Admiralty Practice After Unification:

Barnacles on the Procedural Hull

In 1966 the Federal Rules of Civil Procedure were amended to include actions brought under the admiralty and maritime jurisdiction, and the separate body of Admiralty Rules was abolished. This event was widely denominated a "unification" of civil and admiralty procedure. It did not, however, result in uniform civil and admiralty practice. The "unified" rules contain several provisions explicitly prescribing distinctive treatment for admiralty and maritime claims. To some extent, then, the two procedures remain separate even though the rules have been physically merged.

But these provisions do not account for all instances of the survival of old admiralty practices. In addition, some courts have adhered to pre-unification admiralty procedural doctrines that are not explicitly preserved by the rules. It is the purpose of this Note to investigate some examples of this survival in order to determine whether the continuation of prior practices is consistent with the intent of the unified civil rules.


2. The Advisory Committee on Admiralty Rules used the word "unification" in its August 1965 letter of transmittal to describe the effect of the proposed amendments: "We now recommend the adoption of certain amendments to the Federal Rules of Civil Procedure necessary to effectuate a plan of unification . . . ." 7A Moore's Federal Practice § .112 at 155. The word "unification" has been universally adopted by commentators as indicating the intended result of the 1966 amendments. See, e.g., 7A Moore's Federal Practice § .01[1] and C. Wright & A. Miller, Federal Practice and Procedure § 1014 (1969).

3. The Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. A-F, are the primary repository of unique admiralty procedures. They provide for maritime attachment and garnishment; actions in rem; possessory, petition and partition actions; and limitation of liability. In addition, some of the general civil rules make specific provision for separate handling of cases brought under the admiralty jurisdiction. Thus, Rule 14(c) concerns admiralty third-party practice, Rule 38(c) declines to extend a right of jury trial to admiralty cases, and Rule 82 exempt admiralty cases from the venue requirements applicable to other civil actions. At the time of unification Rule 26(a) preserved the admiralty practice of taking early depositions. In 1970, Rule 26(a) was replaced by Rule 30(b), which permits the taking of early depositions in all civil actions. Rule 73(h) provided that admiralty interlocutory appeals, 28 U.S.C. § 1292(a)(3) (1970), were still available. The provision in Rule 73(h) was transferred to Rule 9(h) in 1968.

4. Although no claim is made that the present study is comprehensive, it should be noted that, on the whole, unification has fared remarkably well. A careful survey of the cases since unification has not revealed any major problem areas other than those to be treated in this Note. Major problems are to be expected primarily where traditional admiralty practice differed greatly from civil practice, in such matters as the right to jury trial, jurisdictional requirements, and remedial powers. Any problem areas not covered in this Note would in all likelihood be found to consist of permutations of these same basic elements.
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I. Principles of Rule Construction

Any attempt to decide whether certain practices are compatible with the unified civil and admiralty procedure presupposes canons for construing the rules by which that unification was accomplished. Some principles of rule construction are thus indispensable. In interpreting the Federal Rules of Civil Procedure, the Supreme Court has indicated that courts should examine "the literal language [and] the intended effect of the Rules" in order to discover "the purpose of the draftsmen or the congressional understanding."5 Applying these principles to the 1966 unification yields the major premise of this Note: that, absent specific provision to the contrary, procedure in admiralty suits should be the same as that followed in civil actions generally. This premise may be denominated the "presumption of uniform practice." The support for this presumption is as follows: According to the "literal language" of the rules, there is to be only "one form of action"6 "in all suits of a civil nature, whether formerly cognizable as cases at law or in equity or in admiralty."7 The "intended effect" of such language may be found in a statement of the Advisory Committee on Admiralty Rules:

[T]here is a need for a modern and comprehensive set of rules for practice in admiralty cases. There is also a need to abolish the formal distinction between civil actions and suits in admiralty, and to provide for one form of civil action, just as the distinction between actions at law and suits in equity was abolished in 1938.8

Yet another factor supporting the presumption of uniform practice is the very structure of the unified rules. The fact that in several areas special admiralty procedures are carefully delineated9 supports the conclusion that elsewhere uniform procedures should be employed. Indeed, unless procedures are to be largely the same in all civil actions, a "unification" of rules is an exercise without meaning. Thus the structure of the rules themselves, as well as their express language and the intent of the drafters, supports the presumption of uniform practice.

One method of exploring the strength and scope of this presumption is to consider the factors that will serve to overcome it. There are

7. FED. R. CIV. P. 1.
9. See note 3 supra.
three: the Constitution, the Rules Enabling Act, and Rule 82. Should application of the presumption in a particular case conflict with a constitutional right or duty, a court would be required to ignore the presumption. The presumption is also limited by the terms of the Enabling Act, the statute authorizing the Supreme Court to promulgate rules of procedure for the federal judiciary. It provides in part that "[s]uch rules shall not abridge, enlarge or modify any substantive right." Distinguishing between substantive and procedural rights is frequently difficult, but the Supreme Court has announced a general yardstick for measuring a rule against the terms of the Enabling Act.

The presumption of uniform practice engendered by the rules is thus limited by the requirement that it affect only procedural matters. If its application in an admiralty context would alter substantive rights, the presumption must be disregarded.

The third factor limiting the application of the presumption of uniform practice is the provision of Rule 82 that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." A potential difficulty in interpreting Rule 82 lies in the word "jurisdiction," which can be used in many different senses. Its meaning in this context has, however, been settled by the Supreme Court, which noted that the Advisory Committee has treated Rule 82 as referring to . . . jurisdiction of the subject matter of the district courts as defined by the statutes . . . .

Obvious examples of such statutes are the three major grants of federal jurisdiction: federal question, diversity, and admiralty. To the extent that application of the presumption of uniform practice would alter these or other jurisdictional grants, Rule 82 prohibits its use.

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In the remainder of this Note, the principles of rule interpretation just outlined will be applied to three areas in which some courts, despite unification, have perpetuated former admiralty practices without specific authorization in the rules themselves. These areas are (1) the availability of equitable forms of relief, (2) joinder of claims, and (3) third-party practice. Each situation will be examined to determine whether the presumption of uniform practice applies to it, and, if so, whether constitutional, jurisdictional, or substantive considerations require that the presumption be overridden.17

II. Equitable Remedies

For more than seventy-five years prior to unification it had been regarded as settled that “[w]hile the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity.”18 Sixty years after it made this statement, the Supreme Court explained that its proper interpretation was that an admiralty court “will not enforce an independent equitable claim merely because it pertains to maritime property,”19 and that admiralty would decide an equitable claim only if it were a “subsidiary or derivative issue in a litigation clearly maritime.”20 It is the contention of this section that these maxims no longer limit the remedial power of a federal district court in dealing with admiralty cases, and that unification has made all remedies available to the court in cases properly brought under the admiralty jurisdiction.

At least one commentator speculated that unification would have such an effect.21 The limited case law since unification, however, indi-

17. Factors and considerations other than the three cited must yield to the policy favoring uniform practice. Examples of such factors are: (1) Tradition. Unification represents a conscious choice to overrule history in most procedural matters. (2) Rule ambiguity. The presumption of uniform practice requires that ambiguities be resolved in favor of a single procedure. (3) Contrary policy considerations. Policy choices were consciously resolved by the Advisory Committee in favor of uniformity, and these choices were subsequently ratified by the Supreme Court and Congress. A district court is not free to disregard these choices and depart from uniformity unless specifically authorized to do so by the rules themselves.
20. Id. at 691. The “subsidiary” equitable issue in Swift was whether there had been a fraudulent transfer of a vessel in order to avoid the court’s writ of foreign attachment. See Fed. R. Civ. P. B. The Court in Swift also described other situations qualifying under the “subsidiary issue” test, including equitable claims raised as defenses, and an equitable accounting that is necessary for “the complete adjustment of rights over which admiralty has independent jurisdiction.” 339 U.S. at 692.
21. “Under the plain language of new rules 1 and 18, all of civil procedure, including the right to seek equitable remedies, becomes equally applicable to admiralty and diversity or federal-question jurisdiction . . . .” Colby, Admiralty Unification, 54 Geo. L.J. 1258, 1268 (1966).
cates that old admiralty maxims are not so easily dislodged. One dis-


tinct court questioned the continuing vitality of the maxim, but then
decided the case before it on other grounds. In the only other re-
ported case involving the rule, its validity was apparently not even
called into question before either the district court or the court of
appeals.


