MINUTES OF THE DECEMBER 1960 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The first meeting of the Advisory Committee on Civil Rules convened in the Supreme Court Building on December 5, 1960 at 9:30 a.m. The following members, constituting the full membership of the Committee, were present:

Dean Acheson, Chairman
George Cochran Doub
Shelden Douglass Elliott
Peyton Ford
John P. Frank
Arthur J. Freund
Albert E. Jenner, Jr.
Charles W. Joiner
David W. Louisell
Charles T. McCormick
John W. McIlvaine
Archibald M. Mull, Jr.
Roszel C. Thomsen
Byron R. White
Charles E. Wyzanski, Jr.

Benjamin Kaplan, Reporter

The Chief Justice was present during a part of the meeting. Others attending were Senior United States Circuit Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James William Moore, a member of the standing Committee; Circuit Judge Bailey Aldrich, a member of the Advisory Committee on Admiralty Rules, attending ~~as alter ego~~ for Judge Pope, the Chairman; Leavenworth Colby, member of the Advisory Committee on Admiralty Rules; Professor Brainerd Currie, Reporter of the Admiralty Rules Committee; Professor Hans Smit representing the Project on International Procedure; Harry LeRoy Jones,

Director of the Commission on International Rules of Judicial Procedure; Warren Olney III, Director of the Administrative Office of the United States Courts; and Aubrey Gasque, Assistant Director of the Administrative Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

The Chairman welcomed the members of the Committee and guests and extended an invitation to the guests to participate and express any views they might have. The Chief Justice was then invited to address the Committee. His remarks were :

"Gentlemen, I did want to come and tell you how interested we are in the Court in the work that you are doing ~~here~~. I won't be able to be with you during the day because we are hearing arguments this week. But were it not for that fact, I certainly would try to do so. Members of the Court will not, of course, be able to spend much time with this Committee. But I do hope that that will not cause any of you to consider that there is a lack of interest in the Court, or a lack of concern about the vacuum that we have had in this field for some years.

The fact is that we have had this great responsibility of rule-making for a great many years, not only in the field of civil procedure,

but criminal procedure, admiralty, bankruptcy, appellate procedure, rules of commissioners, and so forth. But the other fact is, and the one that disturbs us so much, is that we have absolutely no facilities in the Court for performing ~~any~~ a function of ~~that~~ the kind. We don't have a single employee to whom we could delegate this work on a continuing basis. You know ~~a lot of the work for the~~ that members of the Court ~~is done by~~ have only our law clerks and administrative, and our Clerk's Office is a very small organization and has no research facilities, and there just are no other employees ~~on the Court.~~ who could work on the rules.

So the responsibility of keeping these rules up to date and the fact that we ~~are~~ have not doing it weighed very heavily on us, and ~~weighed particularly heavy on me~~ I was concerned because from day to day events, ~~I could see where~~ reminded me that we were not performing ~~that~~ the function. So, it occurred to us that the best way to ~~carry~~ pursue this work on would be through the Judicial Conference, which is set up for the sole purpose of improving judicial administration, ~~and~~ We asked the Congress if it would ~~provide for doing~~ authorize the Judicial Conference to do the spade work in all of these different fields ~~in the Judicial Conference~~ and provide a staff and the necessary funds. The Congress was ~~very~~ responsive, ~~because it recognizes~~ recognizing as we do that a fully most important thing before the bench and bar in these days is judicial administration. We are falling behind, day by

at this time

day, in most of the metropolitan centers in keeping up with our ~~work.~~ [rules of decisions,] and certainly one of the great factors ~~in keeping current with our work is having~~ [in this list of ours] an adequate and efficient set of rules ~~in all of these fields.~~

The Congress ~~did set up~~ the ~~procedure~~, ~~set up~~ the authorization [approved rule program, established] for it, and gave us the money, ~~to do it, and now we are~~ [There we are, launched] on the work in all of these fields, and, like yourselves, all the committees have [already] done a good amount of spade work and are ~~prepared to really get~~ [getting right] down to business. I am convinced that with the members of the bench and the bar, and [with] the scholars that we have and can enlist in this service, we can keep our rules ~~current~~ [up to date] at all times ~~so that everyone connected with them~~ [all the legal profession] can have the satisfaction of knowing that they are current, ~~and that whatever we do has~~ [They will know that the rules have] a foundation based upon the entire legal profession. When I say that, I don't want to be understood as meaning that we expect great changes to be made in the rules. There was no such intention on the part of the Court when we ~~brought this program into existence.~~ [suggested this solution.] On the contrary, we feel that in the main our rules work very well, ~~and~~ we don't advocate any radical changes, or even any considerable departure from the rules, and particularly [how] the Civil Rules as ~~we have had them~~ [they exist]. But

what we do want to know is that we are current and that it meets with the satisfaction of the bench and bar of America.

