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U. S. SUPREME COURT ADVISORY COMMITTEE

ON RULES FOR CIVIL PROCEDURE

Wednesday, November 20, 1935

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MEETING OF U. S. SUPREME COURT ADVISORY COMMITTEE

ON RULES FOR CIVIL PROCEDURE.

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Conference Room,
U.S. Supreme Court Building,
Washington, D. C.,
Wednesday, November 20, 1935.

The Advisory Committee met at 9:30 o'clock a. m., Hon. William D. Mitchell presiding.

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RULE 106

RECORD ON APPEAL--REDUCTION AND PREPARATION

MR. MITCHELL: I think we are up to Rule 106.

MR. DODGE: Mr. Chairman, it occurred to me with regard to the conclusion the court may come to on the scope of the appeal in jury waived cases, that their answer may well require an addition to our revision of our rules, and for that reason it seemed to me to be advisable to get that opinion before we complete our draft.

MR. MITCHELL: All right. If it gets to me, I will manage to get it to the court.

MR. LEMAN: Would it be true, though, of some other rules? I was just wondering whether the court ought to have it fed to them that way.

MR. MITCHELL: I am going to ask Dean Clark when he goes over these things to take out the things we have passed upon and get a memorandum on all of them and put it all in one as

far

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far as we have anything that we know justifies consideration in advance.

We have Rule 106, Record on Appeal.

MR. DOBIE: I would like to hear from some of the gentlemen who have had practical experience about that narrative record. My general reaction was that it has not been very satisfactory.

MR. MITCHELL: It is a mooted subject and lawyers do not like it and we could all shoot it to pieces, but the Supreme Court has required a narrative record for it, and unless we go to the Supreme Court and ask them to change their rule, and they will not do it, we have got to fit the record down in the district court to what they demand. I have thought a lot about that and I do not see any escape from our conforming to the rules and the present requirements of the appellate court. We can not undertake, I think, to go to them in this stage of the case and ask them to modify it.

MR. WICKERSHAM: Especially as that change is a recent change. About the same time they changed that in the Supreme Court of the United States, the court in New York went the other way.

MR. SUNDERLAND: I did not know that it was so recent.

MR. LEMAN: It is at least, I should say, twenty years old. I will tell in a minute because this pamphlet gives the date of the adoption.

MR. DOBIE: I have heard a good many litigants complain of it because you have to pay a good lawyer for his time in getting up that record. Of course it might save the court some trouble but it imposes a heavy burden on the litigants. If you get a first class lawyer it is quite a job.

MR. WICKERSHAM: Don't discard it on that ground.

MR. DOBIE: I am not discarding it. I am just asking for information.

MR. LEMAN: Rule 75 is the rule amended May 31, 1932, but I am quite sure the amendment did not go to this point, because 1932 is only three years ago.

MR. MITCHELL: The thing is an abomination, and I think it is a waste, because the time taken in settling a narrative statement is a terrible cause of delay and expense, and I am thoroughly out of sympathy with it.

My point is that if we undertake to discuss the question of whether there should be narrative records or not, we are up against a stone wall because we have to draw the rule to fit the upper court rule. If you want to, you can put a protest at the bottom of the rule and call attention to the fact that we do not believe in narrative records, but we felt forced to make our rule comply with theirs and let it go at that.

MR. LEMAN: Would it not be more persuasive to try to make an alternative rule and make the comment the other way, that we have drawn this alternative rule in deference to what

we believe the general feeling of the Bar to be and our own view, and if the court does not approve it it will have to go back to the narrative form? You see, the court is differently situated; they have had some experience and perhaps known something about the Bar's objections, and if those objections were sort of introduced by the Committee, it might have some influence.

MR. MITCHELL: If any of you have got any inkling from individual justices as to whether they are in sympathy with that rule, my impression is --

MR. LEMAN: That they all like it.

MR. MITCHELL: I would not say all of them. You see, a lawyer goes into court and he has ten or twelve volumes of records in front of him in questions and answer form --

MR. LEMAN: Has it resulted in substantially reducing the size of the transcript?

MR. MITCHELL: Oh, yes, it reduces the size of the record, undoubtedly.

MR. LEMAN: I mean very greatly. Of course there will be a reduction in leaving out the question because that takes a line or two, but those transcripts that I have seen left out very little apart from the form of the question itself. I never undertook to try to make an estimate of how much it saved but did you ever see any, Mr. Dodge, that really seemed to leave out much?

MR. DODGE: No; they do not leave out much; they do shorten the record somewhat.

MR. LEMAN: Ten per cent?

MR. DODGE: The judges are not all unanimous on this point by any means. Judge Learned Hand, for example, is strongly against the narrative form, and I have read statements of other judges about it. I am not sure that the court appreciates the extent of the feeling of the Bar about this.

It is the client's interests which are the most important thing, and they are put to a very great expense on a case of any imporatance by this because you can not trust it to a junior, you have got to do it with great care, and it is a tremendously expensive thing for the clients, who are the parties really who ought to be concerned. I should think we ought to impress upon the court the feeling of the Bar, which, so far as I know, is unanimous on this point.

MR. DOBIE: I am inclined to agree with Mr. Dodge or Mr. Leman and General Mitchell, if that is possible. I doubt if the court will go with us, and I think they want and I think it is our duty to pass on to them the reactions. We are in a certain sense the contact body between the court and the outside world. We have lawyers here who come from all over the United States and I think it would be a very good thing to draw alternative rules and give the Supreme Court our reactions. I do not think the court would consider it at all presumptive and

I think they would want them and be glad to have them.

As I say, I defer to the opinions of you gentlemen who have had actual experience with this, and with your clients, but as I go about at the various Bar meetings, and I go to quite a number of them, I talk with lawyers about this, and my opinion is the same as Mr. Dodge's, that the opinion of the Bar is not unanimous, but a pretty fair majority is against the narrative record.

MR. TOLMAN: Mr. Chairman, I would like to report that the Patent Bar Association at their meeting in Los Angeles appointed a committee to prepare a report and submit it to this Committee, in which they reach two conclusions: One is that they should no longer be required to print the testimony in narrative form. The other was that the conformity rule in evidence should be limited to jury cases. On those two things they were exceedingly interested.

In addition to that, you find here at the left of your statutes recommendations from the local committees, nearly all of which are in favor of the full record.

MR. MITCHELL: There are none opposed, are there?

MR. TOLMAN: My recollection is that there are not.

MR. MITCHELL: They are either strongly in favor or they have not mentioned it.

MR. DODGE: We could put in a strong caution in the rule to eliminate unnecessary testimony and possibly make it possible

for the court to penalize the putting in of immaterial stuff.

MR. CLARK: There is a provision already in, I do not know how effective it is, a provision for costs.

MR. DOBIE: Your general scheme is, as I understand it, that the appellant shall tell the clerk what he wants and then the appellee has an opportunity to tell what he wants, and then in general it is subject to the judge, is not that the idea, without the narrative form? I mean, this one as it is there now?

MR. LEMAN: No; it says, "In all cases the evidence shall be presented in exact form as taken, and not by way of narrative."

MR. DOBIE: I say, non-narrative, but you do not have to take in everything up as I see it here. The appellant takes what he wants and the appellee has a chance to add anything to that, and it is in the breast of the court. I think it is an excellent rule.

MR. CLARK: Down in (c) I put it up to the clerk to eliminate that portions subject to appeal to the judge, and in the next rule there is a provision for penalizing the attorneys if they --

MR. MITCHELL: You have no alternate rule here that conforms to the present practice of the upper court, have you?

MR. CLARK: No, I have not.

MR. LEMAN: Your leaving it to the clerk is nothing but a

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gesture, because it is hardly conceivable that a clerk would dare leave anything out.

MR. CLARK: I am afraid that is true.

MR. LEMAN: He is not competent to do it. I see no objection to leaving it in there but I do not think it means anything.

MR. CLARK: I suppose all it will mean is that the very obvious things he may strike out. I do not think he will go very far.

MR. LEMAN: I do not think he will do that. Most of them are not lawyers. They will leave it to deputies.

MR. DODGE: I was in a jury case once that took eight weeks in Philadelphia, and it took me just an hour and a half to pass on the objections of the other side because all I had to do was to look at his stipulation as to the part of the testimony that should be omitted. Ordinarily, a narrative form would have taken three weeks or something like that in time.

MR. LEMAN: Speaking of the clerks, Mr. Reporter, you may be interested to know that yesterday I was in the United States Court of the District of Delaware and the Clerk informed me that we were wasting our time. He said that the District of Delaware was very well satisfied with the conditions as they existed today and he thought we were just wasting our time.

MR. DOBIE: That is a small, unified State, and one district includes the State.

MR. LEMAN: The clerk, I understand, is a very important person in that district.

MR. WICKERSHAM: Yes, and one family absorbs the State.

MR. SUNDERLAND: I think most of the clerks would agree to that, that things were going very well and we ought to leave it alone.

MR. WICKERSHAM: In 1915 we had a constitutional convention in New York. At that time they took two to three years for a case to come to trial in the trial court, and almost as long in the Court of Appeals. I was chairman of the committee on judiciary, and the first thing I did was to ask the Chief Judge of the Court of Appeals to come before the committee. He did, and I said, "Judge Cullen, tell us what changes you think ought to be made in our judicial system."

"Why," he said, "Mr. Wickersham, I do not know of anything that ought to be changed."

He was perfectly satisfied.

MR. DOBIE: That attitude is not uncommon. I heard the president of the United States Naval Academy, speaking, and Dr. Alderman asked him, "A re there any changes that ought to be made before the board adjourns?", and the admiral said, "None whatever; I think the Naval Academy is perfect as it is and we want no change whatever."

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Dr. Alderman said, "I congratulate you. I have been

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president of four universities which had hideous situations, but here we find the perfect university that needs no change."

I think this rule is all right, Mr. Chairman, if we put it to the court in the proper way and say to them, of course, that this is what we believe is what the Bar and the litigants want, because if they wished us to stick to the narrative record they are going to do it anyhow.

MR. CLARK: You asked, Mr. Chairman, about the alternative rule. I think the alternative rule would be very simple. As I suggested below, it is just taking out the provision that I have for direct testimony and inserting the provisions of Rule 75 for the narrative.

MR. MITCHELL: I think we ought to present an alternate rule and urge its adoption, admitting that it involves a change of the Supreme Court's own rules. I would go as far as anybody on the committee would in filing a protest to the court against the narrative system. When you look at evidence you do not want to look at some fellow's general statement of it. I like to see the shading of it. You do not get it unless you have question and answer.

MR. LEMAN: If a fellow has dodged the question for five pages and finally answered it, you lose that in the narrative form because they only give you what he finally says.

MR. CLARK: The remedy for long records in question and

answer form is penalizing the lawyers on the printing bill and that sort of thing.

MR. MITCHELL: Have you got anything of that kind in here?

MR. CLARK: Yes, the next one; Rule 107.

MR. MITCHELL: Let us stick to 106, then. Is there anything as to the form?

MR. DOBIE: I like "motion" better than "praecipe".

MR. MITCHELL: It really is not a motion; it is a request. I think a man calls for a ruling and the clerk does not rule on anything.

MR. DOBIE: There are a lot of motions granted, of course, by the clerk.

MR. WICKERSHAM: After all, a praecipe is simply a requisition that they include certain things. A motion is a little different thing.

MR. SUNDERLAND: A notice is really the best term, is it not? That is what it amounts to.

MR. WICKERSHAM: A request.

MR. SUNDERLAND: But he has got to grant it.

MR. WICKERSHAM: That may be so, but he requests the clerk to put certain things in the record, and the other side adds to that certain other things. I have no objection to the terms of art. I rather like them.

MR. MITCHELL: Many lawyers do not know what a praecipe is. They do not practice enough in the Federal courts.

MR. WICKERSHAM: That requires a study of the law.

MR. DOBIE: The praecipe is very well known in Virginia.

MR. WICKERSHAM: Of course it is.

MR. DOBIE: I think we can refer that to the Committee on Style.

MR. CLARK: If I have full control, I like "motion" myself better because I do not like the foreign language.

MR. WICKERSHAM: "State the portions of the record".

MR. SUNDERLAND: It really is not a motion at all.

MR. MITCHELL: Let us leave that for the Committee on Style. We can take that up.

MR. CLARK: They want to do that even after my threat. When you get down to subdivision (c) I think probably you better consider it in the light of what Judge Donworth said.

MR. MITCHELL: You have not made any provision here for the party who makes the motion or the praecipe to serve it on the other side so they can see what the other side has asked for. They have got to up there.

MR. CLARK: That has got to be changed. You see, I had the very simple system of filing everything with the clerk and he does it. It has been overturned and we have to go to the more complicated system of serving.

MR. MITCHELL: Just simply serve and file.

MR. CLARK: Yes, that is it.

MR. DODGE: It might be well to give the parties the right

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of stipulation and submit an abbreviated statement.

MR. CLARK: Yes.

MR. MITCHELL: That is in the next rule.

MR. WICKERSHAM: This statement that the clerk shall be authorized to omit any portion of the record which he shall deem not necessary to the question assigned for review, if subject to appeal, the parties designating what is to be done subject to appeal to the court, may be all right, but I would not give the clerk the discretionary power to say what should go in the record.

MR. DODGE: No, I would cross out all of paragraph (c) beginning with the words "and shall" in the third line.

MR. CLARK: If you do not want the clerk to do it, should not the judge do it?

MR. WICKERSHAM: Let the judge do it, yes, but after all--

MR. DOBIE: You have to appeal to the judge from the clerk. You do not want the clerk in there at all?

MR. CLARK : One of the rules I read last night said that the Clerk was to prepare the transcript.

MR. WICKERSHAM: I think it is that the Clerk, subject to approval of the judge, shall have the approval of the printing.

MR. DOBIE: You would not give the clerk any approval?

MR. DODGE: He does not know anything about the case.

MR. WICKERSHAM: No.

MR. DOBIE: I am inclined to agree with you.

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MR. WICKERSHAM: When the appellant puts in his request or praecipe designating what he wants printed, and the other side does the same, then, subject to the ruling of the court, the record is designated.

MR. DOBIE: I think if you have a stipulation and the judge, you can eliminate the clerk's function.

MR. WICKERSHAM: I do not think you ought to have a discretionary power.

MR. MITCHELL: I do not think you can get by with that.

MR. CLARK: Section 865 of the statutes provides for the clerk to prepare the record but it does not specifically give power; it simply puts on him the duty of preparing the record.

MR. MITCHELL: I have found some of the clerks of the Fed_eral courts very arbitrary as it is. Under that statute, not given any discretion, if they presumed to exercised it, we have real trouble insisting on getting in some things that we think are material but they follow some hide-bound old practice of leaving it out.

MR. CLARK: How would it be to put a period after "printing", and say that the judge may direct the elimination of any portion?

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MR. WICKERSHAM: In case of any dispute between the parties as to what should go in the record the judge should settle it, or something to that effect.

MR. MITCHELL: Would you not give him a little more than

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that? If you are going to have a narrative form you might give a little discretion if the lawyers were lazy and wanted everything dumped in.

MR. WICKERSHAM: That is what I say; in case of dispute between the lawyers as to what should go in the record --

MR. CLARK: Should he not act even if there is no dispute?

MR. MITCHELL: That was my suggestion.

MR. DOBIE: I think you ought to have that power.

MR. MITCHELL: This rule forces everything to be dumped in that both sides want. The judge has no control over it at all. That is a very good argument for abolishing the narrative system. I would give him a little leeway.

MR. DOBIE: Do you want any notice of his action? You say the judge may eliminate any immaterial portion of the record.

MR. WICKERSHAM: Of course, it is putting an additional burden on the judges. If the parties are practicing in a decent way they ought to be able to decide what goes in the record. In case they do not, the judge should decide it.

MR. CLARK: It is not as much as he would have to do under the narrative record.

MR. WICKERSHAM: Of course.

MR. MITCHELL: It does not throw any burden on him. He does not have to exercise his authority. He accepts the

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praecipe and lets it go, but give him discretion if he wants it, whether there is any disagreement or not.

MR. WICKERSHAM: He is not to volunteer anything unless he has to.

MR. DOBIE: Why not say that the judge may eliminate any immaterial portion of the record and then provide that he shall give notice of his action to the parties and the time in which they can take it up with him and have him finally rule on it? Or do you want that? Would that delay it? Would it be better just to give him the power?

MR. WICKERSHAM: I do not think he ought to have arbitrary power. I mean, if there is any real question as to what should go in the record --

MR. DOBIE: He probably would want to hear it.

MR. WICKERSHAM: He probably would want to hear both sides. If it is just an ordinary case of straightening out something in the record, eliminating unnecessary or redundant stuff, that is one thing.

MR. CLARK: When you get passed this I want to speak a little more about Judge Donworth's fear. Are you through with this?

MR. MITCHELL: As I get it, you are striking out "subject to the review by the court or judge as herein provided", and saying that the clerk shall assemble the material of the record and supervise the printing and that the court may eliminate any

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portion thereof which he shall deem unnecessary to present adequately the questions assigned for review? Then you strike out the balance of subsivision (c)?

MR. WICKERSHAM: Yes.

MR. LEMAN: The court may direct the elimination? Did you say the court may eliminate?

MR. MITCHELL: Yes.

MR. LEMAN: The court may direct the clerk to eliminate?

MR. MITCHELLL Yes.

MR. DODGE: Have you established any time limit on this duty of the appellant in paragraph (a)?

MR. CLARK: Not now. I did have a provision in as to when the record must be filed, and that was thought to be a matter -- that is, I did not have it when this must be done, but the record must be completed within a certain time, and you will recall last night it was thought that was properly a matter for the appeal courts, so we took it out. That provision was formerly in Rule 105 and it provided that the case should be docketed and the record filed within 30 or 40 days after the filing of the notice of appeal, but that is out now.

MR. MITCHELL: We can put in here that this shall be done within the time in which the record has to be filed in the Court of Appeals. That will sort of shove that over to the rule and make the time definite. Probably there ought to be something said about it.

MR. DODGE: Yes, it is my feeling that the praecipe, as they call it, ought to be filed very promptly after the appeal is taken.

MR. CLARK: Would it not be better to do it this way: "Not later than 10 days after the filing of the notice of appeal"?

MR. MITCHELL: Well, then, you are up against the question of whether you have got a transcript from the court reporter.

MR. DODGE: That is not required for the praecipe, the actual transcript. This is just a notice of what is needed.

MR. MITCHELL: Does he not want to see his transcript and pick out the portion he thinks necessary before he files his praecipe?

MR. SUNDERLAND: There might be a good deal of it that would not need to be transcribed at all by the reporter.

MR. MITCHELL: If you required him to file his praecipe before he had got his transcript and he has not got it before him to pick and choose, he will just call for the whole thing. If he has it he may eliminate something.

MR. DODGE: In his praecipe he shall state what parts of the transcript of testimony he desires included.

MR. MITCHELL: How can he state it if he has not got it?

MR. CLARK: I have drawn it somewhat on the basis that he would have it before him. Of course we could change it and say

"later furnish transcript of such parts".

MR. LEMAN: There is no time now provided in the equity rule as to when that should be done.

MR. MITCHELL: One of the greatest causes of delay in the Federal Court of Appeals is delay in getting transcripts and this is due to delay in the reporter's system. You will have out in the western Federal courts a man who habitually reports for a certain judge. He will get into the trial of cases during a term and he will get through reporting a long case and then he ought to be relieved and take his place so he can cut the record if the parties want to appeal. Instead of doing that, he keeps right on reporting every case during the term and you can not get your transcript sometimes for a month or a week after the case is tried.

I remember when I was in the Department I thought of trying to split up criminal cases and make some rule that would require these district judges, wherever another reporter was available, to release the man in order to enable him to get out these records. They just will not do it. I think in your rules you have got to take into account the question of getting hold of a transcript and the difficulty.

MR. LEMAN: I see one case cited here where the appeal was dismissed for the failure to file the praecipe with the clerk. That is in 2 F.(2d). I wonder if I could see that.

MR. MITCHELL: What is the present rule about time for

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filing?

MR. LEMAN: Not specified.

MR. CLARK: There is no specification.

MR. LEMAN: It is Equity Rule 75.

MR. CLARK: I think the record matter is only covered in two ways. First, the statute says the record must be filed 20 days before the period; second, the Circuit Court of Appeals rules in general have provisions, and the Supreme Court has a rule on it too.

MR. LEMAN: Usually the Circuit Court of Appeals rules are copied from the Supreme Court rules. There are some slight variations from circuit to circuit, but they take the Supreme Court appellate rules as a model. With minor variations, I think they follow the general model. They change the numbers sometimes and get one or two more.

MR. DODGE: I think some time limit should be put in here, subject, of course, to delay in case of the impossibility of getting transcripts. I have known that to delay an appeal for five or six months.

MR. MITCHELL: You could put in a time limit here and say it shall be extended by the court if the --

MR. LEMAN: Transcript is not available or other specific reasons shown?

MR. CLARK: Here is the Fourth Circuit. I might say that the Circuit Court of Appeals has very long provisions about the

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form of appeal, and here in the Circuit Court of Appeals is a provision that the judge shall have power to determine what should be included, and so on. There is a whole page.

MR. LEMAN: In what?

MR. WICKERSHAM: That is like the Supreme Court rule.

MR. CLARK: That happens to be the Fourth Circuit.

MR. WICKERSHAM: In Rule 75 here is an elaborate statement as to how the record shall be made up and what must go in it.

MR. CHERRY: Just set out in here.

MR. LEMAN: You are speaking of Equity Rule 75, General?

MR. WICKERSHAM: Equity rule?

MR. CLARK: That is the one we worked on.

MR. LEMAN: But he is talking about a general rule, are you not?

MR. WICKERSHAM: Just make that applicable with such changes as are necessary to the combined practice.

MR. CLARK: Of course, we made that the basis of what we did here, except that I took out the narrative form.

MR. WICKERSHAM: Yes, I know you did.

MR. MITCHELL: It just occurred to me, is it not the practice for the clerk of the Circuit Court of Appeals to supervise the printing?

MR. DODGE: Yes.

MR. MITCHELL: You have got it, "the clerk shall", which

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makes the district clerk supervise the printing in the Circuit Court of Appeals.

MR. CLARK: I thought he did.

MR. LEMAN: No, sir.

MR. MITCHELL: Every court has its own clerk do it. You file with the Court of Appeals the typewritten material which you want in the record and the clerk of the Court of Appeals is the one who supervises the printing.

MR. LEMAN: That is done to have a uniform style of printing. Otherwise, every district clerk would have different printing. The District Court of Appeals gives it to one printer, he knows how it is to be done, and it makes for uniformity.

MR. MITCHELL: Strike out "supervising printing".

MR. TOLMAN: That is done both ways. When there is a difference between the clerk of the district court and the clerk of the Circuit Court of Appeals. In the case I had the judge of the Circuit Court of Appeals asked me not to give it to the district clerk to be printed but to give it to the Circuit Court of Appeals clerk, so I think it has been handled both ways.

MR. LEMAN: I did not know that.

MR. DODGE: The district clerk is the one who has to certify to the record.

MR. CLARK: Yes, the district clerk very clearly has to

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certify to the record. (Examining papers) This is printing records by consent; in that case the printing shall be supervised by the printer designated by the clerk of the Circuit Court of Appeals.

MR. DODGE: In our State court the clerk does the printing. I am not sure how it is in the Federal court.

MR. MITCHELL: In our State court no clerk has anything to do with it. The parties get together and hire their own printer.

MR. LEMAN: We do not print them.

MR. DOBIE: That is the Virginia practice.

MR. LEMAN: We have seven judges in the Supreme Court, and in the lower court there are three carbon copies made of the testimony besides the one for the lower court, four in all, and we take up three typewritten copies. The assumption is that if you get three judges of the Supreme Court to read it you are doing well. I think their rule only contemplates that only two of them will read it and three is plenty for them.

MR. DODGE: You do not have the narrative form?

MR. LEMAN: No. You better take out anyhow about the district clerk supervising the printing, and if in some districts he does it, he can still do it. I do not think we ought to do anything here to change the practice. We can leave that open and if there are districts where he does it he can con-

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tinue to do it. I do not think we ought to foreclose it.

