the deposition for the purpose of disclosure is found in General Admiralty Rule 32C; (2) historic admiralty practice permits oral examination for the purpose of disclosure.

Courts invoke the "implied right" theory most frequently. In 1939, the Supreme Court incorporated Civil Rules 33-7 into admiralty. Civil Rule 37, General Admiralty
traditionally been limited in admiralty to matters in support of the pleader’s claim or defense. Since no applicable rule permits a party to use an oral deposition to inquire into all matters relevant to the subject matter of the suit, some courts have refused to sanction oral examination of parties or witnesses for the purpose of pre-trial disclosure.

The permissible scope of interrogatories is also uncertain. General Admiralty Rule 31, authorizing the use of interrogatories to elicit information from parties, fails to define the scope of inquiry. Individual admiralty judges must therefore determine the extent to which written interrogatories may be used for disclosure. The settled admiralty rule has been that inquiry by interro-

Rule 32C, provides that where a party or other deponent refuses to answer any question propounded upon oral examination, on reasonable notice, the party seeking the deposition may apply to the court for an order compelling an answer. Reasoning that the General Admiralty Rule 32C would not enforce a right which did not exist, courts hold that the right to take a deposition on oral examination from the adverse party for purposes of disclosure must pertain in admiralty. See, e.g., Brown v. Isthmian S.S. Corp., 79 F. Supp. 701 (E.D.Pa. 1948); Ballantrae, 1949 A.M.C. 1999 (D.C.N.J. 1949).

In Dowling v. Isthmian S.S. Co., 184 F.2d 758 (3d Cir. 1950) however, the court proceeds on the rationale that oral examination is a part of admiralty’s historic practice. Benedict disagrees. 3 Benedict § 386. So did the court in Mulligan v. United States, 87 F. Supp. 79, 80 (S.D.N.Y. 1949).

38. Benedict says that an admiralty deposition may be taken only for the purpose of obtaining evidence. 3 Benedict § 386.

39. Fed. R. Civ. P. 26(b) which gives to civil litigants this wide latitude in inquiry is neither enacted in admiralty, Mercado v. United States, 184 F.2d 24, 28 (2d Cir. 1950), nor applicable therein, Fed. R. Civ. P. 81(a)(1).

40. See, e.g., Edmund Fanning, 88 F. Supp. 895, 896 (S.D.N.Y. 1949); Gulf Oil Corp. v. Alcoa S.S. Co., 1949 A.M.C. 1965 (S.D.N.Y. 1949). The rationale for denying pre-trial oral examination of the adverse party for disclosure is three-fold: (1) Civil Rule 26 which does authorize oral examination of the adverse party for disclosure is not applicable in admiralty; (2) historically admiralty’s practice does not authorize it. Mulligan v. United States, 87 F. Supp. 79 (S.D.N.Y. 1949). Contra: Dowling v. Isthmian S.S. Co., 184 F.2d 758 (3d Cir. 1950); (3) General Admiralty Rule 32C, under which a party may be compelled to answer questions, and which appears to authorize oral examination, can be explained as referring only to General Admiralty Rule 32A relating to mental and physical examination of a party, or to General Admiralty Rule 32 providing for inspection of documents and things.

Although decisions from the Southern District of New York preceding the promulgation of Local Rule, see note 31 supra, must in effect be overruled by the local rule, presumably the arguments for refusing pre-trial disclosure by oral examination of the adverse party would carry weight in other district courts. See Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1143 (1951). Speck states that interrogatories are the primary method of inquiry in admiralty in part because of the doubtful legal status of depositions.

41. General Admiralty Rule 31 is identical with Civil Rule 33 as originally promulgated.

42. Civil Rule 33 was amended in 1946 and an additional paragraph added making the scope of the interrogatory identical with that of the deposition under Civil Rule 26(b) (any matter not privileged which is relevant to the subject matter involved in the action pending). But the identical admiralty rule was not amended.
tery, as by deposition, is permissible only for ascertaining facts supporting the case or defense of the interrogating party.43 While some judges adhere to traditional admiralty practice,44 others permit interrogatories to include inquiry into any matter, not privileged, which is relevant to the subject matter of the suit.45

Although the trend is toward liberalization of pre-trial disclosure in admiralty, present deposition and interrogatory rules foster uncertainty and inequality. In the absence of express rules outlining all available discovery devices and the exact scope of inquiry in interrogatories, parties may be compelled in any one case to go through unnecessary litigation to establish procedural rights.46 Not only are many admiralty litigants equipped with fewer fact-finding weapons than are civil litigants, but they also have fewer disclosure devices than admiralty litigants in other federal districts.47

43. The two traditional purposes served by interrogatories to parties have been (1) to procure evidence in support of the libel or defense of the interrogating party, and (2) to amplify the pleadings. This means that the scope of interrogatories has been confined to support of the allegations in the pleadings. The J.L. Jr., 64 F. Supp. 185 (E.D.N.Y. 1945); 3 BENEDICT § 384.

44. E.g., The Prospect, 58 F. Supp. 498 (W.D.N.Y. 1944). The rationale used by courts that refuse to extend the scope of the interrogatory beyond the allegations in the pleadings is intricate. The scope of interrogatories under Civil Rule 33 as promulgated originally was actually governed by Civil Rule 26(b). If the Supreme Court had intended that Civil Rule 26(b) be applied in admiralty it would have promulgated the rule explicitly. Conners Marine Co. v. Peter F. Connolly Co., 35 F. Supp. 775, 777 (S.D.N.Y. 1940). It has not done so; nor has it promulgated the amendment to Civil Rule 33 which expressly states that the scope of depositions under Civil Rule 26(b) is to govern the scope of interrogatories. Cf. Citro Chemical Co. v. Bank Line Ltd., 1 F.R.D. 638, 640 (S.D.N.Y. 1941).


