1983

Case of the Dead Judge: Fed. R. Civ. P. 63: Whalen v. Ford Motor Credit Co.

Minn. L. Rev. Editorial Board

Case Comment

The Case of the Dead Judge: Fed. R. Civ. P. 63: *Whalen v. Ford Motor Credit Co.*

On December 10, 1975, Cornelius Whalen, on behalf of Towson Associates Limited Partnership (Towson), brought a diversity action against Ford Motor Credit Company (Ford) for breach of contract.[1] A jury trial commenced on March 31, 1980, in the United States District Court for the District of Maryland, Judge C. Stanley Blair presiding. On April 20, after three weeks of testimony, Judge Blair died and was replaced by Judge Herbert F. Murray. At that time, Ford moved for a new trial, arguing that rule 63 of the Federal Rules of Civil Procedure[2] (Federal Rules) required Judge Murray to order a new trial following Judge Blair's death. Judge Murray ruled that rule 63 did not apply and ordered the trial to continue.[3] Following two more weeks of testimony, the jury returned a verdict for Towson. On appeal, the Fourth Circuit, sitting en banc,[4] reversed Judge Murray, *holding* that, in a civil jury trial, rule 63 requires a successor judge to grant a new trial unless a verdict has already been returned.[5] *Whalen v. Ford Motor Credit Co.*, 684 F.2d 272 (4th Cir.), *cert. denied,* 103 S. Ct. 216 (1982).

Pursuant to the Act of June 19, 1934,[6] authorizing promulga-

1. Whalen was Towson Associates' general partner. Whalen v. Ford Motor Credit Co., 475 F. Supp. 537, 538 (D. Md. 1979) (denial of motions for summary judgment). Ford had agreed to provide Towson with takeout financing for an apartment-office building complex. When Ford refused to close the financing agreement, Whalen brought suit. *Id.* at 538-39.

2. FED. R. CIV. P. 63. *See infra* text accompanying note 9.

3. Whalen v. Ford Motor Credit Co., 684 F.2d 272, 273 (4th Cir. 1982).

4. Originally, a three judge panel heard the appeal, holding that rule 63 was inapplicable and that Judge Murray had properly exercised his discretion in denying Ford's motion for a new trial. Whalen v. Ford Motor Credit Co., 32 Fed. R. Serv. 2d 678 (Callaghan) (4th Cir. 1981). The Fourth Circuit, however, granted a rehearing.

5. In addition to the question of rule 63's interpretation, the Fourth Circuit was asked to consider various other substantive issues. *See* Brief for Appellant, Whalen v. Ford Motor Credit Co., 684 F.2d 272 (4th Cir.), *cert. denied,* 103 S. Ct. 216 (1982). These other issues, however, were not considered by the Fourth Circuit sitting en banc, and are not material to this Comment.

6. Ch. 651, §§ 1-2, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (1976)).

tion of the Federal Rules of Civil Procedure, the Supreme Court recommended passage of rule 63, which permits judge substitution in the event the judge originally assigned to a case dies or becomes disabled.[7] Rule 63, as enacted,[8] provides:

> If by reason of death, sickness, or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after a verdict is returned or findings of fact and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.[9]

Under this rule, it is apparent that once a jury has returned a verdict or a trial judge has filed findings of fact and conclusions of law, a successor judge may make any ruling that his or her predecessor could have made.[10] Thus, a substitute judge may rule on a motion for a new trial[11] or a motion for judgment notwithstanding the verdict,[12] and may enter a formal judgment on the jury's verdict or the trial judge's findings.[13] If the successor judge believes, however, that his or her presence at

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7. FED. R. CIV. P. 63. Rule 63 is a successor to § 953 of the Revised Statutes which provided for the authentication of bills of exceptions. Act of June 1, 1872, ch. 255, § 4, 17 Stat. 197 (repealed 1948). In response, however, to the Supreme Court's interpretation of § 953 in Maloney v. Adsit, 175 U.S. 281 (1899), that a bill of exceptions is invalid unless signed by the judge who sat at trial, Congress amended the statute to deal with judge substitution. This amendment explicitly authorized a successor judge to use discretion in deciding whether to sign a bill of exceptions or order a new trial. Act of June 5, 1900, ch. 717, § 1, 31 Stat. 270 (repealed 1948). The amendment was intended to minimize the hardship on litigants caused by a new trial, as well as to avoid unnecessary delays and expenses in the justice system. *See* Letter from J.A. Flory to John J. Jenkins, Chairman of Subcommittee No. 1 of the Judiciary Committee of the House (March 10, 1900), *reprinted in* H.R. REP. No. 658, 56th Cong., 1st Sess. 1-2 (1900) (suggesting reasons for passage of the amendment).

8. The Federal Rules of Civil Procedure became effective on September 16, 1938. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 62 (1952). Once the rules had been adopted by the Supreme Court, the enabling act required that they be reported to Congress at the beginning of a regular session in order to take effect. 28 U.S.C. § 2072 (1976). Since its enactment, rule 63 has remained unamended. For a complete history of the Federal Rules, see W. CHERRY, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES: DOCUMENTARY HISTORY 1934-1938 (1939).

9. FED. R. CIV. P. 63.

10. *See* Matanuska Valley Lines v. Neal, 229 F.2d 136, 138 (9th Cir. 1955); Miller v. Pennsylvania R.R. Co., 161 F. Supp. 633, 636 (D.D.C. 1958).

11. Berry v. School Dist., 494 F. Supp. 118, 120 (W.D. Mich. 1980); Miller v. Pennsylvania R.R. Co., 161 F. Supp. 633, 636 (D.D.C. 1958).

