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FOR CIVIL PROCEDURE

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WEDNESDAY MORNING SESSION

April 5, 1944

The meeting reconvened at 9:38 a.m., Judge Charles E. Clark, Acting Chairman, presiding.

THE ACTING CHAIRMAN: We are up to Rule 59, and I should think the main feature of any question about 59 (that is the new trial section) has been covered by our discussion of 6(b) and our conclusion that we would have three different versions to recommend on the general principle of further time. I shouldn't think, therefore, there was anything more that was worth discussing on 59. Has anyone any suggestions about it?

JUDGE DOBIE: You have cut out that thing in brackets, have you?

THE ACTING CHAIRMAN: That will really go with one of the alternatives, you see, Armistead. That will go with what was the first version put up for Rule 6(b). The second version put up for Rule 6(b) would make no change. I should think the final version which we developed, which was to leave 6(b) as it is, would probably suggest no change here.

JUDGE DOBIE: All right.

MR. HAMMOND: In connection with that, how are you going to put that up? Are you going to have three separate drafts or are you just going to have a statement in regard to it?

THE ACTING CHAIRMAN: I would suppose that in general we would have three separate drafts or at least enough

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statement.

JUDGE DOBIE: We usually go on record as recommending one of them, don't we?

THE ACTING CHAIRMAN: I am not sure that in this particular case we did recommend one. In certain other cases (for example, in Rule 12) there was a Committee choice and a minority choice, but here there was, as I remember, no express preference of the Committee.

MR. HAMMOND: I was just wondering about it. I was a little worried about this alternative rule business, putting those up, too. I don't know, but I did hear that the Criminal Rules Committee had some trouble in that regard, putting up alternative rules. On this time thing, of course, you could say that some members of the Committee favored retaining the rule as is, and other members favored including in there certain other rules, with an explanation of why. My point is that I think we ought to be a little careful about how we do that, and not put up any more alternative actual drafts of rules than we have to.

THE ACTING CHAIRMAN: All I can say on that is that it seems to me we have been very limited in our differences, that there are several cases where I am quite sure members of the Committee have restrained themselves. I know that, if I were making an actual vote, there are several of the things that we have passed that I would not vote for, but I don't

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expect to say anything about it. For my part, I think that we are limiting our statements to relatively important points. I may have come from a different training. I feel that expression of views is helpful. It happens to be a tradition of my court. For example, Judge Learned Hand always says that he thinks that is a helpful thing. Whenever you have real views, express them.

MR. HAMMOND: I didn't mean that to cut out the views on the thing, but it is just a question of whether you should have complete drafts. This is a different situation from most of them, I think.

DEAN MORGAN: This one (at any rate, for 59(c)), Charles, I think needs only a note here that if the changes were made in 6(b), there would have to be corresponding changes here, or something of that sort.

THE ACTING CHAIRMAN: Yes. I wanted to finish out what was my thought. I wasn't suggesting any particular form as the one to follow. When I said that I thought it better to have the full draft, it was on the point of understanding. All I could say as to the way it should be put out is that I think it should be any way that makes it clear, whatever way makes it clear to the reader so that he understands what we are talking about.

DEAN MORGAN: Our matter on 12(b), I think, has to be spelled out, but on this particular thing, where it is only a

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question of whether there shall be an extension of time in particular cases, I think we can do that by a text statement perfectly simply.

THE ACTING CHAIRMAN: That is quite all right on that. As I say, anything that can be understood. That is all you need.

Then, of course, there is another question about which I haven't been clear, and that is how far it was desirable to make supporting statements. On that, what I did for this version was, as you see, to make them very brief, almost barren. I did that because I thought that was the better way to present it to you. Mr. Mitchell, in his comment, referring particularly to Rule 12, says that there should be explanation.

DEAN MORGAN: I think that is quite clear.

THE ACTING CHAIRMAN: I rather think there should be. I don't know quite how that should be developed, because I didn't believe I should write all the explanations, for example. I thought that when I got back, unless the Committee has some suggestions, I would get hold of Mitchell and go over it and see how it should be done. I think we should ask somebody from what might be termed the prevailing view to write a statement. If there is no one else, I will write a statement for the views that I am supporting.

MR. HAMMOND: I have had several people speak to me about the notes, hoping that the notes would be full and would

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explain what the changes are. I think perhaps that may be what has happened with Mr. Mitchell, and that is why he spoke about the notes being fuller, too.

THE ACTING CHAIRMAN: That is another thing. I don't see why we shouldn't take it up now because I was going to ask you about it later. I did ask you to think over the notes as we went along. Mr. Moore and Mr. Oglebay and I have been working on them. These are what we had thought were adequate and in line with the previous notes that we supplied originally and somewhat fuller, as they should be. These are somewhat fuller. I suppose that is just because you don't recognize your own brain child. I was a little surprised when Mr. Mitchell made the comment, but that is all right. If they are inadequate or if something more should be done, we had better know of it now. I would like to get your reaction. How about the notes?

MR. LEMANN: I thought those I read were quite clear as indicating the reasons for the changes. Until I heard Mr. Mitchell's comment, it hadn't occurred to me that they weren't adequate. As I read the suggestions, I got the reasons from the notes quite clearly. How about you, Eddie?

DEAN MORGAN: I did, too, but I thought it might be that you might explain the impact of some of the decisions a little more fully, Charlie. That is the only thing that I thought Mr. Mitchell probably had in mind, some of the decisions

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that caused us to make the changes.

THE ACTING CHAIRMAN: Of course, there are three things to which Mr. Mitchell might have referred. He might have had all of them somewhat in mind. The first thing is this question of explanations of different views, and that I had left purely tentatively for discussion, and I knew that wasn't extensive. Another is the question of whether there were certain notes for the Supreme Court. I think maybe he had the impression, just as Mr. Hammond was suggesting here, that some notes were directed to the Supreme Court, and I repeat that what I had in mind was that there would be no differentiation. I didn't see any particular reason for it. As I suggested the other day here, I think perhaps the Supreme Court has less need of any notes than the bar generally, so I was making no differentiation. Then the third is the suggestion you made just now, and perhaps it is the determination of all three. Of course, we will go over them and consider expanding the cases wherever necessary, but that would be the reaction of the Committee, would it, outside of a little expansion of that kind?

PROFESSOR SUNDERLAND: I think that is all that is necessary. I think in some of the cases you don't get enough from the note of what you feel when you go and look them up. I think there ought to be enough in the note so that you at least get an idea of what the case will be if you do look it up.

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THE ACTING CHAIRMAN: I take it the view would be, then, that we don't necessarily need to stick very closely to our former form. I mean the form of the already printed notes.

PROFESSOR SUNDERLAND: No.

THE ACTING CHAIRMAN: Of course, there we didn't go into cases very much.

PROFESSOR SUNDERLAND: No. I think a little more expansion on the individual cases that are controlling would be an improvement, but otherwise it seems to me the notes are perfectly adequate.

THE ACTING CHAIRMAN: Again, I will talk with Mr. Mitchell on this, too, but I think we can go ahead on that basis as to setting up opposing points of view or anything of that kind, any suggestions you want to make. All that I have in mind is to make it clear.

It reminds me somewhat of my colleague, Professor Underhill Moore, who has some ideas about studying law on actions. At the football games at Yale, Mr. Moore gets up and stamps the seat and says, "It looks like a grand fight, if I could only get in on it, but I don't know what is going on."

DEAN MORGAN: He isn't the only one.

THE ACTING CHAIRMAN: So, if we just mention the ideas euphoniously, we can let them in on what is going on, so they can jump in and have some fun, too. If you want to make

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any further concrete suggestions, of course that is all right, but I think Dean Morgan is quite correct that in this particular case it will be clear without setting it out in detail.

Is there any further suggestion? If not, shall we pass to 60? As to 60 in general, of course, all our suggestion about Hill v. Hawes is now by the Board. It is unnecessary to consider it. So the material in this second note, beginning at 56 and going on to 59, I think we can just forget. Coming back, I don't know whether there is anything more you wish to consider or not. In (a) there is an addition which was voted that mistakes could be corrected after the appeal is filed, before the record on appeal is docketed. That simply clarifies a point.

JUDGE DOBIE: You mean corrected in the district court, of course.

THE ACTING CHAIRMAN: Yes. These are district court rules. At least, that has always been our story. You will notice that at the end we substituted the word "docketed" for the word "filed", to conform with the terminology used in Rule 73(a).

PROFESSOR SUNDERLAND: But in 73(g) you don't stick to that same terminology. I notice in (g): "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court and the action there docketed". The thing doesn't work out quite yet.

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THE ACTING CHAIRMAN: What do you say about that?

MR. HAMMOND: Mr. Mitchell has a suggestion. He says on this: "Strike out the words 'record on' in line 6. My understanding is that it is the appeal which is docketed."

JUDGE DOBIE: I think that is improved terminology. You file a record and docket an appeal.

PROFESSOR SUNDERLAND: I think that is right.

THE ACTING CHAIRMAN: That is all right, isn't it?

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: All right, I think that is all right.

JUDGE DOBIE: I think that is a good thing to strike out "record on" before "appeal is docketed".

THE ACTING CHAIRMAN: Line 6, Rule 60(a), strike out the words "record on", so as to make it the appeal.

PROFESSOR SUNDERLAND: Then, to correspond with that in 73(a), you should make the same change.

THE ACTING CHAIRMAN: You had better hold that, will you, and we will take that when we get there.

PROFESSOR SUNDERLAND: All right.

THE ACTING CHAIRMAN: As to 60(b), Mr. Morgan has suggested a change, but I think that more or less covered Hill v. Hawes.

DEAN MORGAN: That is it. You were assuming you were going to change it to go in Hill v. Hawes.

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THE ACTING CHAIRMAN: Is there anything left of your suggestion now? I am not quite sure.

DEAN MORGAN: I don't think so. You were going to say "where substantial justice requires," if we were going to throw it wide open to him, and I don't suppose we want to throw it any wider open than it is now.

THE ACTING CHAIRMAN: I take it that is the general view. Then this in its redrafted form was considered a good deal, and I take it this is what we agreed on. I don't think there is any question about it.

MR. HAMMOND: I was just wondering about the insertion of the words "fraud, misrepresentation or other misconduct of an adverse party." I was looking over the past drafts. We had that in there at one time, and then we struck it out.

DEAN MORGAN: Did we strike it out or did it just drop out?

MR. HAMMOND: I can give you the whole history of the thing, if you want me to, but apparently fraud itself remained in there up until the final report, and it was in the final report that we struck it out.

DEAN MORGAN: Is there any evidence of why they struck it out. I think that was inadvertence or excusable neglect on the part of someone.

MR. LEMANN: Inexcusable.

MR. HAMMOND: There must have been some reason,

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between the report of April 1937 and the final report, that the word "fraud" was eliminated.

MR. LEMANN: It was in the first draft that went out?

PROFESSOR MOORE: I think I remember that. Mr. Olney was quite anxious that the California statute be taken, and the California statute, I would say inadvertently, does not mention fraud, but the decisions have read it in.

DEAN MORGAN: That is the answer, then, is it?

MR. LEMANN: The transcript of the debate would show, wouldn't it?

MR. HAMMOND: Unfortunately, we had no transcript.

JUDGE DOBIE: If you do it for misrepresentation, you certainly ought to do it for fraud, oughtn't you?

MR. LEMANN: Not like this?

MR. HAMMOND: No, the meeting at Chicago, the first meeting, was reported in full. Then the next two meetings were reported in full. Afterwards, we had no full report of the meetings. I always thought it was unfortunate that we didn't, and I have found that it has been since, but I think Mr. Mitchell thought it was unnecessary and unduly expensive.

MR. LEMANN: Haven't we had them in the last sessions?

MR. HAMMOND: We have had them ever since then; I mean since we started taking up the amendments to the rules.

MR. LEMANN: We had a reporter here, I thought, at every session I attended.

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DEAN MORGAN: But it wasn't written up.

MR. HAMMOND: We had a reporter, but he took down only the conclusions after the first three meetings of the Advisory Committee.

MR. LEMANN: I see.

THE ACTING CHAIRMAN: I think Mr. Moore is correct. I know that we had some discussion, and I know there was then considerable doubt each way. That would be my recollection, too, that Judge Olney thought we shouldn't put it in because it wasn't in the original. It seems to me it is quite desirable.

DEAN MORGAN: Absolutely.

MR. HAMMOND: I am wondering about it.

JUDGE DOBIE: I move it be kept in.

MR. HAMMOND: This thought also occurs to me: It might have been knocked out because you would have the same thing under a motion for a new trial on the ground of newly discovered evidence, wouldn't you?

DEAN MORGAN: Oh, no, not necessarily on account of fraud.

THE ACTING CHAIRMAN: They are sort of correlatives.

MR. HAMMOND: In other words, I didn't want to have too many remedies to get at the same thing.

DEAN MORGAN: Knock out fraud and leave in misrepresentation?

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MR. HAMMOND: Misrepresentation wasn't in there, either.

DEAN MORGAN: Was there misconduct? There was none of this (2).

MR. HAMMOND: None of this was in there, and it just followed the California statutes, you see.

MR. LEMANN: Has this paragraph been availed of much, Mr. Moore?

PROFESSOR MOORE: Oh, there are quite a few cases. They do relieve the party from a judgment because of fraud.

MR. LEMANN: I should think the lesser would include the greater. This was a novel provision when we put it in, you know. It was taken from California, and most of us, I think, had not heard of it. That is why I asked whether it proved as serviceable as Judge Olney thought it would be. But it didn't originate with the Reporter, as I recall it. It originated entirely with Judge Olney.

THE ACTING CHAIRMAN: That is true. It came from him. I will say this: This may be more a feeling I have than actual fact, but it seems to me it really has been a great thing. Mr. Moore and I have discussed it. Mr. Moore has had a little question, I think, chiefly on the ground that he thought it has been indefinite, limited, and so on, and didn't quite fit the bill. I agree with him on that, but in actual remedy it seems to me a fine thing.

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MR. LEMANN: His criticism is that it is indefinite and what? I didn't catch the word.

THE ACTING CHAIRMAN: And not complete. I don't know whether that is what I said or not, but that is what I have in mind, that it isn't complete. I think it is a fine thing. It is not merely on the positive side. It is also on what might be termed the negative side. You can say to a person, that is, " Well, proceed under 60(b)." Here is the kind of case that came up and worried the district judge in New York a great deal, although I don't see why he couldn't easily have proceeded under 60(b). It was a case where another district judge had granted a motion to dismiss, without saying anything about permission to amend. Whether it was inadvertence or not, the second judge didn't know. That was the first judge's order, just an order of dismissal, with no permission to amend. The second judge asked, "What shall I do? There must be some power somewhere." That was Judge Rifkind. He wrote quite a piece on it. He finally ended by almost main strength saying, "He must amend it, and therefore the whole judgment can be reopened."

I saw him afterwards and asked, "Why didn't you use 60(b)? It seems to me that 60(b) is just the thing for that." He was quite surprised and said, "I never thought of it."

It is that kind of thing. It seems to me to give a nice little play in the joints, so to speak.

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MR. LEMANN: The word "his" that you are now going to take out, might have interfered with the use of it in the case which you refer to. It wasn't the party's mistake or inadvertence. It was the first judge's ruling. You have covered that now by taking out "his", but as the rule then stood I don't know whether your judge could have used 60(b).

THE ACTING CHAIRMAN: Of course, that is true, and this came up with Hill v. Hawes in the appellate court. They said it couldn't be used there because it was the clerk's mistake.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: As a matter of fact, I think I myself might have used it because it always seemed to me that when the judge makes the mistake--it might not be so true in the case of a clerk, but in my case that I am speaking of in New York, why didn't the judge enter the original order? There would be only two reasons. One, and most likely, is that the moving party had made the mistake of not asking for it. The other might be that he considered the point and decided against it, but since there was no showing of that, it was probably the first one.