From 1940 to 1946 these courts proceeded on the theory that Civil Rule 33 and General Admiralty Rule 31 were identical and therefore entitled to the same construction. The Ionnis P. Goulandaris, 1946 A.M.C. 303 (S.D.N.Y. 1946); Lentz v. Sudden & Christenson, 1945 A.M.C. 1159 (E.D.Pa. 1945) (“adverse party” must be given same meaning under Admiralty Rule 31 as under Civil Rule 33). Civil Rule 33 was amended in 1946, but courts continue to use the “identity” rationale. The Creek, 8 F.R.D. 117 (S.D.N.Y. 1947). One court seems to have applied Civil Rule 33 as amended in admiralty. Galperins v. United States, 1949 A.M.C. 1907 (oral) (E.D.N.Y. 1949) (libellant ordered to submit to oral examination although he had previously answered interrogatories). But see Kempt v. Isthmic S.S. Lines, 10 F.R.D. 399 (S.D.N.Y. 1950) where the court refused to allow a party to serve interrogatories, after taking the deposition of a party, without leave of court on the ground that General Admiralty Rule 31 had not been amended as had Civil Rule 33.

46. And this can mean not only a motion proceeding in the trial court but a mandamus proceeding before the Court of Appeals. E.g., Belships Co. v. Republic of France, 184 F.2d 119 (2d Cir. 1950).

47. The deposition and discovery procedures of the Federal Civil Rules are available to some admiralty litigants but not to others. Not only may litigants in the Southern District of New York utilize the Civil Rules, see note 31 supra, but Civil Rules also apply to admiralty causes in the District Court for the Western District of Washington, Local
Crowded dockets, the bane of civil litigation in the district courts, also plague admiralty. However, in cases where facts are not in dispute, parties on the civil side of the court may get a summary judgment. Admiralty provides no such procedure. All admiralty cases must wait their place on the trial docket. As a result, admiralty parties whose claims involve no factual dispute suffer needless delay.

To clear admiralty dockets, district judges have resorted to appointing commissioners, over the objections of the parties, to hear pending admiralty cases. But reference to commissioners merely to relieve docket congestion works a manifest injustice to the parties. The losing party is put to the additional expense of the commissioner's fee; both parties are charged with the cost of transcribing a record for review by the trial court. To the detriment

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49. See United States v. Kirkpatrick, 186 F.2d 393, 395 (3d Cir. 1951). The court stated that a large number of admiralty cases were awaiting trial, many having been pending a year and some as many as three years. See also John Morgan-Montana, 1949 A.M.C. 469, 485 (S.D.N.Y. 1949) and Report of the Attorney General in Report of the Judicial Conference of the United States 27, 34, 35 (1950) (hereinafter cited as Report of the Attorney General).


52. See United States v. Kirkpatrick, 186 F.2d 393, 395 (3d Cir. 1951).

53. The court in United States v. Kirkpatrick, 186 F.2d 393, 395 (3d Cir. 1951) indicated that the District Court had formulated a plan for the trial of admiralty cases by commissioners, in order to relieve the court's congested docket. There is precedent for this practice. The P.R.R. No. 35, 48 F.2d 122 (2d Cir.), cert denied sub nom., Pennsylvania R. Co. v. Shamrock Towing Co., 284 U.S. 636 (1931).

54. Adventures in Good Eating v. Best Places to Eat, 131 F.2d 809, 815 (7th Cir. 1942): "It is a matter of common knowledge that references [to commissioners] greatly increases the cost of litigation. . . . For nearly a century, litigants and members of the bar have been crying against this avoidable burden of costs. . . ." See also Report of the Attorney General at 34.

55. Ibid. That the admiralty court has power, over objection of the parties based on the exorbitant cost, to authorize employment of a stenographer to take and transcribe testimony before a commissioner, and to tax stenographer's fees as costs, see Rogers v. Brown, 136 Fed. 813 (S.D.N.Y. 1905).
of parties whose claims are assigned to commissioners, other litigants gain an advanced place on the trial docket.\textsuperscript{56}

The extent of present power to refer admiralty cases to commissioners is in doubt. At one time, admiralty fully sanctioned the device of assigning cases to commissioners for advisory reports in order to clear dockets.\textsuperscript{57} The power of the court did not depend upon the consent of the parties.\textsuperscript{58} Advisory reports were, however, abolished by General Admiralty Rule 43\textsuperscript{3/4}, which provided that the trial judge could modify or reject the commissioner's findings only when error existed.\textsuperscript{59} But neither General Admiralty Rule 43\textsuperscript{3/4} nor any other General Admiralty Rule outlaws compulsory reference to commissioners for the purpose of clearing dockets.\textsuperscript{60} On the contrary, General Admiralty Rule 43 authorizes courts to refer "any matter" to commissioners when it is "expedient or necessary for the purposes of justice."\textsuperscript{61} A broad reading of "expedient" in Rule 43, coupled with the limited change effected by Rule 43,\textsuperscript{62} seems to allow courts power to refer admiralty

\textsuperscript{56} See United States v. Kirkpatrick, 186 F.2d 393, 397 (3d Cir. 1951). The court also pointed out that a general reference to commissioners denied litigants the right to have their cases tried by judges commissioned under the Constitution to try them, and in effect relegated the admiralty case so referred to trial by commissioner's court.


\textsuperscript{58} P.R.R. No. 35, 48 F.2d 122 (2d Cir. 1931); Sorenson & Co. v. Liverpool, Brazil & River Plate Steam Nav. Co., 47 F.2d 332 (S.D.N.Y. 1930) and cases there cited.

\textsuperscript{59} Promulgated May 31, 1932, 286 U.S. 572 (1932) effective September 1, 1932.

\textsuperscript{60} While General Admiralty Rule 46 calls for the testimony of witnesses to be taken in open court in all trials in admiralty, the rule contains the proviso, "except as otherwise provided by statute." Since the General Admiralty Rules have the force of statutes, The P.R.R. No. 35, 48 F.2d 122, 123 (2d Cir. 1931), Admiralty Rule 43 authorizing referral of cases to commissioners must come within the proviso. It has been so held. \textit{Ibid}.

\textsuperscript{61} General Admiralty Rule 43 provides that "[I]n cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or two commissioners or assessors, to be appointed by the court, to hear the parties and make a report therein."

