would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

Changes Made After Publication and Comment. The rule text is changed by substituting ''for that purpose'' for ''further proceedings''; the reason is discussed above.

Minor changes are made in the Committee Note to make it conform to the Committee Note for proposed Appellate Rule 12.1.

Rule 63. Judge's Inability to Proceed

If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties. In a hearing or a nonjury trial, the successor judge must, at a party's request, 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; Apr. 30, 2007, eff. Dec. 1, 2007.)

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 The statute is therefore superseded.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).

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 63 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 64. Seizing a Person or Property

(a) REMEDIES UNDER STATE LAW—IN GENERAL. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

(b) SPECIFIC KINDS OF REMEDIES. The remedies available under this rule include the following—however designated and regardless of whether state procedure requires an independent action:

- arrest;
- attachment;
- garnishment;
- replevin;
- sequestration; and
- other corresponding or equivalent remedies.

(As amended Apr. 30, 2007, eff. Dec. 1, 2007.)

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.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

The language of Rule 64 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 64 stated that the Civil Rules govern an action in which any remedy available under Rule 64(a) is used. The Rules were said to govern from the time the action is commenced if filed in federal court, and from the time of removal if removed from state court. These provisions are deleted as redundant. Rule 1 establishes that the Civil Rules apply to all actions in a district court, and Rule 81(c)(1) adds reassurance that the Civil Rules apply to a removed action ''after it is removed.''

Rule 65. Injunctions and Restraining Orders

(a) PRELIMINARY INJUNCTION.

(1) *Notice*. The court may issue a preliminary injunction only on notice to the adverse party.

(2) *Consolidating the Hearing with the Trial on the Merits*. Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) TEMPORARY RESTRAINING ORDER.

(1) *Issuing Without Notice*. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

(2) *Contents; Expiration*. Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry—not to exceed 14 days—that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.

(3) *Expediting the Preliminary-Injunction Hearing*. If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.

(4) *Motion to Dissolve*. On 2 days' notice to the party who obtained the order without notice—or on shorter notice set by the court—the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.