MR. LEMANN: You don't think that even with this change, 60(b) would permit a judge to take care of a situation like Hill v. Hawes?

THE ACTING CHAIRMAN: No. I suggested that as an

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alternative, and that is out now.

MR. LEMANN: I mean without any change in this rule.

DEAN MORGAN: No.

MR. LEMANN: You said it came up in Hill v. Hawes. Do you think it could have been used in Hill v. Hawes?

DEAN MORGAN: No. We are talking about amending this.

MR. LEMANN: I thought you said he had discussed it in connection with Hill v. Hawes when the case was pending.

THE ACTING CHAIRMAN: We discussed it here at the Committee meeting. I think Judge Donworth brought it up two or three times.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: And, of course, the courts have discussed it. Roberts discussed it. They all decided that "through his mistake" couldn't refer to the mistake of the clerk.

MR. LEMANN: Therefore (that is why I am asking), we are taking "his" out now.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: Even with "his" out, would it cover a case like Hill v. Hawes without any further change?

THE ACTING CHAIRMAN: I wonder if it wouldn't. I don't know that I am sure about it, but why not?

MR. LEMANN: Now we have put in specifically that the

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failure of the clerk to give notice shall not affect the finality of the judgment.

THE ACTING CHAIRMAN: I guess it wouldn't.

DEAN MORGAN: It wouldn't now.

THE ACTING CHAIRMAN: I guess you are right.

MR. LEMANN: I just wondered. Maybe it would. It was rather startling to me. I didn't think that was the kind of thing that this rule in California was ever intended to cover.

DEAN MORGAN: No.

THE ACTING CHAIRMAN: Well, I withdraw what I said in view of the statement that nothing the clerk does shall have any effect--

DEAN MORGAN (Interposing): --on the finality of the judgment, but you might make the argument (I was interested to hear you suggest it), notwithstanding your concession of a moment ago, that notwithstanding what we are now doing on the subject of notice, this rule might be said to give you a chance to relieve the party from the fact that he hadn't taken his appeal within the proper time.

THE ACTING CHAIRMAN: Aren't you rather concentrating on taking out the word "his"? You wouldn't want to go further than that.

MR. LEMANN: I am not saying I object to it. I am just thinking aloud, as I do with many of my questions,

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without indicating my own conclusions, just to raise a point for the benefit of discussion.

PROFESSOR MOORE: I don't believe, even with the word "his" out, that the Hill v. Hawes situation is covered at all, because the judgment is not taken against the party who, you said, was inadvertent, and so on. The judgment is properly taken. It is the failure to give notice.

MR. LEMANN: I would say that is so, and that would show that you never could have applied it.

THE ACTING CHAIRMAN: I guess that is so.

Is there further discussion? Armistead, you moved its approval, I think.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: Any further discussion? If not, all those in favor will say "aye"; those opposed. (Carried)

MR. HAMMOND: There is one little change of Mr. Tolman's here. There is a word he wants to de-such here in line 13.

DEAN MORGAN: Oh, Yes.

MR. HAMMOND: Page 55, line 13.

THE ACTING CHAIRMAN: To make it "the".

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: In line 13, change "such" to "the".

Then we go over to Rule 62. That is one of those notes,

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but I take it we have settled that. We pass 62.

DEAN MORGAN: How about 60(b)? That is all right, is it?

THE ACTING CHAIRMAN: Rule 60(b) is what I thought we were discussing. We passed (a) without a formal vote. Nobody raised a question.

DEAN MORGAN: All right.

THE ACTING CHAIRMAN: Is there any reason for not assuming 60 is approved? Rule 60(b) was approved specifically, so I think we have covered it.

DEAN MORGAN: I am sorry. I was looking at page 57.

JUDGE DOBIE: The only thing you did to 60(a) was to strike out "record on".

THE ACTING CHAIRMAN: That is it. We pass, then, 62 and 64.

Rule 65 was for suit on the bond. As we say in the note, there is no reason that Rule 65(c) and Rule 73(f) should operate differently. We have always had a provision on action on the bond given as part of the process of appeal in 73(f). Any question? If not, we will consider that approved and pass on to Rule 66.

Rule 66, you will recall, was to cover the question of capacity, and to make it a little clearer how far the rules apply to the question of receivers. We haven't any reference here, have we, to Federal rules, the point we discussed earlier?

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DEAN MORGAN: I think not.

THE ACTING CHAIRMAN: Is there any question anyone wants to raise about 66?

MR. HAMMOND: Rule 17(b), Capacity to Sue, has the same wording.

THE ACTING CHAIRMAN: Where is that?

DEAN MORGAN: In 17(b), Capacity to Sue.

MR. HAMMOND: I wonder if it is amended in the same sense here.

DEAN MORGAN: I suppose so.

MR. LEMANN: What you say about a suit against a receiver not being commenced without leave of the court appointing him has been the law for sixty years, which I think is right. I don't really see much sense in a rule saying you can't sue a receiver without leave of the court. I don't know why you shouldn't be permitted to sue the receiver under modern conditions, but that is the existing law, and probably we should not make a change in it. We are sort of emphasizing it and incorporating it here. We didn't incorporate it before. We were willing to leave it to the decisions. I was wondering as I read it whether it was suggesting approval of what seems to me an anachronistic rule.

THE ACTING CHAIRMAN: I should think so. There may not be much reason for it.

DEAN MORGAN: I always thought an officer of the

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the court was sued in the capacity of an officer of the court, and it would be contempt of court.

MR. LEMANN: That is foolish.

DEAN MORGAN: That is pretty silly now.

MR. LEMANN: We are sort of giving it a nod here. I am just wondering if somebody would say that we thought well of it. Before, we just left it alone. It may be the idea is that our putting in the sentence in lines 2 and 3 make it important to add 4. I guess Senator Loftin would be all for this, wouldn't you, Senator? You don't want to sue a receiver without permission of the court.

SENATOR LOFTIN: I am not a receiver now. I am a trustee now. I am not affected by this at all.

THE ACTING CHAIRMAN: Anything more on 66? The main thing you have in mind, Mr. Hammond, is whether the first sentence should come later.

MR. HAMMOND: You can do it that way and put all that has to do with an action by or against the receiver up together, or you could put the practice part first and the action part last. I rather thought the provisions dealing with the action were the things that these rules really dealt with and that those should all be put up first.

THE ACTING CHAIRMAN: Will you take that under advisement?

MR. HAMMOND: It is just a suggestion.

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MR. LEMANN: Reading again your notes on page 64, it seems that you have a Federal statute now that gives pretty broad leave to sue a receiver.

PROFESSOR CHERRY: Yes.

MR. LEMANN: I just wonder how much it is true. You call attention to it, but I wonder if you aren't sort of stating an exceptional case instead of the general rule by the language you put in the rule. Some people read the rule and don't read the notes. "actions against a receiver may not be commenced without leave of the court appointing him except when authorized by a statute of the United States." When you read the note, you see you have a statute of the United States which I imagine would authorize a suit in almost every case, wouldn't it?

SENATOR LOFTIN: I think that applies generally to receivers for railroads.

MR. LEMANN: This statute?

SENATOR LOFTIN: Yes. I mean in practice.

MR. LEMANN: Yes. That is because in railroads you have ancillary receiverships more, I think, than in most other cases, don't you think so? Don't you think there are more ancillary receiverships for railroads?

SENATOR LOFTIN: More than generally.

THE ACTING CHAIRMAN: I think that actually we also apply it to a trustee in a reorganization. I think we actually

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have applied it in our court.

MR. LEMANN: You mean this statute or this rule?

THE ACTING CHAIRMAN: Yes, the statute.

MR. LEMANN: I wonder what are the cases now in which a suit against a receiver is not authorized by a statute of the United States, because we have a statute quoted on page 64.

PROFESSOR MOORE: Suits in relation to property.

SENATOR LOFTIN: Any suit that does not involve the operation of the property.

THE ACTING CHAIRMAN: Any claim that is already existing.

MR. LEMANN: That antedates the receivership, perhaps; claims that antedate the receivership.

SENATOR LOFTIN: Or any other claim that does not involve the operation of the property.

THE ACTING CHAIRMAN: Adjustment of the interests of all kinds in the estate; that is, pre-receivership claims, and so forth. This is a broad statute, and it is being used right along. I don't know quite what you could say except that it is broad and yet it doesn't cover everything.

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: Of course, if you thought it desirable, you could put the statute up in the rule. I think we do that some. I think we don't like to do it too much, unless it is very important.

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MR. LEMANN: No. The only alternative would have been to eliminate lines 4 and 5, but I don't think so. They weren't in there originally. They seem to emphasize what may be now rather the exception to the situation.

THE ACTING CHAIRMAN: Unless there is some motion, we will pass on and take Rule 66 as approved.

Rule 68.

JUDGE DOBIE: Moore, is that used often? There are not many cases on that, are they?

PROFESSOR MOORE: Rule 66?

JUDGE DOBIE: Rule 68, Offer of Judgment.

PROFESSOR MOORE: No. It may have been used a good deal, but there aren't many cases.

JUDGE DOBIE: Yes. Ordinarily, of course, it is pretty simple in its operation.

PROFESSOR MOORE: Yes.

THE ACTING CHAIRMAN: Mr. Morgan has raised a question and made a suggestion, and I take it that, while he put it in the form of a query, what he really had in mind was something like this (he can see if I state it correctly): It would be adding in line 9 after the word "admissible": "as evidence of the fact or extent of the offeror's liability."

DEAN MORGAN: That is all right, yes. I think that is what you mean, isn't it?

THE ACTING CHAIRMAN: Isn't that what you meant, Mr.

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Moore?

DEAN MORGAN: I am quite sure that is what Bill meant.

MR. LEMANN: You have even a broader statement now, though.

DEAN MORGAN: I say, he has it "shall not be admissible." Of course it has to be admissible for the fact of the offer, whether that is relevant.

MR. LEMANN: It wouldn't be relevant under this rule.

DEAN MORGAN: Not in this action, but it might be relevant in another action. You very frequently have the question of whether you were acting in good faith when you made the offer.

THE ACTING CHAIRMAN: Eddie, doesn't that now leave the "except" clause a little hanging?

DEAN MORGAN: What? "Except" where?

THE ACTING CHAIRMAN: "except in a proceeding to determine costs." It leaves that a little hanging, doesn't it?

PROFESSOR SUNDERLAND: You would cut it out, wouldn't you?

DEAN MORGAN: You don't need to have that "except" clause at all, if you put it my way: "admissible to the fact or extent of liability." Isn't that it?

JUDGE DOBIE: I think that is clearer.

THE ACTING CHAIRMAN: Let me read the sentence, then, as I take it you would suggest it. "An offer not accepted

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shall be deemed withdrawn and evidence thereof shall not be admissible as evidence of the fact or extent of the offeror's liability." Period.

DEAN MORGAN: That is it. That is, "shall not be admissible as tending to prove", you see; "shall not be admissible to prove the act or extent of the offeror's liability."

MR. LEMANN: Is that a rule of evidence?

DEAN MORGAN: It is an admission otherwise, except as an offer of compromise.

MR. LEMANN: It is not a rule of substantive law.

DEAN MORGAN: No, no. It is a rule of evidence.

MR. LEMANN: It is not a part of evidential rules that might be considered to affect substantive rights.

DEAN MORGAN: I don't think so.

MR. LEMANN: It means that in any other proceeding you couldn't offer it.

DEAN MORGAN: This is saying you couldn't offer it in this proceeding or any other to show that he was liable or the extent of his liability.

MR. LEMANN: If you said, "shall not be admissible in any proceeding", would that cover what you have in mind?

DEAN MORGAN: No, certainly not, because it would be admissible for any other purpose, where it is relevant for any other purpose.

MR. LEMANN: You mean to make it admissible? I am

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not sure that I follow.

DEAN MORGAN: I mean to make it inadmissible when it is offered to prove the extent or the fact of liability of the offeror.

MR. LEMANN: What other purpose could it be offered for?

DEAN MORGAN: To show that he was acting in good faith, in another lawsuit. In another lawsuit the question sometimes comes up, "What did he do in the previous lawsuit?" not for the purpose of showing the inference of liability from it but the fact that he made the offer, the fact that there were these negotiations, and so forth.

MR. LEMANN: I don't quite get it.

DEAN MORGAN: Of course you don't visualize another case where that question arises, but it sometimes does.

MR. LEMANN: Give me a case where it could possibly arise. You say you agree that the offer shall not be admissible as proof of liability.

DEAN MORGAN: Of the fact or extent of liability.

MR. LEMANN: Give me a case which would go in your statement of "for some other purpose."

DEAN MORGAN: If you had another lawsuit where the question was what negotiations did you have in this particular lawsuit, what had happened in this particular lawsuit.

MR. LEMANN: Ought you not to be permitted to go into

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that?

DEAN MORGAN: Surely, to show what happened. Why do you ever put in statements that are not admissible as hearsay but are admissible for another purpose? It is just as applicable to an admission as it is to any other kind of statement. You can't foresee the cases in which it will arise. In this particular case you put it in for the purpose of showing costs, and he has just saved that particular exception, and nothing else.

THE ACTING CHAIRMAN: There has never been anything on this in the rules, has there?

DEAN MORGAN: The books are full of cases. You can't foresee things. You are making a general rule to the effect that it shall not be admissible in any case except for this particular thing, and that just won't do.

JUDGE LOBIE: You don't have to recite all those. You just say that the fellow makes this offer.

DEAN MORGAN: Suppose he wanted to put it in himself to show that he made the offer, are you going to stop him from doing it?

MR. LEMANN: I would be willing to, yes, sir.

DEAN MORGAN: Why? Not if it were relevant, you wouldn't. This is to protect the offeror. That is what this is for.

MR. LEMANN: Yes. I wouldn't be much disturbed by

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the idea that I was cutting something out from the offeror. I think in the long run, if I wanted to encourage offers, I would do better to leave it inadmissible except for costs. Of course, the reason you have it in this is because--

DEAN MORGAN (Interposing): Because it does affect costs.

MR. LEMANN: --it puts the burden on the fellow who makes the offer.

DEAN MORGAN: That is because it is highly relevant in this case under your rule of substantive law. Of course, on the whole question of whether it is relevant or not, you might not even have to put it in if you used Wigmore's theory, because it wouldn't be relevant on anything but costs, and you wouldn't need this rule that it should not be admissible. It is kept out anyhow as an offer of compromise.

MR. LEMANN: I would have thought so.

DEAN MORGAN: Yes, but why do you keep on an offer of compromise? The only time you keep that out is when it is offered as an admission of liability by conduct against the offeror.

MR. LEMANN: And when does it go in?

DEAN MORGAN: It might go in if you are trying to show that this fellow acted in good faith.

MR. LEMANN: I never heard of an offer going in for that purpose, but I guess I don't know. As far as I am

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concerned, I am unconvinced, but it is not important enough to question it if you think it is important, and you know much more about it than I do.

DEAN MORGAN: My point is that I don't want any rule which says a thing is absolutely inadmissible, because if you say that, you put yourself in a position where you can imagine every case that might happen where it would be relevant.

JUDGE DOBIE: That is my idea exactly. I think it is hard for us to conjure up every picture that might arise, but there is one definite thing we want to accomplish here by this thing. I believe in saying it, and I believe you have said it. I therefore move that it be amended in accordance with Mr. Morgan's idea.

PROFESSOR SUNDERLAND: Supported.

THE ACTING CHAIRMAN: You have heard the motion. I think we had better state the language again, so I will state it and you see if this covers it: "shall not be admissible to prove the fact or extent of the offeror's liability."

DEAN MORGAN: "as tending to prove".

THE ACTING CHAIRMAN: All right; "as tending to prove the fact or extent of the offeror's liability". Is that all right?

DEAN MORGAN: That is right, yes.

THE ACTING CHAIRMAN: Shall we discuss it more? If not, all those in favor will say "aye"; those opposed. It is

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so voted. (Carried) I take it that means approval of the entire amendment.

DEAN MORGAN: Oh, yes.