\textsuperscript{62} When the Supreme Court wiped out advisory reports, General Admiralty Rule 43\textsuperscript{3/4}, it might have restricted reference to commissioners to exceptional cases. Compare Civil Rule 53(b). Instead it left intact Admiralty Rule 43 which authorizes reference where expedient or necessary. See note 61 supra for the text of Rule 43. The Admiralty Rule was likewise untouched in 1937 when the Supreme Court restricted reference of cases to Commissioners or Masters in civil litigation. \textit{Fed. R. Civ. P. 53(b)}. 
cases to a commissioner for findings and conclusions in order to clear dockets. The Third Circuit held that an admiralty judge does not have power to make general compulsory reference of cases to commissioners. But while the result of this decision is desirable, the court’s reasoning is unconvincing, and other circuits may well refuse to follow it. The court based its decision on the theory that General Admiralty Rule 43 has the same effect as Civil Rule 53(b). But Civil Rule 53(b) limits its referrals by requiring a specific showing of exceptional circumstances, while the Admiralty Rule authorizes reference whenever expedient or necessary for the purposes of justice. In finding that the rules had the same effect, the court relied on a Supreme Court decision holding that reference to a commissioner should be the exception and not the rule. Although the Court of Appeals felt that this holding applied to admiralty as well as civil litigation, the decision of the Supreme Court not only failed to mention admiralty but expressly relied on Civil Rule 53(b). The Court of Appeals ignored the word “expedient” in Admiralty Rule 43. Since “exceptional circumstance” cannot be equated with

63. See, e.g., The P.R.R. No. 35, 48 F.2d 122, 123 (2d Cir.), cert. denied sub nom., Pennsylvania R.R. Co. v. Shamrock Towing Co., 284 U.S. 636 (1931). In the R.R. case the trial court, pursuant to a plan to reduce serious docket congestion, referred all issues in an admiralty case to a commissioner for an advisory report. The Court of Appeals held that General Admiralty Rule 43 had the effect of a statute which authorized an exception to the requirement of oral proof in open court. (Admiralty Rule 46, note 60 supra.) The court further held that Rule 43 permitted a general compulsory reference of cases to commissioners for the purpose of clearing dockets. General Admiralty Rule 43½, promulgated a year later, wiped out advisory reports. But because Rule 43½ only affects the weight to be given to the Commissioner’s findings, it did not invalidate the P.R.R. holding that Rule 43 provides a basis for compulsory reference to Commissioners as a docket-clearing device.

But see Local Rule 25 of the District Court for the Eastern District of Washington providing that so far as applicable, proceedings under General Admiralty Rules 43 and 43½ on reference or assessors shall be governed by provisions of FED. R. Civ. P. 53. 5 BENEDICT Supp. 37.

64. United States v. Kirkpatrick, 186 F.2d 393 (3d Cir. 1951).

65. Id. at 398.

66. Federal Rule 53(b) provides that “reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it.” McCullough v. Cosgrave, 309 U.S. 634 (1940). The Supreme Court’s decision was brief and the proposition for which it was cited in United States v. Kirkpatrick, 186 F.2d 393, 398 (3d Cir. 1951) is derived from the Supreme Court’s rejection of the district court’s order of referral. See id. at 398-9 for the basis on which the judge ordered reference to a commissioner.

68. Id. at 398.


70. The Third Circuit, in United States v. Kirkpatrick, 186 F.2d 393 (3d Cir. 1951), recognized that the language of the two rules differed. In attempting to equate their effect, the court looked only to the “purposes of justice” language in Admiralty Rule 43. That phrase, the court asserted, did not include clearing dockets, but related only to “justice” in one particular admiralty suit. United States v. Kirkpatrick, supra, at 398. In all
“expedient,” and since a Supreme Court rule had limited references in civil cases but not admiralty cases, a reasonable conclusion is that the two rules do not have the same effect.

Appeals in Admiralty

With tireless repetition, courts label an admiralty appeal a trial de novo.\(^7\) While technically trial de novo would require complete retrial in the appellate court,\(^7\) its application in admiralty is more restricted. Historically, admiralty’s trial de novo includes (1) review and alteration of findings of fact of the court below;\(^7\) (2) admission of new evidence on appeal;\(^7\) (3) modification on appeal of the award of damages to a party who has not appealed.\(^7\)

Review of facts and new evidence. Appellate court power to review facts and take new evidence in admiralty cases has had a checkered history. The First Judiciary Act prescribed review by the Supreme Court by writ of error which allowed the court to re-examine questions of law but not of fact.\(^7\) The other situations an exceptional circumstance had to be shown. \textit{Ibid.} Authority for the exceptional circumstance rule was \textit{McCullough v. Cosgrave}, 309 U.S. 634 (1940). But the \textit{McCullough} case was based on \textit{Civil Rule 53(b)}. Moreover, the court’s analysis in the \textit{Kirkpatrick} case ignores the language of Admiralty Rule 43. The phrase “purposes of justice” modifies “necessary,” but not “expedient.” See note 61 supra for the text of Rule 43. A reasonable reading of the rule would permit reference in one of two circumstances: (1) where expedient or (2) where necessary for the purposes of justice. Thus, while the exceptional circumstance rule may be applicable to the second alternative under the Admiralty Rule, it is not applicable to cases where reference is for expediency. Clearing dockets is manifestly expedient where dockets are crowded. P.R.R. No. 35, 48 F.2d 122 (2d Cir. 1931) so held.

71. See, \textit{e.g.}, United States v. Cia. Luz Stearica, 185 F.2d 594 (9th Cir. 1951); Sims v. United States, 186 F.2d 972 (3d Cir. 1951); Lamb v. Interstate S.S. Co., 149 F.2d 914 (6th Cir. 1945); Wilbanks & Pierce v. Hendry, 150 F.2d 214 (5th Cir. 1945); Marguerite W.--Florence J., 140 F.2d 491 (7th Cir. 1944). See generally on the trial de novo 4 \textit{BENEDICT} § 571.

72. Spano v. Western Fruit Growers, Inc., 83 F.2d 150, 152 (10th Cir. 1936): “‘Trial de novo’ is generally held to mean a trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.” See also \textit{Petterson Lighterage & T. Corp. v. New York Central R. Co.}, 126 F.2d 992, 992 (2d Cir. 1943): “[a]ll that has gone before has gone for nothing.”

73. United States v. Cia. Luz Stearica, 185 F.2d 594 (9th Cir. 1951).

74. The Maret, 145 F.2d 431 (3d Cir. 1944).


76. 1 \textit{STAT.} 83-5 (1789). In \textit{Wiscart v. D'Auchy}, 3 Dall. 320 (U.S. 1796) and Jennings v. The Brig Perseverance, 3 Dall. 335 (1797) the Supreme Court construed §§21 and 22 of the Judiciary Act to give writ of error review in admiralty.