12. Miller v. Pennsylvania R.R. Co., 161 F. Supp. 633, 636 (D.D.C. 1958); Lashbrook v. Kennedy Motor Lines, 119 F. Supp. 716, 717 (W.D. Pa. 1954).

13. Matanuska Valley Lines v. Neal, 229 F.2d 136, 138 (9th Cir. 1955); Makah Indian Tribe v. Moore, 93 F. Supp. 105 (W.D. Wash. 1950), *rev'd on other grounds,* 192 F.2d 224 (9th Cir. 1951).

trial is necessary to decide a motion or enter a judgment, the successor may choose to grant a new trial instead.[14]

Since rule 63 expressly applies only "after a verdict is returned or findings of fact and conclusions of law are filed," the propriety of substitution before that point is uncertain. The rule's silence regarding substitution before a verdict or the filing of findings and conclusions has led to two conflicting interpretations of the rule. One alternative is to interpret the rule's requirement that a verdict be returned or findings and conclusions filed as establishing a necessary precondition to any judge substitution, thereby implicitly prohibiting substitution at any earlier point in the trial.[15] A second alternative is to interpret this requirement as merely defining the scope of the rule's coverage, leaving the propriety of substitution before that point to be determined independent of rule 63.[16]

A significant majority of federal courts interpreting rule 63 have adopted the first alternative,[17] reasoning that a verdict or findings are necessary preconditions to judge substitution.[18] These courts, however, have dealt exclusively with challenges

14. Factors considered by the succeeding judge when determining whether such rulings can be adequately made include whether the trial record includes everything the judge feels is necessary for continuation, *see* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342 (8th Cir.), *cert. denied,* 330 U.S. 836 (1946); whether the succeeding judge has been able to examine the trial record fully, *see infra* text accompanying notes 31-33; and whether, in all fairness to the parties, the trial judge should have observed the previous witnesses as they testified, *see generally* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337 (8th Cir.), *cert. denied,* 330 U.S. 836 (1946); *infra* text accompanying notes 30-38.

15. *See* cases cited *infra* note 17. *See also infra* text accompanying notes 44-52.

16. *See infra* notes 24-29 and accompanying text. *See also infra* text accompanying notes 54-67.

17. *See* Arrow-Hart, Inc. v. Philip Carey Co., 552 F.2d 711, 713 (6th Cir. 1977); Brennan v. Grisso, 198 F.2d 532, 533 (D.C. Cir. 1952); Arrow-Hart, Inc. v. Covert Hills, Inc., 71 F.R.D. 346, 348 (E.D. Ky. 1976); Burrill v. Shaugnessy, 9 Fed. R. Serv. 918, 919 (N.D.N.Y. 1946); Ten-O-Win Amusement Co. v. Casino Theatre, 2 F.R.D. 242, 243 (N.D. Cal. 1942).

18. Since 1938, many states have either adopted the Federal Rules of Civil Procedure or have used them as a model in formulating state rules. For a comparison of each state's rules of civil procedure to the Federal Rules, see AM. JUR. 2D DESK BOOK, Item No. 126 (1979). Those states assimilating rule 63 have been confronted with the same problem of choosing between the two alternative interpretations. State courts faced with the issue, exclusively in the context of nonjury trials, have overwhelmingly agreed with their federal counterparts in adopting the first interpretation, reading the rule as implicitly prohibiting substitution before findings of fact and conclusions of law are filed. *See, e.g.,* Pollastrine v. Severance, 375 P.2d 528, 529-30 (Alaska 1966); Sunshine v. Sunshine, 30 Colo. App. 67, 72, 488 P.2d 1131, 1134 (1971); Girard Trust Bank v. Easton, 12 N.C. App. 153, 155, 182 S.E.2d 645, 646 (1971).

to substitution in nonjury trials.[19] In *Ten-O-Win Amusement Co. v. Casino Theatre,*[20] for example, where the trial judge died after orally directing entry of judgment but before approving proposed findings of fact and conclusions of law, the United States District Court for the Northern District of California held that the successor had no power to sign and file findings the predecessor had left unsigned.[21] Similarly, the Court of Appeals for the Sixth Circuit, in *Arrow-Hart, Inc. v. Philip Carey Co.,*[22] stated, "Since Rule 63 specifies that a new Judge may act where the previous Judge had already made findings of fact and conclusions of law, it follows that if the prior Judge had not made those findings and conclusions, then a new trial is required."[23]

At least one court, however, has interpreted rule 63's requirement of a verdict or findings and conclusions as merely establishing the scope of the rule.[24] The United States District Court for the Western District of Pennsylvania, in *In re Garcia,*[25] found that rule 63 is effectively inapplicable if findings of fact and conclusions of law have not been filed, leaving continuation of the trial largely to the succeeding judge's discretion.[26] In *Garcia,* a naturalization proceeding,[27] the successor disposed of the case on the existing trial record without ordering a new trial, commenting that the procedure was consistent with rule 63.[28] Apparently, *Garcia* is the only case explicitly adopt-

19. *See* Whalen v. Ford Motor Credit Co., 684 F.2d at 280 (Butzner, J., dissenting).

20. 2 F.R.D. 242 (N.D. Cal. 1942).

21. *Id.* at 243. *Ten-O-Win* might be decided differently today. In 1947, rule 52(a) was amended by adding: "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein." *See* Makah Indian Tribe v. Moore, 93 F. Supp. 105, 106 (W.D. Wash. 1950), *rev'd on other grounds,* 192 F.2d 224 (9th Cir. 1951).

22. 552 F.2d 711 (6th Cir. 1977) (presiding judge died following presentation of the evidence, without having first made findings of fact or conclusions of law).

23. *Id.* at 712.

24. *See supra* text accompanying note 16.

