

vision, which has no present applicability; and to the extent that any statute is enacted providing “that stays pending appeals to the Supreme Court may be granted only by that court or a justice thereof” it will govern and will not be inconsistent or repugnant to subdivision (g) as amended.

NOTES OF ADVISORY COMMITTEE ON RULES—1961
AMENDMENT

These changes conform to the amendment of Rule 54(b).

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendment is technical. No substantive change is intended.

Rule 63. Inability of a Judge to Proceed

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a hearing or trial without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. The successor judge may also recall any other witness.

(As amended Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule adapts and extends the provisions of U.S.C., Title 28, [former] §776 (Bill of exceptions; authentication; signing of by judge) to include all duties to be performed by the judge after verdict or judgment. The statute is therefore superseded.

NOTES OF ADVISORY COMMITTEE ON RULES—1987
AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1991
AMENDMENT

The revision substantially displaces the former rule. The former rule was limited to the disability of the judge, and made no provision for disqualification or possible other reasons for the withdrawal of the judge during proceedings. In making provision for other circumstances, the revision is not intended to encourage judges to discontinue participation in a trial for any but compelling reasons. Cf. *United States v. Lane*, 708 F.2d 1394, 1395–1397 (9th cir. 1983). Manifestly, a substitution should not be made for the personal convenience of the court, and the reasons for a substitution should be stated on the record.

The former rule made no provision for the withdrawal of the judge during the trial, but was limited to disqualification after trial. Several courts concluded that the text of the former rule prohibited substitution of a new judge prior to the points described in the rule, thus requiring a new trial, whether or not a fair disposition was within reach of a substitute judge. *E.g.*, *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir. 1982, en banc) cert. denied, 459 U.S. 910 (1982) (jury trial); *Arrow-Hart, Inc. v. Philip Carey Co.*, 552 F.2d 711 (6th Cir. 1977) (non-jury trial). See generally Comment, *The Case of the Dead Judge: Fed.R.Civ.P. 63: Whalen v. Ford Motor Credit Co.*, 67 MINN. L. REV. 827 (1983).

The increasing length of federal trials has made it likely that the number of trials interrupted by the disability of the judge will increase. An efficient mechanism for completing these cases without unfairness is

needed to prevent unnecessary expense and delay. To avoid the injustice that may result if the substitute judge proceeds despite unfamiliarity with the action, the new Rule provides, in language similar to Federal Rule of Criminal Procedure 25(a), that the successor judge must certify familiarity with the record and determine that the case may be completed before that judge without prejudice to the parties. This will necessarily require that there be available a transcript or a videotape of the proceedings prior to substitution. If there has been a long but incomplete jury trial, the prompt availability of the transcript or videotape is crucial to the effective use of this rule, for the jury cannot long be held while an extensive transcript is prepared without prejudice to one or all parties.

The revised text authorizes the substitute judge to make a finding of fact at a bench trial based on evidence heard by a different judge. This may be appropriate in limited circumstances. First, if a witness has become unavailable, the testimony recorded at trial can be considered by the successor judge pursuant to F.R.Ev. 804, being equivalent to a recorded deposition available for use at trial pursuant to Rule 32. For this purpose, a witness who is no longer subject to a subpoena to compel testimony at trial is unavailable. Secondly, the successor judge may determine that particular testimony is not material or is not disputed, and so need not be reheard. The propriety of proceeding in this manner may be marginally affected by the availability of a videotape record; a judge who has reviewed a trial on videotape may be entitled to greater confidence in his or her ability to proceed.

The court would, however, risk error to determine the credibility of a witness not seen or heard who is available to be recalled. Cf. *Anderson v. City of Bessemer City NC*, 470 U.S. 564, 575 (1985); *Marshall v. Jerrico Inc.*, 446 U.S. 238, 242 (1980). See also *United States v. Radatz*, 447 U.S. 667 (1980).

VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizure of Person or Property

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

NOTES OF ADVISORY COMMITTEE ON RULES—1937

This rule adopts the existing Federal law, except that it specifies the applicable State law to be that of the time when the remedy is sought. Under U.S.C., Title 28, [former] §726 (Attachments as provided by State laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable State law, and the district courts might, from time to time, by general rules, adopt such State laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

Lis pendens. No rule concerning *lis pendens* is stated, for this would appear to be a matter of substantive law affecting State laws of property. It has been held that in the absence of a State statute expressly providing for the recordation of notice of the pendency of Federal actions, the commencement of a Federal action is notice to all persons affected. *King v. Davis*, 137 Fed. 198 (W.D.Va., 1903). It has been held, however, that when a State statute does so provide expressly, its provisions are binding. *United States v. Calcasieu Timber Co.*, 236 Fed. 196 (C.C.A.5th, 1916).

For statutes of the United States on attachment, see e.g.:

U.S.C., Title 28:

- § 737 [now 2710] (Attachment in postal suits)
- § 738 [now 2711] (Attachment; application for warrant)
- § 739 [now 2712] (Attachment; issue of warrant)
- § 740 [now 2713] (Attachment; trial of ownership of property)
- § 741 [now 2714] (Attachment; investment of proceeds of attached property)
- § 742 [now 2715] (Attachment; publication of attachment)
- § 743 [now 2716] (Attachment; personal notice of attachment)
- § 744 [now 2717] (Attachment; discharge; bond)
- § 745 [former] (Attachment; accrued rights not affected)
- § 746 (Attachments dissolved in conformity with State laws)

For statutes of the United States on garnishment, see e.g.:

U.S.C., Title 28:

- § 748 [now 2405] (Garnishees in suits by United States against a corporation)
- § 749 [now 2405] (Same; issue tendered on denial of indebtedness)
- § 750 [now 2405] (Same; garnishee failing to appear)

For statutes of the United States on arrest, see e.g.:

U.S.C., Title 28:

- § 376 [now 1651] (Writs of ne exeat)
- § 755 [former] (Special bail in suits for duties and penalties)
- § 756 [former] (Defendant giving bail in one district and committed in another)
- § 757 [former] (Defendant giving bail in one district and committed in another; defendant held until judgment in first suit)
- § 758 [former] (Bail and affidavits; taking by commissioners)
- § 759 [former] (Calling of bail in Kentucky)
- § 760 [former] (Clerks may take bail de bene esse)
- § 843 [now 2007] (Imprisonment for debt)
- § 844 [now 2007] (Imprisonment for debt; discharge according to State laws)
- § 845 [now 2007] (Imprisonment for debt; jail limits)

For statutes of the United States on replevin, see, e.g.:

U.S.C., Title 28:

- § 747 [now 2463] (Replevy of property taken under revenue laws)

NOTES OF ADVISORY COMMITTEE ON RULES—1946 SUPPLEMENTARY NOTE

Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. [App.] § 501 *et seq.* [§§ 523, 524]) provide under certain circumstances for the issuance and continuance of a stay of the execution of any judgment entered against a person in military service, or the vacation or stay of any attachment or garnishment directed against such person's property, money, or debts in the hands of another. See also Note to Rule 62 herein.

Rule 65. Injunctions

(a) PRELIMINARY INJUNCTION.

(1) *Notice.* No preliminary injunction shall be issued without notice to the adverse party.

(2) *Consolidation of Hearing With Trial on Merits.* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (a)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION. A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if the party does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

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