A writ of error is a process of common law origin removing nothing but the law for re-examination, while an appeal is a process of civil law origin which removes the case entirely, and subjects fact as well as law to review and retrial. \textit{See}, Wilson, J. in \textit{Wiscart v. D'Auchy}, 3 Dall. 320, 327 (U.S. 1796).
Supreme Court promptly criticized the Act on the ground that maritime affairs were important enough to warrant a decision by the highest court of the land on facts as well as the law of any maritime controversy. Accordingly, in 1803 Congress gave admiralty its trial de novo appeal when it authorized the Supreme Court to review facts as well as law, and to take new evidence on appeal. But the Court soon discovered that taking new evidence and factual review imposed an impossible burden. The Supreme Court adopted a rule which drastically reduced any possibility of a decision on questions of fact on appeal. And by 1878 Congress had provided that the findings of fact in admiralty cases made by the Circuit Courts were conclusive upon the Supreme Court.

When the appellate power in admiralty causes was redistributed between the Supreme Court and the Circuit Courts of Appeals, Congress failed to define the scope of review in the Circuit Courts of Appeals. Munson S.S. Line v. Miramar S.S. Co. replanted trial de novo in the Circuit Courts of Appeals. Although the court utilized the doctrine only to allow a party an additional award in a case in which the party had not appealed from the decree.

Under Acts of the Continental Congress and of the Congress of the Confederation, appeal was had in the Federal Court. Many of the State courts also had recognized review of the facts in an admiralty appeal. See Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 102 (1923). Another rationale was available to the court to justify expansion of review in admiralty: restricting appellate review to questions of law was designed to preserve jury verdicts. Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 102 (1923). Since admiralty did not have juries or jury verdicts, the reason for restricting review did not exist. Warren, supra, at 102.

2 Stat. 244 (1803) provided that "no new evidence shall be received in said [Supreme] court on the hearing of such appeal except in admiralty and prize causes." And see United States v. Schooner Betsy, 4 Cranch, 443, 444 (U.S. 1808) where on appeal from a decree of the Circuit Court in admiralty "the United States appealed to this court, where witnesses were examined viva voce, both on the part of the United States and on that of the claimant." See, e.g., The Samuel, 1 Wheat. 9, 19 (U.S. 1816); The George, 2 Wheat. 278 (U.S. 1817).


10. In The Ship Marcellus, 1 Black 414 (U.S. 1861) the Court announced that in admiralty appeals, where both District and Circuit Courts have concurred on a question of fact the Court would not reverse such finding except on clear proof of error.


83. Prior to the redistribution of appellate power between the Supreme Court and the Circuit Courts of Appeals, review in admiralty cases by the Circuit Courts was by appeal. The Saratoga, 1 Woods 75, Fed. Cas. No. 12,356 (C.C.D. La. 1870). See the Lucille, 19 Wall. 73 (U.S. 1873).

84. 167 Fed. 960 (2d. Cir. 1909).
below, the language of the opinion clearly included within the meaning of trial de novo the power to take new evidence and to review facts.

In admiralty practice today, only remnants of trial de novo review of facts and taking new evidence remain. Most Courts of Appeals will modify or reject an admiralty judge's findings of fact only if they are clearly erroneous.

True, courts will occasionally alter the trial court's findings when the evidence

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85. Ibid. On appeal by respondent, the appellate court found that libellant had not been awarded as much damages below as he was entitled to receive. But because he failed to appeal, the court affirmed the decree of the district court awarding the lesser amount. On appellee's motion for rehearing, however, the court altered the decree to award him the greater damages on the ground that an admiralty appeal was a trial de novo and hence opened up the decree as to all parties whether they had appealed or not.

86. The court held that the Circuit Court of Appeals stood in relation to the District Courts exactly as the Supreme Court had stood in relation to the Circuit Courts before the Act of 1875 (18 Stat. 315) (restricting review by the Supreme Court to review of law alone in admiralty cases.) Prior to the Act of 1875, the Supreme Court had power to review both facts and law and to take new evidence on appeal under 2 Stat. 244 (1863).

87. See, e.g., Marguerite W.—Florence J., 140 F.2d 491 (7th Cir. 1944) (Court of Appeals in admiralty case not required to accept findings below, though not disposed to ignore them.) Compare Temple Bar, 137 F.2d 293, 295 (4th Cir. 1943) (trial judge's findings approved "without reference to the rule that in an admiralty case the findings of fact of the trial court should not be reversed unless they are clearly wrong."), with Smith-Douglass Co. v. Syosset, 164 F.2d 224 (4th Cir. 1947) (despite well known rule against disturbing the findings, Court of Appeals in admiralty has clear responsibility in regard to questions of fact; held: findings clearly erroneous).

88. See, e.g., Roberts v. United States, 186 F.2d 1005 (2d Cir. 1951) (decree affirmed since not clearly erroneous, though Court of Appeals might reach a different conclusion); Stokes v. United States, 144 F.2d 82 (2d Cir. 1944) (where almost all evidence by deposition; held: court's inference clearly erroneous); National Motorship Co. v. Pennsylvania R. Co., 160 F.2d 510 (2d Cir. 1947) (findings stand as final when trial judge saw all witnesses). But cf. Pocone, 159 F.2d 661 (2d Cir. 1947) (finding of negligence not a finding of fact and can be reviewed).

The Second Circuit has said that admiralty review is identical to review in civil non-jury cases under Fed. R. Civ. P. 52(a) which provides that in actions tried without a jury findings of fact made by the trial court shall not be set aside unless clearly erroneous. Petterson Lighterage & Towing Corp. v. New York Central R.R. Co., 126 F.2d 992 (2d Cir. 1942). And see City of New York v. National Bulk Carriers, 1943 A.M.C. 1352, 1354 (2d Cir. 1943) (If appeals are persistently taken without chance of success except by oversetting findings of fact upon disputed evidence, the court may invoke the 10% penalty provided by [Local] Rule 28(2).)

Most Courts of Appeals that review admiralty cases have followed the Court of Appeals for the Second Circuit. See Cappin v. United States, 185 F.2d 754 (D.C. Cir. 1951); Gibbons v. United States, 186 F.2d 488 (1st Cir. 1951); Chilbar-McCauley, 152 F.2d 258 (4th Cir. 1945); Stetson v. United States, 155 F.2d 359 (9th Cir. 1946).