MR. DOBIE: I think that ought to go out.

MR. WICKERSHAM: Rule 76 of the Supreme Court contains a provision: "In preparing the transcript on an appeal especial care shall be taken to avoid the inclusion of more than one copy of the same paper", and so on, and so on.

MR. CLARK: That is the next rule here.

MR. MITCHELL: Is that the next one?

MR. CLARK: Yes.

MR. MITCHELL: Section 865 of the Code says that the record of the Circuit Court of Appeals shall be printed under such rules as the lower court shall prescribe. That is a new one on me. In the 8th Circuit the typewritten copy is filed with the Court of Appeals and then I get an estimate from the clerk of the Court of Appeals as to the cost of printing and send him the money in advance.

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MR. WICKERSHAM: I think that is what is usually done.

MR. MITCHELL: The statute directs the lower court.

MR. CLARK: Here is the rule in the First Circuit, Mr. Dodge's circuit; it says: "Transcripts of records may be printed under supervision of either the clerk of this court or the clerk in the lower court." That is February 13, 1911, entitled An Act to diminish the cost of appeals, 28 U.S.C. 65. In either case the clerk is charged with the duty of having the printing done at a reasonable cost and then there is a

provision for an estimate of expense.

MR. CHERRY: Why not strike out that statement about supervising?

MR. DOBIE: I second that.

MR. CLARK: I did it because of the statute, 865.

MR. CHERRY: Leave it to those clerks that seem to be working at it.

MR. DOBIE: I think that is a detail that we better not go into. I second that motion, Mr. Chairman.

MR. MITCHELL: It is the sense of the meeting, as I understand it, that the words "and supervise printing" shall be stricken out.

MR. WICKERSHAM: What rule is that in?

MR. MITCHELL: We are dealing with subdivision (c) of Rule 106.

MR. DOBIE: "and supervise its printing". Stop the sentence with "record".

MR. MITCHELL: I also note, Mr. Reporter, that we ought not to limit the lower court to merely eliminating things which he thinks are immaterial. He ought to be given the discretion to insert things which he thinks fairly explains his rulings. They are sensitive about that and the lawyers might neither of them like the decision and might leave out something that he thought ought to be in there so he ought to have authority to add as well as to eliminate.

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Now, as I get it, you are merely providing now that the clerk shall assemble the material for the record, that the court may direct the elimination or addition to the record, and then we have stricken out the last sentence. Is that clear?

MR. CLARK: Yes.

MR. MITCHELL: Is there any objection to that?

MR. TOLMAN: O.K.

MR. MITCHELL: Mr. Leman had a proposition about the rule that he wanted to mention.

MR. LEMAN: I was just wondering whether we should make any more emphatic statement for the Bar that bills of exception are no longer necessary. I was not here yesterday afternoon and I did not get it myself from the first reading, that this is the section that does away with it. I asked Professor Sunderland with respect to that and he says this is the section.

MR. MITCHELL: It says at the bottom, "No formal bill of exceptions is necessary to prevent any action of the court for review." That is in (b) at the bottom of the page.

MR. LEMAN: I think that covers it.

MR. MITCHELL: "And the record may set forth, without the necessity of allowance of a bill of exceptions, the steps taken in the trial, including rulings", and so on.

MR. LEMAN: I think that is plain.

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MR. MITCHELL: In the next rule we have got a provision for a substitute rule with respect to a bill of exceptions where the parties just agreed on certain parts of the record.

MR. CLARK: My point goes a little further beyond the point that Judge Donworth raised. He was worried as to how the material in the old bill of exceptions and what I am putting in here will be officially before the court, and it seemed to me that that was only a question of certification. I think he was a little disturbed by the certification by the clerk alone, although these various rules provide for certification by the clerk.

Is it desirable to provide here -- I think probably subdivision (c) ought to have in it the provision for the clerk's certificate anyway because that is so general here -- is it desirable to have the judge sign the record and authenticate it? It seems to me it is a formality, but, nevertheless, if it would make various people who are used to a bill of exceptions feel a little better having the judge's signature on it, it is a simple thing.

MR. LEMAN: I do not think we ought to expect the judge to perform a ministerial act, and I do not see anything to it.

MR. DODGE: As Mr. Mitchell suggested, it may be more than a ministerial act. The judge may want something in there to explain his ruling.

MR. LEMAN: Do you want to put the burden on the judge?

I thought Mr. Mitchell intended to make it so that the judge could do it if he wanted to, but if you adopt the suggested rule you would go to the judge every time for a certification.

Now, what would be the form of certification? If it covered Mr. Mitchell's point, it would be a certificate that these praecipes covered everything that is offered, and he would have to check it up, which I do not think he would have the time or the information to do. If that meant merely a certificate like the clerk's certificate, that this is a correct transcript of what he instructed them to put in, it is a ministerial act. So, it does not seem to me that we ought to put that burden on the judge. I think all the Chairman meant was to give the judge an opening if he wanted to assert himself to say, "This ought to go in."

MR. MITCHELL: In Rule 108 with respect to condensing the record and getting up what under the old practice might be called a bill of exceptions by agreement, that has to be done by the approval of the clerk of court and the clerk certifies it. But the lawyers ought not to be allowed to get together and fix up what amounts to a bill of exceptions among themselves unless the court has a crack at it. Otherwise he may be reversed when he ought not to be.

MR. CLARK: Of course, I do not really think that this is necessary, but I wanted to have Judge Donworth's position fairly stated because, of course, if he is not convinced, there may be

others who are not convinced, and in talking with him he was

7 troubled as to how you got the material formerly in the bill of exceptions, that is, rulings, and so on, officially before the court. I said to just put it in the record but he thought that would not do it.

MR. LEMAN: If you have a full record it shows the ruling of the court. The reporter takes it all down?

MR. WICKERSHAM: If you are preparing a transcript of the testimony and you get the pleadings and other documentary material in the record to go before the upper court in order for it to scan it to see if there is error, what would the upper court require put in to show that that was an authentic record? Somebody's certificate that this was the record? It is not all the record, I suppose. It is such portions of the record as are agreed upon by the parties or --

MR. LEMAN: Covered by the praecipe.

MR. WICKERSHAM: But there must be some kind of a certification by either the judge or the clerk before the appellate court can take that as an authentic record on which to pass. Now, as the Chairman says, we can not let the parties get together and fix up what they will. The judge who has decided the case has just as much an interest as they have to see that the record is correct.

MR. DOBIE: Why not put it "court or clerk", and in ninety-nine cases out of a hundred I am sure it will be done by the

clerk.

MR. MITCHELL: I am not so sure that we ought not to require the approval of the court. This is the way it would work under the system that I have been familiar with: It is a purely formal act on the part of the court unless he has something in his head about it that he wants to take care of. If the parties agree on a settled case, as we used to call it, under the code system you just hand it to the judge with the stipulation of the parties, and so on, and he just says, "Approved", and it is certified up to the clerk of the upper court. If the parties get into a wrangle as to what ought to be in it, then he has to settle it upon five days notice.

Under this first rule, where each party requests what is to go in, when the clerk gets the record up according to the praecipe, so much that the plaintiff asked for and so much that the respondent asked for, he takes it to the judge and says, "Here is the record", and he approves it. You do not have to have a hearing on it, but that is the time when the judge has a right, if in his discretion he wants to, to add or eliminate something. Otherwise, the record will be made up without his being given an opportunity to do anything with it. I do not know of any practice that I am familiar with where the record on appeal is heard without an order assenting to the record by the judge, or, at least, the judge's approval endorsed on it.

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MR. SUNDERLAND: We had that for a while in Michigan, but we have official stenographers and we have the certificate of the stenographer that so far as the record represents his transcripts it is correct. I think there would be quite a protest if they did not have any chance whatever to protect themselves. It may be a mere formality in most cases but they will feel better if they have got a chance.

MR. WICKERSHAM: In the State practice in New York the judge settles the case. The appellants proposes the case, the respondent goes over the case and proposes suggestions or eliminations; they get together if they can on it; if they can not, the appellant gives notice and then they go before the judge and if he settles it or if they agree they file a stipulation and hand up the case to the court. If it is a case that has been closely contested and involves some things he is interested in, he will scrutinize it to see if it contains the questions that should go up.

MR. LEMAN: The practicewith which I am familiar takes it all up, and I think in equity cases it would be the usual rule, especially if you cut out this narrative form as we are now proposing. You see, there is a provision in the present equity rule that you only put up to the judge as to whether the narrative or condensation is a fair statement of the case. You present it to the judge for approval because there is the question of whether you have done a proper job, and the other

fellow ought to be heard. I do not think that is a case of protecting the judge as much as it is the other fellow in case of disagreement. I think in practice when counsel are agreed the judge's action is a formality.

We are proposing to eliminate the narrative requirement if we can and have just the whole record go up. If the whole record goes up how could the judge have anything to do unless he says the stenographer was incompetent and left something out which he remembered, and he can only do that by reading the transcript which he will not have time to do.

MR. SUNDERLAND: He may have his notes.

MR. LEMAN: The likelihood that he would a note that the official stenographer had omitted is very unlikely.

MR. WICKERSHAM: It would not be all the record.

MR. LEMAN: Yes. I can see, where only parts of the record go up, you would want to have an opportunity for the judge to look at it, and it may be that there is not enough difference in practice between the two cases, where you take up parts and where you take it all up, to make a different rule.

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MR. DODGE: I think you are entirely right. It occurs to me that in equity appeals the judge does not have anything to do with the record.

MR. MITCHELL: He does if there are differences.

MR. DODGE: With a narrative statement, that is different.

MR. LEMAN: Yes, in the praecipe. Recently we had a case

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where the appellant wanted to put in a lot of stuff in his praecipe that we did not think ought to go in the record, and so we had a right to be heard. Wherever the parties are not in accord that right should go to the judge.

MR. MITCHELL: The record, as a rul e , is an authorative statement.

MR. DODGE: Yes, the judge must approve a narrative statment. In our system we go up in narrative form and the judge has not anything to do with it.

MR. LEMAN: The reason he has to approve the narrative statement, I think, is to give the other fellow a chance to object. He must motify the other fellow and that gives him a chance to object. If he does not object, the judge signs it as a matter of routine.

I do not think we ought to stay very long on this because it is just a question of whether we are going to save the judge one more thing to sign, if we are in doubt about whether he wants to sign it. If he certifies that this is a correct copy of all the record in a given case -- I do not see how it could certify it. All he could do would be to say, "Approved". If there is doubt about it it seems to me perhaps it would be safer to provide that he should say "Approved", although I think in ninety-nine percent of the cases that will be a mechanical act.

MR. MITCHELL: It would be, yes.

MR. SUNDERLAND: The only objection would be where in the

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Circuit Court the judges travel around, and it would be hard to get hold of your judge and it would cause delay.

MR. DOBIE: That is our trouble, with fifty counties, and some of them as far away as Big Stone Gap. I observed that I could have gotten from Charlottsville to Quebec four hours quicker than I could get to Big Stone Gap.

MR. LEMAN: In these days of automobiles it will cause some annoyance, but it will not cause much delay. It may mean sending a messenger by automobile to where the judge is to do it.

MR. SUNDERLAND: If it will not cause much delay, I think it will prevent a lot of feeling on the judges.

MR. DOBIE: You mean a mandatory requirement that they sign it?

MR. SUNDERLAND: Yes.

MR. DOBIE: Do you make that motion?

MR. SUNDERLAND: I make that motion.

MR. WICKERSHAM: What is that motion?

MR. MITCHELL: That is that in all cases before the record is certified up by the clerk, it must be committed to the judge and approved by him.

MR. CLARK: Would he certify his approval, or does he certify the accuracy?

MR. MITCHELL: He would just say "Approved, United States District Judge."

MR. CLARK: I think it would be difficult to certify the accuracy, and I am afraid that is what Judge Donworth had in mind.

MR. LEMAN: He will not approve it if he has any question in his mind. If it is a close record he can take it and thumb it over and examine the rulings. I think that will cover Judge Donworth's point.

MR. CLARK: I hope so. Judge Donworth said, "Suppose the stenographer has made a mistake."

MR. LEMAN: The judge can catch it in that way. I think he will agree that it is covered. If not, he has a day in court still.

MR. CLARK: You will notice some of the comments of the committee that we should require official reporters.

MR. MITCHELL: We can not do anything of that kind. We have been trying to get bills through Congress for years to appropriate money for that and can not do it when Congress refuses. It is very desirable that we have an official reporter regularly employed by the Government.

MR. DODGE: That is what we have.

MR. DOBIE: That is the code practice, to have official stenographers.

MR. LEMAN: Our stenographers are not paid by the court.

MR. MITCHELL: You would think with all this unemployment money going around it would be a good chance to have that

done.

The motion was made to require in all cases that the record before being certified by the clerk shall be committed to and approved by the judge. All in favor of that say "Aye".

(The question was put and the motion prevailed without dissent.)

MR. MITCHELL: I think that cleans up Rule 106 for the time being, does it not?

MR. DODGE: Is the printing to be left to local regulation?

MR. MITCHELL: We are eliminating the provision about supervising printing.

MR. CLARK: We are not going to say anything about it and we are going to allow the Circuit Courts of Appeals still to violate the law.

MR. MITCHELL: We provided two ways of getting the record up; one is this method, and the next one is by brief statements. We have provided two ways, and that is the end of it, is it not? It would be my impression. I think you ought to have a comment under this rule to the Supreme Court calling attention to the situation about printing in the statute, and that we have it untouched and if they think there is a problem there they can do something to the rule to cover it.

Is there anything further now on 106? Was that where you wanted to provide for certification by the clerk?

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MR. CLARK: Yes, and disapproval by the judge, I suppose. That would put in another sentence.

MR. MITCHELL: And if approved, shall thereupon be certified by the clerk in the appellate court?

MR. CLARK: You would not want to say that the clerk shall submit the record to the judge to be endorsed with his approval? Of course it would mean that the lawyers would have to check up and see that the clerk has done that?

MR. MITCHELL: Just they shall be submitted and then if the clerk is not efficient the lawyers can do it. Anybody can do it.

MR. LEMAN: Have we made a note, Mr. Chairman, of your suggestion to cover Mr. Dodge's point as to the time in which the praecipe should be filed?

MR. CLARK: We did not have them do anything about that.

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MR. DODGE: I thought you were going to put in a time limit of some kind.

MR. CLARK: I guess we did not settle it. I suggested ten days after the notice of appeal and then the question came up as to the getting of the transcript.

MR. MITCHELL: I suggested a fixed time limit and then the court might extend it for cause shown, that the transcript was not available or for other cause.

MR. CLARK: Ten days?

MR. WICKERSHAM: I think that is too short.

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MR. LEMAN: I do not like to have the rule more honored in the brief than in the observance, and if you make it 10 days that is what will happen to it. I would like to make it a little longer.

MR. MITCHELL: How does the 20 days fit in, within the 20 days for docketing?

MR. CLARK: I do not know; if you have to docket within 40 days, you have 20 days --

MR. MITCHELL: Do you docket the case by sending up a preliminary record?

MR. CLARK: I wonder if they do; as I read this, they are supposed to have the whole business. This is the Second Circuit: "It shall be the duty of the appellant to docket the case and file the record with the clerk of the court before the return day of the citation. For good cause shown the justices or any district judge may enlarge the time upon four days notice."

The appellant must have the case docketed and dismissed.

MR. DODGE: It seems to me that the ten days is ample and more than is ordinarily taken. I think the fellow who files his appeal quite frequently files the praecipe with it. If you do not want the praecipe, the appellant should state what he will furnish the clerk, with such transcript as he has indicated there at that time, or as soon thereafter as he can get it.

MR. MITCHELL: Bear in mind in support of that that this

time for appeal is three months, and the fellow who is going to appeal will order his transcript before he perfects his appeal in most cases.

MR. DODGE: I suggest making the time for the praecipe five days. The evidence is the only thing that would take any time.

MR. LEMAN: Where is the provision for the return day on the appeal?

MR. CLARK: There is no provision for anything of that kind, and where that has come from before is really from the Circuit Court of Appeals' rules. There is a provision in the statutes about a citation on appeal.

MR. LEMAN: That makes a return day, that is right.

MR. CLARK: Then the Circuit Court of Appeals' rules provide that the judge in the citation shall state the return day of the appeal, which shall not be later than usually either thirty or forty days from the date of the citation.

MR. LEMAN: This is something different from the -- practically, this is a provision as to when that appeal must be filed in the Court of Appeals, and if you do not put in something like that a fellow would not have any time within which he could file his appeal. He could file his motion within the statutory time and his notice of appeal as we now have it, and then he might wait a year.

MR. CLARK: I am a little worried about it.

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MR. LEMAN: I do not think we can leave that open. I think we have got to close that gap. I think every State must have some practice by which the appellant is required to complete the record of appeal and get it in. That goes beyond your point about following up the praecipe. That means to get everything done and the papers in the appellate court. He might hold the whole thing up for a year before he got them in.

MR. MITCHELL: Is there not a statute or a rule that requires --

MR. LEMAN: That is why I asked?

MR. CLARK: I think it requires a citation. Is that not again one of the provisions we ought to hesitate about, when he shall file it in the upper court? The trouble is that if we do too much hesitating we will leave it all in the air.

MR. LEMAN: Here is a Supreme Court rule on it, and I imagine it is copied --

MR. WICKERSHAM: What rule is that?

MR. LEMAN: It is Rule 10, paragraph 1.

MR. MITCHELL: Of course, there has to be a provision fixing the time within which the appeal should be returnable in the upper court, that is, docketed there, so as to get the jurisdiction, but I had supposed that the rules of the appellate courts covering the --

MR. LEMAN: Maybe it is out of our province.

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MR. MITCHELL: I suggest that we refer that to the Reporter. I think we have to check this back in active practice. I would like myself to talk to the clerks of the Circuit Courts of Appeal and district judges before we can act intelligently about this thing.

MR. LEMAN: It is a matter in which the Reporter is somewhat handicapped because it is so largely a matter of practice and it is something that has to be approached and pretty carefully checked.

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MR. MITCHELL: I think it is a matter of detail, and getting the full picture in the particular court is something we ought to consult the judges and the clerks about.

MR. LEMAN: Would you consider that that might be not our province?

MR. MITCHELL: I had not dealt with it in that light. I had supposed it was all covered by the appellate court rules.

MR. LEMAN: That is the question I am raising, whether this question of when you would file the thing is outside of the district court practice. The praecipe that Mr. Dodge spoke about has got to be done in the district court. The lodging of the appeal and the appearance in the appellate court is something that has got to be done in the appellate court. The point is this, that this is not within our appointment, and maybe we --

MR. WICKERSHAM: Is not this the point: The appeal ordi-

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narily brings up or calls for a transcript of the record from the lower court on which the appeal may be heard? Now, in order to perfect the record you have got to get the evidence, which is no part of the record ordinarily unless embodied in a case or a bill of exceptions perfected on appeal in the lower court. Then, having that, the question of how that transcript of the record shall be gotten to the appellate court, and Rule 10 of the present Supreme Court Rules goes into that elaborately.

MR. DOBIE: I think you will find a similar rule in every Court of Appeal, and I am rather inclined to think that the judges in the Circuit Courts of Appeals may not like us to mess with it.

MR. MITCHELL: We are substituting a notice of appeals for a citation, and the citation fixes the return date, while the notice, of course, does not.

MR. LEMAN: It says here that within the time required by law you must take the notice of appeal. That relates, of course, to the time of asking for appeal and does not relate to the term date. This thing is sort of mixed up because the appellate rules require what the clerk of the district court must do, and this praecipe is in the Supreme Court rules as the appellate court, and I think it is in the Circuit Court of Appeals' rules, so it shows the same practice in the appellate practice as in the lower court.

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MR. WICKERSHAM: Is that not simply because the appellate court wants to have a perfect record before it, wants to have the record prepared in a certain way; so, it says, as the Supreme Court does in its Rule 10, the clerk of court from which the appeal comes shall do certain things to perfect the record in a certain way, conforming to their ideas of what they want presented to them in order to pass on it?

MR. CLARK: May I make some suggestion about Rule 105 on this matter of time? In the first place, it is true that the Circuit Court of Appeals' rules in the various circuits do cover it in allowing a time for the citation.

MR. DOBIE: Yes, but we have ruled out the citation.

MR. CLARK: The judge allowing the appeal shall fix the time and it shall not be thirty or forty days. We want to abolish the citation, and I am afraid if we do not say something about it -- if we just want to fix in so many words the exact time, we ought to at least say that the parties shall serve copies of the notice of appeal upon the opposing parties or their attorney --

MR. MITCHELL: Why not stick right in there, "and such appeals shall be returnable within 40 days after filing"?

MR. CLARK: I really think that would be better. If we do not want to say 40 days, we ought to say within such time as the rules of the appellate court may prescribe, but I do think we ought to say one thing or the other.

MR. MITCHELL: We have got a statute now which says the citation is returnable within 40 days, have we not?

MR. LEMAN: It may be the statute, but the Supreme Court rule says: "When appeals are allowed the citation shall be made returnable not exceeding 40 days except in the far western States where it is 60." The fact it is not in this rule would indicate to me that it is not in the statute.

MR. CLARK: It is not in the statute.

MR. MITCHELL: You are talking about appeals to the Supreme Court of the United States.

MR. LEMAN: Yes, but there are similar provisions in the Circuit Court of Appeals' rule.

MR. CHERRY: We will have to fix a day that is to be the day of the beginning of this thing, as the citation was, and then let the rules apply, the Circuit Court of Appeals and the Supreme Court rules apply from that day. We have no citation any more.

MR. LEMAN: Notice of appeal.

MR. CHERRY: We have a notice. Now, can we not say something here -- I do not have in mind the form of it -- something that simply says for the purpose of the appellate court rules this shall be the equivalent of the old citation?

MR. CLARK: That is just what Mr. Moore whispered to me,

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and maybe that can be worked out, but we have to cover this so that under the Circuit Court of Appeals' rules that court

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in fixing the citation could make --

MR. CHERRY: That is out, because there is no citation, but it does cover the maximum time.

MR. MITCHELL: How would you have that provision now as to this rule? The citation must be returnable not exceeding 30 days from the day of signing the citation.

MR. CHERRY: There is no return any more. You have got 30 days.

MR. LEMAN: The way to do that would be --

MR. CLARK: What I want to get away from is any question that they must go to the judge to fix the time.

MR. WICKERSHAM: Not if you fix a uniform rule.

MR. CHERRY: Not if we say this shall serve the purpose of the citation and the time allowed --

MR. CLARK: Shall be the maximum.

MR. LEMAN: That would answer the point, but I do not know whether that is proper. In some cases the judges may very properly hold down that citation period where they think that the appeal is resorted to for the purpose of delay, where the record is very easy. I know a case where a fellow appealed, a really frivolous appeal, on a suit to foreclose a mortgage.

MR. WICKERSHAM: I think you will get a great confusion if you have a various time subject to the whim of the individual judge.

MR. LEMAN: That is the way it is now.

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MR. CLARK: It is confusing.

MR. LEMAN: I do not think it is confusing. You have a lot of rules and you have to find your way around. That is what you will have to do now, and this will make it simpler.

MR. MITCHELL: The thing that strikes me is that by adopting this method, giving notice of appeal instead of citation, in view of these rules of the appellate court it is forcing the appellate court to modify their rules to cut out citations and there would not be such a thing any more, and it makes me wonder whether or not we better stick to the citation that they are used to and not have the notice.

MR. SUNDERLAND: That is such an awful thing.

MR. LEMAN: I was arguing that the citation is not in our function, that is, those return days when you can file it, and there are other things in those rules that we have considered that are not our function, like the praecipe, which is pretty clearly our function, yet it is covered by the appellate court rules. Whatever changes we make on the citation they will have to conform to.

MR. CLARK: And obviously cover a lot of things --

MR. LEMAN: That are none of their business.

MR. MITCHELL: We can say the appeal shall not be perfected unless the return is in the upper court within the time.

MR. LEMAN: Make the time 30 days unless another time may be fixed by specific order which he may obtain from the district

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court.

MR. WICKERSHAM: Is it not a simpler rule, which is established by all the courts, that you give your notice of appeal, you have to file your transcript within some designated time fixed by statute or rule of the upper court. If it is necessary to get that time enlarged for some good and sufficient reason the judge, of course, can do it.

