MINUTES OF THE JULY MEETING OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The ninth meeting of the Advisory Committee on Appellate Rules convened in the Supreme Court Building on July 7, 1966, at 9:30 a.m. The following members were present:

E. Barrett Prettyman, Chairman
Robert Ash
Henry J. Friendly
Willard W. Gatchell
Joseph O'Meara
Richard T. Rives
Samuel D. Slade
Robert L. Stern
Bernard J. Ward, Reporter

Judges Barnes, Jameson, Raum and Sobeloff were unavoidably absent.

Others attending the meeting were Judge Albert B. Maris, Chairman of the Committee on Rules of Practice and Procedure; William E. Foley, Secretary of the Rules Committees; and John Lewis Smith III, Law Clerk to Judge Prettyman.

Judge Prettyman called the meeting to order, welcomed the members, and gave the following progress report on the pending legislation, S. 3254: The bill was introduced in the Senate and is presently before Senator Tydings' Subcommittee. The Subcommittee has reported it in full and Senator Tydings has asked Chairman Eastland to put the bill on the agenda of the full Committee at its next meeting which may be shortly after July 1. Judge Prettyman stated it passed House Subcommittee No. 5 during the last Congress and that he had heard the bill would soon be considered and it was hoped that it would be passed. Judge Friendly offered to write to Congressman Celler urging that the bill be passed and the Committee thought this would be excellent. He was asked to do so as soon as possible.

The Chairman stated that 30 suggestions for changes to the Final Draft of the Rules had been circulated to the members and these suggestions would be the basis for discussion and Committee action at this session. He further stated that he would not recognize any suggestions for changes from the time of adjournment of this meeting to submission of the rules to the standing Committee. His view being that suggestions for the rules will continue indefinitely, even after the rules are promulgated, and that the suggestions would be accumulated and turned over for the future work of this or another committee.

Judge Maris stated that the standing Committee is scheduled to meet on September 7, 1966, at which time consideration will be given to the appellate rules.

The suggestions considered at this session were:

Suggestion No. 1.

Rule 22. Habeas Corpus Proceedings.

Professor Charles Alan Wright of the standing Committee had sent in a suggestion that this rule requires, as does the present statute, a certificate whether the prisoner or the state is appealing. He suggested that the states be exempt from requirement of certificates. Professor Ward stated the rule follows the statute, § 2253, and recalled four circuit decisions pertaining to this. He said he is inclined to go along with Judge Barnes' view that the whole business of the certificate of probable cause is unnecessary anyway and if the Committee makes a recommendation respecting the statute it would suggest it has dealt with the general subject, which it did not do inasmuch as the statute already takes care of it. Some members thought Professor Wright's suggestion was good and thought the rule should be revised to take care of it. Other members felt it was not necessary and Mr. Slade pointed out that it is a statutory matter and since the circuits have worked it out to their satisfaction the Committee is infringing on a statutory matter where it isn't necessary. Mr. Stern thought that if the statute is uncertain it should be taken care of by rule.

Discussion ensued and Judge Rives moved the draft be changed in accordance with Professor Wright's suggestion, i.e., to include a provision providing that when a state is appealing a certificate of probable cause is unnecessary. The motion was seconded and carried.

Suggestion No. 2.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings.

Professor Wright also submitted a comment that this rule, in dealing with the conditional orders of release, is not clear and that it should be clarified in the Note. Professor Ward explained that the rule is the same as Supreme Court Rule 49 which was considered by the Committee and sent to the Supreme Court. He stated that the present rule provides that if the writ is granted the prisoner is to be released. In most of these cases the writ is conditionally granted, in effect; the state is given a period of time for retrial so the rule as presently written is misleading. He stated that the proposed rule takes care of that and the Note explains the change. The Note points out that the reading of Supreme Court Rule 49 has encouraged some litigants to insist they be let out regardless of the fact that a writ is granted on condition. Professor Wright had expressed the opinion that the Committee is characterizing, as undesirable, the interpretation that the prisoner ought to be released on bail pending appeal if the writ is granted.

Discussion ensued and Mr. Slade moved that the second paragraph of subdivision (4) of the Note be amended so as to eliminate the phrase "the undesirable interpretations" and insert a direct reference to the preceding paragraph in terms of contention, "the proposed rule forecloses the contention referred to in the next preceding paragraph." The motion was seconded and carried.