And the Supreme Court, although it has reviewed facts on certiorari, Lagnes v. Green, 282 U.S. 531 (1931) (facts reviewed and decree altered); United States Southern Pacific Co. v. Hagland, Admx., 277 U.S. 304 (1928) (facts reviewed but decree affirmed), most recently refused to disturb concurrent findings of the District Court and Court of Appeals. Coryell v. Phipps, 317 U.S. 406, 411 (1943).
below was taken in whole or in part by deposition. But this practice is merely another application of the clear error rule which gives superior weight to the findings of the trial court only where they are based largely upon the credibility of witnesses. Moreover, courts rarely take, and parties rarely ask for new evidence on appeal. More often, where new evidence is necessary, the cause is remanded to the trial court. Despite the infrequent use of these two facets of the doctrine, however, Courts of Appeals continue to label the admiralty appeal a “trial de novo.”

Modification of the award. Courts’ refusal to reject the trial de novo doctrine may be attributable to the fact that it can be used to assist the party who has failed to file a cross-appeal. Under the cross-appeals rule in civil cases,

89. West Kyska, 155 F.2d 687 (5th Cir. 1946) (Court of Appeals can make its own determination of facts when all the evidence is by deposition); accord, Crist, Adm. v. United States, 163 F.2d 145 (3d Cir. 1947); United States v. Cia Luz Stearica, 186 F.2d 594 (9th Cir. 1951).

And see also Matson Nav. Co. v. Pope & Talbot, Inc., 149 F.2d 295 (9th Cir. 1945) (where the evidence is partly by deposition a modification of findings is dependent on discretion of appellate court.); accord, Tawada, Ad’m. v. United States, 162 F.2d 615 (9th Cir. 1947).

Cf. Severance, 152 F.2d 916 (4th Cir. 1946) (findings not entitled to same weight when proctors for the prevailing party make findings at trial judge’s request and trial judge adopts them).

90. Only two cases in the last twenty years report a Court of Appeals directing that evidence be taken in the appellate court. George H. Ingalls, 47 F.2d 1017 (7th Cir. 1931), The Maret, 145 F.2d 431 (3d Cir. 1944). In the latter case, the Court of Appeals appointed a commissioner with provision that the commissioner might, in his discretion, grant parties leave to make new allegations, pray for different relief, or interpose new defenses in respect to the issues not decided below. It is the usual practice to put evidence in on appeal by deposition which the court then integrates with the record. See 4 BENEDICT § 575.

In only seven cases in the last 20 years is a party reported to have requested introduction of new evidence on appeal. See K. Papazoglou v. Virginia, 184 F.2d 716 (4th Cir. 1951); Portland T. & B. Co. v. Megler, 146 F.2d 262 (9th Cir. 1944); Lukfish v. Missetch, 140 F.2d 812 (9th Cir.), cert. denied, 332 U.S. 761 (1944); San Diego, 105 F.2d 387 (9th Cir. 1939); Andrea F. Luchenbach, 78 F.2d 827 (9th Cir. 1935); Santa Ana, 57 F.2d 1021 (5th Cir. 1932); George H. Ingalls, 47 F.2d 1017 (7th Cir. 1931).

91. See, e.g., Savannah v. Allanke, 157 F.2d 796 (5th Cir. 1946); The Rebecca, 152 F.2d 607 (4th Cir. 1946); Boston Insurance Co. v. City of New York, 130 F.2d 157 (2d Cir. 1942); The Inerton, 141 F.2d 931 (5th Cir. 1944).

92. For this use of trial de novo see The Spokane, 294 Fed. 242 (2d Cir. 1923); Munson S.S. Line v. Miramar S.S. Co., 167 Fed. 960 (2d Cir. 1909).

The cross-appeal problem is well illustrated by M'Donough v. Dannery, 3 Dall. 418, 198 (U.S. 1796). In a libel for salvage, libellants were awarded a third of the proceeds of the sale of the ship. On writ of error by claimants, the Supreme Court expressed the opinion that libellants ought to have been awarded a larger proportion of the proceeds, but stated that "as they have not appealed from the decision of the inferior court, we cannot now take notice of their interest in the case."

For an excellent note on the cross-appeals rule and resultant confusion, see Note, 51 HARV. L. REV. 1058 (1938). See also 3 MOORE, FEDERAL PRACTICE 3576-7 (1938).
the appellee who does not file a cross-appeal can obtain no more relief on an appeal by the adverse party than was allowed to him below. The trial \textit{de novo} doctrine, sometimes applied in admiralty to this class of case, opens up the whole decree to attack by all parties on the appeal of any one party. The appellate court can increase the damages of appellee while in civil cases it cannot.

The intertwining of the three functions of the trial \textit{de novo} theory in admiralty produces an uncertainty out of proportion to the cases in which it is helpful. If the trial \textit{de novo} were limited in effect to the cross-appeals problem, it would be a desirable addition to admiralty procedure.

However, it has not been limited. Under the carte blanche of trial \textit{de novo} some courts continue to review the trial court’s findings of fact and to take new evidence on appeal. But the litigant who counts on introducing new evidence on appeal, or getting a modification of the award in his favor, or who expects the appellate court to set aside the findings of fact, may be disappointed. On the other hand, the litigant who does not anticipate review of facts, or the taking of new evidence on appeal may find himself unable to take advantage of the court’s disposition to increase his damages. As a result, every party needs to file an assignment of errors on appeal by any one party. Even a litigant who has no desire to contest the decree and only dubious grounds on which to do so will always file an assignment.

93. United States v. American Railway Express Co., 265 U.S. 425, 435 (1924) stated the rule thus: “a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.”

94. See Munson S.S. Line v. Miramar S.S. Co., 167 Fed. 960 (2d Cir. 1909). In T. M. Duche & Sons Ltd. v. The John Twohy, 255 U.S. 77 (1921) the Supreme Court held it error for the Circuit Court of Appeals to allow appellant to withdraw an appeal where appellee, who had not appealed, wished a review of the decree below. See also Reid v. Fargo, 241 U.S. 544 (1916); Consolidation Coastwise Co. v. Conley, 250 Fed. 679 (1st Cir. 1918) (awarding full instead of half damages to party not appealing).