PROFESSOR SUNDERLAND: I would like to suggest a little change in the underlined sentence. I think we have two parts to that sentence that don't belong together, and it ought to be separated in the middle of line 11. The first part is: "The fact that an offer is made but not accepted does not preclude a subsequent offer". That refers only to subsequent offers. The rest of the sentence refers to all offers. "no costs shall be recoverable by the offeree which were incurred after the making of an offer equal to or greater than the judgment finally obtained by the offeree". That is a statement applying to all offers, so I don't think it ought to be connected up in a single sentence with the obverse.

PROFESSOR CHERRY: In that connection, why not drop to the last the first part which you want in a separate sentence, because that is an independent idea?

PROFESSOR SUNDERLAND: Yes, it is an independent idea. You can make that the last sentence.

PROFESSOR CHERRY: I would.

PROFESSOR SUNDERLAND: That would be still better.

PROFESSOR CHERRY: You say he can make a second offer.

PROFESSOR SUNDERLAND: Yes. I think that is an improvement.

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THE ACTING CHAIRMAN: What is that? To reverse the order of the clauses?

PROFESSOR SUNDERLAND: Yes, to cut that sentence in two, with the second part in line 11 beginning "No costs shall be recoverable". Then after that sentence incorporate as the final sentence lines 10 and 11.

JUDGE DOBIE: "The fact that an offer" down through "offer".

PROFESSOR SUNDERLAND: "The fact that an offer is made but not accepted does not preclude a subsequent offer." That would be the last sentence in the paragraph.

JUDGE DOBIE: I think that is clear enough. I move its adoption.

THE ACTING CHAIRMAN: Is that all right?

PROFESSOR MOORE: Yes.

THE ACTING CHAIRMAN: Make two sentences of the material from lines 10 to 14, and then reverse the order.

JUDGE DOBIE: And cut out the "but". One sentence will start "No costs shall be recoverable" and end with "such offer." Then the last sentence will be "The fact that an offer is made but not accepted does not preclude a subsequent offer." I think that is an improvement. I don't think it is vital, but I think it is helpful.

THE ACTING CHAIRMAN: You have heard the motion. All those in favor say "aye"; those opposed. So voted. (Carried)

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I guess that covers 68.

Rule 69 is another Soldiers' and Sailors' note.

Rule 73.

PROFESSOR SUNDERLAND: That carries over a correction we made in the previous rule, in line 9.

JUDGE DOBIE: Cut out "record on".

PROFESSOR SUNDERLAND: Cut out "record on" in line 9.

THE ACTING CHAIRMAN: Yes. Is there objection? I think that would correspond.

JUDGE DOBIE: Yes.

DEAN MORGAN: Where is this, now?

JUDGE DOBIE: Cut out "record on", the third and fourth words in line 9; "before the appeal has been docketed". That is to correspond with what we did a little further back, to use the terms to file a record and docket an appeal.

PROFESSOR SUNDERLAND: I wonder if we shouldn't say in line 13 "appeal" instead of "action". We say in 12, "The record on appeal as provided for in Rules 75 and 76 shall be filed with the appellate court". That is all right. "and the action there docketed". Why don't we say, "the appeal there docketed"? We are talking about docketing an appeal.

THE ACTING CHAIRMAN: I rather think so. Isn't that correct?

JUDGE DOBIE: I think that is good.

THE ACTING CHAIRMAN: Very well; in line 13, change

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the word "action" to read "appeal".

Is there anything else?

JUDGE DOBIE: Drop down to line 20, "docketing the action". That ought to be changed, too.

THE ACTING CHAIRMAN: Yes; line 20.

JUDGE DOBIE: "action" there becomes "appeal". I think that takes care of all of them.

THE ACTING CHAIRMAN: I think maybe you had better look through the rest of the rule, hadn't you?

PROFESSOR MOORE: I take it we have authority, if we catch it some place else, to change it.

JUDGE DOBIE: Certainly.

THE ACTING CHAIRMAN: All right. Any further question on 73?

MR. HAMMOND: Mr. Mitchell had a suggestion to insert in 73(a).

THE ACTING CHAIRMAN: I haven't it before me.

MR. HAMMOND: I have it here. It is the same thing that he suggested be inserted in another rule.

THE ACTING CHAIRMAN: Oh, that was to take care of the Hill v. Hawes matter, wasn't it?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: We decided not to do that, as I understood it. We thought that 77(b) was adequate. Wasn't that the idea?

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DEAN MORGAN: That is what I thought.

THE ACTING CHAIRMAN: I don't know. Of course, it is open for consideration, but I don't think we need to gild or repaint the lily further, do we?

MR. HAMMOND: I think we did leave it out.

DEAN MORGAN: He says, "This seems a silly business".

MR. HAMMOND: Yes.

DEAN MORGAN: I don't think we ought to do that after we have fixed it up in the other so that you couldn't possibly misunderstand it.

JUDGE DOBIE: I think we have taken care of that.

THE ACTING CHAIRMAN: Then, we will pass on to 75. Rule 75(a) was put in this form particularly because Mr. Mitchell brought up the point of the Black Tom case, I think it is, that he was in, and you will notice that we suggested an alternative at the end. We thought this would put too little responsibility on the appellant, and Mr. Mitchell now writes: "The Reporter's substitute for 75(a) seems to be a good one." That is what Dean Morgan wrote, too, and I wonder, therefore, if you wouldn't like to look at that. That appears on page 74. The difference is that in the earlier draft on page 70 it is stated in effect that either one, either the appellant or the appellee, may start making up the record, whereas the one on 74 still leaves the responsibility on the appellant unless the appellee has already taken the ball and run with it.

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Is there any question about it now? I think that since Mr. Mitchell was initially interested and since he now has approved of this alternative, it would be a good idea to take it.

DEAN MORGAN: I move the substitution of the Reporter's alternative on page 74 of the draft.

JUDGE DOBIE: I second that.

THE ACTING CHAIRMAN: Any discussion? If not, all those in favor will say "aye"; those opposed. It is so voted. (Carried)

PROFESSOR SUNDERLAND: I just want to suggest (I suppose we have discussed it already) that the way the thing is drawn here, we are going to confuse the procedure. On page 73 in the note to subdivision (a), it is stated, "Similar procedure has been in operation in at least one circuit by rule." That is the District of Columbia. Isn't this the procedure that is in force in the District of Columbia, as a matter of fact: In the District of Columbia, in case the appellant doesn't file his record within the time limit (in other words, if the appellant is in default), then the appellee can step forward and file the record. But in the District of Columbia practice there is no provision for designation; nobody designates anything. They just use the whole record. I don't see how it is going to be possible for an appellee to designate the parts of the record that the appellant is going to rely upon.

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DEAN MORGAN: Why not?

PROFESSOR SUNDERLAND: Under the rule as we have drawn it here.

MR. LEMANN: He designates the parts he relies on, and then the appellant can come in with a counter-designation.

DEAN MORGAN: Surely.

MR. LEMANN: I think it would work in the reverse just as well as it now works directly. The fact is that the appellant now designates what he relies on, and then the appellee can come in and supplement it. When you get an appeal, of course both parties are interested in the appeal. The appellee says, "I think, from our standpoint, all that we need is such-and-such." The appellant can then supplement that.

PROFESSOR SUNDERLAND: But the appellee hasn't any standpoint, has he?

MR. LEMANN: Certainly; of wanting the judgment affirmed.

PROFESSOR SUNDERLAND: But what points are going to be raised on appeal?

MR. LEMANN: He knows the points because the points have been argued in the lower court. The way it comes up, the appellee says, "All we need for this record is this-and-this. We don't need certain other things because it won't be necessary to refer to them." There may be a lot of voluminous exhibits that have been offered which, after they have gotten

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into the case, it will be more or less generally agreed are not of special importance. I think it would work all right, Mr. Sunderland.

DEAN MORGAN: Yes; and if he is really in a position where he wants speed, he can designate the whole works and shoot the whole business up.

MR. LEMANN: I have done that just recently in several cases where I was the appellant and wanted speed. I designated the whole record. I didn't want to get into any controversy about what is in the record, and I designated the whole record. If you will examine the cases, I think in the majority of them they designate the whole record.

JUDGE DOBIE: Not with us. If you did that with us, we would say, "We are very sorry, Mr. Lemann. You did that to accomplish speed, but the cost of it will be assessed against you."

MR. LEMANN: That is right, we take the risk when we want speed.

JUDGE DOBIE: The court would be reasonable, Monte. Of course, if you convinced us that it accomplished speed, that would be all right.

MR. LEMANN: We would just take that risk, Armistead.

JUDGE DOBIE: If you convinced us of your good faith, that would be all right.

MR. LEMANN: Yes. As a matter of fact, you see, there

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isn't much expense incurred in designating the record. The expense with us is when we get to printing. If you don't have any printing, I can't see that designating unnecessary portions of the record would make any expense, because you simply take them up, and the district clerk hands them to the clerk of the court of appeals. That part wouldn't involve any expense, Armistead. I don't think you could penalize on that. When you get to printing, that is a different story.

JUDGE DOBIE: Yes.

MR. LEMANN: Then we tell the court everything is up in the court of appeals, where the judges can go and look at it if they want to. Then, in this very series of cases, if we say to leave out certain voluminous things because they are here now, the appellee can't complain that they are not here for the court to look at, and you don't need to print them. That is what costs the money.

THE ACTING CHAIRMAN: Just in passing, I don't know how important it is, but my staff tell me that this is the court of appeals rule, and it is the new rule that Mr. Mitchell read here.

MR. LEMANN: The District of Columbia rule?

THE ACTING CHAIRMAN: Yes.

PROFESSOR SUNDERLAND: I have the rule here. It reads:

"If the appellant shall fail to file a transcript within the time limited therefor, the appellee shall be allowed

to file a copy or transcript of the record with the clerk of this court, and the cause shall stand for trial in the like manner as if the transcript had been filed by the appellant in due time; or the appellee may, after the time limited for filing the transcript in this court by the appellant has expired, and upon his or her default in respect thereto, upon producing a certificate showing the entry of the appeal and the date thereof, have said appeal docketed and dismissed."

MR. LEMANN: Is that what we are talking about? I have been familiar for a long time with the idea of the appellee docketing and dismissing the appeal.

JUDGE DOBIE: We do that all the time.

MR. LEMANN: Because the appellant takes the appeal and then he fails to perfect it.

JUDGE DOBIE: That is right.

MR. LEMANN: In order to get rid of the case, the appellee then goes through a routine docketing.

DEAN MORGAN: That is right.

MR. LEMANN: It is just a skeleton docketing, as I would call it. He doesn't file any papers at all. He just formally dockets the appeal and immediately moves to dismiss it. But this, I understand, is a different thing. It doesn't contemplate the dismissal.

JUDGE DOBIE: It is where the appellee wants the case heard and wants the judgment affirmed on the merits.

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MR. LEMANN: He doesn't abandon the appeal, but what the appellee is worried about is that the appellant is going to delay the appeal. So, in order to expedite the appeal and the hearing of the appeal, the appellee wants to go ahead and perfect the record so that the case can then be fixed for argument. It becomes fairly important these days, when the courts are so congested that, if you don't get your case up fairly promptly, it may go over for a year because the court can't get to it. I understood that is what this is for.

JUDGE DOBIE: Not with us.

MR. LEMANN: I don't think that rule, which I had some difficulty in following closely as you read it, would be the sort of thing that we are talking about. I should think the court might have another rule on this subject. The rule you just read I would imagine exists in other circuits. We have a rule, I know, to docket and dismiss the appeal where you don't think it is going to be prosecuted.

JUDGE DOBIE: That is a motion, Monte, and ordinarily, as we say, the docketing is a "Christian Science" docketing. You don't do anything. The man is in default, and you just appear before the court and say, "I move to docket and dismiss."

MR. LEMANN: That is right.

PROFESSOR CHERRY: That is covered in one rule here.

MR. LEMANN: This one rule that Sunderland read deals with both? I thought the rule he read said where, because of

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delays, the time for the appellant to act has expired. If that is the only rule the District of Columbia has, I don't think it would be this rule. As you read it, it applies only when the appellant hasn't acted within the time permitted. You would have to wait until his time had expired, and I understand that is what we are trying to get away from.

PROFESSOR MOORE: It is my impression that that rule has been amended, but we will send up and check on it right now.

THE ACTING CHAIRMAN: I shouldn't think that that in itself was very important. We can either leave it out or--

MR. LEMANN (Interposing): Change your note. We had better change the note.

THE ACTING CHAIRMAN: Leave it in the note or not, as you wish.

PROFESSOR SUNDERLAND: As a matter of fact, I don't think we should make a change in this thing with Mr. Mitchell not here, anyhow, because this was his particular proposal, but I am concerned about the complication of this in view of our provision for designation of parts. If it weren't for the designation of parts, if we just provided for the whole record, there would be no complication.

MR. LEMANN: I don't see that that makes any trouble, Mr. Sunderland, because, granting your idea that the appellee will make an improper designation because he hasn't anything that he wants to put in, I think you are mistaken. He wants

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to get everything in that will lead to an affirmance of that judgment, just as the appellant, you might argue, wants to get everything in that will lead to a reversal of it. But as a practice, both sides as a rule try to be perfectly fair, because you don't gain anything anyhow if you didn't put it on a more ethical basis. You wouldn't accomplish anything. I always feel that we wouldn't want to be in an unfair position. I recently went over to designate portions of a record for printing, and my colleague wanted to leave some parts out. I said, "If we leave them out, the other fellows will immediately point them out and say, 'They didn't want the court to see that.'" So we leaned over backwards, and that is what usually happens.

PROFESSOR SUNDERLAND: In other words, you designate the whole record.

DEAN MORGAN: Not altogether, but everything that has any connection.

MR. LEMANN: We do that or we are certainly careful to put in everything that we think anybody could say the court ought to have. But let's assume you had a lawyer who didn't take that point of view, and he is for the appellee. He wouldn't get anywhere, because the appellant would come right in afterwards and designate whatever the appellee had left out.

PROFESSOR SUNDERLAND: There is no doubt of that.

PROFESSOR CHERRY: Suppose the designation part of it

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is taken care of, hasn't Mr. Sunderland a point in the statement in line 9 that they proceed, that the appellee then proceeds?

MR. LEMANN: This is page 74?

PROFESSOR CHERRY: Page 70.

MR. LEMANN: We have a substitute for it on page 74.

PROFESSOR CHERRY: The same thing, then.

MR. LEMANN: Line 8, is it?

PROFESSOR CHERRY: I am raising the point about subdivision (d), Charlie.

THE ACTING CHAIRMAN: I suppose these things are always open, but I think it is proper for me to call attention to the fact that I tried to stage a little drive on this because I thought it was complicated and unnecessary, and I bit the dust so rapidly. I don't know where Mr. Sunderland was then, but Mr. Mitchell was very clear about it. I was worried about it.

PROFESSOR CHERRY: I am wondering what is the position of the appellee under this alternate in line 9. What is he to do under subdivision (d)?

MR. LEMANN: That is page 71, now?

DEAN MORGAN: He should do just what the appellant would have done.

PROFESSOR MOORE: If he designates the whole record, he wouldn't need to assign errors, would he?

PROFESSOR CHERRY: We have come down to (d) now, not

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(b). That isn't the whole record, page 71, because it says he is to proceed under subdivisions (b) and (d), and (d) is designating the record and a statement of the points on which he intends to rely on appeal.

MR. LEMANN: It says on page 74 "as if the appellee were the appellant."

PROFESSOR CHERRY: All right. He isn't the appellant. What does he rely on?

THE ACTING CHAIRMAN: He relies on the points that he wants to make in the record.

MR. LEMANN: To support the judgment.

THE ACTING CHAIRMAN: I don't see why it can't be done. I don't see anything to prevent its being done. What he really is doing is saying, in effect, what parts of the record he wants.

DEAN MORGAN: That is right.

