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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.

Tuesday, February 25, 1936.

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C O N T E N T S .

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Tuesday, February 25, 1936.

9:30 o'clock a.m.

Washington, D. C.

The Committee met 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 B. Tolman, Secretary.
(Edward H. Hammond sitting for him today.)

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RULE A-26. INJUNCTION PENDING APPEAL.

The Chairman. We are on Rule A-26. Injunction pending appeal.

Mr. Donworth. The suggestion was made by Mr. Dodge that in some instances there should be a possibility of stay without so large a bond as indicated here. I should like to ask Mr. Dodge if he has any definite idea of that.

The Chairman. That was in connection with stay of execution. That was not Rule A-26. Let us go back to the rule which relates to the question you now ask.

Mr. Donworth. I beg the Chairman's pardon. Where is that?

The Chairman. That is in connection with supersedeas.

Mr. Donworth. I came in late, Mr. Chairman. I did not intend to change the proceedings.

RULE A-25. STAY OF EXECUTION-- SUPERSEDEAS-- BOND.

The Chairman. We are back on Rule A-25. I think we did not quite finish that discussion.

Mr. Dodge. That is a favorite point of mine, but I think it is probably due to the fact that we are so unaccustomed to bonds for appeal in Massachusetts. We never give them except in Federal courts. They are rare. One, which was in dramatic form, came to my personal attention. I have always favored some discretion on the part of the court, but I never seemed to get any adherence to that view. I had a case involving several men in Boston who were threatened with absolute ruin because of an outrageous judgment assessed against them. They could not possibly

put up the $6,000,000 bond required of them. At that time I found that no discretion existed in anybody to abate the trouble. I do not know what would have happened there if it had not been that Sherman Whipple, representing the plaintiff, agreed to take an assignment to a trustee of the entire property of each defendant in place of a supersedeas bond. The judgment was promptly reversed by the court of appeals. It was such a dramatic and terrible situation, particularly to find, as I did find out at that time, that there was no possibility of relief from any source.

Senator Pepper. The same question arises in case of injunction bonds at some times. In a lot of these A. A. A. cases to restrain collectors from imposing liens the ground of application in many instances was that the payment of the taxes would bankrupt the petitioner, the claimant. If the injunction could be obtained only by bond for the full amount of the tax as accrued, or by the deposit in court of the amount of the tax as it accrued, you would have a contradiction in terms, an impossibility imposed as a condition of the protection which gave equity jurisdiction, and a number of the court, instead of issuing injunctions where they would have felt bound to exact bonds for the full amount of the controversy, just made ten-day restraining orders and continued them from time to time, and used discretion as to the amount of the security they would exact. I would be strongly in favor of some leeway, Mr. Chairman; that there be some leeway,here, properly safeguarded, because such a case as Mr. Dodge puts, while an extraordinary one, is likely to occur in some form at almost any time.

The Chairman. I think Mr. Dodge has put his finger on the solution. I think the solution is to cut the bond to the net worth of the fellow. The way to take care of that is to provide that the court, in any case which requires bond, where it appears that the fellow cannot give it, grants the supersedeas on a transfer of all the man's non-exempt property to the trustee designated bynthe court. Why is that not a sensible thing to do?

Mr. Donworth. Another idea, Mr. Chairman, that suggested itself to me is this. I thought there was some merit to the point and the way to meet it. It seems to me the best way to meet it would be by adding a rule substantially like this; that when the appeal court shall deem the circumstances exceptional, or something of that kind, the appellate court may fix a bond different from that prescribed by these rules. This of course is all done by the court which has awarded the judgment, and therefore to some possible extent has a failing in carrying out this judgment. You get the new thought on the subject from the appellate court which looks at it fair mindedly. If you give them the discretion to fix the bond in a different sum I think everybody is protected.

Mr. Lemann. Of course it depends so much on the background, I suppose. In the districts and States where it has been common to say that the plaintiff, when he got a judgment, ought to get protection of an appeal bond pending long delay, if you substituted such a rule as here suggested that would limit you to the non-exempt property of the defendant. You would have to have some means of ascertaining what that is. Certainly you would not expect the plaintiff to [illegible] readily.

the ex parte statement or representation of the defendant. You would have to set up some machinery for a hearing by which you could determine that in the nature of supplemental examination, or an examination in bankruptcy, and I do not see how the appellate court could function in such an examination.

Mr. Donworth. You are mingling the two thoughts, Mr. Lemann. My thought is to allow the appellate court to fix the bond in such sum as under the circumstances of the case justice may require, and say nothing about the net worth.

Mr. Lemann. How will they find out the circumstances of the case without a hearing?

Mr. Donworth. By affidavit.

The Chairman. Why are they in any better position than the trial court to do that?

Mr. Donworth. Because they have no interest. They are not so sure of the validity of the judgment and all that as the trial court.

Mr. Lemann. I would want to cross examine that defendant and ask him whether he conveyed any property to his wife or children or to some friends, or practically subject him to the same kind of examination that I would to a trustee in bankruptcy.

The Chairman. You do not mean ex parte?

Mr. Lemann. No; but I mean I would not like to have it done on affidavits. It would be so easy for this chap to put in affidavits what he wanted to say if I could not examine him. I think it would strike the profession as very unusual. You have a hard case every now and then--- we cannot avoid it--- and I think Mr. Dodge's case was such a case, and as it turned out, even bitterly contested as that case was, opposing counsel

agreed to the solution.

The Chairman. If the judgment is affirmed all an appellant loses is the power to execute his judgment pending the appeal. He still has it, and if the man transferred the property he can follow it up, and it strikes me that we could very easily put a rule in here. I remember that case of Mr. Dodge's. We could put a rule in here that provides that in exceptional cases, where the trial court is satisfied that there is substance to the appeal, that it is not taken for the purposes of delay, and he satisfies himself that he is unable to give a supersedeas bond, that the bond may be limited by that process which I suggested, of having him transfer all his property to an official of the court as security, and the whole thing done on hearing with freedom of examination. We would not have to make it elaborate. We could make it simple in its terms. That sort of appeals to me.

Mr. Olney. I think that is a practical solution. I was merely commenting that the Chairman's suggestion seemed to me a very practical solution of the matter.

Mr. Pepper. Is there not something in the point, having regard to the point made by Judge Donworth--- that maybe it ought to be the lower court, the trial court, that mitigates this hardship, because it ought not to be too easy to do it. It ought to be a case which would appeal even to a man who was sure that he was going to be affirmed; that the case was one in which the rigor of the rule should be relaxed. I think if you do leave it to the circuit court of appeals the danger is that the thing will be done perfunctorily, and possibly someone will present the situation in such fashion

below that it will irritate the circuit court or the district court, and we will get a reaction where there ought not to be one.

The Chairman. Pending the time that the circuit court of appeals gets jurisdiction and has time to act on it, a month or so elapses. There is a month there! It has to be done by the trial court in the first instance.

Mr. Pepper. Yes, and he has the parties before him, and can get them, and becomes familiar to some extent with the circumstances.

The Chairman. I wonder if we cannot refer that subject to Mr. Dodge and Mr. Lemann and let them draft up a suggestion and submit it to us during the day.

Mr. Pepper. That is a grand idea.

Mr. Lemann. I am opposed to the suggestion really. I think I am a person who should be kept off, really. Mr. Dodge is affected by his State practice, as we are in all our courts, and in his State he does not put up any bond whatever. I asked him how long it takes him to get an appeal served in the State of Massachusetts. He said three or four months. I am used to the practice in the State and Federal courts both, where it may take one or two years to get the case heard on appeal, and it looks to me that the weight of hardship would be on the plaintiff, who at least has convinced your Federal judge, and he is ordinarily a pretty fair lawyer, that he ought to prevail, and to put the burden on him of being tied up with this kind of hearing and this uncertain protection it seems to me on the whole is not taking the right attitude in view of experience. The

present situation has not caused us enough trouble to cause us to be warranted in putting forth such a proceeding, but I may be too much affected by my background. At any rate I think the idea to ask Mr. Dodge to draw the rule is a good one, and perhaps if he wants any assistance he can get it from a more sympathetic source.

Mr. Pepper. Mr. Chairman, is not the question one upon which we can pass in this fashion, to be determined by vote: That it is the sense of the committee that discretionary relaxation of the amount of the security on appeal be provided for in exceptional cases; that the matter be referred to the Reporter, and that Mr. Dodge be requested to make suggestion to the Reporter for a revision of the rule.

Mr. Dodge. Judge Donworth suggested to me last night that the smaller bond might be accompanied by an injunction against transfer of property pending the appeal.

Mr. Lemann. The Chairman's suggestion was to transfer all his non-exempt property to the trustee.

The Chairman. You see we have got to bear in mind that what we are after is the financial condition of the appellant at the time the appeal is taken, because if we have his complete net worth available as of that date that is all that a writ of execution would seize anyway, and therefore if you are impounding everything he has as of that date why the respondent is not going to lose anything by being delayed in his writ of execution. That is my theory. With all respect to Senator Pepper's suggestion it seems to me that I would not be willing to vote for any relaxed rule at all unless it was specifically condition on some scheme such as has been suggested

here.

Mr. Pepper. The reference to Mr. Dodge was I meant that he should suggest a memorandum based on that Sherman Whipple case that he spoke of.

Mr. Olney. Could we not get at it by simply saying that it is the sense of the Committee that where it appears to the lower court that the appeal is taken in good faith, and that a substantial question is presented, and the court is also satisfied that injury may be done by reason of the inability of the appealing parties to give the bond, but if he turns over his property, all the property he has, to a court, that that may be substituted for the supersedeas bond, and leave to the Reporter the actual putting of that into effect.

The Chairman. I would suggest that you add one condition; that this should only be done on notice and hearing, unless you have got it.

Mr. Olney. Oh yes indeed.

Mr. Pepper. That is a better statement of it.

(The motion was put to a vote by the Chairman, and unanimously carried.)

The Chairman. That question is disposed of then.

Mr. Donworth. I should like to ask the Reporter, referring to line 23 of Rule-A-25, if he thinks the word "wholly" should be inserted before the word "enforced"? The language would then be "In any case where an appeal does not operate as a supersedeas, the appellant may, at the time of filing his notice of appeal or at any time subsequent thereto if the judgment or order has not been wholly enforced",

and so forth. Or is that implied there? So long as the judgment has not been wholly enforced the rights of supersedeas should exist.

Mr. Clark. I should think it would be implied, but I do not know that there is any objection.

Mr. Donworth. I merely suggest that.

The Chairman. Is there anything more under the head of Rule A-25?

Mr. Donworth. I do not suppose there is anything that this rule should properly treat with respect to the case of injunction. Of course an injunction can usually not be superseded. Sometimes it is superseded in the discretion of the court that grants it, but it seems to me that we can leave that without any reference.

RULE A-25. INJUNCTION PENDING APPEAL.

Mr. Olney. Are you dealing now with Rule 26?

The Chairman. Yes we are dealing now with Rule A-26.

Mr. Olney. I should like to make a general criticism of this statement of the rule. An injunction should be granted pending an appeal or denied pending an appeal dependent upon one consideration, and that is the maintenance of the status quo. Always that is what it is for. And that is the only justification for it. I think that principle should be stated in the rule.

Take the case of a preventive injunction. It is not stayed by an appeal. Take the case of a mandatory injunction on the other hand, and it is stayed by an appeal without anything further, because the mandatory injunction disturbs

the status quo.

Take the case where an injunction is denied; it should be allowed to continue pending the appeal only upon the same principle upon which you would permit an interlocutory injunction during the trial, namely to preserve the status quo until the final decision can be had. I think that principle should be incorporated in this rule. It all looks to the maintenance of the status quo.

Mr. Clark. This of course comes from the equity Rule 74. I have a little dislike, or perhaps it is more than that, of trying to state the grounds of a judge's decision in a rule like this. You see this is less discretionary, and that is the way the equity rule was. When you try to state rules of law in the rules I think it may be a little dangerous.

Mr. Olney. I think it is far more dangerous, when all the decisions lay down the principle which should govern this matter, and it is perfectly apparent what it is, to leave it wide open to the discretion of the judge without any limitations upon it, when we know exactly what the limitation is, and it is perfectly clear what it is.

Mr. Dodge. All you had in mind was the mandatory injunction?

Mr. Olney. No; in some instances, Mr. Dodge, even though an injunction is denied, that is a preventive injunction is denied, it should be continued; that is there should be what you might call a temporary injunction during appeal mp allowed in order to maintain the status quo. I have seen that in a number of instances. It is rather

rare in the case of preventive injunctions, but instances of that sort do occur.

On the other hand in some instances, even with a mandatory injunction, it is well to allow the mandatory injunction in the same fashion, in order to restore a status quo which has been disturbed during the trial, or, rather, the good way to put it is this: In order that such a status may be restored as will make the judgment of the court effective when it is finally rendered.

The Chairman. Why does not this rule do that? Will you point out just where it is deficient. I cannot get it at all. The words "or denying" are in brackets here, but you can leave that language in, and does that not hit every sort of case? I was not quite sure where the rule was deficient.

Mr. Olney. It seems to me it ought to go to a statement of the principle that is going to govern it, namely the preservation of the status quo. That is the whole object of it.

Mr. Pepper. If the powers given by this rule are exercised the status quo will be preserved as I see it, Mr. Chairman. If the court below has refused an injunction and an appeal is taken from the decree refusing it, the court is given the power to grant a temporary injunction pending appeal. If the court below has granted an injunction the court is permitted to modify it, or otherwise mold its decree to maintain the status quo pending the appeal, and would not the real question raised by Judge Olney be the question of whether the Reporter in revising the rule could not put up a sign post as he suggests to the effect that the

end in view in all cases is to preserve unimpaired the question which will be before the court on appeal?

You remember for instance in that Rice millers case, that A. A. A. case, the court of first instance refused an injunction pending an appeal to the circuit court of appeals. The circuit court of appeals was applied to and refused an injunction pending certiorari, to the Supreme Court, and the Supreme Court granted an injunction pending the appeal upon terms; then heard the certiorari, and finally dismissed the case for want of jurisdiction. But the status quo was preserved right up to the last moment.

I would move that the rule in substance stand as stated, with the suggestion to the Reporter that the thought of preserving the status quo pending appeal be inserted for guidance in its construction.

Mr. Olney. That is exactly what I had in mind.