[For additional Committee action on this rule, see Suggestion 3, below.]

Suggestion No. 3.

Rule 23. Custody of Prisoners in Habeas Corpus Proceedings.

Another suggestion from Professor Wright was that the draft infers a court of appeals which reverses the district court and orders release, cannot grant bail, unless for "special reasons." He says the Supreme Court Rule makes release mandatory and therefore the proposed draft is a step backward. Professor Ward did not agree with this view but stated if there is any doubt the proposed rule should be altered. The rule presently reads that if the district judge refuses a writ outright it is final. The chief purpose of subdivision (d) is to make it clear that in a case where a district judge refuses the writ, whether refused after hearing, or whatever, a court of appeals or a judge thereof, the Supreme Court or a justice thereof could always release him on bail. Professor Wright's comment was that the rule does liberalize in the majority of cases but not in situations where the judge refuses the writ, the court of appeals is of the view that the refusal is in error, and then review is sought in the Supreme Court. Professor Ward stated that as he reads the rule it provides that the court of appeals is not directly directed to release the prisoner pending the Supreme Court review, but the court is empowered to do so. It says the district judge's determination shall not be altered unless for "special reasons" of the court of appeals. He did not think the court of appeals would reverse the district judge without finding "special reasons" for setting the prisoner free. Mr. Stern inquired what the special reasons were - whether different from the normal ones of good cause, etc. He thought Professor Wright's dissatisfaction may be with the word "special" as implying something exceptional. Judge Prettyman however thought Professor Wright's objection was that the Supreme Court rule makes it mandatory, but Professor Ward said he did not read the rule to say this. Judge Friendly did not think the function of subdivision (d) is clear as subdivisions (b) and (c) cover the two situations pending review of the petition (subdivision (b) where the decision is against and subdivision (c) where it is for the prisoner.) He thought that if the function of subdivision (d) is to let the appellate court order release, even before decision, that the rule should state this and if it has some other function, then he did not understand it. Professor Ward stated the function of subdivision (b) is to take care of the situation where the district

judge refuses release, subdivision (c) takes care of the norm as to what happens if the judge orders release, and subdivision (d) has to do with what happens to the district judge's initial determination with respect to release. Judge Friendly thought (b) and (c) already took care of the function that is in (d). Professor Ward said subdivisions (b) and (c) give power to the court and (d) qualifies that. He stated this follows closely the terminology of the Supreme Court Rule. Judge Friendly also thought Professor Wright's point might be met by removing the word "special." He suggested "good cause" might take care of it. In order to clarify the matter Professor Wright's letter was read.

Judge Rives moved deletion of subdivision (d) as he did not think it added anything to the rule. Further discussion ensued and Judge Friendly thought the phrase "shall govern review in the court of appeals and in the Supreme Court" was unnecessary as actually the case which frequently arises is one after review in the court of appeals, namely in the remand. He thought it would be better to leave in "special reasons" and delete "govern review in the court of appeals and in the Supreme Court" and insert in lieu thereof the words "continue in effect" to read:

> An initial order respecting the custody or enlargement of the prisoner and any recognizance or surety taken, shall continue in effect unless for special reasons shown to the court of appeals or to the Supreme Court, or to a judge or justice of either court, the order shall be modified, or an independent order respecting custody, enlargement or surety shall be made.

After further discussion of Judge Friendly's suggestion, Judge Rives restated his motion to delete subdivision (d). The motion was seconded and carried.

Suggestion No. 4.

Rule 24. Proceedings in Forma Pauperis.

A suggestion was made that the heading of subdivision (b) in the Note be underscored. This was approved.

Suggestion No. 5.

Rule 28. Briefs.