25. 65 F. Supp. 143 (W.D. Pa. 1946). *See also* Bromberg v. Moul, 275 F.2d 574, 576 n.1, 578 (2d Cir. 1960) (declaring rule 63 inapplicable when no findings and conclusions had been filed, but ordering a new trial due to the successor judge's error in granting a summary judgment). Although *Bromberg* seems to support the minority interpretation, the *Whalen* court cited it as indicating support for the majority view. *See* Whalen v. Ford Motor Credit Co., 684 F.2d at 274.

26. 65 F. Supp. at 143-44.

27. A naturalization proceeding is essentially a judicial proceeding, Tutun v. United States, 270 U.S. 568, 569 (1926), and thus the Federal Rules of Civil Procedure are applicable. *See In re* Garcia, 65 F. Supp. at 146-47.

28. 65 F. Supp. at 143-44.

ing the minority position that rule 63's language merely defines the scope of its coverage.[29]

The propriety of judge substitution has also been considered in cases not governed by the Federal Rules of Civil Procedure.[30] Prior to the enactment of the Federal Rules, a substitute judge could continue a trial or rule on post-trial motions if such action did not require the judge to evaluate the credibility of witnesses who had appeared before substitution. In *Cahill v. Mayflower Bus Lines,*[31] the leading civil case permitting substitution on this basis,[32] the court held that a successor judge was empowered to decide a motion for a directed verdict, largely because "[i]t was not essential to have heard or seen the witnesses to pass on this question."[33] The *Cahill*

29. Other courts have suggested that, in circumstances not before them, they might adopt the minority interpretation. In Welsh v. Brown-Graves Lumber Co., 58 Ohio App. 2d 49, 389 N.E.2d 514 (1978), the Ohio court interpreted Ohio Rule 63(B), which is substantially similiar to Federal Rule 63. *See* OHIO REV. CODE ANN. CIV. R. 63(B) (Page 1982). When the judge in a nonjury trial became ill before rendering judgment, his successor continued the trial and rendered judgment. On appeal, the court stated, "In this situation, the successor judge is in the position of rendering a judgment without having observed the witnesses, and such is in violation of his judicial duties . . . . Where witness credibility is not a factor, a different situation is presented." 58 Ohio App. 2d at 51, 389 N.E.2d at 516. Thus, the Ohio court apparently did not read the rule as implicitly prohibiting all prejudgment substitution.

30. Presumably, the minority interpretation of rule 63 which finds the rule inapplicable before verdict or findings of fact and conclusions of law would rely on this authority for evaluating such a substitution. *See supra* text accompanying notes 24-29.

31. 77 F.2d 838 (2d Cir.), *cert. denied,* 296 U.S. 629 (1935). In *Cahill,* the trial judge reserved decision on a motion for a directed verdict until after the jury returned a verdict. The verdict was returned, but the judge died before deciding the motion. *Id.* at 839.

32. *See also* Thomas-Bonner Co. v. Hoover, Owens & Rentschler Co., 284 F. 386, 392-93 (6th Cir. 1922) (where neither party objected at the time, successor held empowered to decide motions for directed verdict as well as whatever questions of fact arose); Chandler v. Chandler, 92 Kan. 355, 361, 140 P. 858, 860 (1914) (holding that a new trial need not be granted by successor unless motion involved examination and weighing evidence and the credibility of witnesses); Barton v. Burbank, 138 La. 997, 1000-01, 71 So. 134, 135 (1916) (where trial judge retires before rendering judgment, successor held empowered to give such judgment without hearing further testimony if parties originally had full opportunity to cross examine witnesses); Clark v. Bailey, 99 Mont. 484, 487-88, 44 P.2d 740, 742 (1935) (declaring that actual prejudice must result from judge substitution before it will be considered a fatal irregularity, unless prohibited by statute); Case v. Fox, 138 Or. 453, 457-58, 7 P.2d 267, 268 (1932) (holding that successor can complete any of the predecessor's incomplete acts not involving comparison and weighing of testimony). Several state criminal cases also have followed the rule cited in the text. *See, e.g.,* York v. State, 91 Ark. 582, 586-87, 121 S.W. 1070, 1071 (1909); Commonwealth v. Thompson, 328 Pa. 27, 29, 195 A. 115, 117 (1937); *infra* note 41.

33. 77 F.2d at 840.

court was apparently satisfied that the successor judge had adequately prepared himself by studying the trial record.

Federal bankruptcy, tax, and administrative proceedings, not subject to the Federal Rules,[34] have continued to use this "credibility test" to evaluate substitution. These courts have generally recognized that a successor judge takes up where his or her predecessor left off. If a new trial is ordered, it is "because of something in the past course of the litigation which cannot be found in the status and record existing when the new judge takes hold and which it is necessary for him . . . to know."[35] To a substitute factfinder who has not had the opportunity to observe witnesses, the trial record may not contain everything necessary for proper continuation of the trial.[36] If, on the other hand, continuing the trial does not involve a question of credibility, the principal objection to substitution is avoided,[37] and a successor will be allowed to proceed with the trial.[38] The constitutionality of this procedure has been upheld in the federal courts.[39]

The "credibility test," which developed before the enactment of rule 63 and which is still used where the Federal Rules do not apply, has also influenced the law of judge substitution

34. FED. R. CIV. P. 81(a)(1) explicitly excludes bankruptcy proceedings from its coverage and, unlike many of the other civil rules, rule 63 has not been incorporated into the bankruptcy rules. *See In re* Schoenfield, 608 F.2d 930, 933 (2d Cir. 1979). The Tax Court is governed by rules prescribed in accordance with 26 U.S.C. § 7453 (1976). *See* 9 STAND. FED. TAX REP. (CCH) ¶ 5820 (1979) (Tax Court Rules of Procedure). Administrative procedure regarding substitution is dealt with under the Administrative Procedure Act, 5 U.S.C. § 554(d) (1976). *See* New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Comm'n, 582 F.2d 87 (1st Cir. 1978) (A.P.A. § 554(d) applied where chairperson of Licensing Board resigned during hearings).