MR. LEMANN: And he designates certain parts and says, "These are the points I think the case turns on." The other fellow can come in then and say, "Well, you have made a very incomplete designation, and I designate certain others." That is exactly what happens now between the appellant and the appellee. The appellant designates his parts, and the appellee has to state his points. That is why we so often designate all the record, so that we don't have the trouble of designating points and the fear that we will overlook something.

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THE ACTING CHAIRMAN: Of course, this is going to operate somewhat as a threat, and it may be a good thing. The appellant is going to be faced with the fact that if he doesn't get under way rapidly, the appellee may take the ball away from him.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: That may be all right, anyway.

MR. LEMANN: It really doesn't take the ball away from him, because he can come back and protect himself. It is only a mechanical device to fix up your record, isn't it, so what can you lose? But it will give the appellee a chance to expedite the appeal if the appellant doesn't want to expedite it. I should think it was an unusual case, myself, although from these discussions around the table about delays I sometimes get the impression that I must know only lawyers who are not anxious for delays, that that must be a very small segment of the bar, and that most of them do want delays. The impression I get here is that the lawyers that most of the other members of the Committee know are fellows who always want delays.

THE ACTING CHAIRMAN: I must say that I more or less subscribe to that, although I don't know that I would want to put it as a desire for delay. I think sometimes they do it just by habit or because they really don't know how to get along, and time just passes on.

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MR. LEMANN: Of course, the delay is often due to the fact that lawyers have too many things to do.

THE ACTING CHAIRMAN: Yes, I think that is true.

MR. LEMANN: They try to cover too much ground. Some of them go to meetings, and some of them have too many cases to try and too many clients; and they help each other, because each fellow doesn't know when he is going to be in that fix next time. Isn't that right, Scott?

JUDGE DOBIE: Monte, we had a fellow once who asked for a continuance because he had a case before a justice of the peace sitting that day.

MR. LEMANN: In your court?

JUDGE DOBIE: Yes; because he had a case down before a J.P. You should have seen Judge Parker's face!

MR. LEMANN: Did you turn him down for contempt?

JUDGE DOBIE: No, but Judge Parker's face was quite a study.

THE ACTING CHAIRMAN: Is there any motion?

JUDGE LOFTIN: I move we proceed to the next rule.

THE ACTING CHAIRMAN: It is moved that we proceed to approve 74.

JUDGE LOFTIN: We have already approved that rule.

THE ACTING CHAIRMAN: I see. I guess we did. You are right. Shall we pass to (b). In connection with (b), you will see that we have added a provision at the end. Question

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came up as to the number of copies and as to whether we were not requiring too many copies. We decided that in general we were. That is what most of the court clerks reported, but there were some who thought it necessary, so we provided for some leeway. At the end, beginning in line 23, we have, "When the rules of the circuit court of appeals so require, the appellant shall furnish a second copy", and so on; and then at the very end, "and the district court may by local rule require the filing of copies of the transcript in addition to the copy provided for in this subdivision."

I make this suggestion: Under the Court Reporter's Bill approved January 20, when the transcript is ordered the reporter is under a duty to prepare a copy in addition to the transcript that was ordered by one of the parties. He must deliver this copy to the clerk of the district court for the records of the court, and no fee is to be charged therefor. Accordingly, we believe that the appellant (or, of course, the appellee where he takes the initiative) should never be required by the district court to file more than one copy. That is, it seems to us that the statute is both inclusive and exclusive, that it is intended to be, that it is on the whole rather a good rule, and that we ought not to monkey with it. Hence, we suggest that that last part referring to the district court, not to the circuit court, should be eliminated.

JUDGE DOBIE: In other words, he has to do it under

the Court Reporter's Bill, so why put it in?

THE ACTING CHAIRMAN: Yes. Of course, as we have it, there might be more required than the Court Reporter Bill provides.

JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That is why I say that it seems to me the Court Reporter Bill is intended to be both inclusive and exclusive. It provides affirmatively for a certain thing, and for no more.

MR. HAMMOND: Under the Court Reporter Bill is there always a copy?

THE ACTING CHAIRMAN: No. It isn't required that the notes be always transcribed, as I understand it.

MR. HAMMOND: That is what I was thinking.

THE ACTING CHAIRMAN: But whenever it is transcribed, then the reporter is required to file one automatically.

MR. LEMANN: What changes are you now proposing to add?

DEAN MORGAN: Strike out the last part.

JUDGE DOBIE: Strike out from the semicolon in line 25; cut out the district court rule because the Court Reporter Bill requires him to do that already.

THE ACTING CHAIRMAN: You are stating it a little broadly, Armistead. The Court Reporter Bill doesn't quite require all that, but nevertheless the principle is the same.

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JUDGE DOBIE: Yes.

THE ACTING CHAIRMAN: That we don't go beyond what the Court Reporter Bill requires. As I said, the Court Reporter Bill does not require a transcription necessarily, but if anybody orders any transcription, there is an extra copy made which goes in the clerk's office.

DEAN MORGAN: That is the only time you will have a transcript anyhow, when one is ordered.

THE ACTING CHAIRMAN: That is true.

JUDGE DOBIE: I move that that be cut out.

SENATOR LOFTIN: Second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. It is so voted. (Carried)

I should think that was all that I know of on that subdivision. Is there anything else?

We have discussed (d) a good deal. Is there any question about (d)? Let's see (g). Mr. Moore, is that last line in (g) necessary, in view of what we have done?

DEAN MORGAN: Yes.

PROFESSOR MOORE: I guess it could do no harm.

THE ACTING CHAIRMAN: I guess that is true. That is, I think the intent of the Court Reporter Bill is to this effect. I suppose it does no harm to state the negative.

MR. LEMANN: How many copies does the Court Reporter Bill require to be furnished by the stenographer?

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THE ACTING CHAIRMAN: Just one, so far as the court is concerned.

MR. LEMANN: Yes. If the court wants more, they must pay for it.

THE ACTING CHAIRMAN: Yes.

MR. LEMANN: He would get extra for that, would he? That isn't covered by his salary?

THE ACTING CHAIRMAN: He cannot charge for the copy that goes to the court.

MR. LEMANN: But he can charge for extra copies?

THE ACTING CHAIRMAN: Yes.

DEAN MORGAN: If you order a transcript, you still have to pay for it.

MR. LEMANN: If you order it, he makes the transcript.

THE ACTING CHAIRMAN: As I read the bill, I thought there might be some doubt whether the Reporter kept the amounts he collected, but I guess the intent of the bill is that he does. Isn't that it? It didn't seem to be entirely clear, but I think that is intended. He gets a basic salary.

JUDGE DOBIE: And he gets those fees.

MR. LEMANN: All he has to do for the salary is to furnish one transcript, and if you want--

THE ACTING CHAIRMAN (Interposing): No, he doesn't even have to do that of himself. He furnishes no transcript unless somebody orders a part of it. You see, he doesn't

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transcribe his notes all along.

MR. LEMANN: Automatically.

THE ACTING CHAIRMAN: But if anyone says that he wants either the whole transcript or some portion of it, then he has to slip in an extra copy which he deposits with the clerk, without charge.

JUDGE DOBIE: That is included in his salary, but the fees that he gets from the litigants go to him.

MR. LEMANN: Suppose I say to the clerk, "I want this transcript written up. File it with the clerk. I don't care for any copies. Write up your notes."

DEAN MORGAN: You have to pay for it.

THE ACTING CHAIRMAN: Then you would have to pay for it.

MR. LEMANN: Where am I any better off than I am now, as a practicing lawyer or a client? I am no better off.

THE ACTING CHAIRMAN: I don't suppose you are. I don't take it that the idea of this was to help the parties out completely. The idea was to have a complete record, and this particular provision about the copy was one to help out the district judges. I know they like it. Judge Hincks, in Connecticut, has always required this anyway; that is, he had a standing order with the reporter that whenever anybody asked the reporter to transcribe his notes, he (the court) wanted a copy. This carries out that idea.

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MR. LEMANN: The only thing this does is to make it compulsory that there be a stenographer there to make notes.

THE ACTING CHAIRMAN: That is it. That is the main idea.

DEAN MORGAN: Then, furthermore, if you order a transcript for yourself, you don't have to order another one for the court. You see, you don't have to pay for that.

MR. LEMANN: He would charge me as much, I guess, for mine.

JUDGE DOBIE: That is taken care of by the usual rates.

MR. LEMANN: In Louisiana, for some time they have had to write up their notes and file them with the court, and they get no extra pay for that. The only way they get extra pay is when I say I want an extra copy for my office. That helped us a good deal, and it helped them because they got a steady salary, which is what they wanted.

THE ACTING CHAIRMAN: That is it. Then let's pass on. There is (h), which we have already considered, and (m) is really the thing I wanted to speak about. Unless there is some question, let's go to (m).

PROFESSOR MOORE: There is (l).

THE ACTING CHAIRMAN: Oh, yes, there is (l). That is the printing one. This is not in any of the papers you have, but I add this about (l).

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Section 3 of the Court Reporter Bill provides that: "Upon request of the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant." Before I come to the suggestion we think that requires in (1), I might say that I have been a little troubled by that Section 3. That came in, of course, with the best of motives. It was announced as breaking the monopoly of the circuit court clerks and, as far as that goes, I don't object to it, of course, but I have been a little afraid that somebody, perhaps Judge Sibley, might say that that means the appellant can always force printing against the court rule. I think that would be a harsh interpretation.

MR. LEMANN: Are you reading now from the stenographer's bill?

THE ACTING CHAIRMAN: From the Court Reporter Bill. This is the provision.

MR. LEMANN: Will you read it again?

THE ACTING CHAIRMAN: I will read it again. It came up in conference. That is, this was not in the original bill. I suppose this is Judge Parker's bill, but this isn't Judge Parker's idea. It was Senator Langer of North Dakota who was going to break the monopoly. He trotted out this suggestion, and everybody took it before we could do anything about it. The intent is good enough, but I think it ought to have made

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clear that it was only where the court rules required printing.

I will read it again.

PROFESSOR MOORE: They have this in mimeographed form.

THE ACTING CHAIRMAN: Mr. Moore says you have this before you.

MR. LEMANN: It is so hard to find, I think it would be easier if you read it, if you don't mind.

THE ACTING CHAIRMAN: I will read it. "Section 3. Upon request of the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant."

At any rate, that is the law of the land now, whatever it may mean. Armistead, have you any thought that somebody could come down in your district now and say, "We want to print," and you can't stop us"?

JUDGE DOBIE: No, I don't think we have gone into that at all.

MR. LEMANN: That is only a part of it. That is only Section 3. We haven't got the whole bill.

MR. HAMMOND: I have a copy of the bill.

PROFESSOR MOORE: That is the part referring to printing.

THE ACTING CHAIRMAN: Passing all this question, it is the law of the land, whatever it may mean. Turning to what I have on (1), does that mean that the words in the second line,

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"and the manner of the printing and the supervision thereof", should come out?

MR. LEMANN: You mean leave in what part should be printed, so as to keep the control of the court to say that there shall be no printing, and take out the manner of the printing and the supervision thereof? I don't know, Charlie. I think the "manner of the printing" might mean the type, the margins, the weight of the paper, and proofreading, for example, and all of that, I think, might still be covered by the rules of the court, so long as they let the fellow choose his own printer. I should think, offhand, that you shouldn't take it out.

THE ACTING CHAIRMAN: I am not really sure, myself.

PROFESSOR MOORE: Isn't that really covered in the "but" clause that stays in?

THE ACTING CHAIRMAN: I don't know. There it is.

MR. LEMANN: What do you mean by "supervision"?

PROFESSOR MOORE: The clerk of the appellate court supervises the printing.

MR. LEMANN: Could he still do it, under this new Court Reporter Bill?

PROFESSOR MOORE: I don't believe so. I think the appellant can take the transcript to any printer he wants. Of course, it has to measure up to the type, paper, and dimensions. But the clerk of the circuit court of appeals will no longer

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have a monopoly on the printing.

MR. LEMANN: No, but he could still supervise the printing. For instance, in New Orleans the clerk now gives it all to one printer, X, and now under this rule I could take it to Y, but he would still supervise it and read the proof. I don't read the proof now.

PROFESSOR MOORE: Does he charge you for that?

MR. LEMANN: I think he does.

SENATOR LOFTIN: Our rules have been amended.

MR. LEMANN: Our rules have been amended so as now to permit them to be printed in the district court. You can have the record printed in the district court now under our rules, but I should imagine that when you print them in the district court you don't know whether the clerk of the court of appeals supervises it or not. Does he, Scott? I have never had it done. I am perfectly glad in my case to have him do all of it.

SENATOR LOFTIN: I don't know. The lawyers asked the court to change it because they thought the cost was too high.

MR. LEMANN: Yes.

THE ACTING CHAIRMAN: That is correct, Scott. The discussion was something about the terrible charges, and I think Senator Langer said it was something that you could get done for something less.

MR. LEMANN: What Scott is speaking of is that in the

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Fifth Circuit about a year ago the lawyers got the court to provide that the lawyers could have the records printed in the district court instead of in the circuit court of appeals. In other words, instead of being printed after being docketed, they could be printed before being docketed. Is that right?

SENATOR LOFTIN: That is right. The lawyers can have any printer that they desire to print the record.

THE ACTING CHAIRMAN: That is, of course, actually what we do in the Second Circuit.

JUDGE DOBIE: What is the difficulty or danger, if the circuit court of appeals wants to make certain provisions for supervision, of keeping it in, Charlie? As I understand, all Langer wanted to do was to keep the clerk from prescribing the printer and having a monopoly.

PROFESSOR CHERRY: Supervision meant very considerable fees for the proofreaders.

THE ACTING CHAIRMAN: I must confess that I can't wholly agree with Mr. Moore that it should come out. There is a problem here.

MR. LEMANN: I think, before we change it, we ought perhaps to check with the clerks again, if you think it that important, to see how they are going to interpret this rule. They may say to you, "You are quite right, there will be nothing left for us to do when the party designates another printer," or they may say to you, "We are still going to do

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something about supervising the record." I don't know.

JUDGE DOBIE: And charge for it.

MR. LEMANN: Yes. They can't do it unless the court of appeals permits it. It isn't up to the clerk. It will be up to the judges, Armistead, whether they permit printing.

PROFESSOR MOORE: Do you think the circuit court of appeals could now properly have a rule that would allow their clerk to supervise the printing and charge for it, in the light of the Court Reporter Bill?

MR. LEMANN: Supervise it and charge for it. I should think so, yes. All this says is that the record shall be printed by a printer. I don't think that says anything about supervising. It may be a straw man. It may be that they won't think of doing it. But if you ask me whether they can technically do it, I think they can.

JUDGE DOBIE: I don't believe the Court Reporter Bill goes beyond the fact that the reporter furnishes the transcript that is required, and he has nothing to do with how that shall be used, what shall be done in the printing, and all like that. That is entirely beyond him. He is functus officio when he reports it and gives you the transcript.

PROFESSOR MOORE: Yes, but Section 3 of the Act was certainly designed to cut down on the costs of printing. Now, if the clerk in the circuit court of appeals still supervises the printing, despite that fact the appellant can turn it

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over to any printer he wants, and then the clerk charges for supervising.

MR. LEMANN: It still saves the cost of printing, Mr. Moore.

PROFESSOR MOORE: It will save some.

MR. LEMANN: All they intended to do, I think, was to protect you against the printer's bill, because the cost of supervising--I never checked up on it.

THE ACTING CHAIRMAN: I think that is quite a permissible interpretation. Of course, this section does refer to these rules. It says, "the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed", and so on.

MR. LEMANN: Yes. You see, the trouble was that a printer in New Orleans might charge $2 a page, for example, when a printer in Atlanta might charge $1 a page, or a printer in Valdosta, Georgia, might charge 75 cents a page. That is what I thought they were getting at; not the cost of supervision, which I don't think was terribly high. I really never checked on it. I just take the clerk's bills and pay them.