Mr. Donworth. Mr. Chairman, I am afraid we are invading what is very much along the line of substantive law--- that is whether there shall be an injunction or not. The status quo should not always be preserved, and I think we can safely leave that to the discretion of the chancellors--the lower courts and the appellate court. For instance here was a case that happened in the western district of Washington. There was a city council which called an election to recall the mayor of Seattle, that is they passed an ordinance pursuant to a charter provision that where certain charters were filed and so on the mayor could be recalled pursuant to a popular vote. A non-resident taxpayer brought an injunction suit to restrain the calling of that election. So far as

my information goes it was the only case in the books where a Federal court had enjoined the election for the filling of an office. Of course there are cases about bond issues and all that, elections to vote on bond issues; there are plenty of those cases, but I do not know of any other cases. The district court granted the injunction. The defendants immediately appealed, and they secured from the appellate court pending the appeal--- not after it was decided, but immediately--- a modification of that order which really permitted the election to be held. It was held, and the mayor was recalled. So it may be that an injunction at times maintains a status quo too severely, and I would hate to lay it down as a rule that in no case can an injunction or can process of appeal fail to interrupt the status quo.

Mr. Pepper. Mr. Chairman, I did not make myself clear. I did not mean that the preservation of the status quo was the duty of the judge in court of first instance, but merely that where he was exercising his discretion to grant the injunction pending the appeal that it should be a guide to his discretion to determine if he thought the case was not proper, to preserve the status quo, and mold his injunction with that end in view.

I quite agree that there may be cases, for instance, injunctions to restrain the continuance of a nuisance, where the grant of the injunction would make it highly desirable that that injunction in some form should be continued during appeal. But sometimes in those nuisance cases the result of the injunction, if it is made permanent, is to require the entire reconstruction of the works of the defendants,

so that the nuisance shall be eliminated. But it is very often possible to make a temporary arrangement under suitable order that pending the appeal the words, for instance, shall be operated in such and such a fashion as not to be a nuisance, until the court above has decided the rights of the parties.

I do think that the principle of the maintenance of status quo in a case where the court thinks it should be maintained is a useful thing to inject into the rule.

The Chairman. What bothers me is this. If we are going to lay down the grounds on which temporary injunction pending an appeal should be allowed, why should we not on the same theory, when we are dealing with injunctions generally later on, go into the whole law as to the grounds on which a court may grant injunctions where there is not an appeal? It seems to me we are going into the element of substantive law. We have gone into that just to this extent I think, that we have perpetuated the equity rule about temporary restraining orders; that they shall not be granted unless there is irreparable damage in sight. To that extent we have gone into the question of ground. But I do not see why we should be laying down the grounds for granting injunctions pending an appeal any more than we should define the grounds on which they can be granted generally.

Mr. Pepper. I do not want to press the point too hard, but it seemed to me that this was cognate to the provision we made as to relaxing a rule as to the size of the bond on appeal. Here is a case where the situation may be such that unless some form of injunction preserves the status quo the right of appeal will be a perfectly empty one, because

the step once taken pending appeal, there will be nothing but a moot court question before the circuit court of appeals.

Take the case where the injunction is to restrain the collection of tax, and assume for the moment that there is no complete, adequate remedy at law to get your tax back when you have paid it. The court below refuses the injunction. The aggrieved taxpayer appeals. If the court below gives no order maintaining the status quo by causing the money to be brought into court, or whatever the case may be, as security, the result is that the collection takes place pending the appeal, and the question before the court of appeals is moot. It ought not to be, it seems to me, that that could happen.

The Chairman. Of course the rule as drawn unquestionably gives the court power to grant an injunction pending an appeal for the purpose of preserving the status quo. There is no question about that. It is not a gap in our rule. If there is a reason for granting the injunction we can maintain the status quo. My point was that we are getting into the question of defining the ground on which injunctions may be granted.

Mr. Lemann. I think the rule should show the power in the court to maintain status quo. That is all any of us want. It is merely a question whether the rule as now worded is clear enough to give him that power. It seemed to me that it was quite adequate to give him that power, and we did not go beyond it.

The Chairman. It certainly does. When an appeal is taken to an order dissolving or denying an injunction, the

judge may in his discretion maintain the injunction during the appeal upon such terms, as to bond or otherwise, as he may consider proper. If it is desirable to maintain the status quo that certainly gives him power to do it.

Mr. Olney. There is no question about that, Mr. Chairman. This rule as it is drafted is broad enough to cover the case where an injunction is necessary--- when an injunction during appeal is necessary in order to maintain the status quo. That is not the point that I had in mind. This is the point I had in mind. At the present time under the general law a preventive injunction is not stayed by an appeal. A mandatory injunction is stayed just by the simple taking of an appeal. And the question has arisen, not merely here in the Federal courts, but in other courts as well, as to the authority of the trial courts to stop the effect of a preventive injunction during an appeal when it is allowed, or if it is denied, to continue an injunction pending the appeal, or as to the right of a lower court to insist upon a mandatory injunction when it is necessary for the defendant to do something in order to maintain the status quo.

All those rules are well established, and they come in, and my objection was that you were here giving a very broad power to the court in very broad language, and it seemed to me that in granting this power which has been in question as to whether the court should have, that it would be well to define the principle upon which it goes, which is a very simple one.

The Chairman. You want to limit it then and not broaden

it?

Mr. Olney. My objection is that this is too broad. That the limit should be put here; the principle upon which it goes should be stated here, because otherwise I am fearful that you will have all sorts of ill-advised orders made with regard to injunctions on appeal. If the principle is stated that is enough.

The Chairman. Then your objection comes not to that part of the rule applied to cases where the injunction is dissolved, but in the case where the injunction is granted, and the order may be made suspending, in effect granting supersedeas. In other words making an appeal from a mandatory injunction operate as a supersedeas in the discretion of the court to suspend the injunction he has granted? Is that the point? I confess I may be muddy about it, but I do not quite understand. Will you make it concrete by a suggestion as to the form of amendment that would illustrate your point?

Mr. Olney. The amendment as I see it should go about as follows. That the trial court should have the power in either case, whether it has refused an injunction or whether it has granted one, either to grant an injunction during an appeal if an injunction has been denied, or to stop even the injunction if it grants it, looking to the preservation of the status quo, so that the court has thenpower, as it were, to keep the status quo clear through to the final end of the litigation.

I am fearful here that this provision may be taken by some judges as practically an unlimited discretion, appreciating the principles by which their actions should be

determined, and it is a very simple matter to state the principle that covers.

The Chairman. Why should you be worried over it? Under equity Rule 74 you can do the same thing:

"When an appeal from a final decree---"

This is it---

"in an equity suit granting or dissolving an injunction is allowed---"

There is the case where he grants it, and there is the case where he dissolves it---

"he may, in his discretion, at the time of such allowance make an order suspending, modifying, or restoring the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party."

That is precisely what we have done, and if there is any appeal in our rule it is found in Equity Rule 74.

Mr. Lemann. Why would not suspending the injunction during the pendency of the appeal cover your very case? As I got your proposition it was this. The rule as it now stands is adequate in the case of the ordinary negative injunction, because the rule provides that if the trial judge refuses to issue restraining order or injunction he may nevertheless agree that the defendant shall be restrained pending an appeal. You may say "Suppose it is an affirmative injunction, and suppose the trial judge grants the affirmative injunction or the mandatory injunction, and that the defendant wants to appeal; there should be a corresponding analogous provision that the operation of the mandatory injunction should

be held in abeyance pending an appeal in order that the plaintiff may not be prejudiced during the appeal."

Mr. Olney. Let me put the point this way, Mr. Lemann, so you will understand it. Suppose it is a question of a preventive injunction, and the court denies it, I do not want him in a position where he has acted upon it; he has passed upon the merits, and he has determined that the plaintiff is not entitled to an injunction on the merits; I do not want him to grant an injunction in that case pending an appeal unless the granting of that injunction is necessary to maintain the status quo.

Mr. Lemann. Well, he does not have to grant it.

Mr. Olney. Oh, he does not have to grant it.

Mr. Lemann. This rule leaves it to him, and ordinarily I should suppose that he would be guided by the principle that the status quo should be maintained. He may think that the status quo should not be maintained. If he thinks it should not be maintained then he of course will refuse, and having refused an injunction then he will refuse to grant an appeal. But if he thinks the status quo should be maintained he can maintain it, and it is up to him. This rule it seems to me gives him more authority to do what he thinks right.

Mr. Olney. It gives him tremendous power.

The Chairman. So long as our amended rule is not any broader than the old equity rule which has stood since 1912 it does not seem to me we ought to be limiting the grounds when the equity rule did not do it.

Mr. Pepper. It really ought not to be necessary for

a man to go to the Supreme Court of the United States to bring about a state of affairs where the right of appeal will mean something. When you apply to the district court for an injunction pending appeal, and that is refused, although necessary to preserve the question which will be raised on appeal, then the circuit court of appeals refuses a similar protective order, then you have to go to the Supreme Court
12 of the United States with a write of certiorari and a request for an injunction pending appeal or pending a hearing of the decision of the court on the writ, in order that the question may be prevented from becoming moot. The existence of the equity rule, sir, to which you refer, was not found effective in the case that I refer to.

The Chairman. Perhaps that is so, but Judge Olney is not driving at that. He wants to limit the equity rule, to make it narrower.

Mr. Olney. Mr. Chairman, just take the very case which Senator Pepper stated. If there had been in the equity rule a provision in effect that the district court should, or that it was proper for it to issue an injunction in such a case as that pending an appeal if necessary to maintain the status quo, I think the district court probably in the case mentioned would have granted the injunction, as it should have done.

Mr. Lemann. I had one of those processing tax cases, and I was right behind every stage of it. What happened there, Judge Olney was that the plaintiff went to the district court for injunction. The District court did not think he was entitled to injunction against the collection of a tax.

The judge said "I will not give it to you". The plaintiff said "I may be wrong, but I claim I have no adequate remedy at law. This is an exceptional case. I want you to let me appeal this case to the court of appeals, and keep the case in status quo." The district court judge said "No, it is not a proper case to keep in status quo. There ought not to be an injunction, and I will not permit you to do it". The plaintiff then went to the court of appeals and said "I think you ought to order that judge to give me an injunction while I am bringing this matter up."
The court of appeals said "No, we can not give it to you. We are not going to restrain a tax". Then it went to the Supreme Court of the United States, where Senator Pepper was presenting his processing tax case on the merits, and he said "This is a proper case, and we want you to do what you can under your power do; we want you to do what the district court might have done under Rule 74; the court might have done it as the rule was recently incorporated, but the court did not in its discretion do it. The court of appeals did not do it." The Supreme Court did it.

The Chairman. Nothing could have been added except to make it mandatory on the district court.

Mr. Lemann. No, and it should not be mandatory on the district court. It seems to me that Judge Olney's argument is against Senator Pepper's argument instead of supporting it. I may be dense, but it seems to me that the two arguments are opposed to each other.

The Chairman. I gathered first that Judge Olney thinks the rule was too broad, and now I gather that he thinks it should be such that the court should or may grant

it to maintain the status quo. But unless you make it mandatory on him you do not add anything to the rule, because he has already got the power under this rule to maintain the status quo, and the only point now, as I get it, is as to whether we ought to say he should.

Mr. Lemann. We cannot say that.

The Chairman. No, we cannot say that.

Mr. Olney. No I do not go that far at all.

Mr. Lemann. I move that we ask the Reporter to leave in the words in brackets in line 2 of the rule. I think that has been the general construction.

Mr. Clark. That is covered by the footnote.

Mr. Lemann. In line 4 the words in brackets should also be retained. Thenwords in brackets in lines 2 and 4 should be retained.

Mr. Morgan. Retained?

Mr. Lemann. Yes.

Mr. Morgan. Yes, I agree.

Mr. Clark. And in line 8?

Mr. Morgan. And the words in line 8. The words in lines 2, 4 and 8 should be retained.

Mr. Lemann. Yes.

Mr. Donworth. I think the rule has been construed as containing those words.

Mr. Clark. Yes.

Mr. Dodge. I question that "provided" clause. Is it necessary for us to reaffirm a recent decision of the Supreme Court as to what the district court is to do in that class of cases?

Mr. Lemann. Does he mean, perhaps, to suggest the possibility of modifying that decision, which is also a Louisiana case? I thought perhaps by one of his brackets the Reporter was suggesting the possibility of somewhat modifying the effect of that decision. Is that right, Mr. Clark? Were you intending to suggest that possibility?

Mr. Clark. In the first place this is a point which is very doubtful, you see, as to what you do in a three-judge case. In answer to the first question, which was asked by Mr. Dodge, I would say that we thought we ought to bring it out, to make it clear what we meant.

Mr. Dodge. I did not realize that you had cleared anything up. I thought this was merely the decision of the court.

Mr. Lemann. I thought the judge's decision was pretty plain, unless you changed it.

Mr. Clark. The question is how is the thing to be done ina three-court case.

The Chairman. The court has settled it that you must do it by the majority of the court and not by one of them. It does not seem to me that we ought to be dealing with the question of whether they sign the same order at different points, or whether they meet en banc and act.

Mr. Lemann. I think the proposition was made quite plain by Justice Taft's statement if two judges ordered it to be done in a session of the court. If you have a three-judge court and you want to get an appeal you have got to get all the three judges to sign the appeal or you have to get the court convened and have a hearing before them, and the

majority of them grants the appeal. I think that is made perfectly plain by that decision.

Mr. Clark. We did not think it was entirely plain. You see on page 4 we raised some question. But even if it is entirely plain we have gone on the theory, to a certain extent, that we ought not to chase the lawyers around too much, and this is going to be the situation under any construction of the decision where the top part of our rule will not apply to a three-judge court.

The Chairman. That is right.

Mr. Clark. And therefore should we not have something in there?

The Chairman. You are right. That first part says that a justice or a judge may, and so forth.

Mr. Dobie. "A justice or a judge who took part in the decision may" and so forth. That would certainly give a dissenting judge in a three-judge court the power in that court if we did not mention that something here.

The Chairman. Yes, that is right. We have to mention the three-judge court. But should we not put in the particular provision as to whether it should be assented to by the three judges by their signatures or an announcement in open court, and all that? Can we not just simply put a proviso in to say at this point that in case of a three-judge court it must be done by the court and not by a single justice, and let the detail as to how they reach their decision rest?

Mr. Clark. I suppose so, only there is this point. When the question is decided by the court does not that mean two out of three, because two out of three can act ordinarily.

Mr. Lemann. Is there any objection to leaving in the second bracket?

Mr. Clark. Mr. Lemann said that it was clear that all three must act.

Mr. Lemann. I said that it was clear that if the court was not sitting you must get all three to sign. Until I read your note it did not occur to me that anybody could doubt that. I do not see any objection to that second bracket. Somebody apparently has doubted it.

The Chairman. The second bracket is the one you move to retain, is it not?

Mr. Lemann. Yes.

Mr. Dodge. Was there not a late decision on that point?

Mr. Donworth. Judge Foster's action.

Mr. Dodge. That was one back in 1922. I thought there had been a recent case.

Mr. Donworth. There has been one in the last two months. I thought that was the Judge Foster case too.

