CEC

P R O C E E D I N G S

of

MEETING

of

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

of the

SUPREME COURT OF THE UNITED STATES.

Monday, February 24, 1936.

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Washington, D. C.

9:30 a. m.

The Committee resumed at 9:30 o'clock a.m., in the Supreme Court of the United States Building, Hon. William D. Mitchell, Chairman, presiding.

PRESENT: William D. Mitchell, Chairman,
Scott M. Loftin,
Wilbur H. Cherry,
Charles E. Clark, Reporter,
Armistead M. Dobie,
Robert G. Dodge,
George Donworth,
George Wharton Pepper,
Monte M. Lemann,
Warren Olney, Jr.,
Edson R. Sunderland,
Edgar V. Tolman, Secretary,
(Edward Hammond, representing the Secretary)
Edmund M. Morgan.

P R O C E E D I N G S

The Chairman. We will come to order. Major Tolman is not feeling very well this morning and is staying at home. I am asking Mr. Hammond to take his place at the table here because he has some matters of substance to be considered. Mr. Hammond, will you sit for Major Tolman this morning?

Mr. Hammond. Certainly, Mr. Chairman.

RULE A10
(resumed)

The Chairman. When we adjourned last night we were down to the first bracket, being the second paragraph of Rule A10. The situation is this: At our last meeting we all agreed that we wanted to go as far as we could under the Seventh Amendment of the Constitution in authorizing judgments notwithstanding the verdict, and the only question we were in doubt about was, how far we could go.

I will say that I have reexamined the Slocum and Redman cases, and I am not willing to ignore the fact that in the Redman case the court, in two different places in the opinion, laid emphasis, or at least stated the fact, that there had been an implied consent by the parties. In the Slocum case it was said it could not be done at all. Then when the Redman case came up -- and all of you know how reluctant the court is to overrule former decisions, thinking it much better to distinguish them, and that is especially true in cases before the Supreme Court of the United States, with all the implications that may come with frequent overruling -- so they went into the Redman case and clearly distinguished it on the

ground that there was implied consent. And while they did not say in explicit words that their judgment was based on that distinction, yet that the common law rule is they must consider each case in the particular light of the case itself; so I would hesitate to pass up to the Supreme Court a rule that flatly overrules the Slocum case in the light of what was said in the Redman case.

I believe a rule can be put up in such a way, with striking out one sentence in the Slocum case, that they can do it, and then put up our notes explaining the situation.

My view is this: that we ought to draw a rule so that in any circumstance the court may reserve the question unless one of the parties objects. And I have drawn a rule which gives that view and which goes quite a ways in the matter of implied consent.

Mr. Olney. As I understand the situation, failure to object will be taken as consent?

The Chairman. I will read that in just a minute. I think we ought to draft a rule on the theory that the Redman case should be considered in the light of the facts of that case. Now, there is another point and it is this: The matter of whether the parties consent or not, the court can take the verdict of the jury if the jury consent. There seems to be quite considerable practice of that kind at common law before the Constitution was adopted. That raises the conclusion instantly that it is not a denial of jury trial under the Seventh Amendment, if in accordance with the old common law the court reserves the question with the consent of the jury.

I am in favor of putting two things in the rule: 1. Either

that the court may do it with the consent of the parties, or if they do not object; or, secondly, even if they do object the court may do it if the jury consent. So I have drawn a rule that attempts to go as far as we can to imply consent without any action. I think that is the thing to do.

On page 16 of my comment I suggest that, --

"Whenever a motion for a directed verdict is granted ---"

and you will note that I do not say declined or refused, as that sounds too much like a ruling, --

"the court will be deemed to have reserved decision thereon and to have taken the verdict subject to a later determination of the questions involved, and may thereafter enter judgment on the verdict, or on motion therefor order judgment notwithstanding the verdict, or a new trial, as may be appropriate, and as the ends of justice shall require, provided that, in no case where there is a constitutional right to a jury trial, shall the court order judgment notwithstanding the verdict ---"

Now, please note this:

"on the ground of insufficiency of the evidence ---"

I have limited it to that because I think Dean Dobie will agree there is authority for the proposition for these things in the Seventh Amendment, about reexamination of facts the only province is reexamination of the sufficiency of the evidence. And if it is to come to a question of law, that it does not involve any examination of the facts, all right.

"notwithstanding the verdict on the ground of insufficiency of the evidence, against a party who, prior to the

submission to the jury, shall have objected to the court's reservation of the questions raised by the motion to direct. Motions for judgment notwithstanding the verdict or for a new trial may be made in the alternative."

Now, I add to that this clause,--

"Notwithstanding objection by a party the court may reserve the question if the jury consent."

Now, if that raises all the questions you want to decide under the question of consent of the jury or consent of the parties, all right. The third is, whether after all it is only a reexamination of the verdict on the ground of insufficiency of evidence that you want to guard. The reporter's rule seems to proceed on the theory that the Redman case has no significance as to the fact that the parties consented or there is mere implied consent.

Mr. Olney. You mean that a motion for a new trial upon the ground of the right of the court to order it, is not limited by the Slocum case.

The Chairman. Not limited by what?

Mr. Olney. Is not limited by the Slocum case.

The Chairman. No; it is a judgment notwithstanding the verdict.

Mr. Dodge. This practice was recognized in the federal courts in a case I was interested in, where there was a sizable verdict against me in the district court, and finally entered judgment after the verdict. The circuit court of appeals reestablished the verdict for the plaintiff, by a 2-to-1 decision, and the Supreme Court of the United States unanimously entered

judgment for the defendant, recognizing that practice.

The Chairman. Do you mean recognizing the practice of getting the consent of the jury?

Mr. Dodge. Yes. It was done in the federal court under the Massachusetts statute by consent of the jury. The old English law permitted that, having a verdict for the defendant entered upon the verdict of the jury.

The Chairman. Do you mean that even though the parties consent, and even though the jury objected, it would be all right?

Mr. Dodge. Yes, perhaps so. I think that at common law it recognized the practice, and gave judgment with consent of the jury.

The Chairman. That arose in the day when the jury was practically the only bulwark a man had. The jury used to stand up against the government.

Mr. Dodge. That practice arose in England in the eighteenth century and was well established.

The Chairman. In that case which you refer to and where you say the Supreme Court denied a certiorari, the jury consented?

Mr. Dodge. No; the Supreme Court granted a certiorari, granted a verdict contrary to the original verdict of the jury, but in accordance with the action of the district judge, who had ordered a verdict for the defendant afterward.

The Chairman. That was a case where the jury consented to reservation of the question. Did the parties object?

Mr. Dodge. I do not recall that there was any objection by the parties.

By this ~~rule~~ paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules.

The Chairman. You say if there was not established squarely within the Redman case the question of implied consent? If the parties stood around while the jury was consenting it would be their consent too?

Mr. Lemann. If the parties waive it you do not have to have the consent of the jury under the Redman case.

The Chairman. I am assuming if the parties consent it does not make any difference what the jury does. But if the parties object then the court can do it if the jury consents. That is the theory of my rule.

Mr. Lemann. This case means if the parties did not object.

The Chairman. I state here that this is an automatic reservation. The court does not have to affirmatively reserve but the court shall be deemed to have reserved. You see, unless one of the parties objects. And if it does object, then, notwithstanding that objection, the court also will say: Well, gentlemen of the jury, may I have your consent to do this?

Mr. Dodge. One minute ---

Mr. Lemann. (Interposing) Well, in order to formally bring this matter before the committee, I move that we adopt the chairman's suggestion.

The Chairman. Well, one minute. I think there may be other phases to be considered. I simply wanted to start the ball rolling here.

Mr. Lemann. Well, that was the object of my motion.

Mr. Dodge. Isn't that matter referred to in the reporter's note ?

Mr. Clark. In this memorandum you were reading last night, and it is also referred to in one of the footnotes. It is referred to in a separate memorandum on the Slocum and Redman cases. And in that connection may I just say this: I am not insisting upon any particular form, nor do I hold a brief for striking out this matter of consent. I will say that a number of members of the committee felt we ought to go as far as we could, but the Court leaves us doubtful as to how far consent is necessary. If we do not put the question up to the Court in some way we might very well be putting in a limitation that they did not intend necessarily to stress.

The Chairman. I propose to put up my rule to the Court with a note on it saying: Your Honors, if you are willing to overrule the Slocum case all that you have to do is to strike out my proviso,--

"Provided that, in no case where there is a constitutional right to a jury trial, shall the court order judgment notwithstanding the verdict on the ground of insufficiency of the evidence, against a party who, prior to the submission to the jury, shall have objected ---"

Strike that out of my rule and you overrule the Slocum case.

Mr. Lemann. And if you strike that out you strike out the next one.

The Chairman. Yes.

Mr. Dobie. If the jury consent the objection of the parties makes no difference.

The Chairman. Last night I overlooked the consent of the jury. It is the old common law practice. Mr. Sunderland pointed that out yesterday afternoon, and I particularly read

the cases and had thrown them aside because I thought the jury had no rights in the matter whether they consented or not. But he pointed out this old common law rule under the Seventh Amendment.

Mr. Pepper. As I understand the situation, we all agree that we ought to go as far as possible in the direction of avoiding expense and the waste of time involved in having a new trial after the court has decided that on the evidence adduced in the prior trial indicated that a directed verdict would have been proper. That is the Slocum case.

The Chairman. We are unanimous on that, and so voted at our last meeting.

Mr. Pepper. And we are all agreed it would be a violation of the Seventh Amendment if the court simply left the matter to the jury in the usual course without reserving the point, and subsequently undertook to upset the verdict of the jury by a reconsideration of the evidence.

The Chairman. I will put it this way: We are agreed that that is what was held in the Slocum case. But I think if we were to take a vote of the committee here you would find it agreed there was a mistake in the Slocum case.

Mr. Pepper. The Slocum case does not raise the question we are now discussing, because we are discussing, are we not, the right of the court to leave a case to the jury subject to the point reserved?

The Chairman. We cannot discard the Slocum case because they held there, apparently, it could not be done at all.

Mr. Pepper. This is what Mr. Justice Vandeventer said:

"In that case the defendant's request for a directed

verdict was denied without any reservation of the question of the sufficiency of the evidence, or of any other matter, and the verdict for plaintiff was taken unconditionally and not subject to the court's opinion on the suffiency of the evidence."

Now, that is pretty strong language.

The Chairman. My rule submitted here does not question that at all.

Mr. Pepper. All that I meant was this: I was wondering whether the rule ought to be put in the form of requiring consent, or whether it ought to be put unconditional, with a note that we interpreted the Slocum case as applicable only to a situation in which there was no reservation.

The Chairman. I do not think that was in it. I do not feel the Court has gone that far. I think in the Redman case it says something more than a mere reservation. It points out specifically, in two places, that the parties consented.

Mr. Olney. Furthermore, if you are going to ask the court expressly to reserve ruling on the matter, you are asking the court to do something which in a way is perfectly useless. It should be automatically reserved so far as it is possible to do it.

The Chairman. My rule says,--

"shall be deemed to have reserved ---"

Senator Pepper has the same idea I think. The only point is this matter of procedure. He wants to go the whole hog on it and put up a rule that it does not require anybody's consent in order to reserve, and then see if the court will agree to it. I am in favor of putting up a rule having a

direction in it, giving the parties the right to object, and then saying even though they do object the court can do it if the jury consents. And then in a footnote state that the committee is unanimously of opinion we ought to go as far as we can, but that in view of what is said in the Redman case about consent of the parties we feel that we ought not to go beyond that case on its facts; but that if the Court is willing to strike out our proviso about consent of the parties, or consent of the jury, we favor it. Now, in that case they will make the decision on our recommendation to strike out the proviso about consent. But instead of putting up two rules we will have the whole thing in one, and all that we have to do is to draw a pencil through a part of it and we will have it. So I am in favor of putting it up to the Court with recommendation that they throw the Slocum case aside practically.

What I do feel is that in view of all the conditions, which we are unfamiliar with, it makes it very inadvisable for the Court to be overruling anything that they do not have to, that we might be going back in the traces a little, and if so it would be an uncomfortable situation, I mean if we just ignored the facts in the Redman case. How could we?

Mr. Dobie. Do you think it would make much difference to the Court which of these two forms we adopted, form 1 requiring no consent of either the jury or the parties, if we should recommend that; and form 2 of yours, where we say we feel this is as far as we can go? It may be that this velvet-glove statement "as far as we can go" would be the better way, meaning that this is as far as we feel we can go

under the Slocum and Redman cases, but that we hope and recommend you can go further and strike out this proviso.

The Chairman. I will put it this way: In view of the facts of the Redman case this is a conservative view of what the Court intended to do, but that ---

Mr. Lemann. (Interposing) I think as to what the Court really intended to do, that is the first question.

Mr. Dobie. I think we will get further if we handle the Court rather gently instead of you might say jarring them and asking them to do some overruling.

Mr. Olney. We will be presenting a rule that we think is supportable under both cases.

The Chairman. Plainly within them.

Mr. Olney. Now, we should like to go further.

The Chairman. And we recommend that the proviso about consent be stricken out. Or, if you choose, we might put up a rule without a proviso.

Mr. Lemann. That would be the simplest way to show the difference, to put it up that way and then if they wish they can strike out two sentences. If you put up an alternative rule, and they have to compare the one with the other, they will likely reach the same result but a little bit more slowly.

Mr. Donworth. I like the substitute form proposed by the chairman, but think it should be molded a little differently into this rule. The chairman's suggestion is that these lines, on page 16 of his memorandum, be substituted for lines 9 to 24 in the proposed rule.

The Chairman. No, not necessarily. There may be other things in those sections that I have not touched. I am just

getting at that one point.

Mr. Donworth. That is what I am addressing my remarks to. In order for us to get action let us go ahead with the first 8 lines, but I had suggested that we substitute "evidence" for "testimony" there, which I suppose is not objected to.

Mr. Clark. No.

Mr. Donworth. Let us now read it with that change:

"In any action tried by a jury a party may move for a directed verdict at the close of the evidence offered by an opponent without thereby waiving the privilege of himself offering evidence in the event that the motion is not granted. A motion for a directed verdict is not a waiver of jury trial in the event that the motion is not granted, notwithstanding that all parties may have moved for directed verdicts."

Now, that is dealing with one thing which is not involved in the Slocum and Redman cases. So when we move over to the Slocum and Redman cases I think we need some words in there to show that we are not talking about this preliminary or half-way motion, at the end of plaintiff's testimony. I think the Slocum and Redman cases should be confined to a motion for a directed verdict made at the close of all the evidence. I do not think we should mingle that with this question of what ought to be done in the middle of the trial. So I had the thought of putting in there,--

"Whenever at the close of all the evidence a motion for a directed verdict is made and not granted."

Now, another point, but I am not sure this is the proper

language,--

"That in no case where the constitutional right to jury trial ---"

whether that is germane with reference to the point. The Seventh Amendment is:

"In suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved."

That we know about. Then the next sentence:

"And no fact tried by a jury shall be otherwise re-examined in any court of the United States other than according to the rules of the common law."

I would defer to these gentlemen who have examined the authorities, but my impression has been that these are two independent or only partly related provisions. If the right of trial by jury exists by statute or in any other way, my understanding is, the fact that it is tried by a jury means that this second clause of the Seventh Amendment,-- trial

"according to the rules of the common law"

would apply.

The Chairman. I agree with that. Haven't I covered that?

Mr. Donworth. I would strike out

"in no case where there is the constitutional right to jury trial."

The Chairman. I would not, because you are trying some cases by jury where there is no constitutional right, and there you would like to protect trial by jury as well.

Mr. Dobie. That was brought up in the Asten case, you

will remember.

The Chairman. Well, I am disqualified in that case, because of being a party.

Mr. Dobie. I think the Seventh Amendment has no reference whatever to a case where jury is waived. I do not think we can waive a jury and then say that we still say the fact has been examined by a jury.

The Chairman. I have not provided anything of that kind.

Mr. Dobie. I know, but I wanted to raise that point. I should like to put it in if the Supreme Court will stand for it. I should like to make that provision if you gentlemen will agree to it.

The Chairman. That gets down to the effect of the findings of a court without a jury, and that is another rule and I think we better bring it up there.

Mr. Dobie. All right.

Mr. Donworth. I am sorry that my powers of expression are so limited that the members of the committee have been unable to get my point. My point is that if a fact has been passed upon by a jury it cannot be otherwise reexamined according to common law, whether it had to be examined by a jury or not.

Mr. Morgan. If a jury tried an equity issue would you say this would cover it?

Mr. Donworth. I am not so sure about that. But under the statute you have a right to a jury trial, and I think the Slocum and Redman cases apply just as much as if you did not have the right by the Constitution but got it by statute.

The Chairman. All that we are dealing with here, if I

understand it aright, is the question of reexamination of the verdict, because that is what a motion for judgment notwithstanding the pleadings is, and it is so whether the trial court is considering the judgment notwithstanding the verdict or the appellate court is doing so. It is a reexamination. And, so, that is why I put in here:

"notwithstanding in any case where there is the constitutional right to a jury trial."

Now, if there is not, we want the absolute right to grant judgment notwithstanding the verdict. If there is, then we pass on and say:

"In no such case shall the court order judgment notwithstanding the verdict on the ground of insufficiency of the evidence."

Now, a reexamination of the clause says that:

"No fact passed on by a jury shall be reexamined."

So that when you come to a motion for judgment notwithstanding the verdict, if you are not reexamining the facts the Constitution does not stand in your way. I looked up the question in Dean Dobie's book, and there found authority for the proposition, and that is what that reexamination of the facts means.

Now, suppose you make it a question of law as to whether the statute means something or not, and the court takes the verdict of the jury and reserves a question of law, or does not reserve it, and a motion for judgment notwithstanding the verdict is made, and there is no question of fact reexamined, no question of fact involved, no question of sufficiency of the evidence, but considering the question as to the meaning

of the practice or the statute, cannot, under the Seventh Amendment, the court grant judgment notwithstanding the verdict, regardless of consent or what not?

Mr. Donworth. Surely.

The Chairman. That point is made in the books. So I stuck in that qualification to try to narrow this consent to the least common denominator.

Mr. Donworth. I must again say that I regret my powers of clear and concise statement, and will make it again: The Slocum and Redman cases are good law in any case tried by jury, common law case, whether or not it had to be tried by a jury. If it was in fact tried by a jury, whether it had to be so tried or not, as to any common law case, the Slocum and Redman cases will apply.

The Chairman. No, sir; I think you are mistaken. The Slocum and Redman cases are based wholly on the Constitution, which gives the right to trial by jury. If there is no constitutional right, the Slocum and Redman cases ---

Mr. Lemann. (Interposing) What common law cases do not have to be tried by jury?

Mr. Donworth. But independent of that question.

Mr. Lemann. I thought your statement implied there was such a class of cases. Mr. Morgan asked you if you wanted to apply it to an equity case, and you replied: No, I put that aside. You say it applies only to a case that does not have to be tried by a jury. I want to see what kind of case that is.

Mr. Donworth. My point is that the constitutional requirement is that a question of fact over $20 in a common law

case shall be passed on by a jury. That is one thing. The other thing is that no fact passed on by a jury shall be re-examined other than as provided by common law.

Mr. Olney. Even if it is an equity case?

Mr. Donworth. No, that is not the point. The point is that if there is a statute of the United States saying that a party is entitled to a jury trial in so-and-so ---

Mr. Lemann. Is there any common law case in which he would not otherwise have the right of trial by jury?

Mr. Dobie. There is some doubt on it, but I think the better opinion is that in a condemnation case there is no right of trial by jury under the Seventh Amendment.

The Chairman. There is mention of it by the Supreme Court.

Mr. Donworth. But my point is that if a man has the right of jury trial, whether under the Constitution or not, if he has it by reason of a statute, then the Redman and Slocum cases apply.

The Chairman. I agree to that.

Mr. Pepper. Mr. Chairman, I wonder if that view of the Slocum and Redman cases applies.

The Chairman. There is a provision in the Constitution which says no fact covered by a jury shall be reexamined, as a part of the Seventh Amendment, and that it only relates to cases where jury trial is guaranteed. I would not consider it otherwise. You say here, first, there is the guarantee of jury trial; and, second, even though you have no right to a jury trial, if you proceed to have one, the facts cannot be re-examined. I take that examination-of-fact clause and say it

relates only to cases where there is a constitutional right to jury trial. But I may be wrong about it.

Mr. Donworth. If you will pardon me in my attempt to state it once more: If anybody thinks this is nothing more than a meticulous sticking to the subject, all right, but if there is a statute giving a man a jury trial, then the Slocum and Redman cases apply to it just as much as if the Constitution gave him the right.

The Chairman. We can amend the statute. We are only troubled about the Constitution.

Mr. Clark. I never heard of this constitutional question before. I should like to have the constitutional experts to pass upon it.

Mr. Donworth. Dean Clark, what do you think of this situation: If a statute gives a man the right to trial by jury, and then there is a motion for a directed verdict, you have the fact that he got his right to a jury trial from the statute rather than from the Constitution, and does that take away any necessity for all these precautions we are now considering?

Mr. Clark. Until you brought the matter up I confess I would have recommended the same as does the chairman. But this may be good argument about an equity case. I should like to hear more on it.

Mr. Morgan. It seems to me you would have to strain the construction of the Seventh Amendment if you did not tie the two parts together. I should say that when a statute authorizes judgment notwithstanding the verdict in a particular case, and another statute authorizes trial by jury of the thing which

theretofore had not been tried by jury, it would be perfectly obvious that what the legislation had given legislation could take away. And there would be no constitutional question on it at all.

Mr. Donworth. I withdraw my point in view of lack of sympathy. But I do think the other point I suggested should be put in here, namely ---

The Chairman. (Interposing) I accept that, whenever at the close of the evidence -- I agree to that.

Mr. Pepper. You have in mind in determining it the proposition should be put up to the Court that in the Slocum case there was a dissent of four judges, and that Mr. Chief Justice Hughes wrote the dissenting opinion and quoted that case in which the Supreme Court of Pennsylvania long ago decided that our practice did not violate the guaranty of jury trial contained in the State Constitution.

The Chairman. Yes. But when the Court took up the Redman case, notwithstanding the fact that the original decision was a 5-to-4 decision, they did not reverse it or overrule it, but they distinguished it, and they distinguished it on the ground of reservation, and they also pointed out explicitly that there was the consent of the parties to the reservation. They have not qualified it latterly any further than that.

Mr. Pepper. It is one of those situations in which it worries me to have to think of it as a legal technicality, because I do not think any man, not a lawyer , would imagine that if it were within the power of the court, after hearing all the evidence, to tell the jury to give their verdict, or I

mean to direct the verdict, that it should be, we will say, for the jury; that that would not be a violation of the defendant's right to go to the jury, and yet after he has refused to give that direction, and has reserved the point, and it has gone to the appellate court and the appellate court has said he was wrong in refusing to take the case from the jury, why, we will send it back in order that you must go through the hocus-pocus of a second trial, and leave the same question for consideration a second time, and then direct the jury to find a verdict.

The Chairman. We are 100 percent with you on that. And you would argue that in the Slocum case the judgment would have been the other way?

Mr. Pepper. The reason I make the point is: There is a very active and intelligent committee of the bar in Philadelphia studying all the questions that are before this committee, with the idea of keeping pace with your work. And Major Tolman asked me to bring up a letter which he received from that committee, in which they ask favorable consideration of a rule which would not make the question of consent impossible, although it does seem to contemplate reservation. The rule that they suggest is:

> "Whenever a motion for a directed verdict has been made prior to the submission of the case to the jury, the court shall, if it is not prior to granting the motion, reserve its decision thereon and submit the case to the jury, subject to the decision reserved. After the verdict of the jury has been rendered, or in case the jury disagree, the court may take such action on the

reserved motion as the ends of justice shall require, and shall modify the verdict accordingly."

The Chairman. We are going to recommend that to the Court in a note, and recommend that we go that far and strike out any proviso about consent.

Mr. Pepper. I think Major Tolman would feel that that ought to have been brought to the attention of the committee, and that is the reason I have taken up your time to do it. Am I right about that, Mr. Hammond?

Mr. Hammond. Yes.

Mr. Sunderland. As the rule is proposed to be drawn it seems to me the motion part deals with the least desirable of the alternatives, and that the addendum to our rule takes up the more desirable part of the alternative. It seems to me we ought to state the rule the other way, on the basis of the propriety of the reservation as at common law, and then provide that although such reservation is not made the judgment notwithstanding the verdict may nevertheless be rendered if the parties desire.

The Chairman. Well, if you are putting that up to me I will say that I do not object. I feel very strongly that I do not want to vote for a rule that requires them to take the position on the theory of discarding the Slocum and Redman cases on their state of facts. I am quite willing to recommend, or to join in a recommendation, that they go that far if they feel they can. But I am reluctant to put in as our primary rule a thing I will have to admit, if anybody asks me, goes beyond the Redman case. Mr. Justice Vandeventer says to me: We did not overrule the Slocum case. Look at what we

said in the Redman case about consent, and all that, and reserving with implied consent. Why, if we put out a rule that fits our cases, and goes as far as the facts seem to justify, all right. If we feel that any restriction ought to be stricken out if they can, and recommend that that be the unanimous view of the committee, all right.

Mr. Dodge. In the case to which I referred this is what was done: The case was submitted to the jury, and in accordance with the practice in Massachusetts, the court directed the jury that if they should find for the plaintiff they ought also to return an alternative verdict for the defendant, which could be entered if later it was held as a matter of law the plaintiff was not entitled to recover. That is what he did, and so they returned two verdicts, but the primary verdict was for the plaintiff. The Supreme Court of the United States entered judgment for the defendant on the other verdict.

Mr. Dobie. That was from the standpoint of the discretion problem.

Mr. Dodge. Well, they agreed to that practice.

Mr. Donworth. I favor consent of jury idea, because I think it would be very rare that plaintiff's attorney will consent to the reservation. He will want a chance if he can to try it over again and introduce new witnesses to cover the hiatus. So I favor the consent of the jury as a substitute. That is your idea, isn't it, that the consent of the jury would be a substitute for consent of the parties?

The Chairman. Yes. Even though the parties objected the court could do it, having the jury's consent.

Mr. Loftin. I move that your suggestion be adopted as

the report of the committee.

The Chairman. I state that as my rule, but it may require revision as to form. All I would ask is that my rule in substance be put up at least as an alternative rule. You see, it has a good many things in it. There is this question, about whether you are troubled by the Constitution at all, it is not insufficiency of evidence that you are talking about. I don't care whether you put my rule up as the only rule, with recommendation to strike out the proviso about consent, or put my rule up as another complete rule as an alternative. That is more a matter of detail.

Mr. Olney. When dealing with the Supreme Court it would seem it would be better to put it up in the manner you have suggested, that we have gone as far as we feel we can without the possibility of overruling a decision of the Supreme Court. Then call attention to the fact that we think in justice the rule should go further. Now, that is the proper approach to the Court, it seems to me, in a matter of this kind.

The Chairman. It is more a matter of contact than anything else, how to group up all that. I fear they will pull back on us and say that we are brushing it aside. I notice the reporter says he does not think much about the mention of consent in the Redman case, that the treatment of that rather indicates it was just thrown in and did not mean anything. I am not willing to go that far.

Mr. Clark. They said there it was a fact in the case. When I cited the fact that there was no objection I thought that wasn't consent so much as it was that there was no objection.

Mr. Morgan. That is where he has it wrong.

Mr. Clark. How far that is a decisive fact is not made clear.

Mr. Pepper. It says tacit consent.

Mr. Cherry. That was later on unobjected to. It is there twice in the Redman case, and I don't think it can be overlooked.

Mr. Lemann. In discussing the Slocum case they particularly made a distinction. I do not think you can say they did not rest the Redman case on the distinction.

Mr. Clark. Oh, no. I think it was viewing the practice of reservation of verdict, and the judge reserved it, and that that was a decisive fact.

Mr. Pepper. In this matter of consent of jury I want to get my mind clear as to how that is to be given. The court in submitting a question to the jury disposes of the motion for an instructed verdict, the parties having failed to agree that he should make reservation and the court turns to the jury and puts to them the question whether or not they will consent that he shall exercise that prerogative. Now, must the jury be polled?

The Chairman. I should say it would have to be unanimous. You cannot take a three-fourths vote of a jury on that. I should assume that in order to get the consent of the jury you would have to get it expressly by calling their attention to the point, and assuming they consent it would have to be a unanimous consent. But that is more a presumption than anything else.

Mr. Pepper. It would take quite some time to explain to them what it is all about. I never saw a jury that would

understand that situation.

The Chairman. The court would likely say: Gentlemen of the jury, this is an important question of law. I should like to give it further consideration, and if you have no objection we will take your verdict with the understanding that I can reexamine the situation later and enter judgment. That is the way he does it, in about a sentence, and the jury will say what they have to say, and that is the end of it.

Mr. Lemann. Ordinarily he could say: I am not prepared to direct a verdict, but will reserve that right, and if one of the lawyers does not get up and object he does not need to say anything more. But one of the lawyers may jump up and say: I do not agree to it. The court would then say: Gentlemen of the jury, is that all right? And I never saw a jury that would say no to a judge.

Mr. Clark. I think in Massachusetts they recite that the jury has consented.

Mr. Dodge. It is usually done I think as the chairman suggests: I presume you gentlemen of the jury have no objection.

Mr. Pepper. If that satisfies everybody's sense of justice, all right, if that gets around the Seventh Amendment of the Constitution.

The Chairman. The point is that it does not get around it, but Mr. Sunderland calls attention to the fact that for over 300 years it was, at common law, customary frequently for the court to reserve a question in that way, with the jury's consent. It is not getting around the Constitution; it is merely confining it to what was a jury trial at the common law.

That is the trick about it.

Mr. Dodge. It accomplishes the same result as having a directed verdict.

Mr. Pepper. Our minds are one as to what is desirable, and Judge Olney has moved ---

Mr. Loftin. (Interposing) No. I made the motion.

Mr. Pepper. Pardon me. And Mr. Loftin has moved that the matter be formulated in the way suggested by the chairman, with an alternative note as is also suggested by him. I am glad to second that motion.

Mr. Donworth. I favor the motion. But I am not sure that this discussion has at all called attention to the fact that in the Redman case the Court actually did make the reservation of the court's own discretionary power of judgment, and that we are here compelling it to be done in that way whether the judge wants to do it or not. Has attention been called to that?

The Chairman. I have called attention to it in a brief way by saying that I made it automatic. When you are dealing with the Constitution if the court has the discretion you can make him do it without violating the Constitution.

Mr. Donworth. But is that good judicial practice. I favor putting it as it is, but I call attention that we are going beyond these cases in that we are taking away from the judge the right to say: Gentlemen, there is nothing to this at all. I do not want it reexamined, and I am going to submit this to the jury, and I do not grant your motion. He cannot do that under this.

Mr. Lemann. He is supposed to reserve it, and having

been forced to reserve it he can say: I have reserved it but do not deny it. The fact is that we have left the door open to the appellate court in this procedure: You have reserved it and you should not have failed afterward to exercise the reserved power. You should have exercised it and directed a verdict. We have not done the lower judge any harm, but we are forcing him to reserve his powers although not forcing him to exercise them.

Mr. Sunderland. That exact point was raised in Wisconsin, where the legislature passed an act requiring the judge to refuse to direct a verdict and to hold the matter open. The point was raised there that that was an interference on the part of the legislative branch of the government with the inherent rights of the judiciary. The Supreme Court of Wisconsin held that that was true, and that the legislature was without that power. I think our situation here is different, because we are dealing with the matter by rule of Court, and there could be no question here of legislative interference.

The Chairman. No. The Court itself would be making the rule.

Mr. Sunderland. So I think that point here is out.

Mr. Pepper. Question.

The Chairman. The question is called for. All in favor of the motion will say aye. (A chorus of ayes.) Those opposed will say no. (Silence.) The motion is carried.

Mr. Clark. Let me ask for information: Do you want it in the form, "The court shall be deemed to have reserved", rather than in the form, "The court must reserve"?

Mr. Dobie. Yes.

The Chairman. I think there is no distinction between telling him to do it, and that he shall do so and so when he is doing it.

Mr. Dobie. Some of them might disregard it, and we think it an important matter.

The Chairman. When the court raises the question and says: Gentlemen of the jury, do you consent? it gives opportunity for objection, but it really is a trap set for a lawyer to admit consent if he does not call attention to it, and make him file objection. But if he did the court could turn around and ask the jury anyway, so what difference does it make?

Mr. Dobie. All right.

The Chairman. You will note I have not said anything about what the appellate court may do, and I do not think there is any need of mentioning the appellate courts, because once you give the trial court the power to do it, it automatically follows that the appellate court may do it. I do not see any distinction in the Seventh Amendment between a trial court and an appellate court doing it.

Mr. Morgan. There would be this distinction in practice: In the states where the statutes do not give the appellate court the right to enter the judgment itself, they always go through the form of sending it back to the trial court and ordering the trial court to enter judgment pursuant to the opinion. But as I understand it in New York the appellate court itself may enter judgment, unless that has recently been changed.

The Chairman. That may be so. What I meant was that I like to avoid all reference to what the appellate court may do. Once we say a thing may be reexamined after verdict, why, then, if the trial court can do it the appellate court can review its action in doing or failing to do it. So you do not have to say anything about the appellate court there.

Mr. Morgan. In the matter of the result I think that is probably true.

Mr. Clark. I am not sure about what would happen. On a motion for a new trial the trial judge's decision is supposed to be discretionary, and you cannot appeal there except for an abuse of the discretion under the federal rules. Whether on a motion for a directed verdict that would follow or not, there may be a question.

Mr. Morgan. There is no discretion there in any of the cases.

The Chairman. On a motion for review that is because there is no judgment. In the appeal statutes they require appeal from judgment.

Mr. Olney. A motion for a new trial is different.

The Chairman. How is that?

Mr. Olney. The trial judge should have the right to grant a new trial on the ground that the verdict is against the weight of the evidence, that it does not comply with the verdict. Now, that is something the appellate court cannot very well check. If the trial judge has granted a motion for a new trial on that ground it is almost impossible for the appellate court to reverse his decision, unless it can show why the evidence is absolutely compelling and that no

reasonable man could reach any other result. The same considerations do not apply to motions for directed verdicts that apply to motions for new trials.

The Chairman. No. And I have drafted it so that the court may thereafter order judgment notwithstanding the verdict or the new trial, as may be appropriate and as the ends of justice shall require. I had this in mind: Suppose there is a fatal defect in proof. That would technically entitle him to a directed verdict or a judgment notwithstanding the verdict, and the court ought to have discretion, as I have provided, that if he thinks the defect is of an informal nature, and can be directly supplied, for instance in the case of perjury, he ought to have the right to catch the fellow and grant a new trial. So it is just discretionary whether he shall grant a new trial notwithstanding the verdict.

Mr. Lemann. I think it would be true if we did not state it, and if he refused a new trial it would not prevent action.

Mr. Morgan. I think that would relieve Mr. Justice Vandeventer, because in the Slocum case he said something about a new trial or newly discovered evidence. I think it would please him although there is nothing to be bartered away.

The Chairman. Notwithstanding the verdict a new trial may be granted, might be put in the alternative. That is the simple practice, to avoid two separate motions for hearing. Let both alternatives be put up to the court in one motion.

Mr. Pepper. Is it the sense of the committee that the rule when drawn should cover the case not merely where the

jury has found a verdict but where the jury has disagreed?

Mr. Morgan. Yes.

Mr. Pepper. It seems to me this power might be exercised whether on the one point or the other, where there has been disagreement on a question of fact.

The Chairman. Of course, if the jury has not been discharged when they come in and report disagreement we do not need any rule to allow the court to go back and grant a motion to direct. It is only where the jury has been discharged.

Mr. Pepper. Yes. And when the court on consideration of the whole record comes to the conclusion the motion ought to have been granted, it seems to me he certainly ought to have the right to do it where there has been disagreement, if he would have the right to do it notwithstanding a verdict.

The Chairman. I have heard of it being done.

Mr. Donworth. I think that is the real point, and if it is it might be covered so that this would say: The court to have the power to take a verdict subject to later determination.

The Chairman. These details refer only to where a verdict has been recorded.

Mr. Pepper. I make that point because Mr. Hammond calls attention to the fact that the recommendation of the Pennsylvania committee is to have it so that it would cover a case of disagreement.

Mr. Donworth. I think it should. I think it would be easier. There would be no constitutional point involved even though the practical effect of the matter is that it has not been passed upon by a jury. As a matter of practice the

judge, instead of setting the case down for later trial, at the next term or whenever it may be, he says: I conclude that I should have granted that motion.

Mr. Pepper. I move it is the sense of the committee, for the consideration of the reporter, that the rule when drafted should be so drafted as to give to the court the power to act where there has been disagreement by a jury, in the same fashion that he would have acted had there been a verdict.

Mr. Morgan. I second the motion.

The Chairman. All in favor of the motion will say aye. (Chorus of ayes.) Those opposed will say no. (Silence.) It is carried.

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Mr. Olney. We have in mind, have we not, the first point suggested by Judge Donworth, that the motion of which we are speaking here is a motion that is made at the conclusion of all the evidence?

The Chairman. That has been agreed to, and put in the rule.

RULE A-11. INSTRUCTIONS TO JURY; OBJECTION.

The Chairman. The next is Rule A-11.

Mr. Clark. I think nothing came in in regard to this rule except suggestions as to form. Senator Pepper was discussing this before. This is the rule with reference to instructions. There is something more you would like to say about that, is there, Senator Pepper?

Mr. Pepper. We just have this: It is a mere matter of verbiage. We always speak of an objection to something which has not yet happened. You object to the introduction of evidence which is offered. If action has been taken, then we except to the action so taken.

The Chairman. We want to eliminate the word "exception", so we say "object to the charge as given." That is what it amounts to.

Mr. Pepper. Very well. I was just thinking that if we were going to use the word "exception" at all, as I think we do in a prior rule, in the sense of objection, that intimates that we are going to use both terms; and if we do use both, I was going to suggest that "objection" was the appropriate one to action not yet taken, and "exception" to action taken. But if we are going to use "objection" in both cases, that is all right with me.

Mr. Olney. There is one matter in connection with Rule A-11. We are dealing here with machinery, and it now provides that any objections to the charge of the judge must be given before the jury retires. Would it not be well, I should like to suggest, to have that before the jury retires, or immediately upon its retirement and before the jury returns with its verdict, so that while the jury is out if there is some trouble about the matter the court can call the jury right back and charge them, correct its charge?

The Chairman. I do not think you will find any judge who will be doing that if he can help it.

Mr. Pepper. May I suggest that a practical difficulty with that way of handling the matter is this: One never can tell how quickly the jury will make up its mind. If you once let the jury retire to the jury room, and then counsel engage in a wrangle before the court over whether the charge is objectionable or not, the jury may reach a conclusion long before counsel do.

Mr. Donworth. Is not that covered in line 12, "before the jury retires"?

Mr. Clark. He wants it after the jury retires, to get them back in.

Mr. Olney. I withdraw the suggestion.

Mr. Dodge. I am wondering about the propriety of allowing a party to object to a charge on the ground that one of his requests has not been given, unless he calls the judge's attention to the omission. Of course it is sufficient if the judge gives the requests in substance. He does not have to give them word for word, I take it, and I think

his attention ought to be called to the fact that he has not covered a particular point in order that he may correct what may have been an oversight.

Mr. Clark. There is an alternative wording. Mr. Morgan had one, and the Major passed on the one he gave. Mr. Morgan's was:

"In no other case may he assign as error any alleged defect of omission or commission in the instructions to the jury unless before the jury retires he makes an objection distinctly pointing out the alleged defect and stating the grounds of his objection thereto."

We were a little nervous about that "omission or commission", as to just what it would mean; and the Major suggested striking it out, which would seem to be leaving it a little blind if it is not in, and if it is in it may be a little blind. We put in "the giving or the failure to give"; but I am not sure but that that may be a matter of form. I just mention it.

Mr. Dodge. What I was speaking of was the sentence beginning in line 8:

"In further proceedings in the case a party may assign as error, without further action or objection".

That is, his mere filing of the request is all that you require. I think the judge should be given the opportunity to correct an oversight.

Mr. Clark. That is true. I was dealing with the next line.

Mr. Dobie. I should like to ask you gentlemen a question as one of practice. Is it common, in the Federal

courts all over the United States, to have arguments on instructions? We have them in great detail in Virginia, in the State courts -- great detail. It is quite a big part of the case.

Mr.Dodge. Sometimes we have them.

Mr. Olney. Out in California they very rarely occur.

Mr. Lemann. You can cover Mr. Dodge's suggestion properly, I should think, Mr. Reporter, in lines 8 to 10.

Mr. Donworth. That is a point of substance, whether we want to do that.

Mr. Pepper. I hope Mr.Dodge's suggestion will be covered, Mr. Chairman. One knows instance after instance where, after written points of charge have been submitted, one of your points has been omitted by the court in his charge. You call the court's attention to the fact of that omission. He says, "Oh, yes, gentlemen; there is one other point which I should have mentioned. I have been requested by the defendant" -- or the plaintiff -- "to do thus and so"; and he corrects what was an obvious inadvertence. If you let it go without calling his attention, and just "lay low", you may do him a great injustice and waste a lot of time.

Mr. Clark. There is a point that strikes me: I should think really, to correct it, we should have to take out that sentence and, in line 10, make the necessity of objecting apply in all cases. If we did that, how would you ever get a fellow to make written instructions unless he wanted to? That is, he could just hold back and see what the judge was going to do. It makes it perfectly optional whether he will ask for written instructions or not. Perhaps you want to

leave it that way.

Mr. Donworth. The present practice is the other way. The present practice is, you put in your written requests, but you do have to except, at present, right in the presence of the jury. Unfortunately, you do have to say, "I except to your Honor's refusal to give our requested instruction No. 7."

Mr. Dodge. I move that that change be made to cover the point I raised.

Mr. Pepper. I second it.

The Chairman. I understand that that means that even where you request the charge, that is not enough. At the close of the evidence you have not only got to object to the things that were said, but you have got to call attention to the fact that things you requested were not mentioned.

Mr. Morgan. Yes; I think that is a good suggestion.

(The question being put, Mr. Dodge's motion was unanimously carried.)

Mr. Dobie. I think that is very wise. There is sometimes a pretty question as to whether the judge has covered the thing in substance. There are any number of appellate decisions on that point.

Mr. Morgan. These requested instructions are a great fly-trap for Federal judges. In some cases the lawyers draw them for no other purpose than to attempt to catch the trial judge, hoping to heaven he will refuse one.

Mr. Clark. But of course here is where the bar gets excited: The judge will have to talk first, and so on.

RULE A-12. REFERENCE TO MASTER -- EXCEPTIONAL, NOT USUAL.

The Chairman. We will pass now to Rule A-12.

Mr. Clark. There are several suggestions of form here. I think there is nothing of substance. Mr. Morgan, for example, suggested that we take out the "which" clause in lines 3 and 4, and put it in a separate sentence. I think that may be a good idea:

"As used in these rules, the word 'master' includes 'referee' or 'examiner'."

The Chairman. That is a matter of form.

Mr. Clark. There is one thing which is requested here, and I will just mention it. I think this is what you wanted--this provision as to "includes an examiner".

Later on, in Rule A-14, we state that the order of reference may state the powers of the master. That is all we have on those several provisions in the equity rules as to an examiner to take testimony. I think that is enough. I just want you to have it in mind. That is what we have done to cover the provisions in the equity rules -- Rule 49, evidence taken before examiners, Rule 51, Rule 52, Rule 53.

Mr. Dodge. We do not provide for examiners anywhere else in these rules?

Mr.Clark. We practically provide for them; yes. That is, we now make it a master, and you may have an order of reference which is simply to take testimony.

Mr. Dodge. We provided for testimony before any officer of the State in such cases.

Mr. Clark. Well, we may not need that in these rules at all. That is, the matter is already covered to a considerable extent in the discovery and deposition section. This, however, repeats it in a little different way. I talked to

Mr. Sunderland about it to some extent. I think he thought it did no harm to include this; but I have no feeling either way. I just want you to know the point. There were these several provisions in the equity rule as to taking testimony before an examiner. We have just incorporated them here.

Mr. Lemann. I think we should do it. Otherwise, the profession will think we are restricting the use of a master to the discovery cases. We had that up, you know, when we were talking about those discovery cases. This first sentence is to refer to the discovery section, is it not, Mr. Reporter?

Mr. Clark. Yes. I think that is Rule 30; is it not?

Mr. Sunderland. Yes. I think this reference ought to be taken out, however, and a provision put into Rule 30 (c) that the rules regarding references to masters do not apply to depositions. I think another arrangement is better.