MR. LEMAN: Can you enlarge it?

MR. WICKERSHAM: Enlarge the time for filing the record?

MR. LEMAN: You can not enlarge the time of the citation.

MR. WICKERSHAM: I am not talking of the citation. You are substituting a notice of appeal. In the code practice, which is uniform everywhere, you must serve your notice of appeal within the given time after the entry of the judgment from which you appeal. That is your appeal.

Now, in order to protect your record which has to be certified up from the lower court to the appellate court, you must prepare the record and file it in the upper court within a certain length of time unless for good and sufficient cause the judge shall enlarge that time.

I do not see any difficulty with that system. That is what we do.

MR. MITCHELL: There is one little quirk, due to the hiatus in the situation. The appeal that has been perfected below and sent up, you have to have some court that has juris-

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diction. The appellate court has not until it is entered up there and docketed. The lower court has lost it by the notice of appeal except for completing the record. That is all he has authority to do. That is why it is that they require some sort of docketing in the upper court primarily. I know if you leave it just to the filing of the complete record and that takes a month or two to get ready, it will not work, and what they do is that within this return date of the citation, if the transcript is not ready and the bill of exceptions is not settled, and all that, the clerk of the lower court in obedience to the citation will transmit to the Circuit Court of Appeals part of the record.

MR. LEMAN: All he has got.

MR. MITCHELL: The formal papers, notice of appeal, and so on, and get it docketed up there, and they do that. So, if you just adopt the plan of not having anything filed above until you have got your case all settled and sent your record all up, you are in trouble about it.

MR. WICKERSHAM: Unless as in the case under the code, the case must be made and filed within a certain time unless that time is enlarged by the court.

MR. MITCHELL: I suggest that this subject be referred to the Reporter to make a further investigation of the situation and that he bring another rule to meet what he thinks will fit the situation'

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MR. CLARK: I should be glad to do that. I would like to state my own reaction now and ask if there are any questions about it. It seems to me that we ought to go back to the original provisions in Rule 105 at the end -- we made a proviso about putting a limitation on when a bill is to be filed. What we are talking about is this: Within a time provided by law a party may effect an appeal by doing certain things, and we are saying he has not got his appeal perfected unless he has done the following -- so, I think a sound argument can be made that it is within our power, and if we do not put that in we

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have two alternatives; first, to try to leave it up to the Circuit Court of Appeals' rules, and as yet the Circuit Court of Appeals' rules are not very adequate, and until and unless the Circuit Court of Appeals change their rules there is liable to be a question. Or, we can go back to the citation, and if we do that I will throw up my hands. It means that you have to go to the judge and get him to set a time. It is going back into the dark ages. So, I again suggest that we come to some such provision as I have here, that the bill is not perfected-- we say if you want to appeal you make these steps, and this is your last step.

MR. LEMAN: Did we take out that last sentence on the ground that it was not our jurisdiction?

MR. CLARK: Yes.

MR. LEMAN: It would really cover the point we are now

talking about.

MR. CLARK: Yes.

MR. LEMAN: On reflection I see no objection to this provision. I think you exaggerate somewhat your dark ages rules, because I think this is O.K. and maybe some improvement.

MR. WICKERSHAM: It seems to me we are establishing what is in effect the code procedure. We do not have any trouble under the code. If the case is not filed in time you move to dismiss the appeal.

MR. MITCHELL: Where do you move?

MR. WICKERSHAM: You move in the appellate court, of course.

MR. MITCHELL: How has it got there? Who is the moving party that brings it up there?

MR. WICKERSHAM: Of course the appellate division is a part of our court. The Court of Appeals is different because it brings up the record which has been made in the lower court, but you can arrange that, it seems to me, by giving a notice of appeal and requiring the record to be perfected within a certain time which may be enlarged by the judge, with the right of either party to have the record set aside as is, unless the time is extended.

MR. DODGE: That is as in the last part of Rule 105.

MR. CLARK: Yes.

MR. DODGE: I move that that stand.

MR. SUNDERLAND: I support it.

(The question was put as to restoring the proviso at the end of Rule 105, and the motion prevailed without dissent.)

MR. LEMAN: We have to say whether it is thirty or forty days, and I move that it be forty, merely because of the western States. The Supreme Court now says a maximum of forty, and sixty in the western States. We might, of course, consider some of the circuits -- you provide thirty, Mr. Clark?

MR. CLARK: Yes.

MR. LEMAN: So, if we are going to stick to a uniform time we should say forty, unless we want to put a contingency in there like the Supreme Court has.

MR. MITCHELL: Having in mind that you have three months in which to start this appeal, I am in favor of 30 days. That gives you four months after judgment to perfect your case.

MR. LEMAN: What you have to do is to fit your motion. If you put your motion in too soon your time would be running too soon, and in order to carry out your idea you have to delay your motion for appeal?

MR. MITCHELL: You can do that.

MR. DOBIE: You do not have to wait for the notice of appeal. Frequently the lawyer starts preparing his transcript before he makes the notice of appeal.

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MR. LEMAN: But this time we are talking about starts running from the notice. We are talking about how much time we will allow, and the Chairman said to make it 30 days, which will make four months, and I said that if he had to file it before that time that argument would not be applicable. I think it would be safer to make it forty, although thirty is all right with me.

MR. MITCHELL: What is your pleasure? Will you make a motion to make it forty?

MR. LEMAN: I make that motion.

(The question was put and the motion prevailed without dissent.)

MR. LEMAN: Do you want to diminish the time as well as to enlarge it?

MR. WICKERSHAM: What, the time for appeal?

MR. MITCHELL: To file the record?

MR. LEMAN: This, of course, will permit a little additional delay, but not much.

MR. MITCHELL: If he has asked for a stay, he can reduce it. He can say, "I will grant you a stay of execution provided you take your appeal within --". He can enlarge it that way, and if there isn't any question of the stay it does not mean anything.

MR. CLARK: On this we do not need any time for the praecipe, do we? We have got the thing very well taken care of

when he has to get it through?

MR. LEMAN: There is no time for it now. Is that not the reason there is no time?

MR. DODGE: If he has to file his appeal in the 40 days, he has to give the opposing counsel time to file his praecipe. I think we should give a very short time.

MR. LEMAN: Why give him any? That is his risk. The longer a fellow waits the more risk he takes.

MR. CLARK: There is one other matter that I want to raise a question about that comes in perhaps more directly with 105. We have not specifically said anything about cross-appeals. I do not know whether we want anything special, or should we have something special?

MR. DODGE: Cross-appeals shall be consolidated into one record.

MR. LEMAN: How does a man take a cross-appeal? The same way?

MR. DODGE: The same way.

MR. WICKERSHAM: There is nothing now in the rules about cross-appeals?

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MR. CLARK: I do not think there is, no.

MR. TOLMAN: Would not these rules cover all appeals, if you did not call them cross-appeals?

MR. CLARK: Yes, that was the general theory I had.

MR. MITCHELL: I think that is sound.

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MR. SUNDERLAND: The conclusion might be that there were no cross-appeals and they had to be independent appeals if you did not put anything in about them.

MR. CHERRY: There has not been any provision.

MR. LEMAN: There is nothing in type under that heading under appellate procedure.

MR. CLARK: While you are looking at that a little more, I might ask the other question: Do you think we have covered the question of appeals in jury waived cases? I think we have without any question. The point is, for example, that, due to the fact that there was no request for special findings, no motion for judgment, and no exceptions, the appellate court could not do otherwise in the Fleishman Construction Case but to dismiss the appeal. I think we have covered that. This sets forth the method. Of course, we have done away with the necessity of requesting special findings. The judge has to make special findings.

MR. MITCHELL: What about this cross-appeal point, before we pass on?

MR. LEMAN: I find nothing in the index in Dobie. In the index to Simpkins it refers to cross errors with a short paragraph where it says that a fellow who takes no appeal can not by assigning cross errors assert any jurisdiction for review.

MR. MITCHELL: You might get into a wrangle on that.

MR. LEMAN: I guess cross-appeal merely means that the

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other fellow takes an appeal of his own, that both parties appealed.

MR. CLARK: I think there may be a statute about two appeals being consolidated.

MR. MITCHELL: The only thought I had was whether it was necessary to put in anything about consolidated the record.

MR. SUNDERLAND: Why would not that take care of the whole thing? Let each take his appeal, but consolidate the record.

MR. MITCHELL: The question is whether it is necessary to do anything. That depends on whether it has been the practice.

MR. CLARK: Here is the provision at 864: (Read Section 864, U.S. Code.)

MR. WICKERSHAM: Is that a rule or a decision?

MR. CLARK: That is the statute, 864, that is on appeals to the Supreme Court. I wonder if that is covered?

MR. MITCHELL: I think we ought to put something like that in our rules so we will not have to be jumping back to the statute.

MR. WICKERSHAM: What is that statute? 28 U.S.C. 864?

MR. MITCHELL: That is on appeals to the Supreme Court?

MR. CLARK: Yes.

MR. LEMAN: Probably there is a corresponding rule.

MR. CLARK: I think likely there is. I do not have it at

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the moment. The Chairman suggests that we ought to have it in here.

MR. DODGE: Cross-appeals shall be consolidated and heard on one record. How would that do?

MR. CLARK: That apparently is not the idea here. They are two separate appeals but there is one record.

MR. LEMAN: I think you better look up the rules and look up the cases and see what problems have been presented and see if you have something there. I think you ought to read the cases which came up and see how they have gone about it.

MR. MITCHELL: There are certain appeals from the district court direct to the Supreme Court, are there not?

MR. CLARK: Yes.

MR. MITCHELL: Now, we have provided that they shall be returnable to the Supreme Court in 40 days, and the Supreme Court says that if you live in Wyoming you may have 60 days.

MR. LEMAN: The district court may increase it.

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MR. MITCHELL: I do not think everybody in Wyoming ought to have that extra time to comply with the Supreme Court rule.

MR. LEMAN: That was in the days when the travel conditions were different.

MR. WICKERSHAM: That is the last Supreme Court rule.

MR. LEMAN: It does not say when it went in. They may have put it in when the difficulties of transportation were

much greater than they are now.

MR. WICKERSHAM: They repeated it in the last revised rules and said that in the Western States the appeal shall be returnable in 60 days.

MR. CLARK: We could cover that, if you wished; we could go back to Rule 105 and say --

MR. LEMAN: Just keep that language.

MR. CLARK: Either put in that language or we could add an exception there, -- except that on appeals to the Supreme Court they shall be filed within such time as the rules of the Supreme Court require.

MR. DODGE: We are explaining these rules as well as the others.

MR. LEMAN: They are their own rules and it is just a matter of what they want to do.

MR. CHERRY: Put a note at the end explaining it to the court.

MR. LEMAN: I suppose this is a detail about which we might pass to the Clerk of the Supreme Court.

MR. DODGE: We would not want to give them more time to appeal to the Circuit Court of Appeals.

MR. LEMAN: I do not see much reason to this in the distance between Washington and Wyoming, but it may be that the local lawyer in communicating with the local judge, because the distances are so great, needs more time because it takes

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him so long to go and get the order signed and get back to the clerk. That would be reflected in a corresponding provision in the Circuit Court of Appeals' rule out there.

Could we not just ask the Reporter to look into that and check it with the Clerk of the Supreme Court?

MR. MITCHELL: I think we have got to.

MR. LEMAN: And also to look into the Circuit Court of Appeals rule out there.

MR. MITCHELL: Our rule is going to force a change in the Supreme Court as well as the Circuit Court of Appeals. They are not going to allow any rules to stand as to citations and issue another one as to notice.

MR. LEMAN: These citations will have to go out, any_how, apart from the time limit.

MR. MITCHELL: Yes, that is what makes me wonder whether they will object to it or not. Have we covered it?

MR. CLARK: I think so.

MR. MITCHELL: Then Rule 106 we will pass over, having discussed it sufficiently.

RULE 107

CONDENSATION OF RECORD--COSTS--CORRECTION OF OMISSIONS

MR. MITCHELL: That takes us to 107, which is the matter of getting a condensed partial record like an bill of exceptions.

MR. LEMAN: In line 2 or 3 to put in/admonition to the

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judge to avoid the inclusion of more than one copy? Would it not be sufficient to adopt the language of the equity rule? I wonder how the judge would like it. You have a penalty below in Rule 107, and I do not think he would enjoy that wording.

MR. CLARK: We have been telling him lots of things up to this point.

MR. WICKERSHAM: If you say that in preparing a record on appeal special care shall be taken, I think that is sufficient.

MR. LEMAN: I think that is sufficient. You have a penalty below for the attorneys, and those are the only parties we want to get at.

MR. DOBIE: Do you want to strike out the words "clerk and the judge"?

MR. LEMAN: I move that we strike out the words "by the parties and by the clerk and the judge." I think all the parties are interested in that.

MR. CLARK: Everybody has to do it, even the printer.

MR. WICKERSHAM: I would say that special care should be taken by everybody.

MR. LEMAN: The only fellow who gets the penalty is the attorney.

MR. MITCHELL: Does this cover the fact that special care shall be taken not to include parts of the transcript that are unnecessary?

MR. CLARK: It should.

MR. MITCHELL: It says that not more than one copy of the

same paper shall be included, "and to exclude the formal and immaterial parts of all exhibits, documents, and other papers referred to therein."

It does not say anything about care being taken not to include the pages of the transcript which are irrelevant.

MR. LEMAN: He has just taken the equity rule language. It should cover the inclusion of unnecessary and irrelevant material.

MR. MITCHELL: Something of that kind should be included.

MR. LEMAN: The equity rule is: "In preparing the transcript on an appeal especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude --" and so on.

MR. CLARK: I think we ought to add something in there -- I put something in the other rule, subdivision (c), that I think ought to be here, with regard to all portions of the evidence which are necessary.

MR. SUNDERLAND: Portions of the testimony.

MR. CLARK: Portions of the testimony.

MR. LEMAN: How would it do to insert after the word "exclude" in line 3, "all unnecessary and immaterial matter, including"?

MR. WICKERSHAM: All immaterial parts of exhibits, documents -- he has got that. What were you going to suggest?

MR. MITCHELL: I do not like the words "include" and "ex-

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clude". I suggest the Reporter phrase that to make it cover immaterial parts of the testimony. I would suggest striking out "for any infraction of this rule" down to the end. We are directly authorizing the appellate court to impose costs. We have made the rule, and let the appellate court impose the costs. How can we deal with their function? Don't you think it ought to be eliminated?

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MR. SUNDERLAND: That is naturally in the appellate courts.

MR. CLARK: It is in the equity rule.

MR. MITCHELL: They have authority to deal with it in the appellate court.

MR. LEMAN: I think we can say that costs may be imposed and let them decide.

MR. TOLMAN: Do you want to make that that the district courts may make the amendment and tender it to the appellate court?

MR. MITCHELL: We are talking about Rule 107 here. Where is there anything about amendment here?

MR. TOLMAN: The last paragraph of 107, with reference to actions, errors, or omissions. But the point, as I understand, is that it attempts to make a rule for the Court of Appeals. Could that be changed to provide that in case of error or omission the correction may be repaired by the district court and furnished for use above?

MR. DODGE: The case is apt to be out of the district

court by that time.

MR. TOLMAN: It is a nice illustration of the sharp distinction between the courts.

MR. SUNDERLAND: The appeal does not oust the jurisdiction of the lower for the preparing of the record. If it is a correction, it is a part of the general function to prepare a record.

MR. LEMAN: I think once you take that appeal, if you claim that the record is not correct, I do not believe you can go back to the district court and say -- here is something else, and then take it to the Court of Appeals. I think Mr. Dodge is right on that.

MR. CLARK: That is already in the statute, 865.

MR. DODGE: That is just to avoid printing.

MR. MITCHELL: I think we might leave it in here in this way: "If in the record on appeal anything material to either party be omitted by accident or error, on a proper suggestion or its own motion the Court may direct that the omission be corrected by a supplemental record."

That gives the district court power to supplement the record without going through the rigmarole of certiorari. It does not deprive the appellate court of the power to do the same thing.

MR. DOBIE: Just strike out the words "the appellate court"?

MR. MITCHELL: Strike out the words "the appellate court"

and insert the words "the court".

MR. LEMAN: Strike out "appellate".

MR. MITCHELL: Yes, that is it; strike out the "appellate". Now, that takes us back to this matter of costs.

MR. LEMAN: Is that "appellate" there too?

MR. MITCHELL: The appellate co_urt is the one that has really got to decide whether there has been surplus material, because when it comes to consider the case it knows what is material and what is not.

MR. LEMAN: They are the ones that have control of costs.

MR. MITCHELL: Yes, and they enter judgment or costs up there on all appeal proceedings. Now, it is awkward to go back to the district court.

MR. SUNDERLAND: In fact, the district court is pretty nearly estopped from doing that after proving that record.

MR. DODGE: It is also awkward to go back to the district court when the appellate court starts to hear a case and it appears that something is the matter. They, of course, ought to have the power to add it to the record.

MR. MITCHELL: I think we ought to strike out "and for any infraction" down to the words "as well as parties".

MR. WICKERSHAM: I so move.

MR. DODGE: I would rather put it up to the court with the words "appellate" in bo th cases as it is here, and to call their attention to the difficulty we had in transcribing this

equity rule which is there, to have it go all the way through.

MR. LEMAN: Yes. If you take out that, then you take out the teeth in the provision. Somebody will say, "There was a penalty in here but they have taken it out."

MR. MITCHELL: What we should do, instead of putting in something we have no authority to deal with, is to call the attention of the court to the fact that we have left it out

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and the reason we have left it out, and that calls attention to the necessity, if there be one, of amending the appellate court rules on imposing costs. I think these rules will be found to do it all right if you state it that way.

MR. DOBIE: I am satisfied they will.

MR. MITCHELL: If they do not, it is the appellate court's business to make rules for the inclusion of final costs in their judgment, of course, and we have done all we can to insist in the lower court that the record be kept down.

MR. DODGE: Under Section 2 of the Act authorizing the court to consolidate the present equity rules with law rules, I think that may be within the power conferred.

MR. MITCHELL: In equity cases, maybe.

MR. DODGE: No, to consolidate the present equity rules, and we do not want to leave anything out which we do not have to which is in the present equity rules.

MR. LEMAN: Of course, it would simplify matters very much if you could proceed on the theory that you are now sug-

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gesting, that there is an implied grant to do everything in law actions on appeal that the equity rules did in equity actions on appeal. Is that not what you are driving at? If we can support that it will take care of a lot of the discussion we have been having.

MR. DODGE: As to the very small extent to which the present equity rules refer to that, we can include them.

MR. CLARK: I might say that I have been very convinced myself that we ought to take that position. I have been a little disappointed at the hesitancy to do it, because it is not really a matter of strict law now, so to speak; it is a matter of where the rules can go now, of course. If we make admissions against interest on behalf of the court now, I suppose it may foreclose them hereafter.

MR. DOBIE: We can admit these things with a note to the court, and if the court wishes to make an appropriate direction, they can do it.

MR. CLARK: I would rather do it the other way, and if there is a question they can strike that out. Is it not the judgment of the committee that that is the proper way to do it, if we put them up with a weight tied around their neck, so to speak?

MR. MITCHELL: I am agreeable to that. I do not want to be technical, and I suggest we put them back in with a note that we have some doubt about how they will function. We have this question that Mr. Dodge raised about the equity rules, that they

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apply to cases in law as the old equity rule did. I think that is all right. I withdraw my suggestion to strike out "for any infraction".

MR. DODGE: I so move.

MR. LEMAN: How far could we carry that idea into other matters we have been discussing?

MR. MITCHELL: We will let the Reporter go through, or we will have to go back now over all these things.

MR. LEMAN: I did not mean to go back now, but have we not given a sort of general leave?

MR. CLARK: Mr. Stone has made for me a list of the memoranda that hawe been proposed, and we had better let it go to the end of our session today, and I will just note the comments you have made and see if I have got everything you want, and so on.

MR. DODGE: If you are leaving out anything in the equity rules simply because it applies to the appellate court, the attention of the court should be called to that.

MR. MITCHELL: We ought to leave out the word "appellate" in the last paragraph of 107. We did that advisedly in order to give the district court more power.

MR. CLARK: All right.

RULE 108

RECORD ON APPEAL--AGREED STATEMENT

MR. MITCHELL: Rule 108. This is the one for an agreed

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statement like a bill of exceptions.

MR. CLARK: I might say that I do not know that we have said in so many words that the parties may stipulate as to the portions of the record to be omitted. This is an agreed statement for the whole business. I should suppose that this agreement would include it all and I would not need to say that the parties may stipulate for omissions. Would that not be obvious?

MR. SUNDERLAND: That would be implied.

MR. CLARK: I should think so.

MR. TOLMAN: This is analogous to the question of law that is certified to the appellate tribunal for a decision? Is it not analogous to that?

MR. SUNDERLAND: It is more analogous to an agreed statement of facts, is it not?

MR. DOBIE: Yes, there are limitations as to a single question of law or one or two, whereas here it is not a limitation on the questions the court is going to consider. Of course, in the certificate the Circuit Court of Appeals certifies the questions because they think that will dispose of the case. But here it is not a question of limiting the number of questions, but limiting the record.

MR. TOLMAN: That is what I meant. I think it is a very good provision.

MR. DODGE: Is this identical with the equity rule?

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MR. CLARK: I think so. There may be small changes in wording.

MR. DOBIE: It is practically the same.

MR. LEMAN: Yes, you even say, "the district court or the judge thereof", in line 4.

MR. CLARK: Yes, that is true.

MR. DODGE: Why not strike out the words, "or the judge thereof"?

MR. MITCHELL: Mr. Clark, what is the technical meaning of the last paragraph of this rule, "shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the judgment from which the appeal is taken, and, togather with such judgment, shall be copied and certified to the appellate court as the record on appeal"? I do not understand that.

MR. CLARK: I think there is a technical meaning. It says somewhere, and I think maybe in the statutes, but certainly

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back in the rules, that a formal record includes the pleadings and all those documents that have been filed. We have tried to get away from formality. I do not know but there might be something said for changing the wording of this last sentence for fear it may ressurect old ideas about the record.

MR. WICKERSHAM: What is the matter with that?

MR. CLARK: We could say, "shall take the place of any other record and shall be the record on appeal", instead of "superseding". What do you think of that?

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MR. SUNDERLAND: I think you could say that such statement shall constitute the record on appeal.

MR. CLARK: I would just as soon make that change.

MR. DODGE: Yes, with the judgment. The judgment seems to be left in here.

MR. LEMAN: Then omit line 4 from the bottom and just say after "the office of the clerk of the district court", these words, "such judgment shall be certified to the appellate court".

MR. MITCHELL: And then omit everything after "court" down to and through "judgment"?

MR. DODGE: Yes, with the judgment.

MR. CHERRY: You want to leave the "judgment" in?

MR. DODGE: I say, "together with such judgment, shall be copied and certified to the appellate court as the record".

MR. DOBIE: It seems all right.

MR. WICKERSHAM: Such statement and the judgment constitute the record for the court of appeals? How about the notice of appeal? That is a part of the record.

MR. CLARK: I do not know. Is it?

MR. LEMAN: I do not think you have to have it in a case like this. That is just a formal matter.

MR. MITCHELL: The upper court would not know if it had jurisdiction.

MR. LEMAN: You have both parties agreeing to this.

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MR. CLARK: "With the judgment and notice of appeal"; it is a small thing anyway.

MR. TOLMAN: Do you want us to do what we did with the other rule, strike out the words "appellate court"?

MR. MITCHELL: Oh, no.

MR. WICKERSHAM: No, not there.

MR. CHERRY: That is descriptive.

MR. DOBIE: You do not have to pass on that, Major. You do not have to go to the appellate court and say, "Can this be determined on appeal". This is just descriptive stuff.