Mr. Lemann. No.

Mr. Dodge. This is a recent case.

Mr. Dobie. Suppose you have a court that has acted like that, and there are three judges and they do not sit together, they split up and one judge goes this way and another goes that way.

Mr. Lemann. Oh, you are not far away from them.

The Chairman. Mr. Lemann moves to retain the language in the second bracket.

Mr. Dobie. I think that provision is a good one. "Any two judges".

Mr. Donworth. That is the second bracket, at the end?

Mr. Dobie. Yes.

The Chairman. All right.

Mr. Olney. If it is consistent with this very recent decision.

Mr. Leeman. We will make that limitation with the request that the Reporter check that decision.

Mr. Clark. What decision is that? The newspaper tax case?

Mr. Donworth. No. I have a vague recollection that within the last two months I have seen a case where after three judges had granted or determined to grant an injunction one judge sitting alone tried to modify it, and some appellate court hend it could not be done.

Mr. Lemann. That is perfectly right and consistent with the second bracket.

The Chairman. Then the motion is on the adoption of the last bracket in Rule A-26, lines 14 to 16: "(shall be allowed by such court, any two judges concurring therein, or shall be assented to by all the judges of such court, such assent being evidenced by their signatures to the order)."

(The motion was put to a vote by the Chairman and agreed to.)

Mr. Dobie. I thought you objected to that language "such assent being evidenced by their signatures to the order".

Mr. Clark. Mr. Dobie, I thought I understood you to say that two judges should be permitted at any time. Of course this does not permit that. The second brasket does

not do that. The two judges can do that when all are in court together.

Mr. Donworth. It must be a three-judge court, is that the idea?

Mr. Clark. Yes.

Mr. Morgan. I wonder if line 16 is necessary?

Mr. Dobie. That is the point I made. Ordinarily they would sign it, would they not?

The Chairman. Somebody told me that this case that the court decided held that any two judges concurring therein could make the order sitting in court, when the court was assembled, but if they were not assembled, then there had to be written assent by all three judges. That is what the opinion said.

Mr. Lemann. This last line is essential. In my partner's case in Louisiana Judge Foster was involved. Injunction was denied, and appeal was asked. The judges assented to granting the appeal, but they did not indicate their assent by signing the order for an appeal. Judge Foster signed the order for an appeal. Senator Long moved to dismiss the appeal in the Supreme Court on the ground that Foster had no authority.

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The Chairman. Suppose one other judge assented to it: Why all three, when they are apart, any more than all three when they are together?

Mr. Lemann. If they are together, as I understand, they sit as a court, as Judge Donworth said, and then you present your order for appeal. It is just like a case which might be two to one. If two say,"You may have the appeal", and the other one says, "I do not think you should have it", the two certainly control the one. The one will not sign the order granting the appeal, because he does not take the view that an appeal should be granted. There you have had a hearing in court, and the majority of the court can grant you the appeal; but if you go around and see them individually, I think the Supreme Court will recognize that it should not be mandatory to get them in a court room, because they do live in different places; but if you elect not to get them in a court room, then you have to get three of them to sign on the dotted line.

The Chairman. Did it say so?

Mr. Lemann. Yes, sir.

The Chairman. All right.

Mr. Clark. Just a minute on that subject. The language used in the first bracket, if that means anything, is Taft's language. See on page 4, where we quote it, the second paragraph indented.

The Chairman. Why does not the second paragraph do the same thing?

Mr. Lemann. That is what I think. It makes it plainer.

Mr. Clark. I think the second may be an improvement

on Chief Justice Taft's statement.

Mr. Lemann. I did not think it meant anything different from what he meant, but perhaps it is a little bit more exact.

Mr. Dobie. But these two judges have to sit as a court. You cannot go around to Judge X and get him over in Houston, and then go to Judge Y in San Antonio --

Mr. Clark. If you get three, you mean?

Mr.Dobie. Yes; three acting separately.

Mr. Lemann. You cannot get Judge Foster to telephone to Judge Bryan (?) and Judge Hutcheson and say,"It is all right to let him go ahead and sign the order." You cannot do that.

The Chairman. Let us take a vote on which of those two brackets is accepted. The motion is to adopt the second, in lines 14 to 16, in lieu of the first, which is in lines 11 to 14.

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

The Chairman. That strikes out the bracket in lines 11 to 14. As I understand, the first bracket, in line 2, is retained, and the one in line 8 is retained.

Mr. Clark. Lines 2, 4 and 8, I think.

The Chairman. Is there anything else in Rule A-26?

Mr. Pepper. Mr. Chairman, just for the record I should like to make clear what the point was which I thought was merely a matter of form for consideration by the Reporter; and I will put it in this way -- to substitute, in lines 4 and 5, for what appears there after the words "in the decision may", these words:

"in his discretion make, upon such terms as to him may

seem just, such order as will preserve the status quo pending final disposition of the appeal."

That was an effort to clarify the provision about suspending, modifying, restoring, granting, and all that, and to state the purpose with which the power to make some order is conferred upon him.

I do not want to have any debate on it. All I meant was, I thought that was worthy of consideration as a matter of form. If not, we will let it pass.

The Chairman. Do you want to make that in the form of a motion?

Mr. Pepper. Oh, no; I just want to make clear that I did not mean to take the time to debate it.

Mr. Olney. That is exactly what I had in mind.

The Chairman. That limits the power to maintaining the status quo. That is all there is to that.

Mr. Pepper. That is all it could be; but the idea is that you are holding up to the court the thought that if, in his discretion, it can be done on just terms, it is his duty to maintain the status quo so that the case will not become moot on appeal. The matter has been debated, however. I just wanted to make my position clear.

Mr. Clark. I am perfectly willing to look at it some more. I really do not believe in it.

Mr. Pepper. I just want to make my position clear for the sake of the record.

Mr. Clark. I think there is awful danger in over-simplification -- trying to state a lot of law in three words.

The Chairman. I should sympathize with it more if there

had been any difficulty under the equity rule. I do not think, by mentioning the status quo, you are going to get a court to grant an injunction any more than you could without doing so.

Mr. Pepper. Perhaps not.

VIII. PROVISIONAL AND FINAL REMEDIES AND OTHER SPECIAL PROCEEDINGS.

RULE A-27. ARREST; ATTACHMENT; GARNISHMENT; REPLEVIN; SEQUESTRATION.

The Chairman. We will pass on to Rule A-27.

Mr. Clark. In connection with Rule A-27, first in this section generally I should like to have you consider whether you want a rule on receivers. That does not come up necessarily in connection with any one, but it might be considered.

On Rule A-27, Major Tolman had a very interesting suggestion, that we ought to try to draw uniform rules on this subject. He finally said he did not think there was time now. I have some sympathy with his idea that uniform rules would be better, but I do not believe we can tackle it now.

Mr. Morgan. You mean for receivers?

Mr. Clark. No; arrest, attachment, garnishment, etc.

Mr. Morgan. Oh, yes!

Mr. Lemann. We voted previously, did we not, that it would be trying to cover too much ground?

Mr. Clark. That is true.

The Chairman. Is there anything in the substance of Rule A-27 on which anybody wants to make a suggestion?

Mr. Dobie. The only question I had was about those attachments without personal service. Do you think that is protected all right by the provision --

"That nothing herein contained shall enlarge the juris-

diction of the district courts"?

Do you see my point, Mr. Chairman?

The Chairman. Just state that again, please.

Mr. Dobie. The point is that the Federal court now will not issue an attachment where you cannot get personal service on the defendant. Attachment is an ancillary remedy only. Now the question is whether that is protected by that jurisdictional statement there, or not.

Mr. Donworth. That is, in regard to venue, the statute allows suits between citizens of different States to be brought either in the residence of the plaintiff or in that of the defendant. If the plaintiff brings suit in the plaintiff's residence and thereby complies with the venue statute, he may find that the defendant has some property in that district; and, as I understand the decisions to which Mr. Dobie refers, they are that you cannot get jurisdiction of the case by attaching the property of the defendant in that case. There are cases, though, where I think you can attach the property of the defendant; namely, where the plaintiff sues in the residence of the defendant, which he may do under the statute. There, those principles to which you refer would not apply.

Am I right?

Mr. Dobie. If he can get personal service on him. He must get personal service on him.

In other words, attachment in the Federal courts is only a form of execution where there is at least a potentiality of an in personam judgment, and I think the Federal courts would not stand for any other rule. I am satisfied the Supreme Court would not; and I am just questioning the use of

the words--

"Nothing herein contained shall enlarge the jurisdiction of the district courts."

I do not know whether that is quite a jurisdictional point or not. They just say,"We will not use that remedy except in an ancillary way, as an appendage to a potential personal judgment."

Maybe that is a question of style; but I am satisfied that the Supreme Court will not adopt any rule which does not preserve that idea on which they have been very emphatic in Laborde vs. Ubarri and the Big Vein Coal Company case.

Mr. Olney. As I understand, what you mean is that it will really mean:

"Provided, that such process do not issue unless the court has jurisdiction otherwise of the person of the defendant."

Mr. Dobie. I think that would be all right, and would make it quite clear.

The Chairman. Will you note that suggestion, Mr. Reporter?

Mr. Clark. Yes.

Mr. Dobie. It may be that the committee disagrees with me, and thinks the Supreme Court will abrogate that rule. I do not think they will.

The Chairman. No; they do not intend to do that.

Mr. Clark. I do not see why this does not do it. Why do the other formal thing?

Mr. Dobie. There is diversity of citizenship, so that there is jurisdiction in that sense. That is Clark vs.

Wells, for example. This man in Montana sued Clark, who was a Californian, and he could get a perfectly good attachment under the Montana law; but the Federal courts will not stand for that.

Mr. Lemann. There might be another objection to this form, Mr. Reporter -- that we imply we think the rule might change the jurisdiction unless we said that it should not. Of course we have no such idea; but some captious critic might say,"Well, that is surplusage for you to say that this shall not change the jurisdiction. You could not change it if you wanted to."

Mr. Dobie. But that is not jurisdiction of the case.

(At this point, at the request of the Chairman, the reporter read the following statement by Mr. Olney:)

"Mr. Olney. As I understand, what you mean is that it will really mean:

"'Provided, that such process do not issue unless the court has jurisdiction otherwise of the person of the defendant.'"

Mr.Clark. I want to raise a question about that. You usually want the attachment before you have got jurisdiction of the person and it can be served. You are going to get jurisdiction of the person, or your attachment of course fails. Does not this tie you up? Your attachment is ordinarily served when a person is about to leave the jurisdiction of the court, and you slap an attachment on his property and then go after him.

Mr. Dobie. I think, under the Federal cases, you have to serve him first, and then get the attachment.

The Chairman. Suppose we put it this way:

"Nothing herein shall be construed to authorize a court to render a judgment where it has not otherwise obtained jurisdiction over the person."

That meets your point.

Mr. Dobie. Yes, because it has got jurisdiction of the suit, but not over the person of the defendant.

The Chairman. Yes. I think the Reporter can fix that up.

Mr. Dobie. I think so. I just wanted that very clear.

The Chairman. I think the point is well taken.

Mr. Donworth. I do not want to cause any delay, but I do not think the suggestion covers the point. I think those decisions are so far-reaching that the attachment is just a nullity. They will not permit it. I do not think it is harmonious with those decisions to say you may issue an attachment in the hope that some time later you will get jurisdiction of the person.

Mr. Dobie. No; you have to get service first, before the Federal court will touch an attachment.

Mr. Donworth. I am inclined to favor leaving this as drawn. It is true it is open to this difficulty: We are now making the attachments, etc., not depend upon the conformity act, but upon a rule. Those decisions were rendered to the effect that the conformity act did not extend to an attachment in that sort of case. Now, it is true that by putting it into a rule specifically, instead of relying upon the conformity act, we do give more basis to the right of attachment in a Federal court suit. Nevertheless, I do not see anything here

that abrogates the rule towhich Mr. Dobie has referred, and I am inclined to think the court would not hold that it is abrogated.

Mr. Cherry. May I suggest, along with the suggestion for the Reporter's consideration, some such language as this -- that it shall not be used as a means of asserting jurisdiction. Something of that sort might express it.

Mr. Dobie. The only trouble about that is -- I do not want to be meticulous-- this word "jurisdiction".

Mr. Cherry. I am talking about asserting jurisdiction-- as a means of asserting jurisdiction.

Mr. Lemann. Over the person of the defendant.

Mr. Cherry. Yes.

Mr. Dobie. If you have it read "over the person of the defendant", I think you are quite all right.

Mr. Olney. As I got Judge Donworth's suggestion, which seems to be acquiesced in, -- I do not know, myself, just what the state of the law is -- it is that you cannot issue an attachment even though it is simply designed to hold the property for the purpose of execution and recover judgment -- you cannot have that attachment issue until you have service on the defendant.

Mr. Dobie. That is the way I understand.

Mr. Olney. If that is the case, why can we not cover the whole thing by simply saying that arrest, attachment, garnishment, replevin and sequestration may be used where personal jurisdiction of the defendant has already been obtained?

The Chairman. I agree with Dean Dobie on the law. I

of course understand that under the present state of the Federal statutes, if you are suing in the jurisdiction where the defendant has property, but he is outside the reach of process, you cannot seize the property and get a judgment in rem good against that property. You cannot get a judgment against him good only against the property. That is forbidden; but I did not understand that when you were about to bring a suit against a man within the jurisdiction, or in hope of serving process, you could not get a writ of attachment against him and turn both the process, the summons and the writ over to the marshal for service.

If you say that is clear, that is all right; I will accept it.

Mr. Morgan. I do not think that case holds that.

Mr. Dobie. Have you 229 U.S. here?

Mr. Clark. I did not suppose that point was clear. As a matter of fact, it is done every day in my State, in the Federal court.

Mr.Dobie. I think we can refer that to the Reporter to look that up and take care of it.

The Chairman. Will you please send him a letter calling his attention to that particular line of cases, and see how they handle that aspect of it?

Mr. Dobie. All right, sir; I shall be very glad to do that.

The Chairman. As long as they do not try to render a judgment against a person outside the jurisdiction, good only against his property, it seems to me that is all the rule amounts to.

Mr. Dodge. See page 646 of Dobie's book.

Mr. Clark. I have just read that, and I do not think it settles the exact point now.

Mr. Dobie. I am not absolutely sure of that point, as to whether you can get the attachment first and process afterward; but they will not enforce the attachment, I know, until you have process.

The Chairman. That is another thing.

(At this point Mr. Clark addressed a question to Mr. Dodge which was inaudible to the reporter.)

Mr. Dodge. I have no doubt it is done that way, because it is the State practice to attach first. You have to attach first.

Mr. Clark. It is done, I know, in my jurisdiction.