Mr. Dodge. Do you differentiate anywhere in the rules between functions of a master and an auditor?

Mr. Clark. No; not as such. That is, now the term used in all cases is "master"; but the master may be, in the order of reference, charged only with the duties, practically, of an auditor.

The Chairman. Do we need to say anything in these rules about the practice or power of the court to refer matters of account to an auditor, and say that his report may be received in evidence prima facie? You have covered the point by inference here.

Mr. Lemann. There is something in Rule A-14, I think, line 17 and following, about that.

The Chairman. Is there anything else of substance in

Rule A-12?

Mr.Clark. I have not anything. We will strike out this reference to Rule 30, and you will take care of it in the other rule?

Mr. Sunderland. Yes.

RULE A-13. PROCEEDINGS BEFORE MASTER.

The Chairman. We come now to Rule A-13. What do you mean by "as soon as he reasonably can after the same is brought before him"? I should say "after he is appointed." That may mean that he cannot do anything until the parties appear and bring the case before him.

Mr. Clark. That came from the equity rules. Mr. Morgan and Mr. Dobie suggested the following:

"When an order of reference is presented to the master he shall immediately set a time for the proceedings therein at as early a date as possible and assign a place therefor, and shall give due notice to each of the parties and their attorneys."

The Chairman. That is better -- "when the order of reference is presented" instead of "when the case is brought before him".

Mr. Clark. We accepted that as all right.

Mr. Dodge. This is just a copy of Equity Rule 60; is it not?

Mr. Clark. Yes; but I just read you a suggested change which I think is better than the equity rule. We are perfectly willing to take it.

Mr. Olney. Will you read that again, please?

Mr. Clark (reading:)

"When an order of reference is presented to the master

he shall immediately set a time for the proceedings therein at as early a date as possible and assign a place therefor, and shall give due notice to each of the parties and their attorneys."

The Chairman. The equity rule had the phrase that he should do that as soon as he could after the case was brought before him. Nobody knows what we mean by "bringing the case before him".

Mr. Olney. It is an objection to form.

The Chairman. That is all.

Mr. Olney. So far as objection to form goes, I do not know whether it is worth bringing up; but the rule says:

"and if either party shall fail to appear at the time and place appointed, the master shall be at liberty to proceed ex parte, or, in his discretion, to adjourn the examination and proceedings to a future day."

The one thing that he ought to have authority to do is to proceed ex parte. The right to a continuance is, of course, implied. It seems to me those words are unnecessary. It does not make much difference, however.

Mr. Dodge. The right, in his discretion, to proceed ex parte.

The Chairman. If you say he may proceed ex parte, then if you do not say he may adjourn, he might infer that he had to proceed ex parte. That is why we put them both in.

Mr. Olney. It says:

"the master shall be at liberty to proceed ex parte".

The implication is that he need not unless he wishes to.

Mr. Clark. This, again, is the equity rule. Wait a

minute; let me see. No; I guess Judge Olney --

The Chairman. Would you object to a provision that he may, in his discretion, adjourn the hearing?

Mr. Olney. No; I simply say that it is quite unnecessary.

Mr. Dodge. It is in the equity rule just in that language.

Mr. Olney. I was just looking at it as a matter of shortness.

The Chairman. You say he may proceed ex parte, and stop.

Mr. Olney (reading:)

"The master shall be at liberty to proceed ex parte".

In the very nature of things, that implies that he does not have to do it.

The Chairman. I think that is a matter of form.

Mr. Olney. It is just a pure matter of form.

Mr. Sunderland. Mr. Chairman, I wonder whether Equity Rule 52, with regard to attendance of witnesses before a master, might not be introduced here. Mr. Clark has made a suggestion to me as to where that should be dealt with. We have no provision anywhere, and this seems to be an appropriate place to put in the substance of Equity Rule 52 regarding subpoenas to be issued in case of reference to masters.

Mr. Lemann. Could we have the same provisions you have as to compelling the attendance of witnesses? Would it be appropriate to make a cross-reference here? I am just wondering.

Mr. Sunderland. It would not apply very well.

Mr. Lemann. It would not apply?

Mr. Sunderland. No. This equity rule authorizes the clerk to make

out the subpoenas in blank and hand them over to be filled out by the master. There is certain mechanism here that does not apply to a deposition case.

Mr. Lemann. You think it is important to preserve that?

Mr. Sunderland. The master does not issue any subpoenas at all. These things are all done by the parties.

Mr. Lemann. I just wondered whether the difference in substance in the two situations in this respect was important enough to justify the difference in machinery. Maybe it is. I have not thought about it.

The Chairman. If you do not provide expressly that the master himself can issue the writs of subpoena, then they have to go to the clerk for them; do they not?

Mr. Sunderland. This equity rule provides that the clerk shall issue them in blank, the master can have them, and he can bring in witnesses as he pleases. It seems to me that is a good provision to have.

The Chairman. I think it is. I think that would be a good place for it.

Mr. Dodge. Is there to be any difference in the manner of getting witnesses before a master and getting them before a court?

The Chairman. The only difference suggested is that here the clerk can furnish the master with the blank writs of subpoena, and then the master can issue them.

Mr. Dodge. Is not that substantially the same as in proceedings before the court?

The Chairman. Yes.

Mr. Clark. We are going to have a provision for

subpoena before the court. I do not know whether this could be worked in there or not.

Mr. Dodge. I think it ought all to be the same.

The Chairman. I do not know why the master should be fooling with the thing. If you have a provision that in a hearing before a master the parties can get writs from the clerk and serve them themselves, just the way they would if their witnesses appeared in court, why is not that all right? Why channel it through the master?

Mr. Sunderland. Probably it would work perfectly well.

The Chairman. I think it would be simpler. Nobody wants to have to go to a master to get a subpoena for a witness.

Mr. Dobie. In other words, you do not want to bother the master with that. Leave it up to the parties.

The Chairman. I do not want to bother the parties to have to go to the master. They ought to be able to go to the clerk and get their writs of subpoena, just as they would if the case were going to be heard orally.

Mr. Lemann. In the case of discovery, how do you get your witnesses there? What did we do about that?

Mr. Sunderland. The parties handle that in the case of discovery.

Mr. Lemann. Why not here? That is really what I meant to ask. The simpler we can make it, the better. Why not have the same way of gettingthem in both cases? That is what I am trying to find out. Why should there be a difference?

Mr. Sunderland. In the case of depositions, you have to serve notice on the other party of the calling of the witnesses. Here you do not have to serve any notice. We have

machinery there for notifying the other party as to who the witnesses are who are to be called for deposition.

Mr. Lemann. Why should not that be here, too?

Mr. Donworth. Have we not a section on subpoenas? I thought we had about orders. I thought we put in an express clause that subpoenas could be issued by the clerk.

Mr.Clark. We were directed to; yes.

Mr. Donworth. Then just add there "whether the appearance is required before the court or before a master."

The Chairman. That is the simple way to do it. We have agreed, if you do not object, to a clause in connection with another rule, where it deals with writs of subpoena issued by a clerk, just to insert a clause there "whether the witness is to be brought before the court or before a master", and have the same practice for both.

Mr. Dodge. Have we clearly provided that subpoenas duces tecum not in connection with depositions, but in connection with a trial in court or a trial before a master, both have to be ordered by the court?

Mr.Clark. That was your direction. Of course the rule is not drawn yet; but the direction the other day was that regular subpoenas may be signed by the clerk, but subpoenas duces tecum must be signed by the judge, or may be ordered by the judge.

The Chairman. Did we agree to that, or did we conclude that we would let the attorneys issue the writ, and then let the man make a motion to quash the writ if it is unreasonable?

Mr. Cherry. I thought the latter.

The Chairman. I thought we adopted the latter -- not to

bother the court with writs of subpoena, because he would not know what objections there might be to it, but let the parties get writs of subpoena from the clerk just the way they do ordinary subpoenas.

Mr.Clark. All right; just so we have it clear that in both cases the subpoena is to be issued by the clerk.

The Chairman. With the power, in the case of subpoenas duces tecum, for the court to quash them.

Mr. Donworth. Would you have to mention that?

The Chairman. Perhaps not.

Mr. Donworth. Would not that be implied?

Mr. Sunderland. Would that be true in the case of depositions also? That would hold everything up, if you had to go back to the court.

Mr. Lemann. Something was said by you about taking a deposition in Chicago -- that you had to get the court out there to order a subpoena duces tecum in connection with the appearance of a witness. I have a vague recollection of something about that.

The Chairman. Of course a subpoena duces tecum may be unreasonable and burdensome in its requirements; but it seems to me that when you apply to a court ex parte for a writ of subpoena, he does not really know whether it is burdensome or not, and he has not really anything to pass on; but if you go and get your writ from the clerk, then the other party may say,"This is going to take a dray-load of books", and he walks into court and objects. That is true whether the writ of subpoena is issued by the court in which the action is pending or by the district court in California as an aid to

the court trial in New York. In either case you can go before the court issuing the writ, and say, "Here: This is an unreasonable thing", and then the court has both sides before him, and can determine whether or not it is burdensome.

An ex parte application to a court is the usual thing, I think. He makes the order, and then he has to take it back the next day when the other fellow comes in and points out the burdensome nature of it.

Mr. Olney. May I ask the Reporter about a thought that occurred to me this morning? Is there any restriction in here which would prevent the court from issuing a subpoena returnable forthwith? Is there any particular limit in that respect?

Mr. Clark. Of course we have not yet drawn the rule, anyway. It is anything we want. I have not yet appreciated the necessity of specifying directly on that point. I should be glad to hear further.

Mr. Olney. The only reason why I ask is that I saw that power of the court to issue a subpoena returnable forthwith used very effectively to bring out the truth.

The Chairman. I do not know of anything in the statute which says that you have to give the witness any notice. You can make the subpoena returnable at the hearing. If it is going to be in two hours, it can be returned, and the witness has to be there unless he can show that he did not have time to get there. I do not think we have to provide expressly that it may be returnable forthwith.

Mr. Olney. I do not think you do; but I was calling

attention to the fact that we want no restriction upon the power of the court in that respect.

The Chairman. Is there anything more on Rule A-13? If not, we will go to Rule A-14.

RULE A-14. POWERS OF MASTER.

Mr. Clark. Rule A-14 I think is probably all form. Mr. Morgan has suggested a rewriting of the first part. We followed more closely that he did the language of the old equity rule. I do not know whether that is important or not. Does your provision provide that the master may be only a master to report testimony?

Mr. Morgan. (Reading:)

"The order of reference to the master may so specify or limit his powers as the court may deem wise."

So that would limit it in any way the court may desire, of course.

Mr. Donworth. I think there should be very full discretion on the part of the court regarding the master's powers.

Mr. Morgan. Yes.

Mr. Clark. You will notice that in both forms of statement the master has power to rule upon the admissibility of evidence unless the order of reference limits that, which I believe is what the committee wanted.

Mr. Morgan. Of course that is the same subject we discussed before. I supposed the committee decided on that.

Mr. Dodge. This reads all the way through as if the master were to do the examining of the witnesses. It is curiously inapplicable to the ordinary situation. It

apparently gives the master authority to summon the papers, etc. I understand the parties are going to do that on a subpoena issued from the clerk's office.

The Chairman. Why should the master have "full authority to examine the parties"? Why not let the lawyers do the examining? That is line 7.

Mr. Clark. Yes. Well, I have no answer except that that is what the equity rule says.

Mr. Donworth. I take it that is what he means.

Mr. Morgan. I suppose he could ask questions himself if he wanted to; could he not?

Mr. Donworth. Of course he could; but lines 7 to 13 seem rather out of touch with ordinary conditions.

Mr. Lemann. Is this the language of the equity rule?

Mr.Clark. Yes; it is.

Mr. Donworth. I take it this really means his jurisdiction and his power, rather than the particular act.

The Chairman. You treat the word "examine" as meaning "receive the evidence". That is what they mean by "examine".

Mr. Dodge. Are we giving him authority to require the production of books, papers, writings, vouchers and other documents if a subpoena duces tecum is not obeyed? Is that it?

Mr. Lemann. That is in the equity rule.

Mr. Morgan. Why should he not order them without a subpoena duces tecum if he wants to?

Mr. Sunderland. This gives him a lot more power than the court has.

Mr. Morgan. Oh, no!

Mr. Lemann. And it has made no trouble in the equity rules; has it?

Mr. Clark. He can order any evidence in that he thinks ought to come in.

Mr. Olney. Trial before a master should proceed in just the same way as trial before the court.

Mr. Morgan. To be sure.

The Chairman. I understand your definition of "master" includes examiner, auditor, and all that. It is one thing to give the master an additional function -- that is, to make findings -- and it is another to bring all these things in.

Mr. Morgan. The order of reference, of course, does this particular thing. The order of reference to the master may specify or limit the powers as the court may see fit. If he is an unlimited master, then he has these powers.

The Chairman. I see.

Mr. Morgan. That was the theory of the equity rule, I understood.

The Chairman. The order of reference may fix that according to the requirements of the case.

Mr. Dodge. I think, as a matter of form, that could be shortened up and made to read more like the real proceedings that go on -- that second paragraph.

The Chairman. Probably.

Mr. Morgan. What do you think about putting in these things that are in the equity rule? Your contention is that they ought not to be there at all, is it not, Mr. Dodge?

Mr. Dodge. Yes; I am objecting notwithstanding the fact that they are in the equity rule, as I knew.

The Chairman. Just leave it generally that the order of reference may fix his powers.

Mr. Dodge. Yes.

Mr. Morgan. If we should just say "necessary and proper for the efficient performance of his duties", I should suppose that would be plenty.

Mr. Olney. As a matter of form, why not simply say that trial before a master shall be conducted in the same way as trial before the court, and with the same power in the master with relation to evidence and requiring the production of evidence that exists in the court?

The Chairman. That is where the master is a court. "Master" means auditor, referee, examiner, and everything.

Mr.Dodge. This applies only subject to restrictions in the order of reference.

Mr. Donworth. I rather favor taking over the equity rule. I recognize the criticism of Mr. Dodge as being apt; but it is here, and it has worked well. I think it is better to retain it.

Mr. Lemann. I should think so. You have a provision here that you can limit it. If he is not a real, true master -- only an auditor or examiner -- the person who takes such a reference can provide in the order for a limitation of his powers.

Mr. Olney. I should like to see an improvement on the equity rule, which Mr. Dodge says is not genuinely responsive to thepractice. It does not express the practice clearly. It is not well worded in regard to that. We are trying to form a code of procedure here which will be of a more workmanlike character than this equity rule; and if the idea can be

better expressed than in the equity rule, I should say we had better do it and adopt it. It is largely a matter of form. That is going to come up. The Reporter has the suggestion. It may be he may be able to recast the rule in some way.

Mr. Clark. I shall be glad to do either way.

The Chairman. This rule is drawn on the theory that unless the court expressly limits the authority in the order, a mere examiner may rule on evidence and do all sorts of things. When I say "examiner" I mean a master who has not the duty of making any findings or decisions.

Mr. Clark. We put in expressly at the top that the order of reference might do certain things, and might restrict in that sense. Mr. Morgan's change does not provide for that specification. I suppose it is not strictly necessary, because if we say that the court may limit, it implies it; but, you see, we do have the express provision --

Mr. Morgan. (reading:)

"The order of reference to the master may so specify or limit his powers as the court may deem wise."

What is wrong with that?

Mr. Clark. We listed, as one way of limiting the master's power, receiving and reporting evidence without ruling thereon or otherwise. The question is whether you wanted to make that point a little emphatic by stating it.

Mr. Morgan. I do not think so.

The Chairman. Your rule is constructed on the theory that unless you limit it, the master will have all these powers, although he is only the fellow who is going to sit around court and transmit the evidence brought before him.

I am wondering whether it would be better to reverse the process, and require the order of reference to define his powers.

Mr. Morgan. It might be.

Mr. Donworth. This rule is a supplement to the rule that all evidence must be taken in open court except as otherwise prescribed by the rules. I have not in mind Mr. Morgan's substitute, but I like the way this begins:

"The order of reference to the master may specify particular powers and functions of the master with respect to the action and limit his powers to particular issues, or to receiving and reporting evidence without ruling thereon or otherwise. Subject to any restrictions stated in the order of reference, the master shall regulate"--

And so forth. What we are doing here is supplementing the requirement that all evidence be taken in open court. That is, we are creating another method of taking it, with all these incidental powers. We are saying that can be done. It can be done, but we still leave it to each particular order to specify what shall be done in that particular case.

The Chairman. Have you any proposal to make with regard to that?

Mr. Donworth. As I say, I have not read Mr. Morgan's suggestion.

Mr. Morgan. Mine does not purport to do anything differently than this.

The Chairman. Then it is just a matter of rearrangement of expression.

Mr. Morgan. Yes. I did not intend to do anything except

what this does. The only question, I think, is the one raised by Mr.Dodge as to whether we ought to put in this matter which does not describe what actually happens -- that is, that the master takes evidence and requires the production of papers, etc.

The Chairman. It provides that he may do that unless the order limits or restricts him. My suggestion was that he ought not to be allowed to do it unless the court order gives him the authority.

Mr. Olney. We might provide expressly that where the matter is a general reference, the master shall have power to conduct the proceedings as the court shall determine. Otherwise, he shall be limited.

The Chairman. You cover the whole thing by merely saying that he shall have such powers as the court may order. The court makes his order according to whether the man is going to make findings of fact and file a report and recommendation for judgment, or whether he is just going to sit there like a notary public and record the evidence. The whole thing can be taken care of by giving the court power, requiring the court in the order of reference to specify the nature of the master's functions.

Mr. Morgan. "Shall specify" instead of "may specify".

The Chairman. According to the nature of the duties he is going to perform.

Mr.Dobie. I supposed the idea was to cover these things when, for some reason, the court omitted to do that, or was not precise in regard to it. If you have a good judge, I think you are dead right, Mr. Chairman. If you have a good

judge, and he really goes into the matter of whether it is necessary in the particular instance to give particular powers to a master, or withhold them, I think the order would be fine; but it may be necessary to specify.

The Chairman. I think probably it is safer to assume that the order will be inadequately drawn, and omits that. (Laughter.) Have you any proposal to make, then, or shall we just leave Rule A-11 with the understanding that Mr. Morgan's recommendations as to form and rearrangement shall be considered in the redraft?

Mr. Dodge. And also the general question that the rule shall not read as if the master were to examine the witnesses.

Mr. Clark. On that point I should like a little expression of opinion. Generally, should we use the language of the equity rule, which is what we are doing, or shall we re-write it in modern language?

Mr. Dodge. We have changed the equity rule a good deal. Your second paragraph is very different from the equity rule.

Mr. Clark. I am perfectly willing to change it.

Mr. Cherry. I think it should be rewritten to express what happens.

The Chairman. Yes. Lawyers who are not accustomed to the equity rule do not know what it means. They would look at this, and they would say, "It is like giving the court power to examine jurors. All the questions have to be propounded by the master." That is what it literally says.

Mr. Clark. On the second paragraph we did try some rewriting. Mr. Morgan has some suggestions there. That is but a part. This is the accounting thing.

The Chairman. Are they matters of substance or of expression? Does he change your substance?

Mr. Clark. I think so far as we and Mr. Morgan are concerned, it is form; but you raised some question a little while ago, did you not, about the accounting provision? I do not know that you wrote it.

The Chairman. No; you dealt earlier with the matter of auditor, and you referred indirectly to the practice in a jury case. It is proper to refer to an auditor who makes findings which are prima facie evidence before the jury. You impliedly recognize that practice is Rule A-12. You say:

"And shall be made in jury cases only to simplify the issues when such are complicated."

Now, that kind of an auditor, recognized there in matters of account, may have other functions than simplifying the issues; and of course the function of an auditor in a law action is to produce prima facie evidence. It is a practice that has been favored by the courts, and I do not know that it is necessary to make any express mention of it. Why not mention it? It is a very nice practice, but lawyers generally are not very familiar with it.

Mr. Donworth. I think there is a rule on that subject, based on ex parte Peterson.

The Chairman. I thought the Reporter said this was the place, here.

Mr. Dodge. No; I think that comes in later -- the difference between jury trials and other trials.

The Chairman. Then let us drop it.

Mr. Dodge. Is the second paragraph necessary? It just

goes into detail as to how a party in a particular case shall prove his case, and gives the master authority to order him to have a certified public accountant if he is content to rest on his own bookkeeper.

Mr. Olney. Mr. Dodge, it seems to me that that provision, "including a statement by a certified public accountant", is very necessary if you have in the rule the proposition that the account shall be cast in the form of debtor and creditor. That rule that it shall be cast in the form of a debtor and creditor account is all right where you are examining the accounts of a trustee, for example, or something of that sort; but when it comes down to examining the books of a business, a large concern, it is almost impossible to do it in that fashion.

The Chairman. It says "or in such other form * * * as he may think proper and convenient under the circumstances."

Mr. Olney. Yes; but I want particularly "including a statement by a certified public accountant".

Mr. Morgan. And that may be required.

Mr. Olney. Yes; because that is going to short-cut a lot of these things.

Mr. Dodge. An ordinary case of accounting is where you are suing, perhaps, a corporate officer to account for secret profits and things like that. How is this applicable in the ordinary case of that kind, in the case of a bill to compel somebody to account for something that he ought not to have kept?

Mr. Olney. It is not; but these actions of accounting sometimes extend far beyond that, and there ought to be the authority there.

Mr. Dodge. Suppose the plaintiff is desirous of resting upon the accounts as kept by his bookkeeper: If the master does not believe that accounting, should he have authority to order that man to go to an expert public accountant?

These are details as to how a particular case may be proved. They do not seem to me to be necessary.

Mr. Lemann. I think there ought to be some way by which a judge can get the benefit of an expert accountant's report where the accounting is intricate. I have often seen cases of that kind, where the judge says, "Well, I am no accountant or bookkeeper. This man says this, and the other man says that." Now, of course this is tried by a master. This is not the judge. The master is ordering a party here to help him understand what the party is talking about.

Mr. Olney. I had an experience in this thing not so very long ago in which a large cooperative, doing business all over the country, was sued for an accounting by one of its members. The books of the cooperative were thrown open to him, and he made his examination, and did not find anything the matter with them, or anything of that sort. He finally came into court, although he had made his examination, and put before the court certain specific objections, which the court overruled, every one of them. Then, at the end of that, he insisted that his action was one for an accounting, and that in that form of action it devolved upon the defendant who was liable to account -- and there was not any question but that the defendant was liable to account -- to make a complete showing of every item that entered into the account.

Well, we would have been there for five years producing

all those items of account, for they had come from 20 different offices, scattered all over the country, to make up the final result.

What I am concerned in is that that be not permitted, or that the court have authority, or the master have authority in a case of that character, to be satisfied in the first instance with the statement of a certified accountant, and to say to the plaintiff in such a case as that, "Here is this report of the certified accountant. If you have any objection to it, point it out; point out the particulars." This, however, was very largely a nuisance suit, and the party wanted to hold up everything and go down the line with it, and be in that position where he could spend his time questioning every item produced.

It is that sort of thing that I was anxious to get away from by this.

The Chairman. That is a pretty live question, in a way, now.

Up in New York, right now, there are many, many suits being brought by beneficiaries of trusts against all the trust companies up there to demand an accounting of the trust. The thing may cover many years, and be quite complicated; and the question has arisen whether they are entitled to an accounting unless they prove some items, at least, in which there is evidently something wrong; whether they can just go into court and, without pointing out any particular matters that have been badly handled, demand an accounting of the whole thing, or whether they at least have to show that there are some items which are questionable before they can get their

account.

That is another aspect of the same thing. You have the same idea, that if there is a prima facie showing of some kind, the man ought to be required to point out what he is complaining about.

Mr. Olney. If a certified public accountant brings in a report that he has examined the books, that they have been honestly kept so far as he can see, and the result is so and so, and so and so, and so and so, stating it with sufficient detail, it should rest with the other party to point out what is the matter. The accounting should be confined to an examination into the points to which he objects.

The Chairman. Would not that necessarily follow if you have a certified public accountant's report covering the whole field of operations? That answers the suit unless the plaintiff can show some particular thing in which he thinks wrong has been done.

Mr. Olney. In the case that I have, the party was relying upon the idea expressed in the decisions, and which has been incorporated here in the rule, that the parties shall cast their respective accounts in the form of debtor and creditor.

The Chairman. There is the alternative of another form of statement, "including a statement by a certified public accountant". It is left discretionary.

Mr. Olney. I want that in there. There was some suggestion that it come out.

The Chairman. Nobody has made any motion to that effect.

Mr. Dodge. I simply raised the question.

Mr. Olney. Mr. Dodge was speaking of it. He raised the question, and I am very anxious that it stay in.

The Chairman. You are satisfied with this alternative?

Mr. Olney. Yes; I am satisfied with the alternative.

The Chairman (to Mr. Dodge). Do you wish to move to strike it out?

Mr. Dodge. No. It simply struck me as being applicable toprobate accounting, but not at all applicable in the ordinary equity suit.

The Chairman. It is all discretionary here.

Mr. Donworth. Has this statement of Mr. Morgan's, "accompanied by a statement of a certified public accountant", gone in, or is that treated as a matter of form?

I have had some experience in accounting suits, particularly in patent accounting, probably the most involved things, because you have to go into the question of what the costs were of their operating their plants, and what they have saved. It is a very difficult thing.

I think it is all right to have the master have power to require a statement of a certified public accountant; but I do not think he should have power to require the first presentation of the account, which is really a pleading. He calls on whichever party has to account. He says, "Now, present your account". This rule very wisely provides that it shall be in any form that the master requires, because there has been a great deal of useless technical time spent in debating whether a certain account as presented is really in debtor and creditor form. So it is very much wiser to leave it in the form that he prescribes. If Mr. Morgan's thought

should be adopted, the only thing I should object to would be about this word "accompanied".

Mr. Morgan. "Be in the form of or be accompanied by".

Mr. Donworth. At any stage -- I do not know about the words, but at any stage he may require the statement, not necessarily in this first pleading that goes in. That, really, is a mere matter of form.

The Chairman. If it is, let us refer it.

Mr.Donworth. "And may, in any proper case, require a statement by a certified public accountant."

Mr. Olney. "And may in any proper case", I should say, "accept the statement of a certified public accountant".

Mr.Donworth. You would not want it to be beyond rebuttal; would you?

Mr. Olney. No; that is it --he may accept it in lieu of calling for a statement by a certified public accountant. What this partyproposed to do in our case was to compel us to come there and prove every item of that account by witnesses who were testifying from their own knowledge. That is what he was going to do.

Mr. Dobie. Salesmen, and people of that kind?

Mr. Olney. Oh, he was going down the line.

Mr. Morgan. Everything.

Mr. Olney. If, under those circumstances, we had produced a statement by a certified public accountant, the master should be justified in receiving it and saying to the man, "Here: If you have any objection, just point out the item."

Mr. Donworth. Very often, though, it is a matter of

months or years to get three years of operation of smelters where you used certain devices; how much did you save, and all that? Very often it would take, and in numerous instances has taken the accountant months to check up those things. All I am arguing now is that the parties should be allowed to put in their accounts in the form that the master requires; and the statement of a certified public accountant, while fully within his power, need not be required to accompany this.

Mr. Olney. I quite agree with that.

Mr.Morgan. Yes; I do, too -- quite.

Mr. Clark. I was wondering if Judge Olney did not want the masters to have power to require this, but merely to examine.

Mr. Morgan. No; he wants them to have power. He wants just what you have.

The Chairman. I think you can get that out of the stenographer's record. Let us pass on now to Rule A-15.

Mr. Donworth. Mr. Chairman, with your permission, I should like to go back for a moment to Rule A-12. You raised a point that I thought was covered by Rule A-12 on Rule A-13, I think, about the case where an auditor is appointed in a jury case.

The Chairman. Does that not come later?

Mr. Donworth. No; it comes before. If we go back to A-12, the leading case, I think, is entitled ex parte Peterson, where the Supreme Court held that it was perfectly proper in a jury case, following the practice so prevalent in Massachusetts, to have an auditor appointed who really tries the whole case in the first instance, and makes findings which go to the

jury as prima facie evidence, subject to the right of any party to proceed independently.

In lines 5 and 6, the rule says:

"and shall be made in jury cases only to simplify the issues when such are complicated."

I suggest that the Reporter refer to the case of ex parte Peterson, if I have the title correctly -- and I think I have -- and go as far as ex parte Peterson goes in allowing these findings of the court or auditor to go before the jury as prima facie evidence.

The Chairman. That was my suggestion, and I was told that that practice was taken care of in some later rule; so I subsided.

Mr. Donworth. I find now that it is an earlier rule.

The Chairman. It is an earlier rule?

Mr. Donworth. Rule A-12 is the one.

Mr. Clark. That is correct; it is Rule A-12.

Mr. Donworth. It attempts to cover the matter, but it does not go far enough.

Mr. Morgan. Rule A-15 refers to the findings, I think.

Mr. Donworth. Does it? I am sorry.

Mr. Morgan. It does not touch your point, though, Judge, I think, because your point is the extent of the reference in the first place; and Rule A-15 tells what shall be the effect of the findings when there is such a reference.

Mr. Donworth. Repeating my suggestion, lines 5 and 6 in Rule A-12 --

"and shall be made in jury cases only to simplify the issues when such are complicated" --

would seem to limit the effect of the auditor's work; and I think we should go as far as Ex parte Peterson permits.

The Chairman. It does not limit it, because it says, in lines 2 and 3:

"Except in matters of account".

So it excepts from line 5 matters of account, and it recognizes in a vague way the power to have a master or auditor to take prima facie evidence.

My point is this: Rule A-12 does not prevent the practice in that case. It recognizes it. It says that except in matters of account, the reference shall be in jury cases to simplify the issues. Where it is a matter of account it may be more than a simplification of issues. My point is that the draftsman had not expressly anywhere referred to that case and said expressly, "You may refer matters to an auditor for prima facie evidence for a jury"; and I thought it ought to be done.

Mr. Donworth. Because I so apprehended it, I suggested that we go back to this rule and put it right in there.

Mr. Clark. This is what the rule now provides -- that in jury cases you may have a reference in matters of account, and also to simplify the issues when they are complicated.

The Chairman. Where is the rule now?

Mr. Clark. That is the A-12 rule.

The Chairman. I am not satisfied with that.

Mr. Clark. Then it is a form of expression. It is there, but it might be better expressed. In Rule A-15, it is provided in lines 9 to 12 as to the effect of the findings, and that they shall be prima facie evidence, and the matter

therein contained may be read to the jury.

The Chairman. All right; I guess that is it.

Mr. Clark. The two together cover those two points.

Mr. Dodge. I think the Peterson case is fully covered by Rule A-12. The court never would refer the matter unless the issues were complicated, under the Peterson case.

Mr. Donworth. That is all right, Mr. Dodge; but it says--

"and shall be made in jury cases only to simplify the issues when such are complicated".

Mr. Dodge. "Except in matters of account".

Mr. Clark. Perhaps we ought to turn it around, and state the "except" clause more affirmatively. That is really what you want; is it not?

Mr. Donworth. I am really with the Chairman, that we should go as far as Ex parte Peterson.

The Chairman. I think we should wait until we get to Rule A-15, and see whether we have expressly provided for it.

Mr. Loftin. We are on Rule A-15 now.

Mr. Clark. In connection with Rule A-15, you had better look at lines 9 to 12 on the point we have just been considering; and then there is another point on the next sentence that I will speak of afterward.

The Chairman. Rule A-15 applies to the particular case we have in mind:

"In a case tried by jury his findings on the issue shall be prima facie evidence of the matters therein contained and may be read to the jury, subject to the action of the court upon objections to such findings filed prior to or made at the time of such reading."

Does not that cover it?

Mr. Donworth. Yes; unless it is restricted by the preceding language of Rule A-12 which says --

"and shall be made in jury cases only to simplify the issues when such are complicated".

The Chairman. But in line 2 it says "except in matters of account"; so the limitation as to simplification of issues does not apply to matters of account.

Mr. Donworth. That is true; but I think it should apply. I think Ex parte Peterson is not limited to matters of account.

The Chairman. I see.

Mr. Dodge. It is limited to matters where the issues are complicated.

Mr. Donworth. Yes; but the power of the auditor is not limited to simplifying issues.

Mr. Morgan. You are right.

Mr. Dodge. He tries the whole case.

Mr. Donworth. Yes; and the rule should so state.

Mr. Clark. I think so.

Mr. Dodge. I should like to say, with reference to Rule A-15, that we are very familiar in Massachusetts -- perhaps more so than in any other State of the Union -- with this matter of reference to auditors. Cases are all the time being referred to auditors; and there is a provision in the first sentence which is entirely inconsistent with the ordinary practice and with the convenient use of an auditor's report; namely, the requirement that he shall annex to his report all exhibits, affidavits, depositions, etc.

That vastly complicates the hearing before the jury.

The auditor's report is only a piece of evidence. It should not be cluttered up with a statement of what the evidence before him was. The case is wholly retried. All the witnesses ordinarily are called again where the auditor's report does not settle the case, and it is very inappropriate to have the question debated before the jury as to whether the auditor correctly dealt with the evidence before him. It very much complicates the use of an auditor's report, and is, I think, out of place.

The Chairman. You want an exception made there in the case of an auditor?

Mr. Dodge. Yes.

The Chairman. You would have to leave in the general clause as applied to masters' reports and other forms.

Mr. Donworth. What would the suggestion be, in words?

Mr. Dodge. Those mandatory requirements in the first sentence I think ought not to apply to an auditor's report.

Mr. Donworth. Oh, yes!

Mr. Dobie. Do you mean that he ought not to file those things, or that they ought not to be read to the jury?

Mr. Dodge. There is no need at all of filing them. If the auditor's report does not settle the case, it is tried all over again, and his report is just a piece of evidence to which the jury may give such weight as they see fit.

The Chairman. Your point is that it enables the adverse party to try to undermine the prima facie effect of the auditor's findings by mixing him up on what he had before him?

Mr. Dodge. Exactly.

The Chairman. Is it the sense of the meeting that that

requirement on the part of the master to file with his report all exhibits, affidavits, depositions, or other papers, etc., be made not to apply to an auditor's report which is to be used as prima facie evidence?

Mr.Donworth. I should like to ask Mr. Dodge if he thinks there is objection to the auditor keeping a stenographic report and a list of exhibits and affidavits and depositions, and filing them with the court. Is not the real question about the use of them when you come to the actual trial? Could you leave out any requirement about his returning those things?

Mr.Dodge. Why should he return them to the court? You are not going to have a hearing before the court as to whether the auditor correctly dealt with the evidence before him.

The Chairman. He may hand them back to the parties.

Mr. Dodge. Your only remedy is to move to recommit to the auditor if you can show that he hasmade some mistake; but on all questions of fact he makes his findings, and they are merely a piece of evidence before the jury.

The Chairman. Is it the sense of the meeting that that exception in the case of the auditor be inserted here?

Mr. Lemann. I was just wondering whether you would help the bar any by putting in a rule about the auditor instead of lumping him in with the master and making lots of provisos. That is for the consideration of the Style Committee -- just a matter of form of putting it. Most of us do not ordinarily think, or at least I do not ordinarily think, of including an auditor under the general definition of "master". You are going to make some exceptions now, and I think the committee

should have leave to consider whether it is feasible or wise to put the auditor in a separate rule.

The Chairman. We will refer that to the revision as a matter of style. There are some advantages in covering the whole thing so far as we can in one rule. You can readily say here that except in the case of an auditor, a master's findings shall be prima facie evidence.

Mr. Donworth. If that suggestion goes in, I would suggest at least that it be discretionary with the court in the order appointing the auditor as to what shall be done in those matters, rather than laying down a rigid rule.

Mr. Dobie. Unless the court shall otherwise order -- something like that.

The Chairman. "In the case of an auditor, unless otherwise ordered, he shall not be required", etc. Is there any other suggestion on Rule A-15?

Mr. Clark. Yes.

Beginning at line 12, Mr. Morgan raised the point that even if no objection were made, the court, when he found prejudicial error occurred, did not need to accept the report. What we have been trying to do is to make the case run along, so to speak, when the parties do not act promptly. It has been objected -- Lane states it in his articles on the equity rule -- that a fruitful source of delay here is in getting your master's report confirmed. Lane thought that some procedure should be made for having the findings stand unless promptly objected to.

I should suppose the court would have the power anyway, if it desired, to step in. I do not object to it as such. I

simply do not want to stop the running along of the case if we can help it.

The Chairman. You have a general rule that the court may relieve the parties and extend the time in matters like this.

Mr. Pepper. Mr.Chairman, I suppose this is flexible enough, without a specific provision, to authorize a master to make an interlocutory report to the court for instructions on some question that has come up at the hearing before him. Strictly speaking, this rule contemplates that the proceedings before the master shall not get before the court for review until he files his final report; but there have been a good many instances in which something unexpected turns up before the master which is of real moment, and of sufficient importance in the judgment of the master to require further instructions from the court. I should think it was not necessary to provide specifically for such a case.

The Chairman. I should think itwas not.

Mr. Pepper. May I ask one other question? May it be taken that the Committee on Style will have authority, if necessary, so to modify the language as to cover a case that is not the ordinary case of a reference, but such a case as arises when a court appoints a master to conduct a corporate election?

The Chairman. I should think both Dean Clark's drafting committee and the revision committee would have power to deal with any hiatus in the rule.

Mr. Pepper. Yes.

The Chairman. That is not exactly a change of substance.

Mr. Pepper. No; not at all.

The Chairman. It is covering an oversight.

Mr. Pepper. I say, just mould the language so that there will be no implication that the only jurisdiction of a master is where there is matter of reference in the ordinary sense of that word, as distinguished from something to be done under the supervision of the master as representing the court.

Mr. Dodge. Such as a special master to conduct a receiver's sale.

Mr. Pepper. Yes; that sort of thing. I just wanted it noted on the record so that it would not escape the attention of the revision committee.

Mr. Clark. I think that is a good point. I think perhaps you ought to think of it a little in connection with execution, etc. Rule A-22 provides that the court may appoint a third person to perform an order. I do not know whether it might come in there or not.

Mr. Pepper. Possibly. I just wanted it noted so that it would not be overlooked.

Mr. Clark. In a way, this seems to me a little more like execution than a master; does it not? The court has granted a judgment, now, and has directed some way of carrying out the judgment.

Mr. Pepper. I am thinking of a case, for instance, in which a non-resident stockholder files a bill in the Federal court raising the question of the right of certain classes of stock to vote at an approaching election, some question of the validity of a voting trust, or something of that sort, and it is likely that there is going to be a hot contest at the

election. Sometimes the court thinks it is important, to preserve order and see that the thing is done regularly, that he shall appoint a master to conduct the election. All I meant was that I wanted to be sure that in some appropriate place we had language to show that that case was included and not excluded.

Mr. Clark. Will you look a little later at Rule A-22, and perhaps give me a note as to whether it should come in there or back here?

Mr. Pepper. Yes; I will.

By the way, Mr. Chairman, I suppose it must already have been discussed by the committee whether our rules are applicable to proceedings to test the title of corporate officers who have been elected. With us, we have a statutory proceeding by quo warranto -- not the public quo warranto applicable to the public officer, but quo warranto in cases of private corporations where the election has been peaceable, and one ticket is returned elected and the other rejected, to test the validity of the title of those who are reported as elected.

I do not know whether our procedure is applicable to that case, or whether the parties would have their remedy under the State statute. That has probably been discussed.

Mr. Clark. All we have done on all special proceedings is practically not to state them, but not to repeal anything connected with them. We have left the general provision in Rule A-36.

Mr. Pepper. I see.

The Chairman. That suggestion might be noted in

connection with Rule A-36, to see whether your rule is broad enough to cover it.

Mr. Pepper. Yes.

Mr. Morgan. Mr. Chairman, I think Mr. Clark misunderstood my objection. It may have been due to my misreading his statement. I thought he had a provision in here, as I read it first, to the effect that the court might modify or reject the report of the master without any hearing of the parties if he thought there was error in it. If the rule does provide that, it seems to me it ought not to. When the auditor makes a report, or the master makes a report with his findings, etc., if the court thinks there is error in it, on its own motion, before it rejects or modifies it, the court ought to give the parties a chance to be heard.

The Chairman. Your point comes up in connection with lines 14 to 18?

Mr. Morgan. The sentence beginning in line 12; yes. That was the point.

TheChairman. As I read that, after the objections are filed--

Mr. Morgan. Only after objections.

The Chairman (continuing). The court, without any hearing, could sustain an objection, because the rule says he may do that, or may order hearing on such objections. Your point is that he ought to sustain the objection and grant a hearing?

Mr. Morgan. That is the point.

The Chairman. That seems to be sound; is it not?

Mr. Donworth. The provision that he may take action or order a hearing seems incongruous. He should not order

any changes until the hearing has been had.

The Chairman. That is Mr. Morgan's point.

Mr. Morgan. That is my point in substance.

Mr. Dobie. I think that is important in connection with the practice of settling the report as they have it in some jurisdictions. The master never makes his report until, after having tentatively made it, he has had counsel come before him and argue it. I believe that is proper, and I think this takes good care of that.

The Chairman. Instead of saying "or may order hearing", it ought to say:

"After hearing, the court may modify or reject the same in whole or in part."

Is that the sense of the meeting, that there ought to be a hearing?

(The members of the committee indicated their assent without a vote.)

Mr. Olney. I have a point here which I think is really a point of substance.

The rule provides, in line 16, that --

"The court may adopt the same, or may modify or reject the same" --

That is, the report --

"in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed."

I think that goes too far. It is too much of a limitation on the power of the court. It comes up in two ways. In the first place, this would apparently put the court in very much the position of a court reviewing a verdict, or an appellate court reviewing the decision of a lower court on

the finding. It ought not to be so. The court looking over the report of a master, considering the report of a master, should have much greater authority than that; and in certain classes of cases the Supreme Court, as a matter of fact, has expressly so ruled. For example, if the court concludes that the master's finding of fact is really against the weight of the evidence -- that is, that if the court had had to make a finding it would have made a different one -- it should be permitted to reject that finding.

Also, as this rule is worded, in a way it says that the findings shall be treated as presumptively correct unless the court finds that error has been committed. It is only error that throws some doubt on the correctness of the findings. The whole object of this matter -- I am now speaking of general reference to a master to make a report of findings and conclusions of law -- is to get findings and conclusions of law that accord with the judgment of the court finally.

As a substitute for the language I have just read, "may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been submitted", I will offer as a substitute the following language:

"When the court is fairly satisfied that the master's findings of fact or conclusions of law are incorrect, or that the master has committed error which throws a substantial doubt upon their correctness, the court may modify or reject the same in whole or in part."

Mr. Lemann. Would it be all right to take out the adjective "fairly", and say "satisfied"?

Mr. Olney. It is more than that.

Mr. Lemann. Do you want "fully" there? He has "fully", and Judge Olney has "fairly".

Mr. Olney. I do not like the word "fully" at all.

Mr. Cherry. May I suggest, Judge Olney, that what we have already adopted takes out "fully satisfied". As I read it, that was to be the action of the court when he did not order a hearing, as provided in line 18. Is not that true? Now, I understood we had agreed that there should be a hearing, and so that test, "fully satisfied", goes out with the change we have made.

Mr. Olney. No.

Mr. Cherry. That would be my understanding of it.

Mr. Olney. No, indeed!

The Chairman. Let me call your attention to one thing. The Reporter has called my attention to the fact that Equity Rule 61½ says:

"The report of the master shall be treated as presumptively correct, but shall be subject to review by the court" --

This is on a hearing, of course --

"and the court may adopt the same, or may modify or reject the same in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed."

I do not understand that that prevents the court from saying that error has been committed if the findings are against the weight of the evidence.

That is the equity rule.

Mr. Olney. We wish to make the rule clearly responsive

towhat the law is. The Supreme Court, particularly in rate cases, has said that it will not be governed by a master's findings; it will examine into the matter itself.

The Chairman. That is where there is a constitutional question involved.

Mr. Olney. Where there is a constitutional question involved; and certainly this proceeding, which is merely put there as an assistance to the court in reaching its judgment, should not goso far that the court is required to accept a finding or conclusion when it is not fairly satisfied that it is correct.

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Mr. Clark. Mr. Chairman, may I say that I think it would be very unfortunate indeed to soften the equity rules. Here is a place where there is so much chance for simple delay in the trial, not getting anywhere, and, of course, under the equity rules the court does have the power to step in.

In a way this is a kind of an admonition, but a correct admonition. What is the use of having it referred to a Master if you are going to have it all retried anyway, and we can certainly go so far as the equity rule goes, that is, the statement in the equity rule. I do not think we ought to modify the equity rule. The rate cases, of course, are on the matter of the Constitution, due process, presenting constitutional questions, which are really questions of law.