22. Defendant also contends that this Court may not grant plaintiff the relief it
seeks [injunction] since an admiralty court has no jurisdiction to issue such an
Proc., however, rendered the continuing effect of this long established doctrine of
admiralty uncertain . . . .

1967).

23. Compania de Navegacione Almirante S.A. Panama v. Certain Proceeds of Cargo,
Bank & Trust Co. v. Compania de Navegacione Almirante S.A. Panama, 437 F.2d 301
(8th Cir. 1971), cert. denied, 402 U.S. 906 (1971).

In this case the owner of a vessel brought suit in admiralty against the vessel charterer
to recover charter hire, and against the charterer's creditor, a bank, to impose a con-
structive trust on funds then in the bank's possession which represented the charter
hire. The bank objected to joinder of the two claims on the ground that there was no
maritime relationship between the vessel owner and the bank, and, therefore, no
admiralty jurisdiction over the equitable claim to a constructive trust.

The district court held that the claim against the bank was "subsidiary" to that
against the charterer, and was thus within the doctrine of the Swift decision, see note
20 supra. The court of appeals disagreed. It held that the claim against the bank was
an entirely separate claim, and was not covered by Swift. But it was held proper for
the district court to decide the independent equitable claim, since it could be properly
joined with the claim against the charterer, for either of two reasons: (1) Diversity
jurisdiction existed over the claim against the bank, though it had not been pleaded;
or (2) The claims, though separate, were closely enough related to justify their joinder
by pendant jurisdiction. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966); Hurn
v. Oursler, 289 U.S. 238 (1933). For another application of the doctrine of pendant
jurisdiction as related to maritime law, see Romero v. International Terminal Oper-


25. See p. 1155 supra.

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...ment pertains to the substantive law involved and the facts of the matter before the court. It is unaffected by unification, since the Federal Rules of Civil Procedure can only alter matters of procedure. But if, as the Court indicates, the rules have made all civil remedies available in all "civil actions," then the Court must have concluded that the availability of remedies in civil actions is a matter of procedure. That being so, the presumption of uniform practice applies. But before concluding that unification has therefore compelled the availability of equitable remedies in admiralty suits, the application of the presumption must be examined to insure that it does not infringe upon constitutional requirements, alter subject matter jurisdiction, or affect substantive rights.

The only apparent constitutional objection to the availability of equitable remedies might be that such remedies are not within the "admiralty and maritime jurisdiction" authorized by Article III of the Constitution. Since, however, Rule 82 forbids interpretations of the rules which would alter the courts' subject matter jurisdiction, one need not reach the constitutional question in order to invalidate a rule interpretation on jurisdictional grounds. Conversely, an interpretation that is unobjectionable under Rule 82 is also necessarily permissible under Article III.

The cases establishing the maxim that equitable remedies are unavailable in admiralty suits appear to rest on this jurisdictional objection. Yet, on closer examination, it becomes clear that it was not the request for equitable remedies which placed those cases beyond the jurisdiction of the court but rather the substantive facts underlying the claims themselves. In essence, these cases denied equitable relief be-

27. Cf. 2 Moore's Federal Practice § 2.02[1], on the effect of the unification of law and equity on the availability of remedies.
28. The exclusively procedural nature of remedy availability is supported by the language of the Supreme Court in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924). The plaintiff in that case sought from a New York state court the specific performance of an arbitration clause in a maritime agreement. In holding that the state court could grant such relief, Justice Brandeis disposed of the contention that specific performance of the clause could not be had in state court because such relief was unavailable from a court of admiralty. It was "merely because that court lacks the power to grant equitable relief" that admiralty would not order specific performance of such an agreement. "The reluctance of the admiralty court to lend full aid goes, however, merely to the remedy. The substantive right created by an agreement to submit disputes to arbitration is recognized as a perfect obligation." Id. at 129 (emphasis added).
29. See p. 1156 supra.
31. One author, writing in 1969, concluded that unification had not altered the equity power doctrine because that doctrine was probably a matter of jurisdiction. Zobel, Admiralty Jurisdiction, Unification and the American Law Institute, 6 San Diego L. Rev. 575, 582-95 (1969). The argument in the text is that the doctrine is not itself jurisdictional, although it frequently appears in the company of other matters which are.
cause they were non-maritime in nature; the court sitting in admiralty did not have jurisdiction to grant any remedy at all—equitable or maritime.

Even *The Eclipse*,\(^{32}\) the Supreme Court case invariably cited for the proposition that admiralty courts do not grant equitable remedies,\(^{33}\) does not indicate that the jurisdictional question goes to the remedy per se. In that case, an owner of half interest in a vessel joined with creditors who were beneficial owners to bring an action to secure possession of the vessel from the owner of the other half interest, who was also master of the vessel. A third party intervened, seeking possession through specific performance of a contract of sale, which, however, had not been signed by the master, although the master had earlier joined in establishing the committee which had negotiated the sale. The Court affirmed possession by the master because (1) the committee had exceeded the scope of its authority in the terms of the sale it arranged, and therefore legal title remained in the master and the other half owner; and (2) a master who is owner of a half interest cannot be removed by the other half owner.

The Court then commented on the claim of the intervenors. If they intended to "enforce an alleged contract of sale,"\(^{34}\) "they should have resorted to a different tribunal."\(^{35}\) Admiralty jurisdiction

depends, in cases of contract, upon the nature of the contract, and is limited to contracts, claims and services purely maritime, and touching rights and duties appertaining to commerce and navigation. . . . There was nothing maritime about the claims of the intervenors, and the intervention was properly dismissed for want of jurisdiction over the subject matter.\(^{36}\)

The objectionable aspect of the intervenors' claim was not that specific performance was sought, but that a contract of sale is not a maritime contract, even when it involves a sea-going vessel.\(^{37}\) And while the Court lists a number of equitable remedies which it suggests cannot be

\(^{32}\) 135 U.S. 599 (1890).


\(^{34}\) Id. at 608.

\(^{35}\) Id.

\(^{36}\) Id.

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granted by an admiralty court, an examination of the cases cited by the Court in each instance reveals that they rested not on a jurisdictional barrier to remedies, but on a determination that the underlying facts, like the contract of sale in the Eclipse, were not maritime in nature. These cases concern such matters as partnership agreements involving vessel operations, ship mortgages, agreements to make a maritime contract, and agency agreements between owners and ship agents. Although suits arising from such relationships often include demands for equitable remedies, admiralty declined to hear them not because of the character of the relief sought, but due to a lack of jurisdiction over the facts underlying the claims. The distinction between

38. Admiralty was said to be unable to "entertain a bill or libel for specific performance, or to correct a mistake... declare or enforce a trust or an equitable title... exercise jurisdiction in matters of account merely... [or] decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagors and direct possession of her to be given to them." 135 U.S. at 608.