The Chairman. I think we have made it perfectly clear to the Reporter what we want done. The exact form of it would depend on the solution of that legal question.

Mr. Pepper. Mr. Chairman, may I ask the Reporter to clear up my mind on the general theory of this rule? The effect of it, as I understand it, is to prevent something like a hiatus between the procedure laid down by these rules and the procedure in the cases specified under existing practice. Now we say:

"Arrest, attachment, garnishment, replevin, and sequestration" --

I do not know whether "and similar proceedings" remains in or not.

Mr. Clark. That will have to be discussed a little.

Mr. Pepper. The question I wanted to ask was whether

there is any similar provision in the rules, and if so where, to cover cases which might otherwise create a hiatus in matters that could not be brought within the scope of the first line of Rule A-27.

The Chairman. This is the way it will be handled: We concluded at the last meeting that we would not attempt to rewrite the code on these provisional remedies and special proceedings; we would leave it to local practice; and that is the general scheme. Now, at the end of the rules we have agreed on this -- that to the extent that we do not cover the field of practice and procedure, the old conformity act necessarily will apply unless local courts supplement our rules with local rules. They are going to be given permission at the end of these rules to make local rules not inconsistent with these, to fill out the details; and if they do not make local rules, and we do not cover the situation, then the conformity act to that extent remains in effect. We are not repealing the conformity act except to the extent that it is repealed by these rules or local rules.

Mr. Pepper. I see. So it means that somewhere in the rules there will be something somewhat to this effect:

"Nothing in these rules shall be deemed to deprive the court of jurisdiction to give relief for which no provision is herein made, if under a State statute or otherwise such jurisdiction would have existed if these rules had not been promulgated."

Something like that?

Mr. Clark. Yes; something like that.

The Chairman. That will come up better when we get to the

tag-end of those catch-all provisions.

Mr. Pepper. It will? All right. I did not know whether this was intended to be the catch-all, or whether there was some subsequent catch-all.

The Chairman. No; this is a special reference to these remedies. We do not want to say nothing about them. We thought it necessary to say something.

Mr. Pepper. It is a little puzzling to hear such a phrase as "arrest, attachment, garnishment, replevin, and sequestration, and similar proceedings." I do not know in what respect there is anything like similarity between, we will say, garnishment, sequestration and replevin.

The Chairman. I think that comes up properly under Rule A-38.

Mr. Pepper. All right.

Mr.Clark. I want to say to the Chairman that in Rule A-38 we tried not to follow the conformity act. We have a little different thesis; but perhaps we had better discuss that when we come to it. It is a catch-all, but it is a question of what form the catch-all will take.

Mr. Dodge. I should like to ask one question for information. Is replevin ever ancillary?

Mr. Clark. It is practically always ancillary except in Massachusetts.

Mr. Dodge. Really?

Mr. Clark. Yes.

Mr. Morgan. What do you mean by "ancillary"?

Mr. Clark. It is made as a provisional remedy in an action. That is the New York rule.

The Chairman. He means this: For instance, under this unified or code system, suppose I want to recover possession of a horse that belongs to me of which you have possession. I do not do what they do in Massachusetts, start the suit with a writ of replevin. I bring an action on complaint, and allege that the horse is mine, and that you are wrongfully withholding it, and demand judgment that the horse be restored to me.

Now, if I do not want to bother with replevin, strictly speaking, I would simply go on to trial, and if I get a judgment a writ of execution delivers the horse to me; but if I am afraid he is going to run off with it, then, in connection with the suit, as an ancillary proceeding, really, at the same time that I start my suit, I get out a writ of replevin, which authorizes the sheriff to seize and hold the horse. So it is ancillary in that sense under this system.

Mr. Dodge. That is probably because you cannot attach as freely as we do in Massachusetts.

Mr. Clark. Mr. Dodge raised this question before, as you may remember, and that is why we put in that formula, "whether by State procedure independent or ancillary."

We shall have to consider a little more "and similar proceedings", I suppose.

The Chairman. Those are the words in the first bracket of line 2.

Mr. Clark. The reason why we did it was partly or largely because of these variations in State practice. I think in New York the technical title is not "replevin". It is "writ of seizure", or something of that kind.

Mr. Donworth. We call it"claim and delivery."

Mr. Clark. What we were trying to do was to get in a few words which would mean that we covered all this sort of thing. Of course the difficulty, I suppose, is the one Senator Pepper had in mind, that you might think it meant something away different, like mandamus.

Mr. Pepper. The reason I said that is because, for instance, in Pennsylvania we have the common law action of replevin, which is in no sense ancillary. The complainant sues out his writ of replevin. The sheriff is commanded to take the property described therein upon the giving by the plaintiff of a bond. If the defendant wishes to retain possession of the thing, and substitute, in case the plaintiff is successful, a money recovery for specific recovery, he gives a replevin bond, which means that you cannot, in replevin, be sure that you are going to get physical possession of the thing as you would have done in a common law action of detinue. So with us it is a perfectly distinct remedy, governed by statute and practice.

The Chairman. But do you not have to draw a complaint and bring a suit?

Mr. Pepper. Oh, yes; and I am not questioning but that it is susceptible of being reduced to this form, but merely the description of it as in the same category as garnishment, attachment, etc., because it does not seem to be that. It is an original remedy.

Mr. Donworth. As I understand, in Pennsylvania you never bring a suit in replevin and leave the property in the possession of the defendant until the trial. That is wherein

the Pennsylvania practice differs from the code equivalent.

Mr. Pepper. You may bring the action of replevin, and the defendant may gain permanent possession of the chattel or other thing sued for by posting a bond, which will change the plaintiff's remedy from a remedy in rem to a remedy for the recovery of damages for the detention.

The Chairman. In our State the bond is only security in case ultimately the property is lost or dissipated.

Mr. Pepper. That is the difference.

Mr. Cherry. May I ask, Mr. Reporter, if it was not the intention, following out our discussion in November, that the words "and similar proceedings" were not, as might at first appear, to indicate the ejusdem generis rule here, but would mean these proceedings or their like or substantial equivalent, as they might be in different designations?

Mr. Clark. By whatever term designated; yes.

Mr. Cherry. I thought perhaps I was answering one of Senator Pepper's questions.

Mr. Pepper. I was misled. I was thinking it was an ejusdem generis classification.

Mr. Cherry. No; I think not. It follows our discussion in November.

Mr. Clark. Of course you could do something like Mr. Cherry speaks of. It is perhaps a little awkward wording, but I guess it would do it -- "and equivalent remedies, by whatever term designated."

Mr. Cherry. I do not know that those are the right words, but that was the idea we had in mind, as I recall it.

Mr. Pepper. That meets my difficulty.

Mr. Cherry. These things get all kinds of names and forms in different places.

The Chairman. Let me ask the Reporter this question: Do you want to limit your phrase to proceedings equivalent to those named, or do you want to include other things that are not equivalent to them, but resemble them in a general way? That is the point I want to get at.

Mr. Clark. I should like to have the latter, if you please. Mr. Sunderland suggests the words "corresponding remedies, however designated."

The Chairman. Are there any other provisional remedies, other than arrest, attachment, garnishment, replevin, and sequestration, or proceedings that are just the same by another name?

Mr. Clark. I do not believe there are.

Mr. Morgan. Is receivership like sequestration?

Mr. Lemann. I think we ought to use some catch-all phrase here. It is just a question of getting it. I have another similar proceeding in my State which corresponds to distress, as I have understood it, for a landlord at common law. We call it "provisional seizure"; and I suspect that every State, or many States, have peculiar names for this same sort of thing.

The Chairman. That would not come under the head of "arrest, attachment, garnishment, replevin, sequestration, or proceedings equivalent to them"; would it?

Mr. Lemann. Not "equivalent to them," no; but I would have thought quite plainly that it come under "similar proceedings", or the language Mr. Cherry suggested.

Mr. Clark. Mr. Sunderland used "corresponding". Would that do?

Mr. Cherry. Could you say "or proceedings of like character"?

Mr. Lemann. I think that would do it -- "of like general character, however designated." I do not think the court would have any trouble with that.

The Chairman. Is that satisfactory as a suggestion to the Reporter?

Mr. Pepper. Adding this as a possible suggestion:

"The seizure of the person or of property, whether by State procedure independent or ancillary, shall be accomplished under the circumstances" --

And so forth. In other words, without attempting to enumerate the different ways in which you may seize property, just make the classification broad -- seizure of the person, as by arrest, or seizure of property in any way that you can seize it, may be accomplished, etc.

Mr. Clark. I think that would be all right. I have a little esthetic reaction against putting "seizure of the person" right at the beginning.

Mr. Pepper. Arrest is seizure of the person.

Mr. Clark. I suppose it is, but it cannot happen very much.

Mr. Pepper. You might say "arrest of the person or seizure of property".

Mr. Clark. That would be a little softer.

Mr. Lemann. I think that is good, but I would still tie it up with some of these illustrative things so that the

lawyers may know just what you had in mind by seizure of property.

The Chairman. Did you intend to substitute that for "arrest, garnishment", etc.?

Mr. Pepper. I thought that might be considered as a possibility, because I do feel a real difficulty in enumerating all the possible cases of seizure of property, or, in the alternative, of specifying some and adding "equivalent" or "similar" or some other word of vague meaning; whereas if you specify the end in view as arrest of the person or seizure of property --

Mr. Clark. As by attachment.

Mr. Pepper. Well, you could say "as by attachment".

The Chairman. "Such as".

Mr. Lemann. Yes; because seizure of property would include execution, which is not within this; is it?

Mr. Olney. It would be a provisional remedy.

Mr. Lemann. I was addressing myself to Senator Pepper's language.

Mr. Pepper. I do not press the point.

Mr. Morgan. Garnishment is hardly seizure of property. Foreign attachment or garnishment is not seizure of property. It is only an order to the debtor not to pay.

Mr. Clark. It is seizure of a chose in action.

Mr. Pepper. It prevents the person who has the claim --

Mr. Morgan. Oh, yes, it does that; but I was just wondering if you can call it seizure of property.

Mr. Pepper. Perhaps you cannot. All right; I do not press it.

Mr. Dodge. I desire to be clear about one thing. I suppose there is no question but that if there is a Federal statute authorizing a limited kind of attachment, but not excluding any other, the general State law of attachment would not be affected.

Mr. Clark. We put in provisions covering both. The Federal law is quite limited -- revenue acts, or something like that.

Mr. Dodge. If there is no such statute -- that does not mean if there is no statute relating to the subject of attachment -- but if there is no statute that goes beyond a certain distance, you may apply the State law beyond that point.

Mr. Clark. Yes; that is what we meant. I think perhaps that could be phrased a little better.

Mr. Lemann. Could we take out the limiting words in line 5, "but if there is no such statute", and leave you to have it under either?

Mr. Olney. I thought you intended by this, Mr. Reporter, to give the right to the provisional remedy if it existed either by State law or by Federal statute.

Mr. Donworth. Why would not that be all right?

Mr. Clark. I should think that would be all right.

Mr. Donworth. Mr. Chairman, there is a matter of some substance in lines 12 to 20 which comes under this point we have had so often of the danger of enumeration. My point here is that enumeration leaves out the most obvious remedy. Let us read that:

"If an order or judgment, interlocutory or final, is made

in an action and it is for the performance of any specific act, as, for example, for the execution of a conveyance of land or the delivering up of deeds or other documents, and the losing party after notice thereof fails to comply therewith within the time specified, and a writ of arrest has been returned unserved, the clerk shall, on application of the party entitled to performance, issue a writ of sequestration against the delinquent's property to compel obedience to the order or judgment."

I think there should be a reference to the appointment of a commissioner or master to make the conveyance, which is the usual remedy, rather than going through this process.

Mr. Olney. That is covered by a later rule, Judge Donworth.

Mr. Morgan. There they use the more modern thing of making the decree effective as the deed, rather than having a commissioner or a master make one.

Mr. Donworth. You do not get a conveyance on the record?

Mr. Morgan. Yes, you do -- to be sure you do. You just record their decree.

Mr. Olney. It is Rule A-30. If you will look at Rule A-30, you will find the very thing you have in mind is covered.

Mr. Lemann. Query to cover this possible confusion: Should, perhaps, lines 12 to 20 come under the same heading as RulesA-30 or A-29, and be taken out of this provisional remedy business? Have you not mixed up execution by the Federal court in lines 12 and following with the provisional remedies that you want to allow? Have you not confused the

two in one rule? Would it not be better to take out the second part of this rule and consolidate it with A-29 or A-30?

Mr. Dobie. I think that is a good suggestion.

Mr. Olney. Yes.

Mr. Dobie. It is an utterly different thing. There is nothing provisional about this. It is a means of enforcing an order which has already been entered.

The Chairman. I should like to ask this question: We have a lot of stuff here about appointing somebody to sign the deed, and all that. I never heard of that. I may have heard of it, but in the jurisdiction in which I practice the court simply makes an order vesting the title in the parties entitled to it, and that goes on the land records, and is just as effective as appointing a master or somebody to sign a deed for a man outside the jurisdiction. I am wondering if we are limiting this method of execution of judgments to the cases mentioned.

Mr. Olney. I think such a provision as that might be very helpful.

The Chairman. If the land is within the jurisdiction of the court, and the defendant has been served, we will say, and judgment rendered that the plaintiff is entitled to the land, owns it, even though it stands in the name of the other fellow on the records, the simple way to do that is just for the court to render judgment vesting title in the plaintiff, and that goes on the land records. This thing raises an inference that our method of handling that is exclusively appointing some political friend to sign a deed for somebody, which is a futile proceeding.

Mr. Pepper. The only advantage of it is that in a jurisdiction where all that you put in the office of the recorder of deeds is the record of deeds signed, sealed and delivered, when you come to search title there is a hiatus if there is no deed on record. It is a difficult thing to disturb local customs in the matter of searching titles and the working of recording systems.

The Chairman. Then suppose we put in a clause, when we get to it, that the court may, by its decree, vest title in the party entitled thereto.

Mr. Pepper. Yes.

Mr. Clark. I get the idea, and I think there ought to be some reference; but I was wondering if that really did not have to depend on State law. I should think you might say something like the provision in Rule A-30, line 4:

"If a mandatory order, injunction, or judgment for the specific performance of any act or contract be not complied with, the court, besides, or instead of, proceeding against the disobedient party for a contempt or by sequestration" --

We could put in some phrase like this:

"Instead of any remedy given by State law as to vesting title".

I am not trying to state the exact form.

Mr. Olney. Why state law? I do not quite get that.

Mr. Clark. Well, there has been a good deal of question in equity as to whether the decree operated directly or not. A great many States have statutes that it may.