Mr. Olney. I beg your pardon, Mr. Reporter. The question which is involved in the Rate Cases, and upon which the Masters find, is a question of fact, pure and simple and the deduction from that is a conclusion of law. And the Supreme Court has said, time and time again, so far as these Rate Cases are concerned, they will examine into the conclusions of the Master as to matters of fact on which the judgment depends.

The Chairman. And they have done that under the equity rule which says that the judge in the exercise of his judgment is fully satisfied that error has been committed. So, they have construed the language, "fully satisfied", as you want them to.

Mr. Olney. And in doing so the court has departed from the language of the rule, as a matter of fact.

The Chairman. It depends on what the rule means. I have construed it to mean where the weight of the evidence is against the finding.

Mr. Olney. This language at the present time is misleading, certainly so far as the practice in rate cases is concerned. It lays down a rule that limits the court in considering the findings in which the court, as a matter of fact, is not limited.

The Chairman. Will you read your proposed amendment again to us?

Mr. Olney. "When the court is fairly satisfied that the master's findings or conclusions of law are incorrect, or that the master has committed an error which throws a substantial doubt upon their correctness."

The Chairman. If you will strike out the word "fairly", I would not object to your language.

Mr. Morgan. I would suggest something else along that line:

"The court shall, after hearing the parties, modify or reject the report, findings and conclusions in whole or in part, if but only if it is convinced that prejudicial error has been committed; otherwise it shall adopt and affirm them."

Mr. Olney. That is all right. I would go along with that. The only thing I object to is that word "convinced". You have to convince him.

Mr. Dodge. I would object to the word "fully", and if you strike that out you have expressed the ideas here slightly in different language.

The Chairman. Yes, that "fully" Judge Olney seems to think "fully satisfied". It means beyond a reasonable doubt, or its other aspect is that it means there is no substantial evidence to sustain the finding. That is the real thing you are driving at, whether the court can review the findings on the weight of the evidence, or whether he is merely allowed to set

aside the findings if he thinks there is no substantial language to support them. Isn't that really the essence of it?

Mr. Olney. There is a little more than that. It is the difference in the approach, the difference of view as to what should be the effect of a master's report. I have the feeling that the master's report is for the assistance of the court, and if the court becomes doubtful, reasonably doubtful, as to the correctness of that report, that he should have authority to set it aside or to modify it.

The Chairman. Well, we can vote on whether we will continue the equity rule or adopt Judge Olney's form, or Mr. Morgan's, or we can refer the thing to the Committee to adopt one or the other of these alternates.

Mr. Morgan. I think Judge Olney is right, that when you phrase it one way you phrase it on the theory that the master's report is to followed if reasonably possible, and if you phrase it the other way you regard it simply as advisory to the court, that it can be adopted or not. That is, it is just the phraseology, the attitude of approach.

Mr. Olney. Yes, I think you have expressed it quite accurately, my idea that the same rules which govern a court in reviewing a verdict of the jury or an appellate court in reviewing the findings of the lower court should not apply to a court which is considering on exceptions the report of a master.

The Chairman. I think we are probably all agreed on that. There is no question as to whether the equity rule as worded has that effect. I should doubt whether it was intended to have that effect. Shall we vote on one of the alternate suggestions?

Mr. Lemann. Before we vote on the question of approach, I wonder if we should say that we all agree that it should have only an advisory effect. As Mr. Morgan has worded it, I take it that we would go beyond that; he would say that the court would affirm the master's report unless the court is convinced prejudicial error has been committed.

Mr. Morgan. That is right. That is not Judge Olney's attitude.

The Chairman. If you s truck out "convinced" and put "satisfied", would you accept Mr. Morgan's suggestion?

Mr. Olney. Substantially.

The Chairman. Are you willing to take "satisfied"?

Mr. Morgan. Yes. If I am satisfied I am convinced. Oftentimes I am convinced when I am not satisfied.

Mr. Pepper. Mr. Chairman, there is a real point there that does not seem to me to be met by either of those forms which Judge Olney raises, a very important point, it seems to me. One often knows of cases in which an appellate court, reviewing the findings of a chancellor in equity, or proceedings in which there has been a verdict of the jury, says in effect: Upon the evidence we would have reached a different conclusion from the jury or the court below, but, as there was evidence from which the jury might find as they have done, or there was evidence from which the lower court might find as he has done, we are not at liberty to review those conclusions.

Now, Judge Olney wants to leave it in such form that the court, treating the master's report as something more than advisory, may, nevertheless, be at liberty to draw different inferences of fact from the evidence from the inferences that were

drawn by the master. Is that right?

Mr. Olney. That is exactly it.

Mr. Pepper. I have known of cases in which that point became quite material. The court shrugs his shoulders and says, "It never would have occurred to me to draw the inference which the master has drawn from the facts; he has drawn that inference, there was evidence from which the inference might be drawn, and I am without power to sustain exceptions to his report."

That seems to me to be wrong. The master ancillary to the court, something more than an adviser, but the power to draw inferences of fact seems to me to remain with the court until the court has made its final judgment.

The Chairman. We find in constitutional cases, where the question of confiscation and due process is a matter of fact, the court will form its own judgment on the fact to a large extent.

Mr. Peopper. Yes.

The Chairman. I would like to ask for information with regard to non-constitutional cases, what is the law today in Federal courts as to the weight to be given the master's findings of fact? Can anybody tell me what it is?

Mr. Donworth. I think the rule settles it.

Mr. Lemann. The rule says it can not be set aside unless he is fully satisfied. You would not say the judge should set it aside unless he is satisfied that prejudicial error has been committed? That is what Mr. Morgan wants to say, that the judge shall not interfere with it unless he is satisfied that prejudicial error has been committed.

Mr. Pepper. I would hesitate to use those words because

each one of them fail as a test when you come to the specific case. I would prefer to put it in some such form as this: That the court on consideration of findings of fact by a master shall be at liberty in his discretion to review the inferences of fact drawn by the master.

The Chairman. My question is not what this rule means, but how the courts have applied it. In other words, in the equity practice today in non-constitutional cases under this equity rule, to what extent have they agreed they can review the findings of the master on questions of fact? I think we ought to have an answer to that.

Mr. Lemann. Isn't the judge going to do as he pleases?

The Chairman. Let us see what the courts have held about it. I do not know myself.

Mr. Pepper. I can only answer as to my own circuit.

The Chairman. What do they hold there?

Mr. Pepper. There the courts regard themselves under the equity rule as bound to give to the report of the master the same inclusiveness as would be given to the verdict of the jury; that is, if there is any evidence from which the master might have reached his conclusion, the court feels bound by his conclusion, notwithstanding the court itself would have drawn a different inference from those facts.

The Chairman. What is the rule in other circuits?

Mr. Donworth. I would qualify that in my experience by introducing the word "almost". I don't think the court feels they must follow like a verdict of a jury, but certainly there is not very much difference. I believe you can get a finding set aside more often than you could get a verdict set aside, be-

cause the evidence comes in with a finding.

Mr. Morgan. We have the authority in black and white.

The Chairman. If the court says the findings ought not to be set aside by the court except in case of manifest error, 29 U.S., 512 and several other Supreme Court cases--

Mr. Morgan. We have the best authority right here.

Mr. Dobie. I would not say that, but there are a great many of these cases, quite a number of them, and these conclusions seems to be established by the weight of the evidence. I am reading from the book now, but citing cases from every State:

3 "Less weight, quite properly, it seems, is given to the master's findings of law, which is the peculiar province of the court, than the findings of fact. His findings of fact, when there is a conflict of testimony, must necessarily have very great weight--" Here, I think,is a paraphrase of Camden v. Stuart, which is a United States case, which I think is in line with Judge Olney says:

"* * * But, even in doubtful questions of fact, the better rule is to leave it to be that the court should set these aside when clearly convinced that these are erroneous and obviously opposed to the great preponderance of the evidence, even though there may be some evidence to support them."

Mr. Olney. That is what I am getting at.

The Chairman. What is the title of that case?

Mr. Dobie. Camden v. Stuart, 144 U. S. 104.

Mr. Pepper. May I move that the Reporter embody in his redraft language conformable to the decision of the court in the case cited by Mr. Dobie?

Mr. Donworth. I second the motion.

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

The Chairman. We voted to adopt the rule by the Supreme Court, just read.

Mr. Olney. All right.

Mr. Dodge. I would like to ask one question about this. I take it it is not contemplated, after a non-jury case has been referred to a master, that there should be any possibility of a retrial with introduction of witnesses into court?

Mr. Donworth. That would be an exceptional case. I take it there is nothing to prevent the court from doing so if he thinks the ends of justice require it. That would be a very exceptional case.

Mr. Dodge. The possibility of that is contemplated by the rule, Mr. Clark?

Mr. Morgan. It does not seem to be. You are not adopting the Massachusetts practice of a new trial before a jury, a brand new trial before the jury.

The Chairman. Before the court, you mean?

Mr. Morgan. No, before the jury. There are some jury cases, are there not?

Mr. Dodge. That is provided for. But, as to a master, is there the possibility of a retrial?

Mr. Clark. I did not suppose so. I do not know how far this modification goes, but I think under the rule as originally drawn there would not be.

Mr. Dodge. I never heard of a case where there was a retrial in a court after a master's findings in equity.

Mr. Morgan. Do you have that in Massachusetts in the equity cases?

Mr. Dodge. No.

Mr. Morgan. I thought that.

Mr. Olney. The whole thing would depend upon wherein the court thought the master's report, for example, was wrong. The master might set out some evidence entirely, in which case, in the nature of things, that evidence would have to be taken.

Mr. Dodge. That would be done on recommittal.

Mr. Olney. It might be done on a recommittal, or the court might say, "What is the use of taking this back; I can take the evidence in a half an hour and find out what it is."

Mr. Dodge. He might as well have that power.

Mr. Olney. Let us leave the thing flexible. I am quite sure it is new practice.

The Chairman. There is a clause in brackets at the end here, and I wonder what this means:

"Objections to the report of a master based upon grounds (which were available to the parties during the proceedings before the master) (other than to the findings and conclusions therein set forth)."

Mr. Dobie: Objections to evidence; objections to the admissibility of evidence, I take it. If you did not make that before the master you can make it for the first time before the court.

Mr. Donworth. I regard this as a very excellent elucidation of a very doubtful point. The first part of this had been the undoubted practice-- objections to the report of the master based upon grounds which were available to the parties during the proceedings before the master -- that you had to show in the record, like an objection in the record in court procedure.

The record had to show that. But there has been quite a diversity of practice in the different districts as to the next point:

"other than to the findings and conclusions". Some judges hold that you must go back before the master and make exceptions before him to his findings as conclusions, and it produces a lot of trouble and expense and doubt. I think this is a very fine solution.

Mr. Dobie. I concur in that suggestion that we cover it, because you are quite right there are a great number of Federal cases on that point, and a good many in that connection.

The Chairman. You would keep in, then, both the bracketed clauses in 23 to 26?

Mr. Donworth. I would.

Mr. Morgan. Yes.

The Chairman. Is it so? Both brackets?

4 Mr. Dobie. Yes. In other words, he need not object to the findings as conclusions of the master; he may make them before the court. But here you have the question of admissibility of evidence, and that is a trap and ambush. If he did not make that before the master he can not make it before the court.

The Chairman. If it was available.

Mr. Olney. It may be interesting to know what the practice is in the district court at home, prescribed by the rule of the local district court in the case of a report of a master.

Either party has ten days, as I remember it, within which to file objections to the report with the master, and then the master has a stated length of time to correct or amend his report in the particul ars to which objection is made.

Then he puts in his final report after that time, and the rule is that unless you have raised some point by way of objection first before the master you can not raise it again before the court by way of exception to the report.

The Chairman. As a matter of practice, under our rule which we have just adopted, where you do not have to file objections with the master to his findings or conclusions, the master, if he were a wise man, before he filed his report would exhibit it to the parties, and, if he wanted to, to bring them up and say, "I propose to file this report. What is wrong with it?"

That is all right. We will allow that. All we do here is to say that if the master does not want to take that precaution, and file his report, then it is sufficient to make the objections before the court to the findings and conclusions.

As a practical matter, the master would probably invite objections to the proposed report, but that is discretionary with him.

Let us pass on, then, to Rule A-16.

Mr. Clark. Both brackets, then?

The Chairman. Yes, if they are consistent with each other, and I think they are.

Mr. Clark. All right.

RULE A-16

APPOINTMENT AND COMPENSATION OF MASTERS

Mr. Clark. Major Tolman had something about collection, I think.

Mr. Morgan. You have got it in your notes, page 24.

Mr. Clark. Major Tolman suggested the following insertion

in line 9 after the word "cause":

"* * * or paid out of any fund or subject matter of the controversy which may be in the custody and control of the court."

And he said that is all right, but probably needless because in the Federal practice today in receivership, bankruptcy, or reorganization the compensation would be paid out of the estate.

The Chairman. Any objection to that insertion?

(No response.)

The rule, as worded, seems to be limited to ordering one party to pay, and Major Tolman wants to insert the order to pay it out of any funds or subject matter of controversy which may be in the custody or control of the court. That seems to be all right. That proposal in substance is agreed to unless there is objection.

(No response.)

Anything else on A-16?

Mr. Clark. I don't think so. There are other changes of form which we have agreed to, I think.

The Chairman. Then we will go to A-17.

VII

JUDGMENT AND APPEAL

RULE A-17

FORM OF JUDGMENTS; JUDGMENTS IN FAVOR OF AND AGAINST VARIOUS PARTIES AND AT VARIOUS STAGES; RELIEF ACCORDED; COSTS.

Mr. Morgan. I have no suggestion except as to form on that.

Mr. Olney. I would like to know what is meant by the last

sentence of the first paragraph. The sentence provides that a judgment or a final order may be rendered by the court upon any issues in favor of any party or parties, and against any party or parties, at any stage of the action, if warranted by the pleadings, proof, or otherwise, of a party or parties, and the action may proceed as to the remaining issues or parties as justice may require.

It says that the judgment rendered pursuant to this rule shall be final for all purposes, including review.

Does that mean you can not review such an order as this?

Mr. Clark. It means you shall review.

Mr. Dobie. It says it shall be treated as a final order. You can not take cases to the Circuit Court of Appeals ordinarily unless they are final.

Mr. Olney. You have defined what you mean by the word "final"-- if you are using that expression in California it would mean it was the end of the matter. Our judgments are not final until the time for appeal has run, and if an appeal is taken, until it is acted on on appeal.

The Chairman. It should read, "final order for the purpose of allowing an appeal therefrom"? That is your point, is it not?

4 Mr. Olney. My objection is to that word "final".

The Chairman. But it is used in all the Supreme Court cases and the statutes. The statutes say you can not take appeal except from a final order.

Mr. Dobie. Yes, it is common law language, Judge.

Mr. Clark. That is the reason we put it in, so you can make that appeal.

Mr. Olney. It is going to cause confusion where we are constantly using the same words with different meanings.

Mr. Dobie. The Circuit Court of Appeals can only review a final decision of a district court.

Mr. Olney. I understand.

Mr. Dobie. I do not think you can change that rule.

The Chairman. We can say it is final for the purposes of appeal, so that you are talking about finality for the purpose of appeal.

Mr. Clark. For all purposes, including the purpose of appeal therefrom; that is, all purposes with the idea of getting an execution.

The Chairman. Yes, all purposes, including appeal therefrom.

Mr. Clark. Now, the question has been raised about our costs. We have subordinated costs pretty well in 18 and 19. I think Major Tolman wants to bring up something rather extensive on costs. You remember last time we discussed what we would do with costs quite a little and finally decided this simple statement was enough.

The Chairman. The amount of costs you are entitled to is a matter of substantive right, I should think. Is it not fixed by statute? We concluded we would not tamper with the allowances as fixed by the courts.

Mr. Clark. I think it is a little more than that. It is not only that, but I think we have gone perhaps a little farther because we have provided that where they are not definitely fixed the court may award costs discretionarily as to the amount of costs and as to whether the court awards costs to the plaintiff

or defendant.

The Chairman. What does Major Tolman want to do? Where is his recommendation under Rule A-17?

Mr. Clark. He said we should go a lot further.

Mr. Hammond. He wanted it in a separate rule first, and then he called attention to a number of admiralty rules. I am just trying to get them. (Examining papers.)

The Chairman. Are we tampering with the admiralty rules?

Mr. Clark. No, he was suggesting--

Mr. Hammond. He was suggesting that type of idea in them.

The Chairman. You mean a fixed schedule of costs? Is that what he wants done?

Mr. Clark. I do not believe it is a schedule. It is awarding of costs, that is, whether they should go to the plaintiff or defendant.

Mr. Hammond. I think he is perfectly satisfied with the rule that they should be in the discretion of the court.

Mr. Lemann. Major Tolman's comments that I have here before me, page 29, are not very clear at lines 18 and 19. Maybe I have a bad copy.

Mr. Olney. I thought what the Major had in mind was that normally the losing party should pay costs, but that it should be within the discretion of the court, if justice required, for it to provide that they be divided or perhaps all fall on the other party.

Mr. Hammond. Yes, he thoroughly approved of that idea.

Mr. Olney. I think that is what he is getting at.

Mr. Clark. He has made reference to Mr. Payne's article in the Virginia Law Review. With all due respect to the great

University of Virginia and Mr. Payne, I read it and I did not feel quite sure when I got through where we were at. I did not get quite the light from that that I hoped. That may not be Mr. Payne's fault.

Mr. Pepper. That is the function of a law school.

Mr. Clark. You mean to confuse?

Mr. Pepper. Yes. (Laughter)

Mr. Dobie. As I got it from that article, I think his idea was that it was in a pretty ragged condition in the Federal courts, very, very indefinite. Of course, this is applicable here; Mr. Tolman starts at the page 29 and then goes down into the footnote.

Mr. Lemann. He does not say exactly what should be done. He says that it should be dealt with more fully, but he does not say just what we are to do with it.

Mr. Clark. If you want the admiralty rules, the reference is to Rule 7, Bonds and Premiums, Which are Taxable as Costs:

"If costs shall be awarded by the court to either or any party, then the reasonable premiums or expense paid on all bonds, or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."

Rule 46 is fees for taking evidence by a stenographer. The fees may be fixed by the court and taxed as costs. Rule 47 is costs of travel of witnesses.

Mr. Lemann. There is a question whether we would undertake to define what items would be considered as costs, and I think we might pass that up for the time being.

The Chairman. Leave it to the statutes. What are the Federal statutes on costs as applied to civil actions in equity

and law?

Mr. Clark. As I understand, there are various details about clerks' fees and that sort of thing.

Mr. Lemann. Mr. Dobie says they are not very clear. I do not think that that is a large enough matter for us to try to clean up. We should leave something f or the other fellow.

Mr. Dobie. I would like to hear from the Major when he is here. I like the flexibility of his provision and there may be some points that ought to be cleared up. But I am frank to say that I do not know much about costs.

The Chairman. Suppose we pass it and give him an opportunity to bring it up if he wants to discuss it further. I prefer not to bring up the Question of costs and that sort of thing.

Mr. Olney. This, Mr. Chairman, is just a matter of form, but I am curious to know whether in the sentence immediately preceding the one that we have been discussing, which provides that every order or judgment shall accord the relief to which the party is entitled, whether legal or equitable or both, and then is inserted, "including a judgment for deficiency in a foreclosure action". Just why is that there, why is that particular thing mentioned?

Mr. Clark. I will tell you why. It had a little history in our drafting of it. The chief thing that this trouble led us was that there is a special provision in the equity rules, I have forgotten the exact number, 10 or 11 -- Equity Rule 10, I think it is -- providing for this very thing, deficiency in foreclosure cases. We considered that it was unnecessary and, first off, were not going to put it in. Then we wondered

whether somebody would get worried as to what we meant by leaving it out. Finally we came to the conclusion that it would do no harm and might even do a little good in the union of law and equity to say something which we think ought to be obvious, that you get all the relief in one action and form of judgment. It really goes back to the fact that there is an Equity Rule No. 10 on the matter and we did not know quite what to do with it.

Mr. Olney. It holds that particular case up so prominently when you are just stating a general rule--

Mr. Clark. I know there is something in that, but if we just put in the Equity Rule 10 alone it holds it up a lot more prominently. We reduced its prominence in Equity Rule 10.

Mr. Lemann. What is the reason for specifically putting in Equity Rule 10?

Mr. Olney. It is really a matter of draftsmanship. It could be handled by a note which could be attached.

Mr. Clark. I think it could. I do not think it is very necessary.

Mr. Olney. It is, after all, a matter of draftsmanship, and we have got the reason for it.

Mr. Clark. The reason is, Mr. Lemann, you see, in an equity rule on foreclosure it is to allow you to give a money judgment.

Mr. Lemann. So there was a reason for specifying it in the equity rule which is not now so persuasive.

Mr. Pepper. I would like to ask Mr. Loftin on that point. I inquired yesterday to what extent foreclosures of mortgages are common in the Federal courts. It is practically unknown in

my part of the world, foreclosures in a Federal court, except in corporation mortgage cases. Mr. Loftin replied that he thought in a good many instances in his State people have gone into the Federal courts where there was jurisdiction to foreclose a mortgage because the State courts were loath to give, or slow to give, or could not give, deficiency judgments on foreclosures. Was it something like that?

Mr. Loftin. That is correct.

Mr. Pepper. And it occurred to me that it may have been that it was to make sure that the Federal courts could give that form of relief that it was specifically mentioned here.

Mr. Dobie. I find here on looking at it that there are a great number of Federal statutes about costs, but I do not see how we could undertake to go into them or things of that kind. It would be a hideous task to try to reconcile them, or anything of that kind.

Mr. Pepper. I was not talking about costs. I was talking about the rule which Judge Olney called attention to, suggesting a reason for it. Perhaps that is not the reason for it.

The Chairman. Rule 10 in equity provides expressly for deficiency judgments, and now we drop them out and say nothing about that at all.

Mr. Dodge. Is it not enough to go far beyond that and say the judgment shall award relief, legal or equitable or both?

Mr. Lemann. You are going further than the equity rule could ever have gone because of this union, but let us leave that.

Mr. Olney. Let us leave that for draftsmanship. I wanted to find out how it happened that the thing was given that prominence in the rule.

Mr. Dodge. I think we better drop it out.

Mr. Morgan. Yes, it would be better dropped.

The Chairman. Is there anything else in Rule A-17?

Mr. Clark. I might say that on that point that Judge Olney has brought up, you have not helped us out very much in redrafting, or perhaps you do not feel you can. I have stated our own struggling and what we finally did with it.

Mr. Dodge. I will move that the last clause be eliminated.

The Chairman. "including a judgment for a deficiency in a foreclosure action".

Mr. Lemann. Second the motion.

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

Mr. Pepper. But is understood, is it not, that that omission, which is also an omission of something provided for in the equity rules, is not to raise the implication that such a judgment may not be entered?

The Chairman. That is our understanding. I do not know what the bar will think about it.

Mr. Olney. Where it says that it may render any judgment, legal, equitable, or both, I do not see how there is any escape from it.

Mr. Pepper. Yes, that is right.

7 The Chairman. If you are not treating it as an equitable right, and if it is legal, would you have to have a jury trial on the deficiency?

Mr. Donworth. I do not know to what extent notes are going out on the first statement to the public if the court decides to submit our draft in any form, as changed or otherwise, but it

seems to me that in order to advise the bar and the public of our intention, just as a Committee of Congress deliberations are sometimes admissible, it seems to me a note to the extent of saying that the Committee was of the view that this was unnecessary because the power is implied, or something of that kind, would be well.

The Chairman. Well, I do not know whether that helps or not, because I do not know the law. But apparently a court of equity could not grant a deficiency judgment unless there was a rule on the subject.

Now, you do not strike out that extra rule and say it is fully taken care of, because legal relief can be granted on the same suit. Now, you transfer this to the field of the legal side and say you can get the same judgment as if you sued on the note, and I ask whether that does not bring you into a jury trial unless you expressly reserve the equitable right to deficiency judgment as an incident to the foreclosure suit.

Mr. Donworth. Is it your point that you might have it with the language in? Some ingenious person may say, even with this language retained, --

Mr. Dodge. The old equity rule suggests that the court did not think that there was any jury question there.

Mr. Donworth. By putting this in it shows that we regard it as a hold-over from the old equity rule. It may not be regarded as legal if it is there, but if you leave it out it may be regarded as a legal issue.

Mr. Lemann. I would rather keep it than talk a lot about it.

Mr. Dobie. I believe it is safer to bring it in there. I

am a little afraid of the idea that somebody advanced here.

Mr. Dodge. It has been stricken out.

Mr. Dobie. It has, already?

Mr. Donworth. I move reconsideration, that it stay in.

Mr. Pepper. I voted aye before but I did not vote until I heard the Chairman declare the result of the vote. So, I guess I am free to vote. I will move reconsideration with instruction to the Committee to consider whether the position in which the provision now stands is the happy place to put it or whether it ought to be put some place else.

Mr. Donworth. Second the motion.

Mr. Dobie. But it ought to go in somewhere.

Mr. Pepper. I think so.

Mr. Dobie. I agree with that.

(The question was put and the motion prevailed with two negative votes, those of Mr. Dodge and Mr. Cherry.)

The Chairman. Is there anything else in A-17 as to substance?

Mr. Clark. I think not.

The Chairman. Then we will pass to Rule A-18.

RULE A-18

ENTRY OF DEFAULT: JUDGMENT BY DEFAULT
BY THE CLERK AND BY THE COURT

Mr. Clark. Now, on Rule A-18, the first few lines, you suggested that --

The Chairman. I suggested?

Mr. Clark. Yes. --that there must be an affidavit showing that the parties failed to make an appearance, and so on. We suggested on that that we thought that was necessary under

the hip-pocket rule, but not under the other.

Mr. Morgan. Of course, the only way it would appear otherwise is by filing. If you do not have what I regard as a sensible rule --

Mr. Clark. The only way to appear is in the other fellow's hip-pocket, is that it?

Mr. Donworth. In that way. You can file your appearance.

Mr. Morgan. No, in a number of ways.

Mr. Clark. All right, that is perhaps the way to appear.

The Chairman. Of course, if you ultimately adopt a rule that no paper is ruled in or counts for anything until it is filed with the clerk, it is apparent on the face of the clerk's records there has been a default and you would not have an affidavit. But I should think an affidavit was necessary under your Mongrel rule because even those rules require the papers to be filed afterthey are served, which will never be obeyed strictly.

Mr. Morgan. What I would like to know is, what is the use of having a default of appearance entered?

Mr. Donworth. Will you elaborate that thought a little?

Mr. Morgan. Yes; it seems to me that the failure to plead is the thing that is important, failure to plead or appear. It strikes me that if a defendant does enter an appearance and he fails to put in a pleading you should have a default judgment against him, just the same.

Mr. Donworth. No; the idea, as I understand it, is if he makes an appearance he is entitled to three days notice in regard to relief in the form of a decree and all that.

Mr. Morgan. Even in case of liquidated damages?

Mr. Donworth. It is my understanding if he makes an appearance. It is the practice with us.

Mr. Morgan. If you adopt that practice you will have to have a different system.

8 Mr. Clark. That is as I understood the Committee's recommendation, if he appeared then he was entitled to notice of everything.

Mr. Morgan. Yes. Of course, I am not familiar with that kind of practice.

The Chairman. Here is the rule that requires that you can not get a default judgment under Rule A-18 without an order from the court, and I say I have some doubt about application to the court for an order for judgment. For instance, suppose a verdict is rendered; the present practice in some Federal courts is for the clerk to enter a judgment on the verdict forthwith after judgment is rendered.

Mr. Morgan. I thought that was universal.

The Chairman. Why should you apply to the court for an order for judgment on the verdict? The clerk enters the judgment immediately and then you can move for a new trial or for judgment notwithstanding the verdict. When the verdict is rendered and an amount is declared recoverable, why apply to the court for an order for judgment?

Mr. Lemann. Just for a new trial.

The Chairman. This rule tells you to apply in all cases.

Mr. Lemann. I thought this was limited to default cases. That is what I had understood.

Mr. Dodge. "In all other cases of default;" the words "of default" should be written in there.

Mr. Lemann. I thought in your statement you referred to cases on trial where there would be a contest on the verdict of the jury after trial, and your point established you should not have to get an order there; that would not be a default, and I thought the rule was restricted to default.

The Chairman. Is it?

Mr. Clark. That is the idea. You should have in line 13, "all other cases of default". That is what we mean.

The Chairman. You did not say it. It says "in all other cases application for judgment".

Mr. Dobie. Applications for judgment by default. That is what you mean?

Mr. Clark. Yes, that is what we mean. Rule A-18, line 13, put in after "in all other cases" the words "of default".

Mr. Dodge. I think the provision of Rule 11-E ought to be in this section rather than where it is. That was injected into the section on pleading and it really seems to belong in this general rule.

Mr. Clark. That is the demand for judgment, is it not?

Mr. Dodge. Yes.

Mr. Lemann. And if so, you make a corresponding change in your reference in Rule A-17, line 15.

Mr. Clark. I am not clear now.

The Chairman. I move --

Mr. Clark. I was going to say, if you are clear about it, all right; if not I want to give it a little more thought. I think maybe you may be right.

Mr. Dodge. It seems clear to me that a judgment by default should not be dealt with under the chapter on pleading

when there is another section that does deal with it and uses much of the language.

The Chairman. I will call the Reporter's attention to one thing. He made the point that in the hip-pocket rule you would have to have an affidavit, and if the pleadings are not effective until filed you do not, but I also make the point that under the rule as you have it here it gives you twenty days to answer and then twenty days to file, so that it is necessary to insert in line 2, "on filing proof by affidavit that a party has failed". On your mongrel rule the default occurred and you may apply for judgment between the date the answer was due and the date the man ought to file it, and you do not know whether it has been served or not, so you have to put that in.

Mr. Donworth. Sometimes even under the present practice a lawyer serves notice on the other lawyer, a written notice of appearance, so as to protect himself, and they perhaps have an oral stipulation and he does not file his appearance even under the present arrangement, so I think an affidavit is a pretty good thing.

The Chairman. It is clearly necessary under your rule about filing papers, and I would suggest that we amend line 2 of Rule A-18 to read:

"On filing proof by affidavit that a party has failed."

Mr. Dobie. "To plead"?

Mr. Clark. All right.

Mr. Lemann. May I ask, is it plain?

The Chairman. I do not know just where that goes in, but he will put it in.

Mr. Lemann. Is the language plain here that the mere fil-

ing of appearance would not protect you from a default if you have not pleaded? It says, "file appearance or plead". We do not have the appearance practice ourselves, and I do not understand if appearance is filed in the Court of Appeals by saying to the clerk on a form, "The clerk will enter my appearance", as we do in the Supreme Court. In the trial court we have no practice of filing an appearance as distinguished from the pleadings. You go ahead and plead, and I just wondered what the language there meant when it says the party has failed to make an appearance or plead? Did it mean if you filed an appearance and did nothing more?

Mr. Donworth. Line 13 takes care of it.

The Chairman. You apply to the court for an order of judgment.

Mr. Dodge. Not as the rule reads. The rules reads that the clerk enters the default if you fail to answer.

Mr. Lemann. That is the point I was raising.

Mr. Donworth. On account of the word "or" there.

Mr. Clark. You will notice that the default really is an entry of a note by the clerk that there is a default, and then line 4 and on down to 10 or 11 provide that where it is a default of general appearance you can got right ahead and get judgment, and that in all other cases you have to apply to the court for judgment.

Mr. Dodge. Then there must also be another motion by the other side to remove the default?

Mr. Clark. Yes.

Mr. Lemann. What happens if you file an appearance and just say to the clerk, "Enter my appearance", and you do not

file anything further, do not file any answer?

The Chairman. I construe the rule to mean that in that case you have to apply to the court on notice for an order.

Mr. Dodge. You do for the judgment and you do not for the default. You have a default that has got to be gotten rid of.

Mr. Clark. That is correct. Mr. Dodge is stating what the rule provides. The clerk enters the default and if you want a judgment you move for it. On the other hand, if the other fellow now wants to come in and go ahead he has to get the default order removed.

The Chairman. But the rule says at the start that the clerk can not enter a default when the party has made an appearance.

Mr. Dodge. He enters a default and not judgment.

Mr. Morgan. He enters a default and not judgment.

Mr. Morgan. Then the case just stands there.

The Chairman. "When a party has failed to make an appearance or plea as provided by these rules, the clerk shall, upon request, enter his default."

He can enter default if it is just a plain appearance.

Mr. Lemann. That is right.

The Chairman. Then you have to apply to the court, if there is no answer, on motion and notice to demand who entered the appearance.

Mr. Dodge. It says the court shall upon request enter his default for failure to appear or plead. I think that is pretty doubtful.

Mr. Olney. I may not have understood the discussion, but

certainly a defendant should not be permitted to delay the entry of the default where he fails to answer within the time prescribed by the summons, merely because he comes in and files a general appearance.

Mr. Morgan. That is what they do.

The Chairman. That is the general practice; if you enter an appearance you can not get a default judgment entered by the clerk; you have to make an application for order of judgment for default in answer and serve notice on the man who has appeared. That is the general practice.

Mr. Olney. It may be the practice in some places, but it is not the practice I have experienced.

Mr. Morgan. Nor mine either.

Mr. Olney. If the defendant fails to answer within the time prescribed he can have presented forty appearances previously, and if he is in default of the pleading he is in default and you are entitled to enter his default.

Mr. Pepper. With us we file a praecipe of appearance or enter by appearance for the defendant as the case may be. That is filed by the clerk. Then if we make default of pleading or answer or the taking of any step which is prescribed, within the time prescribed, the clerk enters judgment without regard to the court and irrespective of the fact that the appearance has been entered. It seems to me that is convenient and expeditious.

Mr. Loftin. That is the practice also with us.

Mr. Olney. Mr. Chairman, it occurs to me in this connection, as a practical case, that a defendant might seriously embarrass by simply appearing in propria persona, and then disappearing.

The Chairman. It embarrasses him to the extent of requiring a three-day notice before judgment.

Mr. Donworth. Do we not have a general rule here that if the address of a party or attorney is not known that you can leave a copy with the clerk of the court, and that takes care of that, you say?

Mr. Morgan. You see, what happens in Connecticut -- that is the prize State, of course -- the defendant always comes in and enters an appearance. Then he stays still until the plaintiff moves for judgment by default and then he counters with a motion to be allowed to file an answer. It is practically always granted. They introduced and passed in the Legislature a provision allowing entry of judgment by default for want of pleadings, and as soon as -- they did that on the recommendation of Chief Justice Wales, and as soon as the lawyers found out about it --

Mr. Clark. The judges passed the rule?

Mr. Morgan. Yes, the judges passed the rule and the Legislature came along and took it away from them. We had many lawyers in the Legislature who wanted the delay.

Mr. Donworth. It is pretty tough, after a lawyer has served notice, if you after twenty days then go ahead and enter judgment without telling him.

Mr. Morgan. It would be.

Mr. Donworth. Why should you do a thing that lawyers regard as sharp practice?

Mr. Morgan. They do not regard it as sharp practice.

Mr. Olney. It all depends on the character of the case.

Mr. Morgan. Of course it does.

Mr. Olney. If you are dealing with a reputable firm and it is a genuine controversy you never take a default, never take a default in a case of that character. But there is many a case where you want your judgment as soon as possible, there is no defense to it, you know no defense will be made, and the defendant is just endeavoring to delay matters, and you take your default in that case without the slightest compunction, and nobody ever claims of it or thinks anything of it as sharp practice or anything else. The sharp practice is all on the other side.

10 The Chairman. It is a question of what you want to do. I am accustomed to practice where a general appearance is served and entered. That entitles the party to notice of everything that takes place in the case. That was the rule in Minnesota when I lived there. I do not know what it is now. If you do not want that, if you want to provie that even if he does enter a general appearance he will get a notice of all further proceedings and any judgment that is to be entered, we will not adopt it.

Mr. Morgan. As I understand the Minnesota practice you had to give him notice on anything on which you had to have a jury, but you do not have to have a hearing on liquidated damages.

The Chairman. I have seen hundreds of affidavits for the purpose of getting judgment for failure to answer, and in every affidavit I filed I had to say that the defendant had not answered or appeared. If he did appear he was entitled to notice of further proceedings including the entering of judgment for failure to answer. All it does in that case is that instead of getting the clerk to enter the default judgment for failure to

answer as against a man who has entered a general appearance, you would serve a 3-day notice under our rules of application for judgment for failure to answer, and serve it on the lawyer on the other side.

Maybe you don't want that. I don't insist on it, but that is what I thought these rules intended. I thought a general apperance was intended to give a man notice of everything that happened in a law suit.

Mr. Donworth. I doubt if there is a lawyer on this Committee who would take a judgment without notifying the humblest member of the bar, and if that is what we regard as professional, why not put it in the rule?

Mr. Pepper. What we do is, when a man enters an appearance the time starts running within which he must file his pleading, whatever the time be, his affidavit or dissent or his answer in equity, we always drop the man a note and say, "We will expect to take judgment on a day specified unless you have got some good reason to the contrary", and if he comes in and gives you some reason which seems adequate, you say, "We will extend the time". That is a kind of professional courtesy. The way the thing works is that if he does not file his pleading at such and such a time he is technically in default then and the judgment will be entered against him for default.

Mr. Lemann. Just to bring it to a head, I move that if the defendant has entered an appearance that no default shall be taken against him without three days notice.

Mr. Donworth. It is five.

Mr. Lemann. I know, but I am suggesting a change to three.

Mr. Dobie. I believe that will meet with such opposition

from the bar, if we put that in there --

Mr. Lemann. It only means three days more. In most cases we give it to them anyhow. In my State, that is true, where we have no appearance, you know who the other fellow's lawyer is, and if he is a reputable member of the bar you do not usually take a default against him, even though you only know it by general information.

Mr. Olney. What you do in that case is to call him on the telephone and tell him he is in default and ask him whether it is inadvertent or otherwise?

Mr. Dodge. I second the motion.

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

Mr. Morgan. What I want to know is, is there any necessity for a separate entry for default of appearance, separate from the default of pleading? Mr. Dodge suggests if you put an entry of default on appearance here and then -- the plaintiff can not go ahead, can he? He has to move for an order of judgment after that?

Mr. Clark. No, the plaintiff in the case of a liquidated sum files an affidavit in the case, which is the same as holding for judgment.

Mr. Morgan. How about the defendant, how does he get the default removed after it is in default?

The Chairman. There is a default for failure to file answer?

Mr. Morgan. No; default of appearance. He does not appear for the 20 days, for example, and after that, in order to be allowed to answer he has to get an order from the court.

Mr. Clark. The fellow who is in default, yes. That is covered by lines 22 to 24. I do not know whether the extra step is necessary.

The Chairman. I do not think it is. You have provided first that the clerk must make an entry on his books and enter a default; then you have provided for an affidavit if there is no answer, and a judgment by default. In the practice I am accustomed to this formality of preliminary entry by the clerk is not required, it is just a useless entry, and the default is entered when the judgment is entered. The fact that there is no answer to the judgment is put into judgment.

Mr. Clark. This is a little more warning to the defendant. Will you indicate a bit more how it works? I say again it is not absolutely necessary but you may want to have it. In line 22 to 24 it says:

"For good cause shown the court may set aside the entry of default."

That is fairly simple. Then we try to make the judgment a little more severe and we say:

"* * * and if a judgment by default has been entered may likewise set it aside in accordance with Rule A-19(c)".

Mr. Pepper. What is the effect of the entry of default if it is not a judgment by default?

Mr. Clark. It is notice to the defendant, when he has entered an appearance, that he is in violation of the rules and a judgment may be taken against him on three days notice.

Mr. Olney. I would like to answer Senator Pepper's question. Under the California practice you are not required to give notice either of the default or the entry of judgment upon

it, but the default serves this purpose, as distinguished from the entry of the judgment: Until the default is taken, a default in the strict sense, an entry of the default is made, a party can file his answer although it may be long after the time has expired for him to do so, but he is free to file his answer or his pleadings until the default is entered, and if he does file it it is a good answer, and it is filed in sufficient time if the default has not been entered, and when the default is entered after that time the clerk will not accept his pleading until he gets an order setting aside the default.

So, it permits, in a way, you see, unless the default is immediately entered, -- it permits the party to come in and plead the bar.

Mr. Pepper. After all, if judgment has not been taken, is there any reason why he should not cure his default by filing his pleading or taking whatever the steps may be? I can not quite get through my head the rationality of a rule which makes it necessary to do something to purge yourself of a default in order that you may plead the answer if the other party is either not entitled to judgment or has not taken it.

Mr. Donworth. It has this effect: If a man is in default then he is at the mercy of the court, and the court may impose terms upon his answering. For instance, the court may say, "Mr. Smith, I will give you five days to answer but not to modify the plaintiffs defendant or to strike out." The court may require him to do whatever the court in its arbitrary discretion feels is right, but he loses his standing under the rules for these various things.

The Chairman. He loses the standing whether the clerk

enters it or not. My point is that entry of default by the clerk, as distinguished from the entry of default judgment, is an idle gesture.

Mr. Lemann. May I get this in mind? As I understand the Reporter's suggestion, if there were no appearance at all, and, a fortiori, no pleading, and the demand was for money judgment, liquidated on a promissory note, for example, if you have that judgment from the clerk you would not have to bother the judge.

Mr. Clark. That is right.

Mr. Lemann. Would you favor changing that, Mr. Chairman?

The Chairman. No, that is my point. It is just this idle entry by the clerk, the entry of the default for failure to appear; it is just a notation by the clerk in the record.

Mr. Lemann. As distinguished from a judgment entered?

The Chairman. I say, the default, as far as any clerk's entries are concerned, should be entered when the default judgment is in.

Mr. Dodge. You mean, if the defeandant comes in late, instead of moving as he would, to remove the fault, which he would very readily been allowed, you would move to stay the entry of judgment?

Mr. Lemann. Move to set aside the entry of judgment.

The Chairman. If it had been moved and entered he would move to set it aside.

Mr. Dodge. That is very difficult to get with us. The default upon an entry of judgment can be readily removed.

Mr. Lemann. As I understand, there is no appearance entered, and the clerk has to do only one thing; you go to the clerk

and say, "This thing has been filed 20 days and there is no affidavit or pleading or anything and we want you to do just one thing; give me a judgment by default on this note."

Now, what I am trying to get in my head is, is that right? Is it to be just that one thing, or do you go to the clerk just the once? If you go to the clerk and get judgment I don't think you can move to set it aside.

Mr. Clark. Yes.

Mr. Lemann. You can move to set it aside? It has been done?

Mr. Clark. In a non-appearance case you can do it all at once except where you may have to have a hearing, possibly. How are you going to fix the damages in a personal injury suit?

Mr. Lemann. It would be simplest if we took one case and saw what is going to happen, and if everybody is agreed that that is what should happen, then we will take up the others.

Mr. Dodge. What is your case?

12 Mr. Lemann. My case is a suit on a promissory note, no appearance and no pleading; after 20 days the plaintiff files the necessary affidavits to establish those facts. I understand the clerk then will give the plaintiff a judgment by default.

The Chairman. Right.

Mr. Clark. That is correct.

Mr. Lemann. It is understood, and nobody objects to that. Then if the defendant wants to come and say, "I don't know how this happened; it is something terrible and I want to set it aside", there is only one thing he can do, he can move to set it aside. He can not move to stay it.

Mr. Morgan. With us all those things would be done with-

out application, and the parties failing to appear would be defaulted as a matter of course, judgment would be entered on the bill, and the filing of the promissory note would be necessary only in order to get out an execution.

The Chairman. My point was a very narrow one; take your case of a suit ona promissory note with no appearance; now, you suggested that in that case all the entry that would be necessary to be made would be that you make your proof of default and get a default judgment. Under this rule there have to be two things done. First, you go to the clerk and request him to enter the default, and then, either at the same time or another day, you walk up and file your affidavit and get your judgment. I say the original entry of default is just a meaningless thing, an extra job for the clerk. If you do not provide that the clerk merely enter the default before he enters judgment then the man who wants to set aside the default, as you call it, and the judgment has not been entered, he does not move to set aside a default that has been entered; he moves for leave to set aside the default against him and for leave to answer, the default having resulted from his failure to answer and not merely because the clerk has entered it. It is a very narrow, little point but I see no use in asking the clerk to enter the default.

Mr. Lemann. I don't either.

Mr. Clark. May I say just a little more on the case you put? It does not amount to anything, and whether they make it or not, I don't think that counts.