THE ACTING CHAIRMAN: Of course, attention should be called to this new statute. I am inclined to think that I wouldn't change it, really. I think we should call attention to it. Of course, in a way it is self-executing.

MR. LEMANN: That is right.

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THE ACTING CHAIRMAN: If it has done things to the rule, it has. We don't need to rush in and do more than it may have done.

JUDGE DOBIE: I think you could leave that to the circuit courts of appeals, and I am satisfied that they will play ball with the Court Reporter Act.

MR. LEMANN: Yes. After all, it takes action by the court the way you have the rule now. They would have to assert the power to supervise and provide the costs in order for the rule to be operative.

THE ACTING CHAIRMAN: I suggest that we leave it, calling attention to it, of course, in a note.

Passing to (m), that is a new section upon which we spent a great deal of time. It was quite necessary and, I think, a good thing before the Court Reporter Bill was passed. The question now comes as to how important it is. We did suggest that it be left out, on the ground that it was now, on the whole, unimportant. Mr. Mitchell has this comment to make:

"On page 75 of his draft, the Reporter suggests that Rule 75(m) be deleted, because of the passage of the Court Reporter's Bill.

"I disagree. In the first place, 75(m) deals with a cheap way of settling the record on appeal in forma pauperis, and certainly the Court Reporter's Bill does not affect that. The other provision in 75(m) deals with a case where a hearing

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or trial was not stenographically reported. May there not be instances where that happens, even if we have salaried official reporters?"

All I can say is that I think there may be, very occasionally.

MR. LEMANN: Does the bill as a whole specify there must be? How does it read, Mr. Hammond, in Section 1 and Section 2 of the Court Reporter Bill?

JUDGE DOBIE: The reporter may be sick, or something like that.

MR. HAMMOND: Here is the provision that has to deal with forma pauperis.

MR. LEMANN: In the bill itself there is a provision?

THE ACTING CHAIRMAN: Yes.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Before you get to that, Mr. Hammond, isn't it true that generally every district just is to appoint a reporter, and he is to be present at all proceedings? Isn't that the background, before you get to that?

MR. LEMANN: That is what I meant to ask.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: You see, there is supposed always to be a reporter.

MR. HAMMOND: Very definitely.

"One of the reporters so appointed for each district

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court shall attend at each session of the court and at every other proceeding that may be designated by rule of procedure or order of court or by one of the judges of the court, and shall record verbatim by shorthand or by mechanical means (1) all proceedings in criminal cases had in open court," and so forth, and"(2) all proceedings in all other cases had in open court unless the parties with the approval of the sitting judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule of procedure or order of the court or as may be requested by any party to the proceeding. The reporter shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk of the court, who shall preserve them in the public records of the court for not less than ten years."

Then it goes on about having it transcribed. You don't want me to read that, do you?

MR. LEMANN: No. What does it say about in forma pauperis?

MR. HAMMOND: "Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose; and the fees for transcripts furnished in other than criminal or habeas corpus proceedings to persons permitted to appeal in

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forma pauperis shall also be paid by the United States if the trial judge or a circuit judge shall certify that the appeal is not frivolous but presents a substantial question."

MR. LEMANN: I should think it covered this, and I shouldn't think that there would be any other expense of any sort in settling the record to present the case, except this transcript.

JUDGE DOBIE: I believe sometimes cases will come up in some way in which there is no stenographic record made, and I am inclined to think that that is a wise provision and that it ought to be left in. If they don't come up, it won't do any harm. They will be very much fewer under the Court Reporter Bill.

MR. LEMANN: Somebody will ask you right away, "How can you have a case when no stenographic report is presented?" You would have to put in a note which would say, "We know there is this Court Reporter Bill; we know it makes provision, but we think the provision may not always be adequate, and we put this in."

JUDGE DOBIE: I think that is all right.

PROFESSOR MOORE: It would be a very rare case where you wouldn't have a stenographic report. Such a case might occur something like this: The official reporter becomes sick this evening, and the parties want to go ahead the next day. The bill has a provision that the judge can take care of

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that, if he will utilize it. He can appoint another person temporarily as official stenographer, with the consent of the Director of the Administrative Office. So, if the district judge got on his toes and called Mr. Chandler, he could appoint a local stenographer, and they would proceed. But if they don't, and they proceed with a reporter of their own or without any, you don't have a stenographic transcript.

MR. LEMANN: You can't have anything that won't give some trouble sometime.

THE ACTING CHAIRMAN: There is a little difficulty, of course, just as you have stated. As it is now, it may appear to them that we are trying to supersede the Court Reporter Bill in part.

MR. LEMANN: Or imply that we don't think it is a very complete bill. It does seem to me you are bound to say you think it doesn't cover it. It might not cover it.

JUDGE DOBIE: You might state that such cases are rare but that they may come up, and it is deemed best to make provision about it. If they don't come up, certainly it won't do any harm.

MR. HAMMOND: I think probably Mr. Mitchell had some other idea, too, about the making up of the record in the forma pauperis cases.

MR. LEMANN: If the majority of us don't think it necessary, I don't think we ought to stop on it very long.

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I should say the best thing to do would be to ask the Reporter to canvass again with Mr. Mitchell. If, after hearing the points raised here (after all, he isn't here for the debate), he still felt that it ought to be retained, go ahead and retain it.

MR. HAMMOND: I am not at all sure, too, in connection with that, that Mr. Mitchell had in mind when he wrote this statement to us that exact provision in the Court Reporter Bill.

MR. LEMANN: Why not ask the Reporter to discuss the matter over again with Mr. Mitchell and leave it to them after their discussion either to keep it or to drop it?

THE ACTING CHAIRMAN: Yes, I am quite ready to do that. I suppose, in the case of an appeal in forma pauperis where the record is fairly substantial, the transcript and all, and the judge has some hesitation, might not the judge say, "Now, here, you can raise everything you want without getting the transcript in detail, and therefore I want to do it some other way"?

DEAN MORGAN: Yes; I should think that is what you had in mind about the first sentence.

MR. LEMANN: I think the first sentence might serve a purpose.

MR. HAMMOND: Yes, that is what I thought, too.

MR. LEMANN: The first sentence, I should think,

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might well be retained. Personally, I would be disposed to delete the second sentence.

DEAN MORGAN: So should I.

MR. HAMMOND: There seems to be no need for the second, under the Court Reporter Bill, but I am quite sure that Mr. Mitchell didn't have in mind this provision when he wrote that.

THE ACTING CHAIRMAN: All right.

JUDGE DOBIE: Suppose we leave that to the Reporter and the Chairman.

DEAN MORGAN: I think so, and I so move.

THE ACTING CHAIRMAN: Unless there is objection, I will take that course. I will suggest that we think there may be some reason for the first sentence, but that we are all rather doubtful as to what the second sentence will do in the light of the Court Reporter Bill. Is that correct?

DEAN MORGAN: That is correct.

THE ACTING CHAIRMAN: Very well. You recall that we have added a new provision, (n), which covers the original papers. That is the one we discussed yesterday.

That covers everything down to 77. Of course, we have adopted the provision of 77(d), and the note appearing on page 76 will have to be rewritten. This note doesn't apply. The note, of course, will have to cite Hill v. Hawes, but in a little different connection. So we will prepare a different

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note.

JUDGE DOBIE: We can leave that to you, I think.

THE ACTING CHAIRMAN: Very well. Mr. Chandler has sent some detailed material on 79. Is that around on the table? I will ask Mr. Hammond to present it, if he will.

MR. HAMMOND: Yes, sir; I shall be glad to.

THE ACTING CHAIRMAN: I take it that in general, of course, we want to follow the suggestions of the Administrative Office and the Conference of Senior Circuit Judges. It is just a question of getting them clearly before us. I don't believe, Mr. Hammond, that it is necessary to go back into the history, if you have what has finally been agreed on. I think we are all ready to accept the recommendations, as long as we get clearly what they are.

MR. HAMMOND: I don't know that there need be any explanation of it. It has all been worked out between you and me and Mr. Chandler. They first submitted an amendment of subdivision (b), and the chief idea of the amendment was to permit the making of records by microphotography or microfilming. I called attention to the fact that their amendment really didn't do that because it still required the papers to be kept in a book or record, you see. So I talked to them about it and suggested that they really hadn't covered the thing which they wanted to cover. Mr. Chandler took it up, even took it up with the Senior Circuit Judges, and they have approved

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this (b) as it reads now. It will leave them latitude as to how they will keep these copies.

I told them that I thought all the Advisory Committee was interested in was having copies kept of these certain papers referred to, and that we in no way wanted to interfere by any rule that we had as to the method in which they should be kept. I said it was the purpose of the original rule that we wanted to leave the greatest latitude to the clerks. Of course, at that time they didn't have the Administrative Office.

The one thing that did seem to interfere was the fact that even under their amendment they had to keep these copies in a book, you see. So we worked out this draft. In fact, I drafted (b) for them and submitted it to them, and the only change that the Administrative Office made was to insert the words "with the approval of the Judicial Conference of Senior Circuit Judges".

JUDGE DOBIE: I don't think there will be any objection to that. If the Senior Circuit Judges and the Administrative Office work out a system that is more or less uniform, I think we certainly should go along with them.

THE ACTING CHAIRMAN: Then, you move the adoption of (b) as recommended?

JUDGE DOBIE: Yes; by the Administrative Office. Isn't there one on (a) down at the bottom?

MR. HAMMOND: There is. It is separately listed

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here because it is a new suggestion which hasn't been presented to the Advisory Committee before. We can take that up, if it is agreeable with the Committee, after we take up (d).

THE ACTING CHAIRMAN: Let's follow his list here, then. Let's vote now on (b). I think it is just as well to do it here.

SENATOR LOFTIN: I second the motion.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. (Carried)

... The draft of Rule 79(b) adopted by the preceding action follows:

"(b) CIVIL JUDGMENTS AND ORDERS. The clerk shall keep, in such form and manner as the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges may prescribe, a correct copy of every final judgment, final order, order affecting title to or lien upon real or personal property, appealable order, and such other orders as the court may direct." ...

THE ACTING CHAIRMAN: What do you want to take next? (d)?

MR. HAMMOND: (d).

THE ACTING CHAIRMAN: Is there any objection to that as you see it here? All those in favor of (d) will say "aye"; those opposed, "no." (Carried)

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... The draft of Rule 79(d) adopted by the preceding action follows:

"(d) OTHER BOOKS AND RECORDS OF THE CLERK. The clerk shall also keep such other books or records as may from time to time be required by the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges." ...

THE ACTING CHAIRMAN: What next? Is (c) next? That is next on your list.

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Isn't that all right, too?

MR. HAMMOND: Oh, yes, that is all right. It is just a question of changing the wording.

THE ACTING CHAIRMAN: Is there any discussion of (c) on the list here?

DEAN MORGAN: I move its adoption.

PROFESSOR CHERRY: Mr. Hammond has a suggestion.

MR. HAMMOND: I did have a suggestion there. This is a note of my own which you will see there. I said: "The words 'judgments and' should be inserted before the word 'order'."

THE ACTING CHAIRMAN: Do we want to include that? Eddie, do you move that?

DEAN MORGAN: I move the adoption.

THE ACTING CHAIRMAN: Including the words "judgments and"?

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DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: As suggested by Mr. Hammond. All those in favor will say "aye"; those opposed. So voted. (Carried)

... The amended first sentence of Rule 79(e) adopted by the preceding action follows:

"Separate and suitable indices of the civil docket and of civil judgments and orders of the nature referred to in Rule 79(b) shall be kept by the clerk under the direction of the court." ...

THE ACTING CHAIRMAN: Now, about (a).

MR. HAMMOND: "The Director has also submitted the following new suggested amendment of the first sentence of paragraph (a)". That is the original paragraph (a) of 79.

THE ACTING CHAIRMAN: The original paragraph, of course, refers to the statute. What is the status of the statute now?

MR. HAMMOND: Here is the point about that. The first sentence of the original paragraph (a) read: "The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Attorney General under the authority of the Act of June 30, 1906, ... or other statutory authority, and shall enter therein each civil action to which these rules are made applicable."

After we promulgated that rule, they passed the Act

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creating the Administrative Office of the United States Courts, and the authority over the clerks about keeping their books and everything now resides in the Administrative Office.

JUDGE DOBIE: I move its adoption.

SENATOR LOFTIN: I second the motion.

THE ACTING CHAIRMAN: The adoption of the suggested provision from the Director as a substitute for the first sentence in (a) has been moved.

DEAN MORGAN: Second.

THE ACTING CHAIRMAN: All those in favor will say "aye"; those opposed. So voted. (Carried)

... The amended first sentence of Rule 79(a) adopted by the preceding action follows:

"The clerk shall keep a book known as 'civil docket' of such form and style as may be prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of Senior Circuit Judges, and shall enter therein each civil action to which these rules are made applicable." ...

THE ACTING CHAIRMAN: That covers them all. Mr. Moore, we have voted all these now, with Mr. Hammond's suggestion for (c) included.

MR. HAMMOND: I have a note here that Mr. Mitchell said something about them, and all that he said was that they shouldn't be adopted.

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THE ACTING CHAIRMAN: Rule 80 is another rule that we worked on a good deal, but it is our judgment that (a) and (b) are taken care of by the Court Reporter Bill. We suggested that the present subdivision (c), which is comparatively unimportant, nevertheless could have some force in connection with the case of a master, and that it might be well to put it down and still retain the formal numbering of the rule. We covered that on pages 79 and 80 of our suggestions.

MR. LEMANN: I move the adoption of the recommendation.

THE ACTING CHAIRMAN: Have I stated that correctly, Mr. Moore? I am not sure whether I have stated it.

PROFESSOR MOORE: I think so.

THE ACTING CHAIRMAN: We propose that subdivisions (a) and (b) be eliminated, with a statement in the text: "(Abrogated because of statute)". In order, however, to assure that a master will have the power--wait a minute. My suggestion goes over in Rule 53(c). This is entirely left out.

MR. LEMANN: I understand that we take this out and put the other change in 53(c).

THE ACTING CHAIRMAN: Just a minute. I guess so.

PROFESSOR MOORE: There will still be an 80(c).

THE ACTING CHAIRMAN: Yes, 80(c) still stands as a single unlettered section. There should be a provision added to 53(c) to cover the question of the master, and that would be

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all.

MR. LEMANN: It doesn't seem to me that 80(c) is worth much. I wondered why we put it in to begin with, and I was told to see the Iowa Code. So the gentleman from Iowa must have added that. That would seem to be plain, wouldn't it?

DEAN MORGAN: No, because some of them require them to bring the stenographer on and make him read his shorthand notes, which is an asinine thing to do.

THE ACTING CHAIRMAN: Mr. Mitchell says, "Rule 80, as shown on page 78, goes out because of the Court Reporter's Bill," but that is a little ambiguous. He says "as shown on page 78," and page 78 doesn't take up subdivision (c). I don't believe he has really considered that separately.

MR. HAMMOND: No.

JUDGE DOBIE: There is no harm in (c) staying on. Do you think so?

DEAN MORGAN: No, there is no harm in doing it at all. Rule 43 otherwise would let it in wherever a state court would let it in. Most of the state courts now do allow it.

MR. LEMANN: This seems never to have made a rule as it stood.

DEAN MORGAN: Rule 43 is where it would go.

MR. LEMANN: You would never think this important enough.

JUDGE DOBIE: There is another reason. I would hate

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to see Rule 60 drop out and change the numbers of all these rules. That may seem foolish, but I don't think it is.

MR. LEMANN: You wouldn't change the numbers. I gather that you would just leave it blank.

THE ACTING CHAIRMAN: I don't think so. Just say "Abrogated."

MR. LEMANN: That is right.

THE ACTING CHAIRMAN: That is what they did in the bankruptcy rules.

JUDGE DOBIE: Yes, that is the best way to do it.

MR. HAMMOND: And then transfer this (c) to 43?

THE ACTING CHAIRMAN: No.