Professor Wright had written that he was disappointed in the deletion of subdivision (d) as stated in the Preliminary Draft of March 1964. Professor Ward stated this was the work of the Subcommittee at the last meeting and that it had been done as a result of his suggestion. He stated that subdivision (d) as shown in

the Preliminary Draft, p. 60, incorporated in the rule the contents of the Fourth Circuit rule. At the May 1965 meeting it was expanded to cover literally all of the Fourth Circuit rule and that he had objected inasmuch as the Fourth Circuit rule did not take care of the problem. Specifically it talks about not referring to parties by formal designations and it suggests it is all right to call them "plaintiff" and "defendant" but not "appellant" and "appellee." He did not think there should be an order directing that they not be referred to by formal designations. Judge Maris said it was not the formal designations that were being objected to but the formal objection of "appellant" and "appellee." He stated the Civil Rules used "plaintiff" and "defendant." It was also pointed out that the subdivision in the Preliminary Draft did not state formal designations must be used, only that they promote clarity. Dean O'Meara moved reinsertion of subdivision (d) of the Preliminary Draft. Mr. Stern inquired whether it would be worthwhile to add in addition to "appellant" and "appellee" the terms "petitioner" and "respondent" and "plaintiff" and "defendant." It was decided that this should not be done. Mr. Stern suggested the word "formal" be stricken and Judge Rives thought this a good suggestion. Judge Rives also thought it could include a statement that it promotes clarity to either use designations used in the lower court or agency, or names or descriptive terms such as employee, etc. Dean O'Meara accepted this amendment. Dean O'Meara's motion was restated to reinsert subdivision (d) of the Preliminary Draft with the amendment offered by Judge Rives to strike the word "formal" in the third line and to provide in the second sentence that it promotes clarity to use either designations used in the lower court or agency, or names or descriptive terms such as employee, etc. The motion was seconded and carried.

[For additional Committee action on this rule, see Suggestion 11, p. 9 and Suggestion 18, p. 12 .]

Suggestion No. 6.

Rule 34. Oral Argument.

Professor Wright inquired whether the final draft reflects Judge Friendly's suggestion that "any request made reasonably in advance would be granted." He also inquired about discretion of the clerk as to additional time. Judge Friendly stated he had been misquoted in the minutes of the last meeting (May 1965 Min., p. 27) as he did not feel that any request made reasonably in advance should be granted. The Committee decided that no action was needed on this. The Committee also decided, after discussion on the extension of time, that further changes in the draft were not needed and the proposed rule was approved.

Suggestion No. 7.

Rule 35. Determination of Causes by the Court in Banc.

Judge Maris felt the rule as drafted is excellent but thought the Note does not reflect the present language of the rule. He further stated he did not think the reference to the Ninth Circuit practice in the Note is necessary. Professor Ward said that as a result of Judge Maris' comment and one of the same nature from Mr. Stern (Suggestion 25) that he had redrafted the Note to read:

Advisory Committee's Note

Statutory authority for in banc hearings is found in 28 U.S.C. § 46(c). The proposed rule is responsive to the Supreme Court's view in Western Pacific Ry. Corp. v. Western Pacific Ry. Co., 345 U.S. 247 (1953), that litigants should be free to suggest that a particular case is appropriate for consideration by all the judges of a court of appeals. The rule is addressed solely to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of a court of appeals to initiate in banc hearings sua sponte.

The provision that a vote will not be taken as a result of the suggestion of a party unless requested by a judge of the court in regular active service or by a judge who was a member of the panel that rendered a decision sought to be reheard is intended to make it clear that a suggestion of a party as such does not require any action by the court. See Western Pacific Ry. Corp. v. Western Pacific Ry. Co., supra, 345 U.S. at 262. The rule merely authorizes a suggestion, imposes a time limit on suggestions for rehearings in banc, and provides that suggestions will be directed to the judges of the court in regular active service.

In practice, the suggestion of a party that a case be reheard in banc is frequently contained in a petition for rehearing, commonly styled "petition for rehearing in banc." Such a petition is in fact merely a petition for a rehearing, with a suggestion that the case be reheard in banc. Since no response to the suggestion, as distinguished from the petition for rehearing, is required, the panel which heard the case may quite properly dispose of the petition without reference to the suggestion. In such a case the fact that no response has been made to the suggestion ought not affect the finality of the order disposing of the petition or the issuance of the mandate, and the final sentence of the rule expressly so provides.

Professor Ward invited comments on the revised Note and one suggestion made was to delete the word "solely" in the third sentence of the first paragraph and to insert in the fourth sentence of the same paragraph the phrase "the judges of" before "a" to read:

> The rule is addressed to the procedure whereby a party may suggest the appropriateness of convening the court in banc. It does not affect the power of the judges of a court of appeals to initiate in banc hearings sua sponte.