The Court cited two other cases, one of which declined to entertain a claim of equitable title because of a substantive rule that the right in question depended on legal title only, The Amelia, 23 F. 406 (C.C.S.D.N.Y. 1877), see p. 1163 infra. The remaining case involved an enormously complicated set of transactions, part of which were non-maritime. The Court ruled that admiralty should not hear the case because the non-maritime elements were so intertwined with the maritime elements, and because the procedures of a court of equity were better suited to sorting out the complications. Grant v. Poillon, 61 U.S. (20 How.) 162 (1857). Cf. the cases discussed in note 43 infra.

43. There are indications in some of the early cases that admiralty procedures were regarded as inadequate satisfactorily to resolve complex matters or to administer unique remedies. See, e.g., Andrews v. Essex Ins. Co., 1 F. Cas. 885, 888 (No. 374) (C.C.D. Mass. 1822).

The authority over this subject [reformation of contract] is generally confided, and most conveniently, to courts of equity. The rules of evidence and the modes of relief in these courts are admirably adapted to cases of this nature.

See also Kellum v. Emerson, 14 F. Cas. 263, 265 (No. 7669) (C.C.D. Mass. 1854):

Though a court of admiralty is not incompetent to take an account, it must certainly be admitted that its modes of proceeding have not been framed with any special reference to doing so, and that complicated accounts between part owners of vessels, and the rights of the parties dependent on them, can hardly be worked out satisfactorily in this jurisdiction.

These procedural weaknesses may have been one reason why certain relationships that spawn complicated lawsuits were excluded from admiralty subject-matter jurisdiction and referred to equity, which had a more sophisticated procedure. If such is the case, there is a certain irony to the present situation. For unification has made equity's sophisticated procedures available under the admiralty jurisdiction, but the cases requiring sophisticated procedures are excluded by jurisdictional rules forged under the premise of inadequate admiralty procedures.

44. A separate question is whether and how admiralty's jurisdictional boundaries might be expanded to include the relationships discussed in the text. Both the Supreme Court and Congress have wrought practical expansions of the admiralty jurisdiction. See, e.g., The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825) (deciding that admiralty jurisdiction extends to navigable inland waterways, not just tidewaters). Cf. Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934) (affirming congressional extension of admiralty jurisdiction to certain ship mortgages). Thus, two avenues of change are
the request for equitable relief and the substantive facts underlying the claim is thus of signal importance, for it frees the granting of equitable remedies in admiralty cases from jurisdictional objection. Where the facts underlying a claim are clearly maritime and within the subject-matter jurisdiction of admiralty, The Eclipse and its progeny raise no bar to the granting of equitable relief. Granting equitable reme-

possible: judicial pronouncement of the newly-discovered content of admiralty jurisdiction and legislation to the same effect which is subsequently sustained by the Court.

The standard of review of congressional extensions of admiralty jurisdiction is of considerable importance in assessing the practicality of the legislative approach to jurisdictional change. That ultimate control is exercised over such legislation by the Court was announced in early cases which suggested that the proper scope of admiralty jurisdiction would be determined by reference to our own legal history and to foreign practice. See, e.g., The St. Lawrence, 66 U.S. (1 Black) 522, 527 (1862); The Lottawanna, 88 U.S. (21 Wall) 558, 575-77 (1875). In a more thorough discussion of the subject, the Detroit Trust case, supra, measured the legislative extension of jurisdiction against "a proper conception of maritime concerns," 293 U.S. at 48, and the "general maritime law" as illuminated by the practice of England and "other European States." Id. at 49. The Court agreed that preferred ship mortgages came within the scope of admiralty jurisdiction, so defined, commenting that the authority of Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned.

An alternate approach is illustrated by United States v. Matson Navigation Co., 201 F.2d 610 (9th Cir. 1953), which upheld the validity of the Admiralty Extension Act of 1948, 46 U.S.C. § 740 (1970). That Act extended admiralty jurisdiction to torts in which a vessel causes damage ashore. The court said that while the "exercise of the admiralty jurisdiction" in this country had not included such torts, they were within a reasonable "concept of maritime affairs" and thus were "within the admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted." Id. at 612.

On either theory, it seems likely that the new perspective provided by unification would render the Court receptive to congressional action bringing the relationships discussed in the text within the admiralty jurisdiction. Congress currently has an uncommon opportunity to do just that. A bill currently before the Senate Judiciary Committee includes several sections redefining the admiralty jurisdiction based on the proposals of the American Law Institute. S. 1876, 92d Cong., 1st Sess., §§ 1316-19 (1971). Cf. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 34-37, 225-54 (1969). The ALI recommendations have been faulted for their timidity, see Zobel, supra note 31, at 395-411. Although the proposed legislation does not rigidly adhere to the ALI recommendations, its approach is that of repairing selected jurisdictional problems on an ad hoc basis. A bolder approach, involving a sweeping redefinition of admiralty jurisdiction, could rationalize an area of law that presently suffers from a surplus of doctrinal patchwork. See, e.g., Black, Admiralty Jurisdiction: Critique and Suggestions, 50 COLUM. L. REV. 239 (1950).

Admittedly, such a reformulation of the jurisdiction would be exceedingly difficult to reduce to statutory language. Nevertheless, one hopes that Congress will make a serious attempt to do so rather than adopting the current approach of S. 1876. No attempt will be made here to prescribe a specific statutory formula, for the question involves considerations far beyond the scope of this Note.

45. It is a fair question whether many situations presently within the admiralty jurisdiction could support claims for equitable relief. Even if jurisdictional considerations were to keep the bulk of potential equitable claims out of admiralty, see note 43 supra, abolishing the maxim might be desirable merely for the sake of greater clarity and consistency in judicial treatment of these matters.

However, situations do exist in which there are no jurisdictional barriers to a request for equitable relief. An example is the issuance of an injunction. Support for the
dies in such situations contravenes neither constitutional nor Rule 82 jurisdictional limitations.

The remaining factor to be considered is whether the availability of equitable remedies in admiralty suits would alter substantive rights. No case has been found which supports the maxim on such grounds. It would plainly be an alteration of substantive rights to grant an equitable remedy where only non-equitable relief such as damages would be appropriate given the facts of the underlying maritime claim. But the mere availability of equitable remedies in admiralty cases, a matter which the Supreme Court has indicated is purely procedural, does not alter substantive rights.

The presumption of uniform practice, therefore, necessitates the conclusion that unification has rendered equitable remedies available in admiralty cases. The contrary maxim, while purporting to rest on jurisdictional limitations, has in fact no such basis and seems to have been a product of imprecise dicta. In light of unification, it must now be discarded.

proposition that admiralty does not issue injunctions is singularly slim. The only authority cited by the Supreme Court in Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935), the case which established the doctrine, is Paterson v. Dakin, 31 F. 682 (S.D. Ala. 1887), which treats the question in a single sentence: "On the hearing of the exceptions in this case I held that the court had no power to grant the injunction prayed for . . . ." Id. at 683. Schoenamsgruber itself held only that since admiralty courts "do not issue injunctions," 294 U.S. at 458, an order of an admiralty court is not appealable as an interlocutory injunction. The reason given for the conclusion that admiralty courts do not issue injunctions is that "they do not have general equitable jurisdiction." Id. at 457. But such remedial jurisdiction has nothing to do with the subject-matter jurisdiction that cannot be altered by rule interpretation.

46. See pp. 1158-29 supra.

47. In Morrison, The Remedial Powers of Admiralty, 43 YALE L.J. 1 (1933), it was concluded that the restrictive rule was entirely a matter of substantive law. The author was primarily concerned to show that the doctrine was not jurisdictional, and did not inquire into the possibility that it might be procedural, rather than substantive.