MR. LEMAN: I notice, in addition to Equity Rule 77, in Hopkins he cites a case that except as permitted by this rule the parties can not stipulate as to what the record on appeal consists of. That makes me think of two things where I do not understand it; by filing a praecipe and the other fellow not objecting to it, you really do agree what is in the record on appeal, and I wonder if we have carefully checked the citations in this situation to see if they present any situations which we ought to try to correct or cover. I do not know whether we have enough in here to permit the parties to stipulate the record on appeal. Perhaps there is something they tried to do that they could not do that you ought to permit them to do. I do not see why the parties should not be permitted to stipulate, especially with the approval of the judge. Of course there might be something to consider when he was deciding that,

but if the judge approved it why should not the parties be permitted to stipulate the record on appeal? Can you think of any reason?

MR. WICKERSHAM: I was just thinking about it. No, with the approval of the judge, why should they not?

MR. LEMAN: Generally, have we checked over, has the staff checked over everything as to these equity rules and the cases under them?

MR. CLARK: They have gone into a great many; they have tried to check what they thought was relevant. I do not mean they have checked them all.

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MR. LEMAN: I do not mean that, but all the points considered by these cases?

MR. CLARK: We have tried to, and, of course, we will re-check now on cases raising that question on this point.

MR. LEMAN: There ought to be a general check, I think.

MR. CLARK: Of course, we have done a great deal of that.

MR. LEMAN: Before we send this out to the profession I think we ought to do that. I think we ought to take these annotations and check them against the points we have considered and see if we have overlooked anything that has been brought up.

MR. MITCHELL: Are we ready for Rule 109?

MR. CLARK: What was the outcome of this? Do we go back and check or do you think we ought to put something about stipu-

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lating for the record?

MR. LEMAN: We have sent for the case on that, and we will look at it.

MR. DODGE: I don't think we ought to be concerned about that.

MR. CLARK: Of course, you have practically an agreement on praecipes.

MR. LEMAN: That is why I sent for the case. It may suggest something.

IX. PROVISIONAL AND FINAL REMEDIES

RULE 109

ARREST; ATTACHMENT; GARNISHMENT; REPLEVIN

MR. CLARK: On Rule 109, at our meeting in Chicago we tentatively decided to adopt the State rules, and, of course, that is the present law except that there has been a question in the present one about presenting this in law. It was made "the present law", which holds things in a vice back at the time of the adoption of the statute.

MR. DODGE: Each district court has had to adopt this, of course.

MR. CLARK: Yes, and we have done two main things; first, we have adopted them, and, second, we have provided for the then existing law, meaning the law existing at the time the action is drawn.

Now, we tried several ways of stating this, and this comes

down to a question of how far we shall try to spell things out.

First off, I had some forms which tried to spell it out a lot longer than this, and we continually tried to cut it down, and I am not sure but what the alternative rule at the end is just as good and I suggest you look at that.

It depends on whether you think the longer form is more helpful, the spelling out we have done, or the alternative at the end. Of course, the alternative Rule 109 does chase the lawyers around a little, but it is fairly simple.

MR. WICKERSHAM: I like that alternative rule very much. Those proceedings, those remedies, are peculiar in each State. They have their own regulation, their own statutes, and their own practice, and I think it is very desirable to leave those be in conformity with the State law and practice at the time when the effort is made.

MR. DOBIE: There are two questions that I would like to raise: One of them is, and you gentlemen know this, in Laborde against Ubarri, that attachment is never issued by the Federal court except as an incident to personal jurisdiction. I do not suppose that there was any idea of overlapping?

MR. CLARK: No.

MR. DOBIE: That is what I gathered. The other question was whether you wanted to make any provision -- there is quite a good deal of law on attachments. The statute provides that when a case is removed it goes in the then condition, and any

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attachment which has been perfected in the State court is binding the Federal court until the court takes action on it. It is not entirely clear, where there is no personal service on the defendant and the attachment is procured in the State court and it then moves to the United States court, whether or not the United States court could dissolve the attachment merely because it would not have granted it. I do not think it should. Those are details, they are not big, and do not often happen, I think, and the Supreme Court would resent bitterly any attempt on our part to try to claim attachment where there is no personal jurisdiction over the defendant. I do not think the removal thing is very important now.

MR. DODGE: Where the defendant whose property is attached comes in and appears personally and removes the case?

MR. DOBIE: Yes.

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MR. DODGE: I do not think he ought to be allowed to get rid of the attachment.

MR. DOBIE: Nor do I, and I think the Supreme Court has so indicated, but in Clark against Allen that rule did not come up because Clark's lawyer did not move to remove the attachment.

MR. DODGE: It would practically nullify the State laws.

MR. DOBIE: I think it would.

MR. MITCHELL: I know in the Federal courts there is no provision of law by which you can institute a suit originally and by attachment of property in substituted service get juris-

diction.

MR. DODGE: That is right.

MR. MITCHELL: You can in the State courts. Suppose it is done in the State courts, and there is a removal; what happens in the Federal court under the existing law?

MR. DODGE: It goes up with attachment, receivership, injunction, and everything. In Clark against Allen had the Federal court not granted the injunction, on the case being removed from the State court the attachment is clearly effective unless action is made to dissolve it.

MR. MITCHELL: The effect is that when the State court has obtained jurisdiction by attachment of property rather than by personal service, and put it itself in the way of rendering a judgment, that is good to the extent of the property seized, and then on removal the Federal court is bound to go on and do the same thing although the suit could not be originally started that way?

MR. DOBIE: Yes.

MR. WICKERSHAM: Except where there is a case brought in for attachment and the defendant goes into the Federal court because he thinks he will get a better ruling of law applicable to his case than in the State courts, so he takes it there and then he moves to vacate just as he would in the State court, but he is pretty sure that he is not going to be able to vacate if he stays in the State court, and he would rather have the ruling of law in the Federal court and also a much smaller bill

of costs.

MR. LEMAN: Is he subject to personal attachment if he appears, beyond the value of the property?

MR. DOBIE: Removal is a special appearance.

MR. LEMAN: He can remove to the Federal court and then question the validity of the attachment, but if he loses on that he can be subject to personal attachment?

MR. DOBIE: Yes, a general appearance.

MR. LEMAN: Let me ask whether this alternative rule would not supersede the present provision that you can not attach a non-resident in the State court? Your comment in your book, Mr. Dobie, seems to indicate as an original question under the statute it might have been allowed, the non-resident could be brought to the Federal court by attachment, but that the Federal courts have set themselves against such a rule by repeated decisions, and, therefore, this is apparently a result which follows from the decisions rather than from any constitutional or statutory requirement.

MR. DOBIE: That is right.

MR. LEMAN: Now, if you adopt an alternative rule which says, "The remedies of arrest, attachement, garnishment, and replevin shall be available under the circumstances and in the manner provided in any applicable Federal statute, or by the then existing law applicable to civil actions of the State in which the district court is sitting", and the law of my State

permits you to bring in a non-resident by attachment, you ought to do it.

MR. DOBIE: I think we ought to provide for that.

MR. MITCHELL: I think you should confer the power on the Federal court to obtain jurisdiction.

MR. DOBIE: I will extend this further in a statement, but I think it is desirable to have it. I am convinced that if you leave it out that is what the Supreme Court will hold, and I think it is better to provide for it.

MR. CLARK: Would you prefer to put it in by proviso or would you start it by saying, "Any actions which are within the jurisdiction of the district courts"?

MR. LEMAN: May I ask how you would accomplish that result, or does everyone think the contrary is too deeply embeded in the law?

MR. DOBIE: I do not think the Supreme Court would stand for it.

MR. LEMAN: I think the result would be unwise.

MR. MITCHELL: I think we would be enlarging the jurisdiction as it now stands under the law.

MR. DOBIE: Attachment is an ancillary process, and where you can not get personal attachment that will not extend it. I move we submit that to the Reporter to take care of it as he sees fit.

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Mr. Mitchell. With that qualification in "Alternative Rule 109," which we have just discussed, is the alternative rule in substance satisfactory?

Mr. Wickersham. I move that we adopt it.

Mr. Dodge. I have one question about it. Perhaps it is peculiar with Massachusetts, but with us replevin is not an incidental remedy to another action. It is a wholly different kind of an action. It does not rank with arrest and attachment in any respect.

Mr. Dobie. That is true with us, too. I doubt if we ought to put replevin in there.

Mr. Wickersham. How is that? I do not get that.

Mr. Dodge. I say, replevin is not an incidental aid to an action at law or a suit in equity. It is a different kind of an action, independent in itself, and has no resemblance to attachment.

Mr. Wickersham. In some States they begin a suit by attachment.

Mr. Dobie. He is talking about replevin.

Mr. Wickersham. I do not mean replevin -- an ordinary action. I think in Rhode Island they begin suit in that way, by issuing a writ of attachment.

Mr. Clark. And in Connecticut and Massachusetts. I do not think this interferes with that.

Mr. Wickersham. Not at all. This takes the suit "as is" and carries it into the Federal court, and then it is

disposed of.

Mr. Clark. Mr. Dodge is now raising the question that replevin is entirely a different action.

Mr. Wickersham. Yes -- well, replevin is different.

Mr. Mitchell. He objects to associating it with arrest, attachment and garnishment. We certainly ought to put in some clause here which provides that the procedure on replevin shall be the local one.

Mr. Lemann. Mr. Dodge seems to think there is something here that implies that this is an incidental remedy; but I do not see anything of the kind in that language. The point is that it is an independent and principal remedy, but there is nothing in this language which looks the other way.

Mr. Dobie. All the others are.

Mr. Mitchell. It really is an incidental remedy in the State court procedure to which I am accustomed. You can bring an action and call it a replevin action -- it is an old expression -- but it is an action for the recovery of specific personal property. The special remedy provided by State law is to file a bond and get out a writ, and the sheriff goes and takes custody of the property and holds it unless the other fellow reclaims it with bond. That is a sort of a special proceeding or remedy incident to an action for the recovery of specific personal property. We do not have a form of action called replevin action.

Mr. Lemann. It seems to me it is just a question of the use of the word "remedy". Is "remedy" broad enough to cover his kind of thing as well as the other?

Mr. Clark. We have much the same thing that Mr. Dodge has. I had not thought but that this was all right. Now, if we are going to do something else, I do not see much that we could do except, either in this section or in a separate section, to put in another sentence.

Mr. Wickersham. As to replevin?

Mr. Clark. Yes.

Mr. Wickersham. I was going to ask a question, too. These remedies we are talking about -- arrest, attachment, garnishment -- are what are generally known in Code States as provisional remedies. Also, they include injunction, as a rule. You have not got that.

Mr. Clark. That is covered in the next section.

Mr. Wickersham. Oh, the next rule -- I see.

Mr. Clark. I could put in a separate rule here for the recovery of personal property; but the rule, I take it, would be in essence the same as this.

Mr. Lemann. I should have thought this language, "remedy", would not be strictly interpreted; but, at any rate, if you do anything, it seems to me all you need do is to change the verbiage and add a sentence which would say that this same rule shall apply to actions of that kind.

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Mr. Wickersham. I would use the language "actions of replevin". We know what that is.

Mr. Lemann. In Louisiana we have some other remedies for which we have peculiar names. One we call "provisional seizure", which you call common law "distress", I think, in a landlord suit. Is not that what you call it?

Mr. Wickersham. Yes -- distraint.

Mr. Lemann. When you want to enforce your lien -- you have a suit for rent, a claim for unpaid rent -- and your tenant or merchant, you think, is about to move out his goods, you get out a seizure immediately on filing your complaint with appropriate bond. Now, we ought not to uselanguage here to exclude that. Is there another section about that later, Mr. Clark?

Mr. Clark. No; I do not think so.

Mr. Lemann. We have also another remedy instead of what you call replevin. This presents a little more difficulty, but I think you can easily get some words to cover it. We have a remedy of sequestration, which is also used in equity practice in a different meaning.

Mr. Wickersham. But "sequestration" is broader; is it not?

Mr. Lemann. Yes; but, I say, we use it in a different sense. We use it as a substitute for what you would call "replevin". We have no such thing as an action of replevin; but if you have my horse, and I sue you, I get out a writ of

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sequestration, allege that you have my horse, and sequester that horse.

Mr. Wickersham. That is a civil law remedy.

Mr. Lemann. Our practice is not civil law.

Mr. Wickersham. You began with the Livingston code; did you not?

Mr. Lemann. Yes, but it was a common-law remedy also; and Mr. Clark points out, in his book on Code pleading, that many of the provisions of the other code originated with Livingston. Livingston is a New York lawyer who came to Louisiana, and I do not think he had much idea of French practice, or even the original Spanish colony practice, which was very different, at least in many particulars. But, at any rate, the point is, I think we ought to have a little broader language here to cover these other kinds. There may be in other States similar limits that would not be covered by the precise language "arrest, attachment, garnishment, and replevin", and we ought to have a little broader phraseology; and then we might cover Mr. Dodge's point in a recasting. Could we not leave that to the Reporter?

Mr. Dodge. This rule would strike anybody in Massachusetts as foolish, because in a section dealing with the ordinary features of an existing action -- that is, the ways to enforce your judgment, attachment, arrest, etc., and execution later -- it deals with this independent kind of an

action, replevin, which has nothing to do with an existing cause of action, but is an independent lawsuit in itself. There are no Federal statutes about it.

Mr. Mitchell. You are harking back to special forms of action which we have all abolished. You have a civil action-- it may be for money, it may be for the recovery of specific personal property -- and, looked at in that light, it seems to me appropriate for us to associate the remedies of arrest, attachment and garnishment, and treat replevin as a remedy. Under this unified system you can bring an action for the recovery of specific personal property, and you do not have any replevin at all. You do not have to go to the sheriff and seize it.

Mr. Dodge. That is all right. I do not object to that.

Mr. Wickersham. But you cannot bring an action for the arrest of a particular individual.

Mr. Mitchell. If you want, however, just as you may want to attach in some cases, to get security for your debt -- if you want this remedy of replevin, as it is called -- then you take the procedure to seize the property. It is a remedy attached to an action for recovery of personal property.

Mr. Wickersham. The attachment is an incident to the remedy that you are seeking in your action. The action of remedy is a suit under the Code -- a suit for the recovery of a specific chattel.

Mr. Tolman. It is an ancient common-law action.

Mr. Wickersham. It is an ancient common-law action; but you do not necessarily issue any process. You may begin and prosecute your replevin action without ever issuing a warrant for the actual taking of the chattel until after judgment.

Mr. Mitchell. It seems to me a very highly metaphysical thing to object to associating the words together; but if you want to put in a separate sentence, and say "Actions in replevin," then I think you will have a roar.

Mr. Clark. Mr. Cherry has a suggestion. I wonder whether it would not cover it.

Mr. Cherry. I suggested to the Reporter the insertion, after the word "replevin" in the second line, of the words "and similar proceedings, whether by State procedure, independent or ancillary." I have tried to take care of both points.

Mr. Lemann. That would cover my point.

Mr. Cherry. It covers yours, and I think it would cover Mr. Dodge's point.

Mr. Dodge. What I object to is introducing into this part of the rules which deal with the proceedings that are incidental to an action of contract, say, something thrown in with regard to an entirely independent kind of lawsuit. You never bring an action to recover $5,000 as an incident in aid of replevied property. You attach, you arrest, you

get your execution. All these things we are dealing with here are incidental to another action.

Mr. Cherry. But I understood Mr. Lemann to say that what they have, which is like replevin, is incidental to an action.

Mr. Lemann. That is right.

Mr. Cherry. But also his case presents the other side of that, Mr. Dodge -- that this sequestration is a writ in aid of your action.

Mr. Lemann. That is right.

Mr. Cherry. So that we have that variance. I just wondered whether that would cover both points in any State.

Mr. Lemann. With me, I can use that writ either in support of a personal claim or just to recover that horse, which would be the common-law replevin.

Mr. Mitchell. Can you, in Massachusetts, bring an action for the recovery of specific personal property, and take no steps to seize it until you have tried your case and gotten judgment for the return of it?

Mr. Dodge. No; you bring the action of replevin probably as you do in every State of the Union, but it is not incidental to another action.

Mr. Mitchell. That is not my question.

Mr. Dobie. He wants to know whether you just bring it and await the determination of the suit.

Mr. Dodge. No; you put up a bond. A writ of replevin

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has nothing to do with aid to the enforcement of rights under other actions.

Mr. Dobie. Or, in Virginia, under our statute, you can recover the value of the property.

Mr. Mitchell. I think it is necessary to the enforcement of your writ to be able to get theproperty, to secure it, while you are litigating the question.

Mr. Dobie. But you cannot bring any action in Virginia to recover the horse yourself unless you have some title.

Mr. Cherry. I suggest that you are begging the question here.

Mr. Dodge. Is it necessary to say anything about replevin? That is an ordinary form of action.

Mr. Clark. How would you get it into the Federal system?

In my State we have a procedure which I suppose is analogous to that in Massachusetts, but I had not thought but that I was covering it. We say "remedies", and now Mr. Cherry has added "independent or otherwise".

Mr. Cherry. No; "similar proceedings, whether by State procedure independent or ancillary".

Mr. Clark. Whether they are, by State procedure, independent or ancillary?

Mr. Cherry. Yes.

Mr. Clark. The only thing which I think would cause any difficulty is my section heading, "Provisional and Final

Remedies."

Mr. Cherry. I thought of that.

Mr. Clark. Perhaps it ought to be "provisional remedies and final remedies". After all, that section heading is rather broad, and does not mean very much. It is just a tag to help the West Publishing Company in knowing where things are.

Mr. Wickersham. You have to have a tag for an index.

Mr. Clark. Yes.

Mr. Dodge. An action for replevin would never get into the Federal court unless it were between citizens of different States and involved property of more than $3,000.

Mr. Clark. That is correct.

Mr. Dodge. But you do not need any special provision, because, if there is such a case, it can get into the Federal court.

Mr. Sunderland. Does it have to get into the Federal court by removal?

Mr. Dodge. No.

Mr. Sunderland. It goes there originally.

Mr. Lemann. What he means to say is that it will not happen often, which I think is true, and if he wants to do it he could do it, because this law would give him the right, and he does not need to tag it especially.

Mr. Dodge. It strikes me it is very inartistic to put it in here.

Mr. Clark. In most States it is clearly not inartistic, and if we do not put it in we may raise a question in those States, as in New York. I must say that it does not seem to me inartistic in either Massachusetts or Connecticut to put it this way; but in most of the States it is artistic.

Mr. Dodge. I am not sure that I have made my point clear. There are incidents to every action at law -- what you can get by way of security for it, what you can get by way of process to enforce your judgment. Those are all incidents to an action. Now, I had supposed that in this part of the rules you were dealing with those incidents, means of enforcing a judgment; and it struck me as inartistic to drag into this something that has nothing whatever to do with the enforcement of your rights in another action. You would never see, in a book dealing with attachment, execution, arrest, etc., an action of replevin dealt with.

Mr. Mitchell. Suppose you say nothing about replevin. How you will express it is another thing. Suppose you say nothing about it, and then a man brings a suit in the United States court, by reason of diversity of citizenship, to recover possession of specific personal property. There is no Federal statute that defines the practice of seizing the property pending in the suit, such as is done under the replevin action. You say nothing about it in the rule. I am afraid you will have no procedure provided in the Federal courts for resorting to that remedy, or whatever you want to

call it, to get hold of the property before the title has been adjudicated.

Mr. Dodge. Is there any doubt about the ability to bring that kind of action as well as the others in the Federal court?

Mr. Mitchell. None about the right to bring it; but we are providing procedure, and the procedure has to be specified; and if the Federal law does not prescribe it, and we have not adopted the State procedure, how does a man know what kind of a bond he is going to get, and how long he can keep the property before the other fellow can reclaim it, and all that sort of thing? Those details as to the procedure have to be provided for; otherwise, there is a blank.

Mr. Dodge. They are all covered by statute.

Mr. Mitchell. What statute?

Mr. Dodge. The State statute. There is no Federal statute.

Mr. Mitchell. But the point is, unless you say that you are adopting the State practice in replevin proceedings, you have not adopted it. You want to strike it out entirely; do you not?

Mr. Dodge. Is that the fact -- that you would have to state something about it in these rules to make the State statute enforceable?

Mr. Lemann. You might. Would it not be simpler -- and,

if you see no objection, I would move that the Reporter be requested -- to rephrase alternative rule 109 so as to use the language suggested by Professor Cherry, omitting, if the Reporter desires, the word "independent", the reference to independent remedies; then adding a sentence which would, in substance, say that a similar rule shall be applied in proceedings where the plaintiff desires to seize property in an action to recover property --

Mr. Mitchell. Specific property.

Mr. Lemann. Specific property, under a proceeding corresponding to a State action of replevin. He could find the language; but I think that would cover Mr. Dodge's theoretically correct point, and at the same time not omit a reference to replevin in these rules.

Mr. Mitchell. I think we must say something about it.

Mr. Wickersham. Why does not Mr. Cherry's suggestion completely cover what you have in mind, Mr. Lemann?

Mr. Lemann. Because, as I understood, there were two objections, one from this side and one from that side. I am not sure about Mr. Clark's objection to the use of the word "independent".

Mr. Clark. I did not make any objection.

Mr. Dobie. I did not understand there was any until you raised it.

Mr. Lemann. Then I withdraw it.

Mr. Clark. Will you state your wording?

Mr. Cherry. My wording was to add, after the word "replevin" in the second line, --

"And similar remedies, whether by State procedure independent or ancillary".

Then it goes on, "shall be available", etc.

Mr. Mitchell. Then it would read:

"The remedies of arrest, attachment and garnishment" --

Mr. Cherry. "And replevin".

Mr. Mitchell. Does that mean a remedy of replevin?

Mr. Lemann. That is what I understood he objected to.

Mr. Mitchell. That is what Mr. Dodge objected to. He does not like to call it a remedy.

Mr. Cherry. Well, "and similar proceedings".

Mr. Tolman. That covers it.

Mr. Cherry. That was intended to take care of that. I do not know whether it does or not.

Mr. Sunderland. Cut out "remedies"; say:

"Arrest, attachment, garnishment, replevin, and similar proceedings".

Mr. Cherry. All right. You may say it is a mere matter of words.

Mr. Wickersham. Answering Mr. Dodge's suggestion, is not the real point that this is not providing that you may bring an action of replevin, but it is providing for the process in an action of replevin of immediate taking of the chattel before judgment? That is analogous to the taking of

property pending an action, or the taking of the body of the defendant in the action. Those are proceedings in the action; and if you do not have that, having abolished the conformity law, you have no machinery whatever under which you could do those things.

Mr. Mitchell. That is my point exactly.

Mr. Dodge. I think Mr. Cherry's rule would largely obviate my objection, providing there was no general heading of this set of rules indicating that they are incidental to the enforcement of the rights in another action.

Mr. Wickersham. But it is incidental in this case. What he is providing for is not the original action, the right to bring an action to recover a chattel. It is for the incidental remedy, pendente lite, of taking the chattel.

Mr. Dodge. Of taking the property.

Mr. Wickersham. Of taking the property. You have brought your suit to recover a specific chattel, and this is a means of authorizing you to take that chattel before judgment and hold it to abide the event.

Mr. Dodge. I should have understood this if it had read in this way, and then I should not have had any objection:

"The remedies of arrest, attachment, garnishment, and those incident to actions of replevin, may be followed out according to State practice."

Mr. Lemann. You do not like that?

Mr. Clark. I think that is all right.

Mr. Lemann. I thought you did not want to label replevin in this civil action we are providing. Of course if you restrict it to State law, it is all right. I did not think you wanted to intimate we were going to have any action of replevin under this practice.

Mr. Dodge. As Mr. Wickersham pointed out, you cannot bring an action of arrest or an action of attachment, but you can bring an action of replevin, and the remedy is incident to replevin.

Mr. Cherry. Is it suggested also to leave out "the remedies of"? I thought that was your suggestion.

Mr. Sunderland. I thought that might make it a little bit better on Mr. Dodge's point.

Mr. Cherry. That would also fit in with what I suggested, "whether independent or ancillary".

Mr. Lemann. Suppose you dictate it from the beginning, now -- not the amendment, but how the rule would read as finally suggested -- and see how it would read.

Mr. Cherry (reading:)

"Arrest, attachment, garnishment and replevin, and similar proceedings" --

Leave out "and", I take it --

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"Arrest, attachment, garnishment and replevin, and similar proceedings" --

Leave out "and", I take it --

"Arrest, attachment, garnishment, replevin, and similar proceedings, whether by State procedure independent or

ancillary, shall be available under the circumstances" --

Mr. Wickersham. In other words, you do not call it a remedy.