95. The Spokane, 294 Fed. 242 (2d Cir.) (decree for personal injuries increased from $3,000 to $15,000), \textit{cort. den.}, 264 U.S. 583 (1924); Consolidation Coastwise Co. v. Conley, 250 Fed. 679 (1st Cir. 1918) (full damages awarded instead of half damages). For the civil rule see, \textit{c.g.}, The Gulftrade, 278 U.S. 85 (1928); Stratton v. Jarvis, 5 Pet. 4 (U.S. 1834); The Slavers, 2 Wall. 333 (U.S. 1864).

96. See 4 \textit{Benedict} \S 573, 564. The assignment of errors does not technically constitute an appeal. But on appeal of an adverse party, filing of assignments of error will be treated as a cross-appeal. See, \textit{c.g.}, Portaritisa, 131 F.2d 363 (5th Cir. 1943); The Sandmaster, 105 F.2d 1009 (2d Cir. 1939).
PROPOSALS FOR REVISION

Courts have engaged in piecemeal revision of admiralty procedure. Although the Civil Rules are expressly inapplicable, many have found their way into admiralty by the back door of judicial decision, sporadic addition to the General Admiralty Rules, and incorporation into local court rules. Further change is needed to give admiralty litigants the benefits of recent advances in civil procedure. Uniform application and full utilization of liberal disclosure machinery will facilitate preparation for trial. Summary judgment procedure will help accelerate the flow of litigation. Limitation of referrals to commissioners will reduce expense. Forthright solution of the cross-appeals problem, with resultant clarification of the trial de novo doctrine will reduce uncertainty. And written rules of procedure will avoid unnecessary litigation now fostered by the unwritten or uncodified rules in admiralty.

97. FED. R. CIV. P. 81(a)(1).
98. E.g., United States v. Cia. Luz Stearica, 181 F.2d 695 (9th Cir. 1950) (policy of Civil Rule 6(a) applied: where last day of time to appeal from a decree fell on Sunday, notice of appeal filed on the day after was held to be timely); Menefee v. W.R. Chamberlin Co., 183 F.2d 720 (9th Cir. 1950) (issue not raised by pleadings, but litigated by express or implied consent, treated as though it had been raised by pleadings, as provided by Civil Rule 15(b)); Fyfe v. Pan Atlantic S.S. Corp., 114 F.2d 72 (2d Cir. 1940) (when missing facts were proved at trial and a cause of action made out, pleadings could be amended to conform to proof as in Civil Rule 15(b)); The Roslyn, 93 F.2d 278 (2d Cir. 1937) (no reversible error in denying motion to dismiss on the pleadings because negligence proved but not alleged; applying principle of Civil Rule 15(b)); Untersinger v. United States, 172 F.2d 298 (2d Cir. 1949) (Civil Rule 12(b) applied by analogy to allow joinder of objection to venue with a plea on the merits.); Boston Insurance Co. v. City of New York, 130 F.2d 156 (2d Cir. 1942) (applying by analogy Civil Rule 9(a): respondent must do more than deny information if he wishes to raise issue of libellants incorporation.)

See also 2 BENEDICT § 222a showing admiralty rules and practice which correspond to Federal Civil Rules.

99. For Civil Rules promulgated into the General Admiralty Rules by the Supreme Court see note 25 supra.

100. The following Courts of Appeals and District Courts have made Civil Rules applicable in admiralty: First Circuit: Rule 11 provides that Civil Rules 73-6 shall govern appeals in admiralty except as appeals procedure in admiralty is governed by 28 U.S.C. § 2107 (time for appeal in admiralty) and Rule 14 of General Rules of the Court of Appeals for the First Circuit (record on appeal in admiralty). 5 BENEDICT Supp. 4. Second Circuit: Rule XV provides that preparation of the record on appeal shall be governed by Civil Rules 74-6 except where otherwise provided by specific rule. 5 BENEDICT § 38; District Court for the Southern District of New York: Rule 46 provides that the taking and use of depositions of parties and witnesses shall be governed by the Federal Rules of Civil Procedure. 5 BENEDICT Supp. 7. Third Circuit: Civil Rules 73(a) second paragraph, 73(b)-73(g) shall govern time for taking appeals, docketing and filing the record, bonds for costs on appeal and supersedeas bonds, 5 BENEDICT §100; 5 BENEDICT Supp. 8, 9. Fourth Circuit: Civil Rules 75(a), (e), (h), (f), (j), (k), (l), (m), (n) applicable to appeals in admiralty. 5 BENEDICT Supp 10. Sixth Circuit: District Court for the Northern District of Ohio: Rule 38 provides that...
Three patterns for over-all reform of admiralty have been suggested. The Supreme Court might make the Civil Rules "generally" applicable in admiralty to the extent that they do not conflict with the General Admiralty Rules. The Court might amend and expand the present General Admiralty Rules, creating what would in effect be a Federal Rules of Admiralty Procedure. Or the Court might revise the Federal Rules of Civil Procedure to apply to admiralty, the revision to include any desirable or essential admiralty procedure not now covered by the Federal Civil Rules.

**General Application**

The Attorney General has submitted to the Court a single rule to be added to the existing Supreme Court General Admiralty Rules. The new rule would provide that "in proceedings in Admiralty the Rules of Civil Procedure for the district courts of the United States shall, so far as they are not inconsistent with these rules, be followed as nearly as may be." Where the General Admiralty Rules prescribe a procedure, they would continue to control. The Civil Rules would govern remaining procedure. The admiralty practice decisions, in the Attorney General's opinion, would be eliminated.

Promulgation of a single rule making the Civil Rules "generally" applicable has several advantages. Delay attendant on a complete revision of the General

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1. See, Mercado v. United States, 184 F.2d 24, (2d Cir. 1950). See also Taft, Three Needed Steps of Progress, 8 A.B.A.J. 34, 35 (1922); Report of the Standing Committee on Admiralty and Maritime Law, 66 A.B.A. Rep. 418, 419 (1941): "Every consideration of harmonious and modern procedure urges that the admiralty rules should be brought into harmony with the new Civil Rules."; Professor Moore agrees. 5 Moore, Federal Practice 67-70 (1951).