But, taking the case where the defendant is in default of doing something required by the rules, and that is the point that I would like to get cleared up, how are you under some other

rule going to do anything about it unless you go through and get a judgment? You filed an answer within the required limit; I, to get you in wrong, so to speak, in a case of negligence, have gone into the court and introduced my proof, and so on, and got a judgment; then you come in and get it easily set aside.

Now, what we were trying to do was to get an intermediate state which warns the defendant before I go through all these steps which the court is going to turn over very easily; I warn him I am about to do it, so to speak, and after I have done those things then the judgment can not be upset so easily.

The Chairman. Where have you provided, in case the clerk has entered the default, that you have got to warn the other man and serve notice?

Mr. Clark. It is an order on which under the earlier rules there has to be notice given.

The Chairman. You do not have to give notice to anybody who has not appeared?

Mr. Clark. I am not talking of the case of non-appearance. That is not very important.

Mr. Lemann. Let us tie that down, if we can, and get through with it.

Mr. Clark. I think you ought to consider the philosophy of it, and the philosophy of it is in the other case. In the case of non-appearance the only time when it would be of much importance would be when you did not -- take this case: Suppose you are going to bring your case in a negligence action before the court, and the defendant comes in to file his appearance, can he do it? He has not done it within the time required, and are you going do let him to that without any penalty or any con-

ditions?

The Chairman. In the case of non-appearance you do not have to serve any notice of default on him and you do not have to make any entry of default before judgment. Suppose he has entered an appearance but he is in default with regard to some order, and you are thereupon entitled to go ahead and have the damages assessed, or something; you still do not have to have the clerk enter a default, and he, having appeared generally, is entitled to notice of all further proceedings. So, when you are going to apply to the court for assessment of damages you serve notice on him, not that he has been defaulted, but that because he is in default you are applying for some other steps in the case.

Mr. Lemann. Suppose he has not appeared, and instead of being on a promissory note it is a suit for damages for a personal injury? You can not go down and get the clerk to enter a default then. That is the next step that it seems to me we have to settle. In my case the clerk could enter it and you could set judgment. Now we have a personal injury case, the defendant has entered no appearance, and is entitled to no notice. I would have thought you would go down to the court on motion day, perhaps any day, and just say to the court when he calls for the motions, "Judge, I have a case in which there has been no appearance filed, a suit for damages for personal injuries, and I would like leave just to take this up here and put the witness on the stand and let the damages be fixed and let you give me judgment."

In that case that is the way we would proceed. We do not monkey with the clerk in any way. The difference between that

and the promissory note case would be that in the note case I would not have to get the judge to do that.

Mr. Clark. That may be, but I want to know what you would do in this case: Suppose at any time up to and including your appearance the defendant now appears and says, "I am appearing"; what happens then?

Mr. Morgan. Nothing; he can not appear after the time for appearances has entered.

The Chairman. You might be required to serve notice on him of all further proceedings.

Mr. Lemann. Suppose I send my boy to check up; and under this system there has not been anything served on me by way of appearance. I say, "I will go down tomorrow and get a judgment", but before I go to court the other fellow has entered an appearance; I think I would have to give him three days notice.

Mr. Clark. He has been too late but he can appear without any condition.

Mr. Lemann. I should think that he could, just as in our practice he gets a certain time to answer, and if he does not answer --

Mr. Clark. He files his appearance as attorney but does not answer?

The Chairman. The appearance does not save his default; he is in default but he is entitled to notice of further proceedings, and if you are going to assess damages and you wantto fix the date for assessment you serve notice on him that you are going to do it.

Suppose he walks into court and tries to take part, cross examining witnesses, or something like that, the court will not

hear him because he has not put in an answer, but he can be present in court and listen to what is going on. The mere entry of general appearance, however, entitles him, not to be heard, but to receive notice of what is going to take place.

Mr. Dodge. It seems to me this is very complicated. It is so simple with us. Where the papers are filed in court the clerk enters the default as a matter of course if he does not appear, and he is out of the case unless he gets that removed. You do not have to go to the court and ask to have the damages assessed. You simply mark it down or the following Monday in the Superior Court for the assessment of damages on a defaulted case. You go up and the other fellow is out of the case unless the default is removed. That is for failure to appear. If he appears and fails to answer you have to move to have him defaulted for failure to answer.

Mr. Donworth. I agree with the Chairman that ordinarily a default against a single defendant is immaterial, but I would like to call the Chairman's attention to the case of numerous defendants, where it is assumed that we want a judgment against one defendant.

The Chairman. It is 1:00 o'clock.

(Whereupon, at 1:00 o'clock p.m., a recess was taken until 1:45 o'clock p.m., this afternoon.)

AFTERNOON SESSION

The committee resumed at 1:45 o'clock p.m. on the expiration of the recess.

The Chairman. Gentlemen, let us resume. You will notice before you on the table blank forms for your expense account. If you have not already done it sign your name, and when you reach home you may send in the details of your expenses, and so on, and they will be appropriately entered for you.

Mr. Lemann. To whom should that information be sent.

The Chairman. I will ask that that be given by someone here.

Mrs. LeDane. It may be sent direct to the Marshal if you prefer, and perhaps that would save some time.

The Chairman. When you reach home you may send in the details of your expenses, and the Marshal of the Supreme Court will have this form that you have signed appropriately filled out.

RULE A18 -- CONTINUED

The Chairman. We will now resume consideration of Rule A18. I will withdraw any suggestion I made about entry of default that might occur. I do not think it important, and do not know of any reason why it should be there.

Mr. Donworth. In order to illustrate the situation I will say that our practice is similar to that stated by the chairman. Where there is a single defendant we do not enter a separate order of default. We have the judgment recite it all. But where there are numerous defendants, as in an equity

case for example, you usually find a certain proportion will appear and a certain proportion will not. As soon as the time for entering has expired we enter an order of default against those who have not appeared and forget them, and do business with those lawyers who have appeared. That is about the only case where default occurs.

The Chairman. Is there anything else that you want to take up on that?

Mr. Clark. Is this point settled: This calls for a separation, as in Massachusetts and Connecticut, for the entry of default and so on. What have you done with it?

The Chairman. If there is no objection it will stand as it is.

Mr. Loftin. There is no motion, I believe, to change it. But I want to ask in connection with lines 22 to 24 providing for setting aside defaults. Would that be governed by the general rule as to time?

Mr. Clark. For the entry of default, line 22, I suppose that will be on the 5-day notice. I suppose we ought to make that a little clearer.

Mr. Loftin. In our state they have fixed the time for motion for setting aside by reason of default, and fixing a time for a motion for setting aside judgment entered on default.

Mr. Clark. I think we might make that a little clearer.

Mr. Loftin. I suggested it so that we might clear it up.

The Chairman. Of course, that is getting into the particular field as to the right to set aside verdicts. There

are some state statutes which allow you to set aside a verdict a long while after the judgment is entered, without prejudice to what has been done under it.

Mr. Clark. On the judgment end of it we will probably have a good deal of discussion, when we come to Rule A19 (c).

Mr. Loftin. I thought you only wanted to cover setting aside a default in this particular rule.

Mr. Dodge. About the matter of setting aside damages, you do not exclude trial by jury where the parties are entitled to it.

Mr. Lemann. That refers to lines 18 to 21.

Mr. Clark. We take the view here that he is not entitled to it, but the court could order it.

Mr. Dodge. Isn't he in fact entitled to it?

Mr. Clark. Well, I will say ---

The Chairman. (Interposing) It is discretionary. You can refer to assessment under the English common law.

Mr. Dodge. Could you exclude him from jury trial?

Mr. Clark. I think you can.

Mr. Lemann. He is considered to have waived it by his non-appearance.

The Chairman. In case of default in an unliquidated claim there had to be evidence adduced, and under the English common law it should be done by the sheriff.

Mr. Morgan. The sheriff's inquest, it is called.

Mr. Dodge. I have in mind the case of a man who sued for an accident, and admitted liability and thought it would be better to have the damages assessed by a jury. In this case I should think it would be improper to have the damages

assessed by a jury.

The Chairman. I thought you were talking about a defendant.

Mr. Dodge. I am talking about a defendant who defaults so as to get this kind of assessment by way of reference.

The Chairman. Because he thinks he would get soaked, whereas by a jury he thinks he might have a better chance.

Mr. Dodge. Yes. If the plaintiff wants a jury to assess his damages I should think he is entitled to it.

Mr. Morgan. At common law he got a sheriff's inquest. There is a provision in the New York Civil Practice Act, or was and I have not heard of any change, that in personal damage cases the damages should be assessed by a jury. I do not know whether they have changed that law lately or not.

Mr. Donworth. It would be followed the other way if we say anything about it.

Mr. Olney. Do you think it would be followed by way of depriving a man of his right to a jury?

Mr. Donworth. There is no issue.

Mr. Morgan. There is the issue as to the amount of the damages.

Mr. Olney. If a man defaults I do not see how he can claim a right.

Mr. Morgan. The plaintiff who has defaulted wants a jury. He normally will want that.

Mr. Dobie. Yes.

Mr. Lemann. As I get it you have no objection to the present provision if it is clearly followed. You have in mind the question as to whether it would be followed to

deprive the plaintiff of the right. Why not recommit that for study so if it is found we can change it all right, and if we cannot do it then leave it as it is?

Mr. Clark. All right. I notice already that under state law for many years we have had the procedure Mr. Dodge speaks of. The defendant used to take judgment against a man in order to get a trial.

Mr. Morgan. He used to demur for that purpose.

Mr. Clark. Yes. Whether there is any question about it in federal cases I am not sure.

Mr. Lemann. I suggest that we reduce the time there from 5 days to 3 days.

Mr. Clark. I had it marked 3 days. I do not know whether you formally passed it or not.

Mr. Loftin. That is agreed to.

Mr. Clark. If that is settled I want to bring up another question. There was some discussion in the committee as to whether the affidavit should cover the amount or the sum due, or should cover merely the fact of there being a default. We considered this a good deal. You will notice our note on it. In New York the rule is to have the amount due. In Minnesota it is merely the fact of default. We thought we ought to have something of record of the amount due.

The Chairman. In the Minnesota practice do you get a default judgment?

Mr. Clark. Yes.

The Chairman. The form of paper always used was an affidavit that there was no appearance or answer, and then you were required to set in for the advice of the clerk, I mean in

your affidavit, the precise amount due, and you had to swear to it. If it is a note you give the amount of the note, plus interest. You also enter up the costs and tax.

Mr. Clark. It comes to the same thing, doesn't it?

The Chairman. I think the affidavit on which the default is going to be entered should state the nature and amount claimed.

Mr. Clark. That is what we provide in lines 8 and 9. We thought it should be done. I take it that is agreed to:

"The clerk shall, upon request of the plaintiff, if an affidavit of the amount due is on file, enter judgment for such amount and costs, but such amount shall not exceed the amount prayed for in plaintiff's complaint."

The Chairman. All right.

Mr. Morgan. I do not see why you should say it is necessary that there should be proof of the allegation. That is admitted by the default.

The Chairman. Technically it is not necessary, but the clerk has to know what the amount is. You have to set it up by your affidavit. If you do not set it up the clerk has to examine the pleadings and himself figure it up. You ought at least to verify your petition. That is the theory of it.

Mr. Morgan. I see no objection to that.

The Chairman. Is there anything else in connection with Rule A18?

Mr. Donworth. What is this I have before me about Rule 1?

The Chairman. I think that is Senator Pepper's.

Mr. Pepper. Mr. Hammond doubtless would tell you that is mine, but I think in fact it emanated from his fertile brain.

CONSIDERATION OF RULE A19.

The Chairman. Next we have Rule A19.

Mr. Clark. I might say that we struggled over it a good deal the last time we were in session, and as a result of the discussion had then we divided it into three kinds of motions to upset judgments. And I trust you have looked it over. It is, of course, a troublesome rule in which to provide several things so as to make a judgment as binding as possible.

The Chairman. I have one suggestion to make in connection with subsection (b) if we are dealing with that. There it says:

> "Rehearing or New Trial. The court shall have power, for good cause shown, to order a rehearing or a new trial if a motion therefor, setting forth the special matter or cause on which such rehearing or new trial is applied for, is served and filed within 10 days after service of notice of entry of the order or judgment---"

I suggest that you put in after the words "10 days" the words "after the verdict if it is a jury case." Why if a verdict is rendered you should wait until judgment is entered before you are required to move for a new trial, would leave a hiatus.

Mr. Clark. Yes, that might be. You could have that motion in a case where there is no jury. You would have to have more than a verdict.

The Chairman. I do not mean to strike out anything. But just have 10 days after verdict or 10 days after notice of the entry of the order or judgment.

Mr. Donworth. The question will arise, in connection with the practice in some districts, of having judgment entered immediately upon the verdict. In others the motion for new trial steps in between the verdict and the judgment. I think the rule we adopted touching the Redman and Slocum cases will probably also run into the question. For instance, you would not want judgment rendered on the verdict there when there is a point reserved. I do not know whether that is involved here or not or should come up later. Judge Olney said I believe that he was going to suggest some more definite rules in regard to motions for new trial. So I suppose that will come up then.

Mr. Lemann. Is there any other place it can come up?

Mr. Olney. That is the only provision here.

The Chairman. There is nothing said anywhere in the rules as drawn on this question of where judgment comes in, that judgment should be entered forthwith, or whether it should or not. The practice in Minnesota is for the clerk to enter judgment immediately, but that does not prevent your moving for a new trial.

Mr. Lemann. We have the practice of entering judgment but not signing it for 3 days, and you must ask for a new trial within 3 days. Ten days is a long time.

Mr. Dodge. Yes, 10 days is a long time. They say it is 3 days after the verdict of the jury.

The Chairman. That is all right if on the minutes of

the court.

Mr. Lemann. I think we ought to be pretty specific on this rule, as on the preceding rule, for the benefit of the heathens in my part of the country. Many of these things are so new they will need a guide. Where you are doing something that the lawyers are accustomed to, you do not so much need a guide. But where you are doing something new it should be made pretty clear. On this point about judgments, for example, when the verdict comes in do you enter judgment or not?

The Chairman. I think you ought to provide the prevailing practice in the federal courts, and that is for the clerk to enter judgment on verdicts forthwith. There are a good many implications from that. For instance, suppose there is another suit pending between the same parties and involving the same claim in a state court, and the question of priority arises, there is a race for priority, which is settled by the date of the first judgment, whether in a state or a federal court. One advantage the federal courts always have is that judgment is entered forthwith after verdict, whereas in Minnesota if you make a motion for a new trial the party might even go to the Supreme Court before judgment was entered, meanwhile the state case would become moot.

Mr. Lemann. This does not follow the state practice in the federal courts?

The Chairman. Not in Minnesota. Who knows that the federal practice is in other districts, where the verdict comes in and they fix the amount, does the clerk enter judgment forthwith?

Mr. Olney. Ordinarily it is entered forthwith unless the court expressly states the contrary.

Mr. Donworth. In Washington there is no provision for the clerk to enter judgment in a case. It was the custom, but the practice was that you did not get judgment until one party or the other presents an order for it after the verdict.

The Chairman. That is in the state court.

Mr. Donworth. I think the federal court follows it.

Mr. Clark. On the question of time and whether it is stated, generally in the states there is a great divergence of opinion. Some provide for entry of judgment on verdict or within 10 days after receiving written notice, as in California. The time element varies, and I think the shortest is New Hampshire with 24 hours. There are quite a few states that have 3 days, and then they go to 4 days, 5 days, 7 days, and 20 days, and so on. Maine I think is 30 days. Wisconsin is 60 days from the verdict. Tennessee is 30 days from the judgment. Alabama is 30 days from the judgment ---

Mr. Lemann. (Interposing) Let us make this plain.

Mr. Olney. I think the time that should be allowed for a motion for a new trial should depend very directly upon the purpose of the motion, or rather the scope of the motion. In California a motion for a new trial is really the method and the sole method by which the trial court can review its own proceeding. The right of the trial court to review its own proceeding is a very valuable one and one that frequently results in avoiding injustice, as well as avoiding necessity for appeal, as to which the court is finally convinced his ruling was in error. It is particularly valuable in enabling

the court to review the verdict when he thinks finally it is against the weight of the evidence.

Furthermore, there is this about it, and this is very valuable it seems to me, and has recently been answered in the California Code. On a motion for a new trial in a case not tried by a jury the court has the power to correct its findings, to correct its conclusions of law; it has the power to render a judgment directly opposite if he pleases upon the findings it has made. In other words, it can finally mold the judgment to accord with its view then. And it works, apparently, exceedingly well. It is accompanied by provisions which require prompt action. If the order for a new trial is not granted within a certain length of time after the verdict or decision -- and when we use the word "decision" in a court case in California we mean noting down the findings and conclusions of law; if the order for a new trial is not granted within a certain length of time after that order, it is deemed denied and the court has no authority whatever to extend that statutory period. So that it requires action. But within that period the control by the trial court, under restrictions, over its judgment is one which it is very desirable as it seems to me it should have.

The provision here is that the court may for good cause grant it. There should be distinct limitations upon that. It should not be left in that general form. There are judges so constituted that if it is left in that way, every time a motion is made they would think there was good cause. There are some men who cannot make up their minds. And there has got to be a distinct limitation on the cases in which new trial

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can be granted, keeping the review by the trial court-- but even those limitations would mean that there would be room for action. And it would require here quite a considerable formulation of further rules governing the matter of new trial.

Now, along that line, if I am not taking up too much time with this, and I think I am discussing the fundamentals of this rule: The motion for new trial is used as a means of review in the strict sense of the word, and it is entirely different in principle from the cases which are included under subsection (c). Those are not cases of review. Those are cases where you are setting aside the judgment or order because it has been obtained through fraud or as a result of inadvertence, or something of that sort. It is an entirely different thing. And the two should not be stated in our rules so that they may be confused. Definitions should be retained between the function of one and the function of the other; and the time that is permitted is different. For example, the time for such relief in general as is prescribed in subsection (c) under the California code that simply says application must be made within a reasonable time, and in no case any more than six months. That has never disturbed the finality of our judgments, I mean that six months' period. We have never had any difficulty from it at all, or any injustice by reason of that length of time. On the other hand, a motion for a new trial must be determined long before any six months' period has expired. What I have in mind, or the essential thing in connection with this rule, is that we want to provide here in these rules as a proper part of any code of procedure, rules that will within proper limitations

enable the trial court itself to review the results in its own court, and the only rule is:

"The court shall have power, for good cause shown, to order a re-hearing or a new trial--"

Which is quite insufficient for that purpose.

Mr. Donworth. I agree with all of that. Regretful as I am to extend the time of our proceedings, it does seem to me if we are to avoid other troubles, we must go into the whole matter of new trials. For instance, if I may refer to a code with which I am somewhat familiar:

"New trials defined."

It is perhaps a commonplace definition, but here it says:

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee."

Then under the head of "Grounds for Granting," it says:

"Irregularity of proceedings of court, jury--"

And so on, and says:

"Accident, surprise, newly discovered evidence, and so forth, error of law--"

Some eight grounds being specified; and I do not see how we can avoid tackling that subject and putting them in.

In regard to entry of judgment in the ordinary case, this is the provision:

"In any action tried by jury in which a verdict is returned, judgment in conformity with the verdict may be entered by the court at any time after two days from the return of the verdict. Any motion for judgment notwithstanding the verdict or for a new trial must be filed

within two days after the verdict."

There you have a complete system, and it seems to me we must so provide here.

Mr. Clark. Mr. Chairman, I had quite an extensive memorandum prepared. I did not get it sent around because I did not have it until late, and there is a great deal of material involved. I take it all of you recall the provision of the judicial code which provides that all the United States courts shall have the power to grant new trials in cases where there has been a trial by jury for reasons for which new trials have usually been granted in courts of law. And that goes way back to the original act, I think, being a reenactment without change of the Judiciary Act of 1789. In the first place, we tried definitely to make the decision between relief against a judgment and the new trial. And as to relief against judgment, it is practically in terms the California rule, as we state it here.

6 Mr. Olney. You have the word "misfortune" which ought not to be in there.

Mr. Clark. We took that out. But we put it in by way of certain alternatives, in brackets. But I am wondering whether, having separated the provision for relief against fraud or mistake on the new trial, we could not cover it in some such way as in the statute without attempting to list all sorts of things.

In the treatise of Graham and Waterman in the matter of new trials, they list: Want of due notice of trial, irregularity in the impaneling of the jury, misconduct of the prevailing party, his agents or counsel on the trial, misconduct of the

jury, a void verdict, absence, supplies, mistake, new trials occasioned by the witnesses, admission or rejection of evidence, misdirection of the judge, where the verdict is against the law or against the evidence, where damages are unreasonable, or for newly discovered evidence.

Wouldn't it be sufficient if we put in for this provision of the statute: For which new trials have usually been granted in courts of law? Or put in--reasons on which new trials have usually been granted in courts of the United States?

Mr. Dodge. Instead of for good cause shown?

Mr. Clark. Yes.

Mr. Olney. Then, if you have that provision, we should prepare the machinery for it. In other words, the time should be specified, and what the court may do. Now, the court ought to have the power on a motion for a new trial, a power that is beyond that which existed in trials at common law. There the action was looked upon as always tried by a jury. And the result was that about all the court could do on any question of fact was to grant a new trial. But the most of the actions for which we are preparing a code here will be actions tried by the court, and there is no reason for requiring a new trial, an actual new trial, in such a case if the court concludes, for example, that it has been mistaken as to a particular finding. He should have the power to make that finding on a motion for a new trial, and to correct it in that respect.

The Chairman. That would come in subsection (b), and instead of ordering a rehearing or a new trial there should be a provision added, for a trial without a jury to modify the conclusions. I had that noted.

Mr. Olney. I am speaking in this case with this in mind: As to the scope, and what we are talking about is so great a problem that we cannot here today properly consider the subject without a draft. If we are determined to give the right of review of which I am speaking, and which I think by all means should be had, we have got to have a further drafting of the rules covering it. We just cannot decide upon the form of these rules today.

Mr. Dodge. Why doesn't the chairman's suggestion cover that fully? I mean the suggestions of the chairman and of the reporter?

Mr. Olney. It does not cover it fully in two respects: In the first place, when you say trials known to the common law, it is going to require lawyers to find out what is known to the common law. In all the code states the practice in the federal court--well, no. When I say "in all the code states" I may be mistaken, and so I withdraw that. But in California at any rate, the practice in the federal courts has been the same as that in the state courts. That is, the grounds for a new trial are the same, and the procedure that is generally gone through, is the same. And we should have here a definite rule that is applicable throughout all the federal courts of the country.

The Chairman. I think so, too.

Mr. Pepper. May I inquire whether there is the right of appeal from an order granting a new trial?

The Chairman. I was going to say, in the first place this falls into two categories in my mind: One is the re-hearing or new trial, where all that you are doing is to

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review the proceedings and see whether error has been committed. Now, in the federal courts there being no appeal from an order granting or denying a new trial, a motion for a new trial on account of any error by the court or insufficiency of evidence on the record made, is a very simple thing. You make it within ten days and it is granted or denied, and there is no appeal from it anyway. But when you get into the question of relief from fraud, mistake, and so on, and especially under the heading of newly discovered evidence--

Mr. Olney (interposing). That should not be in that rule.

The Chairman. Should not be what?

Mr. Olney. That should not come under the fraud and mistake section at all.

The Chairman. That is a matter of arrangement. I am trying to put in two categories the question of review of what has taken place, and other things. I think newly discovered evidence is in the same category of fraud for the purpose I am thinking about, because it involves something that has not taken place and is not in the record, and newly discovered evidence, evidence of fraud, and all that, are all things de hors the record. I agree with Judge Olney that when you come to the matter of a new trial for fraud, mistake, or matters not visible in the record, we ought to have a definite formula as to the grounds and the time; and the time to make a motion for a new trial on the ground of newly discovered evidence we ought to be much more liberal about than in the case of a motion for a new trial where all that you are asking the court to do is to find error in the record.

Mr.Pepper. The reason I asked the question about appeal

is that the action of the court in granting or refusing a new trial is not reviewable. There is not, as it seems to me, the same necessity for specifying meticulously definite grounds on which he may, or as the case may be, he may not, grant the application that is made. It seems to me there is an awful lot to be said in favor of the provisions of the old Judiciary Act, which simply leaves it to the discretion of the court, guided as a judge would naturally guide his discretion, by the course of the common law. I cannot see what is to be gained by meticulously specifying a long series of things when if the court simply says: I do not agree with you, and goes ahead and makes the order that you do not want. For that is the end of it. It is not reviewable. I should think if a man has the discretion, the best way to do is to recognize that fact and leave it discretionary.

The Chairman. When you say it is not reviewable, what we mean is that there is no appeal from the order denying or granting a new trial. But suppose, for instance, in the case of an allegation of fraud, or of newly-discovered evidence, and a motion for a new trial is made and denied, you then go on that record, on the judgment of the whole thing, to the circuit court of appeals, and insist on your newly-discovered

8 evidence. If you had not made the motion below they would say that is where you ought to have made it, and if the court had used discretion in granting a new trial while the appeal is not from the order it is from the judgment, yet it is in error.

Mr. Pepper. I was going to suggest that the real distinction is between the matter which appeals to the discretion

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of the court on an application for a new trial, and the presentation to him of a matter of which he is bound to take cognizance on pain of having the judgment reviewed on appeal, on the ground that there was after-discovered matter, or fraud, or mistake, or some other equitable ground for setting aside the judgment. Isn't the real distinction between that which is of its nature discretionary in connection with an application for a new trial, and that which if established would vitiate the judgment which has been entered or is about to be entered on the verdict? And is it worth while in the former case, or former class of cases, to specify all the different things which enter into the making up of the judicial mind on the question of discretion?

Mr. Morgan. Mr. Chairman--

Mr. Olney (interposing). I would say in regard to that question, that the enumeration from the Washington Code as Judge Donworth read it would seem to indicate it is evidently too meticulous, and enumerates a lot of things which could be covered by one expression. The most of those things were errors occurring during the trial, and such wording would be sufficient to cover the whole matter, practically, along that line. The grounds given in the California Code are very much more limited. They are:

> "When new trial may be granted.--The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

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"1. Irregularity in proceedings.-- Irregularity in proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

"2. Misconduct of jury.--Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors;

"3. Accident or surprise.--Accident or surprise which ordinary prudence could not have guarded against;

"4. Newly discovered evidence.--Newly discovered evidence material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial;

"5. Excessive damages.--Excessive damages appearing to have been given under the influence of passion or prejudice;

"6. Insufficient evidence.--Insufficiency of evidence to justify the verdict or other decision, or that it is against the law;

"7. Error in law.--Error in law occurring at the trial and excepted to by the party making the application."

These are the only grounds specified, and they cover practically everything necessary to review.

The Chairman. Do you have an appeal from the order denying or granting a new trial?

Mr. Olney. No. Any error can be reviewed on appeal from

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the judgment. One thing that is shut out and that you cannot consider on appeal, and that can be considered by the trial court, is the preponderance of the evidence. On the appeal if the finding or the verdict is sustained by the evidence; that is, that there is enough evidence so that a reasonable person could properly come to the conclusion evidenced by the verdict or the finding, the appeal court cannot touch. The trial judge on the review has the right to say: Well, there may be substantial evidence to sustain this verdict, or to sustain this finding which I have made, but I think that that finding or that verdict is clearly against the weight of the evidence, and he can set it aside on a motion for a new trial, but the upper court on appeal cannot do that.

9 Mr. Morgan. There is one consideration about mentioning these grounds for a new trial I think you have to take into consideration, and that is that some of these code states hold if there is an enumeration those are the exclusive grounds for a new trial. I think we ought to adhere to the 1789 Code and not in any way limit the trial judges' right as given by common law to decide about setting aside a verdict on a matter and granting a new trial.

Mr. Olney. The whole point of that, if I may say so, Mr. Morgan, would lie in the fact that there were grounds for a new trial at common law which are not enumerated, for example in this, because it contains the limits, but the grounds for a new trial might be such as are recognized by the common law. I have no objection to that provided you specify those grounds so that people will know what they are.

Mr. Morgan. And it would be a job to try to do it?

Mr. Dodge. That is the point. Those grounds read from the Washington Code are so obviously within the court that what they say is, it is suggested they cover it. As Mr. Morgan suggests, I think it would be a great mistake to specify a lot of detail grounds.

Mr. Lemann. I should think that fraud ought to be segregated to some extent from this matter of a motion for a new trial. In my State, and I do not think we are entirely back in that, you can bring a suit to set aside a verdict on present grounds, and after the judgment has been signed and after the time virtually has expired you can bring a trick suit to set aside that judgment for fraud. And that is what I think the reporter was squinting at in this last paragraph, but it does not seem to belong in connection with an application for a new trial. It is a different sort of thing.

And I want to make one other point about delays. If you are going to have something in this new trial section that will keep the case open for new trial for 90 days in order to take care of fraud cases, you are going to have a terrible extension of the time for appeal, and you will deprive the plaintiff of the right to get protection of the judgment. What can he do? He cannot force the defendant to take an appeal until the time has expired, and that is another reason why I think this last paragraph has got to be changed.

Mr. Pepper. It occurs to me that that is sound, and that the way to deal with it is to leave the new trial proposition on the common law basis of the old Judiciary Act. If one of the grounds that you allege in trying for a new trial is such that a refusal to recognize it should be a

reviewable error, then your proper course is to attack the judgment by a motion to open the judgment, which will have been entered when the new trial is refused. Then you have an appeal from the action of the court in refusing to open the judgment because of fraud, accident, after-discovered evidence, or whatever it may be. I do not see how you can make a classification of things that are discretionary and things that are not a part of the motion for a new trial. But if you are aggrieved by the refusal of the motion and have no appeal you can take the appropriate step to strike the judgment off. With us it is a motion to open the judgment for after-discovered evidence, fraud or mistake, and then when that rule is either discharged or made absolute, the aggrieved party has got appealable error.

Mr. Dodge. I do not think it is appealable error in all the classes mentioned in sub-paragraph (c).

Mr. Morgan. No.

Mr. Pepper. He either has or has not, but if he has or has not it is not a matter which should be the subject of enumeration when you are talking about a new trial. The question of whether the grounds upon which you ask to open the judgment are grounds which are appealable if your motion is denied, is a question that will be decided in that proceeding, not on the motion for the new trial.

Mr. Olney. Let me say this about the motion to set aside a judgment. For example, your order on the ground of fraud or mistake in the California courts, and I imagine the courts of other states in which the provision is found, say that it is a substitute not the exclusive but the alternative method

for giving the relief which was granted by courts of equity against judgments obtained by fraud. It is a speedier method of doing it, allowing a court that has been imposed upon, so to speak, itself to grant relief on motion instead of compelling a man to go out and bring a separate and independent suit in equity.

Mr. Pepper. I did not mean to suggest that that was necessary. I meant that on the motion for a new trial you would urge the grounds upon which you ask for the new trial. They would be either purely discretionary matters from the disposition of which there ought to be no appeal, or they would be matters of the sort that Judge Olney last referred to, which would in equity have been the grounds for opening a judgment. It is almost unthinkable that if you rely at present on your motion for a new trial considerations of that sort with your motion will be refused. But if it is refused and you cannot review it on appeal from that refusal then you are driven to the proceeding which enables you on application to open the judgment, to set forth the matter and to contend with the decision of the court in that regard is reviewable.

Mr. Olney. The only thought I had in mind in my statement was to get clearly before the committee the difference between a trial court reviewing its proceeding to see whether it has committed error, whether the conclusion it had reached was correct, reviewing it practically on the record, and the case where it does not review in the real sense of the word to see whether there is any error at all but to see whether or not it has been imposed upon through fraud or mistake. One is a review and the other is not, in the real sense of the word, and there

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ought to be a very sharp distinction made in our rules between the two things.

The Chairman. The distinction you make is more one of the time in which it shall be done.

Mr. Olney. That plays a great part.

The Chairman. I can see a reason for making a very limited time in which to make a motion for a new trial on the record. But what are we going to do about proceedings to open a judgment or to grant a new trial, which amount to the same thing, for newly-discovered evidence, and so forth. The equity rule said you could have a new hearing at any time during the term. If we do not say something about relief against fraud, mistake, and newly-discovered evidence, then when does the court's jurisdiction end to entertain a proceeding of that kind?

Mr. Olney. The newly-discovered-evidence rule is carefully guarded in the California Code. The procedure is that you intend to move for a new trial, and you specify the grounds on which you intend to move. You must give notice within a certain length of time, and that motion must be made and determined within a certain length of time thereafter. Where it is made on the ground of newly discovered evidence you have a certain length of time to prepare your affidavit showing the newly-discovered evidence, setting it out.

The Chairman. What is the time for moving for newly-discovered evidence?

Mr. Olney. I was looking for it. I will find it in a minute.

The Chairman. Suppose you were to discover it in 30 or

60 or 90 days after the judgment?

Mr. Olney. Well, now--

Mr. Morgan (interposing). Isn't it six months in California?

Mr. Olney. Oh, no.

Mr. Donworth. On that you come to the question of balancing advantages and disadvantages. It is important to have litigation come to an end.

Mr. Olney. It is within ten days after the notice. That is, the notice of intention to move.

The Chairman. When does that notice have to be served?

Mr. Olney. It --

Mr. Morgan (interposing). Does it only give you 20 days for discovering newly-discovered evidence?

Mr. Lemann. Haven't you time enough? There are very few cases of that kind, I take it.

Mr. Morgan. And some of them are immensely important where newly-discovered evidence shows up later.

Mr. Olney. You might feel it is desirable to extend that time, and that may be, and in that case you can give a little further time. The motion for a new trial, particularly on errors appearing in the record--

Mr. Morgan (interposing). That ought to be quicker.

Mr. Olney. Yes; and get through with it.

The Chairman. Provided a motion for a new trial is granted on grounds the courts are accustomed to grant them on, say that the motion is merely based upon the record made; that is, on account of errors of trial or something of that kind, it must be made within ten days and immediately disposed

of, and that is the end of it. If a motion is made on any other ground, why, then, you can enlarge the time somewhat. If it is made on matters that are not in the record, where it is not a mere review of what has been done.

Mr. Lemann. What happens to your delay in appealing?

The Chairman. Your time for appeal starts right away. Of course if the application is not made within the time for appeal, or within "the term" it used to be, and you always had jurisdiction during the term--that is what bothered me.

Mr.Lemann. It is 90 days.

11 Mr. Donworth. I think the pendency of a motion for a new trial extends the time indefinitely.

The Chairman. There is no doubt about that. It stops it from running until the motion is decided, and then it starts to run again.

Mr. Olney. That is almost a necessary accompaniment of giving the lower court the right to review its own decision, because there is no use or should not be any use of a party taking an appeal until he knows what the final conclusion of the lower court is, what the final result is there, and then he can take his appeal.

The Chairman. Couldn't we say that if the motion to review what has been done is desired it shall be made within ten days, and on other grounds action must be taken within the time allowed for appeal? If he makes it on the 89th day he still has one day left to appeal after the court decides his motion. But we have fixed the time limit of three months in all cases, and the thing really isn't final during that period anyway.

Mr. Lemann. He could wait until the 89th day and then make a motion for a new trial on the ground of newly-discovered evidence, and if the court denies the motion on the one hundredth day does the rule that the fellow has for his appeal a time only beginning from the time the motion was denied, so that he has three more months?

The Chairman. No. It cuts out the time the motion is pending. The situation is cared for by this: If he waits until the 89th day and he has not shown due diligence, he is out. He cannot deliberately wait. I do not mean to give him the absolute right to await the maximum limit. There has got to be due diligence shown to the court for it to entertain his motion.

Mr. Lemann. Of course we are not going to cover fraud by this. In my opinion I think a man should have more than 90 days for fraud, but not any particularly long time for newly discovered evidence.

Mr. Dodge. It is subject to collateral attack if it is fraud.

Mr. Lemann. Did I understand you to differ with the chairman, Mr. Morgan?

Mr. Morgan. No.

Mr. Lemann. I think it ought to be made perfectly plain in case you put in a provision for delays and an appeal would not be interrupted by the filing of an application for a new trial. I think we better make that plain. In my part of the country they would not read that construction.

Mr. Dodge. They would if it started all over again.

Mr. Lemann. Yes; but they are accustomed to the holding

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that appeals do not begin to run until the time has expired for the application for a new trial, or after application has been made within these details, and it has been disposed of.

The Chairman. You could not adopt any rule that affects the right of appeal. We will have to stand on the established federal rule. There are many cases in the Supreme Court of the United States that any and all federal statutes have a limited time for appeal, as to when a motion for a new trial is made and entertained. If it is not entertained you are out. But if it is made and entertained it stops the running of the time for appeal. If 20 days have gone by and then you make a motion for a new trial, and the motion is denied, then you have 70 days left. That is the established federal rule, and I do not think we want to touch that.

Mr. Donworth. Do you feel that that is the established rule? I may be very much in error, and very likely am, but I had the impression that the appellate courts were ruling that although judgment was entered on a certain day and a motion for a new trial was not disposed of for 50 days afterwards, that you still had your 90 days after the disposal of the motion.

Mr. Olney. That is what the chairman said, as I understood him.

The Chairman. No. I was under the impression that it just stopped it. But I may be wrong, and if I am wrong we better be looking that up.

Mr. Lemann. Mr. Donworth said if I got a judgment today in my favor as plaintiff, my opponent, assuming that he had 90 days to apply for a new trial, if he waited until the 50th day and applied for a new trial, and the court took it under

consideration and then denied the application, say, on the 60th day, that then the 90 days for appeal started running from that 60th day, which would mean I was powerless for getting my judgment for the 60 days and the 90 days.

The Chairman. I am not sure that I am right about that.

Mr. Pepper. You ought to be right because it is not like the statute of limitations. This case Mr. Lemann quotes is the case of a motion which, upon being disposed of, gives no right of appeal from the motion. There is no reason why the limit of time for appeal should run from the action of the court, which is not of itself an appealable action.

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2:45 p.m.

The Chairman. Dean Dobie, what is the Federal rule in the Supreme Court of the United States on the effect of a motion for new trial as affecting the time for appeal?

Mr. Dobie. I am not sure of that. I am trying to find out now. The importance of this comes, not in fixing the time in which you can ask for a new trial --

The Chairman. (Reading) "If a motion for a new trial or petition for rehearing be made or presented in season and entertained by the Court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of writ of error or appeal."

I was wrong about that.

Mr. Olney. That means if a man in the Federal court at the present time files a motion for a new trial and it is entertained, the time for appeal does not begin to run --

The Chairman. Until the motion is decided.

Mr. Olney. Until that motion is disposed of. That is what should be the law, if the lower court is to review what it has done, because there is no sense in requiring the man to take an appeal and requiring the appellate court to bother with it while the lower court has not yet finally determined what it is going to do about the matter.

The Chairman. Nobody suggested that was the rule. It was a mere question whether the whole three months existed for appeal after the order.

Mr. Olney. I speak of it because my impression is that further on the time of appeal is made to date -- I may be wrong about this, but that is my impression -- the time of appeal is

made to date from the time of judgment.

The Chairman. We haven't anything to do with the time of appeal, and there is any rule on it here, we better strike it out.

Mr. Donworth. Mr. Chairman, to make progress I think we can dispose of these one at a time. I am rather convinced that the present provision in the code is pretty good, simply so far as the grounds are concerned. If we change the verdict in the present Judicial Code we would have to make some conditions to meet cases tried without a jury. I mean, we would have to reframe that language a little. I think we can safely. Will you read that again, please, about new trials in courts of law?

Mr. Clark. It is according to the practice of the common law:

"All United States courts shall have power to grant new trials in cases where there have been trials by jury for reasons for which new trials have usually been granted by courts of law."

Mr. Donworth. We could hardly adopt that and switch it over to equity cases. We would have to have something, I think, to fit; but I would move that so far as actions at law are concerned, and so far as the grounds are concerned, that we leave it as specified in the code.

Mr. Clark. I might suggest this as an alternative for the other --

The Chairman. We have not settled that.

Mr. Clark. No, I just wanted to give you the way it could be done so you would get the whole picture.

The Chairman. All right.

Mr. Clark. "Motions for rehearing in cases which are tried to the court without a jury shall be granted upon the grounds upon which hearings have heretofore been granted in suits in equity. In ruling on a motion for rehearing the court shall have the power to reopen the case, take additional testimony, and amend or make new findings of facts or conclusions of law."

Mr. Donworth. I will change my motion. I move that the Judicial Code section, with the additions drawn by the Reporter, be our sense of what should be done with regard to the grounds. Now, the time is another matter.

Mr. Pepper. I second the motion.

Mr. Olney. You are reserving the time?

The Chairman. Yes.

Mr. Olney. All right.

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

The Chairman. Now, I think we are agreed that ten days is ample if you are just reviewing the record.

Mr. Lemann. It should be three. I move that it be three when you are reviewing the record.

Mr. Olney. That is pretty extreme.

Mr. Lemann. You think it is too short?

Mr. Clark. On that I have a list of States if you are interested. Quite a few states have three. Do you want more?

The Chairman. As you read them, there are seven, six, ten, twenty --

Mr. Lemann. How about five?

Mr. Olney. Of course, everybody goes by what he is entitl-

ed to, but we have ten, and there should be a pretty clear specification. It is done by notice, and the notice has got to specify what the motion is objecting to.

The Chairman. That would be covered by our motion rule, which says all motions shall state the grounds on which they are made. You do not need to say that again here.

Mr. Olney. Yes, but it frequently means that it takes a man three days to prepare a proper motion for new trial.

The Chairman. What time do you suggest, then? Let us make a motion.

Mr. Olney. We found the time of ten days none too long.

The Chairman. Do you want to move to make it ten?

Mr. Olney. I will move to make it ten.

Mr. Lemann. I offer as a substitute to make it five, just to test it.

Mr. Dobie. I should think, if you made it too short, the lawyer would not have adequate time to go into it and then he would crack loose and file a motion for new trial and work it out afterwards. I think the short time is objectionable.

Mr. Dodge. You must remember that nineteen out of twenty, to put it mildly, are based on two grounds, that the verdict was against the weight of the evidence, and the damages were excessive.

Mr. Donworth. And erroneous rulings.

Mr. Dodge. Sometimes that is put in.

Mr. Lemann. I am a plaintiff's lawyer, and it is tough to have to wait ten days to make a motion and then wait another ten days to have it acted upon.

Mr. Olney. The California code reads:

"The party intending to move for a new trial must, either before the entry of judgment or within ten days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits or the minutes of the Court of Appeals. Such notice shall be deemed to be a motion for a new trial on all grounds stated in the order of notice. The time above specified shall not be extended by order or stipulation."

Mr. Loftin. We have four days unless the court shall extend the motion.

The Chairman. Let us settle the time.

Mr. Olney. Unless you put in that latter clause, that the court shall not extend it, you are going to have it extended constantly if you have three days or five days.

The Chairman. You will remember we discussed that point earlier. There was a general provision that the time should be extended by order of the court except on the matter of taking the appeal, and you recommended then that we add, "except for moving for a new trial on appeal". That was Rule 5, I think.

Mr. Clark. It was 7.

Mr. Loftin. Did we decide to put that in or was it merely discussed, Mr. Clark?

Mr. Clark. I understood it was decided, but I can not be sure now without going back. My memory is that it was decided. It was Rule 7.

Mr. Lemann. Suppose we have a vote on the five days, and if there is a majority against five, all right.

Mr. Pepper. Mr. Chairman, the motion is made for a ten day limit, and Mr. Lemann moves to substitute five. I think there is a good deal to be said in favor of the longer period. If you make it very short, the disappointment and the irritation of the lawyer almost always leads him to move for a new trial. He tells his client that the petition has gone against him but it is a miserable decision, and in hot blood he will move for a new trial.

If you give ten days without power to extend the time, there is a cooling off time there, and a lot of motions that would be made inside of five days are not made i nside of ten. It seems to me there is a lot to be said in favor of the ten day period.

Mr. Donworth. In addition to that, I think it will be found -- and I hope lawyers here who have experience to the contrary will so state -- I think it will be found that where a short time is named in the statute, like Washington, for two days, that the judgment can not be entered until after the new trial matter is disposed of. Now, it is true we have not yet definitely decided how soon the judgment is going to follow after a verdict, but if the judgment follows soon after the verdict we can be more liberal in these time matters than if the judgment had to wait pending this new trial.

Mr. Clark. Just a minute on that. I understood we were going to put the ten days in the motion, whatever it is, from the verdict? Am I wrong about that?

Mr. Donworth. No doubt about that.

Mr. Dodge. You are going to insert the words "verdict or finding"?

Mr. Clark. I think we will split the rule into two sentences.

Mr. Lemann. The judge said to me, -- why worry so much about five or ten days if your delays for appeal are going to be running, and we will take that up next. But, as I understand it, we have just agreed that under the present rule delays can not run until that motion has been disposed of, so I do not think that solution will be open.