MR. LEMANN: Or say, "It is believed that Rule 43 would sufficiently take care of the case originally provided for in (c)."

DEAN MORGAN: I think so, don't you, Charles?

THE ACTING CHAIRMAN: What do you say to that?

PROFESSOR MOORE: I suppose so, but suppose you have some backward state.

DEAN MORGAN: That is the only place. It would be just in case you had some backward state, but, Lord bless me, why don't you let them do it? Let them stay backward.

PROFESSOR CHERRY: If it were a new proposition, we wouldn't want to write it, but it is in there, so why not leave it?

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JUDGE DOBIE: That is what I think.

PROFESSOR CHERRY: We have a number without any other use for them.

JUDGE DOBIE: I move it be kept in, Mr. Chairman.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: It is moved that Rule 80(c) be retained and that Rules 80(a) and (b) be eliminated as abrogated by the new statute. All those in favor will say "aye"; opposed, "no." The "ayes" have it, and it is so voted.

Now do you want to move the addition to Rule 53(c) as to the master, to make sure that is covered?

DEAN MORGAN: Yes, I so move.

THE ACTING CHAIRMAN: It is moved that there be added to Rule 53(c) the following: "A master may direct that evidence be taken stenographically and may order a transcript thereof in compliance with subdivision (c)(1) of this rule. The fees for such transcript may be taxed ultimately as costs." All those in favor will say "aye"; opposed, "no." That is voted. (Carried)

Rule 81. Is there any question? Is there anything that anyone wants to say about these? Have you any suggestions, Mr. Hammond?

MR. HAMMOND: Mr. Tolman had a suggestion on this. I will present it.

THE ACTING CHAIRMAN: Rule 81, line 10.

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MR. HAMMOND: He says: "I have some hesitancy lest the words 'statute or by' in line 10 are inconsistent with the provisions of the Enabling Act that the rules shall supersede statutes 'in conflict therewith'. Do we need to say what might be cited against us in an attack against a rule as in conflict with a statute? See also the reference to procedural statutes in lines 18 and 19."

THE ACTING CHAIRMAN: I was just going to say, it seems to me that if we take it out here and put it back according to the statute, it isn't in conflict with the statute, I should think. Of course, the 18 and 19 one is old. We have had that.

JUDGE DOBIE: I don't believe there is going to be much conflict there. We say it it applies to those proceedings which are done in accordance with the statute.

MR. HAMMOND: My idea is that you want to retain the provisions of the statute.

DEAN MORGAN: Applicable to a particular proceeding.

MR. HAMMOND: Yes, applicable to a particular proceeding.

JUDGE DOBIE: Yes.

MR. HAMMOND: So far as they apply, and that the words ought to stay in.

DEAN MORGAN: "except as otherwise provided by statute or by rules of the district court or by order of the court in

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the proceedings".

THE ACTING CHAIRMAN: Is there anything anybody wants to do? Any question or any motion? Of course, there is the reference to eminent domain, if, as, and when. That is in the original draft on page 102.

DEAN MORGAN: You have that in your notes, haven't you?

THE ACTING CHAIRMAN: Yes. Has anyone any question about Rule 81? Shall we consider it passed?

SENATOR LOFTIN: I move it be approved.

DEAN MORGAN: Second.

... The motion was put to a vote and carried ...

THE ACTING CHAIRMAN: I might say in passing that at the last meeting there was some discussion about suits under the Tucker Act, and it was suggested that we make more extended reference to United States v. Sherwood and the attitude of the Government and the fact that the Government conceded that these rules apply. You can see on pages 82 and 83 a discussion of that. Mr. Oglebay, of course, had quite a few more pages than this to begin with, but I said I thought that was a little too much, and we have cut it down some. Has anyone any suggestions? That is the way we have epitomized it now.

Forms. That was approved after considerable discussion, and I think it is very lovely. That is Rule 84. There being no objection, we will pass on.

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PROFESSOR SUNDERLAND: I would like to suggest a change in Form 20 on page 90, the last sentence in the first paragraph of the note. I think probably that should come out in accordance with our action on Rule 12. The sentence reads: "It should be noted, however, that the use of affidavits or other matters outside the pleadings in connection with such defense may make it equivalent to a motion for summary judgment under Rule 56." That is eliminated in our majority draft of Rule 12, so that sentence ought to be out out.

THE ACTING CHAIRMAN: Yes. I think certainly something ought to be done with it. I am not quite sure that I know yet how far you have eliminated affidavits under Rule 12. Our discussion yesterday indicated that there was considerable thought by the opponents of Rule 12 that affidavits were still usable, and those courts, I take it, have decided that they are usable. I don't know that. All I can say is that I shall have to wait and be instructed. I suppose the courts will have to decide that still. At any rate, the last part of the reference is incorrect. If it is intended not to be equivalent to a motion for summary judgment, then I take it it should come out. Do you still want to say it is equivalent to a general demurrer?

PROFESSOR SUNDERLAND: I wouldn't say anything.

THE ACTING CHAIRMAN: I should say that was very damning, myself, but maybe I am just prejudiced about it.

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If you will look at the original, page 119, we have said that it was equivalent to a general demurrer. I don't suppose that would be a wholly accurate statement, in any event. It is at least the modern substitute for a general demurrer, with perhaps some slightly different attributes. At any rate, if you will, suppose you look at the original, page 119, at least, and see if that is the way you want to leave it.

DEAN MORGAN: I think it would be perfectly all right to say it is a substitute for a general demurrer.

THE ACTING CHAIRMAN: We don't say that.

DEAN MORGAN: No. We say it is the equivalent.

PROFESSOR SUNDERLAND: I think "substitute" is a better term.

JUDGE DOBIE: So do I, because a lot of people might think it means legally equivalent and that it has a lot of the attributes of a demurrer which it doesn't have. I think "substitute" would be better there.

DEAN MORGAN: When you do demur to the complaint, of course it amounts to the same thing.

THE ACTING CHAIRMAN: All right, strike out the last sentence of the first paragraph, and in the third sentence (which becomes the last sentence), "substitute" for "equivalent".

JUDGE DOBIE: "substitute for" in place of "equivalent to".

THE ACTING CHAIRMAN: Is a substitute for?

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JUDGE DOBIE: Yes.

DEAN MORGAN: Just say it is a substitute.

THE ACTING CHAIRMAN: Yes. Then, make that sentence read: "It is a substitute for a general demurrer" and stop?

PROFESSOR SUNDERLAND: Yes.

DEAN MORGAN: That is right.

THE ACTING CHAIRMAN: No, you can't stop.

DEAN MORGAN: "or a motion to dismiss."

THE ACTING CHAIRMAN: Yes, they both ought to come in. Is there anything else on that? Back on your Form 17, Eddie.

DEAN MORGAN: Yes. You made an improvement. I haven't anything further to suggest. Do we have it adequately? The only thing is that unfair competition in these cases is passing off for good, and things of that kind. There are several ways of unfair competition. You can do it by other than passing off.

THE ACTING CHAIRMAN: That is correct.

DEAN MORGAN: Lever Brothers v. Procter & Gamble is one of them.

THE ACTING CHAIRMAN: I think it is all right.

DEAN MORGAN: Yes.

THE ACTING CHAIRMAN: The case that more or less suggested this was Judge Clancy's decision. He wanted passing off in that case in the complaint. That, it is true, was that type of unfair competition.

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PROFESSOR SUNDERLAND: There is one other change in Form 20, it seems to me, which would improve it. You had it originally and it still stands, "The third defense is equivalent to an answer on the merits." It <u>is</u> an answer on the merits. It isn't equivalent. It is one, isn't it?

DEAN MORGAN: It is an answer, yes.

PROFESSOR SUNDERLAND: Why those words "equivalent to"? It seems to me that ought to be out out, because it is an answer on the merits.

THE ACTING CHAIRMAN: Is there any reason that it shouldn't come out?

PROFESSOR MOORE: No.

THE ACTING CHAIRMAN: I should think it should.

JUDGE DOBIE: Any objection to that, Eddie?

DEAN MORGAN: No, I don't have any objection.

THE ACTING CHAIRMAN: So, "The third defense is an answer on the merits."

Form 22. See the note for the change in Form 22, which was made necessary by the amendment to Rule 14, the designation of the time limit which is required by the rule.

DEAN MORGAN: That is right. You had to stick that in.

THE ACTING CHAIRMAN: I take it that covers everything that is before us on the rules. I have one or two other matters that I want to bring up.

MR. HAMMOND: I have a note here to Form 9, page 109.

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I don't know whether there is anything in it or not. I must have made it a long time ago. Is that still good?

DEAN MORGAN: Oh, yes, that is good.

THE ACTING CHAIRMAN: The form itself is certainly good.

DEAN MORGAN: You mean the note?

MR. HAMMOND: Yes.

THE ACTING CHAIRMAN: Let's see.

MR. HAMMOND: Erie Railroad v. Tompkins.

DEAN MORGAN: There is a little conflict in the Wham case.

THE ACTING CHAIRMAN: But the Supreme Court has ruled, I take it, now quite definitely in that Palmer v. Hoffman case that this is a matter of pleadings. If it is a matter of pleading, it is all right. It is a rather anomalous result, but I think we rather decided it would make things worse if we tried to change it.

DEAN MORGAN: I think you are right about that, Charlie.

THE ACTING CHAIRMAN: Therefore, I take it that this is approved under Palmer v. Hoffman.

PROFESSOR SUNDERLAND: They have gone back on the original view they had. Didn't they approve Wham?

DEAN MORGAN: No. Burden of proof and burden of pleading are quite different things, they say. Although under

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modern pleading they are usually coincident, you know there are a number of instances where they are not.

MR. LEMANN: Isn't the rule pretty well settled now that the burden of proof is governed by state law?

DEAN MORGAN: Yes. They have said it three times.

THE ACTING CHAIRMAN: Yes, it seems so. I have hated to admit it, but even I have gotten so I don't dare say anything more about burden of proof.

MR. LEMANN: The extent of proof, the degree of proof.

DEAN MORGAN: You mean what will take it to a jury.

MR. LEMANN: I have an equity case, and the district court judge says my proof of fraud is not absolutely conclusive, as required by the state law, and he cites state court decisions. Have I any chance to argue in the court of appeals that they could take a more liberal view of the evidence? The evidence, I think, would convince any reasonable man by a great preponderance of the evidence, but if I have got to prove it conclusively—

DEAN MORGAN (Interposing): Beyond a reasonable doubt.

MR. LEMANN: That is practically conclusively. --and he has some strong language in the state court decisions, I have been inclined to think that I was hooked.

DEAN MORGAN: I am afraid you are licked with their attitude. They have held that whether a thing gets to the jury or not is a matter of state law, haven't they? Sufficiency of the evidence? Haven't they said that, practically, Charlie?

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PROFESSOR MOORE: It is a very peculiar case.

DEAN MORGAN: I know it was a peculiar case, but I think that is a damned peculiar decision, anyhow.

MR. LEMANN: I had this point come up and, if we have finished the important business, I should like to ask what you think, as a matter of general information. In Texas, hearsay evidence is not objected to. It will not support an objection in the Federal court in Texas. Is that technical rule applicable?

THE ACTING CHAIRMAN: I don't know.

DEAN MORGAN: There you are. You are right up against that same question because it wouldn't take a case to the jury under the Texas state rule.

THE ACTING CHAIRMAN: We have had just that sort of case. We have had the problem, and a decision came up a week or so ago. We had the question under the Illinois rule in a trustee reorganization of the Northwestern Railroad. We had all this question of service of process, and we held that the trustee was practically the railroad corporation. But, then, in addition there was the question of negligence, and the judge had directed a verdict holding there was no negligence running down the case of the railroad. The plaintiff properly relied on Justice Black's views, which seemed to be those of the majority of the Court, you know. The jury is pretty sacred.

DEAN MORGAN: By gosh, doesn't he say so?

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THE ACTING CHAIRMAN: We wrote up the opinion. It was entirely a question of state law, and in Illinois they still didn't direct the verdict. I am wondering a little, if that case goes to the Supreme Court, as it well might, which of the two great doctrines they will follow: the one that the jury is everything, the other that state law is everything.

JUDGE DOBIE: Have we anything before us, Mr. Reporter?

THE ACTING CHAIRMAN: Anything else? The thing I would like to have you think about a little is the recommendation for amendment of the enabling act. I have been trying to bring that up for quite a while, and it does seem to me that is an important thing. We have never thought about it.

DEAN MORGAN: Mr. Mitchell said something about that, didn't he?

THE ACTING CHAIRMAN: He did. He said he thought it should not be sent out to the bench and bar, and I wonder, really, if that isn't one way of having a real discussion about it. In the first place, I think the enabling act, rather curiously, was one of the worst drafted acts that was ever invented. The two parts of the act are inconsistent with each other, and then the parts are inconsistent within themselves.

DEAN MORGAN: You aren't going to argue that they cancel each other on that account so that we don't have any authority, are you?

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THE ACTING CHAIRMAN: I don't want to, but it can be argued, however, to a certain extent. Then on top of it we have this restricted way of making amendments. I don't see any objection. Don't think that I am arguing that we should not report to Congress. I think that is easy enough. But why must we follow this very definite machinery that the Court must act within a certain time and put it in the hands of the Attorney General, who must act at a certain time, and that it must stay through a session?

It seems to me that the real idea of what we are doing is a kind of courtesy with a coordinate branch of the Government. We should notify them, but that isn't any reason that we should have a very definite and restricted procedure which in practical effect means that no amendment could be adopted by us short of two years, a year and a half at the earliest. That is the way it works out, and it means at least two years for our consideration.

JUDGE DOBIE: What do you think we ought to do?

THE ACTING CHAIRMAN: Did you see the draft that I have sent out two or three times? It now appears at the beginning of this Preliminary Draft III. I was hoping that you would think about it a little and consider it and, frankly, I had rather hoped it would be submitted with the rest of this for discussion generally.

Of course, it isn't for the bench and bar to pass on

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in one sense, but it must be for Congress. I think the great objection to ever raising the question was that Congress would then get excited and might wipe out the whole power. Of course, I am no politician, and I wouldn't want to prophesy, but that seemed to be a very sweeping idea, anyway. It seemed to me that if Congress didn't like it, the most they probably would do would be not to adopt the change. I don't believe that they would now get so excited that they would take away all the rule-making power. That seems to me rather unlikely.

JUDGE DOBIE: Couldn't we do this? Why not submit it to Congress and tell them the President is opposed to it? Then I think it would go right through.

THE ACTING CHAIRMAN: The only thing is that I wouldn't be sure the President was opposed.

JUDGE DOBIE: So would I.

THE ACTING CHAIRMAN: But if there is fear that Congress might do something like that, why isn't one of the best ways to have it out in the open, with people looking at it and considering it? This is not only a question of our act. What we are thinking about, of course is our act, but these things go in ripples. Much the same problem comes up in the case of the Criminal Rules, only somewhat more so, because in the Criminal Rules, as I recall, they have three different enabling acts for different parts of their rules, with three different procedures to follow under each, and I should think

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they would have a question as to which was the overriding one. I think they are assuming that the one requiring this formalized reporting to Congress is the one they must follow, but why should that be the one?

But beyond that, it is rippling down among the states rather curiously. In the last report of the New York Judicial Council they are now discussing advocating complete rule-making power, and darned if this same old act and all of its difficulties doesn't appear there. I wrote to Leonard Sacks, the Executive Secretary, about it and asked, "Can't you do better than what we have had to operate under?" He replied and said, "Why, this has been recommended by the New York County Lawyers Association, but we haven't settled the wording yet of the form of recommendation." But you see that is the way it is going. It is just going down ripple by ripple, so to speak.

DEAN MORGAN: Charles, this political question that you talk about has been bothering me. I don't know whether I am right about it or whether my observation has been too fragmentary, but I think I have observed a very marked tendency towards reaction against reforms in procedure lately in the bar. I think they are getting more conservative instead of more liberal.

JUDGE DOBIE: Some of them on the appointment of judges I think unquestionably have gone back.