So, it gives us a great feeling of comfort to know that you gentlemen are willing to serve and that you are assembled here in this very important job, and we believe that we will now be able to have the comfortable feeling that all is well because the work is being attended to.

Gentlemen, that is all I have to say to you, except to thank you all for your own participation in the work. Dean, I want to thank you for being willing to be the Chairman of this important Committee, and of course our old friend Albert, who is the overseer of the whole situation and working like the mischief at it. Thank you very much, all of you. I would like to stay very much -- but back to the salt mines!"

At this point, the Chief Justice retired from the meeting.

The Chairman then called on the "Executive Officer," Judge Maris, who affectionately termed the "Executive Officer" of the Rules Committee. Judge Maris explained that he and Professor Moore of the standing Committee were present because they were conscious of the fact that the Court is concerned with the rules of practice as a whole, and there are areas where there could be overlapping and confusion. For that reason, the Chairman invited a member of the Admiralty Rules Committee, Judge Aldrich, and the Reporter, Professor Currie. That Committee, he said, is dealing in a parallel field and with a course which may well be divergent to the Civil Rules, but may

ultimately lead to a unification of the rules in both areas. The same is true, Judge Maris pointed out, with respect to appellate rules problems, since the civil rules get to some degree into the appellate field, and close liaison will be needed there. He expressed the hope of achieving for the bench and bar a program of perfecting and continuous study of the rules of practice and procedure to fulfill the objectives so well stated by the Chief Justice.

After introducing to the Committee the Reporter, Professor Kaplan, and his assistant, Mr. Handler, the Chairman called attention to the agenda prepared for the meeting. Without objection the agenda was adopted and is attached as Appendix 1.

In compliance with the Resolution of the Judicial Conference providing for the division of the Committee by lot into two equal groups, one to serve for 2 years from October 1, 1960, the other for 4 years, Judge Maris took charge of the drawing. Lots were drawn and the following terms were allotted:

Dean Acheson, Chairman	4 years
George Cochran Doub	4 years
Shelden Douglass Elliott	4 years
Peyton Ford	4 years
John P. Frank	4 years
Arthur J. Freund	4 years
Albert E. Jenner, Jr.	2 years
Charles W. Joiner	2 years
David W. Louisell	2 years
Charles T. McCormick	4 years
John W. McIlvaine	2 years
Archibald M. Mull, Jr.	4 years
Roszel C. Thomsen	2 years
Byron R. White	2 years
Charles E. Wyzanski, Jr.	2 years

Judge Maris pointed out that the resolution provides that there may be one reappointment, but after that an individual's obligation is completed.

AGENDA 3. II

The ~~next item on the agenda was the~~ consideration of the amendments proposed in 1955. The Reporter pointed out that in approaching the 1955 proposed amendments, no presumption of validity or correctness or soundness was ascribed to these amendments despite the fact that they had been prepared and matured over a period of two or three years by a very distinguished committee; circulated to the bar; and had ultimately been recommended to the Supreme Court by a majority of the committee. The Reporter then called attention to four memoranda received from members of this Committee: (1) ~~a document from~~ Professor Joiner, (2) Mr. John Frank, (3) Judge McIlvaine, and (4) through Dean McCormick, a memorandum from Professor Charles Alan Wright, who was assistant to Judge Clark as Reporter of the former committee.