Admiralty Rules would be avoided.\textsuperscript{104} Salutary procedures of the Civil Rules for which no provision is now made in the General Admiralty Rules would be immediately available in the admiralty courts.\textsuperscript{105} Present gaps in the Admiralty Rules with regard to service of process, pleadings, capacity and joinder would be filled uniformly by the explicit and detailed Civil Rules provisions.\textsuperscript{106}

But the Attorney General's amendment may defeat the very reform it attempts. The proposed amendment will preserve out-of-date General Admiralty Rules. For example, of the eight Civil Rules transplanted into admiralty, four have subsequently been amended.\textsuperscript{107} In admiralty the rules read as originally promulgated.\textsuperscript{108} Conflict in decisions currently exists; some courts apply the amended, and some the unamended Civil Rules in admiralty. But under the Attorney General's suggestion, the unamended Civil Rules, having the status of General Admiralty Rules, would prevail over the amended.\textsuperscript{109} If courts currently applying the amended Civil Rules rather than the General Admiralty version continue to ignore the General Admiralty Rules, present conflict in admiralty practice will continue. If the Attorney General's rule wipes out application of the amended Civil Rules, it would be a step backwards.

Furthermore, in retaining General Admiralty rules, the Attorney General's proposal may well preserve admiralty's unwritten practice. Admiralty Rule 45 allowing the taking of new evidence on appeal stands.\textsuperscript{110} New evidence

\textsuperscript{104} The integration of law and equity practice into the Federal Rules of Civil Procedure was accomplished over a four year period. In 1934 the Rule Making Act gave the Supreme Court power to unite law and equity and to prescribe all practice and procedure in civil actions. The effective date of the Federal Rules of Civil Procedure was September 16, 1938. See 2 Moore, Federal Practice 6-9 (1948).

\textsuperscript{105} Summary judgment procedure, Fed. R. Civ. P. 56, liberal discovery machinery, Fed. R. Civ. P. 26-32 and Fed. R. Civ. P. 33-7 as amended, and possibly limitation on reference of cases to commissioners, Fed. R. Civ. P. 53(b) would be immediately operative in admiralty. However, the rule limiting reference to commissioners may be held to conflict with Admiralty Rule 43, see discussion pp. 215-17 supra, and if so would be unavailable in admiralty.

\textsuperscript{106} For a chart showing the particular elements of the Civil Rules which would fill gaps in admiralty process, pleading, capacity and joinder rules now governed in admiralty by practice decisions see 2 Benedict § 222a.


\textsuperscript{109} This seems unavoidable since the Attorney General's amendment provides that the General Admiralty Rules are to prevail over conflicting Civil Rules. Report of the Attorney General at 36.

\textsuperscript{110} See Petterson Lighterage & T. Corp. v. New York Central R. Co., 126 F.2d 992, 996 (2d Cir. 1942): "[A]s soon as new evidence is taken the old findings are necessarily superseded; findings are not findings when they rest upon only a part of the evidence...."
and resultant new findings of fact may require alteration of the trial court's award.\textsuperscript{111} In some cases the new evidence may compel the court to change the award in favor of appellee. Thus, although the General Admiralty Rules do not mention trial \textit{de novo}, all its elements are implicit in the Admiralty Rule allowing new evidence. As a colorable admiralty rule, trial \textit{de novo} may well stand under the Attorney General’s proposal since no Civil Rule expressly overrides it.

Finally, the piecemeal reform contemplated by the Attorney General will burden judge and litigant alike. Any piecemeal reform creates rather than dispels confusion.\textsuperscript{112} The task of giving content to the proposed rule will fall on the district judge who must determine applicability of the Civil Rules. The new procedure will emerge on a case to case basis or in the form of local rules. The local rules channel offers slight opportunity for creating a more uniform admiralty procedure.\textsuperscript{113} Case to case evolution offers even less likelihood of uniformity.\textsuperscript{114} Until the practice becomes settled, litigants cannot be certain of their procedural rights. Added difficulty may result from the hostility of the admiralty bar to any extension of the Civil Rules in admiralty.\textsuperscript{115} This antago-

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\item \textsuperscript{111} E.g., George H. Ingalls, 47 F.2d 1017 (7th Cir. 1931).
\item \textsuperscript{112} “Experience seems to show, however, that compromise measures of procedural reform are a mistake, that the slight gain is not worth the cost of confusion entailed, and that the more adequate reform is actually delayed by the half-way steps.” Clark, \textit{Dissatisfaction with Piecemeal Reform}, 24 J. Am. Jud. Soc’y 121 (1940).
\item \textsuperscript{113} The Attorney General appears to consider this course the most probable. His amendment provides: “Each district court, by action of a majority of the judges thereof, may from time to time make and amend rules governing its practice in admiralty proceedings not inconsistent with these [General Admiralty] rules or with the Rules of Civil Procedure. Copies of rules and amendments so made by any district court shall, upon their promulgation, be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.” \textit{Report of the Attorney General}, at 35.
\item \textsuperscript{114} But disparity in admiralty practice in the district courts today is largely the result of the varying local rules. See 2 BEMEND\textsuperscript{222-b}.\textsuperscript{116}
\item \textsuperscript{115} See Moore, \textit{The Supreme Court: 1940, 1941 Terms—The Supreme Court and Judicial Administration}, 23 Va. L. Rev. 861, 862 (1942).
\item \textsuperscript{116} Originally, the Standing Committee on Admiralty and Maritime Law of the American Bar Association, in conjunction with the Maritime Law Association, took steps to formulate a bill extending the rule-making power of the Supreme Court in admiralty to make reform of the General Admiralty rules possible, \textit{Report of the Standing Committee on Admiralty and Maritime Law}, 66 A.B.A. Rep. 219,220,397,412 (1941), and approved reform in the direction of the Civil Rules. \textit{Id.} at 418. However, with the formulation of the draft bill, enthusiasm waned, 67 A.B.A. Rep. 103, 123, 184 (1942); 70 A.B.A. Rep. 111, 214 (1945) and after a total of five years’ consideration, the Committee reported that the Maritime Law Association was unanimously opposed to the extension of the rule-making power, and therewith recommended that the Bar Association disapprove the bill, 71 A.B.A. Rep. 187,188,189 (1946). Informal echoes of this elaborate hedging can be found in the documents of the Maritime Law Association: “It might be well for our Association to drop a suggestion in a proper way that no need is seen for a revision of all the rules . . . especially as from what I have heard the present Civil Rules with some changes might be adopted as the admiralty rules. It might be
nism coupled with uncertainty as to where and how the Civil Rules are to apply, may well produce excessive litigation on procedural points.