Professor Ward called attention to the fact that Mr. Stern's suggestion about the original Note had brought to light some trouble which caused him to take another look at the rule and he suggested that Rule 35(c) be amended slightly in lieu of Mr. Stern's suggestion so as to accord with the revised Note which he had drafted accordingly. In the final sentence of Rule 35(c) he stated that what was intended was to do something about the problem of what happens when a litigant comes in with a petition for rehearing in banc and the panel denies it. He thought that strictly speaking the panel has no business denying a petition for rehearing in banc, although it is invited error, because the litigant has no business styling his paper a "petition for rehearing in banc." The problem is that in asking for a rehearing in banc, no mention was made of in banc because their petition for rehearing was denied. The final sentence should make it clear that because nothing has been said about the in banc suggestion it would have no effect. He stated that the pendency of the rehearing suggestion should not have any effect at all on the circuit hearing. The initial purpose of the final sentence is to make it clear it did not. Professor Ward stated that if the Committee wants to make it crystal clear that the pendency of the unacted-on suggestion has no effect at all, the rule should be more specific. He suggested a modification of Mr. Stern's proposal to the final sentence to read:

> If the suggestion is combined with a timely petition for rehearing and the petition is disposed of without reference to the suggestion the pendency of the suggestion shall not affect the finality of the order disposing of the petition or the issuance of the mandate unless the court subsequently orders otherwise.

Further discussion ensued and upon motion made and duly acted upon, the Committee decided to substitute in subdivision (c) of the rule the following terminology for the last sentence:

> The pendency of such a suggestion whether or not included in a petition for rehearing shall not affect the finality of the judgment in the court of appeals or stay the issuance of the mandate.

The Chairman requested that the record show that the rule was revised as a direct result of the revision to the Note.

Motion was made that the Note to Rule 35 be amended in accordance with the revised text submitted by the Reporter and as revised by Judge Rives' amendment. Mr. Slade inquired whether in the last sentence of the Note the word "ought" should be changed to "does" and Professor Ward agreed. The words "order disposing of the petition" should be deleted and "judgment" inserted therefor. The Rule and Note were approved as amended.

Suggestion No. 8.

Rule 5. Appeals by Permission under 28 U.S.C.

(b) Content of Petition; Answer.

Judge Rives suggested the word "controlling" be inserted before the words "question of law" in the third line to agree with the statute. The Committee approved this additional language.

Suggestion No. 9.

Rule 11. Transmission of the Record.

(b) Duty of Clerk to Transmit the Record.

Judge Rives stated the rule seems to be in conflict with subdivisions (a) and (b) of the Note. The rule says to file after timely docketing and the Note says to file upon receipt. Professor Ward stated this suggestion was good and that the conflict could be eliminated by inserting in the 18th line of the Advisory Committee's Note the words "docketing and" before the word "transmittal" to read:

> to file the record upon its receipt following timely docketing and transmittal.

The Committee approved the amendment.

Suggestion No. 10.

Rule 27. Motions.

Judge Rives suggested the rule should provide a provision for the court to give the clerk power to grant motions ordinarily granted, or unopposed or consented to. After discussion it was decided the court already has sufficient power to do this and no revision is necessary. The Committee approved the rule as drafted.

Suggestion No. 11.

Rule 28. Briefs.

Judge Rives suggested the words "except the Fifth" be stricken from the Note on the 4th line. The Committee approved the suggestion. [For additional Committee action on this rule, see Suggestion 18, p. 12.]

Suggestion No. 12.

Rule 4. Time for Filing the Notice of Appeal.

Professor Ward read Judge Sobeloff's letter of May 16, 1966, suggesting that the courts of appeals should have power to excuse the late filing of a notice of appeal regardless of the expiration of the period of 30 days during which the district court may permit late filing. Exercise of such power would be reserved for cases in which the demands of justice required it and there was an absence of any prejudice to the appellee resulting from the delay. Professor Ward stated the proposed rule gives relief to the party if he checks with the clerk and determines that some undue delay has caused his filing to be untimely, but Judge Sobeloff would like a provision to cover a situation where the party did not check and the 30-day period has expired. Discussion ensued inasmuch as Judge Sobeloff's suggestion brought to light an ambiguity in the time limit as to whether the period of 30 days was absolute or applied to the extension of time. Judge Rives thought the last paragraph of Rule 4(a) should be amended to say

> that upon a showing of excusable neglect, the district court may, before the time for filing the notice of appeal has expired, or upon motion filed within 30 days thereafter, extend the time . . . .