Mr. Lemann. That proceeds from the lack of a court of equity, proceeding in personam under general rules, to

operate in rem without the aid of statute; but we may mix statutes here, and I do not think there is any doubt that no State statute could limit the power of the Federal court or Federal law to provide for the effective carrying out of the decree.

Mr. Clark. State statutes certainly can provide for the effect of notations on their own records.

Mr. Lemann. No; for instance, for years a Federal judgment might be a lien on real estate without being recorded in the State.

Mr. Clark. State judgments are liens.

Mr. Lemann. No; there is an independent provision that a Federal judgment was a lien; and in examining titles in my State for years we had to go to the clerk of the Federal court to complete our examination, and get a certificate that there were no judgments there, though ordinarily for a State judgment we would not be worried; it would have had to be recorded.

The Chairman. To remedy that situation, Congress passed a statute saying that in order to make the judgment effective on the title, you had to file it with the local recorder of deeds if the State law permitted it.

Mr. Lemann. That is right. The same thing is true with a tax lien. In fact, I think today, under the estate tax law, there are possible situations where there may be liens for Federal taxes without recordation.

Mr. Donworth. My objection goes much farther than any of the points which have been discussed. It was decided by the court -- King's Bench, I think it was, in the case of Penn vs. Lord Baltimore, that a court of equity may entertain

a suit for specific performance, though the property be beyond the jurisdiction of the court. In such a case, the only way of dealing with the matter, if the defendant skips out after being served with process and after the trial is had, is for the court to appoint a commissioner.

The Chairman. I am not seeking to abolish it, but I want to raise something in the rules that will prevent our assuming that that is the only way to do it. I agree that it has to be done if the man is outside of the jurisdiction.

Mr. Pepper. Why is not the Chairman's suggestion a perfect one? It gives the alternative to the court, and that alternative will enable the court to conform his order to the local law.

Mr. Morgan. Surely.

The Chairman. Then, if there is no objection, let us have it understood that when the latter part of Rule A-27 is carried over to Rule A-30, some appropriate provision will be put in there giving the alternative method of vesting title by decree.

Mr. Clark. There are two further questions here -- first as to lines 9 to 11 --

"That the process shall be issued by the clerk of the district court and be served by the marshal, unless some other person is specially designated by the court."

Is that all right?

The Chairman. I think it is.

Mr. Morgan. "Process for such remedies".

Mr. Clark. That will change the law in my State, but I think it should be changed.

Mr. Lemann. "Process for such remedy." I think it is good to limit it.

The Chairman. It is well drawn, I think.

Mr. Clark. The other goes in this material that is going to be shifted over, but we might think of it here -- line 17. Mr. Morgan raised the question why we should have the writ of arrest, in between, returned unserved. I do not know why we should. That comes in the equity rule. That is the only reason I can give.

Mr. Morgan. I do not see why a writ of arrest has to be taken out before you can sequester a fellow's property for failure to obey an order, and it has to be returned unserved.

Mr. Lemann. You might not want to arrest him if he is perfectlysatisfied to tie up his property.

Mr. Morgan. You would rather have the property.

Mr.Dobie. It is a case of the pocket nerve.

Mr. Pepper. If you are a liberal, the very thought of arrest or apprehension is revolting to you.

The Chairman. Imprisonment for debt is more trouble, anyway you look at it.

Mr. Donworth. (to Mr. Pepper) You use the word "liberal" in the old sense?

Mr. Pepper. As it was defined when I was a boy --

"Some village Hampden * * * with dauntless breast."

(Laughter.)

The Chairman. Mr. Reporter, are you clear on that?

Mr. Clark. We change the equity rule by taking out writs of arrest.

The Chairman. That seems to be the sense of the meeting.

Mr. Clark. I think that is all.

Mr. Olney. May I ask a question of the Reporter? What is meant by the proviso in lines 7 and 8:

"Provided that the action in which the foregoing remedies or proceedings are had shall be commenced and prosecuted pursuant to these rules"?

Mr. Clark. We meant as to form -- the way you make your complaint, etc.; the way you file your jurisdictional objections.

The Chairman. I think I get it. I have studied that. For instance, Mr. Dodge will tell you that when you want to bring what we call an action for claim and delivery of your personal property, or want to bring some kind of a proceeding to get possession of specific personal property, instead of filing a complaint as the start of a suit, you start out with a special proceeding called a replevin suit, and get out a writ of replevin. That is your suit. Now, this is to make it clear that if you are going to use replevin you have to file a complaint, and go through the pleadings just as we specify in our rules; and then if you want to get a writ of replevin as ancillary to it, you can do it, but there has to be a complaint in a proceeding like that, answer, etc., and not a mere writ of replevin. Is not that the point?

Mr. Clark. That is just the idea; yes.

Mr. Dodge. You eliminate the action of replevin from the Federal court?

The Chairman. As a form, yes, but grant right of replevin on a writ as ancillary to a suit brought as we specify.

Mr. Olney. When I read this, I thought it meant that it

would not apply, for example, to an action brought in the State court and removed to the Federal court. It says "commenced * * * pursuant to these rules."

The Chairman. There may be a hiatus there in regard to removal cases.

Mr. Olney. It does seem to me that when we provide that the actions must all be brought in a certain fashion, and that these are the provisional remedies that go with them, it cuts out the possibility of a writ of replevin, for example.

The Chairman. A removal case?

Mr. Olney. No. I say in the first place, so far as this language is concerned, that it is going to be misinterpreted. When I read it, the only thing I could think of was a removed case in which it would not apply; but it was not intended to have that effect at all.

Mr. Clark. Well, I think we can cover it up, or uncover it.

Mr. Dobie. There ought to be some provision there for removal, because a case might very well arise in which some of these have been done in the State courts, and this replevin thing had already been done, and that would go up with it.

Mr. Cherry. That is covered under removal.

Mr. Olney. Let me call your attention to the case where the proceeding has been removed from the State court, and then the man wishes to get an attachment from the Federal court.

Mr. Clark. Would not this do it:

"Provided, that the action in which the foregoing remedies or proceedings are had shall be commenced and prosecuted, or if removed shall be prosecuted after removal, pursuant to these

rules"?

The Chairman. But you have another rule which says that in a removal case the court may make an order requiring pleadings.

Mr.Clark. I think that is true. I do not think there is much danger here, but I do not know that it does any hurt to put in the additional provision.

Mr. Olney. Is it not clear to you that this is going to be misinterpreted?

Mr.Donworth. What line of this rule gives rise to this doubt?

Mr. Clark. Line 8. It starts on line 7.

The Chairman (reading:)

"Provided that the action in which the foregoing remedies or proceedings are had shall be commenced and prosecuted pursuant to these rules."

Mr. Dobie. Insert certain words after the colon.

Mr. Olney. "Commenced and prosecuted pursuant to these rules" is very specific. An action brought in a State is not commenced and prosecuted under these rules.

Mr. Cherry. But one of these rules has to do with what happens when it is removed, so it is included in that phrase, "under these rules". That just sends you over to the removal rule.

The Chairman. The removal rule says that if the procedure in the State court does not conform to ours, the court may make an order requiring new pleadings.

Mr. Olney. My point is simply that this is going to be read by many lawyers just exactly as I read it, as excluding the use of these remedies in an action that had been removed

from the State courts to the Federal courts, because such an action was not commenced under these rules.

Mr. Clark. We could cover it, too, by a foot-note. We could put it either in the text or in a foot-note.

Mr. Pepper. I thought the Reporter's suggestion was excellent. It was, as I understood it, to insert in line 8, after the word "prosecuted", the words "or, in case of removal, prosecuted thereafter" pursuant to these rules.

The Chairman. Yes; that will do it. It is just as well to tie it up with the removal rule in that way.

Mr. Dodge. Which is the removal rule?

Mr. Clark. It is rule A-36, subsection (c).

The Chairman. It is all right to put it in there to tie it up.

Is there anything else on Rule A-27?

Mr. Clark. Do you want to consider now the question whether or not you want to tackle receivers? We avoided that before just because it was not in the equity rules, and, I guess, because we did not want to go into it. I am not anxious to go into it, because it looks as though I shall be quite busy for the next month; but if you feel that I should, I will do the best I can.

The Chairman. Where will it be left if we say nothing about it? What will be the result then? Suppose I want to get a receiver in the Federal court: Tell me what practice I follow.

Mr. Clark. You follow the existing practice, because it is not regulated by rule now.

The Chairman. Not by general rule. I suppose the local

courts all have rules about receivers; do they not?

Mr. Donworth. I wonder what the law is and will be. Of course we know how, in an equity suit, the court may appoint a receiver. I think we have all worked on receivership cases; but in Washington, I know, in a law action, you can apply for a receiver on certain statutory grounds; and most of our receivers are appointed in law actions. You bring a suit for the debt, and then you allege certain special circumstances mentioned in the statute, and you get a receiver. I do not think that will cause any particular trouble. The only doubt is, for instance, in the State of Washington you do not have to have a judgment on a debt. You can get a receiver appointed in an action on a simple contract debt.

Mr.Dobie. You cannot do that in the Federal courts, under Pusey & Jones vs. Hansen.

Mr. Donworth. You could not prior to this rule. I do not know that we need cover that.

The Chairman. I desire to ask whether this word "sequestration" in line 2 is broad enough to cover receiverships, and, if so, whether it throws the Federal court down onto the State practice in the matter of receiverships.

Mr. Lemann. I do not think it would ordinarily be understood today as covering receiverships. If we had a little more time, and it did not slow us up, I think we ought to put in something about receiverships. There are a lot of questions that come up in receiverships as to orders, and giving notice of accounts, and things of that sort, so that I do not think it would be, perhaps, so easy to cover it by one rule; but perhaps it might be done.

Mr.Clark. There are lots of detailed matters. It is conceivable that we could put in one rule which would be a sort of generality.

Mr. Lemann. We might refer to existing practice in equity. That, however, would lead to no receiverships in law cases.

Mr. Donworth. I do not object to that.

Mr. Lemann. Perhaps you could cover it so that the profession would hear about it and perhaps make a general rule as to existing practice.

The Chairman. I should like to ask the Reporter a question. I assume that before he drafted these rules he examined the local rules of practice in the district courts of the United States. They are all available in the Department of Justice, and they might be very suggestive as to things we ought to put in here to get rid of variety and establish uniformity. While I do not know anything about it, I suspect that you will find, in a great many district court rules, provisions about the appointment of receivers. I may be wrong about that.

Mr.Clark. Mr. Hammond sent us up a great stack of district court rules.

The Chairman. Do they contain anything about receiverships?

Mr.Dodge. If the court felt it necessary to deal with receiverships in the rules, would they not have drafted them, as they apparently did not in the equity rules?

Mr. Lemann. But here, of course, we now have a combination of the procedure; so the fact that they did not think it necessary to deal specifically with a bill for receivers in

equity rules would not be conclusive to me that we should not have some reference to the subject in this combined system. How far we should go into detail, I do not know, and I guess we had better keep away from the subject. I know there is a great variety in practice, considerable variety in practice, as to running the receiverships in different districts.

In my district, for example, we are not called upon to submit an order every time we want to take an order for receiver to counsel for complainant, counsel for defendant, or any other party. You can just go into the judge and get an order if it is a routine matter. In many districts I understand you cannot do that; you have to submit it to all other counsel who filed an appearance before you get any kind of an order, even an order to pay taxes or some routine thing. If we should go into that kind of details, I guess it would not work here.

Mr. Donworth. Would it not be well to put in a brief rule to take receiverships out of this new conformity rule by something like this:

"That the rules applicable to the appointment of receivers and the administration of receivership cases and its equivalent shall be in accordance with the principles of equity as heretofore administered in the courts of the United States"?

Mr. Clark. Mr. Moore spoke to me about the district court rules, and he says in general they contain references to details about accounting, etc., but do not cover the equitable principles of the grounds of granting.

Mr. Lemann. That is substantive law, I think -- the

grounds.

The Chairman. That would leave the administration of receiverships subject to local rules established by the district courts, except -- I am a little afraid of this. Is receivership a provisional remedy?

Mr. Olney. Yes; strictly speaking.

The Chairman. You have a title here "provisional remedies", and you use the word "sequestration". Then you say that unless there is something in the statutes to control it, it shall be according to State practice. Maybe we are abolishing the local district court rules on receivership.

Mr. Lemann. We could cover that by exclusion. We could say, "Other than receiverships, which are covered by Rule _____." Would not that cover it?

Mr. Pepper. What does "provisional" mean in this connection, anyway?

Mr. Clark. It is a term which is used a great deal in code practice. It means a remedy given during a suit. It has a similar connotation to "interlocutory", only you use "interlocutory" as to orders.

Mr. Pepper. The reason I asked the question is to give point to what the Chairman has just suggested. Clearly, a bill for receivership and an injunction is not a provisional proceeding within the meaning of this caption at all. It is a distinct species of equity proceeding, where the end in view is not any one of the things specified in this rule, but the substitution of the officer of the court for the defendant in respect of the possession and administration of the property.

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Mr. Clark. Well, the title is only up in the section head and it is just a sort of catch-all for the section head, and I suppose we are going to put in a rule which should go here. The only place I think that "Provisional remedy" is not in the rule itself or in the suggestion for the change in the beginning of Rule A-27. It is a limited expression and I do not think we used that expression anywhere else except in the title.

Mr. Pepper. I had the same idea that Judge Donworth had, that when this body of rules is promulgated, if it ever is, and indexed, a lawyer turning to the index can find there something about receivership, even if it only referred him to a rule saying that the practice in receivership cases remained as heretofore. Otherwise he will not know where he is.

The Chairman. Wasn't it Mr. Lemann who suggested that?

Mr. Lemann. I think Judge Donworth's suggestion was substantially along the same line I had in mind.

Mr. Donworth. Just as an illustration, the Code of Washington has a title reading, "Title V, Provisional Remedies; Chapter I, Attachments; Chapter II, Garnishments, Chapter III, Claim of Delivery; Chapter IV, Injunctions, and Chapter V, Receivers."

Then it goes on to say that in any action on a debt you may have a receiver appointed on showing certain specific things. It is an ancilliary to your suit for a debt.

Mr. Lemann. That is an entirely different thing from a corporate receivership to prevent waste of assets.

Mr. Donworth. The two are mingled here, but I agree with the general idea that has been thrown out here, that I think it

would be well to exclude receiverships from this new conformity rule, so we will have throughout the United States a uniform system of appointing receivers, the powers to be exercised in certain instances in other districts, and so on. Why wouldn't it be better to let it conform to the present equity practice rather than to adopt any of these State rules?

The Chairman. You favor Mr. Lemann's suggestion, then?

Mr. Donworth. Yes.

Mr. Olney. Would it not be sufficient, Mr. Chairman, if we simply had a rule stating:

"Nothing in these rules shall be taken as limiting the authority of the court to appoint receivers according to the practice of the courts of equity."