**Federal Rules of Admiralty Procedure**

Complete revision and integration of all admiralty practice into a body of rules would have many advantages over the Attorney General's single additional rule. It would permit careful amendment of the present General Admiralty Rules. Conflicts could be anticipated and resolved. An integrated and codified body of rules would enhance certainty. District Judges would be relieved of the burden of formulating the procedure and substantial uniformity of the practice throughout the districts would result.

Although complete revision and integration of admiralty procedure would be a large step forward, creation of Federal Rules of Admiralty is an unnecessary and possibly harmful half-way measure. To be adequate, the revision would, with the exception of several unique admiralty procedures, virtually easier to stop such a revamping before the machinery gets started." Report of the Committee on the Revision of the Limitation of Liability Provisions of the United States Admiralty Rules. **MARITIME LAW ASS'N DOCUMENT No.** 331 at 3306 (1949). See also **MARITIME LAW ASS'N DOCUMENT No.** 272 at 2818 (1942): "It was regularly moved and seconded to be the sense of the meeting that the Rules of Civil Procedure should not be extended to admiralty practice any further than they have been already.... The original motion was then ... carried, with only one vote in opposition." Reason for disapproval is not clear.

Judge Charles E. Clark has suggested that the explanation might lie in the fact that "admiralty lawyers were opposed to one or two special rules of civil procedure, which they consider inimical to their best practice, and hence they took this method of opposing all change as perhaps the lesser evil." Clark, *The Proper Function of the Supreme Court's Federal Rules Committee*, 28 A.B.A.J. 521, 525 (1942).

116. Some of these procedures would be (1) the process to obtain in rem jurisdiction, (2) the limitation of liability proceedings, and (3) certain features of admiralty's impleader rule.

Admiralty's procedures to obtain in rem jurisdiction are unique in the Federal Courts since admiralty alone can give the in rem remedy. But cf. Hendry Co. v. Moore, 318 U.S. 133 (1943).

The limitation of liability proceedings, General Admiralty Rules 51-5, are utilized solely in admiralty. Cf. Mercado v. United States, 184 F.2d 24, 28 (2d Cir. 1950).

Impleader, under General Admiralty Rule 56, is an absolute right where the petition is presented before or at the time of answering the libel. Under Civil Rule 14, the right of a defendant to implead a third party defendant rests in the sound discretion of the court. Gen'l Taxicab Ass'n v. O'Shea, 109 F.2d 671 (D.C. Cir. 1940). Admiralty treats an impleaded party as an original party to the action, General Admiralty Rule 56, where the Civil Rules do not. Fed. R. Civ. P. 14, Civil Rule 14 permits a defendant to implead a third party only on the ground that the third party is liable to the defendant; Admiralty Rule 56 permits the impleading of a new party not only when the impleaded respondent is liable to the original respondent, but also when the impleaded respondent is directly liable to the libellant, either jointly or alternately with the original respondent. See Cory Bros. & Co. v. United States, 51 F.2d 1010, 1013 (2d Cir. 1931). Since there is an absolute right of impleader, and the impleaded respondent must be treated as an original party, the libellant is compelled to assert against the new party any claims he may have
duplicate the Civil Rules. Separate statements of Admiralty and Civil Rules would then serve only to reinforce the presently separate admiralty and law-equity jurisdictions. Creation of separate Federal Rules of Admiralty Procedure would aggravate present resistance to the much needed unification.

Revision of the Civil Rules

The third method of reform in admiralty is to do away with a separate body of Admiralty Rules and revise the Civil Rules to govern directly in admiralty. The Civil Rules would have to be expanded to include desirable or necessary admiralty procedures.

This mode of reform has at least two major advantages. First, an amended unified procedure would make equally available to all litigants in the federal courts advanced procedures of the Civil Rules. And helpful provisions of the Admiralty Rules on initiating in rem suits, presently available only in admiralty, could be used in civil proceedings. Second, unification of the civil and admiralty practice under the Civil Rules would effect the welding of

against him. But under the Civil Rules, while the plaintiff is entitled to assert certain claims against the impleaded party, he need not do so. See 3 Moore, Federal Practice, 441 (1948).

There have been proposals that the practice under Admiralty Rule 56 be adopted into Civil practice, Hammond, Some Changes in the Preliminary Draft, 23 A.B.A.J. 629, 631 (1937), but they were not adopted. For a comparative study of Civil Rule 14 and General Admiralty Rule 56, see 3 Moore, Federal Practice 444-56 (1948).

117. For the many similarities in the Federal Civil Rules and the General Admiralty Rules, consult the parallel table in 2 Benedict § 222a. In addition, the settled admiralty practice, the case law reiteration of Civil Law usage, with regard to obtaining personal service, serving and filing papers, when and in what form motions for additional pleadings should be made, how to plead an affirmative defense, how to plead special matters, and practice as to Joinder and capacity are all substantially like the practice under the Federal Civil Rules. See Benedict § 222a. See also note 95 supra for admiralty cases in which Federal Civil Rules have been applied in principle. For Civil Rules in effect in admiralty by local rule see note 100 supra.

"A comparison of General Admiralty Rules which have been growing by slow accretion for nearly a century, and the Rules of Civil Procedure for the District Courts of the United States . . . reveals that the two sets of Rules cover much the same ground in different language." 2 Benedict § 222a.

118. Psychological forces hindered the union of law and equity. 2 Moore, Federal Practice 305 (1948).

119. Actions for the forfeiture of goods must now be initiated on the admiralty side of the court. Coffey v. United States, 117 U.S. 233 (1886). Since the forfeiture action is a civil in rem action, Personal Property v. United States, 233 U.S. 577, 581 (1911), the action in the trial court is transferred from admiralty and proceeds under the Civil Rules once jurisdiction over the thing has been obtained. See 5 Moore, Federal Practice 135-9 (1951). And appeals procedure is governed by Civil Rules. Fed. R. Civ. P. 81(a)(2). With merger of law-equity and admiralty, admiralty actions and forfeiture actions could be initiated and proceed under a single set of rules without necessity of transfer.