Mr. Cherry. No.

Mr. Wickersham. Just begin with the word "arrest".

Mr. Clark. I guess that is all right. Then I will put in my language about jurisdiction by way of proviso:

"Provided, that nothing herein shall extend the existing jurisdiction of the district courts."

Mr. Mitchell. You mean by attachment?

Mr. Dodge. By attachment of the property of a non-resident.

Mr. Dobie. I second Mr. Cherry's motion.

Mr. Clark. Do you want to put that in? --

"Provided, that nothing herein shall extend the jurisdiction of the district courts by attachment".

Mr. Wickersham. "Nothing herein shall enlarge the jurisdiction of the Federal court over the person of the defendant."

Mr. Dobie. It is not a question of the person. If they have not got jurisdiction of the person, they will not attach.

Mr. Clark (reading:)

"Provided, that nothing herein shall enlarge the jurisdiction of the district court over non-residents" --

Of what? "Over non-residents of the district"?

Mr. Dobie. It practically always is a non-resident, but it would not have to be.

Mr. Wickersham. If you catch the non-resident, you have your jurisdiction over him.

Mr. Clark. "Nothing herein shall enlarge the existing jurisdiction".

Mr. Lemann. It does not exist now.

Mr. Clark. It does occasionally, if you catch him.

Mr. Lemann. Well, then --

"Nothing herein shall give the Federal courts jurisdiction over a non-resident of a State solely by attachment of his property."

That is the idea.

Mr. Wickersham. That is the real point.

Mr. Mitchell. I suppose it ought to be clear, too, that when we are talking about replevin we have not got it so that a man can discard our practice about bringing a lawsuit and filing a complaint, and start an old-fashioned replevin proceeding by issuing a writ. I think that ought to be clear.

Mr. Lemann. I think that language does it.

Mr. Mitchell. I think we can now refer Rule 109 to the Reporter.

Mr. Clark. May I ask about the matter I put in brackets?

Mr. Mitchell. I think that is going to be inferred. I

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think we ought to put a clause at the end of the rule, a general catch-all, stating that --

"Nothing herein shall be construed to prevent the district courts from adopting their own rules with respect to matters supplementary to and not inconsistent herewith".

Mr. Clark.. Of course we have the general rule, Rule 3, which says that. The question is whether to refer back to Rule 3 here.

Mr. Sunderland. I should not think so.

Mr. Clark. All right.

Mr. Sunderland. How would this rule work in the District of Columbia?

Mr. Clark. I tried to cover that.

Mr. Sunderland. Could you say "the District of Columbia or States"?

Mr. Clark. I think that had better go down where we talk about it. The beginning of Rule 116 makes it applicable to the Supreme Court of the District of Columbia:

"Whenever in these rules the law of the State wherein the district is situated is made applicable, the law applied in the District of Columbia shall govern like proceedings when occurring in the Supreme Court of the District of Columbia."

Mr. Mitchell. I think probably that covers it. Why not make it short, and say:

"As used in these rules, the term 'district court' shall be taken to include the Supreme Court of the District of Columbia"? Then you have the whole thing there.

Mr. Sunderland. We have got to have the States mentioned. We are referring back to State practice. We have no practice here on attachment.

RULE 110. TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS.

Mr. Mitchell. Let us pass now to Rule 110.

Mr. Clark. Let me explain Rule 110 a little more. Down to the matter which I start putting in brackets, Rule 110 is essentially the equity rule on the opposite page. Now, in brackets, somewhat for the purpose of informing the bar, we tried to bring in provisions from some of these various other special statutes. I should suppose the question would come down there as to whether those bracket provisions should go in, or how far they should go in, and how many of them should go in.

Mr. Dodge. This whole thing is a re-enactment of legislation all the way through; is it not?

Mr. Clark. Yes; I think that is probably a just statement. I should suppose that probably, if you did not want to put in the other provisions, something like the last one ought to go in, since that is a matter close to Congress's heart,

apparently, or at least to labor's heart.

Mr. Wickersham. It is close to the hearts of the labor people, and, therefore, to the hearts of those who depend on their votes. (Laughter.)

Mr. Lemann. Of course, if you are looking for brevity, and you have something provided by statute which is adequate, you have to choose between the idea of having a sort of handbook a lawyer can use conveniently, where everything is, and brevity. Perhaps the other idea is better anyhow.

Mr. Clark. The Chairman has been warning me not to chase the lawyers around any more than necessary. I want to mention one thing I think you have had in mind. When we first started out, there was a suggestion that 120 rules were a good many. I do not know; I thought we had done pretty well by keeping it down to 120.

Mr. Lemann. I do.

Mr. Clark. You have suggested various additions which will bring it up at least to 130, and perhaps a little more.

Mr. Sunderland. We are going to cut out six or seven in my section.

Mr. Lemann. I think any code of practice or procedure, which this is, which was restricted to 130 or 140 rules, would not be excessive. Do you think so?

Mr. Mitchell. No. I think it is advisable to put in a thing like this, because I think the lawyers ought to have

a handbook. They ought not to have to be running to statutes. Also, we are trying to adopt a model set of rules which may be adopted by States as time goes on. That is very desirable.

Mr. Dobie. The American Bar Association was very hopeful of that in its fight for these rules.

Mr. Mitchell. I think, for that reason, it is desirable to put in a thing like this.

Mr. Wickersham. When you consider the contents of all these rules, I think the Reporter has done extraordinarily well to keep them down to 120 rules.

Mr. Lemann. I do, too.

Mr. Wickersham. We are really making a code of procedure. That is what we are doing.

Mr. Dodge. Of course this makes it necessary for any student of the subject to study a variety of statutes pretty carefully. We do not say here that all this is in accordance with the statute. If you had a simple rule that the practice in injunction matters shall be as provided by statute, you would tell Congress right off you were not going to change it. Is there any way of accomplishing that result?

Mr. Clark. We could do it in that way, but I should think we would have to have some other provision. We could do it in this way -- "in all matters covered by specific Federal statutes, those rules shall apply; in other cases" -- and then put in the equity rule.

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Mr. Dodge. This equity rule is covered by the statute, is it not -- Section 381, on page 3 of the notes?

Mr. Clark. I presume it is. The equity rule is about like section 381.

Mr. Wickersham. Where is section 381?

Mr. Clark. Back in the comments, page 3.

Mr. Wickersham. I beg your pardon; I forgot to turn back.

Mr. Dobie. You have some of the provisions of that that are not in the equity rule in these bracketed things, about the statement of why it is irreparable, and details of that kind.

Mr. Clark. That is true.

Mr. Wickersham. Of course, when you come to dealing with injunctions --

Mr. Dobie. You are handling dynamite.

Mr. Wickersham. You are handling dynamite. My judgment is that it would be much better to make a rule substantially like the equity rule, but make it subject to the provisions of the Federal statutes, without attempting to paraphrase them or repeat them. They are so elaborate, and the present state of the law was framed in that way largely to benefit the American Federation of Labor.

Mr. Mitchell. I am in favor of putting in the matter in brackets here in Rule 110. That will enable the lawyer to

know by looking at this code just how he would go about getting a temporary injunction or restraining order in all conditions. Then I would put at the end of that the express qualification:

"Nothing herein contained shall be construed to modify specifically the jurisdiction of courts in matters affecting employer and employee under chapter 6 of Title 29, U.S.C., or any other Federal statute regulating the issuance of injunctions and restraining orders."

Mr. Wickersham. Mr. Chairman, I agree with you; but you do not mean to put in the rule, then, do you, all the provisions contained in those statutes?

Mr. Dobie. Oh, no!

Mr. Lemann. Mr. Chairman, would it perhaps serve the handbook point if you put in here:

"In all such proceedings the requirements" --, referring to Federal law specifically -- "shall be observed"?

That tells the fellow where to go to. It saves considerable space by not repeating. Considering it from the handbook standpoint, would not that perhaps be as effective?

Mr. Mitchell. Do you mean then to put under that "see" the various statutes?

Mr. Lemann. No; put it in the body of the rule. Refer to the Federal statutes in the body of the rule; say:

"In all applications for preliminary injunctions, restraining orders, etc., the parties shall conform to the

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requirements of 28 U.S.Code annotated, sections so and so" --

And give them also a reference to this master-and-servant thing, this labor matter.

Mr. Wickersham. There may be a change in that.

Mr. Lemann. Of course if there are changes, they are going to supersede the rules, anyhow.

Mr. Wickersham. Therefore it seems to me it would be better to put in a general provision which makes the process subject to existing statute.

Mr. Lemann. That may be changed. Suppose we copy the language which now exists in the statute, which we are proposing to do.

Mr. Wickersham. That may be changed tomorrow or next week, as I say, after Congress meets. Therefore I thought a general rule such as they have here, without going into detail about preliminary injunctions, restraining orders, etc., with the further provision that --

"Nothing in this rule contained shall be deemed in any way to attempt to modify the Federal statute on the subject"--

Which, of course, governs -- if that could be done, you have it.

Mr. Lemann. Yes; but that can be changed, too; and as far as the Chairman's idea is concerned about not sending a lawyer running around to a lot of books, which is an idea with which I personally sympathize very much, it would not

help him if you put in that general language which you speak of after citing this. Then he would have to run around and see if anything had been left out of this language.

Mr. Mitchell. He would have to go and see whether the rule was consistent with the statute.

Mr. Lemann. And that means a lot of getting books down and checking that sentence there and this sentence over here.

Mr. Wickersham. The only alternative is to set forth the statutes in extenso in the rule.

Mr. Mitchell. Why? We can modify the statute.

Mr. Wickersham. I should not like to attempt to modify this statute which has been worked out by the labor organizations. You will be handling dynamite, and have the worst kind of explosion.

Mr. Mitchell. I was talking about power.

Mr. Wickersham. Power -- yes; perhaps.

Mr. Mitchell. My idea was to do what the drafting committee has tried to do, take the provisions of existing Federal statutes, adhere strictly to them, summarize their provisions in this rule, and then state explicitly, to satisfy the labor interests, that --

"Nothing herein contained shall operate or be construed to modify Chapter 6 of Title 29, U.S.C., relating to labor cases."

Mr. Lemann. That will be all right.

Mr. Dobie. Rate cases, too.

Mr. Mitchell. And then put a note at the end, in addition, stating that the rule is believed to conform to existing Federal statutes. It has been the intention of the committee to make no change in them. Then you will hit it always. You write a handbook that a lawyer can use, and you will have expressly excepted the labor statute, and then you will have asserted your honest conviction that you have not changed the Federal law.

Mr. Lemann. Would that note be a part of the rule?

Mr. Mitchell. That note would be appended.

Mr. Lemann. Would it be an official part of the rule?

Mr. Mitchell. For purposes of dealing with Congress; yes.

Mr. Lemann. That would mean that an ingenious and resourceful lawyer might say, "Well, did they mean that if they inadvertently changed the Federal law, the change should not be effective?" Is this a historical note?

Mr. Mitchell. That is my idea.

Mr. Lemann. Or is it a note for interpretation? If it is a note for interpretation, somebody may make the argument that if you had overlooked some provision of the Federal statute, that should not be applicable. Then Mr. Clark is going to make a list of Federal statutes abrogated anyway, he says; and if we adopt that idea you have got to cross the

bridge, then, of whether you make up your mind you have covered the field of the Federal statutes.

Mr. Clark. Yes; but I have indicated how I intend to cross the bridge if this goes through. The only one we would leave is the so-called Norris-La Guardia statute. I think this is not greatly different than the Norris-LaGuardia provisions, except that we do give the court a little bit more power; but, whether or not it is greatly different, I thought that was too hard a subject to touch, and I would except that specifically, and repeal all the rest.

Mr. Lemann. I think that is all right in principle, and I think the Chairman's suggestion of a note is all right, provided it is plain that the note is merely explanatory -- historical, as it were -- and cannot be construed as interfering with the express abrogation of these Federal statutes.

Mr. Mitchell. My idea of a note was a note of comment to be attached to the rules when they are laid before Congress, an advisory note, not necessarily to be printed in the ultimate rules as published; but if anybody got into a question of ambiguity in our rules we probably could go back to Congress and find the original draft there with this note of the committee on it, and say, "Well, here is an ambiguity in the rules. The rules committee stated, and Congress understood, that we were not trying to change the law", and that ambiguity would be resolved in favor of the statute,

the meaning that we have always ascribed to the statute; but I do not believe it could be resorted to in order to upset an express and unambiguous provision in the rules. That would be my notion about it.

Mr. Lemann. Mr. Chairman, I think such a note would be desirable, perhaps, not only here but generally, on that subject. When you go to Congress with these rules, do you not think it would be helpful to them, either as notes under the rules or as an accompanying report, just as now we go to the report of the Committee on the Judiciary when we want to interpret an act of Congress that they brought in? They give their explanations of what they were trying to do. Would it not be desirable to do that generally with all these rules?

Mr. Mitchell. We shall have to do it in our report to the Court, with the idea that it will be laid before Congress. We will have explanations and statements as to what we are driving at.

Mr. Lemann. And before the bar, even before you get to Congress.

Mr. Mitchell. Yes.

Mr. Dodge. Have you embodied here all of the general laws, in substance, relating to injunctions?

Mr. Clark. We may not have them all, but I think in general those general laws would not go out, but would stand. I will indicate what I have in mind particularly.

I should suppose that what we have done is to provide a substitute for Equity Rule 73, and for these particular provisions of 28 U.S.C. which deal with injunctions; namely, sections 378 to 383. I should suppose, further, that this provision with regard to the anti-trust laws, which is 15 U.S.C. 26, and appears on page 4 of the comments, would be one of those that we continue. That, as I see it, does not determine the form of the injunctive process, but it determines when you may have it.

You see, we are not saying in Rule 110, now, that you get an injunction only thus and so. We are saying what you do when you go after an injunction -- what the court shall do -- so that provisions like 15 U.S.C. 26 will stand.

Now, that might almost include the Norris-LaGuardia act, except that act goes into details as to how preliminary orders shall be issued. You have to have open hearing, etc. So that I would just except the Norris-LaGuardia act particularly; but in our schedule of superseded statutes we either would not include 15 U.S.C. 26 at all, or we might even say that it is continued.

When we get to that point I want to discuss a little the form of the schedule. My impression now is that we shall have to have at least a schedule in two parts -- one of acts superseded entirely, and one of acts superseded partially.

Mr. Dodge. Are you undertaking to eliminate U.S.C. 26?

Mr. Clark. No.

Mr. Dodge. I notice, on reading those statutes very hastily, that apparently you have included in your rule the substance of all of those of a general nature.

Mr. Clark. That is true.

Mr. Dodge. And you have eliminated those relating to injunctions against States, injunctions in anti-trust cases, etc.

Mr. Clark. I did not want to eliminate what I might call substantive provisions as to injunctions, or provisions of substantive rights, provisions as to when you can get injunctions. I wanted to eliminate those provisions which deal with how you get injunctions; and I think it is a workable division that we can carry out in the statutes, except that the Labor Act covers both -- when, and how, and whence, and whither.

Mr. Wickersham. Everything else. You have to let that alone.

Mr. Clark. Yes; but outside of that I would eliminate all provisions as to how you get the injunction, but not provisions as to when you get it.

Mr. Dodge. Not eliminate them, but include them?

Mr. Clark. Yes; on the theory that they are covered here; and, if we made any inconsistency, this states how

you get it.

Mr. Lemann. I move that we approve Rule 110 generally, and then we will go back to the brackets.

Mr. Clark. I think you had better look over those brackets.

Mr. Lemann. I think we could approve the general form and then take up the brackets.

Mr. Clark. You mean you approve the general idea?

Mr. Lemann. Yes. That is all I want to get out of the way, because I have a question on one of the brackets.

Mr. Mitchell. All in favor of adopting the general system on which Rule 110 is framed say "aye".

(The question being put, the motion was unanimously carried.)

Mr. Mitchell. Now we turn to the first bracket.

Mr. Lemann. The first bracket, of course, does make an important change, I believe, in the present practice on applications for injunctions and restraining orders in the Federal courts. I do not believe the rule now is to take any testimony orally.

Mr. Wickersham. It certainly is not in the State practice.

Mr. Lemann. Except in labor disputes.

Mr. Wickersham. That is all.

Mr. Lemann. It is not your practice; is it?

Mr. Wickersham. No.

Mr. Lemann. Recent applications for injunctions, even in a three-judge court, under some of our new Long statutes, have all been heard on affidavit and counter-affidavit, in the three-judge court, on the interlocutory restraining order and the interlocutory injunction.

Mr. Mitchell. As the rule is stated here, this bracket would require the lawyer, before he made his motion, to go to a judge and find out whether he was willing to take affidavits, or whether he wanted witnesses.

Mr. Wickersham. Yes.

Mr. Mitchell. That is very objectionable. Why can we not make it read in this way:

"At any hearing the court may, in its discretion, require witnesses to be produced and testify orally in court".

He has power to dispense with it.

Mr. Lemann. I do not think that affidavit practice has given rise to any trouble; has it?

Mr. Clark. Of course that is part of the language which raised the question which led to the Norris-LaGuardia Act. If you leave out the agitation, I suppose, no.

Mr. Lemann. That was only part of it. There are so many other things in the Norris-LaGuardia Act, labor things, and we are leaving them in a class to themselves. In other classes of cases, do you think the general practice of

proceeding by affidavit has been found objectionable by either counsel?

Mr. Mitchell. The provision as to hearing in court ought to be a special provision directed to the court, and the hearing ought to be one which he would call for when the motion is presented. I do not think we ought to have to go to him in advance and find out whether or not he is willing to hear the matter on affidavits.

Mr. Dodge. I think the practice in the State courts of Connecticut is in accordance with this rule. I remember trying a case for three days on an application for temporary injunction.

Mr. Lemann. Is that an argument for or against it? (Laughter.)

Mr. Dodge. Against it, in my opinion. It could have been disposed of in twenty minutes in most courts.

Mr. Lemann. I move the Chairman's general suggestion in this regard -- that this be modified so as to provide that the court may, in his discretion, require testimony to be taken orally in open court.

Mr. Wickersham. I was just wondering whether the court has not that discretion anyhow.

Mr. Lemann. Yes.

Mr. Wickersham. Why should we emphasize it? The ordinary practice has always been, in applications for

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injunction, to apply on affidavits. The labor people have brought in that exception because they thought it would make it more difficult to get an injunction against them; but in the ordinary class of cases which arise in court calling for injunctions, it has always been on affidavits. Why should we encourage hearings? The court has the discretion anyhow. The judge may say, "Well, I am not satisfied with this affidavit. Bring that man in here. I should like to have him examined."

Mr. Mitchell. I think that is right.

Mr. Clark. Yes; it can be left out. I suppose, according to ordinary practice, it would not exist. I put it in first to raise the question, and second because so much fuss has been made about it, although I think the fuss is a labor fuss; but that, of course, was one of their big fighting points.

Mr. Wickersham. Exactly. Now they have their statute, and we do not interfere with it; but I would not encourage the practice in ordinary cases.

Mr. Lemann. There is not any particular reason why that should not be left out; is there?

Mr. Clark. It can be left out perfectly well.

Mr. Lemann. It is only a matter of emphasis whether you put it in with the Chairman's amendment or whether you leave it out.

Mr. Mitchell. As you have it here, it is discretionary

with the court whether he will do it or not.

Mr. Wickersham. I move we take it out.

Mr. Dodge. I second the motion.

Mr. Mitchell. That will be so understood, unless there is objection.

The next bracket begins:

"No temporary restraining order" --

And so forth.

Mr. Clark. I think that is like the statute. That is a copy of the statute.

Mr. Lemann. I do not care anything about the rest of it.

Mr. Dodge. I think there is an exception in the statute.

Mr. Lemann. About security?

Mr. Dodge. Yes. The exception in the statute relates to the antitrust cases.

Mr. Wickersham. Query: Whether that matter ought not to be left to the provisions of each State statute.

Mr. Mitchell. Where is that in the statutes?

Mr. Clark. Section 382.

Mr. Lemann. You have somewhat expanded the language of Section 382; have you not? It says, "payment of such costs and damages" in the statute, and you say "loss, expenses, or damage."

Mr. Clark. Yes.

Mr. Mitchell. We had better stick to the statute.

Mr. Lemann. They have applied that language pretty broadly. I had occasion to check it up recently and get after a fellow for damages, and I got all I was entitled to under the court's interpretation of the present language.

Mr. Clark. All right; let us stick to the statute. I suppose, then, I have to do something with the exception for the anti-trust act, which is in the statute.

Mr. Mitchell. In further discussion at our meeting on form of verbiage I think we can then discuss this phrase which you have used repeatedly, "unless there is a specific statutory provision to the contrary". I think there is chance for great ambiguity about it; but I just note it now, and do not formally bring it up.

Mr. Dodge. Mr. Chairman, I am afraid the time has come when I shall have to go, in spite of the interesting subject we are on. I have gone through the rest of the rules, and have no suggestions whatever, so far as I can see, with reference to any of them. So I will leave you, expressing the hope that I may see you here in February.

Mr. Mitchell. We are sorry to have you go.

Mr. Dodge. I am sorry to go; but there is nothing in the remaining rules that I could add to, anyway.

(Mr. Dodge then left the conference room.)

Mr. Lemann. In the language to which we just referred, about damage, I think it would be well to stick to the

general wording of the statute. You said "loss, expense, or damage caused by the improvident or erroneous issuance of any such order or injunction". The statute says, "payment of such costs and damages as may be incurred or suffered by any party who may be found to have been wrongfully enjoined or restrained thereby." I had occasion to check that up not long ago, and it has been very fairly and liberally interpreted, and you have a lot of cases under it now.

Mr. Mitchell. We should adhere to it, because we are proposing to put in a note here that we have adhered to the statute as nearly as we can, and that might create doubt.

Mr. Lemann. As it stands, I think it probably was an attempt to enlarge the amount to cover items like attorneys' fees, etc.

Mr. Clark. All right; we will limit it to the statute.

Mr. Mitchell. The next bracket is:

"Every temporary restraining order shall be indorsed with the date and hour of issuance."

Where does that come from?

Mr. Wickersham. Is that in any of the rules?

Mr. Mitchell. Here it is. It is 28 U.S.C. 381:

"Every such temporary restraining order shall be indorsed with the date and hour of issuance".

All right. Why should we not leave that in? Why did you put that in brackets?

Mr. Clark. It was not in the equity rule, I think -- not that way. I got it from the statute instead of the equity rule. That is the main reason.

Mr. Mitchell. I think we ought to put it in.

Mr. Clark. I did not know but that you would just say the equity rule --

Mr. Mitchell. I think we ought to leave that bracket in.

Mr. Lemann. Is the rest of Section 381 in?

Mr. Clark. That is covered in part by the equity rule.

Mr. Lemann. I see the first part of it is in the first part of this rule, so I guess you have covered it.

Mr. Clark. We have tried to. We want to go over this again to make quite sure we have covered everything, but we have intended to.

Mr. Lemann. In some cases there have been annoying immaterial divergences or differences between rule and statute which are rather confusing now. As far as we can avoid that, I think it would be desirable.

Mr. Mitchell. If that practice is acceptable --

"Every temporary restraining order shall be indorsed with the date and hour of issuance" --

Then we will pass to the next one:

"Every such order or preliminary injunction shall be specific in terms" --

And so forth. That comes from the statute; does it not?

Mr. Clark. Yes; Section 383.

Mr. Mitchell. Yes. I suggest that that be left in.

Mr. Dobie. That is word for word; is it not?

Mr. Lemann. Have you omitted the part of section 381 which provides that --

"Every such temporary restraining order * * * shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record"?

Mr. Clark. I cannot answer that for the moment.

Mr. Lemann. On a quick look, I do not see that.

Mr. Mitchell. Where do you find that?

Mr. Lemann. It is the second sentence of 28 U.S.C. 381:

"Every such temporary restraining order shall be indorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office" --

That is in here, the first two lines of it, I think.

Mr. Dobie. Down to "record"; but the rest of it, about expiring --

"and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for

such extension shall be entered of record" --

I do not see that, on a quick look; but I am not sure.