35. St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342 (8th Cir.), *cert. denied,* 330 U.S. 836 (1946) (bankruptcy proceeding where trial judge died before concluding a hearing on a railroad reorganization plan).

36. *See In re* Schoenfield, 608 F.2d 930, 935 (2d Cir. 1979) (bankruptcy proceeding upholding district court's order for a new trial following expiration of the trial judge's term).

37. *See* Annot., 83 A.L.R.2d 1032, 1033 (1962) (discussion of substitution of judge in criminal case).

38. *See* Amoroso v. Commissioner, 193 F.2d 583, 586 (1st Cir.), *cert. denied,* 343 U.S. 926 (1952) (fact that the successor reached a decision without presiding at the Tax Court trial did not violate due process since the decision involved no credibility evaluation). *See also* New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Comm'n, 582 F.2d 87, 100 (1st Cir. 1978) (holding no abuse of discretion to deny new administrative hearing because there was no credibility evaluation required); Gamble-Skogmo, Inc. v. Federal Trade Comm'n, 211 F.2d 106, 117-18 (8th Cir. 1954) (setting aside agency decision because it was materially based on the succeeding examiner's credibility evaluation of evidence heard by his predecessor).

39. Amoroso v. Commissioner, 193 F.2d at 586.

in the area of criminal procedure. In reaction to an increase in the number of lengthy criminal trials[40] and to restrictive interpretations of the existing Federal Rules of Criminal Procedure,[41] the Supreme Court, in 1966, amended criminal rule 25 to explicitly allow prejudgment substitution.[42] The amendment seems to acknowledge that in jury trials judges need not evaluate the credibility of witnesses,[43] and that substitution does not necessarily prejudice the proceedings. Under the amended rule, substitution is basically left to the successor's discretion. This discretion reflects the same "credibility test" that is evident in civil cases before the adoption of the Federal Rules.

No court prior to *Whalen* had occasion to consider the propriety of judge substitution in a civil jury trial before the return of the verdict.[44] Judge Murnaghan, writing for the majority,[45]

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40. *See* FED. R. CRIM. P. 25 advisory committee note on the 1966 amendment, *reprinted in* 3 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 25:1 (1966).

41. In Freeman v. United States, 227 F. 732 (2d Cir. 1915), *motion for modification denied,* 237 F. 815 (2d Cir. 1916), for example, the court held that in a criminal jury trial the judge must observe the demeanor of the witnesses and have before him the same evidence as the jury in order to insure the defendant a constitutionally valid trial. *Id.* at 759. This seemed to bar substitution except where the Federal Rules of Criminal Procedure, which until amended in 1966 were identical to the civil rules in all relevant respects, specifically authorized it. Subsequent decisions, however, have severely eroded the basis for the *Freeman* decision. *See* Patton v. United States, 281 U.S. 276, 312 (1930) (right to a 12 member jury trial can be waived in a felony case); Simons v. United States, 119 F.2d 539, 544 (9th Cir.), *cert. denied,* 314 U.S. 616 (1941) (jury trial may be waived in a criminal case). *See also* Annot., 83 A.L.R. 2d 1032, 1036 (1962) (discussion of *Freeman*).

42. The amendment, which became criminal rule 25(a), provided:

> If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

FED. R. CRIM. P. 25(a). The original rule 25, which was substantially similar to civil rule 63, became rule 25(b). For a comprehensive history of criminal rule 25, see 3 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 25 (1966).

43. *See infra* text accompanying notes 79-84.

44. The subject was discussed in the British case, Coleshill v. Manchester Corporation, [1928] 1 K.B. 785. There the trial judge died before the jury returned the verdict, and the court allowed the succeeding judge to conclude the trial. The following dicta, however, casts grave doubt on the precedential value of that action:

> I doubt whether a judge has any jurisdiction to continue the hearing of a case in which witnesses have been called in Court in the course of a trial before the jury and another judge, it not being a case of evidence being taken on commission or before an examiner.

Id. at 786.

45. Judge Murnaghan was joined in the majority by Judges Russell, Wid-

rejected Whalen's contention that a basis exists for distinguishing between jury and nonjury cases in the prejudgment period of a trial, noting that rule 63 applies similarly to jury and nonjury trials.[46] To Murnaghan, the history of rule 63 clearly negates any intent on the part of the rule's framers to permit judge substitution under conditions other than those expressly provided for in the rule.[47] As evidence, Murnaghan noted the absence of any pre-rule practice customarily permitting judge substitution despite the objection of one of the parties, suggesting that rule 63's silence could not be interpreted as sub silentio approval of judge substitution in those circumstances not expressly covered by the rule.[48] In addition, Murnaghan quoted transcript extracts from the 1953 meeting of the Advisory Committee on the civil rules, at which the Committee considered but rejected an amendment expressly authorizing substitution during trial. These extracts, Murnaghan felt, clearly demonstrated the committee members' belief that substitution was not permissible under the existing rules without a stipulation of the parties.[49]

As further proof, Murnaghan contrasted the development of rule 25 of the Federal Rules of Criminal Procedure with that of rule 63.[50] After recognizing the previously existing similarity between the two rules, Murnaghan noted that the Advisory Committee on the criminal rules approved an amendment to rule 25 authorizing substitution during trial,[51] while its counterpart committee took no action to amend the civil rules, further demonstrating to Murnaghan that the civil rulemakers were content with the existing authorization of substitution only after a verdict is returned or findings and conclusions are filed.[52] Thus, Murnaghan adopted the majority view that rule 63 implicitly prohibits substitution except where expressly

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ener, Ervin and Chapman. Judge Butzner dissented and was joined by Judges Hall, Phillips and Sprouse. Chief Judge Winter, although sympathetic to the views of the dissent, concurred specially, largely because had he not done so, the court would have been evenly split and, thus, powerless to act. 684 F.2d at 279 (Winter, C.J., concurring specially).