Mr. Donworth. Of course, I am not talking about appeal at all. I am talking about getting execution and going ahead with your judgment, whether it is injunction or whatever it is, and, I say, if we are going to have the judgment follow very soon, say, immediately after the verdict, or two days afterwards, if the judgment is going to come pretty soon after the verdict, regardless of the pendency of a motion for a new trial, then we can afford to be more indulgent and give the man more time.

3 Mr. Lemann. I can not take out execution under the statute for ten days. You have 60 days by statute for supersedeas, but I believe the ten days run from the time the new trial is refused, although I am not sure about it. So, there is a good deal of dealy to which I am subjected already. I do not believe we can avoid it.

The Chairman. Judge Olney, I understand your motion, the original motion, is that under subdivision (b) on motions for new trial that merely involve a review of the record, the time shall be ten days after the verdict or notice of the decision?

Mr. Olney. Yes.

The Chairman. With a provision that it shall not be extended by the court?

Mr. Olney. I think that is wise.

The Chairman. Now, your motion is five days, Mr. Lemann, with nothing said about extending?

Mr. Lemann. My practice and Mr. Dodge's practice can not extend it.

The Chairman. What is your motion?

Mr. Lemann. I make a motion for five days with no provision for extension.

The Chairman. The question is on the substitution of five days, with no provision for extension.

(The question was put and the motion did not prevail on a voice vote.)

The Chairman. The question now is on the original motion for ten days without the right of extension.

(The question was put and the motion prevailed.)

The Chairman. Now, you have left the question of what, if anything, in the way of instructions you are going to give the Reporter about the time for making a motion where there is a fraud, mistake, newly discovered evidence, and matters that are not on the record of the proceedings of the trial.

Mr. Dodge. I think, prima facie, we have already covered newly discovered evidence, that is, it must be expressly eliminated, because that is certainly one of the grounds known to common law.

Mr. Clark. That would not necessarily prevent it also being in (c), would it?

Mr. Dodge. No. It is now prima facie covered and we can take it out by section (c).

Mr. Clark. You can take it out unless you think that is a short time to discover newly discovered evidence.

The Chairman. The ten day limit which has been placed has no application to newly discovered evidence.

Mr. Dodge. It would if we stopped the rule right there.

The Chairman. The motion did not have any reference to the rule. It adopted the principle that in motions for a new trial, thased on the record, on a review of what has taken place, there should be ten days without extension.

Mr. Dodge. I thought it was for causes known to the common law.

The Chairman. No.

Mr. Olney. Just to get before the Committee the machinery that is provided by the California code, there are a number of instances in which the grounds do not appear in the record, and those are presented by way of affidavit, so, when they refer to affidavit they refer to the matter we are speaking of.

They give their notice of motion for new trial, and within ten days after serving the notice, the moving party shall serve upon the other parties affidavits intended to be used upon such motion. Such other parties shall have ten days after such service in which to serve upon the moving party and file counter affidavits. The time herein specified, except as above provided, may, for good cause shown by affidavit, or by written stipulation of the parties, be extended by the judge for an additional period of not exceeding 20 days.

The Chairman. That relates only to newly discovered evidence?

Mr. Olney. Newly discovered evidence, and it refers here also to misconduct of the jury. In other words, it refers to all matters,practically, which do not appear on the face of the record.

The Chairman. Does the order for extension have to be made if the original time limit has expired?

Mr. Olney. Yes.

The Chairman. If you do not discover newly discovered evidence until the 11th day, and have not got an extension order, you are out then?

Mr. Olney. You are through.

The Chairman. You can get an extension order on this.

Mr. Donworth. On the time for filing affidavits but not the time for filing the motion.

Mr. Pepper. Mr. Chairman, may I inquire what happens in a case where a motion for a new trial is made seasonably for alleged error occurring in the course of the trial, the motion is refused, and the time for appeal begins to run, and runs to expiration, and no appeal is taken; then, one hundred days, three or four months, or five months or six months, after the entry of the judgment, matter is discovered which in equity gives the plaintiff the right to have that judgment opened. Suppose it is a case in which the relief can be still granted without disturbing intervening equities which have been interposed, and it is still a question between the original parties; there is a well established practice by bill of review for dealing with that case, and I am wondering why we mix up that, which is the subject matter for bill of review with the motion for a new trial, because if, within the period allowed for moving for a new trial, any ground develops, whether matter occurring during the trial or subsequently, that can be presented, the court will consider it and act upon it, but if the time for moving for the new trial goes by why should we have an additional provision in the nature

of a bill of review, but with a time limit to it, when all that would happen would be if the time limit shut down on you you would then have your bill of review?

The Chairman. But we have not provided for any bill of review and there will not be any under this code.

Mr. Pepper. Why, Mr. Chairman, there must be some way of allowing within a limited time the review of the judgment which has been entered as a result of a conspiracy, for example.

The Chairman. That is what we are right on now.

Mr. Clark. I am not sure that that would set out what Senator Pepper has in mind. This way suggested by Judge Olney, I think, the last time as a comparatively short and summary form of bringing up those questions. You notice we say in our footnote that we think general equity bars will still remain.

Mr. Olney. They do still remain.

Mr. Pepper. My point is --

The Chairman. Is the bill of review an independent suit?

Mr. Pepper. Oh, yes.

Mr. Dobie. Oh, no; not under the old procedure, it was not; it was limited to equity.

The Chairman. It was not independent?

Mr. Pepper. When you say it was not independent, it was this sort of a proceeding: The proceeding in equity would have been terminated by a final decree and on the docket of the court the entry of final judgment would have been made. A bill of review under the old chancery classification would have been a bill in the nature of a bill not original, but it actually was an independent suit brought to correct something that had been

done by the court in ignorance of facts which the plaintiff now presents.

The Chairman. Did you have to get service anew, or could you get service on the lawyers in the old case?

Mr. Pepper. You had to get service anew.

The Chairman. That is, it is an independent action to set aside an action on grounds of fraud. We are giving means to do that in the suit itself and I do not suppose we are touching the question of an independent action.

Mr. Pepper. If that is clear, I have nothing more to say, but I just did not want to have any implication from the fact that a short bar, ten days or 50 days, or 60 days, had shut down on you and you were without recourse in respect of an after-discovered conspiracy which made the whole thing smell to Heaven as a fraud, or some obvious mistake which, upon being drawn to the attention of the chancellor, would shock his conscience.

Mr. Olney. To make the matter clear, there are two grounds, for example, here stated in the code as motions for a new trial, which are ground outside the record, and in both of them I think the time for presentation on the ground should be quite short.

The one is misconduct of the jury, such as you may find, for example, if the jury has determined the thing by lot, and the other is newly discovered evidence.

In both those cases the time permitted for review on those grounds should be short and it can well be covered by a provision in connection with a motion for new trial. When it comes to such grounds as fraud or mistake, our courts have always held that the code provisions for a motion -- and it is not a motion

for a new trial; it is a motion to set it aside -- that that motion is but an additional method of giving the relief which you could obtain by a direct proceeding in equity.

Mr. Pepper. That is all right.

Mr. Olney. And it seems to me that that is quite advisable, and the time limit there is extensive, as I said, in our State, and does require that the motion be made within a reasonable time, and in no case within more than six months. While that six months' period stands there in that fashion, it has never been found, I do not know of any case, where that time has had such an effect on the judgment or rendered the judgment so uncertain as to be of any embarrassment to anybody. We never pay any attention to it.

The Chairman. What is your time for filing? Six months?

Mr. Olney. It is either six months or three months, I am not sure which.

The Chairman. You see there is an analogy for a six months time for filing, and why can we not adopt that? These motions for extraneous matter must be made with due diligence and within three months.

Mr. Olney. Within the time allowed for appeal.

Mr. Lemann. Then it is going to be plain? I just want to be sure.

Mr. Olney. If it is made.

The Chairman. And entertained.

Mr. Olney. If entertained and denied, with the three months time for appeal beginning to run from the time of denial. That is the Federal decision.

Mr. Clark. I do not think so, because I do not think this

is now provided for specficially. The Federal rule certainly applies to (b), and I think (c) is a new rule. That is, formerly you could do it by some of these other bills, there was inherent power, but I think (c) is a new thing so far as any specific provision in the same case is concerned.

Mr. Olney. I am not sure Mr. Lemann understood this, that this motion we are speaking of last, the motion to set aside a judgment because of fraud, is not a motion for a new trial, and will not extend -- the fact that such a motion is made will not prolong the time for appeal.

Mr. Lemann. I did not understand it, and I think if that is so, it ought not to be in this rule at all. That was my original proposal, that that kind of situation should come out of this rule and be in another rule.

Mr. Donworth. I think it is very clear, in the first place, we have not disposed of some of the features of the new trial practice, about how much time for affidavits, and so on, and we are jumping now into this matter that Senator Pepper has well called attention to, in the nature of a bill of review. It seems to me, beginning with (c) it should be a new rule, entirely independent of new trials and judgments. It is in the nature of a bill of review to relieve a party from fraud or some other special thing, and that we should go on and put in a new (c), or add this to it by prescribing the time within which affidavits must be filed, and complete the new trial procedure before we take up this other matter.

Mr. Clark. Mr. Chairman, on the question of the place of the rule, it does not seem to me that that is very important. It can be a separate rule. You will notice that this rule is

not an entire rule. It is a rule with three different aspects and we thought we were setting it up in the best way. Whether it would be better to have it in three rules, which I think would be necessary, I do not know. You will notice that we have no citations at the beginning in (a).

Mr. Dobie. I think in this connection in fixing the time limit you have got to remember this, that we are dealing now with both law and equity. Under the old system at law unless you moved to take steps during the term at which the judgment was entered, that was the end of it.

Under the equity situation, and I am talking now of only about the old equity proceedings for the correction of a decree by a court that entered it, you had to petition for a rehearing and it could be filed at any time within which an appeal could be taken and there was no time limit whatever for the filing of the bill of review that the Senator was talking about. It was very rarely granted when it was not properly applied for. If you put in a time limit that is inflexible you have to put in something that is fair in those two separate situations.

Mr. Lemann. The argument for two separate rules is that if there is a difference in effect from the time for appeal between these two things, then you should have them, I believe, in two separate rules to prevent misunderstanding.

The Chairman. I do not think we can proceed on the assumption that if we put in a provision here making a form for motion to affect judgment by fraud, that the courts will not apply the very same principle which they apply on motions for new trial or rehearing, to-wit, that when they are made, until they are disposed of the time for appeal does not commence to run. I am

afraid of that and I do not think we ought to assume that that is going to be the result.

Mr. Olney. They have not done that in California where our time for appeal really runs from the motion, as I understand it, from the action upon the motion for a new trial.

Mr. Lemann. Of course, fundamentally, I never thought that this -- supplementary motions are looked upon as entirely distinct. I thought it was a new name, Senator Pepper's bill of review just called by a new name, and not the sort of thing I would have thought of as a new trial.

Mr. Pepper. The Chairman has satisfied me that it would be a fine reform to make provision consistently with this new
6 trial machinery, for taking advantage at that stage of quickly discovered matter which otherwise would have been available as the basis for a bill of review. All I was anxious for was that it should be made clear that if matter heretofore available as a basis for a bill of review could not be adduced in support of the grieving party's claim within the time specified by this rule, that we should not thereby forever be barred from seeking relief, but it would be without prejudice to his right to proceed independently by an independent suit.

The Chairman. That is my understanding of it and there is a great advantage in providing for relief against fraud, and so on, in the original suit instead of by a bill of review because you can do it in the same proceeding, and if the lawyers appear you can serve on them. The man who got the judgment may be gone to Europe and in the other thing you can not reach him. By this method you can make it a continuation of the same law suit. You just simply serve the lawyers on the other side, wherever the

defendant may be.

Mr. Dodge. So far as fraud is concerned, am I wrong in thinking we do not need any rule about it because any judgment or decree can always be attacked for fraud at any time, attacked for fraud upon the court?

Mr. Dobie. There is another thing in addition to the bill of review, that there is, of course, a separate, independent rule in equity preventing the plaintiff from enforcing an unconscionable decree.

Mr. Dodge. If it was obtained by fraud upon the court it can be opened again, can it not?

Mr. Dobie. Yes.

The Chairman. That is not as good a remedy as the means in the suit itself because you do not have to serve the process as you would in an independent suit.

Mr. Dodge. You mean you would have to await a chance to attack it collaterially or bring an independent suit?

The Chairman. If you did not have a form for doing it in the old suit you would have to go through the formality of a new suit and have to locate the defendants within the jurisdiction of the court and serve the process. By putting it in as a supplemental suit to the suit itself you can serve upon the lawyer and your troubles are over.

7 Mr. Dodge. It is perfectly true, if there is any present method of continuing it in the case itself.

Mr. Clark. Would it save time if at the end of (c) we put this: "Judgment shall remain until it is ruled against."

Mr. Donworth. That would embrace some doubt. There can not be any doubt about it.

The Chairman. I take it it is the sense of the meeting that you do want a provision that is in addition to the independent suit or the bill of review to enable parties in the old case itself to move to set aside the judgment or attack it for fraud or conditions of that kind?

Mr. Loftin. Except, Mr. Chairman, I think we want to be sure we are not taking away the remedy in the nature of a bill of review.

The Chairman. Well, you can put a note at the bottom of the rule that the Supreme Court can promulgate and say this is an additional remedy and it is not intended to exclude the independent suit, or what was formerly known as a bill of review, and that goes out with their signatures.

Mr. Dodge. Or a petition to vacate judgment. There are various grounds on which a judgnent may be vacated.

The Chairman. As long as this remedy is in addition to the independent suit, is it not proper for us to make the time failry short? Now, what time do you want to put on it?

Mr. Olney. I should say the time for appeal, myself.

Mr. Dodge. Second the motion. You put it in the form of a motion?

Mr. Olney. I make that in the form of a motion.

The Chairman. With the understanding, in any event, that it is to be made with due diligence? It is not an absolute right.

Mr. Olney. No.

Mr. Pepper. Laches may bar within that time.

Mr. Olney. Yes.

The Chairman. That is my point.

Mr. Loftin. That is from the time of the verdict or finding or from the time of discovery?

Mr. Olney. The time to make this motion expires when the man's right of appeal from the judgment expires.

The Chairman. That makes the suit final.

Mr. Olney. The judgment becomes final, so far as any motion of this character is concerned, at the time when he loses his right of appeal.

Mr. Loftin. That is satisfactory.

Mr. Clark. Do you want to use the words, "within time of appeal", or do you want to say "90 days"?

Mr. Olney. Refer it to the time of appeal.

The Chairman. 90 days is wrong. Sometimes it is 890 and sometimes 89.

Mr. Dobie. The time for appeal coordinates it with the old petitions for rehearing, which is an advantage, I think.

The Chairman. Is there a motion before the Committee now?

Mr. Olney. I made that motion.

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

Mr. Olney. Now, to bring up the other matter, and to bring it to a head, I move in case of a motion for new trial on ghe ground of misconduct of the jury or on the ground of newly discovered evidence, the moving party be allowed ten days after the time called for him to give notice of intention, or that he be allowed ten days to prepare affidavits upon which he is going to base his motion; and the other party be allowed ten days to reply by a counter action.

The Chairman. You are assuming that our original ten day

limit applies to that kind of a motion?

Mr. Olney. Yes.

The Chairman. Well, that is an assumption you better take note of, because, as I worded that motion, it only applies to matters on the record.

Mr. Clark. Let me get it clear. That is in effect that (b) shall include these matters not on the record, and, in addition, (b) shall specify something as to affidavits, is that it?

The Chairman. That is right; (b) shall include misconduct of the jury and newly discovered evidence, and a general clause that in those two cases --

Mr. Olney. I mean, Mr. Chairman, to make the matter clear, that the parties should have a full 10 days in the case of this character, and, in fact, he might well be allowed more within which to prepare his affidavits to make his discovery and prepare his affidavits. The other side should then be allowed 10 days to rebut.

The Chairman. This applies to motions for a new trial on the ground of misconduct of the jury or newly discovered evidence, which motions, as I now understand it, have to be made within 10 days after the verdict or decision, but he wants a little relief on those two cases to get out the proof.

Mr. Sunderland. So it means actually 30 days?

The Chairman. Before the hearing.

Mr. Sunderland. Before the hearing.

Mr. Donworth. Mr. Chairman, in view of the fact that we are not stating the grounds for new trial in any of the code statutory language, but in the general language which I thoroughly

concur in, should we not then say that this matter is to be shown by affidavit when the ground of a man for a new trial is something not appearing already in the record? In these affidavits -- confine it to the two cases of newly discovered evidence and the misconduct of the jury, while there may be misconduct of the party, and so on --

The Chairman. You are still further enlarging it beyond the three months.

Mr. Donworth. No, not at all. I understand that we voted that the time for filing a motion for new trial should be 10 days after the verdict, and the only question now pending is, if I understand the present debate, the time allowed for filing the affidavit in support of your motion. Isn't that so?

The Chairman. In support of two kinds of motions, limited to newly discovered evidence and -- you do not give affidavits if you are just reviewing the record, because it is all there. Now, you have two kinds of cases where it is not in the record.

Mr. Donworth. You have more than two; that is agreed upon.

8 Mr. Dodge. Yes; they are not the only two.

The Chairman. I am opposed to extending the time when you have already allowed the man three months.

Mr. Donworth. Mr. Chairman, I am not suggesting to extend anything, rather than to shorten it, I think. I understand we are agreed that a motion for a new trial shall be made within 10 days after the verdict, regardless of what the grounds are.

The Chairman. What do you mean by a motion for a new trial?

Mr. Donworth. In the ordinary sense; asking the judge to set aside the verdict or change his ruling, if it was a court

case.

The Chairman. All right.

Mr. Donworth. Ten days is the limit, and in no case can that be extended. Now, the question, as I understand it, right before us now, is how much time you will allow for affidavits to bring before the court attention to matters that are not already of record, and it did not seem to me that we should single out only two possibilities of that character, namely, newly discovered evidence, and misconduct of the jury, because we have misconduct of the party keeping my witness away, and a lot of other things maybe matters --

The Chairman. That is fraud, is it not?

Mr. Donworth. We will admit that it is fraud.

The Chairman. We have already allowed three months in which to make that motion.

Mr. Donworth. Yes, but I want a new trial on the ground of that matter, I do not want to be relegated to the other procedure; I want to have a new trial granted. It is a common thing.

Mr. Lemann. The other procedure is a new trial, as it sort of percolates. It has had a little trouble getting through the ivory. But, as I understand, this is a new trial, Judge, which is not going to stay in here. It is a new idea of a new trial.

Mr. Donworth. In answer to the Chairman's suggestion, you have got in your discovery evidence down in (c)--

The Chairman. He is talking about putting it in (b), putting a misconduct of the jury in (b).

Mr. Dodge. I think Judge Donworth has a perfectly good point in mind. We can not be certain that there is no case of

a motion under (b) which can not be based on facts outside the record.

Mr. Lemann. And still fall short of the other?

Mr. Dodge. Yes, and any motion depending on facts outside of the record should be supported by affidavit, only I don't think the plaintiff should have ten days to file those. I think you can save time right there by providing that the affidavits shall constitute the motion, unless the court for cause shown allows not exceeding ten days thereafter.

The Chairman. Let me see. I think we are getting confused. Maybe I am. But here is the way I understand it. Under (b) we have provided that the time limit for making a motion under (b) is ten days and can not be extended. That covers all cases where you are merely reviewing what has taken place. It covers, in addition to that, the time limit of ten days for those two cases which do not appear on the record, the motion for newly discovered evidence, and the misconduct of the jury.

Mr. Lemann. The point is right there.

The Chairman. Now, I have not finished. Under our catch-all provision, we say that applications may be made on other grounds, fraud, mistake, or what not, within three months. Now, why do we need to put a lot of stuff in about more time for affidavits in those cases?

Mr. Olney. Mr.Chairman, you have denominated it the catch-all, but it is not that.

The Chairman. It is not?

Mr. Olney. No, not by any manner of means. It merely serves the same purpose as the old bill of review, and it is quite different in its conception from a motion for new trial.

It has the result, if granted, of setting the judgment aside, for example, so that a new trial may be necessary, but it is not a motion for new trial.

The Chairman. Make your motion and submit it. I am afraid I am too badly confused to be anything more than an obstructionist. Let us have the motion and I will submit it. Judge Donworth, what was your motion?

Mr. Donworth. It is substantially the same as Judge Olney's, as I understand it, only it included something which I think he did leave out.

Mr. Olney. I did leave it out. Judge Donworth's motion is better stated than I stated it.

Mr. Donworth. In substance it about states this -- we have already required the motion to be made in ten days -- add this to (b):

"When such motion is based upon grounds not already appearing of record in the court --" and that, of course, would imply the stenographic report of the proceedings as well as the formal record -- "the facts constituting such grounds shall be shown by affidavit, which affidavit shall be filed within the filing time, to-wit --"

Mr. Dodge. With the motion.

Mr. Olney. Mr. Dodge says affadavits to support should be filed at the time the motion is filed, which would be 10 days, and you have to allow time for final affidavit.

Mr. Lemann. Would the Chairman's point be covered by adding:

"This is not understood to apply to cases which would be covered by class (c)", because class (c) would have the effect,

whatever it may cover, whether it is to be grouped or lumped, of giving you much more than ten days.

9 Mr. Olney: That is perfectly proper. I have no objection.

Mr. Donworth. My view of that is this, that we are purposely letting (b) and (c) overlap on some grounds. That is, I do not think we should prohibit their overlapping. If a motion for new trial can be granted on any of the grounds known to the common law on motion, I would let that speak for itself, and then (c) goes on, and whatever it covers (c) is good for.

Mr. Pepper. Mr. Chairman, in order to facilitate proceedings I am going to withdraw, with your permission. I have a meeting of the Chapter of the Washington Cathedral at 4:00 o'clock which I am bound to attend.

The Chairman. Will you be back this evening?

Mr. Pepper. Yes, I will be back. I partly go for that reason and partly that you may make more progress in my absence. (Laughter)

Mr. Donworth. I will not take up any more time presenting my views. If the Committee thinks those two should be mutually exclusive, all right, but I thought they should not.

Mr. Clark. I really think they ought to overlap because it may puzzle lawyers, and there may be a chance for mistake if they do not. I do not see that it does any harm if they do and it avoids a trap.

Mr. Lemann. What is going to overlap?

The Chairman. The time for doing it overlaps.

Mr. Lemann. That is what I had not quite understood.

Mr. Clark. There are different results. Under (c) it is

a final judgment except that you get your relief in a shorter way than by the bill of review. Under (b) it is not a final judgment.

Mr. Donworth. If the ambulance chaser has kept my witness away and I do not know why my witness did not turn up, if I find out in ten days after the verdict just why he kept away, I want to make that a ground for a new trial and prove it by affidavit.

Mr. Lemann. I think that is covered by (c). Let us suppose the case happens and you come in after 20 days with that allegation, and if I am on the other side I am going to say to you: "You should have come in within ten days."

You will say, "No, I am under (c)."

I say, "No, you are under (b), and (b) is what covers you here. You should have come in within ten days."

The Chairman. That is why you can not make them overlap.

Mr. Lemann. That is what I am afraid of.

The Chairman. One says ten days and the other says three months.

Mr. Dobie. That was in (c). I should say that I agree with Judge Donworth. There is no reason why he should not immediately apply for a new trial, and if he wanted to come under (c) for 85 days, and you could bring out that the party had slept on it for 75 days, I am satisfied the court would turn him down.

The Chairman. I understand (b) is a motion for new trial even though judgment has been entered; (c) is a motion to affect judgment.

Mr. Donworth. That is correct.

The Chairman. I think in essence they are the same thing,

because, in vacating the judgment, what do you do? You grant a new trial if you vacate it, and I do not think you can make a distinction between them just because you call one a motion for a new trial and one a motion to vacate judgment.

Mr. Olney. No, because where judgment has been given, when you vacate it the result is that you probably have to grant a new trial.

The Chairman. Of course, they do not end the case by vacating it. They grant a new trial. Do you understand the situation pretty well?

Mr. Clark. Yes.

The Chairman. That is all that is necessary.

Mr. Morgan. I suppose that one of the common law reasons for granting a new trial was newly discovered evidence. I supposed that. We are going to say you can grant a new trial for anything that is given at common law. Now, I can not make out why Judge Donworth's point is not well taken, and that number two and number three have got to overlap if you are going to do that -- (b) and (c), I should say. How are you going to get away from that?

Mr. Olney. To what extent does a bill of review lie on grounds of newly discovered evidence?

Mr. Dodge. I think it was the common way of raising that. It could be brought for an indeterminate time or definitely stated.

Mr. Dobie. It could not be brought until the end of the term of equity, because the petition for rehearing was the way you had to do then and it requires a leave of court to file it.

Mr. Dodge. It was filed almost anytime after the motion

for new trial expired.

Mr. Dobie. You could not file it before that. It started when the other stopped.

Mr. Olney. I may be wrong about that, but I have the feeling that one of these abuses in the equity procedure, the old chancery procedure, was this right to bring a bill of review on the ground of newly discovered evidence whereby the thing was kept open and open, and that this provision was found in the code just as a means of requiring that if a man has any new evidence he has got to come in within a certain length of time.

Mr. Dobie. There was always a restriction on the old bill of review, that unless you acted seasonably you never would get it.

Mr. Olney. But you know how courts are.

Mr. Dobie. Yes.

Mr. Lemann. I was going to suggest that the Reporter dictate the summary of what he understands the conclusion to be and then we will all go away knowing what it is. There are some of us who are not entirely sure.

Mr. Clark. Not right now.

Mr. Lemann. I meant right now, to be sure we decided it, or is that too much to suggest?

The Chairman. I think he will have to study the transcript.

Mr. Clark. I don't think so. I want to say I have two questions more: The first is whether (a) stands, and the second is which bracket of (c) we take. I would say that as I understand it, (a) should stand.

Mr. Olney. I have some questions in regard to that.

Mr. Clark. I did not know but that we had all forgotten

it. (b) is changed in form. The general idea remains as (b) but it is changed in several ways, not all of which I may recall in detail. But it is changed so that there are two separate sentences, one dealing with new trials in jury cases, where the governing rule is the common law provision of Section 391. The other is the rehearing case where the governing rprinciple is the procedure heretofore in courts of equity and where the court may receive testimony and amend its findings and conclusions, and then, further, the period is ten days providing that in matters outside the record supporting affidavits shall be filed within ten days, but may be answered by other affidavits within ten days.

Mr. Lemann. Don't you give them ten more days?

The Chairman. Ten days afterwards to file the completing affidavits.

Mr. Clark. The opposite side, yes. There is just one point there: May the moving party, who is to file his affidavits in ten days, apply for and get an extension of time? I was not sure whether that went in or not.

Mr. Dodge. That was my motion that by leave of the court he should be given some extra days.

Mr. Clark. All right, that goes in. Next we have (c) and, by the way, these three divisions perhaps should appear in separate rules. (c) stands substantially as it is now taking, I judge, probably the first bracket, although I am not quite sure it is proper to leave out the other two.

Mr. Donworth. Strike out "misfortune" in line 17.

Mr. Clark. Strike out "misfortune".

Mr. Olney. Yes, that must come out.

Mr. Clark. I would like tomake sure I am right that it is the first bracket, provided the application is made within a reasonable time?

Mr. Dobie. You are going to leave in "because of newly discovered evidence"?

Mr. Clark. I understood it was going out, but it could stay in.

Mr. Morgan. That is what I wanted to know.

Mr. Clark. You said the three brackets, as I got it. Go ahead and then come back and see what you want. Then: "Provided application is made within reasonable time and in no case later then the time given for appeal."

Mr. Dobie. Yes.

The Chairman. There is left in under (c) the right to make the motion during the time for appeal on the question of excusable neglect?

Mr. Clark. I want to come back to the bracket, which bracket you want, and do you want newly discovered evidence in, or what it is? The final question, therefore, is as to the language to be used in lines 16 to 21.

On the point of overlapping, I think we should, under the judgment we made here, say nothing about overlapping. I mean, we should not prohibit overlapping, and then if there is overlapping, all right.

Now, will you tell me which phrasing you want in lines 16 to 21?

The Chairman. These are things which can be done within the time of appeal?

Mr. Clark. Yes.

Mr. Lemann. Would you mind telling me which of the enumerated things would also be under (b) if they are left in (c)?

Mr. Clark. Newly discovered evidence, if you leave it in, I should think that clearly would be.

Mr. Lemann. Then that would permit you to come in within the time for appeal with newly discovered evidence?

Mr. Clark. Yes, if you had not found it within a reasonable time before.

Mr. Lemann. There would be no more 10-day limitation on you for newly discovered evidence?

Mr. Clark. That is true.

Mr. Lemann. You would only have that if you proceeded under (b)?

The Chairman. Why put that in (b) at all? You are going to give them 90 days anyway.

Mr. Clark. That was Judge Olney's idea to exclude it. I am not recommending that it stay in. I want you to decide that.

Mr. Olney. All that I had there was this: I will state it again. When it comes down to such a matter as newly discovered evidence, it may result in injustice; the man has not found his evidence; it may be entirely without any fault on his part, or any lack of diligence, but, nevertheless, if it is bringing the litigation to a finale, the man should not have the right for any considerable length of time to claim a new trial on the ground that he did not have all the evidence that he might have put in. It either goes in at the time of the trial or else he is trhough except for a very short period for

discovery thereafter.

The Chairman. Newly discovered evidence ought to be in one or the other; one is 10 days and one is three months; which do you want?

Mr. Olney. I want that 10 days, myself.

The Chairman. I understood your motion that way.

Mr. Morgan. I certainly want the three months.

Mr. Dobie. So do I.

Mr. Dodge. You can prevent the overlapping by making it all in (c). That gives the evidence discovered after the trial the lapse of time for moving for a new trial.

Mr. Donworth. That is pretty good.

Mr. Olney. We might do that.

Mr. Donworth. Then there is no overlapping.

Mr. Morgan. How about mistake or inadvertence or excusable neglect that did not appear in the record? Could you not move for a new trial on that ground under common law?

Mr. Dodge. Certain limited cases. They are not recognized under common law.

Mr. Lemann. If you take Mr. Dodge's motion you have three months to discover your new evidence.

Mr. Dodge. If you discover it in ten days you could not hold it.

The Chairman. That is a matter of diligence.

Mr. Dodge. It prevents any implication that you are excluding it on the grounds under (b).

The Chairman. Do I understand that a motion to vacate a judgment under section (c) for excusable neglect can be made within three months? Are you going to leave that in there?

Mr. Olney. That is the provision in these code sections, and, as I say, I have never known any abuse of it.

Mr. Clark. Let me ask this? Would you be better satisfied if (c) was made general too, that is, make it on the grounds as heretofore have been grounds for a bill of review?

Mr. Olney. I have an impression, I do not know where I got it, or how I got it, that these bills of review were used as a means of delay. I don't know.

The Chairman. We took some action here and the Reporter was trying to state what that action was. Now, are we going back over it and argue the details of it or are we trying to get to the point where we know what was done? That is the point.

Mr. Morgan. I think the Reporter's statement is a demonstration that most of us did not know what was done. As I suggested, I was one that did not know what was done.

The Chairman. That proves what I said, that he would have to study the record in order to take it. I know I could not.

Mr. Lemann. The trouble with studying the record leaves him -- if it is to be left to him to decide what is to be done, that would be a way to go about it, but if you really want the judgment of those here, I do not think you should leave it to the reporter to go over the record about it, because I do not think I got it.

Mr. Clark. I think you are right, but I do not think I stated anything erroneously yet, and the other point is the thing that is not settled yet. It is what you want in lines 16 to 21.

The Chairman. Let us pin it down to that now.

Mr. Olney. The suggestion we have been making is practically to follow this provision of the code. Mr. Morgan's suggestion is that as a substitute for it we use the general expression: "A motion may be made on the grounds that would be entertained by way of a bill of review according to the old equity procedure."

Mr. Morgan. Don't put that on me. That is Mr. Clark. I would not suggest that.

Mr. Olney. I thought you suggested it.

Mr. Morgan. I do not like the bill of review any better than you do.

The Chairman. Twenty-two States of the Union had never heard of the bill of review unless they were very well educated lawyers.

Mr. Olney. My notion is that we should follow the language of the code provisions with which the lawyers are generally familiar.

Mr. Dobie. Don't put that in, Judge, because that would give a lot of trouble.

Mr. Donworth. My suggestion would be this, that we let the Reporter frame (c) as he thinks best, so far as these changes between accident, surprise, inadvertence, and so forth, that he include among others, newly discovered evidence, and include the substance of everything that is now in (c), adding to it with the proper words: "Provided further, that any of such grounds known to the moving party within the time for filing the motion for new trial must be taken by motion or shall be barred."

Mr. Lemann. "Known" or "should have been known"?

Mr. Donworth. "Known", because it is neglect, and so forth, that you are going to relieve him from. What do you think of that, Mr. Dodge?

Mr. Dodge. Do you think that is right?

The Chairman. It is a good idea.

Mr. Olney. That last is covered by the fact that he must move with diligence in any case.

Mr. Donworth. This would set a definite date on the diligence.

Mr. Lemann. This permits him to be negligent for 90 days.

The Chairman. No, the effect is this: No matter what the ground of relief is, if he knows about it, he has got to make it in ten days, but he may make it afterwards in certain cases if he discovers it after the ten days.

Mr. Olney. That is all right.

Mr. Donworth. Is that all right, Mr. Reporter?

Mr. Clark. Yes, that is quite all right. Now I have something that I suggest you consider doing.

The Chairman. That is agreed to. What is your proposition?

Mr. Clark. How about this, under (c): "Such action shall not affect the finality of the judgment,order or other proceeding for the purposes of appeal", and, if you want, you can put in: "nor shall it preclude an independent action to rescind the judgment under the general powers of equity", or something of that sort. Do you want either of these things?

Mr. Lemann. Yes; otherwise, with your desire to protect the abused fellow, you might really take from him something he has now got. You might cut him down if you do not add the last

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thing because I believe you could come in after more than 90 days under the existing law. If you do not add Mr. Clark's last suggestion, in your desire to protect I think you are taking something away.

The Chairman. Let us leave it to the Style Committee to say whether that ought to be in the note or in the rule itself. It deals with substantive matters and I think it is better to put it in a note and say we are not intending to take away the independent suit, and so on.

Mr. Dobie. Some people do not read notes. They read the rule and then stop.

The Chairman. Let us leave that to the Style Committee.

Mr. Clark. I had two suggestions; one was as to the finality proposition.

Mr. Donworth. I move the Reporter include the clause that the finality of the judgment shall not be affected by --

The Chairman. Proceeding under (c)?

Mr. Donworth. Yes.

The Chairman. For fixing the time of appeal?

Mr. Loftin. Second the motion.

The Chairman. I move as a substitute that that be put in the note, because we are trying to fix the time for appeal.

Mr. Donworth. I accept the amendment.

The Chairman. Is that the sense of the meeting? If there is no objection, it is so ordered.

Mr. Dodge. I question whether that other suggestion was needed, because we simply provide here that the court may grant relief and it can grant it on that form of proceeding.

Mr. Olney. If we are through with (b) and (c), I would

like to go back to (a). We got onto them without considering (a) and I have some suggestions there.

The Chairman. Let us go back to (a). Are you ready to go back to (a), Mr. Dodge?

Mr. Dodge. Oh, yes.

Mr. Olney. I doubt the wisdom of confining the power of the court given by (a) to correct merely instances of clerical mistakes. I am inclined to thing that the court should have the right to correct any mistake on the record or anything in the record that does not correspond to what actually took place, and, furthermore, there comes in the question of whether in a case of that character the correction should not be made and we should not specify that it be made nunc pro tunc.

Mr. Morgan. Mr. Clark suggested phrasing it to allow a correction that occurs from any oversight or omission. Would that be broad enough to meet this?

Mr. Olney. Oversight oromission?

Mr. Morgan. Yes.

Mr. Olney. I do not want the court putting in the record and claiming something that did not occur and claiming it was an oversight. This is a correction of the record.

Mr. Morgan. Oh, yes, that is true.

Mr. Dobie. You want it to go beyond mere clerical mistakes?

Mr. Olney. I doubt the advisability of limiting it to merely clerical mistakes.

Mr. Dodge. This is the old equity rule, substantially copied.

Mr. Clark. We had this in our Rule 100 before -- "shall

have such control as will enable it to correct any error apparent on the record or not."

You were a little worried about that before. Maybe we have grown since November.

Mr. Dobie. This is not the record in general; this is just judgments and orders?

Mr. Olney. I thought it was the record.

Mr. Dobie. No.

The Chairman. It is copied from the equity rules, and it also says, "not only clerical mistakes --".

Mr. Dobie. Yes. Isn't that true, Mr. Reporter? This applies only to clerical mistakes in judgments and orders and not the whole record?

Mr. Clark. I suppose it does now.

Mr. Morgan. It certainly ought to go further than that.

Mr. Clark. I think it would be wise to have it go further.

Mr. Dodge. Have you not sufficiently covered mistakes in (c)?

Mr. Clark. These are minor mistakes.

Mr. Dodge. It does not say minor.

Mr. Olney. I have never looked into it with any idea of ascertaining the exact limits of the court's power in such cases of mistake, but there are a good many decisions upon the point, I know, and limits have been laid down with some degree of certainty, I think. But it might be well to look at that power of a court over its record.

The Chairman. Well, he has enough knowledge on the subject to propose a variation.

Mr. Dobie. I think Mr. Sunderland would be well qualified

to reply to that, the general code provision.

Mr. Sunderland. I could not state a proposed wording right now that would do anybody any good.

Mr. Dobie. No, I mean the general practice.

Mr. Sunderland. I think it has given rise to a great deal of trouble, just what the court can do in the way of correcting its errors.

Mr. Donworth. You must be more or less vague on this one question, must you not? You can not exactly go into it with detail?

Mr. Olney. Could we do this: Could we ask Professor Sunderland to look into the matter a little bit and endeavor to frame for us a rule that would not limit the court too strictly, and, yet, on the other hand, would not permit the court to amend the record or correct a mistake or to do something that the rule had not done before at all?

Mr. Sunderland. I would be glad to look that up and suggest something.

The Chairman. And send the draft to the Reporter.

Mr. Olney. There is another matter in this connection. It is a very small one, but, as this is worded, clerical mistakes may be corrected by the court upon motions. If the court finds a clerical mistake, or any kind of a mistake, it ought to be permitted to correct it as it pleases without relying upon the parties for it.

Mr. Morgan. Of course, that raises the question, Judge, whether you should allow the court to make any correction without notice to the parties. He might do just the thing that you are suggesting, that you were objecting to a moment ago, make

a change without notifying the parties, that the parties would consider something more than merely clerical.

The Chairman. Something outside of the rule?

Mr. Morgan. Yes.

Mr. Olney. That should not be permitted for one moment.

Mr. Morgan. No.

The Chairman. I have one suggestion to make that I dod not think is covered anywhere in the rules, as nearly as I can get it. We have talked a lot about judgments notwithstanding the verdict, but we have not anywhere pplaced a limit on the time. I ask the Reporter please to note that and check it.

Mr. Clark. I think that is correct.

The Chairman. It ought to be ten days, the same as a motion for new trial.

If there is nothing more on A-19, let us pass to A-20.

RULE A-20

DECLARATORY JUDGMENTS

Mr. Clark. On that I have suggested changes in wording that have been suggested to me.

Mr. Donworth. In line 7 should that word "preference" be "precedence"?

The Chairman. Well, that is a matter of form.

Mr. Donworth. Yes, it is. If attention is called to it, it is.

Mr. Olney. One thing has got to be taken care of in that rule or we will get into trouble.

The Chairman. May I interrupt? The Chief Justice has invited us in at 5:30 to see him for a few minutes. I trust that that is agreeable.

Mr. Olney. In the matter of substance in connection with that rule I would like to bring up this point: We have got to word this rule in regard to declaratory judgments and declaratory proceedings in such fasion that if the relief involved or the matter is one as to which the party would have a right of trial by jury, he gets it in these cases of declaratory judgment.

Mr. Sunderland. That is taken care of by the statutes.

Mr. Clark. Yes.

Mr. Olney. Is it taken care of by the statutes?

Mr. Clark. Yes.

Mr. Olney. I did not know that.

The Chairman. It refers to the statutes here.

Mr. Sunderland. I have a suggestion to make, Mr. Chairman, adding at the end of the paragraph this sentence:

"The existence of another adequate remedy shall not preclude the use of declaratory relief in cases where it is appropriate."

There has been some trouble on that, some of the courts going at least sometimes on the theory that this is an extraordinary remedy and it must appear that there is no other remedy available. The Pennsylvania courts have been the worse offenders along that line. We have had one or two very foolish decisions in Michigan, and I think it might as well be eliminated by rule.

The common English practice is to make no such distinction as this, and I think three-quarters of the cases where they ask for declaratory relief are cases in which they ask for other relief at the same time, they ask for both.

Mr. Dodge. I second that motion.

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

at 4:00 pm

Sup.Ct.
Adv.Com.
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4 p.m.
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Mr. Olney. May I ask why a party should have an especially speedy trial in an action for declaratory relief? Why is it different from any other proceeding?

The Chairman. Why would you have a rule for it? And individual case can be advanced on the calendar.

Mr. Lemann. It is the only place we have given a special grant.

The Chairman. I don't think we ought to have any rule for preference. That would give it preference over anti-trust cases, which are by statute tried by a three-judge court.

Mr. Olney. Declaratory judgments simply involve statutes that are involved in civil actions.

Mr. Lemann. Was it because a fellow wanted to find out where he stood in declaratory judgment and wanted to pitch his course accordingly? The whole purpose was to know what his rights were?

Mr. Dobie. Take Willing against Auditorium, where there was a very valuable piece of property in Chicago, and very old buildings. He wants to know if he can take those buildings down and put new buildings up. The rentals run into hundreds of thousands of dollars a year.

Mr. Sunderland. Another reason is that in law cases, when damages are involved, you save the time of going into the question of damages.

The Chairman. Wouldn't it be enough to say that the court may provide speedy hearing for any action for declaratory judgment and advance it on the calendar? I don't think we want the trial court making rules. Just give the authority to advance it on the calendar.

Mr. Lemann. Omitting everything after "judgment" in line 7 would cover that, would it not, Mr. Chairman?

The Chairman. Yes, that is right.

Mr. Olney. I can see no more reason for speedy judgment in those cases than in any other.

The Chairman. Not as a class. In any action for declaratory judgment, the court may order a speedy hearing. That gives him power to advance a particular case from the regular calendar date.

Mr. Olney. He has got that power already.

The Chairman. Not if you have a rule that says the case shall go on the calendar only in a certain way.

Mr. Sunderland. There is this feature to be considered, Judge Olney. Where you have a choice of asking for merely declaratory relief or asking for other relief at the same time, or instead of declaratory relief, since you ordinarily shorten the litigation for asking for declaratory relief, and leave out all questions of damages, the party might well be encouraged to bring the proceeding which is the shortest and perhaps burdensome on the court, by giving something of preference in the way of speed.

Mr. Olney. I have just been through a hard fought action for declaratory judgment. If, as a matter of fact, the cause of action which we were asserting had already arisen, we would have been more anxious for speedy trial and determination of it than as it was, because we could afford to wait. The thing had not been determined yet; the crisis had not arisen.

The Chairman. Are we through with Rule A20? Then we will go to Rule A21, Findings by the Court.

RULE A21 -- FINDINGS BY THE COURT

Mr. Clark. On that there are, of course, several important questions. You want to know why I put in "on a claim for a liquidated sum." Now, in jury-waived cases the court may make either a special or a general finding, and I know judges hate these findings like poison. I am a little worried about a blanket provision for special findings in all cases. We had certain machinery for asking for it in the former rule. I think that we may be sending a lot of cases to the jury from judges who want to avoid making special findings.

Let me indicate a little bit how that has come up. In the first draft we had provision whereby on a certain kind of motion you could get a special finding and on others a general finding. The committee did not like that very well. In our discretion it was decided that when judgment was entered on motion for summary judgment on affidavits there was no necessity for general findings there, because your affidavits were supposed practically to show that; so, pursuant to the direction of the committee, I put in the motion for the summary judgment as an exception as to a special finding rule. Then, I shall have to say, on my own I stuck in this "claim for a liquidated sum," because first I wanted to relieve the pressure on the judges, as I have, in a way. I think this is a real problem about making all the judges file special findings in all cases, because, you see, appeal cases are only a small percentage of all cases, and you are putting a burden on the judge on every case that goes to judgment.

The Chairman. Let me state my point. There might be cases where you ought to have a special finding. I do not see

the reason for that provision. Although the claim may be for a liquidated sum, the facts on which the right to the sum depends may be complicated and require findings.