48. Chief Judge Brown of the 5th Circuit agrees about the effect of unification on the availability of equitable remedies. The melding of the civil with the admiralty does more than obliterate the cherished hoary title of proctor. It invests the Judge with all of the statutory powers, whether their genesis be formerly at law, in equity, or in admiralty. Stern, Hays & Lang, Inc. v. M/V Nili, 407 F.2d 549, 551 (5th Cir. 1969). As a result, in this day and time the disposition will be to let the Chancellor stride the quarterdeck to transport into the Admiralty all of the Court's equity powers. Id.


49. That district courts should discard the maxim on their own is not to say that a clarification from the Supreme Court or Congress would not be in order. The equitable remedies doctrine is of formidable complexity, and possesses such a strong jurisdictional aura that its non-jurisdictional components may be perceived only with difficulty.

Again, there is a legislative opportunity at hand. Short of redefining admiralty jurisdiction so as to include all the conceivably maritime relationships now excluded, see note 44 supra, it would be of real service to have clearly defined the effect of unification.
III. Joinder

In the area of permissive joinder of parties, the intent of the unified rules appears to be clear. Rule 20(a) was amended explicitly to permit the joinder of “any vessel, cargo or other property subject to admiralty process in rem” with real persons as defendants in a single action. Such joinder is permissible if as to all defendants so joined “there [be] asserted against them jointly, severally, or in the alternative, any relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.”

Problems in this connection have arisen where admiralty claims brought in rem against a vessel are joined with claims brought against real persons, where the latter claims have a jurisdictional basis other than admiralty and one that entitles the plaintiff to a jury trial. At least one court has held that the presence of a jury trial demand for the in personam claims bars the joinder of maritime property in rem as the object of the admiralty claims. In what follows it will be argued that: (1) demand for a jury trial of the in personam claims does not bar the joinder of maritime property in rem as a party defendant, and (2) when such joinder is made the jury should resolve the issues in all of the joined claims, including those against the maritime property.

The problem described above has presented itself most frequently in seamen’s personal injury cases. The injured seaman has three rights of recovery. The most ancient is that of maintenance and cure, which is the right to receive from the owner of the vessel compensation for medical care and subsistence during convalescence if the seaman is injured or becomes ill “when subject to the call of duty.” It is not necessary that the injury or illness be work-related. The seaman’s second right is to recover damages against the owner if he is injured because of the unseaworthiness of the vessel. Neither un-
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seaworthiness nor maintenance and cure claims require a showing of negligence on the part of the vessel owner; recovery is available regardless of fault.\(^5\) The third cause of action for personal injury arises under the Jones Act,\(^5\) \(^6\) which incorporates the Federal Employers' Liability Act\(^5\) by reference, and provides for recovery against the employer upon a showing of negligence. The seaman has the option of bringing suit under the Jones Act either “in admiralty,” in which case trial is to the court; or “at law,” with a right to trial by jury.\(^5\)

The first two causes of action, maintenance and cure and unseaworthiness, as with most maritime causes of action, may be maintained at law under the “saving clause”\(^5\) in state court or, upon a showing of diversity of citizenship in federal court.\(^5\) The attraction of suing “at law” is, of course, the availability of a jury trial.\(^5\) Alternatively, these actions may be brought under the admiralty jurisdiction either in personam, against the owner of the vessel, or in rem, against the vessel itself. In neither case is a jury trial available.\(^5\) An in rem suit personifies the vessel and names it as a party defendant. The in rem procedure provides security for the plaintiff, for the court can order that the vessel be sold to satisfy a judgment. By contrast, a suit under the Jones Act, even though brought in admiralty, cannot be in rem, since the Act has been construed to create only in personam liability.\(^5\)

It is customary for a seaman to assert all three grounds of recovery in a single action. This practice raises questions about the proper scope of the jury right when the seaman elects to pursue his Jones Act remedy at law with trial by jury, but cannot establish diversity jurisdiction so as to bring his other two claims at law and thereby obtain as of right a jury trial of these claims as well. A bifurcated

\(^{55}\) Id. at 253-54.
\(^{58}\) A suit “at law” under the Jones Act may be maintained in state or federal court. In either case, the plaintiff must comply with venue requirements in the Act which do not apply when the action is brought “in admiralty.” Further, since a Jones Act suit “at law” in federal court comes within the general “federal question” jurisdictional grant, 28 U.S.C. § 1331 (1970), it is necessary to satisfy the §10,000 “amount in controversy” requirement. W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 32 at 180-81 (Wright ed. 1960).

\(^{59}\) 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.


\(^{60}\) See generally G. GILMORE & C. BLACK, supra note 37, at 33-35.
\(^{61}\) U.S. CONST. amend. VII.
\(^{63}\) Plamals v. S.S. Pinar del Rio, 277 U.S. 151 (1928).
trial is usually feasible so far as the maintenance and cure claim is concerned because the issues relevant to that claim are largely separable from those involved in the other two actions. Problems are involved, however, in any attempt to try the Jones Act claim to a jury and the unseaworthiness claim to the court since the issues involved in the two claims have large areas of overlap. The two claims are really alternate theories for a single recovery, and having two fact-finders in the case makes it difficult to arrive at a single appropriate amount of recovery.

In Fitzgerald v. United States Lines Co., the Supreme Court undertook to resolve differences among the lower federal courts relating to the mode of trial in seamen's personal injury cases. The Court observed that

\[
\text{requiring a seaman to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of res judicata and collateral estoppel, and can easily result in too much or too little recovery.}
\]

Thus, both judicial economy and fairness are served by having a single fact-finder decide all three claims. And since the plaintiff was entitled to a jury trial of his Jones Act claim, the Court in Fitzgerald held that the single fact-finder must be a jury. No constitutional objection could be made to a jury trial of the admiralty claims, for,

64. The Second Circuit, in affirming a bifurcated trial in the Fitzgerald case, noted that the issues in maintenance and cure are separable from those in the other claims. Fitzgerald v. United States Lines Co., 306 F.2d 461, 472-73 (2d Cir. 1962).
66. See quote accompanying note 68 this page.
68. Id. at 18-19.
69. These claims were not strictly in admiralty. The plaintiff asserted them as "pendent" to his Jones Act claim at law. The possibility of using the doctrine of pendent jurisdiction in the seamen's personal injury context was suggested by the Supreme Court in Romero v. International Terminal Operating Co., 358 U.S. 354, 380-81 (1959). In Romero, the Court explicitly reserved decision on whether jury trial was available for the pendent claims. Fitzgerald might seem, then, to be the answer to that reserved question.

At least two factors indicate, however, that the holding was intended to embrace claims for maintenance and cure and for unseaworthiness regardless of how they were joined to the Jones Act claim. First, the Court mentions Romero only once, in a footnote to a different aspect of that opinion. 374 U.S. at 17 n.3. Second, the Court states quite plainly that its "responsibility for fashioning the controlling rules of admiralty law," id. at 20, justifies its decision that [0]

[0]only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments.