He thought this would make clear it is the time of filing of the motion rather than the time of decision of the district court. Judge Friendly suggested the last sentence of the third paragraph of subdivision (a) be amended to take care of the district court situation to read:

> Any request for an extension made after the time has expired shall be made by motion within 30 days after such expiration with such notice as the court shall deem appropriate.

Professor Ward thought this would be a change for the better, but pointed out that this would not take care of Judge Sobeloff's suggestion. Judge Friendly thought the rule should be changed to take care of the district court first and then deal with the court of appeals. Discussion ensued concerning the first and second sentences which would be in conflict. The first sentence

saying the court may extend the time for filing the notice of appeal for a period not to exceed 30 days from the expiration of the time prescribed by this subdivision as that limits the court's power to the 30-day period following the expiration of the 30 or 60-day period, depending on whether it is a private or government case. Professor Ward stated he thought it would be desirable to adopt Judge Rives' suggestion. He said the district judge doesn't have the full 30 days because a motion filed on the 30th day may be subject to local rules regarding the notice so that nothing could be done with a motion filed that late. Judge Maris expressed the opinion that the instant case is a rare situation and wondered if a special provision is needed. Judge Friendly suggested another revision to read:

> Provided that no extension after the time of filing notice of appeals has expired shall be granted unless the notice of appeal has been filed and the motion made within such additional 30-day period with such notice of motion as the court shall deem appropriate.

Professor Ward said he could foresee a great deal of difficulty resulting from the proposed revision and both he and Mr. Slade gave examples where it would not work. After further discussion the Committee decided to leave the rule with respect to the district courts as drafted by the Reporter.

Mr. Ash inquired whether there should be a Note stating that this does not apply to the Tax Court but Professor Ward said there was a provision in proposed Appellate Rule 14 which would cover this.

The Committee then considered whether the courts of appeals should be given specific power to extend time by denying the motion to dismiss on the ground that it was an untimely filing. Judge Friendly suggested that the rule be left as drafted and Dean O'Meara agreed with Judge Friendly. Dean O'Meara moved Judge Friendly's suggestion that the rule be left as drafted, with an amendment that the Reporter include in the Note that the denial of extension of time is appealable. The motion was seconded and carried.

Judge Friendly inquired why subdivision (b) was included as he thought it was confusing. He did not see why there should be different time limits to override the statute. Professor Ward said that he had a note in his material that the Committee would approve abolition of this provision if it could get statutory authority for the rules. He further stated that this was included just to take care of the bankruptcy provision. Judge Friendly thought it should be deleted but Judge Prettyman stated he thought it was too late to start deleting things of this nature.

He suggested that it be passed for the time being and return to it at the end of the session. [For Committee action, see discussion on p. 18 .]

Suggestion No. 13.

Rule 10. The Record on Appeal.

(b) The Transcript of Proceedings; Duty of Appellate to Order; Notice to Appellee if Partial Transcript is Ordered.

Mr. Stern referred to the sentence in the middle of the paragraph "Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on appeal." He questioned whether it should say other parties rather than appellee. He thought other parties would be better but did not know whether it would require changing the terminology. Judge Rives thought there was broad authority to go back and get any part of the record which the court of appeals needs and he did not see any reason to change this. Discussion ensued and the Committee approved the rule as drafted by the Reporter.

Suggestion No. 14.

Rule 11. Transmission of the Record.

(b) Duty of Clerk to Transmit the Record.

Mr. Stern suggested that the pages in the record prior to the transcript be numbered with some identifying letter. Judge Maris thought this was putting an imposition on the clerk. It was pointed out that Rule 28(d) states intelligible abbreviations may be used (e.g., R, T, A, P's Exh. 6, to precede, respectively, pages of the record paginated by the clerk of the district court, pages of the Reporter's transcript of proceedings, pages of the appendix, and pages of exhibits.) Mr. Stern stated this was for briefs and he thought there might be confusion in people going back to read the original record. After discussion it was decided not to change the rule, but to leave it as drafted by the Reporter.

Suggestion No. 15.