46. *See supra* notes 17-23 and accompanying text.

47. 684 F.2d at 275.

48. *See id.* at 274.

49. *Id.* at 275-77. *See* Proceedings of the Advisory Committee on the Federal Rules of Civil Procedure, May 20, 1953 (Charles E. Clark Papers, Yale University Library) (on file at the *Minnesota Law Review*). Charles Clark served as reporter to the Advisory Committee, as well as dean of the Yale Law School and judge for the U.S. Court of Appeals for the Second Circuit.

50. 684 F.2d at 277. *See supra* note 42.

51. *See supra* note 42 and accompanying text.

52. 684 F.2d at 278.

permitted.[53]

Although it is true that rule 63 does not distinguish between jury and nonjury trials, the relevance of rule 63 to the facts in *Whalen* depends on its applicability to judge substitution *before* a verdict is returned or findings and conclusions are filed. The history of rule 63 does not necessarily show, as Judge Murnaghan believed, that the drafters intended to alter the pre-rule practice concerning substitution before the return of a verdict or filing of findings and conclusions. The Advisory Committee's note accompanying rule 63 indicates that the rule was meant to supersede 28 U.S.C. § 776, which authorized a succeeding judge to sign bills of exceptions.[54] Since a bill of exceptions, by definition, followed a decision or opinion by a judge or jury,[55] section 776 did not affect any procedure prior to such a decision or opinion. By superseding this provision, rule 63 extended the successor's power to include "all duties to be performed . . . after verdict or judgment."[56] Nothing in the rule's official history mentions any intention to change procedures *before* a verdict or judgment, and inasmuch as the statute it superseded did not deal with such procedures, it is

53. In an opinion highly reminiscent of that of the original three judge panel, 32 Fed. R. Serv. 2d (Callaghan) 678 (4th Cir. 1981), Judge Butzner led the dissenters in challenging virtually every conclusion of the majority. He argued that neither rule 63 nor any other rule expressly prohibits pre-verdict substitution. 684 F.2d at 280. The dissent traced the rule's official legislative history to show that it was not promulgated to bar substitution in a jury trial, *id.* at 280-81, and refused to rely on subsequent informal history to demonstrate a contrary intent, *id.* at 281. To the dissent, it was equally inappropriate to use an amendment to criminal rule 25 to interpret rule 63. Criminal rule 25, unlike civil rule 63, had been severely restricted by a decision that could not be avoided without an amendment. *See supra* note 41. Since the scope of rule 63 did not include substitution before verdict, the dissent reasoned, civil rule 83 supported the exercise of discretion in denying Ford's motion for a new trial. 684 F.2d at 282. *See infra* note 74 and accompanying text.

54. The Supreme Court Advisory Committee's note accompanying rule 63 stated:

> 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.

FED. R. CIV. P. 63 advisory committee note.

55. A bill of exceptions was a "formal statement in writing of the exceptions taken to the opinion, decision, or direction of the judge, delivered during the trial of the case, setting forth the proceedings on the trial, the opinion or decision given, and the exceptions taken thereto, and sealed by the judge in testimony of its correctness." 4 AM. JUR. 2D *Appeal and Error* § 417 (1962). *See* Conner v. Pritchard, 115 Ind. App. 55, 60, 54 N.E.2d 283, 285 (1944). In the federal courts, bills of exceptions have been abolished. 4 AM. JUR. 2D *Appeal and Error* § 417 n.7 (1962 & Supp. 1982).

56. FED. R. CIV. P. 63 advisory committee note. *See supra* note 54.

unlikely that the drafters of the Federal Rules intended to change any prejudgment procedure by their silence in rule 63.

The 1953 proceedings of the Advisory Committee support this conclusion.[57] While debating an amendment to rule 63 which would have authorized a successor judge to take testimony and evidence to complete a trial, Chairman William Mitchell argued against the amendment as being outside the scope of the rule. According to Mitchell, rule 63 "only relates to cases where the judge who tried it [sic] has died after making findings of fact and conclusions of law."[58] Apparently Mitchell believed that rule 63 does not apply when the substitution is to take place before a verdict is returned or findings and conclusions are filed.[59] The Committee demonstrated its agreement with this point of view by leaving the rule unamended.

Judge Murnaghan based his interpretation of rule 63 in large part[60] on Chairman Mitchell's conclusion that prejudgment substitution was not allowed under the existing Federal Rules.[61] It appears, however, that Mitchell and Murnaghan did not arrive at this conclusion via the same route.[62] Twice during the debate over the proposed amendment, Mitchell commented that no previous statute or rule allowed substitution before ver-

57. Arguably, these proceedings are of very little use in determining the intent of the rule's drafters. The *Whalen* majority cited these private papers as support for its interpretation of rule 63. *See* 684 F.2d at 275 n.8. Butzner's dissenting opinion, however, reasoned that most of the discussions concerning rule 63 found in the papers of Charles Clark, *see supra* note 49, took place years after the Federal Rules took effect. *See* 684 F.2d at 281. Butzner then cited Consumer Products Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 n.13 (1980), to show that the Supreme Court has cautioned against utilizing less formal types of subsequent legislative history to show intent. *See* 684 F.2d at 281. Moreover, he argued that the Judicial Conference had many years ago decided that the official text of the committee's working papers should not be made accessible for litigation. *See id.* (citing Letter from Chief Justice Burger to Judge Francis D. Murnaghan, Jr. (Dec. 18, 1981)).