Mr. Clark. It was partially covered in the equity rule, and we took the equity rule. Maybe it is not sufficient. If you will look back to the third sentence, at the beginning, you will see that.

Mr. Lemann. Yes; I saw that.

Mr. Clark. That is not enough?

Mr. Lemann. This statute is quite explicit, and I think the profession has become a little used to it. I have known of cases where they have entered stipulations within the ten-day period under the language of the statute to keep it in force from time to time. I know one case where our judge told me that it had been a nuisance in so far as it was construed to require that it must be done every ten days. He did not so construe it, but he told me he had a case in which some attorney general had construed that it required that you could not continue it more than ten days at a time; and while the judge continued it, I think, almost a year, every ten days he sent down an extension. He did not object to the extension, but it had to be done every ten days; but after he had done it for almost a year he then decided to put in a general blanket provision that by stipulation the restraining order could remain in effect until the court acted. On reflection, I do not know whether it might not be desirable to make it

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plain that that could be done, and to that extent depart from the statute; but that provision of the statute, I think, is pretty generally respected now and watched by the lawyers.

Mr. Mitchell. I think we ought to adhere to the statute as nearly as we can, unless we have some very cogent reason for departing from it, because I am hoping that we will put a note here, at the bottom, that we have.

Mr. Clark. All right; I think I can do that. That is, I take it that if there seems to be any ambiguity between the present equity rule and the statute, we follow the statute and not the equity rule.

Mr. Lemann. I would put them both in -- requirements and limitations -- as far as you can; do not have duplications of language, of course, but add them together; fuse them.

Mr. Clark. You know, our Connecticut provision is that in case of conflict between rules of law and equity, the equity rule shall prevail. I take it that here, if there is any conflict, the rule of the statute shall prevail.

Mr. Lemann. I should suppose so. That would be the present situation.

Mr. Mitchell. Are we satisfied with that bracket? It is the one beginning:

"Every such order or preliminary injunction shall be specific in terms."

If we are, we have nothing left. We will leave in the

bracket calling special attention to the Norris-LaGuardia rule, as I understand.

Mr.Clark. Notice my note away at the bottom of the page. Have you any suggestions on that -- the note at the bottom of the page, as to Rule 110, the second paragraph, receivers?

Mr. Lemann. There are no special rules now on them; are there? -- I mean, no general rules. There may be local rules. I think we had better leave that if there are any local rules.

Mr. Dobie. They are included in the provisions for interlocutory decrees, of course.

Mr. Lemann. Oh, yes. I had a fellow take one on me. He held me up for about a year, and held the receiver; and, strange to say, the court of appeals would not advance it for hearing.

Mr. Clark. There would not be any question, I take it, but that the general practice would remain.

Mr. Lemann. No; I think not.

Mr. Clark. Mr. Wickersham, the particular question now is this: I have a note here that I have no rules now concerning receivers, as to appointment or otherwise. Is that all right -- I mean, the omission of any reference to receivers?

Mr. Wickersham. I wonder.

Mr. Lemann. It has never been covered by a general

rule. Do you not think we can leave that to the district courts? The only point Mr. Clark made was whether, if we did not say anything about it --

Mr. Wickersham. I think if you have rules about injunctions, and that sort of thing --

Mr. Lemann. We have never had any special rule about receivers.

Mr.Clark. I did put in an attempted omnium gatherum in Rule 114. I think probably some omnium is necessary.

Mr. Wickersham. Yes; I think so.

Mr. Dobie. As well as a "gatherum".

Mr. Lemann. Would not that cover it -- I mean, your last point?

Mr. Clark. You may want to look at that rule when you get there, as to whether that is the correct way to put it.

Mr. Wickersham. I have not thought of this before. I am just wondering if we ought not to have a rule on receivers. If you have no rule at all on the subject, you will leave it all up in the air.

Mr. Mitchell. The equity rules have never covered it.

Mr. Wickersham. I wonder why.

Mr. Lemann. Nobody has had any trouble with that being up in the air; has he?

Mr. Mitchell. The practice is all we are interested in, not the right, and that has been dealt with by local rules.

It is a ponderous subject.

Mr.Wickersham. Yes.

Mr. Dobie. I think it might be hard to touch it gently without going deeply into it, which would unduly expand these rules. I move it be omitted.

Mr. Wickersham. I have not given any special thought to the subject. Leave it for the present, at all events, just as it is.

RULE 111. INJUNCTION PENDING APPEAL.

Mr. Mitchell. That carries us over to Rule 111.

Mr. Tolman. Is not that almost precisely equity rule 74?

Mr. Clark. I think it is; yes. We have added --

Mr. Dobie. You have left out "at the time of such allowance"; have you not?

Mr.Wickersham. You have shortened it a little.

Mr. Clark. I have put in "an interlocutory or final order or judgment". That was to cover the matter of appeals, the 30-day statute, which is back opposite "appeals".

Mr. Lemann. Is this Rule 111, now?

Mr. Clark. Yes; Rule 111. The reason I put in "interlocutory" there in the second line is because of the statute which is copied opposite Rule 105, 28 U.S.C. 227, providing for an interlocutory appeal within 30 days.

Mr. Dobie. You left out the words "at the time of such allowance." Did you do that deliberately?

Mr. Clark. Let me see.

Mr. Dobie. "At the time of such allowance": That evidently contemplated that this may be done only at the time he allows the appeal.

Mr. Clark. I took it out because he is not going to allow the appeal.

Mr. Lemann. I am wondering whether you know what the broad application of this is. I am not sure I read it correctly on the first reading. In a three-judge case, would this permit one judge to act?

Mr. Mitchell. The equity rule did.

Mr. Lemann. One judge could not allow the appeal. If he can keep the restraining order in force during the pendency of the appeal, that gives him a pretty broad power. I am thinking of these cases to enjoin State statutes, or, in the old days, to enjoin telephone rates.

Mr. Clark. Let us look at that statute which appears under Rule 110. That is section 380, I think.

Mr. Lemann. Section 380. That is the three-judge statute; but under that statute it has been specifically held that one judge cannot grant the appeal, because we had a case in which Judge Foster tried to do it, and it did not work. He happened to be the dissenting judge.

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Mr. Wickersham. Exactly.

Mr. Lemann. My partner had the case. It was a rate case, and we lost it before the three-judge court; but Foster dissented, and Foster got an appeal. As a matter of fact, Foster had asked the other judges, and they said, "It is all right", and they set it aside in the Supreme Court.

Mr. Dobie. The old equity rule evidently contemplated that this was just something that was incidental to the appeal. Of course we do not have the allowance of appeal now; but this rule as we have it now allows him to act later.

Suppose you got one of those cases. An appeal has been allowed; and, as you say, Judge Foster can hop in and make some order; or, if you thought the other man was more favorable to you, Judge So and So could make some order.

In other words, whether intentionally or not, we have broadened the scope of this, because the old practice was purely in connection with the appeal, and it had to be done when the appeal was allowed. Now we do not require any allowance of appeal, of course; but in cutting that out you do not make any provision for limiting the man at all.

Mr. Mitchell. Your point is that after the appeal is perfected and pending in the court of appeals, the judge who tried the case could make a stay order?

Mr. Dobie. Yes; any one judge could just hop in and could modify, suspend or restore the injunction.

Mr. Lemann. I notice that Hopkins' Notes to Equity Rule 74 contain the following note:

Quoting from a decision in 21 F. (2d):

"Equity Rule 74 specifically restricts the granting of injunctions pending appeal to cases (1) when an injunction has been granted, and (2) when one has been dissolved. It does not include cases where an injunction, or restraining order, has been refused." New York Life Insurance Company v. Marshall, 21 F. (2d), 172, 176; opposed to the other cases cited in this note.

Mr. Mitchell. You broadened it to include interlocutory orders, also; did you not?

Mr. Clark. Yes; I did. That is because by 28 U.S.C. 227 there is now an appeal from interlocutory orders. That appears back opposite Rule 105 -- 28 U.S.C. 227.

Mr. Lemann. If several judges are required for the result, it does not seem to me one judge should have powers as great as this.

Mr. Dobie. I think you have to make two things. The old thing was solely in connection with the appeal, fixing the conditions of an appeal, and had to be done then.

Mr. Wickersham. But suppose there is argument; the three judges take the matter under advisement, and they go to their respective homes. By and by you get word that the court has decided the matter, and has decided against the

injunction, or has granted an injunction, whatever you like. You have to chase around to find three judges to pass on the supersedeas on appeal. That would be pretty intolerable.

Mr. Lemann. You have to do it, though, under that decision we had in the Cumberland Telephone case. The granting of supersedeas did not directly involve this rule; but Foster undertook to grant an order of appeal, which would have continued the original restraining order in force.

Mr. Mitchell. The dissenting judge, on dissolution, ordered it kept in effect.

Mr. Lemann. That is really what was attempted to be done, although I do think he had consulted the other judges, and they had told him it was all right; but he was the only one who signed it, and Mr. Huey Long, who was then representing the Public Service Commission, got the Supreme Court of the United States to dismiss it on the ground that Foster had no right to do it.

Mr. Wickersham. How would it do for us to require that this shall follow the requirements of Section 380?

Mr. Mitchell. Section 380 does not deal with it; does it?

Mr. Clark. Section 380 is opposite Rule 110, page 2 of the comments.

Mr. Mitchell. Where does it deal with it -- down at the bottom?

Mr. Clark. I am not sure it does deal with it.

Mr. Mitchell. It does not say anything about "pending appeal"; does it?

Mr. Wickersham. Oh, well, if it does not --

Mr. Lemann. I do not think so.

Mr. Wickersham (reading:)

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State."

Mr. Lemann. This case is copiously reported in Dobie, to the extent of about ten pages -- this case of Cumberland Telephone and Telegraph Company v. Louisiana Public Service Commission.

Mr. Dobie. It held a whole lot of things.

Mr. Lemann. It is 260 U.S., 212.

Mr. Dobie. Where is it in the Bible? (Laughter.)

Mr. Lemann. Your Bible? There are about 12 pages quoted. I want to see where you quote it on this appeal point. On this one-judge point you apparently thought it was very important. Here is the way you state the result:

"On appeal from a final decree granting or dissolving an injunction, the judge allowing the appeal who took part in the decision of the case may suspend, restore or modify the injunction during the pendency of the appeal. Equity Rule 74. See, also, Cumberland Telephone and Telegraph Company v. Louisiana Public Service Commission."

Mr. Mitchell. Was that a three-judge case?

Mr. Lemann. That was a three-judge case; yes. It was a kind that could not now arise, under the recent statute, because it was an injunction in the Federal court against the State commission on a rate case; but it may come up now in other injunctions. For instance, I now have a chain-store tax case where I am enjoining the State chain-store tax. There have been a number of such cases; and where they have kept the injunction in force where the lower court has finally denied the injunction, they usually give a restraining order and then have a hearing, and in many of them recently they have denied the injunction.

Mr. Wickersham. Was this in the district court?

Mr. Lemann. Yes; before three judges; but they have

permitted the injunction to remain in force pending the appeal, but that is signed by all three judges. I do not think a careful lawyer would take a chance, really, on one judge, even where the judge was not a dissenting judge.

Mr. Mitchell. I would not change thelanguage, in view of that. I would leave it. A prudent lawyer will get the whole court if he can. If he gets caught unexpectedly -- if the court hands down its decision, and the judges have scattered -- he will go to one of them. He will not go to the dissenting judge; he will go to the presiding judge. Probably the dissenting judge would refer him to the presiding judge anyhow.

Mr. Lemann. Ought we not to examine these cases and check up on them before we undertake to do that? It might be thought that we wanted to change the practice and give ourselves some easier way of taking appeals.

Mr. Mitchell. Rule 111 is tentatively approved, subject, however, to the question as to whether the order shall be made by the court or by a judge who took part in the decision, and we shall have to look up the practice.

Mr. Clark. Perhaps we ought to consider a little more Mr. Dobie's point. I think he would like to leave it "at the time the notice of appeal is final".

Mr. Dobie. We should be on safer ground if that could be done. That was the old rule.

Mr. Clark. Mr. Dobie does not like it.

Mr. Dobie. No; I did not say I did not like it. I beg your pardon. I say we have extended it. I did not say I objected to the extension. The old rule was solely in connection with the allowance of the appeal, and it said "at that time". Now, of course, we do not have to have an appeal allowed; and, adopting the rule without that, there are no time limitations on it at all.

Mr. Lemann. In practice, will not this happen: If you were the plaintiff, and you asked for an injunction and the court denied it, and you took an appeal, you would have to be very quick to get an order --

Mr. Dobie. I agree with you.

Mr. Lemann. Because you would be without protection meanwhile. Will not that cover it?

Mr. Mitchell. No; his point is that it purports to extend the authority of the district court indefinitely, even after the perfection of the appeal in the court of appeals; and I think his point is a good one. It is a question of the jurisdiction of the lower court, its power to do this sort of thing. You might say "at any time before the appeal is docketed in the court of appeals."

Mr. Lemann. When would you be likely to go to the district court? In what practical cases would you be likely to go to the district court after the appeal has been filed? I

cannot think of any. Usually, the fellow who wants the injunction to stay in force --

Mr. Mitchell. He will go promptly, undoubtedly; but suppose the other fellow raised a roar about it, and wanted him to revise it in its terms, or something: If you limited it to the exact moment when the appeal was filed or allowed, he would not have any authority to modify his stay order at all. That is the thought that is in my head, that he ought to have power to deal with it. It is not so much that the man who wanted the stay would not apply promptly, but I was thinking about modification of his order -- an order made ill-advisedly which he wants to change.

Mr. Lemann. There is no time limit here, and he is objecting to the absence of time limit. Mr. Dobie suggested the possible putting in of a time limit.

Mr. Mitchell. The time limit I would suggest would be "at any time prior to the docketing of the appeal". After that you would have to go to the upper courts for your stay.

Mr. Lemann. I think that is the law anyhow.

Mr. Mitchell. (to Mr. Dobie): Does it satisfy your ideas there?

Mr. Dobie. Yes. Really, to be perfectly frank, as I said, I had no definite ideas on the subject. I just wanted to raise the point.

Mr. Mitchell. Mr. Lemann makes the point --

Mr. Dobie. I think it is a good one.

Mr. Mitchell (continuing:) That this gives him authority to make any order up to the time the appeal is docketed. After that, his jurisdiction is divested, and he cannot act anyway.

Mr. Dobie. I think that is entirely all right. You are going to look into these three-judge cases, I understand, and report back?

Mr. Clark. Yes. Your suggestion is "at any time up to or until the appeal is docketed"?

Mr. Lemann. I think the idea is to leave it as it is.

Mr. Mitchell. Because that is the legal effect of it.

Mr. Lemann. We will not need to say anything about it.

Mr. Mitchell. No.

Mr. Lemann. The only note to be made is to look into the powers of one man.

Mr. Mitchell. I think it might be construed that it would have to be done when any appeal is taken, because it says:

"When an appeal * * * is taken " --

The judge may do this. You mean "if".

Mr. Lemann. I think he has to do it anyhow. He will be quick to do it.

Mr. Mitchell. All right.

RULE 112. EXECUTION.

Mr. Mitchell. Now we pass to Rule 112. This is one on which I have a note as to whether or not we have specifically provided for supersedeas. We have referred to it, but we have not specifically provided for it.

Mr. Clark. I refer back to the statute in effect. Here we could try to cover it by what I should think probably had better be a special rule.

At the end of the first sentence, it reads:

"Unless a stay has been granted to allow a motion for rehearing or new trial to be filed or passed on, or unless an appeal has been taken and a supersedeas bond given."

Those are two different provisions, and are covered by 28 U.S.C. already. One of them is the 42-days stay on motion for new trial, and the other is the stay on filing the supersedeas bond. Would you like to have me insert a rule, or perhaps two rules -- I do not know whether they need to be separated or not -- giving the substance of those two statutes?

Mr. Mitchell. The statute has a hiatus in it, as I pointed out the other day. It provides that a stay of 42 days shall be granted to enable a man to make a motion for a new trial. There is not a word said about granting a stay to enable him to perfect his appeal. The practice is to get your stay anyway on the supposition you are going to make a

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motion for a new trial, and switch around and take advantage of it to perfect your appeal.

I think the statutory statement ought to be enlarged so as to authorize the granting of a stay of execution for 42 days to allow motion for new trial or appeal.

Mr. Lemann. Provided he furnishes a supersedeas within the time otherwise provided. You would not want to authorize a delay as long as that without security; would you?

Mr. Mitchell. Ordinarily, a stay is granted as a matter of course in every Federal judgment. What is that statute? Have you a reference to it?

Mr. Clark. Yes; it is opposite Rule 112 -- "stay on conditions."

Mr. Mitchell. Is it on conditions?

Mr. Lemann. Yes; but it gives him the right to call for security, as I read it.

Mr. Mitchell. That is all right.

Mr. Lemann. In our State now you have to appeal in ten days and file a bond. I do not think it likely that our Federal judge, with the background he has, would be disposed to allow a delay of 40 days without security; but his way out would be --

Mr. Cherry. He has it in the statute.

Mr. Lemann. Yes; it is in the statute now.

Mr. Clark. What about the next statute, just below it?

This is just over the page.

Mr. Wickersham. Section 841?

Mr. Clark. Yes -- "stay of one term".

Mr. Lemann. That makes a reference to the State law as a condition; does it not?

Mr. Clark. Yes.

Mr. Lemann. It is not an independent grant?

Mr. Clark. Not an independent grant.

Mr. Mitchell. It is understood that you are going specifically and affirmatively to authorize the court to grant stays in the language of Section 840. Is not that it, substantially?

Mr. Clark. All right.

Mr. Mitchell. Adding "for appeal" as well as "for a new trial".

Mr. Clark. And we want to cover also the supersedeas bond situation; do we not -- or is that obvious?

Mr. Lemann. What are you doing about the time? You say now in the appeal section, "notice of appeal given within the time provided by law". As I understand now it is 90 days, I believe.

Mr. Clark. Ninety days, except thirty days --

Mr. Lemann. It is less than that for the supersedeas, I am quite sure -- either sixty or thirty. It is rather confusing. Of course in State actions up to now you have had to

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conform to the practice in common-law actions; and in some of the States, like mine, I think there is a much less time for supersedeas even than thirty days.

Referring to your catalogue of abrogated statutes, Mr. Clark, I wonder if you are also going to make a catalogue of non-abrogated statutes. That would be a very useful Bible for the lawyers.

Mr. Wickersham. That would take a good deal of work, though.

Mr. Lemann. He has to go all through this to see which ones he has abrogated. On procedure, Mr. Wickersham, he has to look at them all to see which ones he is going to preserve or abrogate; and it would be a mighty convenient thing, from the standpoint of the Chairman's handbook, if we had something to show us what is not abrogated. That is what we really have to go and look at.

Mr. Mitchell. I started reading every Federal statute in the Judicial Code that has anything to do with practice, making notes as to whether we had covered them or not.

Mr. Lemann. Somebody must do it.

Mr. Clark. We have been doing that, yes; but the only statutes you have in mind are those in 28 U.S.C.; are they not?

Mr. Lemann. Yes. I think that is where they are collected; but I should hate to have some one come along and say we had overlooked something.

Mr. Clark. That is what a continuing committee is for.

Mr. Lemann. I mean, something very glaring.

Mr. Clark. Yes.

Mr. Mitchell. It is understood that either in Rule 112 or in a separate rule, whichever the Reporter thinks advisable, we are to put in affirmative provisions respecting granting stays to allow motions for new trial and appeal. He can work it out.

Mr. Lemann. And the matter of supersedeas is to be left to the existing statute -- I mean, about the time within which it is taken, the bond you must give for it. The statute on the bond, I am sure, is like the injunction bond statute -- "Such costs and damages as the party may suffer if his appeal is dismissed"-- but it has to be fixed by the court. The Supreme Court rule said it should not be less than the amount of the judgment.

Mr. Mitchell. Have we no rule about supersedeas?

Mr. Lemann. Not about amount and time. The only thing we have is this and that general appeal provision which says you shall take the appeal within the time fixed by law and upon filing a bond approved by the court.

Mr. Clark. That is correct.

Mr. Mitchell. We ought to provide for it in the rules. The lawyers ought not to have to mull around in the statutes to know how to take an appeal.

Mr. Lemann. I think it would be desirable. Shall we make a motion to ask the Reporter to look up the statutes and incorporate them in the rules?

Mr. Clark. You mean look up the rules, do you not?

Mr. Lemann. The statutes and rules respecting supersedeas, and the time, and the amount of the bond, and incorporate them in a rule or rules.

Mr. Mitchell. That will be understood unless there is objection.

Mr. Wickersham. I suggest that this last sentence be stricken out.

Mr. Clark. Yes; I think that should go out, in view of what we have already decided in other cases.

Mr. Wickersham. I should strike it out in all cases, and leave it to the general rule.

Mr. Clark. You probably will want to look at the matter a little more, perhaps, in connection with Rule 113. You will notice that Equity Rule 8, down on the opposite side, covers a lot of things. We first put in execution here, and then we had a separate rule on these subsequent things; and I probably should mention this: We put in this provision, too, in Rule 112, that --

"In States where so-called equitable assets can be reached only by a separate action, such action may be dispensed with and supplemental proceedings may be taken in the

original action in lieu thereof."

We wanted to cover all supplemental proceedings. So I think we probably should adjourn, but I wanted you to have in mind the fact that I tried to make the rule inclusive there.

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(Thereupon, at 1:10 o'clock p.m., a recess was taken for 35 minutes.)

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AFTERNOON SESSION.

The Committee met, pursuant to recess at 1:35 o'clock p.m.

RULE 112 (Continued)

MR. MITCHELL: Rule 112. I notice you refer to successor in interest. I do not know the object of that. The equity rule merely said final process and execution, and so on. Did it say anything about successor in interest? What is the point about that?

MR. CLARK: That is mainly to cover an assignment of the judgment.

MR. WICKERSHAM: Would you not say, just for convenience, the judgment creditor?

MR. MITCHELL: Should be entitled to the right?

MR. WICKERSHAM: Yes.

MR. MITCHELL: Or do it as the rule has done, -- process to enforce decree for payment of money to be writ of execution. Would that make it necessary to leave in any reference to successor?

MR. CLARK: I do not know. I suppose that would be implied, would it not?

MR. MITCHELL: I think so.

MR. LEMAN: How about following the existing practice in the execution of sales? There is a statute now that requires every judicial sale to be at the principal front door of the court house of the county, and we do not make any sales,

in the State practice, at the principal door of the court house. The Sheriff sells real estate where auctioneers sell it, at the auction exchange. I do not know whether this language would have the effect of abrogating that Federal statute, and, if so, I think it might be a desirable abrogation. I just make a comment for the Reporter, if he has not run into that statute, to include that among those that might be abrogated by this rule.

MR. WICKERSHAM: Supplemental proceedings may be taken as original action in lieu thereof. We have no provision here for supplemental proceedings, have we?

MR. CLARK: This is to do it.

MR. WICKERSHAM: I mean, if we are going to put in here procedure on supplemental proceedings, that is quite an elaborate process.

MR. MITCHELL: All you mean here is that you follow the State?

MR. WICKERSHAM: According to the State practice?

MR. CLARK: Yes.

MR. WICKERSHAM: That is all right.

MR. LEMAN: Would you put the State practice into the Federal Court in that connection?

MR. CLARK: Yes.

MR. LEMAN: Would that give you, perhaps, a very novel system of practice in the Federal Courts, in following your

general line-up? I do not know.

MR. MITCHELL: There is always, of course, the question of whether you go so far. You have got a general set of rules here. If you made one rule instead of 120 and said that all practice and procedure in the Federal courts would be in accordance with the local practice, you would not be following the statute because there would be a system set up in every district. We are infringing on that in part now, but I think it rests largely with the court. I have kept quiet about it although I have doubts about it, on the theory that we would not go any further than we needed to, but it is important to do it in special proceedings, and if the court says it is O. K., that is the last word.

MR. LEMAN: I was not thinking so much of that as I was of the possibility that we might be encroaching upon our ideal, beautiful, symmetrical system of procedure for Federal courts with a lot of hybrid processes used in State courts in these connections. That is the only thought. You see, if you go ahead according to the State practice in that kind of cases, I do not know whether the State practice fits into your general picture or whether you would be --

MR. MITCHELL: All we have done here, first, is to follow State practices as near as may be in writs of execution; second, there is a reference to so-called equitable assets which allows us to dispense with the State practice in

a separate action.