Rule 18. Stay Pending Review.

Mr. Stern suggested a change in the 6th line from the bottom of the Note to insert the words "deal with" in lieu of

"address." The Reporter agreed with this and Mr. Stern moved that this be done. The Committee approved the motion and the sentence is to read:

> Many of the statutes authorizing review of agency action by the courts of appeals deal with the question of stays, and at least one, the Act of June 15, 1936, 49 Stat. 1499 (7 U.S.C. § 10a) prohibits a stay pending review.

Suggestion No. 16.

Rule 25. Filing and Service.

(a) Filing.

Mr. Stern suggested that the filing be made applicable to all papers evidenced by the postmark except the notice of appeal. Mr. Stern stated that the Subcommittee had voted this for briefs and the Committee had previously covered this for records but he could not see any reason why, if this is done for briefs and records, it should not be done for less important documents. Professor Ward stated the Subcommittee had made the exception for briefs and he would agree with Mr. Stern that it should include an exception for appendices but beyond that it will require the clerks to staple every envelope to the papers and cause undue hardship. Blurred and illegible postmarks would also cause trouble. He said he would be against including this for petitions for rehearing as he did not think they should be made easier. Judge Friendly stated that on motions there is no problem, as generally you can make a motion anytime you want; when there is a time limit it should not be permitted; and answers to motions would make it unworkable. He therefore moved the rule be expanded to include only appendices. The motion was seconded and approved.

Suggestion No. 17.

Rule 23. Briefs.

The suggestion for this rule was considered with Suggestion 5. [See discussion and Committee action, p. 4, supra.]

Suggestion No. 18.

Rule 28. Briefs.

(f) Length of Briefs.

Mr. Stern stated that the first sentence of this subdivision does not clearly state that it applies to briefs. Judge Prettyman

suggested the word "And" be added before the word "except" to read:

And except by permission of the court, ...

The Committee approved the change.

Suggestion No. 19.

Rule 30. Reproduction of Necessary Parts of the Record.

(a) Appendix to the Briefs; Duty of the Appellant to Prepare and File; Content of the Appendix.

Mr. Stern suggested the word "must" in item (4) is too strong and would prefer in lieu thereof the following:

(4) such other parts of the record as he deems it essential for the judges to read in order to determine the issues presented.

The Committee approved the change. [For additional Committee action on this rule, see Suggestion 20, below.]

Suggestion No. 20.

Rule 30. Reproduction of Necessary Parts of the Record.

(b) Ordinary Method of Designating Contents of the Appendix; Cost of Producing Designated Matter.

Mr. Stern says that the rule provides that if the appellant refuses to advance costs of appellee's designations of appendix, appellee must do so. He does not like this provision and suggests the Illinois rule which would allow appellant to seek instructions from the court in these circumstances. Judge Maris said an Act had just been passed allowing costs in favor of and against the United States in civil cases, and the old doctrine about no costs against the United States is going to be done away with. Judge Friendly thought this situation was too onerous for the Committee to deal with and moved that the Reporter make clear in the Note that where the appellant has grossly under-designated and refuses to comply with the appellee's request, the appellee may move for dismissal. Mr. Stern suggested it be put in terms that this rule does nothing to impair the remedies which the appellee otherwise has. Judge Friendly accepted this suggestion and stated the Reporter could work it out. The motion was seconded and carried. [For additional Committee action on this rule, see Suggestion 21, p. 14.]

Suggestion No. 21.

Rule 30. Reproduction of Necessary Parts of the Record.

Mr. Stern suggested a sentence be added to the end of the Note as this was approved in the Minutes of the last meeting [May Minutes, 1965, p. 25) to read:

> Particularly when the record is long, use of this method is likely to be economical for the parties.

Professor Ward said that if this was approved he had inadvertently omitted it. He further stated that he would have no objections to such a sentence but he would suggest it be a substitute for the final sentence as it re-emphasizes what has already been said. Judge Prettyman thought that in many instances repetition is good. Judge Maris suggested that this be changed slightly to say:

> and it has proven its value in reducing the amount to be required to be reproduced

and then go on to say it will result in a savings. He wanted to emphasize that it reduces the volume of what is required to be reproduced. Mr. Stern said he would accept Judge Maris' suggestion and moved that the last line of the last sentence of subdivision (c) of the Note be changed to read:

> in reducing the volume required to be reproduced. When the record is long, use of this method is likely to be economical for the parties.