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DEAN MORGAN: I have been greatly worried about that, as a matter of fact. I thought that the Nebraska action was just a heavy symptom of that. When I was out in Nebraska a couple of years ago at Lincoln, advocating reforms in evidence as well as in the Federal Rules, the younger men out there were just sure that they were going to drive that thing through, and they were going to get it, all right. It was just a bunch of old fogies who were preventing it. The result was that they got it from the Supreme Court, all right, and then the Legislature not only refused to approve it, but they repealed the act which allowed the Supreme Court to make rules.

MR. LEMANN: They did?

DEAN MORGAN: Yes, sir. I notice, as I go around doing quite a lot of talk about breaking down orthodox rules of evidence, that I get a great deal more resistance than I ever have before.

JUDGE DOBIE: I doubt that we could do much about that in the absence of Senator Pepper and Mr. Mitchell. Do you think so?

MR. LEMANN: What was Mr. Mitchell's view, Charlie?

MR. HAMMOND: Here it is. "No submission should be made to the bench and bar or report to the Court at this time. The Committee has not given the subject enough consideration. I doubt if it is a matter that need be submitted to the bar. If desirable, we can submit a separate report on it in

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the fall."

MR. LEMANN: The bar couldn't control it; we can't control it. It is up to Congress. Therefore, if it is a desirable thing to do, the only argument for submitting it to the bar is the hope that we could influence their Representatives and Senators to support it. As Eddie said, I would be uncertain whether we would get more help from the bar or whether we would do better to go through the Court or through the Conference of Senior Circuit Judges, perhaps, to the Congress.

DEAN MORGAN: Wouldn't we be more likely, Charlie, to get just an amendment to the act which would allow all amendments to the rules to go in effect within sixty days, and let it go at that?

MR. LEMANN: Yes.

JUDGE DOBIE: I believe the Conference of Senior Circuit Judges would have a good deal of effect on Congress--more than this Committee, in my opinion--not that I would say that they have more influence.

MR. LEMANN: You never can tell. They are not too well attended, as a rule, but after all they are the official indicators of opinion. If somebody gets up and says, "I don't think we ought to give this board a mandate of power," he is quite as likely to have it voted down as voted up. I really don't think we would get much political help by doing it.

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THE ACTING CHAIRMAN: Frankly, I wasn't expecting to, but it was suggested here the other day, and I think quite truthfully, that we really don't get so much help from the bar. We get some. It is more individual. We might get it by writing to individuals anyway. The chief thing we do get from the bar, I think, is estoppel, if you want to put it that way.

MR. LEMANN: I don't think you need that on that point.

THE ACTING CHAIRMAN: Wouldn't you get an estoppel likewise on this?

MR. LEMANN: After all, you have to get it to Congress, and it doesn't make any difference about the estoppel. It is different with the criticism of the merits of our rules. I think there you have something on the point. I think there is a chance of getting help there.

THE ACTING CHAIRMAN: I don't know that I think submitting it for publication is necessarily the way to do it, really. I should like to have it brought out in the open somewhere.

MR. LEMANN: You have one wise man here on these matters, and that is Senator Loftin. His judgment ought to be worth something.

THE ACTING CHAIRMAN: We always keep sort of shying away even from discussing this question. Why can't we discuss it? Apparently it is one of those things that are taboo.

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MR. LEMANN: You mean our discussing it here now?

THE ACTING CHAIRMAN: Why can't we discuss the form of the act, and if we think we ought to ask the Senior Circuit Judges for their advice, why don't we do it?

MR. LEMANN: Why not? I don't see anybody objecting to discussing it now.

JUDGE DOBIE: I am strongly in favor of that. I believe they have more influence than anybody we can go to, more than the American Bar. I don't believe Congress pays any attention to the Bar Association. I think they pay a good deal of attention to the Senior Circuit Judges, where the Chief Justice presides, and I think that is our "white hope."

THE ACTING CHAIRMAN: Even the Conference is not going to consider it unless we suggest it to them.

JUDGE DOBIE: That is what I am talking about. I want to suggest it to the Conference of Senior Circuit Judges.

THE ACTING CHAIRMAN: What do you think of my draft? I don't want to be insistent on this, but I keep suggesting it in every meeting, and then in every meeting we say, "Let's not do it now."

MR. LEMANN: Let me see another copy of it. I have succeeded in messing up my papers so beautifully that I can't find anything right now.

SENATOR LOFTIN: Mr. Chairman, of course I would be in favor of such an amendment to the enabling act, but I doubt

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very much the wisdom of advocating it at the present time. I think the sentiment in this country today is very strong against bureaucratic agencies; in other words, what they call government by executive directive rather than by law. I think the feeling between Congress and the bureaucratic agencies is very strong at this time, almost bitter, and, whether we like it or not, we would be denominated one of the bureaucratic agencies in the making of these rules--by the bar, at least. To say that what we recommend and what the Supreme Court adopts should become law as far as these rules are concerned, without submitting them to Congress or giving Congress an opportunity to pass on them, just at this time might unfortunately become involved in this controversy that is going on between Congress and the executive agencies, the bureaucratic agencies, in which the people are very much concerned and over which they are very much aroused.

THE ACTING CHAIRMAN: Let me say again my thought was not to keep away from submitting it to Congress. I would report to them with the greatest of deference, and I don't see why it shouldn't be done. But there are two general things that trouble me about this. One is the method of amendment, and the other is the inconsistencies in the act itself, which the Supreme Court may take care of.

JUDGE DOBIE: Couldn't we try to get that waiting period cut out? Go to the Supreme Court, and let them send it

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to the Congress and have Congress enact it, without any necessity for any incubation?

THE ACTING CHAIRMAN: I don't see that that is anything that Congress would get excited about or raise a question about. It just seems to me that we expect all the Congressmen to be stupid or malicious on that. If they want information, it is a graceful act to have it done. For example, why have the Attorney General in the picture, anyway? Suppose the Attorney General says, "I won't do it," or suppose the Attorney General has gone to Florida at the time. That is just a little bit of machinery that probably isn't very important in itself. The real difficulty is this stereotyped thing that it can go into effect only if it goes in at the beginning of a regular session and stays until the end. Why shouldn't it be a matter of reporting it at any time to Congress?

JUDGE DOBIE: I believe if we went to the Conference of Senior Circuit Judges on that, we would have a pretty good show.

THE ACTING CHAIRMAN: Then, of course, there is another thing along that line. We are going to them right along. It seems to me in a way we raise the question. There is talk that on the condemnation rules we would go to them and ask them for a special resolution. It seems to me, if anything, that would precipitate the thing more than ever. "Why do you want a special resolution? Are these special?" And so on.

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It seems to me the better way to do is to say to Judge Summers, "Don't you think this is really a very awkward way of doing a very simple thing? Wouldn't it serve your purpose if the Supreme Court would always agree, or you put it in your act, or something?"

MR. LEMANN: You have it in here to report it, and you say that they shall take effect in not less than sixty days, and Congress shall be informed. Assuming that Congress wanted to retain the veto power, I should think that your provision would be inadequate to preserve it.

THE ACTING CHAIRMAN: It hasn't any express veto power now.

MR. LEMANN: I know, but you have cut down the time limit so that you have only a sixty-day interval, and then I should think Congress wouldn't have any chance to act. It might be during vacation, when they wouldn't even be here. If you are going to preserve that veto power or if you think they are going to insist on it, you will have to change the bill.

I think, No. 1, that we would all be agreed that from the standpoint of the improvement of the law, it would be desirable to have this amendment.

DEAN MORGAN: I think so.

MR. LEMANN: We wouldn't have to debate it. We would vote it. The question is a political one. Can it be attained. We wouldn't want to recommend something and have it defeated.

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I think that the wise course would be to take counsel with men like the Chairman, Senator Loftin, and perhaps Mr. Sumners, perhaps the Chairmen of the House and Senate Judiciary Committees.

JUDGE DOBIE: Who is that?

MR. LEMANN: The Chairman would be the man to canvass them. If they feel as Senator Loftin thinks they feel, I don't see any use in pursuing it. I am afraid, personally, that you are right, Scott. Hadn't we better leave this (not because we don't want to discuss it, Charlie; get that idea out of your head) at the most with the statement that we think such a provision would be desirable, if it is feasible?

DEAN MORGAN: Legislatively feasible. I think that is the only question.

MR. LEMANN: Then ask the Chairman to give it consideration and let us have the benefit of his views. I presume there will be at least one more meeting of this Committee, or the survivors, as the reports come back from the bench and bar.

JUDGE DOBIE: Some of us are getting pretty old.

DEAN MORGAN: Not on this before it goes to the Court. You mean before it goes to the Congress ultimately.

THE ACTING CHAIRMAN: Oh, yes.

MR. LEMANN: That is what I mean. By that time, I assume, the election will be over. The presidential election will be past, I assume, before we take final action on this

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redraft.

THE ACTING CHAIRMAN: At least, before the Court does, I guess.

MR. LEMANN: So we are not shelving this indefinitely, Charlie. We are coming back anyhow. Don't you think that is all we could do now.

THE ACTING CHAIRMAN: Yes, I guess it is. I don't know that any subject should be taboo. How do we know that political conditions are as bad as this? I should think the sensible thing was to talk to Judge Sumners. It seems to me to be the rational thing. Why do you need all this rigmarole? Does he want it?

MR. LEMANN: That is right.

MR. HAMMOND: The only thing he wants, I am sure, is the submission to Congress. I know he wants that.

JUDGE DOBIE: We couldn't possibly get away with that. You are talking nonsense, if you think that.

MR. LEMANN: If he thinks that is essential, he is not going to be content with your draft, because a sixty-day interval might come within a recess of Congress, and it wouldn't be adequate. I think you would have to change it, if that is a correct statement of Sumners' position.

JUDGE DOBIE: I believe that General Mitchell could take it up with Sumners, and it would be a courtesy, I think, to take it up with the Chairman of the Senate Judiciary

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Committee, whoever he is. Nobody here seems to know. I believe, certainly, through the counsel of the Conference of Senior Circuit Judges, we could get those restrictions lifted. As to giving the power to promulgate the rules, I think that is piffle. I don't think Congress would consider that. I don't believe you could get ten votes. I think it would be silly to try.

THE ACTING CHAIRMAN: Of course, I think that they do think there is a good deal in it, and I think it is a polite gesture that is all right. I don't object to it. As a matter of fact, really, between sensible men, it is one of the silliest things ever. I mean, this reporting to Congress is really nothing. Any Congressman who is a lawyer is going to know of any action of the Supreme Court much sooner than he gets it through any letter of the Attorney General, and all that sort of stuff. The lawyer gets it in the daily press and from all the reporting agencies. You see, the reporting to Congress is nothing, really. I mean it isn't a veto power or anything else. It is a question of conveying to them news, information, and there are much better ways of doing it. I am not objecting to that, however.

JUDGE DOBIE: You don't think Congress would ever give us the power to promulgate rules without having them pass on them.

THE ACTING CHAIRMAN: Apparently there is some sort

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of fetish attached to this. I say it is a little foolish, but I don't object to that in itself. I say it is a fetish because there are much easier ways of getting information as to what the Supreme Court is doing each day. The easiest way of all that I know of immediately is the Tuesday New York Times, and there are other ways--the United States Law Week, and so on. But as a matter of gesture, it is all right.

MR. LEMANN: Congressmen generally don't read either of those. But, Charlie, the thing that worries me as I listen to the discussion is that we know it took years to get Congress to pass this act, and is it true or is it not true that when they did finally pass it with their long waiting period in between, the Supreme Court stood better with Congress than the present Supreme Court stands with Congress?

SENATOR LOFTIN: And the President and the Administration stood better with Congress at that time, and it was through the intervention of Homer Cummings, as Attorney General, that that act was passed.

DEAN MORGAN: You remember what Homer said, that he wasn't able to convince a lot of people to vote for it, but he was able to persuade them to stay away when it came up.

SENATOR LOFTIN: That is right.

DEAN MORGAN: There isn't any question, if we had to have approval, we would never have gotten it.

MR. LEMANN: Another thing, the bar association and

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the Supreme Court. I doubt if the Supreme Court is as popular with the bar associations or commands the complete respect of the bar associations to the extent it did ten years ago, when this was adopted. If you went to the bar associations with this, Charlie, and said, "Let the Supreme Court and the Rules Committee do this," I would be somewhat uncertain about the result, and I think I am understating the case at that.

SENATOR LOFTIN: I agree that it would be a splendid idea if Mr. Mitchell would talk with the Chairman of the Judiciary Committee of both the Senate and the House and see what their reactions to it would be.

THE ACTING CHAIRMAN: Yes, I should think so. Of course, in the case of the Criminal Rules, it might be a good idea for Chairman Mitchell to discuss the matter with Chairman Vanderbilt of that Committee. In the case of the Criminal Rules in one sense the question is more pressing because, as I said, a part of the Criminal Rules, according to the particular enabling statute, goes one way, and a part another way, and only a part are supposed to be reported to Congress. There there might be a real question as to how to do it. How can you cover three different ways in the same set of rules?

I don't see why we shouldn't consider the matter. I am not at all sure but that a person like Judge Summers would say, "Why, the whole thing should be simplified." It isn't right to have three conflicting ways of doing it. That happens

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because the criminal rule making power developed in three different ways. There was a criminal appeal rule, and so on. Then, of course, with us there are different provisions. The equity rules are under a different statute, and we have already run into that difficulty I have mentioned about our printing the record rule.

JUDGE DOBIE: Do you think any formal motion is necessary? If it is, I should like to make it, that you take up with Mr. Mitchell the advisability of talking the matter over sometime with Chairman Sumners of the House and the Chairman of the Senate Judiciary Committee, with the idea of working through the Conference of Senior Circuit Judges, if they think there is any chance of getting those formal restrictions removed.

... The motion was regularly seconded ...

THE ACTING CHAIRMAN: All those in favor say "aye"; opposed, "no." It is so voted. (Carried)

MR. LEMANN: Mr. Dodge yesterday referred to this bill that he and Senator Pepper had been asked to draw up to carry out the suggestion of Judge Frank that further provision be made for the possibility of appeals from interlocutory orders. He drafted such a provision, as I understand, following the last meeting.

THE ACTING CHAIRMAN: No, he didn't draft it.

DEAN MORGAN: He and Pepper drafted a report, that is

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all.

MR. LEMANN: A report, then. He was wondering what had happened to it and whether something shouldn't be done about it. What has happened? Do you remember, Mr. Cherry?

PROFESSOR CHERRY: Yes. He brought that up.

MR. LEMANN: He intended to bring it up if he were here, and he asked about it.

THE ACTING CHAIRMAN: All I know is that the Chairman sent around and asked for a vote. I didn't realize things were going that rapidly. The Chairman's first letter was a vote as to whether it should be submitted at once to the Judiciary Committee, and I must confess that I was quite shocked by that, because there wasn't really even a proposal in definite form. I was very doubtful about it, so I wrote to the Chairman protesting that I thought it shouldn't go through that way and that I thought there was a great deal of question about it anyhow. Then, on that and perhaps, too, on the report that he got from the Committee (I don't know just what he did get from the Committee), he decided that attempting to take a vote by mail was a fiasco. At any rate, he decided that it wouldn't be covered by vote.

So I supposed it would come up here, if you want to take it up, but it is a little hard, of course, with neither Mr. Dodge nor Senator Pepper here. I am here, and I dislike it, and there you are.

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MR. LEMANN: We had better not now, but just for my information, what is your difficulty with it? As I understand it, there is a provision that the district judge may certify that in his opinion an appeal should be allowed from an interlocutory order. If the district judge felt that the case was so doubtful that he might be wrong and that the party should not be required to go through a long trial if he were held off, upon a certificate from the judge that party could get it passed on by the appellate court. That seemed good sense to me.

DEAN MORGAN: It was by the consent of both counsel and the approval of the district judge. Isn't that right? I think he said that is the way it is in Massachusetts, didn't he?