Suppose you sue on a promissory note, and all kinds of questions arise--fraud, payment, and what not. The whole litigation is over that. Why should you relieve him from making special findings simply because when he comes to enter judgment he does not have to make any finding on the damages? I do not see that that is the proper line of demarcation.

Mr. Morgan. I would go further than you, simply because of experience in two states, Minnesota and Connecticut. I think in Connecticut that the judges when they try cases, simply because they can give a hunch judgment and hunch findings, do not carefully consider the facts until they find out whether the thing is going to be appealed, and then they draw their findings to uphold their hunch if they possibly can. I think that is the reason in New York for requiring findings. We make the judge consider carefully. As for the judge drawing his findings, I have not seen many judges that do not require the attorneys to do it after they indicate in a general way what their findings would be. I do not see any special burden on the judges in drawing findings. I do not see why they should not be made on summary judgment. I think they ought to be in every case.

Mr. Lemann. Isn't Mr. Morgan right in saying generally that the judges usually require the lawyers to draft them in the first instance? I had a recent case when the judge gave judgment, and I drafted them and submitted them to the adversary, and then we went to the judge and argued the things

my adversary claimed ought not be put in there. All the judge had to do was to finally say, "I think that is correct." He did not really sit down and have to compose and arrange anything; the lawyers did that.

Don't you think that is so, Mr. Dodge?

Mr. Dodge. This is the equity rule just recently adopted.

Mr. Dobie. The Supreme Court passed this rule on the 25th of November absolutely requiring it in all equity cases.

Mr. Lemann. And they did so extend the rule to three-judge cases and to all cases for application for interlocutory injunction.

Mr. Donworth. Let me read this which has been transmitted to our chairman. It is dated November 25, 1935.

> "Rule 70-1/2 is amended to read as follows: In deciding suits in equity, including those required to be heard by the three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and in granting interlocutory injunctions the court of first instance shall similarly set forth its findings of fact and conclusions of law which constitute the ground of its action."

That is, they not only make it necessary in all equity cases where there is final judgment, but also in all interlocutory injunctions.

Mr. Dobie. It seems to me to indicate how the Supreme Court feels on those things.

Mr. Dodge. While it was only amended in 1935, it was originally adopted in 1930, but the whole thing is very new.

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Mr. Clark. I do not question that; that is quite true. It also is quite true that this does change the rule in jury-waived cases at law.

The Chairman. Why, Mr. Reporter, do you want to make the line of demarcation it makes finding in, and thus it is not a question of whether it is for liquidated sum? What has that got to do with it? That would mean the only case where he had to make findings was where liquidated damages were assessed. How about summary judgment?

3 Mr. Olney. In that case it says -- the rule reads -- "in all cases tried without a jury except on motion for summary judgment."

There is no trial in any real sense in the motion for summary judgment. It is an incorrect description.

The Chairman. We use it in the sense of a trial.

Mr. Morgan. It is a hearing; it is not a trial at all.

Mr. Olney. We are confusing things if we call that a trial. The minute you have a real trial, the man is entitled to a trial by jury; and it is only because there is no issue--no real issue to be had and no real trial to be had--that the party can find summary judgment.

Mr. Lemann. How about putting it in in a note that this, of course, must not apply to summary judgments?

Mr. Dodge. I think it is totally unnecessary.

Mr. Dunworth. We provide for summary judgment in cases of constitutional right of trial by jury. It applies just the same, over my objection. This would imply that it is a sort of trial on affidavit.

Mr. Olney. Exactly, and it is not. We can justify on any

ground that it is not a trial.

Mr. Dodge. I make a motion to strike out the first bracket.

The Chairman. All in favor of striking out the first bracket say aye. (There were a number of ayes.)

Mr. Clark. Now, down at the second bracket, lines 9 to 11, there is the question of the effect of findings, as to which I ask you to look over the memorandum I filed. That was more or less on the theory that the committee, if it considered constitutional questions, would go into this.

The Chairman. Your phrasing would go further than it should. Your point is that the facts involved are the fundamental basis for the constitutional decision. That is the kind of case you want to deal with.

Mr. Morgan. That is still a very much disputed matter--how you get facts of that kind before the appellate court.

Mr. Clark. You are quite right about that.

Mr. Morgan. Whether it is within the realm of judicial knowledge or what it is.

The Chairman. Certainly the findings of the court should have the same effect as the verdict of a jury if you are going to provide that at all, even though it is a constitutional question in the case if the facts are not the criterion for the application of the constitutional rule.

Mr. Lehmann. That would be the case in a case tried to the jury.

Mr. Clark. Perhaps you are right. I do not insist on that.

Mr. Lemann. I move we strike out the bracket in line 9.

Mr. Donworth. I do not want to prolong this discussion, but while that motion is pending I have a few things I would like to state.

I think this sentence should be confined to the law cases. I know the reporter does not like to recognize the distinction between law and equity cases. There is a memorandum right here, I think, to the effect that the distinction in the appellate courts and the method of review of law and equity are based largely upon the fact that in the equity case the depositions are taken usually instead of testimony in open court, and so the findings of the lower court were not regarded with the same finality as in cases where jury cases are waived.

I think the reason why findings in equity are not treated by appellate courts with the same sanctity as findings of law is largely because the remedy in equity is nearly always to a large extent discretionary. If the court is going to grant an injunction, for instance, the appellate court has a question of injunction up, or a question of specific performance. The court wants to know the story, wants to go over the evidence. It is an equity case, and the court will give due regard to the findings by law, but won't say, as it does in the case of a jury, "Why, here is one man who has testified this was black and ten others who have testified it was white, but this seems to be a truthful man; we will believe him against the nine." It cannot disturb that verdict, and that is perfectly proper. But when the question of weight of evidence comes up in an equity case, where the discretion of the appellate court is involved as to whether it will grant an injunction, I believe

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the upper court should have the right to treat findings in equity the way they always have treated them and not simply feel bound to affirm them because there was some substantial evidence to support them.

The Chairman. This is vital,because it limits the right of review in what were heretofore equity cases.

Mr. Morgan. My dislike is perhaps the other way. I dislike the court to interfere with the finding of the jury. I think the court's refusal ever to interfere with the finding of the jury is based very largely on history, because for a long time, certainly until after the middle of the 17th Century,

4 the jury could depend very largely on matter that was not in the record at all, so the court had no way of finding out about the matter, and that tradition has continued. I should dislike very much to do anything to limit the power of the court over the findings in the lower court.

The Chairman. Could we say here "except in those cases in which the right to jury existed as a matter of constitutional right, the finding of the court" -- no, it is the other way. "In those cases in which there was a constitutional right by jury, even though the right is not claimed, the finding shall have the same effect."

Mr. Lemann. Wouldn't the sense of the situation be to give the findings of the court in every case not tried to a jury--I don't know whether that necessarily involves differentiating between law and equity cases. It would involve changing the rule, but you could change that, it seems to me, in the sense of the thing. The rule should be the same on the theory under which we are proceeding, whether the case was law

or equity, if it was tried to the judge and not to the jury. I have the same feeling that has been expressed here about making the finding of one man on facts practically conclusive on the appellate court. As I understand it, the rule here would be that the upper court might think that the weight of the evidence was strongly against the finding of the lower court, but they could not disturb it unless they saw that no reasonable man could have found it.

Mr. Donworth. The statute says that if a jury is waived, the findings shall have the effect of a verdict of the jury, but there is no statute on the subject of equity, and that goes up on the idea of the court being entirely free to find its fact.

Mr. Olney. I am wondering what authority we have to prescribe what effect should be given to a finding in the appellate court. This applies to the appellate court.

Mr. Morgan. Surely it does.

Mr. Olney. I was wondering what authority we had in that connection. I am quite in favor myself, if it is possible to do it, to extend to any court case the same way of looking at it as has been provided in the past in equity cases.

The Chairman. If we say nothing about it, the law is going to be what it is today. If we say nothing about it, then, in what would ordinarily be the law case, the court will apply the statute, and in what was formerly an equity case they will take the broader view, but that will force them in each case to analyze the cause of action to determine whether it is a jury-waived case or an equity case. The court will have to make that distinction. Under this unified system

you have, nevertheless, to analyze the claim to see if it was of equitable common sense, and so on. If we say nothing about it, that is the result. If we are going to leave it that way, we ought to say nothing about it.

I think we all agree that we are not going to narrow the breadth of review in equity cases. If we are going to make them alike, I think we are absolutely certain to enlarge the law of review rather than reduce the equity rule. On the question of whether we have power to do it, I suppose there are certain proceedings in the trial court that may take place after findings that have something to do with the effect of the findings, are there not?

Mr. Clark. I went into the question of appellate review.

The Chairman. There was one thing in that memorandum that appealed to me. When you come to study the statute it says that you have a uniform system for equity and law actions. The equity rule can be combined. The equity rules cover the act and cover the breadth of review in the appellate court, and you can raise an inference there that in such matters as this, they being matters that could be covered by the equity rule, we might deal with them, so far as is necessary to conduce to uniformity.

Mr. Lemann. I read the memorandum, and it convinced me on that. This is a very tenable ground. I think we have certainly support to send it to the Court.

The Chairman. This is one of the things we have to put up to the Court. They will decide whether we have to leave it as it is by law today, the finding having the effect of a verdict in a jury-waived case and the findings not having the

effect in equity cases. I favor putting up a rule on the theory that we have the power to that extent to deal with the effects of these things and to make the same rule to the effect of findings in jury-waived cases as formerly existed in equity, and then append a note for submission to the Court, telling them of our difficulties and showing them what the statute is on jury-waived cases and the practice in equity and letting them decide it. Then we don't have to worry over the law.

Mr. Dobie. What you have said is very sweet to my ears. I am inclined to doubt whether we have the power to go into it. I hope we have. If we do have the power to go into it, I agree with everything that has been said. Let us broaden the power of the appellate court, not narrow it. Instead of giving the effect of a verdict by a jury, let us give it the effect of a finding by a judge in an equity case.

The Chairman. Let us take a vote on the principle as to whether we would like to broaden that out on the uniform basis, if we can. All in favor of having a uniform system on the broad basis of the old equity practice, say aye.

(There were a number of ayes. The motion was carried.)

The Chairman. Now the question remains as to how to formulate a rule. Of course, this does not. It puts all jury and court cases on the narrow common law basis.

Mr. Dodge. Isn't that merely a matter of form for the reporter?

Mr. Clark. I think there are two general ways. You can say that all cases tried by the court without jury shall be on the basis of the former equity appeal, but since that is not

at all clear you could try to spell that out. If you tried to spell it out, you would have to say it is in the nature of re-weighing that presumption of finding by the court below.

The Chairman. The finding of the court in a case tried without a jury shall have the same weight as a finding heretofore had in equity cases.

Mr. Dobie. I agree with that.

Mr. Donworth. Another alternative would be saying nothing about it. If we say nothing about it, as the chairman suggested a few moments ago, I think the effect would be that they would apply the present distinctions.

Mr. Dodge. In a case involving both issues, where would they be?

Mr. Dobie. The present statute says that the finding of the court shall have the same effect as the verdict of a jury. I am strongly opposed to letting it alone.

Mr. Donworth. You are in favor of saying nothing?

Mr. Dobie. No, just the opposite. I am heartily in favor of what the chairman says if the Court will stand for it, and I want to put it up to them.

The Chairman. Put it up to them in that form, and then give them that rule, and if they think they do not have power to do it, then we don't need to say anything, and the old rule will apply. That particular rule takes care of all these constitutional cases without anything being said about it.

Mr. Donworth. Yes.

Mr. Olney. In connection with this rule, Mr. Chairman, may I ask, Why the provision that such findings of conclusion shall be entered in the record to be included by the clerk in

the record sent to the appellate court?

Mr. Dobie. That is in the new equity rule.

Mr. Clark. It came from the equity rule. I do not think it is necessary.

Mr. Olney. I want to suggest, in that connection, this: The courts frequently write opinions, and heretofore those opinions have been taken frequently to be the findings of the lower court. I think it would be well if it were stated here that the findings and conclusions shall be the decisions by the lower court. That is what they really are.

Mr. Clark. We provide a little later on that the judgment shan't contain anything. Is the decision different from the judgment?

Mr. Olney. Yes.

The Chairman. I think you ought to include "and its order for judgment." That is the usual form--findings of fact, conclusions of law, and order for judgment.

Mr. Olney. Let me illustrate, so that you can see what I am driving at. In California until recently the opinion was not any part of the record, and the court could file an opinion and had complete right to make findings and enter judgment directly contrary if he changed his mind. The case was not decided until the findings were made.

Mr. Morgan. It is true that the opinion is not part of the findings unless it is specifically made so.

Mr. Olney. No, it is no part of the findings. The opinion of the lower court until recently was not a part of the record on appeal. Now they have passed a rule that it should go up, that the only purpose of it is to inform the upper court or

give the upper court some idea of what was in the mind of the lower court.

The Chairman. The opinion ought to be a part of the record.

Mr. Olney. The thought I had in mind was to call attention to the fact that now that findings are necessary, the function of the opinion of the lower court formerly--the function it had--is now gone or will be gone.

Mr. Donworth. There is a rule of the circuit court of appeals that the ruling of the lower court must be included in the record. They want to know the reasons. I don't think we ought to touch it.

Mr. Olney. I am not touching it.

Mr. Dobie. I think there is a Supreme Court rule or a statute in connection with the Supreme Court of the United States respecting decisions in state courts, that requires them to send up the state court's opinion.

The Chairman. That is when they are to show what the federal grounds are. That will not affect this. In Rule 70½ the Court made the general rule that in deciding suits
6 in equity there are to be facts specially found, and it took precaution there to say, although it was surplusage, "including those required to be heard before three judges." I think we ought to put that in after "jury" on line 11. They put it in not because it was necessary but because they wanted to admonish the judges. They put it in not later than last November.

Mr. Olney. If my memory serves me right, the three-judge court was rapped over the knuckles by the Supreme Court

because it did not make specific findings, and they said they could not tell from the opinion of the court what facts it really did find--the facts that went up.

Mr. Clark. There is a general rule that covers that, Rule A36.

Mr. Olney. By the way, in this matter of findings, let me call attention to this, that perhaps should be covered by the rules. It arose in connection with a case that our office has in California, where we get judgment on the pleadings. One of those three-judge courts took the view that it had to make findings in a case of that character. That is a fact. I think it might be well to put in a rule somewhere that where judgments on the pleadings are granted, you do not have to make separate findings of fact.

The Chairman. Judgment on the pleadings?

Mr. Olney. Yes, the court granted motion for judgment on the pleadings, and then insisted on findings being prepared.

Mr. Morgan. That is plain dumb.

The Chairman. I should not think we would have to make a rule on that.

Mr. Clark. Have you finished with Rule A21?

The Chairman. Yes, we are on A22.

Mr. Clark. I thought I suggested that Major Tolman's suggestion as to the weight to be given to verdicts in equity cases be continued until now. Of course, you have settled this question pretty thoroughly. There is no reason why there should be any doubt on advisory opinions or verdicts. There may be a question as to whether you need to say so.

Mr. Morgan. No, Idon't think so.

Mr. Clark. The Major wanted to put in a provision that in the equity cases the verdict was advisory.

Mr. Dodge. I don't like that.

Mr. Clark. I wanted to make it stronger. While the question is not tied up with the one here, yet it is so nearly analogous that I thought I was whipped.

Mr. Morgan. I think you ought to be licked.

Mr. Donworth. Before we pass to appellate court, there is another matter I would like to take up. I want to call attention to this fact. Maybe we don't want to put any time on it. I think before these rules reach the Court, they should say something about the court's entering judgment and the court's power to stay judgment in its discretion on account of motion for new trial. There is nothing here to tell how soon after a verdict a judgment should be entered, and perhaps there should not be. There is no power conferred on the clerk to enter judgments at all according to these rules. All judgments must be entered by the court. That I favor.

There are cases where on motions for new trial something startling comes up, so that the judge feels that he should suspend the operation of the judgment, and we have nothing as to when the judgment shall be entered by the court or any possibility of the judge to stay it on account of motion for new trial.

Mr. Clark. The first is not covered; the second is. The first is not covered because we assumed that the judgment followed, of course, after the decision. Whether there should be something covering that, I don't know.

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The stay is Rule A25. It was suggested that we take in the statutory material and incorporate it here. That is what we have done.

Mr. Donworth. Then I will withdraw my suggestion at this point.

Mr. Lemann. Would you not renew the suggestion for a rule to make it plain to provide that the judgment shall not be signed when the verdict is brought in, because otherwise I think you are going to have a great variance in the practice. Many will not know just how to go about it.

Mr. Clark. If we are going at that, I think it could come well within one of these other rules. I think it could quite well come within Rule 17.

The Chairman. Instead of deciding that question now, I should suggest that we put a note in our draft that goes out to the bench and bar to call attention to the fact that we have made no provision as to whether the judgment shall be issued forthwith on the verdict or not because of a variation of practice in the various circuits, and ask for suggestions. We will get a response from judges all over the country on that. We are pawing air here tonight. Shall we leave it and ask for suggestions?

Mr. Dodge. Or leave it to local rule. The practice differs so much.

The Chairman. We will ask for suggestions.

Mr. Dobie. We have not done that in any other thing. Do you think that that one thing is important enough to do it here. I think we ought to put something in here and let them shoot at it.

7

The Chairman. Well, that is all right, but I don't know what the practice is.

Mr. Dobie. There seems to be some slight difficulty as to whether the conformity rules absolutely, or whether the state practice, are followed in that connection.

The Chairman. I know perfectly well it is not in Minnesota. I can tell you precisely what the practice is in the United States District Court there.

Mr. Dobie. What do you have there?

The Chairman. The clerk enters judgment forthwith as soon as the verdict is in. The order for judgment is filed. He leaves a place open for the taxation of costs. You can go in on two or three days' notice and tax your costs. He has judgment within 24 hours after the verdict.

Mr. Dodge. It is totally different from our practice. It is a very sacred thing. The motions for new trials, and all those things, have to be done beforethere is any judgment entered.

Mr. Donwort. As this exists now, I think the judge would enter judgment whenever he has that right.

The Chairman. He could make a local rule on it and say nothing about it.

Mr. Lemann. Would the districts like Massachusetts on delays for appeals start differently from Minnesota?

Mr. Dodge. I was speaking of the state courts.

The Chairman. I am talking about the federal courts. The state court practice in Minnesota is quite different.

Why can't we do this: We will leave a note that we have made no provision for it, and consequently in our general

catch-all provision it is a matter in the scope of local rule.

Mr. Lemann. Should we not at least decide whether we think there should be a uniform rule on it and then propose in that suggestions as to what that rule should be? It seems to me that if delays for appeals date from the judgment, it ought to be uniform. Somebody said here, I think, that the conformity act does not govern a thing like this. If it does not govern a thing like this, then there must be a federal rule on it now.

The Chairman. It is local practice.

Mr.Donworth. I think the conformity states just like we have it.

Mr. Sunderland. As to time of entry, Simkins on Federal Practice says:

> "A judgment may be validly entered at the subsequent term following that at which the case was heard and taken under advisement."

Mr. Lemann. Let us see if we think there should be a uniform rule. If we don't, that will end it.

Mr. Donworth. I think we should have a uniform rule, and I think we have it.

Mr. Lemann. Then, you make the point that it is irrelevant.

Mr. Donworth. As soon as judgment is entered, the time for appeal begins to run.

The Chairman. When should we say the judgment is entered?

Mr. Donworth. As it stands now, when the judge thinks it should be entered.

Mr. Lemann. I think there should be a uniform time assigned.

Mr. Donworth. For what?

Mr. Lemann. After the verdict.

The Chairman. How about an order for judgment? That is the same thing as a verdict. If you put an order for judgment and a trial by the court on the same basis as a verdict, wouldn't that be the same?

Mr. Lemann. Yes.

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Mr. Clark. How long after the judge has indicated his decision?

Mr. Donworth. Suppose he does not do it. What happens then?

The Chairman. It is automatic. There is an automatic entry by the clerk.

Mr. Lemann. Either the clerk automatically enters it, or counsel who has won the case presents it immediately and says, "The rule says you should sign it now", and the judge will, if we say so, if that is the opinion. I think it is Judge Donworth's opinion that there should not be any uniform rule.

Mr. Donworth. By all means there should be.

Mr. Lemann. It depends on the definition of uniformity.

The Chairman. I shall not vote on the question, because I am not familiar with the local practice. I think we would get at it if we simply said we made no provision, but left it, under our blanket rule, to local rules, and called attention to that fact, and invited suggestions as to whether they think a uniform rule should be adopted, and why. Then you would get some material to work on next fall, which would give us a sound result.

Mr. Lemann. I have no strong feeling about it.

The Chairman. I have not either, but I hate to vote on a thing I do not know anything about.

Mr. Donworth. I think that should produce good results.

The Chairman. Is there a motion to fix a uniform time? I think you made a motion, Mr. Lemann.

Mr. Lemann. I withdraw that.

Mr. Dobie. I would like to second it, if you will. I

would rather adopt a tentative rule, and put a note down there that that is subject to amendment when we hear from the bar.

Mr. Lemann. I have the throught that the present practice is going to be somewhat changed in some districts. In Louisiana our practice now is to follow the State practice. I am pretty sure we do not sign the judgment for three days afterwards, in order to allow an opportunity for a motion for new trial. That is to go out of the picture now, because the delays for new trial have been considerably changed. Will we adapt the old practice to these new rules, just changing the date, or will we do something else? My two District Judges are going to be scrambling around to know just what to do, and two districts may differ between themselves. Lawyers will scratch their heads a little bit.

Mr. Dodge. Does the filing of your motion for new trial stay the entry of judgment?

Mr. Lemann. Yes.

Mr. Donworth. The difficulty that confronts us is that the practice with which the Chairman is familiar, and which, no doubt, exists in other jurisdictions, is that the clerk enters the judgment. The clerk is always there. He has no discretionary power. As soon as the verdict is rendered, the clerk enters it. It is all right. The judge has to take a train the night the verdict comes in, perhaps. If you are going to have the judgment entered by the judge -- and that is what I think is contemplated by the rules -- then, to say he must do it within two days just creates a doubt about the legality of it. If it is going to be entered by the judge, I do not object to

there being some kind of a rule, but it should not be a jurisdictional rule, by any means.

Mr. Lemann. No; I did not mean it to be such. I just said it should be promptly entered, or should be entered after the verdict was brought in. The order of judgment is what I have in mind.

The Chairman. I do not remember any provision about the judge doing it, and the Reporter tells me he has not covered the point.

Mr. Clark. I have just looked it up. It is not specifically covered, and perhaps it should be.

Mr. Lemann. To get rid of it, I move that it is the sense of the committee that there be a rule saying whether the judge or the clerk shall enter the judgment, and further providing a uniform rule for all districts, as to when it shall be done.

Mr. Clark. Why should it not be by the clerk, then, and entered at once?

Mr. Lemann. That would be the next point to consider, if this motion were adopted.

The Chairman. Of course, if it is for a money judgment, the clerk can enter it. But suppose you have a complicated decree, or something else. The court ought to approve the form of it before it is entered.

Mr. Lemann. My own preference would be for the judge to enter it always.

Mr. Morgan. For the judge to enter it, or just order it entered?

Mr. Lemann. He signs it. If the judge tells me, "I am

going to decide the case in your favor", or if the jury brings in a verdict in my favor, the judge tells me, "Draw the judgment, Mr. Lemann, and bring it in." I draw it as fast as I know how, and bring it to him, and he signs it.

Mr. Morgan. Just what do you do? Do you file it with the clerk?

Mr. Lemann. Yes.

Mr. Dodge. I never heard of such a practice.

The Chairman. There is a motion to do what?

Mr. Lemann. That we have a rule on the subject.

Mr. Morgan. Does not the judge say, "Enter" at the end of the thing he signs?

Mr. Lemann. No. I notice that on a lot of outlandish things that come from Connecticut. (Laughter)

Mr. Morgan. I am not talking about Connecticut. I am talking about New York and Minnesota -- civilized States.

Mr. Dodge. Why should it not be provided that upon the verdict of a jury judgment shall forthwith be entered by the clerk as a matter of course, and that in all cases tried by the judge, he shall himself enter the order?

Mr. Lemann. Enter the order?

Mr. Dodge. Enter the order as soon as may be.

Mr. Donworth. Even if it is a law case, it is the judge's own act, and he should have more liberality than in the case of the jury, I think.

Mr. Lemann. That would cover your point, too, Mr. Chairman.

The Chairman. In the case of the verdict of a jury, or order for a judgment fixing some money, there ought not to be

any difference, but where there is any other kind of a judgment ordered, not for a fixed sum of money, the form of judgment ought to be in some way ordered or approved or signed by the Court. I see no difference between entering the judgment forthwith by the clerk, on a verdict for $10,000, and an entry by the clerk forthwith on an order from the court that a judgment be entered "accordingly" where he awards a stated sum of money. But I do see, where there is not a money judgment, the necessity of having the decree approved by the court.

Mr. Lemann. The motion I made was merely to have a rule.

The Chairman. To have a rule.

Mr. Lemann. To have a rule on the subject.

The Chairman. That has been seconded. All in favor of having a rule on the subject, say Aye; contrary, No. The motion is carried.

Mr. Charry. Does that mean a rule to be drafted now?

Mr. Lemann. Not this minute, no; but a rule to be drafted before this goes to the bar or to the Court.

The Chairman. We may lay down the fundamentals of it, but should not try to prescribe the form. That is carried.

What should be the general instructions to the Reporter as to the details?

Mr. Dodge. Unless the Reporter sees some objection to it, I would simply like to make my suggestion.

Mr. Clark. I have not got it clearly in mind. I wish you would state it again.

Mr. Dodge. That the clerk, in all cases, enter the judgment as a matter of course, forthwith, upon the verdict of the jury; but, in other cases, the judge shall, within a reasonable

time, or promptly, or whatever you may say, after his decision, enter the judgment.

Mr. Lemann. I second that motion.

Mr. Morgan. Shall enter the judgment, or order for judgment?

Mr. Dodge. Order the entry.

Mr. Clark. Order the entry by the clerk. That is it, is it not?

Mr. Dodge. Yes. He has to approve the form of a decree.

The Chairman. I suggest a substitute for that, that in cases of verdicts of the jury, the judgment shall be forthwith entered by the clerk of the court, and where there is not a jury, but an order for judgment, for the recovery of money, the clerk will enter it, of course, on the order; and that in any other form of judgment order, the judgment shall be approved by the court.

Mr. Olney. Suppose the verdict of the jury is in favor of the plaintiff in an action of replevin -- not a judgment for a sum of money, but covering certain particular property?

Mr. Dodge. I know of no reason why the clerk should not enter the judgment.

Mr. Donworth. I offer the further amendment:

Provided, That in the cases provided for by rule _____, namely, the Slocum-Redmond cases, judgment shall not be entered until the judge shall so order.

The Chairman. You know what you are doing there, I suppose.

Mr. Donworth. I suppose so.

The Chairman. The rule we have adopted there prescribes

in all cases, without any action by the court, he shall be deemed to reserve the point.

Mr. Donworth. Yes.

The Chairman. The result is that you cannot enter judgment on a jury verdict in any case until the court has ordered, because he is deemed to have reserved the point.

Mr. Donworth. The Chairman is assuming that in every case tied there is a motion for a directed verdict at the end of all the evidence.

The Chairman. How is the clerk going to know that? Is he going to get the transcript of the evidence and find out whether there is a motion for directed verdict?

Mr. Donworth. I will withdraw the suggestion, if the members of the committee feel that the reservations we made under the Slocum-Redmond cases are still all right for judgment.

The Chairman. Don't you think, really, they are?

Mr. Donworth. No; I understand that judgment is not to be entered until the court decides that reserved point, under our ruling.

The Chairman. That is not the practice in the Federal court in Minnesota. Judgment is entered forthwith by the clerk.

Mr. Donworth. You mean under such a rule as we are putting down in the Redmond-Slocum cases?

The Chairman. The court can order judgment notwithstanding the fact that there has been automatic judgment entered the other way. There is nothing to prevent it.

Mr. Clark. I suppose we would have to make some provision,

not merely in the case Judge Donworth puts, but in a case where the court hears half and the jury hears half, or three quarters. We have that situation, too.

Mr. Lemann. If the judge signed the judgments, you would not have any of this trouble. What do you do in decrees in equity in your part of the country? Does the clerk enter those?

The Chairman. He enters them, but the judge settles the form.

Mr. Lemann. The judge does not sign the decree?

The Chairman. No.

Mr. Donworth. There is a difference in the method. Some sign by initials. Some sign in full. They usually say, "Enter: So-and-so, Judge."

Mr. Morgan. The clerk does the entering. The form of the decree is in the order.

Mr. Donworth. I really think the Slocum-Redmond cases require special treatment. Perhaps not. Perhaps if the plaintiff gets a verdict for $10,000, he goes ahead and gets a judgment, and he goes right out with his execution.

The Chairman. No; you have a stay here, under the statute, of at least 10 days.

Mr. Lemann. The delays for appeal would begin to run from your first judgment.

The Chairman. Unless the motion is made.

Mr. Lemann. Unless meanwhile the judge grants the motion for a new judgment notwithstanding the verdict.

Mr. Donworth. I did not understand what the Chairman said about there being a stay for 10 days.

The Chairman. That is a statutory provision. I think you are entitled to a stay of execution as a matter of right.

Mr. Lemann. You cannot get away from it. I looked it up.

The Chairman. The court will always grant a stay at the end of the trial, before the jury is in. The lawyers say, "We may have a stay of execution?" and they get it.

The last proposal is a proposal in the cases covered by the Redmond case, which means in every case in which there is a motion for a directed verdict. Somehow it should be provided that in those cases the clerk shall not enter judgment except upon order of the court. The court cannot enter it until he finds out whether there is going to be a motion for judgment notwithstanding the verdict, and that is 10 days.

Mr. Lemann. If there is a motion for directed verdict, the judge is deemed to have reserved judgment on it. He does not have to wait 10 days, or any particular time.

The Chairman. Why not? What is the use of holding it up until the motion for judgment notwithstanding the verdict is made?

Mr. Clark. I think we can separate the two -- these motions for directed verdict and motions for judgment notwithstanding the verdict.

The Chairman. No; they are both there.

Mr. Clark. You were going to provide that they could be made in the alternative. That is true.

The Chairman. Judge Donworth's point is that where you reserve a law point and take the verdict conditionally, it is improper to enter any judgment until you have found out whether there is going to be a motion for judgment notwithstanding the

verdict, and therefore he wants that exception made. My thought is that there is no reason why judgment notwithstanding the verdict may not be moved, even though judgment has been entered.

Mr. Donworth. I think it would be impolitic to load down our reservation there in the Slocum-Redmond cases with another advantage, so I will withdraw that suggestion. But would it not be all right, in this generalrule about the clerk entering judgment on the verdict immediately, to say, "Unless the court otherwise directs"?

Mr. Lemann. Or you could put in a provision that the entry by the clerk of that judgment should not interfere with its vacation, or however you want to make it plain, so as not to interfere with the operation of your procedure under the Slocum-Redmond cases.

Mr. Donworth. I like to have the judge boss of the court.

Mr. Lemann. So do I.

Mr. Donworth. I think the direction for the clerk to enter judgment immediately on the verdict should say, "Unless the court otherwise directs".

The Chairman. The next proposition is mine, and that is that the rule provides that on verdicts, or on orders of the court, after trial without a jury, on a judgment for money, the clerk shall enter the judgment forthwith; but where the decree is not for the recovery of money --

Mr. Dodge. Or for the defendant.

The Chairman. I am thinking about the plaintiffs. I had not visualized the other side. Where the decree is not for the recovery of money, it should be provided, in substance,

that the court shall fix the form of decree before its entry. Mr. Dodge's suggestion was that we draw the line between verdicts on the one hand and orders for judgment in jury cases on the other, to provide that automatic judgment is entered on the verdict, and, if it is an order from the court, that the court shall fix the form of judgment. His order for judgment is an order for recovery of so many dollars.

Mr. Clark. I did not have that point in mind. I should think such an order, or an order for judgment for the defendant, could be entered forthwith.

The Chairman. Then you do not object to my suggestion?

Mr. Dodge. No.

The Chairman. Has anybody any other suggestion? What is your pleasure? Do I hear a motion?

Mr. Donworth. I move that the Reporter be requested to draft a rule along the lines that have resulted from this discussion. I think they are fairly well understood.

Mr. Dobie. I second the motion.

The Chairman. Unless there is objection, it will be so ordered.

Where are we now?

Mr. Clark. We come now to the matter of appeal, which, of course, is very important, in the sense that we are trying to do something to improve the situation.

The Chairman. This is rule A22.

RULE A22. APPEAL.

Mr. Clark. We come now to the matter of appeal, which, of course, is a very important one. That is rule A22. There have been several suggestions. It seems to me that the sentiment of the committee is crystallizing to do a good deal here, and perhaps we can do more than I might suggest. That will not make me feel badly at all.

I should say that I would be glad, if you wanted to do away with assignments of error on the whole business, and have merely notice of appeal, and no printed transcript of the testimony, and have these things set up by brief, which I think is really the advanced method.

The Chairman. And have the assignments of error noted in the brief, instead of in the appeal papers?

Mr. Clark. Yes.

Mr. Olney. In that connection, may I state the experience that we have had in California? I think it is quite illuminating.

For years there we had the method of preparing a bill of exceptions, and all the rest of it; then the transcript, as we called it, would be printed, containing the whole record, including the bill of exceptions, or the statement of the case, and so forth.

Quite a number of years ago now -- perhaps 10 years or such a matter -- we adopted what is known as the alternative method. The alternative method simply consisted in having the reporter's transcript of the proceedings, with all the original papers in the case on appeal, sent up to the Supreme Court. We just took the papers as they were there before the trial court,

added the transcript on appeal, and sent them all up, with the exhibits. If the parties desired exhibits, they were sent up.

Mr. Dodge. Just one copy?

Mr. Olney. Just the original; not copies, but the originals.

Mr. Dodge. Just one copy of the transcript of the evidence?

Mr. Olney. Yes; one copy of that was sent up. They were certified, and all that sort of thing. Then the parties were required, in connection with their briefs, to print the portions of the record upon which they chose to rely, either as appendices to the brief, or in the brief itself, and they were required to specify their assignments of error.

Many of us -- I was one of them -- looked with great suspicion upon that method of taking an appeal. It was something new. We were accustomed to the old method. It was very precise, and we knew the rules, and all the rest of it. For some time I think the older practitioners and those accustomed to the older method followed the older method, but the new method gained ground constantly, until now, in all except rare, exceptional cases, it is the method followed, and while we still call it the alternative method, it is the method that is used, and used in a very practical way. With the exception of the sort of "graft" the reporters have in connection with preparing the transcript, it is a method that results in great savings to the litigants in the expense of printing. It avoids enormous delays in the way of trying to make a narrative statement of the testimony. Any lawyer who has to tackle that knows what an interminable job it is, not in his preparing the

statement, as he sees it, but in getting the other side to agree to it, or, when he does not succeed in getting the other side to agree to it, in getting the court to pass upon it. But it all goes up. The thing that goes before the court finally in the printed briefs, in connection with the testimony, is what took place there, what question was asked, and what was said. There is no room for any dispute on that score.

The thing works admirably. There are certain minor defects that could be very easily corrected, but the thing works admirably, and when I look at these rules that have been prepared here on appeal, prepared in an endeavor to simplify the rules as much as possible, and yet retain the old procedure, and see what it inevitably means in the way of expense and delay both to the litigants and to the court, I am simply appalled.

I want to advocate most strongly that the committee consider this method of appeal, which I think is essentially the method pursued in England, is it not, Mr. Reporter?

Mr. Morgan. Yes.

Mr. Olney. It seems to me that it is one of the greatest things we can do for Federal procedure, if we adopt carefully drawn provisions that provide for that method of going up. It is going to remove a number of traps for the unwary and the incompetent, and it is going to save expense and delay to a very great extent.

Mr. Donworth. Let us make that definite, Judge Olney. You mean that the Reporter's transcript is prepared and filed by the appellant, and then, subject to the usual modifications and suggestions, to be approved by the judge, that original goes up?

Mr. Olney. That original goes up, and the original papers go up, all the original papers. A man walks into the office of the clerk of the trial court, and puts down his notice of appeal. The clerk then bundles up the file of papers that he has, and he ships them up to the upper court.

Mr. Donworth. There is no record remaining in the lower court?

Mr. Olney. No; the original papers go up, and when the appeal is over they are sent back.

The Chairman. The clerk certifies, I suppose, that those are all the papers.

Mr. Olney. Yes.

The Chairman. The court certifies to the correctness of the reporter's transcript of the proceedings of the trial?

Mr. Olney. I think the reporter does, as a matter of fact. But they are certified, so as to prevent any fraud, or anything of that sort.

Mr. Dodge. You say, Judge, that the parties then print the parts of the record on which they rely, in their briefs?

Mr. Olney. It is in the briefs, or as an addendum to the briefs.

Mr. Lemann. What happens if one side prints part and the other side prints another part, and there is more than one judge who wants to go and look at this thing to see what really was said? Do they take turns at getting that original record to look at it, or does it mean that only one judge ever bothers with it in the appellate court?

Mr. Olney. I do not think it means the latter; but unless the parties print it -- and, of course, the upper court has the

power to force them to print any portion of the record that it desires -- I do not know just how they would operate if two judges wanted to see the transcript at the same time, and it was not printed.

The Chairman. You could never get the Circuit Court of Appeals to agree to a rule that in case of a dispute as between the parties as to what the record shows, they would have to consult the typewritten draft, or even three typewritten drafts.

Mr. Lemann. There are a great many of these records that go up. The clerks in the trial court get them very poorly arranged, and if you take them up the way they are there, it is a burden to go and find something if they do not agree. We have a system of making three typewritten transcripts. We think we are pretty lucky if we get three of the seven judges to take a look at it. There are three complete copies, and one original staying down in the trial court. I just wonder how you could work with only one.

Mr. Olney. Mr. Lemann, the theory is, if it works ideally -- of course, very often it does not -- that the upper court will not be called upon, really, to look at any portion of the transcript, as we call it, or any portion of the papers, except that which is printed in the briefs.

The Chairman. Judge, that system may work all right where the court to which you are taking your record is the court of last resort; but let us take a case in the Circuit Court of Appeals, in which they have three typewritten transcripts of the evidence sent up there, and the parties then argue the case, and in their briefs, between them, they

print certain parts of the record. There is a judgment entered in the Circuit Court of Appeals, and then the defeated party wants to file a petition for a writ of certiorari with the Supreme Court. You have not anything that the Supreme Court will look at.

Mr. Dodge. He would then have to print it. It is the same way in England. When they go to the House of Lords they have to print their books, as they call them, but in the court of appeal they do not.

The Chairman. The time limit for filing an application for writ of certiorari is pretty short. Under the statute it is 30 days, is it not?

Mr. Dodge. I thought it was 90 days.

Mr. Dobie. I think it is 90 days.

Mr. Lemann. I thought it was 90, but I am not sure.

Mr. Dodge. What has been said is entirely along the lines of my feeling, except as to this matter of not printing the record. I think it is one of the greatest opportunities we have to simplify Federal procedure. This is an abomination to all lawyers who are familiar with an easy method of appeal, to have to get out all these documents, assignments of error, praecipes, and citations on appeal. All we do in an equity case in the State court is simply to claim an appeal within 20 days. Then there are time limits. You have to proceed promptly under the statute, but that is all there is to it. The record is printed. There is never any controversy as to what is to go up. The evidence, pleadings, and necessary papers go up. It is simplicity itself, as compared with this abomination here of having to get out all these papers, and I

should be very sorry, regardless of whether we print the papers or send them up in typewritten form, if we could not get rid of the citation on appeal, the assignment of errors, and the praecipe.

The Chairman. I have suggested the notice of appeal as a substitute for the citation. I never practiced under any citation in any State court. Now the rule is drafted so that you serve a notice, and then you get a citation, too, whereas, under the other system, all you need is to file a praecipe or citation, and that is the notice. But there is a long memorandum from Elmore Cropley, the Clerk here, setting forth the importance of the citation. With all respect to Mr. Cropley, he is thinking about the functions it serves, and assuming that there is nothing to replace it.

The citation serves two purposes:

One is to notify the other fellow that you are appealing, and have it served on him; and

The other is to fix the return date in the upper court.

A mere notice of appeal is all the notice necessary. Then the rule could require an appearance up there within a stated time. You do not have to file both notice and citation. But, of course, Judge Olney's suggestion is much more fundamental.

You must bear in mind that it would require a pretty thorough revision of the rules of the Circuit Courts of Appeal, and, desirable as it may be, what have you to say about our power now to go ahead and repeal the practice of procedure in the Circuit Courts of Appeal on appeal?

Mr. Dodge. You mean as to the printing of the record?

The Chairman. We have been dealing with the making-up of the record in the lower court, which has to be used on appeal, on the theory that it is an act of the lower court. We were going to make those records conform to the requirements of the Court. Now you are going to change the requirements of the upper court. There is no Circuit Court of Appeals which would not have to sit down and revise its rules if you adopt that system.

Mr. Lemann. The Supreme Court could do it, Mr. Clark's memorandum convinces me.

The Chairman. In law cases.

Mr. Lemann. In all cases. The Supreme Court has such control over the appellate procedure that it could do it. I think he made out a very convincing case about it. We cannot do it as a committee under this particular statute, but, as a court, they can do it.

The Chairman. They can do it under some other statute, and make it a part of these rules, for that matter. If they can do it under any statute, it does not make any difference whether it is in these rules or some other set of rules.

Mr. Donworth. I am in favor of simplifying everything that can be simplified. Take Judge Olney's method. I do not think the Court or the bar would favor stripping the records right out of the District Court office, and moving them bodily up to the Circuit Court of Appeals office. I think the authorities will insist on a certified copy, so that the record is still there in the lower court.

Then, in regard to the evidence, I do think that if we are opposed to the narrative form, we can come right out and

propose the other method, and if the Court still is strongly in favor of the narrative form, they can strike it out. I do not like it. It is useless labor, I think. But insofar as not having the whole record printed, that may depend upon the rules of the Circuit Court of Appeals, as I understand it. We can regulate what goes up there, but I do not think we can regulate the printing. I think the rules require the entire record to be printed unless the parties stipulate for the printing of a lesser portion, which they may do. But if the court finds you have omitted something they want, they will require you, on oral argument, when they do not find it printed, to put in a supplemental printing, which does not often happen. But I do not think we have anything to do with printing.

Mr. Clark. That comes, really, from the statute entitled An Act To Diminish the Expense on Appeals, passed in 1911.

The Chairman. Is there a statute that authorizes the Supreme Court of the United States to prescribe the procedure on appeals in the United States Courts of Appeal in all cases?

Mr. Clark. There is not anything explicit now. What I did was to go back to the early history, when they had powers to regulate the Circuit Courts -- not the Circuit Courts of Appeal, but the old Circuit Courts. I thought that I made an argument to the effect that that power of the Supreme Court never had been taken away.

Mr. Lemann. The statute merely came along and did something that was not inconsistent with the exercise of the power by the Supreme Court.

Mr. Dodge. Would you not favor, Mr. Clark, leaving out

all these papers except the notice of appeal?

Mr. Clark. Yes. I do not intend, the way I have it now, that the notice of appeal should be served. I think this is a question of detail on that. I should think it might be a good thing to have the only notice served on the parties the one served after the proceedings have been taken in the district clerk's office, and the bond fixed. I do not know whether you had in mind to do it before you went to the clerk's office or not. Would it not be better to have the notice of the appeal come after the appeal is perfected, to use that old term? Otherwise you would not know when it was perfected, and you would not know what date was the return date in the upper court. Suppose you were going to provide that it should be 40 days after the taking of the appeal. If the notice is served when you take the appeal, you will not know when the 40 days begins to run.

The Chairman. The notice is the taking of the appeal -- "I hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from such-and-such judgment", and serve it on the other side.

Mr. Clark. You have to have your bond. That is one difficulty. The statute now requires a bond, either a supersedeas bond or cost bond. I do not suppose you have an appeal taken, have you, until you have the bond in the hands of the court?

Mr. Lemann. But you could, of course, provide for notice of appeal, and then make an independent provision that you must also get the judge to fix the bond, and must file the bond.

The Chairman. They hold that the bond is not jurisdictional; that the appeal is taken on notice.

Mr. Clark. I think that could be arranged. Suppose you were served on several? From what day does the return date to the upper court run?

Mr. Olney. Why do you need a return day in the upper court at all?

Mr. Lemann. You file your record there, to be sure, and the case must be heard there.