The Reporter then briefed the Committee on the rule concerning impleader "as of right." He stated that the procedure is now very well known and the question arises whether there is any more a purpose for preserving the requirement that the defendant seek the approval of the court before he serves summons and complaint upon the third party. In many cases the impleader is routine. He pointed out that the Department of Justice

informed
reported to the prior committee in 1955 that, in its experience, the impleaders were dealt with pro forma in a good many courts ~~and the same report has been received from~~ a Federal Bar Association also reported that the impleader is dealt with pro forma. He stated, however, that Judge Nordbye and others say that in their courts the impleader applications are carefully and seriously dealt with. Even where that takes place the consideration of whether the impleader shall take place or not goes on in the absence of the third party. Therefore there are cases where the impleader is granted as between plaintiff and defendant but when the third party comes in there is further argument and the impleader is denied, whether for discretionary or substantive reasons. In Mr. Frank's memorandum, it was brought out that some impleaders are disposed of at the threshold -- the argument between plaintiff and defendant is enough to show the court that the impleader should be denied and when that happens there has been a saving. The problem, the Reporter stated, is to reach a balance between these efficiency factors.

The Reporter stated that he was persuaded by the memorandum of Judge McIlvaine to favor what he called the "hybrid" impleader -- that is impleader as of right until a certain stage of the litigation has been reached, with leave being required thereafter. Reference was made to Admiralty Rule 56 which permits impleader up to the time of filing the answer.

Mr. Doub objected to the term "hybrid." He thought the cut off date was an essential element. He felt that there should be automatic right without leave up to a determined date. The Admiralty rule is far more liberal than even the amendments proposed. In order to obtain acceptance from the admiralty bar, Rule 14 must be expanded and liberalized

Mr. Frank felt the rule should be left as it is and in any case would not wish to see a change to longer than after the answer period.

Mr. Jenner suggested that as of the date of filing, the answer period as of right should end.

Mr. Joiner thought the Reporter should make a further study and reach an agreement with the Admiralty Rules Committee.

Judge Thomsen said that he was opposed to giving the right to bring them in as of right beyond a short period after the answer.

Professor Louisell thought there should be some liaison with the Admiralty Committee by way of subcommittees that would guarantee synchronized amendment.

After further discussion,

The Chairman expressed the sense of the Committee that for the time being it was the conclusion that as a matter of right the cut off date is the filing of the answer. This will not go on to the standing Committee at this time. Without objection this was agreed to.

The Reporter stated that minor amendments are consequential upon the change in Rule 14(a) -- in Rule 17, Form 22, and Rule 5(a). It was agreed that this would go forward without objection.

AGENDA 3. III. Permitting supplemental pleading although original pleading defective.

The Chairman, after discussion, asked if it would be desirable to permit the supplemental amendments to be filed with a clear statement either in the rule itself or in a note to be submitted back to the Committee saying that this does not affect the question of the merits of the statute.

Professor Moore questioned whether this was ~~a matter~~ of sufficient importance to amend the rule, or whether it could be done by a note ~~or to the~~ ~~by a textural change~~. Mr. ~~Gasque told the Chairman that the Chief Justice might be quoted as having expressed the view that he hopes the rules can so far as possible speak for themselves, and cut to a minimum going to notes, texts and other ways of finding how the rules are proposed to meet. The rule should be entirely self-sufficient.~~

The Chairman suggested that so far as the end to be sought is concerned the supplemental amendments should be permitted regardless of the deficiency of the original complaint -- that this should in no way affect the disposition of the proceeding on its merits and it should not affect the statute of limitations.

He asked if the Reporter should confer with others, including Professor Moore, and bring back choices -- bring back a note and see if it can be done in a way that would be satisfactory. He suggested a little more development of the matter before coming to a decision. He expressed the sense of the Committee that there be further discussion of the Committee and this was agreed to.

AGENDA 3. IV. Assignment of judge to superintend pre-trial matters in protracted litigation. (Rule 16)

The Reporter recommended that the Committee pass by this Rule 16 amendment in the hope that this rule will form part of a more general study of discovery. Professor Currie stated that this was the only Civil Rule incorporated by reference in the Admiralty Rules and asked that whatever action this Committee takes with respect to Rule 16 might be especially coordinated with the Admiralty Committee. After a short discussion, it was agreed to pass Rule 16.

AGENDA 3. V. Judge to ensure adequate representation in class actions.

The Reporter recommended that the particular amendment of Rule 23 be passed for the time being on the understanding that the Reporter will undertake a more general study. After a short discussion it was agreed to pass this rule.

PUBLISHER'S NOTE:

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basic principle and that it would be well to go on to some of the questions that arise if the amendment is adopted.

Mr. Jenner suggested that the Committee should adopt the proposal that we follow whatever the state practice is on general or limited agreement in a particular case.

