

THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

**INTERIM REPORT OF THE COMMITTEE ON
SUPREME COURT ADMIRALTY RULES TO
THE EXECUTIVE COMMITTEE**

At its August, 1951 meeting the Executive Committee recommended some eleven amendments to the Supreme Court Admiralty Rules, as set forth in the Association's Document No. 348, dated September, 1951. It soon became apparent from many quarters, including important segments of the Judiciary, that the proposed amendments did not meet the present day demand for uniformity, so far as practicable, with the Federal Rules of Civil Procedure. Largely for this reason, opposition to the proposed amendments of 1951 developed to a point where it was advisable to further examine the matter of amendment or revision of the Admiralty Rules.

The proposed amendments and revisions submitted herewith cover the procedural needs shown in Document No. 348 to exist. In accomplishing this result, we have attempted to incorporate to the fullest presently practicable extent and to make applicable by reference the enumerated Federal Rules of Civil Procedure subject to the qualifications set forth and explained in the annexed proposals.

Your Committee is of the opinion that the present proposals will serve to preserve the identity of the Admiralty Rules and at the same time meet the demand for uniformity as near as may be with the Rules of Civil Procedure.

Respectfully submitted,

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Dated: August 18, 1952.

PROPOSED AMENDMENTS TO ADMIRALTY RULES BY ADOPTING AMENDED RULE 44½, WHICH INCLUDES THE BULK OF THE CIVIL RULES BY REFERENCE, AND AMENDING WHERE NECESSARY THE BALANCE OF THE ADMIRALTY RULES FOR THE PURPOSE OF RECONCILIATION AND ALSO AMENDING CIVIL RULE 81(A)1

Supreme Court Admiralty Rules

1. *Process on filing libel.* Amended to read as follows:
1. *Commencement of suit in Admiralty.* A suit in Admiralty is commenced by filing a libel with the court.

Comment

This rule codifies *The Cypria* (2nd Cir.), 137 F. (2d) 326, 329.

2. *Suits in personam—process in—arrest same.* (Unchanged.)
3. *Bail—imprisonment for debt.* (Unchanged.)
4. *Bail in suits in personam.* (Unchanged.)
5. *Bond in attachment suits in personam.* (Unchanged.)
6. *Bonds—stipulation—how given.* (Abrogated. The practice is now obsolete.)
7. *Bonds—premiums—taxable as costs.* (Unchanged.)
8. *Reduction of bail, bond or stipulation—new sureties.* (Unchanged.)
9. *Monition to third parties in suits in rem.* (Unchanged.)
10. *Process in suits in rem.* (Unchanged.)
11. *Perishable goods—how disposed of.* (Unchanged.)
12. *Ship—how appraised, sold or bonded.* (Unchanged.)
13. *Seamen's wages—materialmen—remedies.* (Unchanged.)
14. *Pilotage—collision—remedies.* (Unchanged.)
15. *Assault or beating—remedies.* (Unchanged.)
16. *Maritime hypothecation—remedies.* (Unchanged.)
17. *Bottomry bonds—remedies.* (Unchanged.)
18. *Salvage—remedies.* (Unchanged.)
19. *Petitory or possessory suits.* (Unchanged.)
20. *Execution on decrees.* (Unchanged.)
21. *Requisites of libel of information.* (Unchanged.)
22. *Requisites of libel in instance causes.* Amended to read as follows:
22. *Verification of pleadings.* The libel and other pleadings shall be verified on oath or solemn affirmation.

Comment

Since the filing of a libel or petition may give a party a right to seize property, it is deemed better practice to continue the verification of pleadings.

The balance of Rule 22 is no longer necessary since proposed amended Rule 44½ will take in, generally, the practice in civil actions in respect of pleadings.

23. *Amendments to libels.* (Abrogated. Covered by proposed amended Rule 44½.)

24. *Stipulations for costs.* (Unchanged.)

25. *Claim—how verified—claimant's bonds.* (Unchanged.)

26. *Answers—requisites of.* (Abrogated. Covered by proposed amended Rule 44½.)

27. *Pleadings—interrogatories—exceptions to.* (Abrogated. Covered by proposed amended Rule 44½.)

Comment

The procedure whereby pleadings are tested by exceptions is no longer compatible with modern practice and should be discarded, as was the demurrer.

28. *Default of failure to answer.* (Abrogated. Covered by proposed amended Rule 44½.)

29. *Effect of failure to answer fully.* (Abrogated. Covered by proposed amended Rule 44½.)