The Chairman. Mr. Lemann's suggestion was along those lines.

Mr. Lemann. I should think it ought to be an affirmative statement.

The Chairman. An affirmative statement is preferable, I think, stating that the matter of receiverships should be contested in the Federal courts according to the practice heretofore prevailing in the courts of the United States.

Mr. Olney. The only objection I would have to it is that that would exclude the provisional remedy which is provided by the State law in Washington, which is rather novel to me, but I can see no reason particularly for excluding it. It is just as well to let thmm have that remedy according to State law, if it exists, but simply provide that there shall be no limitation on the authority of the courts to grant the remedy of receivership according to the practices of equity.

Mr. Lemann. In receiverships there is always grave doubt

how far you can do in the Federal courts what you do in the State courts. In the cases to which Mr. Dobie referred they have certainly laid down some limiting rules as to how far State statutes can enlarge your right to get a receivership in the Federal court, and that suggests to me this answer to what Judge Olney has just said: We ought not to undertake to give the Federal courts the right to do everything in the receivership line that the State courts do, because the Federal courts have not got the power now; that is my impression.

If the fellow wants that particular kind of State receivership, let him get it in the State court as he has had to get it up to now, and not give him the broader right in the Federal court than he has heretofore had.

Mr. Olney. Do you agree?

Mr. Donworth. Yes.

Mr. Dobie. I agree to that.

The Chairman. How would you put that in concrete form?

Mr. Lemann. I would support Judge Donworth's statement, which has been taken by the Reporter, that there be an affirmative rule, and an independent rule, in these rules stating in substance that the procedure and practice in receivership matters shall be as heretofore in the United States courts in equity. I am not phrasing it precisely, but that is the idea.

Mr. Pepper. And then, either by note or otherwise, a distinction should be made between those orders for a receivership to meet situations arising in the courts from an action, and the case in which a receivership is sought as the main object of the proceeding.

I have in mind this sort of a case: The question arises

respecting the testamentary capacity or the validity of a will; there are a lot of documents in the possession of a party, and there is apprehension on the part of the other party that those documents may be tampered with, and, pending the proceeding, it is customary with us under such circumstances to make an order appointing somebody who is really a custodian to represent the court, to take possession of those documents and hold them pending the outcome of the proceeding. Now, that is an entirely different sort of receivership, although so called, from the receivership that is covered by your proposal.

I am for the proposal made by Mr. Lemann that some sort of a note or other cautionary intimation, that this does not interfere with orders in the courts of an ordinary action which may be necessary to deal with contingencies arising in the action.

Mr. Lemann. I agree with that, and that really would be a sequestrator.

The Chairman. The Reporter hands me this note here: "Theoretically, there are two kinds of receiverships; one a conservation, incidental in nature to sequestration, which might well be governed by A-27; second, liquidating receivers as the main objective, to be governed by the present equity practice."

Mr. Lemann. Liquidating is too limited a word, because sometime you have receivers to let you keep going and come out. I have had some. Otherwise, I agree with that, as Senator Pepper has, and we can leave this now to the Reporter.

It may be that some word should be put in Rule A-27 in connection with the use of the words "provisional remedies" to make the reference to the independent provision of the kind of receivership that is not a mere conservation or sequestration.

Mr. Donworth. I would like to make this suggestion to the Reporter in noting any such distinction: In practice in our State we make no distinction, and so this caution might be too broad if you do not bear this in mind. If we want a receiver appointed for the Northern Pacific Railway Company in the State of Washington I can go into a State court and sue for $100 -- I am citing the extreme case simply to show what the statute is -- I can sue the Northern Pacific Railway Company for $100; if I say in the complaint that the Northern Pacific Railway Company is insolvent, then I can apply for a receiver, but no receiver can be appointed without notice. That is the safeguard. I must apply on notice for the appointment of a receiver and support my application with affidavits that it is insolvent. If the court finds the plaintiff is sueing for a debt and defendant is insolvent he can appoint a liquidating receiver, which is going further than we want.

Mr. Lemann. It must be plain that the kind of conservation receiver that might be appointed under the provisional remedy section would be a very limited one. I think that is your suggestion, Judge, that we have to be very careful about the kind of receivership you admit under the provisional remedy section.

The Chairman. Is it possible for a Federal court now to appoint a receiver ex parte? It can be done here in the District of Columbia, I know, and it causes trouble, but whether that is under local statute or not I do not know.

Mr. Pepper. I do not think it is any longer possible. There was a notable case some years ago in which in the Delaware district the judge appointed a midnight receiver in the case of the Bay State Gas Company, and that resulted in an equity rule mak-

ing that thing impossible.

Mr. Lemann. There was a judge some years ago who appointed a receiver for the Bluefield Steamship Company. I think you were in that case.

Mr. Pepper. Yes, sir. Mr. Dodge and I have a vivid recollection of it.

Mr. Lemann. He appointed that receiver ex parte. He had just gone on the bench. I do not think it is considered good practice any more, although I am not sure that it is impossible. But, at any rate, we would not deal with that, I understand, and it is to be governed by whatever the practice is in the United States courts of equity.

The Chairman. The district courts of Idaho have a rule that receivers will be appointed only in accordance with the practice of the Federal courts of equity, and it placed a limit on them, that they must be after an appeal has been filed in the issues, and so on.

Mr. Lemann. You said, Mr. Clark, this Rule A-27 governed injunctions, but you have a later rule.

Mr. Clark. No, this section.

Mr. Lemann. May I ask what would happen, what rule, if any, specifically governs foreclosure of mortgages? How would you foreclose a mortgage in the Federal court under these rules? Will you do it by just a regular law suit?

Mr. Clark. Yes.

Mr. Lemann. We have got a very summary method of foreclosing a mortgage which is now open to us in the State court and also in the Federal court on the law side. I suppose that is quite a freak.

Mr. Clark. I suppose so. Foreclosure was an equity action.

Mr. Dobie. I do not believe the Federal court would do that.

Mr. Lemann. They will in Louisiana. In the early days the Supreme Court had to grapple with it but they said you could do it. I do not suppose it would be under A-37 in the nature of things.

Mr. Clark. I guess not.

Mr. Lemann. I would think not, too.

The Chairman. Well, have we got a proposition that we can vote on now?

Mr. Donworth. I move that the suggestion of Mr. Lemann, to which I perhaps contributed more or less of an addition -- I think it is understood -- I move that we provide for receiverships by a separate rule, and that they be granted in accordance with the principles of equity along the line Mr. Lemann proposes.

The Chairman. Any second?

Mr. Dodge. I second the motion.

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

Mr. Olney. One point further in connection with this matter of receivers. There has been a great deal of difficulty where property extends over a State line; where, for example, in the case I had in mind, the case of a railroad company extending through a number of different States, the receiver is appointed in one district, and there comes up the matter of appointing receivers in the other districts, and there was no clear, sharp definition of the authority in the districts where

the proceeding was not brought in the first instance. I think there is now a statute on the subject.

Mr. Lemann. There is a Federal statute on it. But isn't that jurisdictional?

The Chairman. Yes, it is covered. I thought there was a decision on that, but maybe it is a statute. That is not practice, it is a matter of jurisdiction, it extends the jurisdiction of the initial court outside of the district.

Mr. Olney. I have not looked at it. Have you?

Mr. Dobie. Extending the jurisdiction through the circuit.

Mr. Lemann. And broad enough to cover in some instances manufacturing concerns which are within different districts in the same circuit; but it is jurisdictional, it seems to me.

Mr. Dobie. There is a statute, yes.

The Chairman. Suppose we pass on to A-28. If we want to come back to that statute later, we may.

RULE A-28

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS

Mr. Clark. On that we were directed the last time to embody the statutes here, which we think we have done, with a few changes of form, and we have accepted in lines 42 to 45 a suggested change by Mr. Mitchell, which is:

"Nothing in these rules is intended to modify Chapters 5 and 6, relating to temporary restraining orders and preliminary injunctions in cases affecting employer and employee."

Mr. Lemann. That is the Norris ante-injunction act?

The Chairman. The Norris-LaGuardia Act, and the one preceding; there are two sections in the statute. You accepted my change of phraseology there?

Mr. Clark. Yes. You will note the alternative rule, which just lists the statutesat the end. Which do you prefer? There has been a general suggestion that we should not chase the lawyers around, and what we have done may be the better way.

Mr. Lemann. It will save the appearance of length of rules if you just make reference, will it not?

Mr. Dodge. Yes.

Mr. Clark. We can, since we intend in a later section or the appendix to list the statutes, strictly procedural statutes, not superseded or modified by the rules.

The Chairman. If you take the alternative rule you simply give reference to the statutes and say that they shall be granted under the circumstances in the matter. That raises a point, the reason why I suggested the change in the phraseology with respect to this labor injunction statute. The rule originally read that that statute shall govern. That statute has never been before the Supreme Court, and there was a very big debate about it when it was passed as to whether it interfered in any way with judicial power. The Court has never passed on it and I do not think we ought to ask them in a rule to confirm it. So, I said, instead of saying, "It shall govern": "Nothing in these rules shall --". How did I word that?

Mr. Clark. "Is intended to modify --"

The Chairman. "Nothing in these rules is intended to modify Chapters 5 or 6, Title 29, U. S. C., relating," and so forth.

It may amount to the same thing but it did not sound quite the same.

Now, if you just simply recite the statutes and say they

shall govern, you are doing just what I do not want to ask the Court to do. It may be that that staute is all right, and I am not saying it is not, but I know at the time it was passed there was vigorous opposition to it on the ground that it interfered with the judicial power, and I was hounded with briefs on the subject and had to advise the President whether to sign it or not. He referred it to me and I reached no conclusion about the constitutional question, except the one conclusion that they were not going to be settled by any administrative officer, that the bill ought to be signed and those doubtful questions that were being raised ought to be judicially determined.

An administrative officer who attempted to say yes or no on that thing was just foolish.

It never has been brought up and I rather shrink from the alternative form which puts the judicial seal of approval on everything that those laws contain.

Mr. Lemann. I think your idea is right, and I wondered if we could preserve it and still adopt the alternative form by eliminating in the alternative form any reference to this particular statute, and then add -- because, after all, most lawyers are thinking here of the general laws -- and say:

"Temporary restraining orders and injunctions may be granted under the circumstances and in a manner provided in --" and then refer to the other statutes, the general ones, and then add:

"Nothing in these rules is intended to modify Chapter V or VI, Title 29, relating to temporary --".

The Chairman. That is picking that one statute out of the

rest and making a special case out of it.

Mr. Lemann. You have got to do that. You have got to pick it up under your suggestion.

The Chairman. No; under your suggestion you would, yes. All these other statutes you will take just as they stand, and on this particular one we say we are not changing it. I think that we better stick to the general form, and instead of enumerating the statutes state the substance of them in Rule A-28.

Mr. Lemann. I move that be done, Mr. Chairman.

Mr. Olney. Let me say something on that, because I have been wrestling with the procedure here. This statute as passed simply lays traps for the lawyer who is not exceedingly careful.

The Chairman. What statute does?

Mr. Olney. The statute in regard to obtaining restraining orders. It is exceedingly poorly drawn.

Mr. Morgan. Do you mean the rule or the statute?

The Chairman. Are you talking about the rule or the statute?

Mr. Olney. The rule is stated here practically in the sense of the statute.

Mr. Clark. That is correct. We tried to improve the statute before and were directed to come back to the statute.

Mr. Olney. I am dealing with the substance of what is here. I do not know whether you want to change the statute any, or whether you want to follow it or not.

The Chairman. You are agreeable to having the rule instead of merely referring to the statute?

Mr. Olney. Yes.

The Chairman. Then we will pass on to the substance as

written.

Mr. Olney. All right.

The Chairman. Is it the sense of the meeting that we will take the first alternative and not limit ourselves to a mere reference of the statutes? Unless there is objection --

Mr. Donworth. The statutes will be mentioned in a derivatory note, will they not?

Mr. Clark. Yes.

Mr. Lemann. But the suggestion is that the text is to recite them if we take the first alternative, and the reason given by the Chairman I think is convincing.

Mr. Donworth. All right.

The Chairman. All right, Judge Olney, having adopted the principle, we will have a rule instead of a mere reference to statutes, we will take up A-28.

Mr. Olney. Well, take such a thing as this, which is found in lines 8 to 12:

"Every such temporary restraining order --" and frequently you have to have a restraining order entered immediately -- "Every such temporary restraining order shall be endorsed with the date and hour of issuance, shall be forthwith filed in the clerk's office and entered of record, shall define the injury and state why it is irreparable and why the order was granted without notice, --" now, we come to the point -- "and shall by its terms expire within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown, and the reasons for such extension shall be entered of record."

Now, just let me tell you the experience I had in a case of this character. It was a rate case, we had to get a restraining order; we got it; it prescribed that it should expire at the end of 10 days and we complied with the statute exactly. Well, when we got the restraining order and made our application for a temporary injunction -- the whole object, of course, of the restaining order was to keep the thing in status quo until the application for temporary injunction could be heard -- the defendant in the case, in the very nature of things, had to have time for reply; there were elaborate affidavits filed to sustain the application for the restraining order, and the defendant in the nature of things had to take the time to prepare the affidavits to reply. They were affidavits that took the defendant a reasonable time, took the defendant a couple of months to get ready and get prepared, and at the defendant's instance, and not at the instance of the plaintiff at all, the matter had to be continued from time to time, the hearings on the application for preliminary injunction had to be continued, so every ten days we had to go out there and get a special order continuing the existence of the temporary restraining order.

It is just a perfectly useless proceeding, and someone who was not paying absolutely strict attention to the language of the statute, and who failed to get this purely formal order of continuance, an order of continuance that was made necessary by the wish of the defendant -- if he did not watch it and get that he would lose his rights.

Of course, the proper rule should be that the restraining order should not continue after the hearing and determination of the application for a preliminary injunction, but it should

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continue until then, and this method just lays a trap for the unwary, as a matter of fact.

The Chairman. Your particular case could be covered by a provision that the court should stick to this rule unless the parties consented. In that particular case I have no doubt that the defendant would have agreed to a longer period. But, when you are dealing with the question of tampering with the present statutes on injunction so as to give the court discretion to keep a temporary restraining order open more than ten days, you are playing with dynamite.

Now, the fact is, I have many times tried to find out why it was that when they provided for the union of law and equity, that if the rules were unified they were to be laid before them, and did not require them to be laid before them if we confined our revision to law actions alone. And the only explanation I have ever been able to devise for it was that when you start in with the union of law and equity, dealing with injunctions and temporary injunctions in labor and other disputes, we are then in a position to modify by the rules Federal statutes that have been fought out on the floor of Congress limiting this right to restraining orders and injunctions in labor disputes and all that. One of the things I have felt right from the start, whether we liked them or whether we did not, was that we ought not in this draft make one change of a dot or the crossing of a T on these things that go to such matters as you talk about.