Mr. Frank made a motion that the Committee approve in principle the conception of the Federal quasi in rem jurisdiction, subject to the guiding rule that the Federal rule practice in respect to all these matters should follow the state practice, and that the note to the rule should make perfectly clear that if as a result of special appearance under the state practice you don't have the jurisdictional amount the case abates. The motion was seconded.

Very lengthy discussion ensued after which the Chairman asked how many would like to leave this rule as it is, and how many would like the Reporter to go forward along the lines of his suggestion that the actions should be allowed to be originated in the federal court.

Mr. Jenner moved that it be the sense of the Committee that the Reporter go forward and that his initial basic proposal be approved by the Committee as a basis for further work along the lines with respect to general or limited appearance. A vote was taken and 8 voted that the Reporter be instructed to develop further the amendment along the lines of his suggestion.

The Chairman, in addition to inviting representatives of the Admiralty and Appellate Advisory Committees, had invited Professor Hans Smit, who is acting as Reporter for the Commission and Advisory Committee on International Rules of Judicial Procedure, two bodies set up under a recent act of Congress to study the problems of international judicial assistance, one of which is the way to effect the service of notice abroad for our courts. Professor Smit presented the problems encountered under Rule 4 and, although the Committee expressed some doubt as to the feasibility of including in the Civil Rules the suggestions proposed, it was agreed that there would be liaison between the two committees.

The meeting adjourned at 5:30 (December 5)

The Committee reconvened at 9:30 (December 6).

Mr. Gasque outlined to the members the method of reimbursement for travel and subsistence expenses.

Professor Kaplan referred to the last item under Rule 4, (f) [Item 3. I. of the agenda] regarding service within a 100 mile radius. Reference was made to the suggestion of Professor Joiner in his memorandum. Professor Joiner expressed himself as being in favor of the amendment and recommended a long range proposal toward ultimate unlimited range of process.

Mr. Frank expressed doubts on two points: (1) whether it is properly within the scope of the powers of this Committee. He thinks it should be

decided by a political and an elective body. (2) that this may be a spoiling improvement. In the West it does not do much good. The Chairman pointed out that through dissemination to the bench and bar this would be taken care of. Judge Wyzanski shared the view of Mr. Frank that this was a matter to be considered by the Congress.

Mr. Gasque commented that ~~this Committee~~ should submit ~~this~~ to the bench and bar and ~~it~~ should not be prevented from doing so by ~~presuming~~ ~~that~~ the Congress might feel ~~that~~ about the matter.

Professor Currie asked out this provision would operate in the context of the venue statute. Professor Kaplan responded that it would not supersede the venue statute and said that it should be briefed and dealt with in a note. Mr. Jenner asked to see a memorandum on that.

Judge Thomsen suggested a vote to determine if the Committee favored the proposal as a matter of principle and that the Reporter rewrite the matter in a way in which he would propose to send to the bench and bar which might or might not contain some suggestions of the doubts expressed by this Committee, and check with the American Law Institute.

A vote was taken on Judge Thomsen's suggestion and 13 members voted that the Reporter should proceed as instructed.

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officer" in (2) and this also was agreed to. Mr. Jenner suggested using the present tense in lines 2 and 3 of (d)(1).

The question was then raised as to the method of treating this as an emergency matter. Judge Maris stated that this Committee should make a report tentatively recommending this rule. It would then be immediately cir/culated to the bench and bar with request that all comments be received by the first of the year. It could then be submitted to the Judicial Conference at its meeting in March.

Professor Moore suggested that as to the effective date it should be added as subdivision (e) to rule 86.

Mr. Jenner offered one further amendment to Rule 25 -- the addition of the words "in his official capacity" when referring to a public officer. The Committee voted to leave it to the Reporter to make the decision as to the place where the words would be inserted.

The Rule as adopted by the Committee reads as follows:

RULE 25

(d)(1) PUBLIC OFFICERS: DEATH OR SEPARATION FROM OFFICE. When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party.