Mr. Olney. Suppose it is the duty of the clerk below -- not following the method I have suggested -- immediately upon notice of appeal being filed, to print the record and send it up, and he sends it up. Then he notifies the other parties that it is there.

Mr. Clark. Mr. Cropley objected that the appellees never knew what they were to do, and he was getting notices of appearance on cases which were filed, that he never heard of.

Mr. Lemann. Was he talking about appeals from the Circuit Courts of Appeals, or the State courts? We have nothing to do with the method of going up from the State courts. I do not recall at the moment whether his memorandum might perhaps deal with appeals from the State courts, more than the other.

Mr. Clark. I think it could apply to either.

Mr. Lemann. You have not so many appeals from the Circuit Courts of Appeals. You have appeals from the district courts.

The Chairman. The return on appeal must not be confused. It is one thing to say that the appellant shall file his record within a certain length of time. In one sense, that is a return, but the citation on appeal, under the old style, cites the respondent to appear at a certain date, and if he does not appear he is in default. That is all "bunk". If he gets his

notice of appeal served on the respondent, it is his business to follow it up by sending notice of appearance any time he likes. He does not have to file an appearance on any particular date, but that is the rule under the old citation.

Mr. Lemann. That language ought to be changed, but I think you still need a return day to file that record.

The Chairman. This is not a return day, strictly speaking.

Mr. Lemann. No, but we must have something to correspond to a return day, I think, because, although Judge Olney says it is the duty of the district court to make up the record, if there is no time limit within which it must be done --

The Chairman. I said there had to be a time limit on the appellant's action, but there ought not to be any time limit on the respondent's appearance up there. He has to follow it up and file his brief in time, and all that. If he does not, he is just out. He knows the appeal is there. He does not have to file his appearance. There is no sense in that.

Mr. Olney. The way it works is that the record is sent up there, and the appellant must file his brief within a certain length of time after the record is there, and the respondent never bothers or pays any attention at all until the appellant's brief is served upon him, and then he has a certain length of time to reply. The first time the court ever hears from him is when he files his brief.

The Chairman. That is all that is necessary.

Mr. Lemann. You do not file briefs, as a rule, until the case is posted for hearing.

May I offer this motion, to clarify it: That the Reporter be requested to redraft this rule, leaving aside, for the

moment, the question of how the record shall be made up, so as to eliminate the provision for citation, and provide for a notice of appeal which will eliminate any reference to the appellee's having to do anything; and that appropriate provision be made for the fixing of the bond by the court within a suitable time limit, and for the filing of the record on appeal within a suitable time limit.

Mr. Dodge. How about the praecipe?

Mr. Lemann. That has something to do with the making-up of the record. I was trying to limit this particular motion, and go to the other things afterwards.

Mr. Clark. Are you going to leave out assignments of error?

Mr. Lemann. We are coming to that later. This just relates to the manner of taking the appeal.

The Chairman. He has done all that, except he has the citation in as well as notice.

Mr. Clark. We intended to have only the citation, and not the notice.

The Chairman. What do you mean by that?

Mr. Clark. The citation is practically a copy of the notice.

The Chairman. I do not know what your intentions are, but the rule says that you must file a notice of appeal.

Mr. Clark. It does not say "serve". Service comes afterwards.

The Chairman. Then the citation shall be issued.

Mr. Morgan. Then the citation is served.

The Chairman. Then the citation is served. I think the

notice of appeal served on the other side and filed is all that is necessary.

Mr. Clark. I think it is. The reason we did it that way was to have the appellee know that the bond had been filed, and so forth.

The Chairman. It is now 27 minutes past five. We are due in the Chief Justice's office in three minutes.

We will adjourn until eight o'clock tonight.

(Thereupon, at 5:27 p.m., a recess was taken until 8 p.m.)

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EVENING SESSION.

The Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States reconvened at 8 o'clock p.m., Monday, February 24, 1936, at the expiration of the recess.

RULE A-22-- APPEALS (Continued).

The Chairman. The meeting is open to further discussion for a while on the general system of appeals. We have not gotten down to any particular specification yet. We are just discussing the question generally.

Mr. Clark. Mr. Lemann made a motion, did he not, before we took a recess this afternoon, which was not passed on.

The Chairman. What was that motion?

Mr. Dodge. That citation on appeal be eliminated.

The Chairman. Perhaps we can settle that question. I will see what I have stated on that subject.

Mr. Morgan. You were against keeping the citation, were you not?

The Chairman. Yes.

Mr. Morgan. I think you all pretty generally agreed on that before, but I do not know how much we might be disturbed by Mr. Cropley's letter.

The Chairman. No; that would not hurt us any. This is my thought along the same line, cutting out of the citation business and all that. This is just a crude summary of the idea:

"Within the time allowed by law for taking an appeal, a party entitled by law to appeal from an order or judgment

may take an appeal therefrom by serving on all the other parties and filing with the clerk a notice of appeal, which shall contain his assignment of errors, and an appeal bond as required by law. No citation on appeal shall be necessary. The appellant shall file the record and certified copies of his notice of appeal with the appellate court, and docket the case therein within thirty days after filing his notice of appeal, but the District Court may for cause shown enlarge the time for filing the record."

I did not mean to suggest any detail, but just the general form.

Mr. Dobie. Isn't there something about when you take the case up, as to the lower court losing jurisdiction? When does the lower court lose jurisdiction?

The Chairman. That is another phase of it.

Mr. Olney. As I understand it, the lower court loses jurisdiction on all matters except preparing the record when the appeal is taken.

Mr. Morgan. When it is perfected, do you mean?

Mr. Olney. When it is taken. When you file your bond.

Mr. Morgan. Yes.

The Chairman. This does not interfere with that.

Mr. Olney. No.

The Chairman. You want to settle the record afterwards.

Mr. Morgan. That court has got to settle it, has it not?

The Chairman. Yes. All in favor of the motion that we abolish all citations and stick to the plain notice of appeal say aye. Opposed no. The motion is adopted.

Mr. Clark. Should the notice of appeal contain assignments of error?

The Chairman. They should be attached to it.

Mr. Morgan. Do you have that rather than in the brief, Mr. Mitchell?

The Chairman. It gets down to this, Mr. Morgan. You will have to do it that way if you are going to have the record settled in the lower court and not carry the whole thing up in a dray above. The lower court cannot settle the record unless it knows what the assignments of error are.

Mr. Morgan. Quite right. I thought the two were tied up together.

The Chairman. They are. And my suggestion is on the theory that the lower court is going to settle the record. But if you decide differently to that later, why you can change it.

We carried your motion, Mr. Lemann, that we abolish all the citation business, and stick to the plain notice of appeal and the filing of it.

What is your next proposition, Mr. Clark?

$300 APPEAL BOND.

Mr. Clark. On the matter of the $300 bond you had a question as to where the $300 comes from. The amount of $300 we suggested because we desired to get an administerial act done by the clerk, and unless you have something definite we do not see how it could be arranged. So far as we could see that seemed to be a usual amount which was ordered, and that is all on that. If you do not have some amount fixed I see no way by which you can avoid going to the judge.

Of course on the matter of the supersedeas bond, we have not attempted to settle that.

The Chairman. There is no objection to having the bond approved by the clerk. If anyone takes exception to the surety or anything like that, or wishes to raise a row about it he can, but in the first instance the clerk ought to take care of that.

Mr. Olney. There is no provision in the rules, as I remember them, for objection being made to the clerk.

The Chairman. Not yet.

Mr. Olney. I do not think there is any such provision in the rules at all.

Mr. Morgan. It says "which bond shall be approved by the clerk if regular in form and adequate in security."

Mr. Olney. There should be provision under the rules of procedure whereby the person makes his objections to the clerk, and then the clerk passes on the matter of the security--the bondsman.

Mr. Clark. The appellee will not know anything about the bond unless he goes to looking it up, will he?

Mr. Olney. The bond has to be filed in a certain time, and if he desires to object to the bond he goes and looks at it after it is filed.

Mr. Morgan. Yes.

The Chairman. My requirement would be that when he serves notice of appeal he attaches to it assignment of error and appeal bond. He then gets the bond approved, and his opponent knows all about it, having had the notice served on him.

Mr. Olney. The bond notice should stand as approved I should think, Mr. Chairman, unless objection is made to it. In other words it should not require a special approval unless the party chooses to object.

The Chairman. That is probably so.

Mr. Donworth. There should be provision I think that service of the notice of appeal should be made on the attorney who appeared for the party in the district court. There should be service on such party. I think that is a usual provision.

The Chairman. That is a good suggestion. I provided for service on all the other parties or their attorneys of record.

Mr. Lemann. Do we not have a general provision to permit service on the plaintiff throughout the rules?

Mr. Morgan. Yes.

The Chairman. I will check up on that.

Mr. Lemann. There ought to be a general provision.

Mr. Donworth. What we are speaking of now is getting into another court; from one court to the other; and I think the general provision is necessary.

The Chairman. It may not be necessary, but it is well to have it noted.

SUMMONS AND SEVERANCE.

Mr. Clark. The last paragraph is an attempt to do away with summons and severance, and to provide for the case of joint appeal.

The Chairman. That is important. Let us look at it.

Mr. Donworth. I suggest in line 27, after the word

"jointly" that there be inserted the words "or severally". It very often happens that the parties are mixed up in various capacities.

Mr. Clark. But the problem does not arise where it is several. It only arises where there is a joint judgment.

Mr. Donworth. I doubt that. The point is that if it is embodied in one judgment the court wants everybody notified and brought up.

The Chairman. The summons and severance technically only applies where it is joint.

Mr. Donworth. It depends on what you mean by "joint".

The Chairman. It may be one release against one and another release against another. That is not a joint judgment; is that yourunderstanding?

Mr. Clark. Yes.

Mr. Donworth. This would remove the question.

Mr. Clark. I was a little afraid that it might add ambiguity here.

Mr. Donworth. If it is one judgment, I think no matter how the parties are affected by it, if one party should take his appeal he should serve all the parties in the case, and then it should go on. That should be sufficient for the summons and severance.

The Chairman. The importance of serving on the parties with this notice, instead of filing it with the clerk, and having thereafter notice by citation, is this, Suppose you wait until the last day for appeal. Then you go and file your notice and depend on the clerk to serve it later. The time for appeal of the other side may go by before he has

notice that you are appealing, and he ought to have notice of your appeal while he still has time to appeal himself, to make a counter appeal. He may be holding off to see whether you are going to appeal or not. I think that is covered if you have the notice of appeal and not the citation served on everybody.

What about summons and severance now? Have you got that taken care of?

Mr. Clark. We have.Mr. Dobie's suggestion on that point.

Mr. Dobie. It is only necessary when the judgment is joint. There are any number of supreme court cases on that.

Mr. Morgan. Do you think that the joint plaintiffs are sufficiently protected if they are merely notified in the appeal without being made parties on the appeal? Suppose that one joint person appeals and the other person is satisfied. There is a judgment in favor of some joint plaintiffs for example and one of them is dissatisfied, and he wants to appeal, and the others are satisfied. They are afraid of what will happen on appeal or new trial. Now all that is provided for here is that they should have notice of appeal. They are not parties, so they are not furnished with briefs or anything else in the case. That may be enough protection. I am not sure about that.

The Chairman. They are served with briefs, but of course they do not have any right unless they join in the appeal, or when they are served with notice, or serve notices themselves--- they have no right to ask for reversal.

Mr. Morgan. No, they do not want reversal; they want

affirmance, but one of them wants reversal, and they want to be heard on affirmance. I notice Mr. Clark very carefully provided that they are not to be parties in the appeal; they are just to be notified of the appeal.

Mr. Sunderland. Should we not provide that anyone who is qualified should file appearance and become a party, but if they do not file appearance they are out?

Mr. Morgan. It may be that is the way to take care of it. I am just asking for information. I do not know of how much importance it is. I have never had any experience of that kind.

The Chairman. I think if you serve a notice of appeal on your co-plaintiff, for instance, he would have a right, if he wanted to, to serve notice of appeal himself, but if he did not he would have notice of the appeal, and he is a party, and you give him copies of your brief and everything, and if he cares to file a brief in the upper court he may, but he is in no position to ask for a reversal, because he has not taken an appeal, but he can appear there and file a brief and do anything he wants to.

Mr. Morgan. Is he a party?

The Chairman. Yes.

Mr. Morgan. It says not, here.

The Chairman. He ought to be.

Mr. Morgan. The language is: "and without the necessity of summons and severance or naming them as adverse parties, provided he serves a copy of his notice of appeal" and so forth on them. I suggested that perhaps he ought to be made a party, and Mr. Clark's answer is that that

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suggestion is rejected, as we understand it. The necessity of summons and severance was to be done away with, because there is no necessity for making a joint party a party on appeal and be required to serve him with briefs and records. That is what he asks here. I think that is a matter of substance. I do not know how important it is.

The Chairman. I think he ought to be allowed to participate in the appeal, except that it is impossible for him to ask for reversal.

Mr. Morgan. Unless he joins in the appeal, yes.

The Chairman. The reversal however would not affect him, would it?

Mr. Morgan. It might, might it not.

The Chairman. How could it? It could only be reversed with respect to the man who appeals, and the other fellow stands on the judgment.

Mr. Morgan. How can you reverse a joint judgment as to one of them and let it stand as to the other? It is beyond me to know how that can be done. I do not know how that can be done.

Mr. Clark. I was a little worried through here. Suppose there are a number of joint parties, and only one goes out, has he got to provide briefs and so on for all the others?

The Chairman. That is a detail, whether he serves them with briefs. The question is whether he is affected in any way by appeal.

Mr. Morgan. Yes; I want to know whether he is a party to an appeal.

Mr. Dodge. Suppose this judgment is against a partnership where they have to be sued in their individual names, and one partner wants to appeal, and the other is dissatisfied and very much afraid of the result; one impecunious partner, perhaps, is not afraid of an increased judgment, and wants to appeal, whereas the others do not desire to appeal. That is a similar question I think to one we had before us the other day.

The Chairman. What happens when you have a summons and severance in a case like that? You sever the man who is a co-plaintiff with you.

Mr. Dobie. He is bound by the appeal proceedings then.

Mr. Clark. Not if he is severed.

Mr. Cherry. I should like to call your attention and ask you to look at lines 34 to 36.

Mr. Pepper. How can you sever in such a way as to affect the substantive liability? Mr. Dodge puts the case of the partnership creditor who gets a judgment against all the partners. That is on the theory that their application is joint. That is a unitary application with a plurality of subjective reliefs. Now if that happens can you sever in such fashion that you can reverse or affirm as to one of those who are jointly liable without affecting the judgment as to the others?

Mr. Dobie. I understand the thought is that having given them the opportunity to join, that then the judgment of the appellate court can be enforced against all of them, but it is called a summons and severance. It is just to give them an opportunity to come in, and if they fail to take

advantage of that opportunity they are bound by whatever the appellate court decides.

Mr. Dodge. Then you have one partner forcing the partnership to the appeal against their judgment.

Mr. Dobie. Certainly.

Mr. Dodge. That ought not to be allowed.

Mr. Cherry. Lines 34 to 36 say they are to be bound whether they appeal or not.

Mr. Dodge. It says they are bound by it.

Mr. Cherry. Yes.

Mr. Dodge. One partner to a partnership ought not to force the others to appeal.

The Chairman. It drives at the same result that happens now in case of summons and severance, and I suggest that we instruct the committee to advise us just what the effect of summons and severance is in a case like that, and have us rule accordingly.

Mr. Dobie. I am satisfied that what you said just now, Mr. Chairman, is correct, that the severance is a misnomer. Let us say there is a judgment against you, Morgan and myself. Now Morgan and myself want to appeal, whether you want to or not, just so we serve you with summons and severance--- it is not really a severance. Whether you want to come up or not, or take no part in it, you are bound by the judgment of the appellate court. Is that not your understanding, Senator Pepper?

Mr. Pepper. Yes.

Mr. Dobie. "Severance" is a misnomer.

Mr. Pepper. The point is that each partner is bound by

the unitary judgment. It supports a levy of execution against his separate estate. He is bound to have a right of appeal. I do not see how you can reverse or affirm as to him without necessarily affecting the application of the man who is jointly bound with him. I think it goes deeper than procedure. It goes to the nature of a partnership debt.

The Chairman. Then if the rule is as Dean Dobie says it is, the rule of summons and severance, in a case where one joint debtor takes an appeal, and allows him to go up and get a reversal for himself or for the other side---

Mr. Dobie. That is my understanding.

The Chairman. Then the rule is wrong, because it attempts to exclude the parties who do not join in the appeal from any operation of the action of the court of appeals.

Mr. Olney. Mr. Chairman, I know comparatively little about this, but I was always under the impression that you served the other parties. We will say there was an action against the defendant in partnership--- a joint application. One of them wishes to appeal, and he was required to serve his partner, because the statute provided that all parties affected by the judgment must be served.

Mr. Morgan. That is it.

Mr. Olney. And after those people were served they were parties to an appeal, really, and if they wanted to appear in the upper court they could.

Mr. Dobie. I think so.

The Chairman. Do you disagree with Dean Dobie's statement as to the result of a summons and severance?

Mr. Clark. No; but I think we provide for it. We say

they shall be bound by that judgment.

Mr. Dobie. What you do is to substitute notice for this technical thing. I think that is a good idea.

Mr. Clark. I think the expression "without making them parties" may be a little misleading.

Mr. Morgan. That is what bothered me.

Mr. Clark. All that does is that once they take an appeal you do not need to worry about them; once you summons them.

The Chairman. They ought to be named as respondents then.

Mr. Morgan. I should think so too.

The Chairman. They are parties, and they have a right to file briefs, and you dragged them up there; they were dragged up by the other side and they ought to be allowed to appeal.

Mr. Olney. Do you think one party can appeal now?

Mr. Clark. I think he could take a summons and appeal, yes.

Mr. Olney. So as to bind his partners by the appeal?

Mr. Clark. I beg your pardon?

Mr. Olney. So that his partners might be bound by the result?

Mr. Clark. Yes. Of course I was going to say that even before they get to appeal one partner can drag the others into court, you know, by bringing suit and join them as defendants. It is a partnership action, and it may be a question of majority vote of the partnership whatever the action is, but he can get them into court against their will

now for whatever you seek and make out of it.

Mr. Morgan. Have these other partners any way now to resist the appeal under this system that you have got here? They are not parties. They are just served with notice that it is going on, and how can they resist the appeal?

Mr. Sunderland. They cannot resist the appeal.

Mr. Morgan. They cannot resist the appeal! It seems to me that that is pretty tough. They cannot resist the appeal.

Mr. Clark. No, they cannot resist the taking of appeal.

Mr. Morgan. Of course not.

Mr. Olney. I see what you mean.

The Chairman. Why do you say that they should not be named as parties?

Mr. Morgan. That is what I wanted to know.

The Chairman. When we were treating them as if they were out of the case.

Mr. Donworth. What line is that?

The Chairman. The top line of page 2 of Rule A-22.

Mr. Clark. I think it was not a good idea, and ought to be changed, but the question was to keep them out so if they took no affirmative action of their own they should not be served with briefs.

Mr. Donworth. I think that should go out.

The Chairman. Why should they not have the right?

Mr. Olney. They have the right to put in the briefs, but nobody pays any attention to them as a matter of fact, and if we do not say anything about them, if we do not say that they are not parties or anything of that sort, the matter

will take care of itself.

The Chairman. I think that clause about naming those adverse parties and treating them as outcasts ought to be stricken out of the rule.

Mr. Clark. I suppose we are not going to say who are parties to the appeal anyhow.

Mr. Donworth. No, except in your bond; you must make your bond run to everybody, including your associates.

Mr. Morgan. Absolutely.

Mr. Pepper. Of course, Mr. Chairman, the case we have been discussing is the case, we will say, of three partners with a joint judgment, and A takes an appeal, and B and C wants to stand pat, and it has been assumed that the case is
12 one in which A, an impecunious partner, wants to take the appeal, and the conservative men say "let it go as it stands".

I am thinking of the case in which A is the solvent partner, and B and C are the fellows who have got nothing to respond with. If the judgment stands it is entirely satisfactory to B and C, because the plaintiff will get his money out of A. A is the fellow that is the real party in interest in the appeal.in, I should think, 99 cases out of 100.

While I agree that technically it is all right that those other fellows should be made parties, I would hate to have them come into court and say "We beseech you to affirm the judgment below because that will let us out and soak our solvent partner."

Mr. Morgan. I do not see that that would let them out.

Mr. Donworth. I think you can trust the court to do what is right. As long as one man has the right to appeal

he is entitled to be heard, and the nature of the judgment that the court will enter will depend upon the circumstances of the case. I think "that naming them as adverse parties" should go out, and with that out you can trust the court to render a judgment which is proper.

The Chairman. We are agreed that the procedure ought to be the same as summons and severance. We understand that summons and severance has the effect of binding joint judgment debtors whether they appeal or not. And with that understanding I think we can go ahead.

Mr. Olney. I simply wanted to be sure that we were not increasing the right of appeal in a case like that.

Mr. Morgan. I do not think we are.

The Chairman. Is there anything else?

Mr. Donworth. There is a question of form that I should like to have the Reporter note. It seems to me in line 34. The word "They" is rather far from its antecedent. I suggest instead of the word "They" that there be substituted the words "such other parties" may appeal, or anyone "may appeal in like manner, but shall, as between themselves and the party first appealing be bound" and so forth.

Mr. Clark. Yes, I should think so.

Mr. Donworth. A matter of substance, Mr. Chairman. It has been a matter of consolation always to me, and I think to other practitioners, that in the Federal appeals the bond is not jurisdictional, and I fear that this language here makes it jurisdictional. You have to serve a copy of it. I do not know just the best way to meet that. I think the less jurisdictional requires you have, so long as they are

perfectly clean-cut and definite, the better. I think that the giving of a notice of appeal and the serving of it and the filing of it really should be all that is necessary for jurisdictional purposes.

The Chairman. That is a good point. Why not say that giving the bond is all that is necessary for jurisdictional purposes?

Mr. Donworth. Yes, that is the point.

Mr. Clark. Do you want the copy of the bond with the notice?

The Chairman. Yes, but say it is jurisdictional. The giving of the bond is jurisdictional.

Mr. Lemann. Do you think you ought to have the copy of the bond with the notice?

The Chairman. Yes.

Mr. Lemann. You have to file the original anyhow. Serving a copy of it would not dispense with filing the original.

The Chairman. I know, but it gives the fellow the notice of what your bond is, so if he wants to attack its sufficiency he can, and if you say it is not jurisdictional, or if you omit it, why you have not lost your appeal, and you get relief in the court.

Mr. Donworth. And more time to file it in writing.

The Chairman. File it in writing in three months; in that time a party ought to be ready to have his bond and serve a copy.

Mr. Lemann. Yes.

Mr. Clark. What happens in the case when the clerk

says I do not think your surety is any good"? You have served him a copy of the bond.

Mr. Morgan. That is what Judge Donworth said. We must have some procedure for allowing an attack on that bond.

Mr. Clark. Suppose that you have not done anything about it?

Mr. Donworth. So long as it is not jurisdictional the court will give you time to fix up a new bond, and I think it will work out with that qualification of jurisdiction.

The Chairman. You can provide, if you want, a brief statement there that the party who objects to the sufficiency of the bond can file exception in the court.

Mr. Clark. If he does not care, and the bond is changed, why it does not make any difference. But if the bond is changed from the copy he has , then what?

Mr. Morgan. Without notice?

Mr. Clark. Wait a minute. That is what I want to find out. You see service of the notice of appeal and the copy of the bond will be before he has gone to the clerk. He then goes to the clerk and the clerk says "I know that fellow, and he is no good. Get a new surety." And he gets a new surety, and then what do you have to do? Do you have to serve a copy of a new bond?

Mr. Lemann. I think it meant that he filed a copy of the bond before he got it approved.

Mr. Morgan. The answer is that he gets it approved before he serves it.

Mr. Olney. No, the correct rule in a case of that sort is that the clerk must accept the bond unless the other party

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objects to it. If the other party does not care enough about it to object to it, why let it stand.

The Chairman. That is the way to do it. Let it be approved as of course, and then if the other fellow has not seen a copy of it, let him take exception and go before the court.

Mr. Clark. Then we want to strike "which bond shall be approved by the clerk if regular in form and adequate in security"?

The Chairman. Strike out "which bond shall be approved by the clerk", and say it shall be filed, and then if the other fellow wants to except to it why the clerk does not have to do anything with it. n If he files exception to it the exception can be heard to the sufficiency of the security.

Mr. Lemann. This should apply to the supersedeas bond too.

The Chairman. No, this is not supersedeas. This is an appeal bond.

Mr. Lemann. But does it not apply to a supersedeas bond also?

The Chairman. No. We have not gotten to that point yet.

Mr. Lemann. If you give a supersedeas bond you do not have to give the other bond, do you?

Mr. Clark. The supersedeas bond includes it.

Mr. Lemann. Let me see if I understand. If you decide you want a supersedeas you go to the judge and ask him to fix the amount of the bond, and usually the practice

now is to get the judge to approve the surety. So the order reads that it is a bond for so much, and the surety to be approved by the court, and then you have him approve it. Will that also be required here on the supersedeas bond?

The Chairman. I should think that we will get to supersedeas in a little while.

Mr. Lemann. We have not got to that yet?

The Chairman. No.

Mr. Clark. You will notice in lines 7 and 8 of Rule A-22 the language "provided, that if a supersedeas bond has been given pursuant to Rule A-25, no appeal bond shall be necessary."

Mr. Lemann. Yes.

Mr. Olney. In connection with the bond there should be a provision here which permits of objection to the form of the bond. Sometimes the bond is just as defective in form as it can be, and the rule should provide for objection being made to the form, and require its correction or else the dismissal of the appeal.

The Chairman. That would come under and be included in exceptions filed as to sufficiency. You can add there "as to sufficiency of form".

Mr. Olney. Very frequently the clerk passes on the sufficiency of the surety. The form of the bond is something rather for the judge, I should think. It does not make so very much difference.

Mr. Dodge. Suppose three trustees are sued on a matter not involving individual liability ultimately, but really a suit in which the beneficiary alone is the real

party in interest, can one trustee appeal?

The Chairman. If they are personally liable?

Mr. Dodge. No, assuming it is really a case where the beneficiary of a single trust is the only party who will ultimately have to pay the judgment, and two of his trustees say "this judgment is a very favorable one to us but we had better not appeal", can one insist on appeal?

The Chairman. I do not think so. That is not a joint judgment. It is a single judgment against three parties who are an entity. If it is against the three trustees individually for misapplication of funds that would be different.

Mr. Dodge. I was assuming it was not that kind of a case.

Mr. Sunderland. If you have four trustees, and two want to appeal and two do not want to appeal, then what happens?

Mr. Dodge. Trustees ordinarily have to act unanimously.

Mr. Lemann. Yes.

Mr. Sunderland. And then no one could appeal.

Mr. Lemann. That is a part of the law of trusteeship. Let us leave something for the judge. Mr. Dodge, shall we not leaving something for the judge?

Mr. Dodge. Yes.

Mr. Donworth. Trustees must act unanimously on any affirmative act.

Mr. Olney. There is another provision in this rule that must be watched pretty carefully. It says:

"The district court shall retain control over the action until the time for docketing the case and the record in the appellate court shall have expired, unless the case and the

record are docketed sooner;"

The implication is that if they were docketed sooner the district court would lose control then. There should be no doubt that the district court obtains control unless it is docketed.

The Chairman. Unless it is docketed.

Mr. Olney. Yes, unless it is docketed. But even if it is docketed the district court retains control for the purposes of granting a new trial, for the purposes of review, until that proceeding has expired. Otherwise you could just cut off the motion for new trial.

The Chairman. But a motion for new trial stops the running of appeal time.

Mr. Olney. But the man may take his appeal anyhow.

Mr. Lemann. You mean the defendant appeals. He hurries up---

The Chairman. But the man who is making the appeal is the man who himself is moving for new trial.

Mr. Olney. He may not be.

Mr. Morgan. No, both parties may be dissatisfied. That is his point.

Mr. Olney. They may not be satisfied at all.

The Chairman. That is a good point to note. Did you catch it?

Mr. Clark. Yes.

Mr. Dobie. One of them wants a new trial and one of them wants an appeal. Is that your case?

Mr. Olney. Yes.

The Chairman. We have got a case there where one side

is making a motion for a new trial and it is pending and it is not decided. The other fellow is taking the appeal, and under this rule if he has docketed his appeal the other fellow's motion for a new trial has gone to the wastepaper basket.

Mr. Donworth. I understand the general rule is that when a case is pending in the appellate court the party can not do anything; he can not modify a word or do anything without permission of the appellate court so long as the appellate court has jurisdiction.

Mr. Lemann. That is what I thought, and I wondered, the Reporter having this in mind, what he is going to do with it?

Mr. Pepper. I think we ought to leave a few tricks like this in the rules to get some compensation out of this job of ours.

Mr. Dodge. In line 17 of Rule A-22 the Committee on Style is requested by me to look into the question of "issuance"--- the propriety of the use of the word "issuance", which I think is barbarous.

The Chairman. That is barbarous, but it is a matter of form.

Mr. Dodge. I said I asked the Committee on Form to consider that word.

Mr. Clark. It is also done in this connection.

Mr. Donworth. "Citation" is eliminated, so the issuance is gone.

Mr. Dodge. So that it is nowhere else in the rules?

Mr. Morgan. But he does not want it anywhere else.

Mr. Clark. Both "citation" and its issuance are gone.

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RULE A-23. RECORD ON APPEAL-- PREPARATION AND APPROVAL (A) PRAECIPES TO BE FILED BY THE PARTIES.

The Chairman. Let us pass now to our Rule A-23, and that is the record on appeals, how it is to be prepared, and so on. We are now discussing the question of the method of making up the record.

Mr. Donworth. Mr. Dodge objected to the use of the word "praecipe" in line 4. But, Mr. Dodge, what can you substitute there for the idea that the party appealing should notify the clerk what papers he wants in the record? How can you get rid of that?

Mr. Dodge. Perhaps you cannot get rid of something equivalent to that.

Mr. Lemann. You agreed to that when we were talking about it.

Mr. Dodge. Yes.

Mr. Lemann. Mr. Dodge first suggested that it be a stipulation, a part of the record, but suggested you might not get your neighbor to stipulate. He suggested then that instead of filing the praecipe of what to put in, he said to file a praecipe what to leave out. Is that it, Mr. Dodge?

Mr. Dodge. That was the substance of it, because we have so little trouble with this in our State practice. There is never any question as to what the papers are which go into the appeal papers.

Mr. Lemann. Of course this involves passing on Judge Olney's plan, because under that plan you just took the record up. You just took it under your arm and took it all up.

You have got to presuppose that that is not going to be done.

The Chairman. Let us see about that. This idea of just dumping papers upon the upper court, bringing up to the upper court the original papers, and all that is not so good. It seems to me that however much it may be looked upon as an advance, there are a great many objections to our considering it. In the first place we vision it in terms of a simple lawsuit. The English system works very well. They do not have any rate cases over there with thousands of pages of stuff all in the record. It looks very nice over there in a simple little case. I do not think we are ever going to get the court of appeals to agree for a minute on that. They will hold a judicial conference and come down on us like a nest of wasps.

Then there is this thing about it. The Reporter has a memorandum there going back over the statutes for the last hundred years to figure out if it is within the power of the Supreme Court under some other statutes--- not the one we are working under--- to regulate the rule of practice on appeal in law cases in the circuit court of appeals. Perhaps he is right about it. But there is a shadowy field there, and certainly they cannot very well do it under the statute we are working under.

At this stage of our proceedings here is it not better for us, instead of attempting such a revolutionary change as that, to proceed on the theory that the record is going to be made up in the lower court? That is the way it has always been done. And make such improvements as we can in the matter of simplicity, and methods of getting the record made

up in the lower court.

If we are going to tackle that other job I think it will mean serious question from the court, and whether or not we can do it at all under the statute, and then we have got to face a complete revision of the rules of the circuit court of appeals. They have got to be all done over again. I do not know who is going to do that job. I doubt as to our powers and all that. However appealing it may be as a reform I shrink from it myself. I should like to see the thing done in the old way so far as we are concerned, by getting the record settled below and send up just what the parties arrange for in the lower court.

Mr. Donworth. Under your suggestion, Mr. Chairman, how much of this would be proper for consideration and how much would go out of this Rule A-23?

The Chairman. Under my suggestion it is merely a matter of revision of Rule A-23. There are a good many things in which it ought to be revised, involving for instance this question of narrative statement. The rule is a little vague in some way. For instance it allows the appellant to serve a narrative statement or a narrative statement and part of the evidence. And then it provides generally that the other side may serve a narrative statement or something. My idea here is summed up in this way:

First, allow the appellant in the first instance to decide what testimony should be included, and, in the interest of economy, what part of the testimony of any witness is to be in narrative form and what in question and answer form.

That means that the appellant if he wants to, call for

the whole thing in question and answer form. If he decides he wants to save money and he thinks he can, he gets up a narrative statement either for all or a part of the testimony.

Then, second, appellee being confronted, we will say, with the request for all the evidence in question and answer form, he is through and does not need to add or subtract anything. But if there is a narrative statement thrown at him he can propose amendments to any narrative statement, or he can ask as a matter of right that question and answer form be substituted for a narrative statement. And he can propose the addition, either narrative or question and answer, of testimony of any witness whose testimony has not been included and which the appellee deems necessary to the appeal.

The only situation in which the court has to interfere is in case of amendments offered to any proposed narrative statement. That would have to go to the court for settlement. But it allows the narrative statement as a matter of option to the parties below, instead of enforcing it, as it now reads under the existing rules as a matter of necessity.

Then there is another provision of course that the rules provide for here, that the parties may by stipulation, subject to the approval of the court, stipulate what the records shall contain. They can do that very shortly. This preserves the narrative statement as a possibility, but does not enforce it on the parties, and I suggested that a suitable rule would be that if either party includes anything which thereafter appears unnecessary--- for instance, suppose one man fills up a narrative statement with a lot of formal evidence. This gives a picture of the background which is not really

essential, and the other party comes in and wants the whole question and answer form of all that stuff in the record, he goes up subject to being penalized in costs if he has demanded something which is unreasonable. That is a sort of a compromise on the present narrative statement rule. It does not exclude the portion of the evidence in which the question and answer form is necessary. It gives the appellant a chance to cut down his record by means of a narrative statement which covers the whole or a part of the testimony; either a narrative statement on all or a narrative statement on a part, and a question and answer form as to the rest. And the other party comes back in and we will say he does not want a narrative statement on Jones' testimony; he wants a question and answer form put in. He gets it. And instead of countering with a question and answer demand he counters with amendments to the narrative form, and they do not agree, and then it goes to the court for settlement.

Mr. Donworth. I like the Chairman's comments on page 17, and I rather felt they were along the right line. The thing I was not very clear about, Mr. Chairman, was whether you had drafted a rule to comply with these comments?

The Chairman. No, I have not, because I think it merely means a revision of this rule. For instance, this proceeds along these lines. The rule says:

"If he---"

That is, the appellant---

"desires /any portion of the testimony of witnesses to appear in such record, he shall so indicate and shall furnish the clerk with the stenographer's transcript of such testimony. If he

desires any portion of the testimony to appear in condensed and narrative form, he shall furnish with his praecipe, or at such later time as the court shall order, a statement of the evidence thus condensed".

Now that is all right.

"within ten (10) days after the service of the praecipe, the appellee or another appellant may serve and file his praecipe indicating additional portions of the record in the district court desired by him to be incorporated into the record on appeal---"

That is all right.

"together---"

This is where the rule I think needs revision---

"together with such further transcripts of the testimony of witnesses or such other condensed statement of the evidence or amendments or additions thereof as the case may be."

It is a little vague as to what he is to do there, but the idea I think does not differ seriously from what I have given. There is only one fault with this rule, as it is drawn, and that is that the appellant only has to furnish the reporter's transcript of what he has asked for. Under the rule, if the respondent wants any additional evidence in he has got to go and buy the transcript for that. That is all wrong.

Mr. Donworth. Yes.

The Chairman. The appellant ought to be required to furnish the full transcript from the reporter, at his own expense, and not make the respondent go and buy from the reporter the transcript which he needs. However I am just

covering that to show you that it is more a matter of revision here than anything else to make the Reporter's rule conform to my general scheme.

Mr. Dodge. There is a mass of detail here, Mr. Chairman. I was wondering if it would not be all covered by a statement that the material evidence shall appear in question and answer form, but by agreement the whole or any part thereof may be put in in the form of a narrative statement.

Mr. Morgan. I should like to see something as simple as that if we could make it so.

Mr. Dodge. You have come down now to the point where it amounts to that in effect, as I understand it.

The Chairman. No I do not, in this way. I shrink away just a little from that on this ground. That enables the respondent, as you have got it, without any penalty on him, to burden the appellant with the taking up of a record in the question and answer form--- the whole business. I have backed away from that just to the extent of allowing the appellant to substitute a narrative statement if he wants to. That still leaves the respondent the right to demand the full question and answer form if he wants to, but on the other hand the appellant having proposed the narrative statement, the respondent having demanded the question and answer, he does it at the peril that he may be soaked with costs if he is trying to burden the appellant.

Mr. Dodge. You accomplish the same result if you have your proposed narrative statement filed in court as the

basis for application to the court for costs.

Mr. Sunderland. Are those orders for cost ever imposed?

The Chairman. They are difficult to impose, because it is the appellate court that always has to decide when an appeal is decided how much of this stuff has been dumped in there that is unnecessary, and I admit that it is not easy to determine.

Mr. Donworth. They dislike exceedingly to be bothered with a matter of that sort.

7 The Chairman. But I do not believe in forcing the parties to a narrative statement. I think if one man supplies a narrative statement the other man ought to have the right either to suggest amendments to it to be settled by the court, or, if he chooses, counter as a matter of right with the demand for question and answer.

Mr. Dodge. Then the simple rule which I suggested, covers it all except this matter of costs.

The Chairman. The matter of costs, yes. That is about all it does not cover.

Mr. Dodge. And that could be covered in some other way.

Mr. Lemann. You have a suggestion here in your memorandum at page 25, Mr. Reporter. I wondered if we should not have that presented. You suggest:

"Third. A rule providing that a question and answer transcript, either printed or typewritten, shall be furnished the appellate court, and the appellant shall include a concise statement of evidence in narrative form giving appropriate reference to the pages of the transcript. The

appellee may then put in his brief any correction of such statement he deems necessary, and the points of difference may be decided by the appellate court upon examination", and so forth.

What I am wondering is this. We are not sitting around the table here and we are all fixing these rules for the appellate court judges, and we are fixing all this from the standpoint of the lawyers, but the appellate court judges are going to have a good deal to say about the rule. They have never changed it. Some of them read law articles, and they probably meet the bar now and again. I do not know that they are entirely indifferent to the hostility of the bar on this subject. I was thinking if I were an appellate court judge whether I might have a different point of view from what I now have, and whether I should like to have the case presented to me in the first place in narrative form. They seem so far to have an inclination for it.

Mr. Morgan. Some of them are positively profane about the narrative form.

Mr. Dodge. Judges differ with respect to that question. Some favor it and others do not.

The Chairman. In talking about typewritten transcript and narrative form there are two different problems. You will never get the judges to agree to forcing the filing of the typewritten transcript. You might as well forget it.

Mr. Lemann. Yes. But what I wanted to bring up for discussion is whether we should give some further thought to the possibility of something else--- I think it was a suggestion made by your boy in that article which your boy, Mr. Chairman,

wrote with Griswold which was published in the Harvard Journal sometime ago, that the brief state the things in narrative form so far as possible, and then have a record in question and answer form, so if the lawyers get to scrapping in their briefs as to what was said the court can turn to this transcript which I assume is printed. They might not have to turn to it. That would at least relieve the lawyers of getting together on this narrative form. In many cases there may not be much issue on the testimony. The appellant has not got to quote it all. He has only got to quote the part that he thinks is important to his case. And he then boils it down for the court.

Let us say I am the appellee. I might say "Well, that fellow has done a pretty good job. He is all O.K., and I have got no kick". Or I may say "He has not given the right view of this thing at all. You do not get it from his narrative form. He has omitted something". Or "Do you not see how this witness hedged about this thing for ten pages"? If I feel that way about it I will put in my brief my objections, and I tell the court "Look at pages so and so, and so and so, and you will see what this really was".

That I understand was practically the suggestion made, and I think perhaps we ought to give that some consideration.

The Chairman. Under this proposal of mine the lawyers do not have to have it in a narrative form. They are relieved of that. If I am the appellant I can prepare and serve the narrative form if I want to, but I do it knowing that my opponent does not have to sit down and chew it over. If he wants to he can counter and my narrative form goes into

wastebasket.

Mr. Lemann. You take care of the lawyers all right, I think. I am looking after the judges for the moment--- with apologies. Suppose a lawyer says--- and I think he will usually do so under your method: "Well, I am not going to bother with this narrative form myself".

The Chairman. Not unless he called up the lawyer on the other side and found out whether it would be acceptable to him. Whether he would stand for it.

Mr. Lemann. I did not quite understand that.

The Chairman. He would not do it unless he called up the other lawyer and found out whether he would counter on the question and answer.

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Mr. Lemann. Do you not think that normally he would not follow the narrative form?

The Chairman. Yes I think so.

Mr. Lemann. He would take the record, and I think it destroys all the rule. As a lawyer I am all for destroying it, because that is the easiest thing to do, but I am wondering if the judges would like that so much.

The Chairman. I am willing to try for that. Each fellow asking for so much of the question and answer form as he wants to. Let us try it and see if they will agree to it.

Mr. Lemann. You mean try your plan?

The Chairman. No, wipe out all my plan in reference to narrative form except by stipulation.

Mr. Lemann. The other plan, that is the plan of Mitchell and Griswold contained in this article to which I

referred, contemplates that the whole record will ordinarily be printed in question and answer form, and then in the brief a summary of the testimony. It will be a rule for the briefs, that they summarize the testimony in the briefs. And then if their summaries do not agree, the court has got the question and answer in there and can go and look at it. So the court gets the narrative thing in the brief. But the lawyer has usually to do that in his brief anyhow if he is going to use testimony. Therefore that gives the court what it wants, and it saves the lawyer the burden of putting the whole thing in there, and the record is there for the court to look at.

The Chairman. I am quite agreeable to an arrangement such as Mr. Lemann proposes, and that involves wiping out narrative forms entirely unless the parties stipulate for it. If they want to do it they can stipulate for it, but it does not force them to. And it makes the normal arrangement, in absence of stipulation, to take up in question and answer form.

Mr. Lemann. What do you think about that, Mr. Dodge?

Mr. Dodge. Omit such parts as they stipulate may be omitted. That is exactly right.

The Chairman. That comes up when you file a praecipe. I file a praecipe for part of the evidence in question and answer form, and the other fellow thinks that is not enough, that there should be more question and answer form for a witness, and up she goes.

Mr. Lemann. That is a stipulation by which you can

leave out a great deal of it.

The Chairman. It has that effect; either party can demand.

Mr. Dodge. The ordinary way is for the parties to state what portions he wishes to omit.

Mr. Lemann. He can say "print all the record except the testi ony of A, B, and C".

The Chairman. He can say what part he wants printed.

Mr. Lemann. Yes.

Mr. Clark. Would you want to make any provision as to briefs?

Mr. Morgan. I do not think so.

Mr. Lemann. It seems to me that if you want to give a sop to the judges you would put something in there that the briefs should contain some broad statement of a condensed summary--- well, the counsel wants to rely on the testimony of so and so.

The Chairman. In the procedure before the court of appeals--- I think the way to do that would be to put a note on it: "We have done it this way with the exception that the matter can be handled in the appellate court by summary statement and narrative statement and the briefs." And just give them a suggestion.

Mr. Lemann. Yes.

Mr. Donworth. What bothers me is this. Before you get to the appellate court, what does the appellant file in the lower court? I take an appeal, we will say, in an equity case. And I know now about what I will have to do about notice of appeal, and serving it and filing it. What

do I file in the lower court with respect to the evidence? Do I file the stenographer's transcript?

The Chairman. In the first place I made the point a few minutes ago, I think, that it is up to the appellant to procure the transcript and supply his adversary with the complete transcript, so he does not have to pay for it. When that is prepared the appellant files with the clerk the praecipe, and says, "I want such and such parts of the record, and such and such parts of the proceedings of the trial, including the testimony of the witnesses, in the record." That is served on the other side, and he counters with a praecipe for such additional matters as he wants in; that the other party has not asked for; and the two praecipes together advise the clerk.