This provision for continuing a restraining order longer has been bitterly fought, and Congress passed its statute after a bitter fight of that kind, with all kinds of accusations against Federal judges for abuse and everything else. However

appealing any argument may be that we would like to see it changed in some respects, I am agin' it. I would not object to a provision that the time could be longer than that if both sides agreed to it. That would cover Judge OlNey's situation. If the defendant himself was asking for time to get the affidavits in he would have agreed to an extension.

Mr. Pepper. That seem to me to really cover the ground if the plaintiff has obtained his restraining order. There ought to be no relaxation of the 10-day rule, because if he can show cause for the extension for a second ten days, or even the third, he ought to be required to do so before the expiration of the order which he has secured. On the other hand, if the defendant wants the time extended before the hearing on the preliminary injunction there isn't any doubt now, as far as I know, in the minds of any Federal judges that by consent the standing order may be continued until the parties are ready to go on with the motion for the injunction.

The only cases in which the Federal judges, and, it seems to me quite properly, refuse to grant restraining orders for more 10 days at a time, are the cases in which it is bitterly resisted by the defendant. This is for the protection of defendants, this provision, and the defendant can always waive his protection and there can be a stipulation that the existing order shall stand without the necessity of renewing it until the parties are ready for the hearing on the preliminary injunction.

Mr. Lemann. We do that.

Mr. Olney. I might say, Senator Pepper, that in our case we could have obtained such a stipulation from the defendant

without the slightest difficulty, but under this rule we were simply afraid to trust to it.

The Chairman. Afraid to do it under the statute?

Mr. Olney. Afraid to do it under the statute, yes. Now, if I may go on, the reason for which the Chairman has stated for not tampering with this statute in any respect are exceedingly strong. I am not at all certain that we should not almost take it literally and be done with it, but I do think the suggestion that has been made by the Chairman is one which would go really to the heart of the difficulty which we had. I say that we had it; it was not so much the difficulty that we had, because we took care of it, but it was a case where a man might get into a terrible trap if he did not exercise the utmost care.

It would be sufficient, I believe, to provide that these limitations should apply unless at the instance of the defendant the hearing on the order and on the application for temporary injunctio n was continued at the instance of the defendant.

Mr. Pepper. I am entirely satisfied that that is wise, but what I am really afraid of is that just because this particular subject is likely to occasion so much controversy in Congress, that I would hate to have this matter brought up and then turned down; whereas, if it is allowed to remain as at present I can imagine it must be so, as Judge Olney says, that if the judge would refuse to recognize a stipulation waiving the right of a defendant to insist on the ten day limit, I can not imagine that that would be generally the case with the courts.

I have in mind no less than half dozen cases where a defendant has agreed that ten days was too short for him to get ready

to answer the motion for a preliminary injunction and he has requested the plaintiff to let that go on for a little while, stipulating that the restraining order shall stand in the meantime.

I know of several cases where Federal judges have assented to stipulations of that sort, and it is so wholesome and necessary that one would hate to try to crystalize that informal practice into a rule and have somebody making inflammatory speeches in Congress and have that thing made an impossible thereafter by some such foolish statement as -- "Well, we can not tell what may happen; we don't want to modify this thing. It is an excessive use of judicial power anyway. We don't want to put it within the power of any parties to have the conduct of individuals tied up by orders issued by the Federal courts."

7 There is all sorts of talk like that in Congress and it is as potent as it is unintelligent.

The Chairman. I don't think we ought to tamper with this. There are just two subjects in these rules, although I may be wrong about it, that Congress would be inquisitive about. One is the preservation of jury trial inviolate and the other is the injunction.

I think we ought to be able to draw this rule so that we can go to Congress with a note at the end of it stating that we have made no change whatever in the existing Federal statutes on injunctions, that the rule states in substance and it has been drawn that way merely as a guide to counsel, and that there has not been any change.

Then, I think with our drafting committee and our revision

committee one of the most important tasks they will have is to take those statutes again and go through them with a fine toothed comb and see whether we can truthfully make that statement, to be certain nobody can contend that we departed from the statute.

It seems to me this illustration was a bad one, and the lawyer may have thought the stipulation wasn't any good and under the statute the restraining order would fall of its own weight, but that is an extraordinary case. It is not worth while to go to Congress and say, "We have followed the statutes except --" and then start in pointing out things that we have changed.

Mr. Olney. In that particular case, the defendant, who was counsel for our Public Utility Commission, went with me to the court. He said, "We are asking for this continuance", and, of course, the defendant should have that time.

I think, just to get my position clear on the matter I brought this matter up so that the Committee would see that the rule as provided in the statute was very imperfectly framed. I am inclined to think myself that we ought not to tamper with it. I would be very doubtful indeed about the advisability of making any change in it, but I thought the Committee ought to see that the thing that they are leaving unchanged, if they do leave it unchanged, is, as a matter of fact, quite an imperfect thing.

The Chairman. Is it the sense of the Committee that our policy is to make this rule A-38 conform to the existing Federal statutes? I take it that it our intention.

Mr. Dobie. Yes.

The Chairman. Now, that being so, we have not very much

to do with it this morning. We can not in this general meeting analyze the terms of the rule, and it seems to me that the task of preparing a rule conforming with the statutes, ought to be left to the Drafting Committee to try again to see whether they can do it, and let the Revision Committee take a look at it. The members of the general committee will get copies of the reports as they come in, and if any one of us is able to point out a part where the rule does not conform to the statute we ought to send it in. Do you think we can gain anything this morning by going over the details of the rule?

Mr. Clark. I ought to state that there are two or three clerical changes to be made in this.

Mr. Olney. If you are not going to change it in substance, I doubt the advisability of any clerical change.

Mr. Clark. I do not know that they are necessarily important. We can leave them in. As to the "verified bill", of course we have not provided for such a bill there, but I guess everybody knows what it means.

Mr. Olney. You can substitute for "verified bill" for "complaint", can you not?

Mr. Clark. Yes, sir. What I expect to do is what we have done here; we can say these are the Federal statutes except for certain clerical changes, and we could list them so there would not be any question about them.

The Chairman. And give your reason for the clerical change.

Mr. Clark. All right.

Mr. Donworth. There was one point I intended to suggest with respect to the Chairman's remarks about not touching this at all. The practice, as I understand it, in Federal courts is that an in-

junction must be a writ of injunction issued by the clerk of the court after the judge makes the order for it. The State practice usually dispenses with writs of injunctions and provides that a certified copy of the judge's order, certified by the clerk, may be served as a equivalent of a writ. But I suppose if such a change as that was made it might suggest that we were departing from the statutes, and, whatever they are, perhaps they better be left as they are.

The Chairman. Then we will pass on to Rule A-39, Execution.

RULE A-39

EXECUTION

Mr. Clark. There was some suggestion, I think, on taking out lines 6 to 9, as being unnecessary. I suppose they may be, but they seemed to us informative.

Mr. Olney. In connection with that rule A-39, the very first sentence reads:

"Process to execute any order or judgment for the payment of money shall be by a writ of execution which may issue when authorized by any applicable Federal statute, or if there is no such statute, under the circumstances when a like writ would issue on a like order or judgment rendered by a court of general jurisdiction of the State in which the district court is sitting."

Why not just simply say:

"Process to execute any order or judgment for the payment of money shall be by writ of execution."

Why the necessity for all the rest of that sentence?

Mr. Clark. How about the question of exemptions? I supsupose that would be covered anyway.

Mr. Olney. Exemptions are no limitation on the issuance of the process or the character of the process to be used. That simply provides that the process shall not be effective as to certain property.

Mr. Clark. This comes from the equity rule and the Federal statute. Equity Rule 8 provides that final decress may, if the decree be for the payment of money, be by writ of execution. This is covered by various statutes, as I have listed them in the note.

Mr. Olney. You will note, Mr. Reporter, that in the second sentence you go on to say:

"The practice and procedure relative to execution and supplementary to and in aid of the order or judment or on and in aid of execution shall be subject to any applicable Federal statute, or if there is no such statute, it shall be subject to the then existing practice and procedure of the State."

Now, is it not sufficient to say here -- this is my point -- "The practice and procedure relative to execution and supplementary to shall be in accordance with the statutes"?

Mr. Clark. I do not believe I can answer it more than --

Mr. Olney. All the matters you have been speaking of have been matters of practice and procedure relative to the issuance of the writ, and so on, and it seemed to be covered by the second sentence of the paragraph. I move, to bring the matter before the Committee, that everything in the first sentence following the word "execution" be stricken out.

Mr. Dodge. I second the motion.

The Chairman. Is there any discussion? Does the Reporter wants to say something?

Mr. Clark. Just a moment.

The Chairman. All right.

Mr. Dobie. "Practice and procedure" is broad enough. You have to include when it may be issued.

Mr. Olney. It is a judgment for money and the way it is to be enforced is by a writ of execution. Now, the practice and procedure are so and so and so.

Mr. Lemann. In other words, your point is that there is nothing in what you propose to meet in the first instance that is not adequately cared for by what is in the second one?

Mr. Dobie. I think that is true if practice and procedure involves power to issue the writ, which I think it does.

Mr. Olney. If you put in all that first sentence you may not know where you are getting.

Mr. Dobie. That is the only question I have, whether or not you ought to put something in there about the power to issue the writ. I suppose that is included under practice and procedure.

Mr. Olney. So far as the power is concerned, when we say that the process shall be a writ of execution we mean that the court has power to issue writs of that character.

Mr. Dobie. His first sentence provides that it may be issued when authorized by applicable Federal statute or State law.

Mr. Cherry. Mr. Chairman, I wonder if there is any difference in substance involved in the suggestion or whether it is merely a matter of style.

The Chairman. I am not sure I understood the motion to strike out the first sentence after the word "execution". I be-

lieve it was made on the theory that practically the same thing, or all that was necessary to be said on it, was said in the second sentence commencing with practice and procedure in line 9. Am I correct about it?

Mr. Olney. That is correct.

Mr. Clark. The question I have been discussing previously has been the differences in the State laws as to the time after judgment and when you can enter a writ of execution.

Mr. Olney. That is procedure.

Mr. Clark. It may be.

Mr. Olney. To me it is purely a matter of form. I brought the matter up because I did not know before but what there was a matter of substance involved because I could not tell why those words were in there.

Mr. Dodge. I second Judge Olney's motion.

Mr. Clark. Suppose the State law says you can not have a writ of execution for two weeks; would that be covered by practice and procedure?

The Chairman. I think so.

Mr. Lemann. What would we have jurisdiction over if it was not practice and procedure?

Mr. Clark. We are taking over State practice.

Mr. Olney. This is not practice, just procedure.

The Chairman. The question is on the motion.

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

Mr. Lemann. In line 12, as a matter of form, for the consideration of the Reporter or the Style Committee, I wonder, if there no such statute, whether the wording might be unduly

limiting. Suppose there is a Federal statute, but you have a State practice which you ought to be permitted to invoke, no reason to the contrary; the Federal statute goes so far, we will say, but suppose in your particular State it would be something beyond that; now, suppose somebody came along and said that you could not use the State practice because there was a Federal statute?

The Chairman. On the general subject?

Mr. Lemann. Yes, but I think that is a matter of form.

Mr. Dodge. I don't think that is form. I think that is quite substantial. I was going to raise the same point, as to whether our State poor debtor law is eliminated because there is a Federal statute.

The Chairman. You mean except to the extent it is regulated by the Federal statute?

Mr. Lemann. Yes.

Mr. Olney. Is it not the same thing that was involved in the preceding rule with regard to provisional remedies?

Mr. Morgan. Yes.

Mr. Lemann. It is the same point that we had before.

The Chairman. All right. Anything else in A-29?

Mr. Dodge. The question of whether the words in brackets are to be included in lines 17 to 21.

The Chairman. How about that, Mr. Reporter? Ought that to be in or out?

Mr. Clark. That is the place where we issue the orders -- we were directed to bring in a rule on supplementary proceedings, and we studied it a while -- that is about what it comes to.

Mr. Morgan. It is supplementary proceedings, all right.

Mr. Lemann. Why would not lines 10 to 13 cover?

Mr Clark. Lines 10 to 13 are the points on supplementary proceedings that we have just spoken of. Lines 17 to 21 provide additional remedy which is practically discovery in aid of execution, which is given in New York.

Mr. Lemann. Would it be permitted to do that by lines 10 to 14?

Mr. Dodge. Can you not take depositions now in aid of this supplementary process?

Mr. Clark. I should not suppose you could unless you have a State statute. I should suppose lines 17 to 21 would not be necessary in New York but I think they would be elsewhere.

Mr. Lemann. Your point is that by 17 to 21 you would have the right to do it? If you are going to use the State practice you have got that already by the preceding line.

Mr. Clark. It is the previous line that it is to be done in the manner provided by State practice, but we included it to make sure we do not shut it out.

Mr. Dobie. I move that it stay.

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

The Chairman. Now, Mr. Reporter, you want to take up this question of supplementary proceedings?

Mr. Clark. Are you satisfied with supplementary proceedings in view of what we have said? You will notice the note on page 2.

Mr. Lemann. You mean, will we be satisfied with what we have got here? It seems to me you have adequate provision for them.

The Chairman. You see, we attempted to draw a uniform rule on supplementary proceedings and we decided it was too big a job to tackle.

Mr. Lemann. Lines 17 to 21 would be as far as we should go at the time.

Mr. Olney. Let me suggest that I think you can go further than lines 17 to 21. They cover merely the matter of executiln. They provide that in aid of the order or judgment the judgment creditor may examine any person, including the order or judgment debtor, in the manner provided for taking depositions.

Now, in supplementary proceedings it is the State practice in some States, it goes considerably further.

The Chairman. That is covered by lines 15 and 16. It says that it shall be subject to any applicable Federal statute, and, in addition, it may be done according to the existing State practice and procedure.

Mr. Olney. I will withdraw my remarks.

The Chairman. Then we are satisfied?

Mr. Clark. Mr. Tolman's suggestion was that the referees in bankruptcy should do that.

The Chairman. If we refer to State practice and procedure and provisions for discovery under our discovery deposition we have covered it. I think the referee in bankruptcy has enough to do.

We will take up A-30.

RULE A-30

COURT MAY APPOINT A THIRD PERSON TO PERFORM FOR DELINQUENT ORDER OF JUDGMENT PARTY, WHEN -- WRITS

OF ASSISTANCE

Mr. Clark. In Rule A-30 we are to insert the provisions from A-27.

The Chairman. That is right. Anything else on A-30?

Mr. Clark. I do not think I have anything on that.