58. Proceedings of the Advisory Committee on the Federal Rules of Civil Procedure, *supra* note 49, at 572-73. Later in the same debate, Mitchell reiterated his opposition to the amendment on the same grounds, stating, "But [the amendment] doesn't cover the point that I had, because this rule in the first clause only relates to cases where there has been a verdict or findings of fact and conclusions of law have been filed." *Id.* at 574. Again later he said: "The whole rule is limited in its application to cases where there is a verdict or findings of fact and conclusions of law." *Id.*

59. *See also supra* notes 24-29 and accompanying text.

60. *See* Whalen v. Ford Motor Credit Co., 684 F.2d at 276-77.

61. For instance, Mitchell stated, "We came to the conclusion that under the existing rule, the only way a judge could take up a case which has been tried by another judge but he hasn't decided it, is by stipulation." Proceedings of the Advisory Committee on the Federal Rules of Civil Procedure, *supra* note 49, at 572-73.

62. *See supra* text accompanying notes 44-53.

dict or judgment.[63] It seems, therefore, that his conclusion rested not on a determination that rule 63 itself prohibited prejudgment substitution, but rather on his belief that no authority expressly permitted such substitution.[64] Thus, Chairman Mitchell's comments cannot be taken as an endorsement of the majority position that rule 63 implicitly prohibits prejudgment substitution.

Moreover, Judge Murnaghan's reliance on the amendment of the criminal rules proves too much. Amending the criminal rules to provide specifically for judge substitution in jury trials does not necessarily reflect a judgment on the part of the Advisory Committee on the criminal rules that language identical to that of rule 63 precluded such substitution.[65] What it does reflect is that the Advisory Committee considered judge substitution appropriate in criminal jury trials in circumstances other than those specifically covered by rule 63.[66] Consequently, the amendment of the criminal rules, far from proving that rule 63 of the civil rules precludes prejudgment substitution, suggests that prejudgment substitution would be equally desirable at least with respect to civil jury trials.[67]

The *Whalen* majority also failed to consider the Federal Rules' policy of discouraging unnecessary cost and prolonged

63. "There seems to be no statute or rule under which any other judge can take over on the typewritten record and decide the case." Proceedings of the Advisory Committee on the Federal Rules of Civil Procedure, *supra* note 49, at 572. Later, Mitchell again stated, "Here is a case where the trial judge died and you have had a long transcript of testimony taken. He is dead, and there is no law or rule that allows another judge to take over the case on a transcript made by the preceding judge who is now dead." *Id.* at 573.

64. It should be noted that the amendment considered and rejected at the 1953 meeting of the Advisory Committee would have authorized substitution in civil bench trials only. The Committee apparently did not consider the issue of substitution in civil jury trials.

65. For example, Judge Butzner, in dissent, suggested that an amendment to the criminal rules was necessary to permit prejudgment substitution in criminal cases because of court decisions holding that a criminal defendant was entitled to a trial judge who had heard the evidence and observed the demeanor of witnesses. *See supra* note 41. Since no such decisions restrict the development of the civil rules, however, such an amendment would not be necessary to authorize prejudgment substitution. *See* Whalen v. Ford Motor Credit Co., 684 F.2d at 284 (Butzner, J., dissenting).

66. Rule 25 of the criminal rules was virtually identical to rule 63 of the civil rules prior to the 1966 criminal rule amendments. *See supra* notes 40-42 and accompanying text.

67. In addition, Butzner stated that "there are neither logical nor pragmatic reasons for allowing a criminal jury trial . . . to go forward after the death of the trial judge while a civil jury trial, involving lesser stakes, must inevitably grind to a halt . . . ." Whalen v. Ford Motor Credit Co., 684 F.2d at 284 (Butzner, J., dissenting).

delays in the administration of justice.[68] Rule 1 embodies this policy by stating that the primary purpose of the Federal Rules is to secure the just, speedy, and inexpensive determination of every action.[69] If rule 63 is interpreted as implicitly prohibiting substitution in all cases where the judge dies or becomes disabled before the verdict is returned, the duration and cost of trials will, by definition, increase. This sort of inefficiency is a source of concern to many[70] and is precisely what the adoption of the Federal Rules was designed to avoid. Moreover, the Federal Rules were meant to be interpreted to avoid strict, technical interpretations that could work hardship on litigants.[71] The *Whalen* majority failed to consider that in many complex civil cases, as well as in most cases involving private individuals as litigants, requiring a new trial in all cases where the judge dies before judgment might very well cause extreme hardship in terms of time and money.[72] Therefore, interpreting rule 63's language as merely defining the scope of its coverage[73] more closely coincides with the Federal Rules' spirit of promoting efficiency and of avoiding hardship.

Reading rule 63 so that it does not apply where the trial judge dies or becomes disabled before the verdict is returned or findings of fact and conclusions of law are filed leaves a gap in the Federal Rules' coverage. Such gaps are filled by rule 83, which authorizes each district court to adopt its own policy when a subject such as prejudgment substitution is not con-

68. Of course, the proper administration of justice to the parties should be the most important consideration in interpreting a rule such as this, but requiring a new trial in every case where a judge dies or becomes disabled before a verdict is returned is not necessary for the proper administration of justice. *See* St. Louis S.W. Ry. Co. v. Henwood, 157 F.2d 337, 342 (8th Cir. 1946), *cert. denied,* 330 U.S. 836 (1947). *See also infra* text accompanying notes 79-84.