30. *What either party may object to answering.* (Unchanged.)

31. *Interrogatories to parties.* (Abrogated. Covered by proposed amended Rule 44½.)

32. *Discovery and production of documents and things for inspection, copying or photographing.* (Abrogated. Covered by proposed amended Rule 44½.)

32A. *Physical and mental examination of persons.* (Abrogated. Covered by proposed amended Rule 44½.)

32B. *Admission of facts and of genuineness of documents.* (Abrogated. Covered by proposed amended Rule 44½.)

32C. *Refusal to make discovery—consequences.* (Abrogated. Covered by proposed amended Rule 44½.)

Comment

Rules 31, 32, 32A, 32B, and 32C were adopted from the original Federal Rules of Civil Procedure which have since been amended and which will be incorporated in proposed amended Rule 44½ subject to the exceptions therein contained.

33. *How verification of answer to interrogatory obviated.* Amended to read as follows:

33. *How verification of pleading obviated.*

Where any party is out of the country, or unable, from sickness or other casualty, to verify a pleading on oath or solemn affirmation at the proper time, the court may, in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the oath or affirmation of the party when and as soon as it may be practicable or may receive a verification by agent or attorney with like force and effect as if made by the party.

Comment

In view of the provision for verification of pleadings, it seems desirable to amend Rule 33 to provide for some machinery for obviating a verification in such cases. There seems to be no necessity of retaining the provision dealing with interrogatories in view of the powers the court would seem to have under the Civil Rules made applicable by proposed amended Rule 44½.

34. *How third party may intervene.* (Unchanged.)

Comment

This will be supplemented by F.R.C.P. so that parties will have the benefit of the Admiralty rule which will be supplemented by, and is not inconsistent with, the Civil Rules.

35. *Exceptions to pleadings for surplusage or scandal.* (Abrogated. Covered by proposed amended Rule 44½.)

36. *Procedure against garnishee.* (Unchanged.)

37. *Bringing funds into court.* (Unchanged.)

38. *Dismissal for failure to prosecute.* (Abrogated. Covered by proposed amended Rule 44½.)

39. *Reopening default decrees.* (Abrogated. Covered by proposed amended Rule 44½.)

Comment

This matter of reopening default decrees is covered adequately by Rule 60B, F.R.C.P., incorporated by reference in proposed amended Admiralty Rule 44½. The present Admiralty Rule 39 is to some extent obsolete, as it refers to the term rule which was repealed by the Judicial Code, 28 U. S. C. 452.

40. *Sales in admiralty.* (Unchanged.)

41. *Funds in court registry.* (Unchanged.)

42. *Claims against proceeds in registry.* (Unchanged.)

43. *Reference to commissioners.* (Unchanged—except delete reference to “masters in chancery” and insert in lieu thereof “Masters in civil actions”.)

43½. *Report of commissioners—presumption as to correctness—review.* (Unchanged.)

44. *Right of trial courts to make rules of practice.* Amended to read as follows:

44. *Rules by district courts.*

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. 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.

Comment

This is identical with F.R.C.P. Rule 83 and brings Admiralty Rule 44 up to date.

44½. *Pre-trial procedure; formulating issues.* Amended to read as follows:

44½. *Applicability of Federal Rules of Civil Procedure.*

The Federal Rules of Civil Procedure, with the exception of Rules 1, 2, 3, 6(c), 7(a), 14, 22, 23, 38, 39, 47, 48, 49, 50, 51, 53(b), 53(d)(3), 53(e)(3)(4), 54(b), 59(a)(1), 62(f), 64, 65, 69, 70, 71A, 81(a)(b)(c), 83, 84, 85 and 86, shall be applicable to cases in admiralty, as near as may be, insofar as they are not inconsistent with these rules, subject to the provisions herein set forth.

(A) References to process, pleadings, parties and the civil docket shall be deemed to refer to their analogous counterparts under these rules.

(B) The word "summons" shall refer only to in personam process. The issuance and delivery of any process shall be held in abeyance unless otherwise requested by the libelant or petitioner. All process shall be served by the marshal, except that in personam process may be served by some person specially appointed by the court for that purpose, in conformity with Rule 4(c) of the Federal Rules of Civil Procedure.

(C) A party may elect to have process with a clause of foreign attachment issued conditioned upon the inability to serve a summons upon the respondent within the district, even though the summons might otherwise be served elsewhere in the state in which the district is located. (See comment, (iv)(C).)