Id. at 21. A Court which could conceptually unify the three seamen's actions in this
while this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them.\textsuperscript{70}

Fitzgerald involved unseaworthiness and maintenance and cure claims brought in personam against the shipowner. The jury trial problem raised in connection with the joinder of those claims with the Jones Act claim at law was resolved by permitting joinder and providing for jury trial of all three claims. It remains to be considered whether the reasoning of the Court is equally applicable to such a situation when the unseaworthiness and maintenance and cure claims are brought in rem against the vessel. At least one court has indicated that the proper disposition of such a case is to preclude joinder altogether.\textsuperscript{71} Yet Rule 20(a), in providing that maritime property may be joined as a defendant, does not indicate that any special conditions are necessary for such joinder. In the absence of any explicit distinction between joinder of maritime property as against other potential defendants, the presumption of uniform practice appears to compel the conclusion that a vessel is as susceptible of joinder as its owner, and that both cases fall under the Fitzgerald rule permitting joinder and providing a jury trial of all three related claims. However, it is necessary to show that giving effect to this presumption will not violate constitutional requirements, alter jurisdiction, or affect substantive rights.\textsuperscript{72}

The result suggested here was approved in Hashins v. Point Towing Co.\textsuperscript{73} The district court had held that the plaintiff's Jones Act claim had to be brought in admiralty because the venue requirement for proceeding at law had not been met.\textsuperscript{74} All of the claims, therefore, were tried to the court. The court of appeals reversed, holding that the venue requirement had been satisfied. The court went on to discuss the proper handling of the case on remand, since the Jones Act claim was joined with the traditional claims for maintenance and cure and unseaworthiness. The holding of the Fitzgerald case was not directly applicable because the claims were asserted both in per-

\textsuperscript{70} 374 U.S. at 20.
\textsuperscript{72} See note 58 supra.
\textsuperscript{73} 395 F.2d 737 (3d Cir. 1968).
\textsuperscript{74} See note 58 supra.
sonam and in rem. But the court of appeals indicated that this additional factor did not require departure from the Fitzgerald rule. The court could see no reason to “compel [the plaintiff] to lose the advantages which inhere in the characteristic admiralty claims, such as in rem process” as “the price for a jury trial.”75

Nevertheless, the following year a district court did make forfeiture of in rem process the price of a jury trial.76 In Fernandes v. United Fruit Co.,77 a seaman joined all three customary claims, asserting all of them both in personam and in rem, and demanding a jury trial for them in their character as in personam claims against the employer. The district court held that the plaintiff was required to choose between having a jury trial of the in personam claims and proceeding in rem. In view of plaintiff’s subsequent insistence upon his jury demand, the court dismissed the in rem counts.78 This case may appear to parallel Fitzgerald and to differ from the situation under consideration, since in Fernandes plaintiff did not demand a jury trial of the claims in their in rem character. However, the difference is merely a matter of form. The issues involved in the claims are precisely the same, whether asserted in personam or in rem. Thus, a demand for a jury trial of the claims in their in personam character is in effect also a demand for jury trial of the claims in rem.

The objections of the Fernandes court to joinder of the in rem claims were not explicitly constitutional. But implicit in the court’s requirement that the plaintiff forego either the in rem device or his jury trial demand is the notion that there may never be a jury trial of an in rem claim. This precise point has not been treated by the Supreme Court, but the Fitzgerald case provides an analogy that is very close indeed. The Fernandes court acknowledged that Fitzgerald would require a jury trial of the admiralty claims if they were brought in personam, but assumed that to apply the Fitzgerald reasoning to in rem claims would be intolerable.79

An examination of Fitzgerald discloses no reason for restricting its holding to in personam claims. The language of the opinion indicates no such restriction. The Court found that no constitutional provision forbade jury trial in “admiralty cases,”80 which plainly embraces in

75. 395 F.2d at 741.
76. This fulfills the prediction of one commentator that joinder of admiralty claims under Rule 20 would meet jury trial objections. Cohn, The Seamless Web: Civil-Admiralty Unification, 1967 A.B.A. Secr. Ins., Natl. & Comm. L. 228, 230.
78. Id. at 682-83.
79. Id. at 682-83.
80. 374 U.S. at 20.
rem as well as in personam actions; it can hardly be supposed that the Court forgot about in rem actions when it spoke of "admiralty cases," since the in rem action is the most distinctive characteristic of admiralty jurisdiction. A jury is no less competent to decide in rem claims than claims brought in personam, for the issues to be decided are identical. The interest in judicial economy and fairness which lay at the heart of the Fitzgerald opinion seems equally strong whether the joined claims are brought in rem or in personam. From the constitutional perspective, there appears to be no reason not to allow jury trial of in rem claims. This constitutional bar having been removed, it can no longer serve to thwart the free joinder of in rem admiralty claims with other claims brought at law.

While the constitutional objection to joinder is only implicit in the Fernandes opinion, the court makes an explicit argument that there is a substantive law requirement that the plaintiff elect between proceeding in rem and having a jury trial. The argument advanced by the court relies on an interpretation of Plamals v. S.S. Pinar del Rio, one of the early cases construing the Jones Act. According to the Fernandes reading, Plamals held that

\[\text{[seamen may invoke, at their election, (a) the relief accorded by the traditional admiralty rules in rem against the ship, or (b) that provided by the Jones Act with the right of jury trial against the employer, but not both.}\]

But an examination of the Plamals opinion reveals that an election between proceeding in rem and having a jury trial was not the choice the Plamals Court had in mind. In that case a foreign seaman sought to recover under the Jones Act. Possibly because his employer was not subject to the court's in personam process, the seaman libelled the vessel and proceeded in rem. The Court held that a suit under the Jones Act could not be brought in rem, and ordered dismissal of plaintiff's suit. Having so held, the Supreme Court added the following language:

81. Indeed, only in admiralty may an in rem proceeding against a vessel be maintained. The Moses Taylor, 71 U.S. (4 Wall.) 411 (1867); The Hine v. Trevor, 71 U.S. (4 Wall.) 555 (1867). At least one commentator doubted the wisdom of procedural unification because of a fear that the in rem action, which he regarded as the very heart of admiralty, would face the danger of doctrinal erosion. Wiswall, Admiralty: Procedural Unification in Retrospect and Prospect, 35 BROOKLYN L. REV. 36, 46 (1968).

82. See p. 1166 supra.

83. 277 U.S. 151 (1928).

84. 303 F. Supp. at 682.

85. 277 U.S. at 155-56.
Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both.86

The Fernandes court read this language as imposing a procedural choice: in rem process or jury trial. But it is apparent that its concern with jury trial is a misreading of the Plamals opinion. Nowhere in that opinion is jury trial even mentioned. The plaintiff did not seek, indeed could not have sought, a jury trial, for the statute grants a jury trial only if the Jones Act claim is brought at law. In Plamals the plaintiff sued in admiralty.87

The choice required by Plamals was substantive, not, as interpreted by Fernandes, procedural.88 The old admiralty rules had always allowed a plaintiff to proceed both against the ship owner (who was with few exceptions also the employer of the seamen manning the vessel) and against the vessel itself,89 so the Jones Act did not create a new form of relief by allowing the employer to be sued. What was new was the availability of a recovery against the employer for negligence. Traditional maritime substantive remedies—Plamal's "old rules"—recognized recovery for maintenance and cure and for unseaworthiness, but not for negligence. The Plamals Court thus seems to have been suggesting that a seaman must choose between using the traditional maritime theories of recovery, under which a suit may be main-