Judge Maris suggested the language be stronger and the members agreed. It was redrafted to read:

> in reducing the volume required to be reproduced. When the record is long, use of this method is likely to produce substantial economy to the parties.

The motion was approved, as amended by Judge Maris.

Suggestion No. 22.

Rule 32. Form of Briefs, The Appendix and Other Papers.

(a) Form of Briefs and the Appendix.

Mr. Stern suggested that a sentence be added in the rule to permit pages in the record to be reproduced in actual sizes.

Judge Friendly thought the only place this would apply would be where the party wanted to use Xerox copies of the transcript instead of portions of it. Discussion was held on the size of papers which can be xeroxed and after discussion the consensus was that this was not pertinent and a motion was not made. [For additional Committee action on this rule, see Suggestion 23, below.]

Suggestion No. 23.

Rule 32. Form of Briefs, The Appendix and Other Papers.

(a) [Second paragraph.]

Mr. Stern suggested colored covers be used for briefs and further suggested the Illinois language be used.

Professor Ward was of the view that if colored covers are desirable the Committee rule will result in more frequent use of such covers than will the Illinois rule without undue burden on counsel. After discussion it was decided to make no change in the draft respecting colored covers.

Suggestion No. 24.

Rule 34. Oral Argument.

Mr. Stern disapproved of using both "argument" and "hearing" in this rule and suggested it be consistent throughout.

The motion was made and seconded that the term "argument" be substituted for "hearing" wherever the latter appeared in Rule 34. The motion was carried.

Suggestion No. 25.

Rule 35. Determination of Causes by the Court in Banc.

Mr. Stern's suggestion for the Note had been discussed in conjunction with Suggestion 7. The Committee's action on the suggestion appears at pp. 6-8, supra.

Suggestion No. 26.

Rule 11. Transmission of the Record.

(b) Duty of Clerk to Transmit the Record.

Judge Raum submitted a comment that the requirement for pagination is unnecessarily burdensome and he preferred the

terminology in the Preliminary Draft of March 1964. After discussion, the Committee was of the view that pagination served a useful purpose, and directed that the language requiring pagination remain as written. [For additional Committee action on this rule see Suggestion 27, below.]

Suggestion No. 27.

Rule 11. Transmission of the Record.

(d) Extension of Time for Transmission of the Record; Reduction of Time.

Judge Raum also commented that this subdivision seems to infer that an extension for transmittal can be granted only upon motion and he urged that the rule state extension may be ordered with or without motion.

Discussion ensued and a motion for change was not offered. The subdivision remains as drafted by the Reporter.

Suggestion No. 28.

Rule 32. Form of Briefs, the Appendix and Other Papers.

A comment on this rule was received from the State Law Librarian of New York asking that records and briefs be uniform size. The Committee however decided not to take action on the request and the rule was approved as drafted.

Suggestion No. 29.

1. Addition of a Rule Defining the Authority of a Single Judge.

Judge Rives suggested the addition of a rule which would define the power of a single judge of a court of appeals, and he submitted a draft to the Reporter prior to the meeting. The Reporter strongly favored Judge Rives' suggestion and thought the rule should go even further to confer on judges of the courts of appeals the kind of authority which 28 U.S.C. § 132 confers on district judges. The Reporter read his draft which had been distributed to the members and invited comments. Judge Friendly inquired whether the Reporter's draft which centers around the word "motion" would be understood by the bar -- whether they would understand that things like allowances, appeals and other matters are the extraordinary writs. He stated however that the judge could take care of it and refer it to the full court.