(D) Any references in the Federal Rules of Civil Procedure to a jury trial shall be inapplicable, except that in those districts in which a jury trial is permissible by statute in certain admiralty cases, the district courts may provide for such cases by their own rules.

(E) A written agreement for enlargement of time shall have the same effect as an order made pursuant to Rule 6(b) of the Federal Rules of Civil Procedure. (See comment, (iv)(E).)

(F) In collision matters the surrounding circumstances and the acts alleged to have caused the collision may be pleaded with the particularity customary in such cases in admiralty.

(G) The time for a party to plead or move under in rem or foreign attachment process shall not commence until the return date of such process. In the event that no process is issued the party shall plead or move within twenty days from the filing of a voluntary general appearance or claim.

(H) All counterclaims in admiralty shall be permissive and not compulsory, and may be interposed if the court has admiralty jurisdiction thereof. The reference to 54(b) in Rule 13(1) of the Federal Rules of Civil Procedure is not applicable to admiralty cases. (See comment, (iv)(H).)

(I) The time for response to an amended pleading shall be not less than twenty days.

(J) Leave shall not be necessary at any time to serve a notice of the taking of a deposition after the commencement of an action. The payment of counsel fees or travelling expenses to any of the parties served with a notice of taking a deposition may not be imposed as a condition of taking a deposition within the United States.

(K) The court in its discretion may shorten the time for notice of the hearing of an application pursuant to Rule 27 of the Federal Rules of Civil Procedure.

(L) Interrogatories may be annexed to a libel or petition without leave of court, in which event the time to object to or answer such interrogatories shall be the same as the time to respond to such pleading, except that interrogatories addressed to a garnishee shall be answered by the return date of the process.

(M) On appeal, the appellate court shall not be limited to applying the "clearly erroneous" test in setting aside findings of fact in admiralty cases. (See comment, (v)(M).)

(N) The word "master" shall be deemed to include a "commissioner" in admiralty cases, but the "first meeting" shall not be held until a party serves a notice of such hearing of not less than ten days. (See comment, (v)(N).)

(O) Rule 58 of the Federal Rules of Civil Procedure shall be applicable only to the extent that it defines the entry of judgment and provides that the entry thereof is not to be delayed for taxation of costs.

(P) The reference in Rules 43(a) and 59(a)(2) to "suits in equity" shall be deemed also to include "suits in admiralty". (See comment, (v)(P).)

(Q) A separate supersedeas bond or bond for costs on appeal need not be given, unless otherwise ordered, where an appellant has already filed in the district court security which includes the event of appeal, in accordance with the admiralty practice, except for the difference in amount, if any.

(R) Rule 68 of the Federal Rules of Civil Procedure shall not limit the power of the district court to provide by rule or order for an offer before or after interlocutory decree.

(S) The time within which an appeal may be taken from final decisions and interlocutory decrees in admiralty shall be as pre-

scribed by 28 U. S. C. Section 2107, and an appellee who desires other or further relief than that granted by the decree appealed from may file a notice of his intention to apply to the appellate court for such relief not more than fifteen days after the filing of the notice of appeal. Assignments or cross-assignments of errors, other than those which may be contained in the briefs of the parties, shall not be required. (See comment, (v)(S).)

Comment

See Appendix hereto for comment.

45. *Further proof on appeal.* (Unchanged.)

46. *Evidence—how taken.* Amended by deletion of the first three sentences, the subject matter of which is covered by F.R.C.P. as incorporated in proposed amended Rule 44½ and the statutes relating to official court reporters. 28 U. S. C., Sections 19, 20(2) and 753.

46½. *Findings of fact and conclusions of law.* (Abrogated. Covered by proposed amended Rule 44½.)

46A. *Scope of examination and cross-examination.* (Abrogated. Covered by proposed amended Rule 44½.)

46B. *Record of excluded evidence.* (Abrogated. Covered by proposed amended Rule 44½.)

47. *Costs—travel of witnesses.* (Unchanged.)

48. *Issue on new facts in answer.* (Abrogated. Covered by proposed amended Rule 44½.)

49. *Record on appeal.* (Abrogated. Covered by proposed amended Rule 44½.)

50. *Security on cross-libel.* Amended to read as follows:

50. *Security on counter-claim.*

Whenever a counter-claim is filed arising out of the same contract or cause of action for which the original libel was filed, and the respondent or claimant in the original suit shall have given security to respond in damages, the libelant in the original suit shall give security in the usual amount and form to respond in damages to the claims set forth in said counter-claim, unless the court, for cause shown, shall otherwise direct; and all proceedings on the original libel shall be stayed until such security be given unless the court otherwise directs.