69. FED. R. CIV. P. 1. Several courts have recognized this principle. *See, e.g.,* Bankers Trust Co. v. Mallis, 435 U.S. 381, 386-87 (1978); Des Isles v. Evans, 225 F.2d 235, 236 (5th Cir. 1955); Boysell Co. v. Colonial Coverlet Co., 29 F. Supp. 122, 124 (E.D. Tenn. 1939). Avoiding excessive cost and delay is as important today as it was when the rules were enacted. Since World War II, the average duration of a civil case in the United States District Courts has increased from approximately .9 years, to 1.16 years in 1980. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century,* 55 S. CAL. L. REV. 65, 80 (1981). *See generally* Comment, *Federal District Courts—Too Much for Too Long: Due Process and the Civil Litigant,* 9 CUM. L. REV. 523 (1978).

70. *See, e.g.,* Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation,* 70 F.R.D. 83 (1976); Address by Chief Justice Earl Warren, Meeting of the America Law Institute (May 20, 1964), *reprinted in* 35 F.R.D. 181 (1964).

71. *See* United States v. One Ford Coupe, 26 F. Supp. 598, 598 (M.D. Pa. 1939).

72. *See* Comment, *supra* note 69, at 525.

73. *See supra* text accompanying notes 16, 24-29.

trolled by a specific rule.[74] The logical step for these courts is to adopt the pre-rule practice still followed by courts not subject to the Federal Rules.[75] This practice allows prejudgment substitution when the succeeding judge would not be required to evaluate the credibility of witnesses.[76] Moreover, the history of rule 63 demonstrates that the drafters did not intend to interfere with pre-rule practice in areas not specifically covered by rule 63.[77] Thus, the common law "credibility test" should control all cases not specifically within the scope of the rule.[78]

The "credibility test" delineates a clear distinction between jury and nonjury trials. The trial judge's functions and duties vary markedly depending on whether the proceeding is before a jury or a judge.[79] The area where these functions differ the most is in the judge's power to decide issues of fact. In a bench trial, the judge acts as the sole arbiter of both questions of fact and issues of law,[80] and is required to summarize his or her findings and conclusions.[81] When the case is tried before a jury, however, the judge relinquishes many of these duties to the jury. If the facts are completely undisputed and admit of no conflicting interpretations or inferences, the issue is one of law, solely for the judge to decide.[82] Any questions of fact, however, are for the jury to decide.[83] As part of their duty to resolve questions of fact, jurors must evaluate the credibility of witnesses and determine how much weight to give their testimony. In a jury trial, questions of fact are within the exclusive province of the jury.[84] A successor judge who has not seen the

74. The relevant portion of FED. R. CIV. P. 83 reads: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

75. *See supra* text accompanying notes 34-39. Even though Advisory Committee Chairman Mitchell assumed no prejudgment substitution was allowed before the enactment of the Federal Rules, *see supra* note 63, he seems to have misread prior case law.

76. *See supra* notes 30-33 and accompanying text. *See also* 58 AM. JUR. 2D *New Trial* § 202 (1971) (new trial should be directed where credibility of witness is involved).

77. *See supra* notes 54-59 and accompanying text.

78. *See supra* text accompanying notes 30-39.

79. For a discussion of the duties of judges, see generally A. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS, AND SELECTION (1956).

80. *Id.* at 8.

81. *See* FED. R. CIV. P. 52(a).

82. *See, e.g.,* General Accident Fire & Life Assurance Corp. v. Smith & Oby Co., 272 F.2d 581, 584 (6th Cir. 1959).

83. *See, e.g.,* Pinson v. Young, 100 Kan. 452, 456, 164 P. 1102, 1104 (1917). *See generally* Broeder, *The Functions of the Jury: Facts or Fictions?,* 21 U. CHI. L. REV. 386 (1954).

84. 75 AM. JUR. 2D *Trial* § 321 (1974).

witnesses or heard their testimony could complete a jury trial begun by a predecessor, since it would not be the successor's function to evaluate the credibility of witnesses.

A judge's varying duties in jury and nonjury trials provide a natural basis for distinguishing between the two types of trials in determining the propriety of substitution when rule 63 does not apply. Consequently, if rule 63 does not control judge substitution prior to the return of a verdict or filing of findings and conclusions,[85] Judge Murnaghan should not have dismissed a distinction between jury and nonjury trials on the basis of rule 63 alone. The foregoing arguments suggest not only that such a distinction makes sense but that it is consistent with the results, if not the reasoning, of the post-rule cases that considered the propriety of judge substitution before the filing of findings and conclusions in nonjury trials.[86]

The profferred distinction between jury and nonjury cases might be objected to on several grounds. For example, one may argue that, in submitting a case to the jury, a federal trial judge, in his or her discretion, may comment on the evidence and express an opinion on the facts.[87] Since a successor has not heard all the evidence in person,[88] he or she arguably cannot adequately comment on the evidence when submitting the case to the jury. The decision whether to comment on the evidence, however, is generally discretionary on the judge's part.[89] Moreover, the jury is not bound by any comment the judge may make.[90] A successor, therefore, could choose not to comment, to avoid unfairness to either party.

Similarly, one may argue that, in a jury trial, a successor judge may be asked to direct a verdict on the basis of evidence he or she did not see presented. Upon analysis, however, this argument does not challenge the appropriateness of substitution before the verdict is returned. In directing a verdict, a

85. *See supra* text accompanying notes 54-67.

86. *See supra* notes 17-23 and accompanying text. Although one could conceive of a case where a substitute judge in a bench trial would not have to evaluate the credibility of witnesses in order to finish the trial, in most cases such evaluation will be necessary and a new trial will be warranted. *See, e.g.,* cases cited *supra* note 17.