86. Id. at 156-57.
87. The statutory language that a seaman could, "at his election, maintain an action for damages at law, with the right of trial by jury," 46 U.S.C. § 688 (1970), had raised some question whether a Jones Act suit could be brought in admiralty. In Panama R.R. v. Johnson, 264 U.S. 375 (1924), it was held that a suit could be so brought.
88. The reasoning of Fernandes was closely followed the next year in Johnson v. Venezuelan Line Steamship Co., 314 F. Supp. 1403 (E.D. La. 1970). In Johnson, the widow of a longshoreman sued under the Louisiana wrongful death statute alleging the unseaworthiness of the vessel on which her husband was killed. She filed separate suits in federal district court: one in rem against the vessel, and the other under diversity jurisdiction against the owner. She demanded a jury trial of the action against the owner. The owner moved to consolidate the actions for trial and to strike the jury demand. The court held that plaintiff was required to choose between having a jury trial of the diversity claim against the owner and proceeding in rem against the ship. To reach that result, the court took a circuitous route through the Jones Act cases, including Plamals, discovering the same "election" rule that Fernandes had found. Though in Johnson the claim at law was itself an unseaworthiness claim brought in federal court under diversity jurisdiction, the court found the Jones Act election rule to be applicable.
     Here the claim does not arise under the Jones Act, and we do not have the statutory election rule. But the rationale of the Jones Act cases is applicable.
     Id. at 1407.
89. See G. Gilmore & C. Black, supra note 37, at 510-12.
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tained either in personam or in rem; and using the new Jones Act negligence theory of recovery, which the Court held, as a matter of statutory construction, could be brought only in personam against the employer. This reading of the Plainals opinion is reinforced by the fact that the Court spelled out a similar choice the very next year. For some time after the Plainals decision courts required a seaman to choose, either before proceeding to trial or before the case was submitted to the jury, whether to rely on the Jones Act or on unseaworthiness for recovery. That election, which was never required by a Supreme Court holding, has been discontinued. Plaintiffs now go to the jury on both theories, and recovery is granted if justified under either.

The Fernandes court was therefore mistaken in its conclusion that there exists a substantive law requirement that the plaintiff elect between proceeding in rem and having a jury trial. The two are in no way incompatible, so that the existence of a jury trial demand for a claim brought at law is no bar to the joinder of that claim with in rem claims "arising out of the same transaction."

The third possible objection to free joinder of civil and admiralty claims is that it would alter the court's subject matter jurisdiction, contrary to Rule 82. But that rule is no bar to joinder of these per-

90. Thorough analysis of the decision in Plainals requires that one venture into a part of the trackless swamp of Jones Act history and construction. See generally G. Gilmore & C. Black, supra note 37, at 279-89.

In The Osceola, 189 U.S. 158, 175 (1903), the Supreme Court outlined in four propositions the rights of recovery belonging to injured seamen. Propositions (1) and (2), respectively, recognized rights of recovery for maintenance and cure and for unseaworthiness. Propositions (3) and (4) in conjunction closed off negligence as a ground of recovery. Proposition (5) announced that all crew members, with the possible exception of the master, were fellow-servants. Hence, a seaman could not recover if another crew member negligently injured him. Nor could he recover for injuries suffered while obeying a negligent order issued by anyone other than the master. Proposition (4) provided "(1) that the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew . . . ."

The differences between these propositions were to be of crucial importance. In 1915, Congress enacted a statute apparently aimed at overruling proposition (3). It provided that "in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." 38 Stat. 1164 (1915). Subsequently, in Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), a seaman brought suit for injury caused by obeying an officer's negligent order, on the theory that the 1915 statute removed the bar to recovery. But the Supreme Court held that proposition (4) of the Osceola determined that negligence was not recognized in general maritime law as a ground of recovery for seamen's injuries. Chelentis' action was dismissed.


92. See generally G. Gilmore & C. Black, supra note 37, at 279-96.

sonal injury claims since all three claims are independently within the jurisdiction of the district court.

Given the clarity of the language in the applicable rule and the absence of any constitutional, jurisdictional, or substantive law objections, the achievement of unification in the matter of joinder requires only that courts apply Rule 20(a) as written.94

IV. Third-Party Practice

Third-party practice is a device which permits a defendant to bring into a lawsuit another party who may be liable for the damages alleged by the plaintiff. In the United States it was first used in admiralty, under the name “impleader.” But since the adoption of the Federal Rules of Civil Procedure in 1938, it has been available in all federal civil actions. The issue in this section is whether the jurisdictional requirements of third-party practice peculiar to the former admiralty procedure survive under the unified rules.

Prior to the 1966 unification, there were a number of differences between third-party practice under the civil rules and impleader in admiralty. In admiralty, a defendant95 could implead a third party on either of two grounds: (1) that he might be liable to the defendant by way of “remedy over, contribution or otherwise”96 (an “indemnity” claim) or (2) that he might be liable directly to the plaintiff (a “substitute-defendant” claim). In the latter case, the plaintiff was

94. In the Senate bill to define federal and state jurisdiction, S. 1876, 92d Cong., 1st Sess., see note 44 supra, section 1319 provides that, with certain exceptions, “any [admiralty] claim in personam limited to money damages for personal injuries or death shall be tried by jury if any party demands it.” Such a rule would simplify matters greatly, sending to blessed oblivion the tortured doctrines used to justify jury trials in the past. But, at the same time, there may be a danger of a negative implication being read into the language to the effect that in rem actions for personal injury may not have a jury trial.

This danger is made more likely by the fact that the language of the bill is identical to that proposed in ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 37 (1969) [ALI, STUDY], which differs from that used in an earlier ALI draft: “[T]rial of . . . any claim arising out of personal injuries or death in which the relief sought is limited to money damages shall be by jury if any party demands it,” ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 22 (Tent. Draft No. 6, 1968) [ALI, STUDY (Tentative Draft)].

The ALI commentary does not explain why the “in personam” qualification was added to the final draft. That commentary merely adds the words “in personam” to a paragraph from the earlier commentary which announced that the “section makes a deliberate legislative judgment.” Compare ALI, Study at 253 with ALI, Study (Tentative Draft) at 163. Since, as argued in the text, there is no reason for distinguishing between in personam and in rem claims in the matter of jury trial, section 1319 should be made applicable to all personal injury suits by deleting the words “in personam.”

95. Prior to unification the terminology used in designating parties and pleadings in admiralty differed from that used in the civil rules. For example, instead of plaintiffs and defendants, admiralty had libellants and respondents. Unification made the civil terminology applicable to admiralty. The new terminology is used in the text even in discussing pre-unification practice to avoid confusion.

96. Former Admiralty Rule 56. See note 102 infra.
compelled to proceed against the third party as though he had been originally joined as a defendant. In contrast, third-party practice under the civil rules provided only for the assertion of indemnity claims.97

Another difference between admiralty and civil third-party practice was that the former required independent admiralty jurisdiction over the third-party claim. In most cases this requirement is not unduly burdensome; admiralty jurisdiction is shown by the maritime nature of the facts underlying a claim. Hence a third-party claim, growing out of a primary claim within the admiralty jurisdiction, would itself involve those underlying facts, and so would usually be within that same jurisdiction. Thus, requiring independent admiralty jurisdiction over third-party claims under Rule 56 did not unduly restrict the usefulness of third-party practice. However, if an analogous restriction requiring independent federal jurisdiction were to have been imposed on civil actions, the result would have been to deny the use of third-party practice in a substantial percentage of cases, especially those under diversity jurisdiction. The fact that the principal claim and the third-party claim would often be based on the same occurrence or transaction98 establishes a geographical focus which reduces the likelihood that all the participants, both original and third-party, would be of diverse citizenship. In order to salvage the purpose of third-party practice—the adjudication of interrelated claims in a single action—the federal courts in diversity cases developed the doctrine of ancillary jurisdiction. Under this doctrine, it is unnecessary to show independent federal jurisdiction over a third-party claim made in a diversity suit. To qualify for ancillary jurisdiction one need only show that the person against whom the claim is asserted "is or may be liable to [the defendant] for all or part of the plaintiff's claim against him."99

Such were the two salient differences existing prior to unification. Since unification, third-party practice has been governed by Rule 14, in which 14(a) applies to civil action generally,100 while a new sub-

97. Indemnity claims in admiralty were required to grow "out of the same matter," former Admiralty Rule 56, note 102 infra, while such claims under the civil rules were not subject to that restriction. Fed. R. Civ. P. 14(a).
98. Although it is not a strict requirement, see note 97 supra, many third-party claims do arise out of the same transaction upon which the principal claim rests.
100. Fed. R. Civ. P. (14a):
WHEN DEFENDANT MAY BRING IN THIRD PARTY. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party
division, 14(c), is concerned with admiralty suits.\footnote{101} Rule 14(c) is similar, both in content and in much of its phrasing, to former Admiralty Rule 56.\footnote{102} It might at first seem proper to view this circumstance
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as establishing that the former admiralty practice, including the requirement of independent jurisdiction over third-party claims, has been preserved in its entirety in Rule 14(c). However, it is appropriate to seek better indications of the "purpose of the drafters" or the "congressional understanding" before relying on the mere similarity of the new rule to the old.