Comment

The proposed amendment simply refers to "counter-claim" in lieu of "cross-libel". There is no longer necessity for a cross-libel.

51. *Limitation of liability—how claimed.* (Unchanged.)

52. *Filing and proof of claim in limited liability proceedings.* (Unchanged.)

53. *Rights of owner to contest liability and of claimants to contest exoneration from liability or limitation of liability of owner.* (Unchanged.)

54. *Courts having cognizance of limited liability procedure.* Amended to read as follows:

The petition shall be filed and the proceedings had in any United States District Court in which the vessel has been libelled to answer for any claim in respect of which the petitioner seeks to limit liability. If the vessel has not been so libelled, the proceedings may be had in the District Court for any District in which the owner has been sued in which an action is pending against the owner in respect of any such claim, or in the District Court of the District in which the said vessel may be. If no suit has been commenced in any District and the vessel is not in any District, then the petition may be filed in any District Court. The District Court may, in its discretion, transfer the proceedings to any District for the convenience of the parties. If the vessel shall have already been sold, the proceeds shall represent the same for the purposes of these rules.

Comment

This proposed revisal is substantially the same as that recommended by the Executive Committee in Document No. 348, September, 1951.

55. *Appeals in limited liability cases.* Amended by deleting the word "circuit" before "courts of appeal of the United States".

56. *Right to bring in party jointly liable.* (Unchanged. See comment on proposed amended Rule 44½, Appendix hereto.)

57. *Property in custody of marshal.* Amended by substituting "28 U. S. C. 2464" for "Section 941 of the Revised Statutes".

Federal Rules of Civil Procedure

Proposed Amended Rule 81(a)(1) F.R.C.P.

"These rules do not apply to proceedings in Admiralty except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States, pursuant to Title 28 U. S. C., Section 2073".

APPENDIX

Comments on Proposed Amended Rule 44½

This proposed amendment expands Rule 44½ to incorporate, in whole or in part, and subject to express limitations or conditions, some 65 of the Federal Rules of Civil Procedure. Since Rule 44½ already incorporates by reference Rule 16 of F.R.C.P. (pre-trials), it has seemed the logical point for incorporating the desired additional Civil Rules.

Many of the proposals are self-evident and no comment thereon seems necessary. The reasons for excluding certain of the Civil Rules is that obviously they are not appropriate or applicable to Admiralty, as for example provisions relating to jury trials and condemnation proceedings. On the other hand, it is equally apparent that certain of the Admiralty Rules must be retained to meet the time-tested needs and peculiarities of the Admiralty, as for example proceedings in rem, limitation of shipowners' liability, and related matters.

Reasons for excluding certain of the Civil Rules, on which comment may be desired, follow:

6(c). Since the term rule has been abolished by 28 U. S. C. 452, it seems unnecessary to adopt this now needless rule.

7(a). The various forms of admiralty pleadings, including petitions, and the different nomenclature, make adoption of the Civil Rule denominating pleadings impractical.

14. Impleading petition practice under Admiralty Rule 56 has become a basic and universally accepted part of Admiralty practice and is considered more satisfactory for Admiralty purposes than the Third Party practice under Civil Rule 14, which is limited to claims over and always requires an Order. The Admiralty rule permits impleader for direct liability to the libellant, and no order is necessary if the petition is filed with or before the answer.

22. The Interpleader rule would change existing case law which does not recognize this procedure in Admiralty. As the subject of its adoption is controversial, it is felt that it should be considered, if at all, separately and at a later date.

23. Certain class actions are permissible in Admiralty, as for salvage, by bailees of cargo, etc. It is believed that the adoption of Civil Rule 23 might be confusing at this time.

38, 39, 47, 48, 49, 50, 51, 53(e)(3) and 59(a)(1) all relate to jury trials and need no discussion.

53(b). It is customary in Admiralty to refer to commissioners for determination or computation of unliquidated damages in most commercial and property damage maritime cases. This is covered by Admiralty Rules 43 and 43½. While the Civil Rule has been held, at least in the Third Circuit, as in *pari materia* with the Admiralty Rules, it is deemed advisable that the Admiralty Rules relating to commissioners be left intact. For example, the Civil Rule reads "A reference to a Master shall be an exception and not the rule", whereas in the computation of unliquidated damages following interlocutory decree the reverse is true in Admiralty.