87. The trial judge should comment on the facts whenever it is believed to be necessary to assist the jury. *See* 75 AM. JUR. 2D *Trial* § 658 (1974).

88. *See* Annot., 83 A.L.R.2d 1032, 1033 (1962) (successor judge is denied opportunity to observe deportment and demeanor of testifying witnesses).

89. Insurance Co. v. Rodel, 95 U.S. 232, 238 (1877).

90. Emich Motors v. General Motors Corp., 340 U.S. 558, 571-72 (1951); United States v. Murdock, 290 U.S. 389, 394 (1933); Doyle v. Union Pac. R.R. Co., 147 U.S. 413, 430 (1893).

judge does not evaluate the credibility of witnesses; rather, the judge resolves all questions of credibility in favor of the nonmoving party.[91] Moreover, a motion for directed verdict involves the same issues as a motion for judgment notwithstanding the verdict (n.o.v.).[92] Since the judgment n.o.v. motion is filed after the verdict is returned, rule 63 clearly allows a successor discretion to decide it.[93] There is no logic to a rule that prohibits a successor judge from ruling on a motion for directed verdict, while permitting him or her to rule on an equivalent motion once a verdict is returned.

Because of the uncertainty concerning the proper scope of rule 63, the Supreme Court should amend the rule specifically to permit judge substitution during trial. This Comment suggests that rule 63 be amended to read as follows:

> FEDERAL RULE OF CIVIL PROCEDURE 63: If by reason of death, sickness or other disability the judge before whom a trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court may in his discretion proceed with and finish the trial; but if continuing the trial requires such other judge to rule on the credibility of witnesses who have previously testified before the predecessor judge, or if the succeeding judge is satisfied that he cannot adequately familiarize himself with the record of the trial, he shall grant a new trial. If the trial judge dies or becomes disabled after a verdict is returned or findings of fact and conclusions of law are filed, the succeeding judge may in his discretion perform all duties remaining to be performed.

The proposed rule explicitly adopts the "credibility test" upon which prejudgment substitution should rely,[94] and it permits the successor to use discretion in deciding whether to continue a trial even if the successor judge is not called upon to rule on the credibility of witnesses.[95] It further allows substitution in a bench trial in the unlikely situation where credibility is not a

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91. *See* Yazzie v. Sullivent, 561 F.2d 183, 188 (10th Cir. 1977); Banks v. Koehring Co., 538 F.2d 176, 178 (8th Cir. 1976); Guam Fed'n of Teachers, Local 1581 v. Ysrael, 492 F.2d 438, 439 (9th Cir.), *cert. denied,* 419 U.S. 872 (1974); Johnson v. Geffen, 294 F.2d 197, 200 (D.C. Cir. 1960).

92. *See* Fountila v. Carter, 571 F.2d 487, 489-90 (9th Cir. 1978); Dulin v. Circle F. Indus., Inc., 558 F.2d 456, 465 (8th Cir. 1977); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 253-54 (E.D. Pa. 1979), *cert. denied,* 451 U.S. 911 (1981).

93. *See* cases cited *supra* note 12.

94. *See supra* text accompanying notes 30-43.

95. For example, a successor may want to grant a new trial, even though no credibility evaluation is necessary, when the successor determines that the delay caused by the trial judge's inability to proceed with the trial and the successor's need to familiarize himself with the record would confuse or distract the jury and cause them to forget important aspects of the previous portion of the trial.

factor.[96] Moreover, it provides that a successor may make any decision his or her predecessor could have made when substitution occurs after a verdict is returned or findings of fact and conclusions of law are filed. This ensures that the intent of the original rule 63 is fulfilled.[97] The proposed rule 63, therefore, would overrule the *Whalen* decision, and further the spirit of the Federal Rules by promoting efficiency and avoiding hardship.[98]

In choosing to interpret rule 63's requirement that a verdict be returned or findings and conclusions filed as a necessary precondition to any substitution, the Fourth Circuit's majority opinion in *Whalen* relied very heavily on inflexible statutory interpretation and dogmatic analysis of Advisory Committee hearings that provide a questionable basis for determining the intent of the rule. While Judge Murnaghan's opinion did not directly contradict any authority, a reasoned approach to the history of judge substitution, including the rule's enactment, its judicial treatment, and the subsequent Advisory Committee proceedings, suggests that the court's holding is based on a misconception of what the rule was intended to achieve. These sources clearly show that rule 63 does not prohibit preverdict substitution.

When rule 63 does not apply, common law principles should govern the appropriateness of judge substitution. The common law practice, still used where the Federal Rules do not apply, follows a "credibility test," allowing the successor to use discretion in deciding whether to continue the trial unless the successor is required to evaluate the credibility of witnesses. In a civil jury trial, a successor judge is not required to evaluate credibility; evaluating credibility is the sole province of the jury. It follows that substitution should be appropriate in most civil jury trials. The adoption of a credibility test to determine the propriety of judge substitution when rule 63 does not expressly apply would save litigants time and money, and would be consistent with the spirit of the Federal Rules. This Comment has suggested that the civil rules be amended specifically

96. *See supra* note 86. It is interesting to note that since criminal rule 25(a) is limited to jury trials, *see supra* note 42, all prejudgment substitution is apparently still prohibited when a criminal defendant waives the right to a jury trial. Since the "credibility test" is the basis for allowing substitution, the proposed civil rule 63 should encompass bench trials where credibility is not a factor.

97. *See supra* text accompanying notes 54-56.

98. *See supra* text accompanying notes 68-73.

to sanction use of the credibility test in such circumstances, to eliminate any doubt caused by decisions such as *Whalen v. Ford Motor Credit Co*.