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The Chairman introduced Judge Prettyman, Chairman of the Advisory Committee on Appellate Rules. Judge Prettyman pointed out that Civil Rules 72, 73, 74, 75 and 76 deal with phases of appeal, and queried whether consideration of these rules should remain with the Civil Rules Committee or fall within the assignment of the Appellate Rules Committee. He expressed the opinion that all rules that deal with appeal should be in the appellate rules. Judge Maris stated that he thought it would be a mistake to throw any doubt upon the validity of these rules presently in use by bringing them in in such a way that it appears they are no longer being considered as Rules of Civil Procedure of the distr ict courts. Judge Thomsen suggested the four rules in question should be ~~referred to~~ considered by the Appellate Rules Committee and made a motion that the Civil Rules Committee take no action of any kind with respect to these rules unless and until they are specially referred to the Civil Rules Committee by Judge Maris' Committee; and further that the Committee proceed to consider the borderline rules but take no final action until appropriate conferences are held between this Committee and Judge Prettyman's Committee. Judge Thomsen's motion was unanimously carried.

AGENDA 3. XIII. Rule 52(a)

Mr. Freund stated that he would like to see this rule remain as it is. Mrssrs. Jenner and Frank were of the same opinion. A motion was made after discussion that this Committee would not come to any final conclusion on

this rule until Judge Prettyman's Committee has debated the matter and reported. The motion was passed. After lengthy discussion, it was agreed to pass Rule 52(a) without further instruction to the Reporter.

AGENDA 3. XIV. Rule 54(b)

After discussion the Committee came to the conclusion that the Committee should adopt the reporter's suggested amendment and upon the motion of Messrs. Jenner and Frank it was decided that final action should not be postponed until after consideration had been given to it by Judge Prettyman's Committee, but that the Chairman should consult with the Chief Justice and Judge Maris and the rule should be put out as early as possible.

In Rule 14(a) the language in the 1955 proposed amendment "the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b)" was agreed to be stricken.

AGENDA 3. XVII. Rule 60(b).

After a long discussion it was decided that Rule 60(b) should remain unchanged.

RULES OF EVIDENCE

Professor Joiner moved that the Committee go on record as urging the standing Committee on Rules of Practice and Procedure to initiate a project involving a study of the feasibility of adoption of a set of rules of evidence for the federal courts, at a time when it can well be worked out and with personnel of its choosing, whether it be assigned to a committee already

in being or a new group ultimately looking forward to the drafting ~~of a set~~ uniform of rules of evidence for the federal courts.

He pointed out that various Judicial Conferences of the Circuits and the House of Delegates of the American Bar Association favored this action. Since the matter is one that is on the agenda for the next meeting of the standing Committee, Professor Joiner thought it would be helpful to Judge Maris' Committee to have an expression of opinion of ~~this group as to whether or not a study would be wise.~~ the Advisory Committee on Civil Rules,

The motion was carried unanimously.

The meeting was adjourned at 5:40, December 6 and recovened at 9:30 am December 7.

AGENDA 3. XV. Changes in summary judgment provisions.

After discussion it was decided that the present rule was working rather well and the entire Committee felt that no change should be made in the rule.

If any other change is made in the rule as a whole, the Reporter asked that line 7 be changed to add after the word "deposition" the words "answers to interrogatories." The Committee agreed to this suggestion.

The next change suggested was in Rule 56(e). The Reporter stated that if the suggested change was adopted in principle, he was not satisfied

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copy of the transcript at a lesser price. The proposal is that the court be given the power to allocate these costs. Mr. Frank wishes the Reporter to make a further change to provide that testimony taken may be transcribed at the request of either party, so that whoever wants it asks for it. It was moved, after discussion, to adopt the Reporter's proposed amendment, subject to his coming back and saying that he has a better one still. Judge Thomsen asked that it be made broad enough to see that the Judge has general discretion to do what is fair.

Mr. Joiner in his memorandum suggested taking depositions by mechanical means. This is something that will be considered.

The Chairman announced that the Chief Justice believes that it would be appropriate and wise to deal with these matters which the Committee has thought to be emergency matters. Therefore the Committee will proceed to go ahead with those and send them to ~~Judge Maris'~~ the standing Committee, ~~These will be prepared and transmitted to Judge Maris' Committee and~~ the Reporter will prepare ~~a note to accompany each one~~. ~~They~~ These matters will be distributed immediately to ~~this~~ the members of this Committee and the members were asked to communicate with the Chairman by letter, telephone or telegraph as soon as possible.

AGENDA 3. IX. Discovery regarding physical, mental, and blood relationship.

Rule 35 and the corresponding sanction provisions of Rule 37 were discussed. A vote was taken and the amendment was carried.