53(d)(3). There is no accounting in Admiralty.

53(e)(4). This is covered by the Admiralty Rule on references.

54(b). There is a statutory right to appeal from certain interlocutory appeals in Admiralty. The multiple claim rule would, we believe, create considerable confusion, and is not needed.

62(f). Because of possible confusion in respect of maritime liens, it is thought inadvisable to include the rule that would apply, to an Admiralty decree, state laws on the stay of execution.

64. Admiralty has its own provisional remedies, and incorporation of state statutory remedies is believed inadvisable and unnecessary.

65. Injunctions in Admiralty are strictly limited to express statutory authorizations, hence Civil Rule 65 is inapplicable.

69. Civil Rule 69 is mandatory and requires proceedings in accordance with state law. This would be unworkable in respect of enforcement of maritime liens in Admiralty, for example. Admiralty Rule 20 is broader, and would seem to include in any event Civil Rule 69 under the all inclusive language of the last sentence: "And any other remedies shall be available that may exist under the state or federal law for the enforcement of judgments or decrees."

70. Specific performance, except to the very limited extent expressly allowed by statute, is not an Admiralty remedy, and this rule is inapplicable.

81(a)(1) is proposed to be amended as set forth in this Report.

83. A similar rule for Admiralty is Proposed Amended Admiralty Rule No. 44.

With regard to the limitations and conditions appended to proposed amended Admiralty Rule 44½, the following comment is made as to those which may be less self-evident:

(C) This provision preserves the security rights of libelants which now exist under the present Admiralty practice, so that libelant, at his election, may either obtain personal service of a respondent without the district and within the state under Civil Rule 4(f), or he may attach property of the respondent under the present practice of foreign attachment conditioned on the inability to serve respondent *within* the district. This will also reconcile the retention of present Admiralty Rule 2 which permits the attachment of property of the respondent "if said respondent shall not be found within the district".

(E) It has been customary in Admiralty matters to extend time by stipulation, rather than seeking an order of the court and cluttering up the court records. This rule will overcome the decision in the *Orange Theatre Corporation v. Rayherstz Amusement Corporation*, 130 F. 2d 185 (3 C. A. 1942), which holds that an order is necessary in order to enlarge time in civil actions. This decision of the Third Circuit may conflict with the earlier approach of the Second Circuit in *O'Brien v. Lasher* (2 C. A. 1921), 273 F. 520, decided under the old Equity Rules. It would seem desirable to have the Admiralty practice continue in its simplified form.

(H) Because of the limitations on Admiralty jurisdiction in respect of counter-claims, *The Kearny* (3rd Cir.), 14 F. 2d 949, a party should not be required to speculate as to whether or not his counter-claim is compulsory. Even though a non-maritime claim may be established as a defense, it cannot be interposed as a counter-claim in Admiralty. *Armour & Co. v. Ft. Morgan S.S. Co.*, 270 U. S. 253, 259, 260. See discussion in *Swift & Co. v. Compania*, 339 U. S. 687, concerning the right of an Admiralty court to determine non-maritime auxiliary issues.

(M) This provision is included in order to make it clear that in Admiralty appeals the Appellate Court can go beyond the "clearly erroneous" rule because of the trial *de novo* principle.

(N) This provision is included as a substitute for Rule 53(d)(1) of the F.R.C.P. which requires the master to bring on the first meeting within twenty days after the reference. Most Admiralty references are for the purpose of computing damages and the parties, after considerable investigation and computation, usually agree on most or all of the items of damage, in which event the Commissioner does not act.

It takes a considerable length of time for the parties to ascertain the amount of damages, especially when they include the obtaining of data in foreign countries and the computation of the general average. A proposal to require a Commissioner to bring on a hearing was presented to the Committee on the Southern and Eastern District Rules and was rejected.

(P) This provision will reconcile the admissibility in evidence and new trial rules of the F.R.C.P. with Admiralty cases by adding "suits in admiralty" to the standards contained in those rules.

(S) Under 28 U. S. C. 2107, it is only necessary to file a notice of appeal, and no allowance of appeal is required. *Vega v. U. S. A.*, (2nd Cir.) 191 F. 2d 921. Although it is still the practice in some circuits to file assignments of error or cross-assignments of error, they are no longer necessary. The notice of intention by an appellee would be a substitute for cross-assignments of error without affecting the *de novo* character of Admiralty appeals.