In this case, examining the "literal language" of the rule and its "intended effect" does provide a superior guide to whether Rule 14(c) should be held to retain the independent jurisdiction requirement. The "literal language" of Rule 14(c) is silent about any jurisdictional requirement, as, indeed, was the language of Admiralty Rule 56. The search for "intended effect" properly begins with the Advisory Committee's Note to Rule 14. No intent is there expressed with regard to the independent jurisdiction requirement. Instead, the entire Note is devoted to a discussion of the need to preserve substitute-defendant practice. The sole purpose of having a separate rule for admiralty third-party practice thus appears to be the preservation of the unique admiralty substitute-defendant practice. This purpose exemplifies the general rationale for separate rules announced in the Advisory Committee's letter of transmittal, namely, to preserve distinctive admiralty procedures. Supplemental Rules A-F preserve the most characteristic elements of the former admiralty practice, elements that have no real equivalent in civil practice. They provide for in rem actions, foreign attachments, limitations of liability, and possessory, petitory, and partition actions. As to the instances of separate rules for admiralty suits within the main body of civil rules, all but Rule 14(c) follow the same pattern. Rule 9(h) preserves the unique admiralty interlocutory appeal. Rule 38(e) retains the distinct position of admiralty with respect to jury trial. Thus, both in theory and in fact, separate rules for admiralty suits have a single purpose: to insure the survival of those admiralty procedures that have no equivalents in civil practice.

Viewed against the background of the other separate rules, Rule 14(c) is deviant. The provision for substitute-defendant practice fits

105. Id.
the pattern of preserving distinctive admiralty practices. No comparable procedure is available for civil actions generally. But the other element, permitting indemnity claims, is clearly not unique. In fact, the treatment of such claims is virtually indistinguishable from the third-party practice for all civil actions under Rule 14(a). Since the purpose of establishing separate admiralty rules is to preserve unique procedural features, and since third-party indemnity claims are in no way a unique feature of former admiralty practice, it is reasonable to apply the presumption of uniform practice to such claims. Doing so creates a tentative conclusion that unification has created a single procedure with respect to indemnity claims, notwithstanding their separate mention in Rule 14(c). And since ancillary jurisdiction is available for indemnity claims in civil actions generally, it should also be available for indemnity claims under Rule 14(c). Of course, this application of the presumption of uniform practice is subject to the requirement that uniformity not be objectionable on constitutional, jurisdictional, or substantive grounds.

These possible objections to the availability of ancillary jurisdiction under Rule 14(c) were explored in the case of McCann v. Falgout Boat Company. In that case a seaman, injured aboard ship, brought suit against his employer under the admiralty jurisdiction. The defendant filed a third-party complaint under Rule 14(c) against the physician who treated the plaintiff after he returned to shore. The complaint included both indemnity and substitute-defendant claims. The defendant, as third-party plaintiff, did not allege independent grounds of federal jurisdiction over the third-party claims, relying instead on the doctrine of ancillary jurisdiction. The court dismissed the third-party action, holding that Rule 14(c) continued the former admiralty impleader practice, which required independent jurisdiction.

An alternate argument to that made in the text is that Rule 14(a) third-party practice is available to all civil actions, including those brought under the admiralty jurisdiction. Under this argument, Rule 14(c) contains additional third-party rights for use in admiralty suits. If a defendant in an admiralty suit chose to exercise the rights provided in Rule 14(a), the availability of ancillary jurisdiction would have to be settled through reasoning from general principles, since Rule 14(a) has no history of application to claims made under the admiralty jurisdiction, and is free of any historical requirement of independent jurisdiction over such claims.

The McCann court is not the only district court to wrestle with this problem since unification. One of two earlier cases, Williams v. United States, 42 F.R.D. 609, 614 (S.D.N.Y. 1967), avoided taking a stand. The other, Young v. United States, 272 F. Supp. 738 (D.S.C. 1967), denied availability of ancillary jurisdiction because the suit had commenced prior to unification and the court felt that to recognize ancillary jurisdiction in a suit so pending would be unfair. Accordingly, the court invoked FED. R. Civ. P. 86(a), which permits use of the former procedure in pending cases if application of the new rules "would not be feasible or would work injustice."
over third-party claims. The court argued first that the intent of the Advisory Committee was to require independent jurisdiction—an argument that has already been refuted as to indemnity claims. But, not content to rest on intent, the court also argued that recognition of ancillary jurisdiction would violate both the Constitution and Rule 82.

The court’s constitutional objection arises from two propositions: (1) The Seventh Amendment gives a right of jury trial to a third-party defendant when the third-party claim is not maritime in nature, and (2) Admiralty “tradition . . . disallows a demand for a jury in admiralty cases.” As interpreted by the court, that tradition means that once a suit is brought in admiralty, one cannot claim a jury trial, even of non-admiralty claims which become attached to the principal action. Fitzgerald is distinguished on the ground that the Supreme Court subsequently “acquiesced to the tradition” by promulgating Rule 38(e), which explicitly refrains from expanding the right to jury trial in admiralty cases. Following the no-jury tradition would, in the instant case, deprive the third-party defendant of his constitutional right to a jury trial. In order to avoid this result, the court refused to permit impleader and construed Rule 14(c) to require “an independent basis of federal, and perhaps admiralty, jurisdiction” over third-party claims.

It should first be observed that the court’s proposed solution, by leaving open the possibility that non-admiralty grounds of federal jurisdiction would satisfy Rule 14(c), does not resolve the court’s jury trial problem.

Even if diversity jurisdiction had been shown to exist over the third-party claim in the instant case, the problem of a denial of jury trial would have remained. The court’s jury trial conundrum is the same for third-party claims resting on federal non-admiralty jurisdiction as it is for those made under ancillary jurisdiction. If the matter is to be resolved by interpretation of Rule 14(c), it would seem that only independent admiralty jurisdiction would be acceptable as a basis for third-party claims.

110. *See* pp. 1175-76 *supra.*
111. 44 *F.R.D.* at 43.
112. 374 *U.S.* 16 (1963). *See* p. 1166 *supra.*
113. 44 *F.R.D.* at 43-44. The court concedes that the statutory exception to the tradition for cases arising on the Great Lakes, 28 *U.S.C.* § 1873 (1970).
114. *Fed. R. Civ. P.* 38(e): "Admiralty and Maritime Claims: These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(b)."
This resolution is in any case unnecessary, for the conundrum is a phantom—a product of a basic premise that is unsupportable. Tradition plays an important role in the law, but it is only one factor among many. Fitzgerald makes it clear that the tradition of disallowing a jury trial in admiralty matters is without constitutional roots, and that considerations of fairness and efficient judicial administration are strong enough to override it. Nor does Rule 38(c) support the McCann position. While that rule does not create any new rights to jury trial, neither does it purport to narrow the circumstances in which a jury trial may be otherwise appropriate. McCann to the contrary, Rule 38(c) does not overrule Fitzgerald, and admiralty tradition is subordinate to the factors described in Fitzgerald when the propriety of jury trial must be decided.