Professor Ward said as he had explained on page 3 of his memorandum that there would be a Note explaining the limitations and, if desired, he could explain mandamus at this point. It was agreed that this would be good. Judge Friendly also stated that he would like to see extraordinary writs put in in addition to allowances. Another member inquired where temporary injunctions would fit in. Discussion ensued on the points brought up and also regarding a single judge being subject to review and Professor Ward said he thought the fact that a single judge is subject to review is the key to the problem. The new power to act, particularly in situations where the judges could not be reached. He said if there were cases where the single judge did not want to do this it would be up to his discretion. Judge Friendly said this is a new situation and he was of the opinion that the rules should have something like the district court rules that a single judge could grant a temporary restraining order but anything more than that would be presented before a panel. Discussion was held on the problem of getting three judges together to review these and Judge Rives pointed out that in the remote cities it is hard to get three judges together as it entails a lot of telephoning and circulation by mail to get the documents signed. Mr. Stern inquired whether the motion must be filed with the clerk or whether the judge can accept it and Professor Ward stated that the rule reads that if relief can be granted the judge may permit it to be filed with him. It is not recognized as a good practice for the larger cities but it is logical for the remote ones. Judge Maris said he had in mind the case where this would permit the party to shop around to file his motion with the judge that he thought would be the most lenient.

After full discussion of the matter, Judge Rives moved adoption of new subdivision (c), as suggested by the Reporter on page 2 of his memorandum appearing in the Deskbook, to be inserted in Rule 27, and that in addition the Reporter prepare and attach to the new subdivision a Note which would include the sense of his suggestions which were incorporated in the memorandum. Judge Maris inquired whether there is any ambiguity in the words "certain motions." Judge Prettyman stated he thought "certain motions" include certain classes of motions and the present wording is sufficient. This was agreed. It was pointed out that the Note would include the powers identified in Judge Rives' draft (4), (5) and (8), indicating that they are "conferred by these rules" as shown on page 3 of the Reporter's Memorandum.

Judge Friendly pointed out that the Reporter would have to make certain changes as there were one or two things which the members differed from Judge Rives, for example, that a single judge should be allowed to grant or deny leave to proceed in forma pauperis. Professor Ward stated the draft is written to allow that and Judge Friendly though there may be other instances where changed would be necessary. The Committee approved the motion.

Suggestion No. 30.

2. Addition of a Rule Respecting the Taking of New Evidence on Appeal.

The Maritime Law Association had forwarded a resolution to the Committee urging that additional evidence be accepted in connection with appeals involving admiralty and maritime claims, and extended to all civil and non-jury appeals. It was pointed out by the members that the courts do take testimony or evidence at the present time and Judge Prettyman thought it would be a mistake to put this in the rule. Judge Maris stated that this is an anachronism dating back to 1892 and he explained how it arose. Judge Rives states that the only cases that come before the courts of appeals are the ones questioning arbitration in labor controversies, and explained a case which had been before him. The matters of remanding and judicial notice were also considered and it was decided that no amendment was necessary to cover the Maritime Law Association's suggestion. The members thought that a change was unnecessary in the second sentence and the only point in question was whether there should be something in the first sentence to take care of Judge Rives' point. After further discussion the Committee decided not to take any action for change.

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The Committee instructed the Reporter to work into the draft rules the changes made at this session and to prepare the draft for submission to the standing Committee.

It further authorized the Chairman to prepare and sign a letter to the standing Committee transmitting the rules.

The Committee discussed in some detail the course it should follow if the proposed legislation, S. 3254, is passed prior to September 7, the date scheduled for the standing Committee meeting, and also if it is not passed prior to the meeting. The Committee was of the following views:

IF THE ENABLING ACT IS PASSED PRIOR TO SEPTEMBER 7, 1966:

1. That Rule 4(b) be eliminated with appropriate Note that bankruptcy appeals be covered by Rule 4(a), and

2. For the present time no changes in the rules relating to appeals in the Tax Court will be made.

Professor Ward stated that he knew of no other places in the proposed rules requiring changes, but he would reread the rules. He also stated he would take care of the matter of costs to the Government.

IF THE ENABLING ACT IS NOT PASSED PRIOR TO SEPTEMBER 7, 1966:

If at the time Judge Maris' Committee meets Congress has not passed the bill, the Committee should advise the Chairman of the standing Committee that if the rules are approved by the standing Committee they should be sent to the Judicial Conference with a recommendation that the Judicial Conference approve them but not to transmit them to the Supreme Court but to hold them for subsequent transmittal to the Court at the appropriate time.

The Committee thought it would be well if the Judicial Conference approves the rules prior to the Enabling Act that the Director of the Administrative Office or the Secretary of the Judicial Conference inform Congress that the rules have been approved by the Conference and are awaiting legislation before being transmitted to the Supreme Court.

There being no further business, the meeting was adjourned at 3:11 p.m.