MR. LEMON: When he said supplemental proceedings, I understood Mr. Wickersham asked the Reporter what he meant by supplemental proceedings, if he was not going to have any provisions specifically for them, whether he meant State supplemental proceedings, and he said yes, and then I raised the question which I am not competent to answer,which may be easily answered.

MR. MITCHELL: You know what supplemental proceedings are, and when that term is used you get a writ of execution returned unsatisfied, you call up the judgment debtor and examine him. That is all there is to it.

MR. CLARK: I did not want to use anything technical. It might be better to put it this way: "Such action may be dispensed with and proceedings analogous to such State --"

MR. WICKERSHAM: Proceedings supplementary to execution may be taken.

MR. CLARK: That is it. -- "in the original action."

MR. WICKERSHAM: Proceedings supplementary to execution.

MR. TOLMAN: Have you not limited the supplemental proceedings now only to cases where so-called identifiable assets can be reached?

MR. MITCHELL: I think you have.

MR. LEMAN: Yes, that is another point, because most all States forbid you to use the proceedings generally.

MR. TOLMAN: If a man has it hidden in a safe deposit box you can't reach it.

MR. MITCHELL: Why don't you provide something in that general clause about attachments, and so on, and put in proceedings supplemental to execution.

MR. LEMAN: He is speaking there of proceedings before judgment and here he is talking about proceedings after.

MR. CLARK: We may be sidetracking the idea, of course. What we wanted to do was to avoid the necessity of an independent, new suit.

MR. MITCHELL: That is all right, but in doing it you limited, as the Major says, supplemental proceedings to that type of a situation.

MR. WICKERSHAM: If you say proceedings supplemental to execution, taking the original action in conformity, as near as may be, with the State practice --

MR. MITCHELL: Yes, and then go on to say that where so-called equitable assets can be reached only by such action, such assets may be reached in that way.

MR. DOBIE: Are you limited to the so-called equitable assets?

MR. MITCHELL: No, you are not limited. You are making the statement that proceedings supplemental to execution may be resorted to in all cases where it is in accordance with State practice, and then you add to that that in States where

so-called equitable assets can be reached only by separate action, such supplemental proceedings may be taken in lieu thereof. It is substituting the supplemental proceedings for the separate action, but it grants general authority to follow the State remedy.

MR. CLARK: Now, I think I have that now. I wanted to ask Mr. Sunderland, particularly, should we not have the discovery process applicable to execution?

MR. WICKERSHAM: What is that, Dean?

MR. CLARK: Should we not have some process analogous to discovery? It is not the technical discovery that we have already covered, but analogous to discovery? I think you have that in New York.

MR. MITCHELL: That is a supplemental proceeding.

MR. WICKERSHAM: That is a supplemental proceeding.

MR. MITCHELL: You call up other witnesses.

MR. WICKERSHAM: It may be followed up by examination after appointment of a receiver. There are various things that can be done to reach the assets, but that is all in the supplemental proceeding.

MR. MITCHELL: Under your practice the examination is not limited to the adverse party? You can subpoena anybody?

MR. WICKERSHAM: Yes, examine anybody who is supposed to have any property belonging to the defendant.

MR. MITCHELL: It is a full discovery.

MR. CLARK: Suppose all the States do not have that, or have only limited provisions? We will not touch that? We will not try to add a general discovery for the Federal courts?

MR. LEMAN: That is really what I thought Mr. Wickersham had in mind when he asked if you were setting up such machinery, and then I got the impression he meant complicated machinery.

MR. WICKERSHAM: It differs somewhat in different states, but the lawyers in each state are familiar with that type of proceeding. We would not use it very much in Federal court suits.

MR. LEMAN: And it really is restricted largely to discovery?

MR. MITCHELL: That is all it is. It is not only discovery, but it is to produce some evidence that shows a reason for it and then applies to the court for a receiver in supplemental proceeding, or an order for turning over property. It is more than a mere discovery; it goes to the result.

MR. WICKERSHAM: Mr. Kellogg sent me a lot of suggestions in regard to these things, and he says that he believes the judgments of the Federal courts in the districts should be made enforceable in any other district without the necessity of commencing a new action, simply by filing the judgment. What about that?

MR. CLARK: That has been advocated, and my former colleague, Prof. Cooke, wrote an article fifteen years ago with suggestions for a proposed act. I think it is a fine thing. I do not know whether we could do it or not.

MR. SUNDERLAND: Is that the thing I spoke to you about? You say registration in another district?

MR. WICKERSHAM: That is right.

MR. SUNDERLAND: I should think that would be entirely possible. The American Bar Association approved that a number of years running. I drew a bill that was introduced in Congress several times but never got anywhere, not because there was any ppposition to it, but nobody was sufficiently interested to push it along.

MR. WICKERSHAM: That is a procedural question.

MR. SUNDERLAND: It covered State and Federal, but if it could be limited to Federal judgments it seems to me it would come clearly within our province.

MR. WICKERSHAM: It would be a very convenient way to avoid the plurality of suits. You would sue on the judgment in every other district.

MR. LEMAN: Would it not be just as much within our province as the rules we have requiring execution and judgment? If the question of judgments generally is part of our job, and I think it is, would not this provision be just a step along in the same direction, not an enlargmment?

MR. MITCHELL: The proposal, as I understand it, is to preclude the equivalent, as far as our question of power is concerned, to the rule which provided that a writ of execution to execute any judgment in the Federal court might run throughout the United States? That is about what we are doing here.

MR. LEMAN: It is the same thing.

MR. MITCHELL: We simply transfer the judgment and have the writ executed from another court?

MR. LEMAN: Yes.

MR. SUNDERLAND: It is like sending a subpoena out and having it authenticated in another district and served.

MR. MITCHELL: You dodge that by applying to a local court for a writ.

MR. SUNDERLAND: Of course, here you apply to the local court for your execution. All you do is register your judgment and then the local court has full jurisdiction.

MR. WICKERSHAM: Suppose you want to put a lien on real estate belonging to a defendant in some other district; if you file the judgment there you will have a lien on the real estate.

MR. SUNDERLAND: Because it becomes, in local effect, the judgment of that local district court as soon as it is filed.

MR. WICKERSHAM: That is right. I think you ought to

have a separate rule for that.

MR. LEMAN: Mr. Hammond calls attention to the contrary provisions in the Code. The first says, when they run from one district to another in the State, and the suggested proceeding would be a clear extension of that; and the other section following gives the right to run the writ to any State if the judgment is for the use of the United States. Is there any objection to providing that if I get a judgment in New York in the Federal court that I just could take a certified copy of that judgment down to Louisiana and have the Marshal in Louisiana seize the defendant's property down there in execution? It seems rather foolish to require another judgment to be brought in the court of the same sovereign, does it not?

MR. WICKERSHAM: It does.

MR. SUNDERLAND: It is utter folly.

MR. MITCHELL: Let us try it.

MR. LEMAN: Let us try it, yes.

MR. DOBIE: Have you got a copy of your statute somewhere?

MR. SUNDERLAND: I can get it.

MR. MITCHELL: Why did Congress refuse to pass it?

MR. SUNDERLAND: Mr. Michener introduced it to the Committee but he just never could get anyone interested. I argued it before the Judiciary Committee of the House and I thought they were quite interested. They certainly shot

me full of questions, but they never could get the thing reported; it just stopped. Michener had it in hand for two or three sessions but he never could get it out.

MR. MITCHELL: Between now and our next meeting would you communicate with him and ask him the underlying reason for it?

MR. SUNDERLAND: There was no reason. I have talked with him a number of times.

MR. MITCHELL: It was not real opposition?

MR. SUNDERLAND: No real opposition, no. It just got caught in the cog wheels and could not get out.

MR. LEMAN: It did not go beyond what we are doing?

MR. SUNDERLAND: That covered State judgments.

MR. MITCHELL: That is a different thing.

MR. LEMAN: That is a different thing.

MR. SUNDERLAND: This is much less extensive.

MR. LEMAN: I got the impression that that went beyond what we are doing now.

MR. SUNDERLAND: Yes, it went to the State.

MR. LEMAN: Mr. Wickersham, you make the motion.

MR. WICKERSHAM: I make a motion that there be a provision making a judgment effective in one district, effective in any other district.

MR. LEMAN: And execution?

MR. WICKERSHAM: And execution. It may be recorded and

be a lien in any other State.

MR. CLARK: May I come back to the matter we were discussing of equitable assets? How would something like this do: we would add a provision about proceedings supplementary to execution and then after that say that in States where the so-called equitable assets can be reached only by a separate action, such action may be dispensed with and supplemental proceedings may be taken by motion and affidavits taken of the necessity for and the right to reach such assets. Here is a little something more: "And in all cases a judgment creditor shall be entitled to examine any person in the manner provided for by these rules."

MR. WICKERSHAM: How is that?

MR. CLARK: It is an attempt to refer it back to the general discovery procedure.

MR. MITCHELL: Then you are adopting a supplemental proceeding of your own in the Federal court?

MR. CLARK: Yes. That suggestion does two things; first, it clarifies what we already have in supplemental proceedings; and then the other is something new.

MR. SUNDERLAND: It is authorizing the taking of a deposition, not the examination; still, our proceeding is a deposition. This is not a deposition we are trying to take, it is just an examination.

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MR. MITCHELL: Your whole procedure on deposition and

discovery will not fit.

MR. SUNDERLAND: It will not fit because you are after the record is there; here we are not.

MR. WICKERSHAM: I think if you say proceedings supplemental to execution in conformity with State procedure in the particular State, you will get it and avoid having to import into these rules the different statutes requiring supplemental proceedings in different States. They vary a great deal.

MR. CLARK: I perhaps can raise the question more directly: Do you want a general provision here for examination of the debtor?

MR. LEMAN: And other persons.

MR. CLARK: Oh, yes, I suppose so.

MR. WICKERSHAM: Yes.

MR. CLARK: Do you want it or shall we leave it a definite procedure.

MR. MITCHELL: That is an important question. I was thinking about it. Our choice lies between leaving the proceedings supplemental to execution to be governed by State practice, or to set up two or three additional rules that would specify a Federal practice supplemental to execution.

MR. CLARK: Or both; we could have both.

MR. MITCHELL: I would not be in favor of both. It is either to let the State practice govern or to have a simple,

concise proceeding of our own which sets aside the various State practices.

MR. LEMAN: Of course, we have in one other case permitted a permissive choice. I have forgotten where it is.

MR. WICKERSHAM: Is it not simpler to leave this to the local rules?

MR. LEMAN: That depends on whether the rules are generally adequate and simple. If they are, I think we could do it. If they are not, then our job is to have a simple method of getting Federal procedure. It would be unfortunate if we left the fellow who got the judgment in some places insufficient protection.

MR. WICKERSHAM: In every Code State there is a pretty good provision for supplemental proceedings.

MR. MITCHELL: Is there any man here whose State does not provide for such proceedings?

MR. LEMAN: We did not have it up to five or six years ago, and I just wondered if we were peculiar in not having it. Don't you think we could commend this to the Reporter?

MR. TOLMAN: Prof. Sunderland can correct me, but it is my impression that we have supplemental proceedings only in the municipal court under that act, and do not have it in the circuit and superior courts.

MR. SUNDERLAND: I do not know.

MR. LEMAN: You see, that would be an illustration very

much in point of what I just said. If in Illinois your Federal judgment creditor -- if you got a judgment in New York against an Illinois defendant, having gotten it in New York where he resided, and you went out to Illinois to collect that judgment you would be up against an inadequate procedure.

MR. SUNDERLAND: I know in civil practice we provide for no supplemental proceedings.

MR. TOLMAN: Then it is limited to the municipal court of Chicago.

MR. LEMAN: Why did they not cover it with their new procedure?

MR. TOLMAN: I do not know.

MR. WICKERSHAM: That is a court of record, is it not?

MR. TOLMAN: Yes.

MR. WICKERSHAM: Then why not say it may be taken in conformity with the State procedure on judgments in courts of record?

MR. SUNDERLAND: That would not help anybody in Illinois outside of Chicago.

MR. MITCHELL: That would be bad.

MR. WICKERSHAM: My thought would be that we ought to let the Reporter see if we could get it covered in two or three rules, and also whether on a survey there are a number of important places like Illinois. If he thinks he can cover it in two or three rules, I think he should do so.

MR. CHERRY: Do you have anything like this for reaching such assets by separate action in Illinois?

MR. TOLMAN: No, I think you have to file a creditor's bill.

MR. CHERRY: If you have this, you would come in under this ruling.

MR. TOLMAN: It says in States where you have it you would do it by supplementary action.

MR. LEMAN: But you would not be able to do much with a creditor's bill, which is very short, because all you do with that is try to reach certain specific property. With a supplemental proceeding you can do something like bankruptcy proceedings and get a history of the business life of everybody he did business with.

MR. MITCHELL: I am inclined to think we ought to take the best practice in some of those Code States in supplemental proceedings and try by two or three simple rules to cover it which do not conflict. The other course would be to leave it; as Prof. Sunderland points out, it is only in one State you have such a law -- we have the added duty that we are supposed to be getting up a model set of practice procedure rules.

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MR. LEMAN: I move that the Chairman's suggestion be adopted.

MR. WICKERSHAM: Had you not better let the Reporter

see first whether there are any appreciable number of States that have not got those proceedings? We could cover the Illinois situation by using a broad enough term -- in accordance with State procedure, where there is such procedure regarding the judgments of courts of record.

MR. LEMAN: He says that will only apply to the municipal courts in Chicago.

MR. WICKERSHAM: You can make that apply here by making your provision broad enough.

MR. LEMAN: And it would be carried over by the courts?

MR. WICKERSHAM: Yes.

MR. LEMAN: You would have to have very specific language.

MR. WICKERSHAM: I think you can make it general.

MR. MITCHELL: You may have some states in which the supplemental proceeding practice differs in different courts. You may have special procedure in the court of general jurisdiction.

MR. LEMAN: You could not use the word "general jurisdiction".

MR. MITCHELL: I do not think it is a great job to cover it with two or three rules that will take care of it, but let us look at it.

MR. LEMAN: I move the Reporter be requested to draw up some rules to cover supplemental proceedings, and then advise us generally as to the provisions of the State laws.

MR. MITCHELL: Is there any second?

MR. TOLMAN: I second it.

(The question was put and the motion prevailed without dissent.)

MR. MITCHELL: You better not ask any more questions, Dean, or you will get into more trouble.

That covers Rule 112.

MR. CHERRY: Mr. Chairman, I do not want to delay the proceedings, and I did not vote against the motion, but I still think, in regard to supplementary proceedings there is this possibility to bear in mind: if in the State of Illinois outside of the City of Chicago it seems to be the settled policy of that State not to have supplementary proceedings, in view of the fact that they have just revised their procedure and left it out, that is a rather definite conclusion about the policy in that State.

MR. SUNDERLAND: You mean if they did not want it?

MR. CHERRY: Yes.

MR. SUNDERLAND: The point never came up for discussion.

MR. CHERRY: I am just raising the question. In such States I am wondering a little about the policy of providing for it in Federal courts in such States. All I want to do is to raise the question for the Reporter. It is not so much a matter of trying to draw a better set of rules or supplementary proceedings, granted that we could do that probably by combining

the different features of the States, but whether we are running into that policy question.

MR. TOLMAN: I would like to make one observation in answer to that. Illinois was a State where until within the last few years there had been no grant of legislative power to the courts to make rules. As a consequence, we have had to go to the legislature. I believe I have been on every committee that went there for 20 years. We would have to go there to get our legislation through, and the matters which were not passed at all, failed to pass because the legislature was busy with other things. I do not think you can consider it a declaration of policy.

MR. LEMAN: My illustration may be unfortunate.

MR. MITCHELL: We will go on with Rule 113.

RULE 113.

WRIT OF SEQUESTRATION; WRIT OF ASSISTANCE -- WHEN IN THE ENFORCEMENT OF INTERLOCUTORY AND FINAL ORDERS AND JUDGMENTS.

MR. LEMAN: The word "arrest", where the writ of arrest has been returned unserved, struck my eye.

MR. CLARK: Which one?

MR. LEMAN: Rule 113: "If the order or judgment, interlocutory or final, be for the performance of any specific act, and the losing party fails to comply therewith within the time specified, and a writ of arrest has been returned unserved --" I did not know just what you have in mind.

MR. WICKERSHAM: That does not differ much from the equity rule?

MR. CLARK: This was supposed to take over the equity rule.

MR. WICKERSHAM: You do not see anything about writ of arrest there, do you?

MR. MITCHELL: Yes, it says writ of attachment.

MR. WICKERSHAM: You appreciate this provision somewhat? This is practically a provision for contempt, is it not, this equity rule?

MR. CLARK: It is similar, but it is a writ of attachment.

MR. WICKERSHAM: As I understand it now, attachment means attaching his person.

MR. CLARK: Under the Federal rules that means taking his person. We have now called that a writ of arrest.

MR. MITCHELL: What is a writ of sequestration? What does that do?

MR. WICKERSHAM: That has the effect of a receivership.

MR. MITCHELL: Why don't you say receivership?

MR. WICKERSHAM: That would be the modern word.

MR. CLARK: Under the Chancery Rule they appointed a sequestrator who held his property and impounded his revenues until he performed the act.

MR. MITCHELL: In the absence of that, all you can do is

commit the man for contempt.

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MR. LEMAN: It is a little different from the ordinary receivership. It is a receivership against the individual.

MR. WICKERSHAM: We have receivership in a supplemental proceeding.

MR. LEMAN: You have a receiver against the individual?

MR. MITCHELL: Yes.

MR. LEMAN: That is all this would be, I think.

MR. WICKERSHAM: It is a very common practice in supplemental proceedings, if you find the defendant has been concealing property, and you can not get at it very readily otherwise.

MR. LEMAN: Of course, this is not for the collection of a money judgment? This is where you sue him for specific performance and get a judgment and he does not pay and he has run out, you can put him in jail.

MR. WICKERSHAM: But the party has property.

MR. LEMAN: Then you appoint what they call a sequestrator.

MR. MITCHELL: What would you call him?

MR. LEMAN: I do not want to try to put myself in a class with Mr. Clark and Mr. Dobie, but it is in the Encyclopedia of Law and the dictionary of 25 years ago.

MR. MITCHELL: Does that mean that the debtor shall appoint the receiver of the delinquent property? Why use these old, antiquated words?

MR. DOBIE: They are in the equity rules.

MR. MITCHELL: Did you ever sue on such a writ?

MR. DOBIE: I never did.

MR. MITCHELL: I do not believe we have forms in our district courts for it, and I do not believe the Clerk would know what you meant by sequestration. My idea is to put it in simple words which preserve these old forms. Why not say that if there is an order for the performance of a specific act, and the man fails to comply with it, and he can not be arrested, and if a writ of arrest has been returned unserved, the court may sequester his property after receiving the testimony on that point, and hold it to enforce payment? What does he do when he gets it? Just hold it?

MR. DOBIE: Just hold it, I guess.

MR. MITCHELL: They do not sell it or anything like that? They just hold it all the way through?

MR. LEMAN: I do not know whether they sell it or not.

MR. DOBIE: I will bet there have not been ten cases where they have been issued in the Federal court in the last 25 years.

MR. MITCHELL: We will see what Dobie has.

MR. DOBIE: I have something just about the equity rule.

MR. CLARK: Sequestration, writs of, 768.

MR. LEMAN: He treats that?

MR. CLARK: I am not sure. He has got it in the index.

"If the defendant party can not be found, so that judgment would be ineffective, then, upon a return of non est inventus, a writ of sequestration issued against his estate to compel obedience to the decree."

And he has a foot note here, 40, quoting in the foot note Foster on Federal Practice; "See also Shainwald against Lewis, District Court of California, 1880."

Then he goes on to say, "The use of this writ, though, seems to be comparatively rare."

MR. LEMAN: This is taken from the equity rules and adopted here.

MR. MITCHELL: I guess that covers 113.

X. MISCELLANEOUS PROVISIONS

RULE 114

MATTERS NOT COVERED BY THESE RULES--FORMER RULES TO APPLY

MR. MITCHELL: We will go on to No. 114.

MR. LEMAN: Does that not leave a pretty wide door open, Mr. Clark?

MR. CLARK: Yes, I think it does. I am not clear that this is the best form of doing it, but I did not know quite what to do. For example, there are some extraordinary rights that you can not have at the start in the Federal court but that you can have before you have finished it.

MR. LEMAN: Do you mean mandamus?

MR. MITCHELL: Speaking of mandamus, in many jurisdic-

tions it is a civil proceeding, a civil action.

MR. CLARK: I did not think that.

MR. MITCHELL: It is well to get something in here to prevent the abolition of it.

MR. CLARK: Of course, we could try putting it in by name, which would be more helpful to the lawyers, but I am afraid of having any reference to the mandamus here.

MR. MITCHELL: When you apply for a writ of mandamus in the lower Federal court, in the District court, what proceeding do you call it?

MR. LEMAN: Have they got jurisdiction already for mandamus?

MR. MITCHELL: Yes.

MR. DOBIE: Mandamus is not a suit in the Federal courts.

MR. SUNDERLAND: It would be in the State courts, and maybe in the District of Columbia.

MR. MITCHELL: You are right.

MR. CLARK: I thought you could use mandamus as an auxiliary lien when you have the suit already in.

MR. DOBIE: That is true, but a mandamus is not a suit.

MR. CLARK: Do you want to take out the last two lines? Some of the comments suggest that they conform to the existing State practice.

MR. WICKERSHAM: Here is Mr. Kellogg's suggestion:

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"As to an 'omnium-gatherum' clause.- It would seem to be necessary that at the end of the new rules some general provision should be inserted governing topics not specifically covered by existing statutes or by the new rules.

"So far as actions at law are concerned, it would seem to me that the formation of such an action should be governed by the principles of the Conformity Act.

"The suggestion that the so-called 'common law' of the King's Bench should be made the arbiter in such cases would seem somewhat inadequate to provide for the needs of district courts sitting in 81 different districts in this country -- in addition to the District of Columbia."

MR. DOBIE: That provision in line 4, would not that save everything?

MR. CLARK: I think it is a little better.

MR. SUNDERLAND: Yes.

MR. LEMAN: My only objection to the last two lines is that I see something of an invitation to a little further modification.

MR. CLARK: Perhaps you are right.

MR. WICKERSHAM: After all, the central principle in this, I take it, is that old rule of common law, -- no wrong without a remedy. This provides a remedy heretofore existing for anything that has not been expressly provided for in the rules, is that right?

MR. CLARK: All right, take out the last two lines.

MR. SUNDERLAND: Mr. Leman thought the lady protested too much.

MR. WICKERSHAM: Well, I do not know; reasonable protests are essential to the preservation of virtue.

MR. SUNDERLAND: I think you have everybody protected by the first four lines, and the next two lines seem to me a sort of implication that there may be a number of things laying around, and I think it is taken care of in the first four lines.

MR. WICKERSHAM: It is recognition of what may happen; something you have not got covered.

MR. SUNDERLAND: Would it not be saved by the first four lines?

MR. DOBIE: Suppose we had not mentioned the writ of assistance and had said nothing about it?

MR. SUNDERLAND: I should think, if there was any previous practice on it, we should use it.

MR. LEMAN: --"shall be deemed to be subject to statutes, if any, or to the previous existing procedure." All matters of practice not covered are subject to the previous existing procedure.

MR. WICKERSHAM: I think that is perhaps complete.

MR. CHERRY: Suppose it is complete; what about this something not covered here, which is covered by the previous

existing procedure, and then you have occasion to use that procedure; you have got to go back to these rules to find the Code no longer in use in the State and perhaps nowhere else.

MR. SUNDERLAND: The last two lines do not help on that.

MR. CHERRY: I assumed that that was settled. I referred to the question of previously existing procedure.

MR. DOBIE: I think Mr. Cherry's point is a good one. I think it all ought to come out.

MR. MITCHELL: It is a matter, of course, of discretion, how that is to be handled. The point is well taken.