PROFESSOR CHERRY: Do you have that, Mr. Hammond?

MR. HAMMOND: I have here the conclusion of the report of Mr. Dodge and Senator Pepper.

"Our conclusion is that the proposal to give the United States district courts power in proper cases to allow appeals to the United States circuit courts of appeals for interlocutory orders merits favorable consideration, but as the proposal requires legislation and may not be accomplished by a procedural rule drafted by the Advisory Committee, we recommend that a copy of this report be transmitted to the Chief Justice of the United States for consideration by the Supreme

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Court or the Conference of Senior Circuit Judges."

Then Mr. Mitchell sent that report around with a letter dated November 24, in which he said, "Those who approve the recommendation in the last paragraph of the attached report please notify me."

THE ACTING CHAIRMAN: Mr. Hammond, do you know definitely what report Mr. Mitchell got? I know I protested.

MR. HAMMOND: No, I haven't heard.

THE ACTING CHAIRMAN: I don't know, but I guess that probably half the Committee didn't answer.

MR. LEMANN: Really? Do you think so?

PROFESSOR SUNDERLAND: I answered approving of it.

PROFESSOR CHERRY: So did I.

MR. LEMANN: I answered approving. What did you do, Eddie?

DEAN MORGAN: I answered approving. I saw Charles' letter, and I said I wanted to be here to debate it, because the two Massachusetts acts that he referred to were pretty vague and ambiguous in content, I thought. The whole question that I thought ought to be debated was this: To what extent would the district judge make these certifications formally? In Massachusetts, according to Mr. Dodge, the certification is made only in the cases that are really doubtful; it is used not more than once or twice a year, if that often, and so forth. Under those circumstances, if it were to be used in the same

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way that it is actually used in Massachusetts, I thought it might be a very good thing to save expense, and so forth; but if you had a judge who would sign just anything that the counsel wanted, you would get upstairs and back all the time.

PROFESSOR CHERRY: We have practically the same thing in Minnesota, and it is not abused.

MR. LEMANN: If you had both counsel agree to it. I don't know that you ought to require that. If you did have that, it would be a pretty good, maybe too good safeguard.

THE ACTING CHAIRMAN: If I may say so, it seems to me that that was a rather cursory way of treating a proposal that is of some importance, and I think there is great danger in that proposal for interlocutory appeals. Let me say that this might be a good thing in a theoretically perfect place like Massachusetts, and so on, but this proposal is whether we shall take political action of a certain kind. Yes, I say political action, and I mean it. Action influencing legislation.

MR. LEMANN: You don't hesitate to recommend a bill here to extend our own power. Do you call that political?

THE ACTING CHAIRMAN: Yes, it is, but it seems to me that is a political action that is right in our province.

MR. LEMANN: That is good politics.

THE ACTING CHAIRMAN: I don't think you are giving me a fair statement, because I don't think that you have thought

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back over what happened. How did we ever come to think about this? We never would have taken up any general questions of appeal without some prodding. The prodding was from my distinguished and able colleague, Judge Frank. Judge Frank thought that the powers of the circuit court of appeals were too restricted on interlocutory appeals. He is used to New York practice, and the New York practice is very general on interlocutory appeals. It happens that he and I disagree very violently about that, and I feel very strongly about it.

One of the defects of the New York practice is that you run into the Appellate Division on every question of procedure in advance of trial and that you can go to the Court of Appeals pretty generally. There are certain formal restrictions, but you go up very rapidly. But that is a question by itself, and you want to consider it in its setting. It is an important matter.

That was the suggestion he made to us. He made it to Chairman Sumners of the Judiciary Committee. He made it quite generally, and Chairman Sumners suggested that it be referred back, I think, to the Conference of Senior Circuit Judges, and so on. It comes before us and, as a kind of glancing blow, it is suggested that we take up this Massachusetts practice. Thereupon, the Chairman wrote my good colleague, saying, "We have considered your matter with much interest," and so on, "and we wonder if this isn't the way to

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handle it." Judge Frank and Judge Learned Hand, who also was somewhat taken with the Judge Frank proposal, immediately took that, and we endorsed the need and injected our remedy. That is what they have said, what they told me. I said, I think you are quite mistaken. The Advisory Committee hasn't passed on this." They said, "Oh, yes, you have expressed general approval, but the method is one we think shouldn't be followed." As Judge Learned Hand put it, "I don't think the district judges should have the power to enlarge our authority. I think we should have it."

I am not sure that is a sound criticism of the Massachusetts proposal, but it was the reaction that the entire Committee through there was a difficulty.

MR. LEMANN: Where did they get that reaction?

THE ACTING CHAIRMAN: They got that from Chairman Mitchell's letter, and I have seen Chairman Mitchell's letter.

MR. LEMANN: Letter to whom?

DEAN MORGAN: Frank.

THE ACTING CHAIRMAN: To Judge Frank, about the proposal.

MR. LEMANN: You mean after he got the replies from the Committee?

DEAN MORGAN: No, before.

THE ACTING CHAIRMAN: No, at the time of the discussion. I think there was really more in Chairman Mitchell's

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letter than he intended. Nevertheless, I think that is not so unnatural a reading. Why are we going into legislation? We are going into legislation because certain circuit judges have suggested there is a defect, that interlocutory appeals don't go as far as they ought to, and therefore we are meeting this defect in this way.

I think, at the very least if we were going to do this, we ought to do two things. Of course, I am again expressing my opinion, but it is a very definite opinion. First, we ought to say that there ought to be no more interlocutory appeals, that there ought not to be any general provision. I am not objecting to the particular statutes, the preliminary injunction, accounting in past cases, and those things. Those are definite things, and they are right. But there ought not to be a general power. We ought to negative any idea that we are going further.

Second, if we were going to do this, we would want a definite act. All we have now are two separate and conflicting Massachusetts statutes, because that was the report, and there was no suggestion of what we were recommending, which one of the two acts, or of whether they would apply in admiralty or of whether they would apply in the criminal law or of where they would apply. In fact, the proposal is one for legislation of a very indefinite kind as our answer to a very specific and concrete thing in which I do not believe.

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That was the main thing.

Now I will add one thing more, and that is this: As a separate matter, I wouldn't greatly object to the thing, only I am quite sure that it is unimportant. I am quite sure it is unimportant in the Federal system because it isn't geared to this sort of thing. As a matter of fact, we have the practice in Connecticut which is known as the reservation. While it can be used very broadly and widely in Connecticut, almost the only case where it ever is used is in will construction cases. You can see the reason, and it is of some use there. You have to have some definition of what a will means, and the judge says, "Here, I will hold that for the Supreme Court." Generally in our practice we like to have the district judge pass on it and get it in that way.

So, if this were removed from everything else and were made definite and concrete, I shouldn't feel very worried about it. I just don't think it is very important. That we should get into a legislative controversy (because, believe me, I think the question of extending interlocutory appeals is and should be just that) for something which seems to me really is not going farther than this is, I think, too bad. There are so many other legislative proposals that I believe in so much more. One of them is amending the rule-making act. Another is cutting down the time for appeals. It seems to me that those are things that are much more important, more vital,

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than doing this.

So, that is the background.

MR. LEMANN: Evidently it is a controversial subject. Is that a judicial statement?

PROFESSOR CHERRY: It is a very good statement.

DEAN MORGAN: You can't handle it now with Pepper and Dodge and Mitchell away, I think.

THE ACTING CHAIRMAN: Monte, I wish you would look at their report. They quote the two different Massachusetts statutes. I think at least there should be more thinking about it.

MR. LEMANN: Could I have a copy of the Massachusetts statutes which were sent out?

DEAN MORGAN: They were in the report.

MR. LEMANN: Were they in the report? I don't recall that. I had the report and answered it.

THE ACTING CHAIRMAN: Of course, you may say that is a question of draftsmanship, and so on, but the draftsmanship of a statute is an important thing.

MR. LEMANN: Are these notes transcribed now?

MR. HAMMOND: Yes.

MR. LEMANN: I would suggest that a copy of this portion be sent to Mr. Dodge, because he asked about it yesterday. He and Senator Pepper were asked to serve on a committee, and did, and he was asking what had happened to it. I think he

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would be interested in reading Judge Clark's statement. I could write him a letter, and will, but the statement would be more persuasive, perhaps. You will have an extra copy sent to him?

MR. HAMMOND: How about Senator Pepper?

MR. LEMANN: Yes, and Chairman Mitchell.

MR. HAMMOND: He gets a copy anyway.

THE ACTING CHAIRMAN: I shall be glad to have that done, but I will say that I wrote this at length to both Mr. Dodge and Senator Pepper.

MR. LEMANN: I didn't know that.

THE ACTING CHAIRMAN: I am afraid they might say not merely at length, but ad nauseam.

MR. LEMANN: I didn't know that. It may be unnecessary.

THE ACTING CHAIRMAN: I say that because I don't want to have it appear that I am surprising them. Is there anything more?

MR. HAMMOND: I have just two very minor things before you adjourn.

In your title to this preliminary draft you have the words "and the District Court for the District of Columbia". Can't we strike those off?

THE ACTING CHAIRMAN: I guess so. I guess that is not necessary.

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MR. HAMMOND: All right. The other thing is a matter of saving a little cost to the Committee on printing. You will recall that Mr. Mitchell said he thought we ought to submit these rules to Congress or that there ought to be a submission to Congress of a draft of the rules showing the amendments, as well as a clean copy. If that is to be done eventually, I think we ought to start now by doing it in the way in which that is done in Congress. Whenever the Attorney General submits a bill to Congress, he always submits a clean copy and a copy showing amendments. The form which Congress uses is to strike through the matter deleted or the matter repealed, and then to put the new matter in italics.

I thought that if we could do that now, we would eventually save costs because we would have the type set up in the Government Printing Office for this, and the chances are that that could be used right on through. Would that be agreeable to you?

THE ACTING CHAIRMAN: I should think so. Isn't it just a case of taking our present draft and making directions to the printer. That is, our present draft follows underlining and brackets just because we haven't the type to do the other, and when this comes to be printed, if the printer is directed to follow your model, I don't see any reason that it shouldn't be done.

MR. HAMMOND: Yes. Possibly the printer could do

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that.

THE ACTING CHAIRMAN: If there is any question about it, we will send it down here to your office to have that done. You see, we haven't the typewriters to do it, that is all. Any way to get it in print in the correct form. I quite agree that I think it ought to be as much in its final legislative form, or whatever it is, as possible.

MR. LEMANN: You would send out a draft like the one submitted to us with omitted words bracketed and new words underlined, or mechanically the equivalent.

MR. HAMMOND: Yes.

MR. LEMANN: If that were done, would you in addition send what you call a clean copy? I am not sure that I get your idea.

MR. HAMMOND: That is Mr. Mitchell's expression.

MR. LEMANN: What is a clean copy? The present rules?

MR. HAMMOND: No, the new rules as they will read, without any indication of the changes.

MR. LEMANN: In other words, you would first print the rule as it will stand with the amendments, and you would immediately below that print the present rule as shown in the material submitted to us in a way to show the changes.

MR. HAMMOND: I wouldn't do that in submitting it to the bar. In submitting it first to the Supreme Court, I would just submit it like this so that they can see, and I would also

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submit it in that form to the bar. I don't see any necessity for the clean copy in that case, but of course when the Court itself gets to promulgating the rules--

MR. LEMANN (Interposing): That is a long way ahead, though.

MR. HAMMOND: I am just thinking of the matter of cost. That is all.

THE ACTING CHAIRMAN: You mean if you get it set up in type now, they can use the same type all the way through, except as we make later changes?

MR. HAMMOND: Yes. I don't know whether or not the Supreme Court will want to submit this sort of copy which shows the changes, as a matter of courtesy more or less, to the Congress.

MR. LEMANN: That is sometime ahead of us, isn't it?

MR. HAMMOND: It is quite far ahead of us, I will admit.

MR. LEMANN: They wouldn't want to tie up their type all that time from now, and besides we don't know what further changes may take place as a result either of the bar's suggestions or of the Supreme Court's suggestions. I hardly see how you could start to put things in type now for going to Congress.

MR. HAMMOND: Maybe not. I just thought it might work out that way, and if some of these weren't changed we could use

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the same old electrotypes. You see, this will have to be electrotyped because there will be so many copies that will go to the bar. I think there were something like 40,000 of the first preliminary draft.

THE ACTING CHAIRMAN: Can't you or Mr. Chandler get us definite information?

MR. HAMMOND: Yes, I think possibly so.

MR. LEMANN: May I ask what the time schedule is now? I suppose that the next step will be to acquaint the Chairman and the absent members of the Committee with the changes voted at this meeting. Then, if nobody wants a rehearing because of absence, the Chairman will take it up with the Court. Is that the way it is going to work?

THE ACTING CHAIRMAN: I rather suppose so. I intended to get in touch with the Chairman at once and get definite instructions from him as to how I would proceed, but I had assumed he would probably say, "Get out the draft as soon as you get the transcript." I should think copies would be sent to the Committee but that, unless there is some question, it would be expected that we would submit it to the Court just to ask for permission to publish. Isn't that the general view?

MR. LEMANN: You haven't much more than a month, a month and a half, to do that.

THE ACTING CHAIRMAN: I suppose that is true, yes.

JUDGE DOBIE: You want to submit it to the Court

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before they adjourn?

DEAN MORGAN: Oh, yes.

THE ACTING CHAIRMAN: Yes, we would have to do that, although it isn't a submission for study, necessarily. It is just so they know they have it.

MR. LEMANN: If you don't, possibly they will scatter, and the Chief Justice wouldn't want to have the trouble of sending it around and taking a vote. They adjourn the first Monday in June as a rule.

THE ACTING CHAIRMAN: That is true.

MR. LEMANN: Next week is almost the middle of April. You haven't much time.

MR. HAMMOND: I notice that Mr. Mitchell says that he would like to see the Reporter's final draft of the revised notes before submission to the Court, as he may want to suggest some additions to the notes.

MR. LEMANN: The Reporter is going to have a busy month, I think.

THE ACTING CHAIRMAN: Of course, I didn't suspect that I had any power to do otherwise than submit it to him. That was quite amusing to me. Maybe we could have gone further than we suspected.

MR. HAMMOND: I think when we are sending him a copy, we might send a copy to the other members who were not here.

THE ACTING CHAIRMAN: I should think that, if we are

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sending copies, we should send them to all members of the Committee. We might as well. It would be my idea that, as soon as we get the draft, we will send it to all members of the Committee. The Chairman may want to see if there are any protests. Meanwhile, he can talk to the Chief Justice.

Isn't it the view of the gentlemen here present that we don't expect another meeting, unless something new develops before they are printed?

PROFESSOR SUNDERLAND: That is my idea.

SENATOR LOFTIN: That is what I understood.

THE ACTING CHAIRMAN: It is our general understanding, isn't it, that we don't expect another meeting unless the Chairman has some reason for calling us?

DEAN MORGAN: That is right.

PROFESSOR SUNDERLAND: Not until all this stuff gets back from the bar.

THE ACTING CHAIRMAN: Yes. So far as we are concerned, we are ready to have it submitted as we put it to the bench and bar.

MR. LEMANN: That would probably mean not until after the election, I guess.

THE ACTING CHAIRMAN: I suppose so, yes.

MR. LEMANN: I don't know that they are cause and effect, but the bar won't do much in the summer, I suppose. Did we put a time limit on the bar before? We didn't, did we?

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MR. HAMMOND: I don't think that we did, no, not when we sent out the preliminary draft, and we want to be careful about that, if we do put a time limit on.

MR. LEMANN: The bar associations have appointed committees to study it.

SENATOR LOFTIN: They have standing committees.

THE ACTING CHAIRMAN: Have you anything more, Mr. Hammond?

MR. HAMMOND: No.

DEAN MORGAN: I move that we adjourn.

... The motion was regularly seconded, put to a vote and carried, and the meeting adjourned at 12:30 p.m. ...

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