Mr. Donworth. Then the clerk of the district court makes up what you might call--- of course we know the record consisting of the orders, that goes anyway--- but so far as the evidence is concerned the clerk then makes up a new copy consisting of what the two lawyers say they want in.

The Chairman. He takes the reporter's transcript and takes the binder off and takes out those pages that they have asked for, and leaves the rest in his files.

Mr. Donworth. That is all right.

Mr. Clark. Suppose it is a long case, and the appellant has a good deal of hope that he will not have to have all the testimony in the record, he mustnstill get it typewritten?

The Chairman. Still what?

Mr. Clark. He must still get it typewritten?

Mr. Morgan. The transcript, you mean?

Mr. Clark. Yes.

Mr. Morgan. Well, I suppose unless there is a stipulation to the contrary he must have it.

Mr. Lemann. Yes; otherwise the other party can not have an opportunity to look at it, to look it over and see what he wants to require him. They have got to have it in order to do that.

The Chairman. Yes, unless they stipulate.

Mr. Lemann. Yes.

Mr. Dodge. I think your suggestion about cost is a good thing. It might operate in terrorem. I think I should like to let a party who wants to shorten up the record file his summary form over in the clerk's office if the court found that the extension of the evidence was wholly unnecessary.

The Chairman. That would have to go to the court of appeals. He would have to file it there.

Mr. Lemann. Assume I were to file a praecipe and I said "Put this in", and the opposing party said I could not". In such case the appellee could not say "Leave that out". All he could say would be "Put some more in". Is that not all he could say? Then if I wanted to take issue with what he said we would go to the district judge to find out whether it should go in or not, as I understand it. The appellant has the first right to designate what is to go in. The appellee cannot say "Leave some of it out" or he can not say that any of it should be left out, but he may say "Put some more in". Then the appellant can say "That is unnecessary. We will fight it out before the district judge as to whether that shall go in or not." That would operate in terrorem

against the appellee more than the appellant. But if the district court ruled on it, saying as to how it was to be done, in such case I do not know how you could penalize either side by reason of having put in or asking to put in what it thought should have been put in.

Mr. Dodge. That would exclude the other method of dealing with it.

Mr. Lemann. Yes. The district judge settles the record finally. Usually the parties have no disagreement as to what goes in. I do not think they ought to have to bother the district judge with respect to it.

Mr. Clark. I wonder whether it would not be a good plan to put in a sentence or two about the briefs.

The Chairman. That is in the rule.

Mr. Clark. I think the court will want some sop. As a matter of fact this rule that I tried to draw was drawn after suggestions to the chairman that the courts would think they ought to have something to make the records short. One thing I hope you all have in mind is this. Do not have any illusion but what we are making spots in the rules of the C. C. A. now. These two rules are going to call for changes.

Mr. Lemann. The abolishment of citation will call for changes.

Mr. Clark. Yes. And this rule also will call for some changes.

The Chairman. We understand that. But I doubt if we should try to put in our rule a statement of what the briefs should contain in the circuit court of appeals. Why not make a note and state that we have provided it this way, and

if the circuit court of appeals wants to call for narrative statement in the briefs along the line we have been discussing, they can do it.

Mr. Lemann. Another way to do it would be to suggest to the Supreme Court, Mr. Chairman, that when they promulgate these rules they promulgate a proper chain in their own rules. I think you will find that the C. C. A. rules are almost verbatim--- here and there there are some divergencies, but they are largely verbatim Supreme Court rules.

The Chairman. We agreed at the last meeting that if we made any changes in the narrative statement the circuit court of appeals as well as the Supreme Court would be bound to make their amendments read to take effect at the same time.

Mr. Morgan. Did you ever see a brief on appeal which did not have a narrative statement of what the appellants and what the respondents believe to be the pertinent parts of the testimony?

The Chairman. Well, you will find a brief statement of facts, but there are a great many cases in the United States courts where the whole case is the fact. The rate cases are going up, for instance all the time. The question is a question of fact. The narrative statements in the briefs are not worth a whoop except to tell the court the facts. If they have to solve any questions in the case they have to go to the record.

Mr. Morgan. There is no way of getting an agreement as to what the narrative statement should be in a case of that kind.

The Chairman. No. I am not very much sold on this idea of a narrative statement to go into the brief on appeal. You can not get very far with it.

Mr. Lemann. In line with your suggestion, I think it gives them a sop, and I think, under your suggestion, the lawyers would not bother with anything approaching a narrative form in the brief at all.

The Chairman. I had forgotten that article by Griswold and Mitchell. It was about three or four or five days ago?

Mr. Lemann. Yes.

The Chairman. Gentlemen, are you ready to lay down the system here of principle so that the Reporter can go on with his revision?

Mr. Donworth. As I understand the idea that has been favored in the latest part of the conversation it is that the party appealing shall get from the stenographer a full transcript. He shall serve on the opposing party a copy of that, and what does he do? He puts the original into the clerk's office temporarily while this discussion is going on, and then he proposes, or instructs the clerk to put into the transcript that he is to send up only pages 19, 56, and so on, and then the opposing party can designate other pages. Is that it?

The Chairman. I had not thought out in my mind how many copies he was to get, and all that, but he is to supply his adversary with a full transcript, and probably file one copy with the clerk. I know how we used to do that. We never filed anything with the clerk. We got the reporter's transcript, and then we used to serve on the other fellow a

statement as to just how much of this transcript we wanted in, and we handed him the transcript along with our demand, and he would take it and look it over, and he would designate then what additional parts he wanted in, and then we would walk up to the clerk and we would request to put in what both sides wanted. I do not think we ought to try tonight to go into the minutiae of that. It is the general principle that we want to settle. We all agree that the expense of furnishing the necessary transcript ought to be borne by the appellant, that is the reporter's transcript, and the question we want to settle is whether we want to get rid of narrative form and deal with it at all, or whether we want to let each fellow designate such part of the testimony in question and answer form as he wants in, and I am willing to go along with that and forget my feeling about narrative form, and try it, and see if the court stands for it, and if they will not, then let us lean back and away and say: Let us put up this scheme of letting the fellow offer a narrative form if he wants to, but not make it compulsory.

Mr. Pepper. I move that the Chairman's statement be taken to be the sense of the committee.

Mr. Loftin. I second the motion.

Mr. Olney. May I ask a question? As I understand this method would involve the changing of some rules of the circuit court of appeals?

The Chairman. That is right.

Mr. Olney. Is there any distinction in that respect between this method that you have in mind here and simply passing the whole record up as I suggested?

The Chairman. We are not going to change the rules of the circuit court of appeals. What we mean is that if this rule shall be adopted it will inevitably follow that the Supreme Court and the circuit courts themselves will have to amend their own rules so as not to require something that these rules do not call for.

Mr. Olney. And if we provided here what the record on appeal should consist of, and that the original papers should all be passed up, the same thing would be true, would it not?

The Chairman. Oh yes. They would have to amend their rules more than ever then.

Mr. Olney. Yes, they would have to amend them more than ever then. It would be a matter of degree. There would be that difference in degree. I just wanted to say that so far as objection based on our authority is concerned it seems to me that it applies equally to one as the other. I have no hope and I do not desire to urge on the committee particularly that they adopt my method if they feel that the method I suggested is not worth while. However I do want to say that I think it is the method which finally will be adopted, and it is the only really sensible method in the matter.

But coming down to this particular thing, there are two suggestions I would make. In the first place so far as western lawyers at least are concerned you will assist considerably if you will abandon the word "praecipe" and substitute---

The Chairman. "shall designate those parts". He shall file a statement with the clerk designating those parts of

the record; and get rid of the word "praecipe".

Mr. Olney. Yes. The other thing is this, and it is a very practical matter. Under your rule you are going to leave the printing of this matter to the clerk.

The Chairman. The printing?

Mr. Olney. Yes.

The Chairman. That is done in the circuit court of appeals. The lower court does not have anything to do with the printing. He sends up a typewritten record.

Mr. Olney. Then of course we have nothing to do with it. But I want to say that there is one of the greatest abuses.

Mr. Morgan. Absolutely.

Mr. Olney. There is one of the greatest abuses in the way of expense in connection with appeal that goes on. Those printing bills are out of all reason.

Mr. Morgan. Absolutely.

The Chairman. That is so. We do not have anything to do with it, but that is one of the grafts here in the circuit court of appeals that somebody ought to go after.

Mr. Olney. Why not go ahead?

The Chairman. We cannot do anything with it. They have always insisted on doing their own printing up in the circuit court of appeals. We can not get away from that.

Mr. Clark. I think it is illegal.

The Chairman. There is a question about it.

Mr. Clark. The statute provides that the district court can do it, and most of the circuit courts of appeal have ruled on the subject, and those usually provide that

either can do it.

Mr. Cherry. Try to do it!

Mr. Donworth. That statute of 1911 is restricted. For instance, the statute of 1911 starts in something like this "In any appeal for final judgment", or "In any case of appeal for final judgment", and then the circuit court of appeals says "We have a great many appeals coming up which are not for final judgment; bankruptcy and so forth, and we will give that a strictly limited interpretation."

The Chairman. I do not think we ought to stop and deal with this matter, because if we tried to transfer the printing back to the district courts we would have the same old graft. It would not help any. They would charge just the same.

Mr. Olney. There should be some method by which the litigant or party is permitted to do the printing himself.

Mr. Cherry. Absolutely.

Mr. Olney. That would end it immediately. It is possible to do it.

The Chairman. I concede we can adopt the rule that after the record had been designated, settled as to what was to go mm in, the parties themselves should then cause the thing to be printed. We would have every court in the country coming down on us on that. We would be attacking the graft. I do not know whether we could get away with it or not.

Mr. Donworth. It is intrenched.

Mr. Pepper. I was going to ask if it would clear the air to put the motion I suggested on the matter of substance, and then take up the matter of printing. My motion was that

your statement, Mr. Chairman, as taken by the stenographer, shall stand as the sense of this committee in making up the record.

Mr. Clark. May I make one suggestion in that connection. Why would it not be proper and possible to take Judge Olney's suggestion as an alternative, and why would it not be good tactics? We are suggesting a kind of -- shall I say--- piddling reform, and it goes against what, so far as I know, is the views of the upper courts now.

Mr. Pepper. You are talking about printing?

Mr. Clark. No, about narrative.

The Chairman. He wants to hire a dray and take the original records in the district court and carry them up and dump them on the table.

Mr. Clark. I want to follow Griswold and Mitchell. But it seems to me that it would be at least a dramatic contrast and make them think about it. Even if we want to get the lesser through it would be some advantage, and they can see what is the best thought of the country, namely Judge Olney and Griswold and Mitchell. Is there not something to be said in favor of putting in the alternative form at the same time?

Mr. Lemann. The alternative form is the typewritten transcript or the going up of the original record. I want to get this straight in my mind.

Mr. Clark. Just the form that they had in California.

The Chairman. It takes the original papers right up.

Mr. Morgan. And the typewritten transcript?

Mr. Olney. Yes.

Mr. Lemann. Do you mean by the "transcript" the typewritten testimony? The transcript of the testimony?

Mr. Morgan. Yes.

Mr. Lemann. Which is a part of the original record.

Mr. Morgan. When it is reduced.

Mr. Lemann. Take up all the papers and the testimony, is that the idea?

Mr. Morgan. Yes.

Mr. Lemann. And then you have the narrative summary of your testimony in the brief if you want.

Mr. Morgan. Yes.

Mr. Lemann. What we were talking about was that if the upper court wants to look at the record of the thing that we were talking about a while ago they have a printed record. Under Judge Olney's plan they look at a typewritten record. Am I right about that?

Mr. Olney. No, not quite. You are required to print, usually as an addenda to your brief, those portions of the record upon which you rely.

Mr. Lemann. That is exactly what we were suggesting a while ago, as I understood it. The Chairman said instead of putting it in the rule we should put it in the note. Counsel should put in their briefs a summary of the testimony on which they rely.

The Chairman. Judge Olney's proposition was not to have the record settled in the district court at all. Just dump the papers on the circuit court of appeals.

Mr. Olney. You are mistaken on that, Mr. Chairman, if I may interrupt you. The record is settled in the upper

court. He settles the reporter's transcript, and he settles the records and the papers that are to go up.

The Chairman. Yes.

Mr. Olney. He certifies to them, the whole thing; so there is the record.

The Chairman. The authentic record, yes. I mean it is not settled in the sense of settling what part was needed in the circuit court.

Mr. Olney. No. The parts that are needed to be considered are referred to in the briefs and picked up there.

The Chairman. What do you print up there?

Mr. Olney. I beg your pardon.

The Chairman. Do you print nothing but what you put in your briefs? Your rule calls for a consideration of the typewritten transcript in the circuit court of appeals if the parties do not agree on facts in their briefs.

Mr. Olney. If a man wishes to refer to the testimony of A he is supposed to print that testimony, and attach it to his brief. So that unless the parties are guilty of such incompetence that the court can very well take them tontask for not obeying the rules, the court never has to look at the typewritten papers.

The Chairman. Suppose you have an injunction case or a rate case with 10,000 pages of testimony on the question of value of the property, the rate of return, depreciation, and a few other little items. How would you handle that? You would put that in your brief, would you not?

Mr. Olney. Certainly. If the party was going up on the record on the proposition that the judgment, we will say,

was unfavorable to the utility company that was complaining, they would pretty nearly have to print the whole record.

The Chairman. In the circuit court of appeals?

Mr. Olney. In the circuit court of appeals.

Mr. Donworth. In the Supreme Court of California you do not print the record at all, do you?

Mr. Olney. Well, you donnot print it as a separate transcript.

Mr. Donworth. That is what I mean.

Mr. Olney. We used to print it as a separate transcript and then there would be the volume of the transcript and the briefs. We always called that the transcript. We do not do that under this alternative method as you call it. But if a party is appealing, for example, from a judgment on the ground that it is not supported by the evidence he has practically got to print all of the evidence, because it is all necessary for his case.

The Chairman. It is in a separate volume just as if it were a record, but it is called appendix to his brief, is that it?

Mr. Olney. It is called an appendix to his brief. I remember one case which took several months to try. An appeal was taken, and what they did was simply to print the whole thing.

Mr. Lemann. Does he have to print all of the record, or just the part on which he wishes to rely?

Mr. Olney. He is supposed to print only that on which he relies.

Mr. Lemann. Then if the other fellow does not like it

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that other fellow would absolutely at his own expense have to print the rest of it, which makes it pretty hard on the appellee, because under the Federal system, if the appellant does not put in his praecipe all that should be, or that the appellee thinks should be in it, the appellee has to print it, and pay for it. Under the other scheme a situation of that kind arises where if the other fellow does not put it all in because he does not think it is necessary, and I think it should be in, I have to print it, and I suppose I do not get it back again. Is it true that I do not get it back again?

The Chairman. Oh yes you would get it back. Why should you have to pay?

Mr. Lemann. Is the cost of printing a brief charged as "costs"?

The Chairman. Yes.

Mr. Lemann. I never got the cost of printing a brief back. Perhaps I went to sleep at the switch.

Mr. Olney. The appellee for example claims that the appellant has not printed sufficient in the record, and all that sort of thing. That goes up. But it is combined with the power of the court to impose costs in a case of that sort. And it is a very minor thing as compared with the saving in time and the saving in labor, the simplicity of taking an appeal and the saving in cost to litigants on both sides finally.

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The Chairman. I think we might adopt the rule along the lines of the motion that has been made, and then, if you want to do so, adopt another motion to provide an alternative rule such as you suggest, and see what it looks like, and put it up to the Court.

Mr. Olney. May I say -- and then I am through on the subject -- that I should like very much to see the suggestion Dean Clark has made taken up.

I have no hope that the Supreme Court and the circuit courts of appeal -- because the circuit courts of appeal will come into this picture very distinctly before we get through with it -- are going to agree to anything so unknown to them as this, out of hand; and yet I feel very strongly that as time goes on, and the matter is agitated, and their thoughts become accustomed to it, this method or substantially this method of appeal will be allowed.

I should like, therefore, in some way, if the matter could be called to the attention of the Supreme Court in such a fashion as to cause discussion on the part of the bar. That is what I should like to see more than anything else -- a discussion of this thing on the part of the bar and on the part of the judges -- because there is no hope of getting it through now. I am perfectly confident of that.

The Chairman. Let us take a vote first on the motion as to whether a rule shall be prepared along the lines first suggested. That motion is pending.

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

The Chairman. Now do you wish to make a motion that an

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alternative rule be put in our draft and submitted to the Court on the lines suggested by Judge Olney?

Mr. Donworth. I should like to ask Judge Olney a question. It will not take long.

Judge Olney, my understanding of the practice in the Supreme Court of California is this: If I am vitally wrong, I should like to have you correct me. It is that you do not have a printed record; that the things the court has before it in the clerk's office are typewritten things, and that the only things that are printed are the briefs of the parties with appendices setting forth what they claim the record shows. That is printed, and the court regards those as partisan statements of the record.

Mr. Olney. No; there is where you are mistaken.

Mr. Donworth. I should like to have you correct me.

Mr. Olney. The parts of the record which are printed are verbatim transcripts of the record.

Mr. Donworth. But they do not print the complaint, etc.; do they?

Mr. Olney. They do if the complaint is material; they print it.

Mr. Donworth. If the party thinks it is material, he prints it?

Mr. Olney. Yes.

The Chairman. And the question-and-answer form of the evidence is printed as an appendix to the brief.

Mr. Olney. And the question-and-answer form of the evidence is printed.

The Chairman. My understanding is that these so-called

appendices to the brief are not statements of fact in the brief; just printing parts of the record, including such parts of the testimony as the parties want.

Mr. Donworth. All right. I had the other impression.

The Chairman. Do you want a motion to that effect -- to draft a rule along those lines?

Mr. Morgan. I so move.

Mr. Clark. I will second it; and, Mr. Chairman, perhaps I might say for your information that we looked up the question how far typewritten transcripts are now permitted, and we were quite surprised to see the number. There are 37 jurisdictions where they are now permitted in alternative form, and one of those is Washington. Supreme Court Rule 3, Remington's Revised Statutes 32, Volume 1, page 138, provides that transcripts may be either printed or typewritten.

Mr. Donworth. Let me say that I never heard of a printed transcript in Washington.

Mr. Clark. You mean typewritten, do you not?

Mr. Donworth. Everything is typewritten -- the complaint, the pleadings, the statement of facts. I never heard of anything being printed. It is a poor man's court.

Mr. Lemann. That does not mean that you take the original record up?

Mr. Donworth. Oh, no.

Mr. Lemann. Let me say to you, Mr. Clark, that in Louisiana everything we have is typewritten. We do not think of printing; but that does not for a minute mean that we take up the original record. The clerk copies out in typewriting every single docket entry, every single minute entry that took

place in the lower court, and he makes three such copies in addition to the original, which stays in the lower court. The only difference between our practice and the Federal practice is a very important difference, but it is a very different thing than in California -- that instead of 25 copies we have 3 copies, and those 3 copies are typewritten copies instead of printed copies. It is much cheaper, but it is quite different from taking up the original record.

The Chairman. Stripping the files out of the clerk's office.

Mr. Lemann. Yes.

Now, if you want to make a rule in alternative form that instead of printing 25 records on appeal, when the record has been settled and agreed upon the rule will only call for three typewritten transcripts to be made for the use of the three appellate court judges, I personally should think that much more feasible than the other plan. Of course that would still leave you short of the printed records to take up in cases you wanted to take up to the Supreme Court on certiorari. You referred to that this afternoon, or earlier in the day.

Under the present system, when you take a case up to the court of appeals you have plenty of printed copies, and the fellow who loses in the court of appeals, if he wants to apply for a writ in the Supreme Court, has his printed copies already available. If you have a plan such as either the California or the Louisiana plan, or perhaps the Washington plan, and you have only a limited number of typewritten copies, and one party then wants to take it up to the upper court, you have to print it then.

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The Chairman. That would be a deterrent against foolish applications for writs.

Mr. Lemann. Perhaps so.

Mr. Olney. We have been using this method for some years, and certiorari has gone up from Washington and gone up from California, and we never have had any difficulty along that line.

Mr. Donworth. The Supreme Court of Washington has jurisdiction of every case involving $200 or more. As I say, it is a poor man's court. The judges represent rural communities. They are perfectly willing to earn their salaries by taking typewritten transcripts and going through them. I do not think the eminent judges in the circuit court of appeals are willing to work that way -- perhaps they are not.

The Chairman. Let us get to a head on it. Judge Olney has moved his scheme as an alternate rule, and Mr. Lemann has suggested a modification, that instead of taking up the original files of the district court, the original files remain in the clerk's office, and typewritten copies go up.

Mr. Lemann. May I ask a further question while I think of it?

Take our western district. We have five or six divisions in the western district. Our circuit comprises half a dozen States. If you take up a record from Texas, for example, to the court of appeals in New Orleans in the original, as suggested, I am wondering what the fellow in San Antonio will do if any one wants to look at that record.

He goes into the district court, and they say, "This case went up on appeal. Go to New Orleans and look it up." I

said to myself, "When they get through with it in New Orleans, will they send it to San Antonio, or to Jacksonville, or to Mr. Loftin, who is 36 hours away?" Suppose some law student or somebody else wants to look at it. Suppose I want to see what the court of appeals had before it. When I goto the court of appeals to see what they rendered their judgment upon, I am told, "That record came from Jacksonville. You cannot find it in New Orleans anymore." Then I have to go over to Jacksonville or San Antonio, or wherever it may be.

We have a circuit extending over thousands of miles. If we are going to adopt the California plan, and take the original record away from the district in which it was and put it up in the circuit court of appeals, is it going tostay in the circuit court of appeals, or is it going to go back to the district court? And in the meanwhile what happens to the local fellow who wants to look at it?

I just thought of that.

The Chairman. It would go back eventually, but it would be missing for perhaps months or years.

Mr. Lemann. Then the fellow who wants to look at it in the court of appeals would not have it.

Mr. Olney. But the litigant does have copies of the papers. They have copies of the whole thing. The only people who would be interested and could not find it and would not know what it was would be outsiders who had some kind of an interest. I do not see why litigants should be put to the expense that would be involved just to satisfy the curiosity of people who are not interested in the litigation.

Mr. Lemann. If the litigants have copies, why not take

one of those copies and send it up?

The Chairman. What about exhibits?

Mr. Olney. They go up, too.

The Chairman. Original exhibits?

Mr. Olney. The original exhibits go up, and they are constantly called for under the present system of appeal. Under the present system of appeal the original exhibits are frequently called for.

The Chairman. I think we ought to draw an alternate rule on this subject.

Mr. Morgan. They go up with typewritten records frequently.

Mr. Dodge. Printed records, too.

Mr. Morgan. Yes.

Mr. Dodge. Mr. Lemann's suggested amendment would bring it right in line with that of the New York Court of Appeals. They have to bring up three typewritten copies of each paper.

Mr. Lemann. As an amendment to Judge Olney's suggestion, I move that there be an alternate rule which provides for three typewritten transcripts; leave the original back in my poor district court, and take up three typewritten transcripts.

Mr. Pepper. I suggest that the question be taken first on Mr. Lemann's suggested amendment to Judge Olney's motion.

The Chairman. All right.

Mr. Sunderland. In Michigan we have the system of actually bundling up the original records and sending them up, and at the same time we send up a complete printed copy of the whole record.

Mr. Lemann. Printed?

Mr. Sunderland. Printed. They both go up. (Laughter.) So the record is not in the lower court; it is up at the Capitol. It never is looked at, because they have a complete printed copy at the same time; and after they get through with the case, back comes the original to the clerk's office. It is perfectly useless, but it does not cause a particle of trouble, and nobody has ever complained about it.

Mr. Lemann. If you are going to have it completely printed, I do not see what is the use of arguing about how many copies you are going to print.

Mr. Olney. Let me say this in connection with Mr. Lemann's amendment: It goes a long way along the line I have in mind.

Mr. Lemann. Yes; it does.

Mr. Olney. I am not so much concerned with whether his amendment is adopted or not. I am concerned that the essence of the plan I have in mind should be put before the court. I am more concerned that it should be put out in such a way that it comes to the attention of the bar and the judges as something that is seriously put forward.

The Chairman. That is on the main question. Let us confine ourselves for a moment to the question of detail that is raised by Mr. Lemann's motion. Let us get that out of the way; and then if we want to argue the main question afterward again, we can do that.

Unless somebody wants to say something more --

Mr. Donworth. I understood Mr. Olney was willing to accept Mr. Lemann's amendment. Is that correct?

Mr. Olney. No; I am not. What I have in mind is not so

much that we should try to frame an alternative rule. The framing of this rule in the alternative is going to require pages; but I should like to have go with the committee's report a statement as to this method, that it was seriously urged.

The Chairman. Let us take a vote on the question of whether your scheme is adopted -- whether we shall send up the original files, or send up typewritten copies and retain the originals in the clerk's office.

Mr. Clark. As a matter of parliamentary procedure, I wonder if you could not vote on Judge Olney's proposal first?

The Chairman. Let me settle that. Let us take a vote on this.

Mr. Donworth. On what?

The Chairman. On your motion.

Mr. Donworth. On Mr. Lemann's motion?

Mr. Lemann. That means three typewritten transcripts. Is that it?

The Chairman. That is it.

Mr. Clark. I do not think it would quite fairly test the way of getting at it, because Judge Olney's motion goes further.

The Chairman. I know it does; but Judge Olney's motion is a substitute or amendment.

Mr. Pepper. And if you vote in favor of the amendment, you may then vote against the perfected proposition if you do not think the scheme at all is a good one.

The Chairman. Of course.

Mr. Lemann. Or you may vote against the amendment and

the original proposition. That is what Mr. Clark would prefer.

Mr.Clark. I should like to vote for both, but I cannot very well register --

Mr. Olney. You are putting Dean Clark and myself at least in this position -- that we would prefer the suggestion I have made, and if that is not taken we would like Mr. Lemann's.

Mr. Clark. That is it.

The Chairman. I rule that the only thing before the committee is the amendment of Mr. Lemann. All in favor of that will say "aye".

(The question being put, the amendment was agreed to.)

The Chairman. Now the question is on the original motion as so amended to adopt an alternative rule that carries out the scheme Judge Olney has stated, as qualified by the Lemann's amendment.

Mr. Pepper. Mr. Chairman, I have been very much impressed with the force of what Judge Olney and Judge Donworth have said about this substitution of typewritten records for print, etc. I am wondering whether we are doing a wise thing in suggesting this rule in view of the extent to which we have perhaps spoiled the judges in the effete East with an abundance of printed material, etc. We are going to encounter an awful lot of objection to our proposals. We do not want to make enemies unnecessarily; and, as I understand, the promoters of the proposition think that all we will do is to get people thinking along this line, with no real chance of putting the reform through now.

I wonder whether we will not do more harm than good by starting the movement in this particular connection. I am very much impressed with the force of what has been said, and if there were any hope of getting it through ultimately I think I should be for it; but it seems to me a practical certainty that it is going to stir up so much opposition that even in the form of an alternative rule it will do more harm than good.

Mr. Clark. I wonder, Senator, what you consider the "effete East". The rule, at least so far as Mr. Lemann's end of it goes, apparently is applied in Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Maine -- I am leaving out the western States -- New Jersey, Rhode Island, Virginia, Washington, and other eastern States.

Mr. Pepper. What are the States you are now reading?

Mr. Clark. These are States where the alternative of a typewritten record is permitted; and of course in Massachusetts there is still a further idea. We might consider that. In Massachusetts it is provided that all copies for the court shall be written in a fair, legible hand, or printed. (Laughter.)

Mr. Lemann. I want to make the point that this is not my child by choice. It is a compromise which seems to me clearly preferable if you want to put in an alternative rule. Personally, I had a rather strong feeling that it is going to be very difficult to persuade the Federal bar to give up the printed record. Of course you should bear in mind that while the Supreme Court of Washington is a poor man's court, the Louisiana court is not so much so, but it is still more so

than the Federal court. The Federal court,however, is not much of a poor man's court; and the arguments that have appealed particularly to the rural legislators in the other States I do not think are going to have as much weight with the Federal bar, and I share very largely Senator Pepper's fear that it will meet strong opposition. However, Ithought certainly the alternative I suggested was preferable to the plan suggested by Judge Olney; and at least, Senator, it may show the West and South that our hearts are in the right place, and if we get such a storm of protest from it, it will only be in the alternative.

Mr. Pepper. The court will take judicial notice of our cardiac condition. (Laughter.)

Mr. Olney. When this goes out to the bar, you may get a surprising support for the alternative suggestion.

Mr. Donworth. I take it that in certain of these matters there are direct appeals still in a number of cases; and I also take it that the average amounts involved in cases coming before these busy judges in the circuit court of appeals and in the Supreme Court of the United States are such that they will insist upon printed records, and I am inclined to think they are entitled to them. It is true it adds to the expense of the litigants, but I do not see how to avoid it. I should hate to put up to the Supreme Court of the United States, on a direct appeal from a district court, three typewritten copies or any other number. I do not think it is proper.

The Chairman. Of course cases in the Federal courts are all bigger cases than they are in these States where cases

involving two or three or five hundred dollars may be taken to the State supreme court. That is a factor in it.

Mr. Lemann. May I ask what the effect of this alternative rule would be on direct appeals to the Supreme Court?

The Chairman. We have not considered that at all.

Mr. Lemann. I feel that we would not get to first base with the Supreme Court itself with a proposition that they shall take three typewritten transcripts.

The Chairman. No; you would have to limit it to circuit courts of appeal. You would be foolish to suggest it for direct appeals.

Mr. Lemann. The country likes to feel that they all look at the record. In the court of appeals you have only three judges, and you can give each of them a copy of the record; but if you only gave the Supreme Court of the United States three --

Mr. Morgan. Why do you not insist, then, that they have it done on parchment, like the House of Lords, so that in a $500 case you may have $50,000 costs?

Mr. Lemann. It is all in the alternative.

Mr. Pepper. How would it do to test it?

The Chairman. I wanted to, but I did not want tochoke off the discussion as long as the members of the committee were talking about it.

Mr. Pepper. I will bear the brunt of that unpopularity.

Mr. Olney. Before you do it, Senator Pepper, I want to say this:

This committee could do nothing that would more commend its work to the bar at large than to demonstrate to the bar at large that it was seriously trying to cut down the expense

of appeals and simplify the method of appeals. If there is one thing on which the lawyers probably feel more strongly than anything else in connection with these rules, it is that.

The Chairman. Of course your rule does not make much difference with the expense, because after you get into the circuit court of appeals each side has to print. We are not talking about using paper, typewritten stuff, in the court of appeals. We are talking about sending up typewritten copies, and after they get there each party has to print whatever evidence he is going to rely on. Where do you gain much by that? If you are going to require the judges to look at the typewritten copies, that is a big item of expense; but Judge Olney's plan does not involve any saving in printing -- not a penny's worth.

Mr. Olney. That is too strong a statement, Mr. Chairman.

The Chairman. Why? As the rule stands, everything that you want to use you have to print. Everything that you send up that you want to use, you have to print; and according to your rule, you send up the typewritten stuff, just dump it up there, and you just transfer to the lawyers in the court of appeals the job of there printing what they want.

Mr. Olney. The great saving of expense is just in this way: The parties themselves print the briefs. The clerk does not do it; and that accounts for a very great difference, right there.

Mr. Pepper. Question!

The Chairman. All in favor of the motion to adopt an alternative rule along the lines suggested by Judge Olney,

as amended by Mr. Lemann, say "aye". (Putting the question:) The ayes seem to have it.

That is a big job; and before we get through we shall have to consider whether we are going to have another meeting of the committee to consider it, or whether we will just dump it in in the way the drafting committee gets it up.

Mr. Pepper. I will say that I voted as I did because I will take the chances of getting along with the bar, but I should hate to go back and face our Federal judges unless I was able to tell them that I had voted against this proposition.

Mr. Donworth. I expect to win a case or two in the circuit court of appeals by it. (Laughter.)

The Chairman. Then I think we have probably covered Rule A-23.

Mr. Lemann. What has happened to assignments of error? Has that been settled?

The Chairman. Yes; that has to be served with the notice of appeal.

Mr. Clark. Except, I suppose, in this alternative you will not need assignments. That is correct, is it not, Judge Olney?

The Chairman. Not with the notice of appeal.

Mr. Olney. According to the method we have here now, assignments of error are essential.

Mr. Donworth. But where would they be?

Mr. Olney. They come in the brief, really.

Mr. Donwroth. That is your alternative.

Mr. Clark. Are you all satisfied -- and I think you

ought to be -- with the way we have authenticated what used to be the old bill of exceptions? The particular reason why I bring up the matter is that Mr. Wickersham seemed dissatisfied. I thought we had done pretty well. Judge Donworth, last time you were a little worried; but do you not think we have covered that?

Mr. Donworth. It goes through the routine of the clerk, but the court really settles it. That is my understanding.

Mr. Clark. That is it.

The Chairman. The substance is all right.

Mr. Donworth. I think so.

RULE A-24. -- RECORD ON APPEAL --

AGREED STATEMENT.

The Chairman. Now we come to Rule A-24.

Mr. Olney. I was wondering why you require the approval of the trial court for a transcript that is approved by the parties. Why do you require the approval by the trial court of an agreed statement?

The Chairman. For this reason: Judges are sometimes sensitive about reversal; and even though the lawyers think that everything is in there that ought to be in, the judge wants to be sure he is not going to be reversed; and if he thinks something else ought to go in, he ought to have a chance to say so.

This rule is practically a copy of Rule 77 of the equity rules.

Mr. Clark. Yes; and in Rule 77 there is provision for the approval of the district court.

RULE A-25. -- STAY OF EXECUTION -- SUPERSEDEAS -- BOND.

The Chairman. We will pass to Rule A-25 -- stay of execution -- supersedeas -- bond.

Mr. Clark. Last time we were asked to incorporate the statute so that it will appear in the rule; and we covered the point of the motion for new trial, and the time.

The Chairman. Is there any suggestion of substance in connection with subdivision (a) of this rule?

Mr. Olney. I do not quite understand the second sentence in (a) (reading:)

"If a motion for a rehearing or a new trial or a motion to vacate the judgment or any other motion attacking the judgment pursuant to Rule A-19 is filed as filed as therein provided, with a certificate thereon from any judge of said court that he allows it to be filed" --

He has not anything to say about whether it is filed or not; has he? (Reading:)

"With a certificate thereon from any judge of said court that he allows it to be filed, which certificate he may make or refuse at his discretion."

Mr. Morgan. That is on staying; is it not?

Mr. Olney. But as it is worded, I suppose it must refer to the proposition that he allows the stay in such a case.

Mr. Morgan. If he files his certificate, then the stay is automatic. Is not that it, Charlie?

Mr. Clark. Yes.

Mr. Olney. But as it reads, it means that he files the certificate if he allows the motion for rehearing or for new

trial or to vacate the judgment to be filed.

Mr. Morgan. If he does that, then there is an automatic stay. It is just another way of getting a stay.

The Chairman. That is a sort of a clumsy way to say it. Why do we not simply say that in case such a motion is made, the court may, in his discretion, grant supersedeas or stay execution pending the hearing, and let it go at that?

Mr. Lemann. Where is this language from, Mr. Reporter? You said something about that at the bottom.

Mr. Clark. I wanted to check up on that.

Mr. Lemann. You say:

"It is believed that the rule as drawn follows the statute and the Supreme Court rules as far as possible."

I was looking at the Supreme Court rules to trace its origin, and it looks like a bastard child, judging from a quick glance at the Supreme Court rules. It may come from the statute.

Mr. Clark. It had to be something of miscegenation anyway, because it combines two different ideas.

Mr. Pepper. I move that the statement just made by you stand as the sense of the committee with respect to a revision of subdivision (a) of Rule A-25.

(The motion was seconded.)

The Chairman. Do you know what that was?

Mr. Pepper. I understood that to be to the effect that you should state very simply that where a motion for rehearing is made, or a new trial is pending, the judge may, in his discretion, grant a stay or supersedeas pending the disposition of that order.

The Chairman. Without all this stuff about a certificate?

Mr. Pepper. Yes.

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

Mr.Dodge. That applies only to the first part of the sentence?

Mr. Pepper. Yes, sir.

Mr. Dodge. Not to the appeal in the last part.

Mr. Pepper. Yes.

Mr. Donworth. As a change in style, I should like to suggest to the Reporter, in line 20, to strike out the words "has been", and in line 21, after "A-22", to insert "is pending", so as to read:

"and not at all if an appeal taken pursuant to Rule A-22 is pending."

Mr. Lemann. May I ask why it is necessary in lines 11 and 12 to make a reference to a stay order if a supersedeas bond has been filed?

Mr. Morgan. There is not any necewsity of it.

Mr. Lemann. There is a provision there that there shall be a stay order, "if notice of appeal, together with a supersedeas bond as hereinafter provided, is filed." Why is it necessary to get a stay order there?

Mr. Clark. I was trying to find how guilty we were. What we did was to follow the statute on this matter of the certificate, etc. That is 28 U. S. C. 840, "Stay on condition."

I do not see any reason why you should not improve it. I am all for improving it.

Mr. Lemann. To me there is a certain inconsistency between a stay in the first paragraph and in the second paragraph.

Mr. Morgan. It just says it shall be stayed; that is all. It does not say you have to have an order for staying.

Mr. Lemann. Why do you have to get a stay if there is a supersedeas bond? Why is it not covered by the second paragraph? Suppose we just pass that.

The Chairman. What is your point, Mr. Lemann?

Mr. Lemann. My point was that there is no need for a reference in paragraph (a) to the situation where supersedeas bond has been filed, supersedeas has been taken. That is covered by (b). It is confusing to see it referred to in (a). That is a matter of form. I just call it to the Reporter's attention.

The Chairman. There is nothing said in the statute about any certificate allowing it to be filed, or anything of that kind.

Mr. Clark. 28 U.S.C., 840, provides:

"If such petition is filed within said term of 42 days, with a certificate thereon from any judge of such court that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

The Chairman. That applies to a case where it goes over the term.

Mr. Clark. We were directed to combine those two.

The Chairman. There is a case where the court has discretion whether or not he will entertain the motion. He may refuse it or not. We are dealing here with the case where, under our rule, he is bound to entertain it.

Mr. Olney. In subdivision (b) of Rule A-25, there are two things that I would suggest. The first is that where the judgment is not for the recovery of a certain sum of money, but for something else, and a supersedeas bond is necessary, the provision be that the judge fix the amount of the bond. That is not so stated here. It should be so stated.

The Chairman. Shall we adjourn now? It is five minutes past ten.

Mr. Denworth. Let us try to finish this rule, Mr. Chairman.

The Chairman. All right. That is agreeable to me.

Mr. Olney. The next thing in connection with it is that the only provision here is that --

"Such bond must be regular in form and adequate in security" --

And --

"Such an indemnity, when the judgment is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay and costs and interest on the appeal."

There, again, the judge should fix the amount, because while it is all right to make a party assume the obligation to pay the full amount of the judgment with costs and interest and all the rest of it, the surety company wants a limit on its obligation. It wants a definite amount beyond which its

obligation will not go.

Mr. Lemann. This is the language of the statute, Judge. I had occasion to check it up. What happens is, the judge fixes the amount of the bond. This is the condition of the bond. When he comes to fix the amount of the bond, he has to fix it at an amount to cover the amount of the judgment or decree, including just damages for delay and costs and interest on the appeal; and when you go to the judge, he has this statutory language. He fixes the amount of the bond, which is what the surety company want. They will never write an unlimited bond. This does not mean that the bond has no penalty in it. This is merely the condition of the bond.

Mr. Olney. But what I am getting at, Mr. Lemann, is that when we are drafting rules, we ought to provide that the judge shall fix the amount.

Mr. Morgan. And that it shall not be less than -- etc.

Mr. Lemann. This is the language of the statute. Maybe it could be improved on.

Mr. Donworth. I agree with Judge Olney. I think a clause giving the judge the right to fix the amount would be a wise provision.

Mr. Pepper. I move its insertion.

Mr. Loftin. I second the motion.

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

Mr. Dodge. There is one other question which I think I raised last November.

Suppose a poor defendant has only $5,000 worth of property, and he has a verdict of $10,000 rendered against him,

and all the property he has is under attachment: Unless the court has some discretion, in cases of merit, to allow a smaller bond, the rule prevents him absolutely from staying the sale of all his property and the loss of it.

I have never been able to see why a judge in a proper case should not be allowed to fix a smaller bond than the full amount of the verdict and judgment.

The Chairman. If he makes it all that a fellow can collect on execution anyway, why is not that enough?

Mr. Dodge. Yes. There are cases of great hardship that may arise -- I have been in one of them myself -- where, as a practical matter, you are absolutely prevented from appealing because you cannot put up a bond for the full amount of the verdict. I suggest that that is a case where I think it would be perfectly fair for the judge to be given the power, which he has not under the present statutes, of fixing a somewhat smaller bond.

The Chairman. You would condition that on the amount being as great as the fellow's execution of property is, I suppose.

Mr. Donworth. How would you word the rule as to discretion, in substance, Mr. Dodge, with regard to the amount?

Mr. Dodge. I should put it "unless, for cause shown, the judge fixes a smaller amount."

Mr. Lemann. I should oppose that.

Mr. Dodge. Possibly you might define "in the circumstances".

The Chairman. I should be willing to say that the amount of the bond should not be larger than the total amount

of property the man has subject to execution, because that is all he is losing anyway.

Mr. Lemann. What good would that do him, then? I do not know that that would do him any particular good.

The Chairman. It might not.

Mr. Lemann. And how would you find out how much he had subject to execution?

Mr. Olney. You have to bear in mind, in connection with this, that if execution issues, and a man does not give a supersedeas bond, and the money is collected from him or any part of it is collected from him, and the judgment is reversed, he can recover that money back.

Mr. Donworth. If the plaintiff is good.

Mr. Olney. If the plaintiff is good.

ELECTION OF VICE CHAIRMAN.

The Chairman. Gentlemen, Mr. Loftin is leaving tonight, and there is one thing I wish to bring up while everybody is here. That is the question of election of a vice chairman.

The other matter I hoped to talk about I am afraid cannot be taken up tonight, because it has gotten pretty late. That was the question of our procedure between now and the first of May. It may be too late to talk that over, and we shall have to do it and tell you later. The other matter perhaps we can take up while Mr. Loftin is here.

Mr. Wickersham's death has made it necessary to elect a vice chairman, if we are to have one.

Mr. Loftin. Mr. Chairman, I move that Senator Pepper be made vice chairman.

Mr. Olney. I second the motion.

Mr. Pepper. Mr. Chairman, I appreciate that, but I think it would be very much more appropriate to have some member of the committee who knows far more about its work than I have yet been able to learn.

Mr. Donworth. Unless you insist on that, Senator Pepper, I think the sentiment of the committee is strongly in favor of your acting, for so many reasons that I hope you will not insist upon that.

Mr. Pepper. Judge, I did not mean to sidestep, but I seriously do think that I am at considerable disadvantage compared to the rest of you. Possibly if I ever were called upon to preside it might be that I would talk less, or exhibit my ignorance less. Perhaps that is an advantage.

The Chairman. I think one of my faults as chairman is that I have been working too hard on the rules. If I paid no attention to them I would keep mum.

Mr. Donworth. Do you think we should regard Senator Pepper's declination as final?

The Chairman. No; I do not think so. Are there any further nominations? If not, I will entertain a motion to have the assistant secretary cast a ballot for Senator Pepper.

Mr. Dobie. I make that motion.

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

Mr. Pepper. I will take comfort in reflecting that Benjamin Franklin, when they were discussing the proper official titles of the officers of the new government,

suggested that the Vice President should be called "His Superfluous Excellency." (Laughter.)

SUBSEQUENT PROCEDURE OF ADVISORY COMMITTEE.

Mr. Loftin. Mr. Chairman, on the other question, while you may not take it up, I do not mind expressing my views about it for whatever they may be worth.

In view of the fact that the Chief Justice seems to think we ought to have the rules in the hands of the Court by May 1st, and, it seems to me, the physical impossibility of the two Reporters revising the rules and having them back and a style committee passing on them after they do that and then this committee being called into session again, I am of the opinion that the only practical and feasible way of handling the thing is to have a subcommittee of five, of which the Chairman and the Reporters shall be ex-officio members, which shall not only pass on the style but more or less have the authority of this whole committee to pass on the rules as revised, and then deliver them to the Court, without this entire committee being called into another session.

The Chairman. We will record that view, and take our action in the light of it.

I think probably we had better adjourn now.

Mr. Dobie. As I understand, you are expressing the view that that committee should be appointed by the Chairman?

Mr. Loftin. Yes.

(Thereupon, at 10:15 o'clock p.m., the Advisory Committee adjourned until tomorrow, Tuesday, February 25, 1936, at 9:30 o'clock a.m.)