MR. CLARK: Just a minute on that. The previous procedure gets back to the Conformity Act, the conformity would be a continuous conformity.

MR. CHERRY: But we say the previous existing procedure without saying what it is. I am afraid of it.

MR. CLARK: If you are going to have a continuing committee, that is going to solve it.

MR. MITCHELL: What do you mean by "subject to statutes"? Is it State or Federal or both? Previous procedure in the Federal court?

MR. SUNDERLAND: There are some statutes on some of these procedings, and I think it would be all right to limit it to Federal, and allow the State to come in under the existing procedure, whatever you call it.

MR. MITCHELL: I think that has been well provided for in the revision. Probably you can do it.

MR. DOBIE: You said to omit "Federal"?

MR. SUNDERLAND: Yes.

MR. WICKERSHAM: That is for further study.

MR. MITCHELL: Yes, we can read that further.

MR. SUNDERLAND: We can cover that with more language.

MR. CLARK: If we need to, but here it was applicable to the then or present State --

MR. MITCHELL: State law.

RULE 115

REMOVED CASES AND CASES HEARD BEFORE THREE JUDGES

MR. MITCHELL: Rule 115, removed cases.

MR. CLARK: On that you will see that we do try to help out the New York suggestion a little bit, trying to tie down the extension of the period of completing. We have not done very much there. Query: Can we and should we?

The existing authority on Federal procedure points out the various difficulties, that sometimes you are supposed to go to the State court and sometimes to the Federal court. Some of the committee suggestions were that we ought to have no proceedings in the State court. See the suggestions, for example, of the South Carolina Committee, near the end of the first page of comments.

MR. MITCHELL: Don't you think, in the matter of remov-

ing, that our authority is limited to the practice after the case reaches the Federal Court? I don't think we have the right to change the practice in the State court in getting the case removed.

MR. DOBIE: The real fight in all these cases comes on the motion to remand. The average lawyer in his practice knows as much about removal as he does about cuneform inscriptions. The usual practice is to put in an order for removal and let the fight go on up to the Federal judge, who knows about it.

MR. MITCHELL: I do not disagree with that, but I say our job is to provide practice and procedure for dealing with removal cases when they reach the Federal court. We can specify after they reach there, how soon the answer shall be put in, and if you want to, you can provide procedure on motions to remand and things of that kind. But Mr. Clark was talking about changing some rule about the procedure you had to take in the State court to get removal. Is that not what you refer to?

MR. CLARK: Yes, the State. In fact, I think I would rather have Mr. Dobie explain a little more about it. As I understand it now, in certain cases you go to the State courts.

MR. DOBIE: That is right.

MR. CLARK: And in certain cases you go to the Federal Courts.

MR. DOBIE: In nine-tenths of them you go to the State

court.

MR. CLARK: The South Carolina suggestion is that a rule should be promulgated whereby the filing of a petition and a bond in the Federal Court should immediately remove the cause.

MR. MITCHELL: In the Federal court?

MR. CLARK: Yes.

MR. MITCHELL: When you file a petition and bond it is ipso facto removed.

MR. CLARK: You have to go around to the State courts.

MR. WICKERSHAM: In the average case you file a bond in the State court and that ipso facto removes the case to the Federal court, and then you file the record in the Federal court.

MR. CLARK: The question is whether you have to go to the State court or not.

MR. WICKERSHAM: The statute provides it, and I think is a very proper statute, so it seems to me. You notify the State court of this removal. Mr. Kellogg, in his memorandu said:

"The present statute is not clear as to whether the Supreme Court is given jurisdiction to change the existing statutory law upon this topic.

"I feel quite certain that the topic needs a thorough re consideration, and in some respects amendment.

"To illustrate, - a number of the circuits hold that

extension of time to answer bars the right of removal; other circuits hold the contrary. A uniform rule should be provided.

"There are also many conflicting decisions in cases where several defendants are involved, and other questions as to whether a case, once removed, should not by action of the Federal judges themselves be remitted, if necessary, to one of the jurisdictions in which alone it could have been originally brought.

"I will not endeavor at the present moment to cite other instances of matters involved in the law of removal of causes, but I certainly believe that the entire subject is entitled to study, and in some respects should be revised; and I fear in that connection that new legislation may be necessary."

That was earlier in the day when we thought we could not do anything to interfere with the existing statute.

MR. CLARK: What do you think about that, Mr. Dobie? Is that something that we should not touch?

MR. DOBIE: I have made quite a study of this removal situation, but I do not believe we can go into the whole subject. I would like to see that done by somebody else and I would like to have a part in it. I do not think we can go into all these things. I was going to talk to you gentlemen about this, and I wondered if it would be advisable for us to make some recommendations as to various statutory changes that

would be desirable. I doubt it. I do not know whether the court appointed us for that purpose or would want us to go into that.

MR. CHERRY: You can remand the controversy where one party is a non-resident of the State in which the suit is brought. The rule requires the suit to be filed in the State court at or before the State court requires an answer. Then there comes the question of whether a stipulation for the extension of time has the effect of extending the time for filing the removal petition. There is a tremendous amount of law on that and I wrote an article on it some years ago. I do not believe we can go into all that now.

MR. CLARK: You have got two problems.

MR. CHERRY: After it reaches the court, I agree with the gentleman that there can not be any question about it.

MR. CLARK: I touched on the question of speeding up the pleadings in the District court.

MR. MITCHELL: I suggest the words, "And shall govern all procedure after removal."

MR. CLARK: That is all right.

MR. WICKERSHAM: What is that?

MR. TOLMAN: "And shall govern" instead of "governing", in line 3.

MR. WICKERSHAM: What do you substitute for it?

MR. TOLMAN: "And shall govern."

MR. MITCHELL: "In a removed case in which the defendant has not answered -- " at the time of removal, you mean? -- "he must present his defenses pursuant to Rule 26 at the time of filing the transcript of the record of the case in the Federal court."

MR. DOBIE: Now he has 30 days.

MR. WICKERSHAM: I don't think it ought to be at the moment of filing because, suppose he is not going to answer at all, but is going to move to dismiss?

MR. LEMAN: You mean to quash?

MR. WICKERSHAM: No; move to dismiss the complaint in lieu of a demurrer.

MR. LEMAN: He will not be permitted to do it any more.

MR. WICKERSHAM: Certainly he can. He can remove to the Federal court.

MR. LEMAN: Mr. Wickersham is talking about a motion to dismiss the non-jurisdictional action. We have been here a week and I have sort of forgotten some of the things.

MR. CLARK: We presented it as it is in Rule 26.

MR. LEMAN: Did you not take that out and cut down some jurisdictional points? Did I not suggest that and you said I was out of order, but I think when we got through with it you thought yourself we had left nothing in it in that respect?

MR. CLARK: Yes.

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MR. LEMAN: Then, if that is true, and if my recollection

is correct, if I sued under these rules in the Federal court and I have any jurisdictional points to present by motion, I can not present any other points by motion.

MR. CLARK: You can present all these things by your answer.

MR. LEMAN: But Mr. Wickersham said the man removing should have the right to move to dismiss, because if he had been sued directly he would have it.

MR. WICKERSHAM. It is a motion to dismiss the cause of action.

MR. LEMAN: Not as we have left that.

MR. WICKERSHAM: We do it all the time.

MR. LEMAN: With all respects, I do not think that is so.

MR. WICKERSHAM: In other words, you remove the controversy and it stands as it was with the complaint served, and so forth.

MR. LEMAN: As I understand it, leaving out removal, if you were sued in the Federal court today --

MR. WICKERSHAM: I can do one of two things; I can move in the Federal court to dismiss and then file petition and bond --

MR. LEMAN: I am talking about a suit begun in the Federal court.

MR. WICKERSHAM: We are not talking about that.

MR. LEMAN: We are, because we want to see what the rights are because we do not want to give the moving party any greater rights.

MR. WICKERSHAM: In the suit begun in the Federal court, instead of answering, I am going to test the sufficiency of the pleading and move to dismiss.

MR. LEMAN: I do not think you can do that under the rules.

MR. WICKERSHAM: We should have it. This is a compelling rule. Why should I be compelled to answer? Why can I not file a demurrer?

MR. LEMAN: We must know what we are doing, certainly.

MR. WICKERSHAM: I can not conceive that there is any justice in preventing a defendant from moving to dismiss if he chooses, instead of answering or demurring. That is what it amounts to. Why not?

MR. LEMAN: All I am saying -- perhaps you better find out whether I am right; I believe I am -- I think at the time it was inadvertent, and it was unimportant, but I had talked so much about it I did not want to talk again about it. However, I secured the Reporter's attention and he said that he would put it back in. I called his attention to it later and he said he did not put it back. I think that at least our minds ought to meet on a thing as fundamental as that.

MR. WICKERSHAM: I had no idea any such conclusion was

reached. I am absolutely opposed to it and I can not see any justice in it.

MR. LEMAN: I will trace the history of the debate, Mr. Wickersham. As Mr. Clark had it, he did have one motion--

MR. WICKERSHAM: I am not speaking of the ordinary motion. I am speaking of the fundamental motion that goes to the substance of the action.

MR. LEMAN: He had such a provision that permitted you to do that in his original draft of Rule 26. Then I tried to have a special provision made for the jurisdictional point. I was talking about the jurisdictional point.

MR. WICKERSHAM: But we are talking about different things. I am talking of what we call a demurrer. By what possible token could you deprive a defendant of the right of demurrer and moving to dismiss in lieu of a demurrer in the court where the suit is brought?

MR. LEMAN: I was just giving you the history of how it happened.

MR. WICKERSHAM: I did not understand there was any such conclusion reached and I think it would be a very unjust conclusion.

MR. DOBIE: As I read my notes, we decided to limit that to motions relating to process and venue.

MR. CHERRY: Is it proper to remove this discussion to Rule 26?

MR. MITCHELL: I was going to make the point that we can go back and reconsider that rule if we want to. The only question we have up now, whatever we have on Rule 26, is, what is our time going to be on a removed case. We have a time to answer in Rule 26, 20 days. Under the present removal statute the time to answer is 30 days.

MR. CLARK: He has already had 20 days.

MR. MITCHELL: I am not asking what he ought to have, but that is what we have to consider. We should have the time on removal correspond.

MR. WICKERSHAM: There is one point bought up, namely, on a removal case in which the defendant has not answered at the time of removal, he must present his defense on Rule 26 at the time of the filing of the transcript of the record of the case in the Federal court.

MR. MITCHELL: We do not need to go back now and re-argue Rule 26, as to what those defenses are. If we want to reconsider it when we get through with Rule 120, that is all right with me, but I think we ought to stick to the question here.

MR. WICKERSHAM: Very well.

MR. MITCHELL: But the point is that that is too fast here, making him do it the same day.

MR. CLARK: He has had 50 days already, which is a long time to make up that transcript.

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MR. LEMAN: Let us get that procedure, Mr. Clark, from the statute. Can you tell us? That is a long time.

MR. DOBIE: He has the time in State practice which prescribes the filing of the petition for removal.

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MR. MITCHELL: That is 30 days, let us say.

MR. DOBIE: Then he has 30 days to file the transcript, so that is approximately 50 days altogether.

MR. CLARK: That transcript usually includes nothing but the complaint. That is all the proceedings there have been. There is your 50 days, and then on top of it you would have 30 days or some other period in which to answer.

MR. WICKERSHAM: Make it 50 days.

MR. DOBIE: I think he ought to have a chance if he wants to raise any question in the Federal court.

MR. CLARK: He can raise any other question that the other party can raise. It is like Rule 26.

MR. MITCHELL: Having in mind that time for filing the record, I am for this rule.

MR. CLARK: You can not shorten the time for filing the record. I think that is outside of our power. It is a matter, not of procedure, really, it is a statutory procedure.

MR. LEMON: Certainly it is not the procedure in the District court.

MR. CLARK: And, as long as we can not shorten that, I believe in pinning down the time for answering on the removal.

That gives him at least 50 days in any state I know anything about, and that is too much.

MR. LEMAN: Say we give 10 days plus 30 days, which is 40; that is more than any defendant gets in any State or Federal court if he is sued there to begin with.

MR. WICKERSHAM: I am in accord with that, but I want to give notice at the proper time that I want to bring up the question about Rule 26. I had no idea that there was any effort to abolish demurrers or the alternative motion to dismiss. I am strongly opposed to it.

MR. MITCHELL: We can take that up, but I would like to go through the other rules. You can answer in the State court before you remove, without waiving your rights.

MR. CLARK: On removal for local prejudice.

MR. LEMAN: Not on diverse citizenship. I understood that on diverse citizenship you had to remove before pleading. Is that right?

MR. MITCHELL: My impression is the other way, but I am not sure. Can you answer in the State court?

MR. DOBIE: It is very, very rare that it is done.

MR. CHERRY: But there are such cases?

MR. DOBIE: Yes.

MR. CHERRY: This is enough to take care of it.

MR. WICKERSHAM: The statute, as I recollect, prescribes that the petition and bond shall be filed at or before the time.

MR. CLARK: But there is the local prejudice case, and, therefore, this gives the right to get a jury trial in the Federal courts in a local prejudice case. That is the thing it does.

MR. LEMAN: Mr. Clark, every lawyer is going to jump to the point that I did there, and it better be spelled out. If that is the only class of cases in which -- local prejudice -- I may be wrong in my recollection, but I think that I could answer in the State court and then remove where diversity of citizenship is my only ground.

MR. WICKERSHAM: You could find the petition and the bond and answer at the same moment.

MR. DOBIE: What is the problem?

MR. MITCHELL: Whether an answer filed in the State court waived the right of removal.

MR. DOBIE: The defendant still within the period may, if no action has been taken, file a removal petition.

MR. LEMAN: But you can not have action taken on it and make this a kind of an appeal? But you can file your answer as long as you do it within the time limit?

MR. DOBIE: Yes.

MR. TOLMAN: What page is that?

MR. DOBIE: Page 473.

MR. WICKERSHAM: Of your book?

MR. DOBIE: Yes. It would not be done often because

you would be afraid to file a demurrer to your answer.

MR. DOBIE: Yes.

MR. CLARK: Here is another way of doing it, Mr. Leman:

"In a removed case in which the issues are closed at the time of removal, a party shall be entitled to jury trial --" When a party is entitled to a jury trial he may make the claim in the manner provided in Rules 79 and 80, or within ten days after the record of the case is filed in the Federal court, provided such party has not already waived his right, if any, to jury trial.

MR. LEMAN: I just wondered when I read it if there was any difference between filing an answer and closing the issue. You have already answered that. What I had in mind, Mr. Dobie, was in the black letters on page 351 where you say: "A waiver will be implied when a defendant, without petitioning for removal, affirmatively invokes the powers, or voluntarily submits to the jurisdiction, of the State court."

MR. DOBIE: Yes.

MR. LEMAN: And I thought that meant filing an answer.

MR. DOBIE: No, but some of the cases say he ought to withdraw his answer.

MR. LEMAN: I see that you cite the cases on page 353, but your black letter was what I would have thought the law was.

MR. DOBIE: That black letter is sometimes very general.

MR. WICKERSHAM: Take the ordinary case of removal; promptly after the suit was brought the case goes into the Federal court in the State it was in in the State court, and if the time for answer has not expired before the removal took place, on or before the time fixed by the State the defendant files an answer or demurrer as the case may be, then the case goes on just as if it had been brought in the Federal court.

MR. CLARK: It seems to me that that language can be doctored up. It is just an attempt to save his jury trial rights.

MR. MITCHELL: We did agree to the proposition of having so much time to get his record in, he ought to be required to do his pleading, removing, or whatever it is, when he files his record.

Shall we pass on to the next rule?

RULE 116

APPLICATION OF RULES TO SUPREME COURT OF THE DISTRICT OF COLUMBIA.

MR. MITCHELL: That seems to be all right.

RULE 117

COMPUTATION OF TIME--SUNDAYS AND HOLIDAYS.

MR. MITCHELL: Did anybody want to make any suggestion on that?

MR. WICKERSHAM: That seems to be all right.

MR. CLARK: That is the equity rule of the court.

RULE 118

ADVISORY COMMITTEE ON CIVIL PROCEDURE.

MR. MITCHELL: Rule 118?

MR. WICKERSHAM: I think that is an excellent thing, but don't you think before we suggest it as a rule we ought to take it up with the Court? I don't think we want to suggest ourselves as a continuing body unless the Court wants us to.

MR. LEMAN: At any rate, suggest a new body, as it were, and change the name so that there will be no --

MR. WICKERSHAM: It is a question of whether the Court wants a standing committee on rules. There is one in England.

MR. LEMAN: I think it ought to be called to their attention in a way which would save us from the suggestion that that committee be this committee.

MR. WICKERSHAM: Should not that subject of the committee be better taken up by the Chairman with the Chief Justice rather than by formal presentation?

MR. MITCHELL: As a matter of fact, we have considerable time in which to consider this thing. I think we ought to leave it out of the rules, and if Mr. Morgan and others have ideas about the desirability of a continuing committee, it ought to be presented in court. I think we can lay it aside today and maybe consider it further at our February meeting.

MR. CLARK: Is it not so that it would be pretty unanimous that there ought to be such a committee, leaving out the question of how to get that over?

MR. TOLMAN: With me it is a question of the propriety.

MR. LEMAN: Is there any formal action we should take? You would just like an expression from the committee that they think the idea is right?

MR. CLARK: I myself hoped it would be phrased a little differently, because I feel that the only way rule making can be effective is by having such a continuing committee, and I would be willing, subject to the question of the proprieties, to put it in as an expression of opinion, as definitely as that.

MR. MITCHELL: Mr. Morgan is going to put in a document expressing his reasons for it to the Reporter. If anybody else on the Committee has anything of that kind, and will send it in, we will have it mimeographed and sent around to the members and then when we meet again in February we will thresh it out.

MR. DOBIE: It certainly ought to be decided by the full committee.

MR. MITCHELL: My whole point is that we are anxious to get through and this thing could be done just as well in the next couple of months or three, and we can just lay it aside. I do not mean to rebuff it by laying it aside. I have no

ideas about it myself. We will table it for the time being.

RULE 119.

REPEAL OF PREVIOUS RULES -- STATUTES.

MR. CLARK: This, as I have indicated before, I think, is very important, but I think we can do it. I think there probably will have to be some differentiation between those statutes which we consider superseded in full and those that we consider superseded in part, and it will require care, but I think it can be done.

You will notice I have used the term "superseded"; I did not want to use the word "repealed". There may be some word better than "superseded".

MR. LEMAN: "Shall be thereafter of no force and effect." I think the word "abrogated" is all right, but I question it in the first sentence in the third line. The statute says we are uniting the general equity rules with the rules of law. Several times the question has been raised here about what is the effect of some old rule that we do not altogether put into effect. I think if you use the words "united and merged herein" you would cover that.

MR. WICKERSHAM: But there is more than that. "Superseded" is better.

MR. DOBIE: Which one is that?

MR. MITCHELL: Instead of "abrogated", in the third line, the word "superseded".

MR. WICKERSHAM: Superseded by these rules.

MR. CLARK: Yes. I guess "when these rules take effect" is not important there. We can take out "when these rules take effect."

MR. MITCHELL: Why not say "superseded" in the second place in line 5.

MR. WICKERSHAM: Yes.

MR. CLARK: I wish you would think of that sentence a little more. That troubled me a good deal, because most of the district court rules, or, in fact, all, are based on the idea of conformity and they more or less depend on that. Should we force them to revise at once?

MR. DOBIE: I think they ought to.

MR. CLARK: They really ought to. It is a question of whether we should tell them to do it.

MR. WICKERSHAM: If you do not, they will not, many of them.

MR. DOBIE: Don't you think they ought to? They certainly will want to study them. Probably where you have a number of judges, like in New York, they will have long debates. However, in Virginia we only have one judge.

MR. WICKERSHAM: The sooner they do it, the sooner they will be through.

MR. MITCHELL: We have abrogated the rules in part, and if they are too lazy to draw up a new set, I do not know what

we can do.

MR. WICKERSHAM: The best way to get them to act is by abrogating their rules.

MR. MITCHELL: If you have a situation where half of the rules are in effect and half are not, it is their business to get busy and make them conform.

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MR. CLARK: Then shall we leave it as it is here, that the rules which are inconsistent herewith are abrogated?

MR. MITCHELL: Yes, it is well stated.

RULE 120

THESE RULES EFFECTIVE WHEN?

MR. MITCHELL: Then you have your schedule. I make this suggestion, that you ought to state the event which determines the taking effect of the rules, and then state that the rules are to take effect 30, 60 or 90 days afterward. That is very important. The American Bar Association got a bill through abolishing writs of error, and they did not say "60 or 90 days after this takes effect", they made it instanter, and the courts did not know the statute had passed, had no notice of it, and the appeals were in trouble, especially to the Supreme Court. The lawyers ought to have notice and they will not have notice unless you say that the rules shall take effect so many days after whatever act it is.

MR. CLARK: They shall not take effect until after they shall have been reported to the Congress by the Attorney

General at a regular session thereof, and after the close thereof.

MR. WICKERSHAM: Suppose we say 30 days after the closing of such session, or 60 days, whatever you like.

MR. MITCHELL: Under that statute the court has the power to lay the rules before Congress without saying as to whenever they take effect, and then after Congress adjourns to make an order for 30, 60 or 90 days thereafter.

MR. LEMAN: Would it not be all right to say these rules are effective 30 or 60 days after the adjourning of the 75th Congress?

MR. DOBIE: Don't you think, because we do not know when the Congress will adjourn, it will keep the people up in the air?

MR. LEMAN: They shall not take effect until they shall have been reported to Congress and until after the closing of such session.

MR. DOBIE: Don't you think we ought to provide a few days, because you do not know when Congress is going to adjourn? A court sitting out in the State of Washington ought to have some days, or up in Big Stone Gap in Virginia, and they do not know when Congress is adjourning.

MR. MITCHELL: That was my suggestion, that it be a certain number of days after something happened.

MR. WICKERSHAM: After the close of the session?

MR. DOBIE: I do not think there is that much hurry.

MR. MITCHELL: The court, as I pointed out, does not need to follow that method at all. It does not lose the rules when it files them with Congress. It can leave them there until Congress adjourns and say nothing about when they take effect, and then it can make an order after Congress adjourns saying they shall take effect on a certain day. It is not necessary to take the day on which Congress adjourns.

MR. WICKERSHAM: The only trouble is that the Court might adjourn the week before Congress adjourns and not meet again until the first Monday in October, and there are three months that will have elapsed.

MR. MITCHELL: I think we can let that rest and we will have to work that out as things develop.

I have an outline here by way of suggestion as to what the procedure shall be hereafter; just to keep the ball rolling and get you thinking about it I have outlined it in this way:

First, the Reporter will go ahead now and make the revisions in the rules made necessary by the action of this meeting.

Second, when they are revised, they will be distributed to the members. That does not mean we will have to wait until they are all revised, but they can be distributed in sections.

Then, before we meet again the members will take these revisions and go over them carefully, getting our noses down

closely to the details, the verbiage and things of that kind. that take so much time at a meeting like this. Each one of us can write out the corrections or changes that we recommend in this second draft and send them in to the Secretary and he will keep them and give them to the reporter, and give copies to each of the rest of the members. Then the reporter will take those suggestions from the members and go through them, and whatever he thinks worthy he will adopt and make changes accordingly.

Then, when he has made revisions that way he will supply copies to the members and then we will meet and consider that draft. My idea is that that will avoid a lot of wasted time in our meetings discussing small changes that nobody would dispute.

(There was a discussion off the record.)

(Whereupon, at 4:30 o'clock p. m. the meeting was adjourned to a date to be later set.)

. . .

Following the discussion of the rules, there was a colloquy with respect to future procedure, etc., of which a summary is given below:

It was determined that perhaps there would be time for but one revised draft of the rules, before the next meeting, rather than the two according to the procedure suggested by the Chairman.

There was discussion regarding the date of the next meeting, and conflicting engagements of some of the members of the Committee.

There also was question as to how far the members could discuss these rules outside of the Committee meetings, and it was announced that the members would be able to take up with local committees the problems under discussion, with the understanding that there shall be no publicity, such as newspapers.

It was determined that the date of the hearing to be held in February, probably in Washington, would be decided later, depending on circumstances and other engagements of the members.