The McCann court also refrained from recognizing ancillary jurisdiction on the ground that such recognition would violate the pro-

116. Even absent Fitzgerald, tradition is subordinate to the presumption of uniform practice. See note 17 supra.

117. The propriety of a third-party claim is an entirely separate question from the availability of a jury trial. The first inquiry to be made is whether the substantive conditions for a third-party complaint are shown to exist. The tests in Rule 14(c) to decide this point are whether the complaint arises from the same "transaction, occurrence, or series of transactions or occurrences" as the principal action and whether the third-party defendant "may be wholly or partly liable." Once these factors are established the appropriateness of the third-party complaint is settled. One of the objections of the McCann court was that the third-party claims did not arise from the same "transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 14(c). The previous admiralty practice, requiring a "maritime" transaction, was held applicable. Since the malpractice tort did not arise "upon the high seas" it was not a part of the same maritime occurrence as the original injury. 44 F.R.D. at 42. Here again it is useful to distinguish between substitute-defendant claims and indemnity claims. The former, being exclusively available in admiralty, are properly subject to the restrictive admiralty definition of transaction. As to the latter, however, the presumption of uniformity argues for an interpretation of the transaction requirement that is coextensive with the situations under Rule 14(a) in which an indemnity third-party claim is properly made. See note 97 supra. If the alternate approach suggested in note 108 supra is followed, Rule 14(a) is directly applicable, which eliminates any question about the allowable scope of "transaction."

The availability of jury trial becomes an issue only when it has been decided that a third-party claim may properly be asserted. Neither tradition nor Rule 38(c) is sufficient ground for denying a jury trial of the issues in a non-maritime third-party claim simply because that claim has the misfortune to be attached to a principal claim resting on the admiralty jurisdiction. Jury trial of the issues in third-party claims under Rule 14(c) should be available on the same criteria as in claims made under Rule 14(a), i.e., regardless of the jurisdictional basis of the principal action. And at least to the extent that such issues are identical to those in the principal admiralty suit, that suit would also be tried by a jury. But this is very similar to the Fitzgerald situation. Multiple interrelated claims, resting on varied jurisdictional grounds, some entitled to a jury trial and some not, are properly before the court. Fitzgerald indicates that only one finder of fact, the jury, should be used. There is no compelling distinction between the cases. In Fitzgerald the claims were properly before the court through compliance with joinder rules. In the proposed disposition of the McCann situation, the claims would be properly before the court pursuant to third-party practice procedures. The essential point is that the claims be properly before the court, not that they arrived there in a particular way. The Fitzgerald considerations of judicial economy and fairness, then, would frequently require jury trial of all issues in both claims, not merely those issues which happen to overlap.

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Hibition of Rule 82 against expanding federal jurisdiction. This is a serious objection, for the practical effect of the doctrine of ancillary jurisdiction is to extend federal judicial power to controversies which it could not independently adjudicate. But this is true regardless of which jurisdictional grant covers the primary suit. The McCann court does not explain, and no reason is apparent, why the use of ancillary jurisdiction in an admiralty suit is any more violative of Rule 82 than its employment in a diversity suit. The doctrine must stand or fall as a whole.

No argument is made here that ancillary jurisdiction should be available in the case of substitute-defendant claims. Since such claims fit within the category of distinctive admiralty procedures preserved through separate rules, the presumption of uniform practice is inapplicable. There is no analogous civil practice with which to achieve uniformity. Accordingly, the former admiralty doctrines properly govern its use. McCann was correct insofar as it dismissed the substitute-defendant claim for want of an independent jurisdictional basis.

118. A panel of the Second Circuit is now on record as supporting the availability of ancillary jurisdiction in third-party practice under Rule 14(c). Leather's Inst., Inc. v. S.S. Mormaclynx, 451 F.2d 800, 810-11 n.13 (2d Cir. 1971). The holding in that case, that a district court sitting in admiralty can entertain a claim based on state law if it is rooted in the same facts as an admiralty claim, was supported by analogy to the doctrines of pendent jurisdiction and ancillary jurisdiction. Of the latter, the court said, "The effect of merger upon the former admiralty requirement of independent jurisdiction for impleader has not as yet been conclusively resolved. . . . But if we were presented with the question, it would be only with the greatest reluctance that we would conclude that under the merged rules the doctrine of ancillary jurisdiction did not extend to admiralty as well as to civil impleader. . . . Certainly the practical considerations which support the doctrine of ancillary jurisdiction in the context of civil impleader are equally persuasive on the admiralty side . . . . In any event, we do not perceive the requirement of independent jurisdiction in pre-merger admiralty impleader to have had constitutional underpinnings. Rather it reflected a judicial conception of the limited nature of Admiralty Rule 56 and the appropriate reach of the then distinct admiralty jurisdiction."

Id.

119. The third possible objection, having considered those which are constitutional and jurisdictional, is that uniform availability of ancillary jurisdiction would be an alteration of substantive law. McCann made no such argument and no plausible argument based on this premise is apparent.

120. A recent treatise agrees that it is permissible and desirable to recognize ancillary jurisdiction under Rule 14(c), but does not suggest a distinction between indemnity and substitute-defendant claims. 6 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1465 at 348-50 (1971).

121. Whether those jurisdictional principles should be changed is, of course, a different question. There are strong policy reasons for retaining the requirement of independent jurisdiction over substitute-defendant claims. Specifically, a plaintiff could choose a cooperative defendant who would obligingly implead as a substitute defendant a party whom the plaintiff could not have sued directly in federal court.

Although this danger was not regarded as especially serious in Comment, Impleader of Nonmaritime Claims Under Rule 14(c), 47 TEXAS L. REV. 120 (1968), avoiding collusion is at least one reason why courts require independent jurisdiction over claims asserted by plaintiffs against third-party defendants under Rule 14(g). See Hoskie v. Prudential Ins. Co. of America, 39 F. Supp. 305 (E.D.N.Y. 1941). There is no reason why this risk should not be given equal weight in the admiralty context.
Unfortunately, Rule 14(c) is obscure and tends to discourage adoption of the approach urged here. The repetition in 14(c) of a provision for indemnity impleader does raise the possibility that it is intended to differ from that described in 14(a). Rule 14(c) could profitably be redrafted to encourage an interpretation that would promote rather than retard unification of civil practice. Even without redrafting, however, courts could promote the unification of civil practice by carefully distinguishing between the two kinds of third-party practice and making ancillary jurisdiction available for admiralty indemnity impleader under 14(c) by analogy to Rule 14(a).

Conclusion

Unintended and unwarranted distinctions survive in the unified federal practice. That historical quirks may have survived the initial unification attempt is understandable. But a second effort is now needed to correct important flaws in a generally admirable structure. Judicial reinterpretation of old doctrines, and perhaps amendment of the rules or new legislation, will be required. It is not too soon to begin.

122. One way of redrafting Rule 14(c) would be as follows.

(c) ADMIRALTY AND MARITIME CLAIMS. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may, in addition to his rights under Rule 14(a), bring in a third-party defendant who may be wholly or partly liable [or to the plaintiff, by way of remedy over, contribution, or otherwise] on account of the same transaction, occurrence, or series of transactions or occurrences. New material is in italics; portions of the existing rule to be deleted are in brackets. The remainder of Rule 14(c), under the proposed revision, would be unchanged.