Mr. Dodge. What is a writ of assistance?

The Chairman. We went forward on that and discussed it.

Mr. Clark. That is a thing that is spoken of in the equity rules.

The Chairman. Let us strike it out and put something else in there.

Mr. Dobie. The sheriff puts you in possession of the land. After the ejectment you do not give up the land, but the sheriff gives the possession.

Mr. Donworth. We have it that in foreclosure we put in the decree that immediately upon judicial sale the purchaser shall be let into the possession of the mortgaged premises. If the purchaser does not get possession you apply for a writ of assistance to carry out that provision of the writ.

The Chairman. It is a matter of terminology. I thought what we were dealing with was the subject of executing judgments, and if we could use the words "writ of execution" as applied to any sort of process to execute a judgment, -- the writ of assistance is an old phrase, it has been abandoned in a great many jurisdictions, but I do not see why we should have two kinds of writs of execution.

Mr. Lemann. The equity rules had a special rule for it back in 1912, Rule No. 9.

Rule
No.9."

(fursdon
contd.)

Mr. Dobie. It will probably be informative to Mr. Dodge when I tell him it is executed in the same manner as a habere facias possessionem.

Mr. Pepper. Our proceedings under ejectment in Pennsylvania are still governed by the act of 1772, and the writ which issues in favor of a successful plaintiff is the one which, with exemplary regard for Latin pronunciation, Dean Dobie has just stated.

Mr. Donworth. This is in the equity rules, and it is not an obsolete thing, and I think the provision is good, especially if the derivation note calls attention to it.

The Chairman. I do not like to see "writ of execution" in, and say we have abolished the phrase "writ of assistance". However, we will pass on to A-31.

A-31
REGISTRATION OF ORDERS AND JUDGMENTS WITH OTHER FEDERAL COURTS AND THE EFFECT THEREOF.

Mr. Clark. A-31 is, I think, leaving out the question of form, a gem. That is what the committee decided to do, and I think it is a fine thing. Mr. Morgan has some suggestions on form, but I do not believe there is much of substance that has turned up yet. That was the committee's own idea.

Mr. Morgan. I just had three suggestions as to form, that is all.

The Chairman. I raised a particular question which is not a matter of form.

Mr. Clark. Yes, that is true.

The Chairman. Here is a case where we are providing that when a man gets a judgment in one federal district he can

go into another and get a writ of execution without any lawsuit.

Mr. Morgan. I think that is fine.

The Chairman. I say this, we need to consider whether this changes the substantive rights of the party. We have abolished the necessity of bringing a lawsuit in another district, and the judgment is effective all over the United States. It is a very desirable thing to do, I believe.

Mr. Morgan. Congress does not like it. Mr. Sunderland, you tried for years to get this sort of thing done as between judgment of state courts, did you not?

Mr. Sunderland. Yes, state and federal both.

Mr. Morgan. State and federal, yes. I cannot see, Mr. Chairman, that there would be any objection to it as to federal courts. It is just a method of enforcing the judgment.

Mr. Lemann. It is procedural.

Mr. Morgan. Procedural rather than a question of substantive right. In each case the judgment debtor is fully protected.

The Chairman. We would concede right now that we cannot change these rules so as to provide that if you bring a suit in New York you can serve a man in California.

Mr. Morgan. Quite so, but what I refer to is the difference between that as a substantive matter and this.

Mr. Tolman. The first thing is jurisdictional.

Mr. Morgan. It goes back to the old case of Livingston v. Jefferson. If it had not been for that you could have done it, and the Federal Judiciary Act which makes the

different districts just about the same as different states. I suppose it all goes back to the idea of States' rights at the time the Judiciary Act was passed, but I do not think this thing touches jurisdiction.

Mr. Sunderland. This merely affects the method of accomplishing the result which is capable of being accomplished.

The Chairman. I favor putting it up to the Court with a notation calling their attention to the extent we have gone and asking their views as to whether it is within the power we have. That is the solution of it.

Mr. Morgan. That is fine.

Mr. Lemann. May I ask whether we should give consideration as to whether the first draft should cover interlocutory orders? I was trying to visualize this in my own mind, and I thought it was a very good rule for the collection of a judgment. If we get a judgment in the federal court in Minnesota, or a final order, which should I not be permitted, if the defendant has property in Louisiana, to go down and have the marshal in Louisiana seize the property on that Minnesota judgment without going through the rigmarole of having the Louisiana judge render judgment on the judgment of the Minnesota judge?

But if you take interlocutory orders, suppose the Minnesota judge gives an injunction, a provisional order in the district, and then you want to enforce it in Louisiana, you might get into some discussion there with interlocutory orders, and the Louisiana judge might want to try that case that started in Minnesota. Your proceedings would have to be in Louisiana if you invoked this rule, I suppose, and I thought

it would be much safer, going on new ground, to limit this to final judgments and orders, because if we go a little too far we will run into trouble.

Mr. Sunderland. I think that bill that I drew was limited to final orders. I argued that before the House Judiciary Committee and I did not think there was any particular opposition to it, they just did not get around to it. I talked to Michener, who introduced the bill for the A.B.A. Committee, and he reported no opposition, particularly, but they just could not get any action.

The Chairman. Do you move to confine it to final judgments?

Mr. Lemann. Yes, I move to confine it to final judgments.

Mr. Morgan. I agree that that is what ought to be done.

Mr. Donworth. Let me inquire in that connection; I do not suppose this is intended to touch the question of the ancillary receivership, is it? There has been, as we all know, a lot of trouble on that subject, the court having ruled that a receiver in one district has no authority in another, and the question of how to get him appointed in the other jurisdiction has caused some trouble. I believe there is a decision or two on the subject. Should we incorporate in this rule the idea that an order appointing a receiver in one district may be registered in the other district and that the receiver shall have powers there with some qualification about the local court having ---

Mr. Lemann. That is the same point that Judge Olney raised a while ago. There is a federal statute, I know, that

now covers it, when the property is in -- except railroads -- only where the property is in different districts in the same circuit.

Mr. Clark. That is why we put it in, Judge Donworth. You see, in our note on page 4 there is a discussion of that point.

Mr. Donworth. Do you think this rule covers it?

Mr. Clark. We put this provision in to cover it and we thought it did.

Mr. Dodge. It is not limited to judgments on which an action could be brought in the other district?

Mr. Donworth. You see, the order appointing a receiver is really interlocutory.

Mr. Morgan. Surely, it is.

The Chairman. There is a motion to strike that out.

Mr. Clark. The reason we put it in is stated on page 4, and is mainly on the receivership point.

The Chairman. Let me read the statute:

"Any suit of a local nature, at law or in equity, where the land or other subject matter of a fixed character lies partly in one district and partly in another, within the same state, may be brought in the district court of either district; and the court in which it is brought shall have jurisdiction to hear and decide it, and to cause mesne or final process to be issued and executed ---" and so on.

"Where in any suit in which a receiver shall be appointed where the land or property of a fixed character, the subject of the suit, lies within different states in the

same judicial circuit, the receiver so appointed shall, upon giving bond as required by the court, immediately be vested with full jurisdiction and control over all property, the subject of the suit, lying or being within such circuit, subject, however, to the disapproval of such order within 30 days thereafter by the circuit court of appeals for such circuit, or by a circuit judge thereof, after reasonable notice to adverse parties and an opportunity to be heard upon the motion for such disapproval; and subject, also, to the filing of and entering in the district court for each district of the circuit in which any portion of the property may lie or be, within 10 days thereafter, of a duly certified copy of the bill and order of appointment. The disapproval of such appointment within said 30 days, or the failure to file such certified copy of the bill and order of appointment within 10 days, as herein required, shall divest such receiver of jurisdiction over all such property except that portion thereof lying or being within the state in which the suit is brought. In any case coming within the provisions of this section, in which a receiver shall be appointed, process may issue and be executed within any district of the circuit in the same manner and to the same extent as if the property were wholly within the same district; but orders affecting such property shall be entered of record in each district in which the property affected may lie or be."

We ought to change that.

Mr. Lemann. There is another thing about this. 77 (b),

if it is held that it has superseded this receivership -- the result of giving all this power to the central receivership is to make a hardship on the people who deal with the concern locally. Take the United Cigar Stores, which went into receivership in New York; we had lots of leases in Louisiana, and under the Louisiana law they had liens on the contents of the premises.

This is the way it works under 77 (b), all of us have to go and get lawyers in New York or in Delaware to enforce our local lien on the assets; we have to go to the extent of hiring lawyers up there or taking our clients up there and making proof there, although under the previous practice in receiverships you had an ancillary receiver in Louisiana, and our local judge, being familiar with our local law, whom we could go right to, could hear us.

The New York lawyers did not like this business of the lawyers in Louisiana and Massachusetts and California and Washington making a lot of trouble for them because they had to employ correspondent lawyers in those places, and it was much easier to say, "You fellows just come up here to Delaware or to New York where we are."

That is fine for them; it is all in the point of view; but it is very hard on us.

Now, 77 (b) has given them that advantage and we cannot do anything about it. 77 (b) has practically wiped out ancillary receiverships, and it has made a lot of trouble for us.

I was formerly their counsel in Louisiana until we got into too much trouble with the landlord clients. There isn't

much we can do about it right now because of 77 (b) and the orders of the court, but I would certainly oppose, from the standpoint of the provincial lawyer, putting anything in these rules to help that cause along. It has been put too far along for me already.

The Chairman. Would it not be all right to make your motion relate only to final orders, and say, "Nothing in these rules shall be construed to modify the statute" -- referring to the statute I just read. Would that cure the thing?

Mr. Lemann. Yes, I think probably limiting it to final orders would cover it.

The Chairman. Let us think about it.

Mr. Pepper. I move the chairman's proposal as the sense of the committee.

Mr. Lemann. I second the motion.

The Chairman. That brings out the interlocutory feature and makes the rules relate only to final orders, and has a provision saying that the rule shall not affect the two statutes I have read.

Mr. Clark. What are the numbers of the statutes?

The Chairman. They are Title 28, sections 116 and 117.

Mr. Dobie. Mr. Chairman, I am in favor of that motion. That statute confines it to the same circuit, and there you have a circuit court of appeals with jurisdiction over all of that circuit with power to review interlocutory orders; but if you have two circuits and two of them messing with it, I think you are playing with dynamite.

Mr. Donworth. I withdraw my first suggestion.

The Chairman. I have not put the motion. May I put it?

Mr. Donworth. Yes.

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

Mr. Donworth. I was going to reply to the able counsel from Louisiana. I think he must be the author of a poem I read recently, beginning:

"How doth our seventy-seven bee
Improve each shining hour." (Laughter.)

The Chairman. Is there anything else in Rule A-31, of substance?

Mr. Donworth. With respect to form, I call the attention of the reporter, down in the bottom line, line 28, "shall be filed in the court". I think it should be "filed in the office of the clerk". You do not have to call it to the attention of the court.

Mr. Clark. You want to put in "office of the clerk"?

Mr. Donworth. I suggest it for your consideration. The very last line of the proposed rule, do you think that is necessary?

Mr. Dobie. The bracketed part?

Mr. Clark. Yes. I should think you ought not to be able to register that.

Mr. Morgan. I suppose then you are better off.

Mr. Clark. I am not sure it would not apply if you left it out.

Mr. Morgan. These rules apply to the District of Columbia, so I suppose it would.

The Chairman. It would be within the rule.

Mr. Clark. Did you say to leave it in?

Mr. Morgan. Yes, I do not see -- otherwise, it would apply, would it not, because our rules say so specifically?

Mr. Clark. If you want to leave it in, all right.

Mr. Morgan. That is the only federal court that does grant divorces. Since the Popovici case they cannot even do it for consuls now.

The Chairman. Is it the sense of the meeting to leave out the bracketed part, lines 54 to 56 of Rule A-31?

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Mr. Clark. We have a note which says that in the Popovici case the Supreme Court of the District of Columbia held that a divorce action was not a civil cause. This ruling was reversed on other grounds.

The Chairman. I take it the sense of the meeting is to include the bracketed clause referred to in lines 54 to 56 of A-31.

Mr. Dodge. That last judgment to be registered, of course, could not form the basis of an action in the other state, where the right of action would necessarily involve the bringing of another suit.

Mr. Clark. Could you not bring action on all these things?

The Chairman. You can't bring an action on a judgment.

Mr. Dodge. You cannot bring an action on an injunction or a judgment establishing a status, whatever that is.

The Chairman. I suppose the only purpose of this rule is to get execution and that the rule should be limited to cases for the recovery of money or property.

Mr. Morgan. What about an order for the payment of money?

The Chairman. If the court orders the payment of money it is a judgment for the payment of money.

Mr. Dodge. Mr. Sunderland's draft of the rule went beyond the judgments or orders on which a suit could have been brought in the other state.

Mr. Sunderland. I don't think so.

Mr. Morgan. I would not want that phraseology because the question is whether you can sue in another district court

on an equity decree, the enforcement of the equity decree.

Mr. Sunderland. You cannot sue on an equity decree in another state.

Mr. Morgan. If it is an equity decree for the payment of money there is a conflict on that.

Mr. Sunderland. There you probably could.

Mr. Morgan. You ought to, but if you say, "On which a suit could be brought," you are going to get into trouble on that conflict.

Mr. Clark. We have the proposed bill and I think we had better settle it because--

Mr. Dodge. I wonder if in a decree establishing a status you run into the conflict. I think you might because the status might depend upon the local law of one state which would differ from the law in another state.

Mr. Lemann. How would that affect us under the practical rule? You would want to do something under that.

Mr. Dodge. You would register a decree and you would establish it as legitimate, whatever the status might be, as a local law--what would the effect of that be?

Mr. Lemann. I cannot imagine why you would want to register it. If you had a judgment recognizing it as legitimate, I should think that would be reasonable.

Mr. Dodge. That is not a good illustration, but you certainly can have a decree in one state which would not have been entered had the suit been brought in another state because of the difference in local law.

The Chairman. It is res judicata now. Of course we are not enlarging the force of that judgment, and if it is not

res judicata it would not be registered.

I understand this is something to make a little easier your machinery of enforcement, and instead of having to bring a new suit and saying it is res judicata and that you want a judgment under the full faith and credit clause.

Mr. Dodge. I did not raise any question about a suit on which a judgment could be brought in a district. I merely raised that question. I had not thought of it before.

The Chairman. This is the limitation in this bill here that may cover it. It says:

> "Whenever any judgment, decree or order shall be entered by any court of record of the United States * * * requiring that money be paid, or that any act shall or shall not be done, or establishing a status, or investing any person with authority over property, such judgment, decree or order may be registered."

We have not placed any limitations here. We have simply said any final judgment.

Mr. Lemann. Of course the bill which you read from makes that a limitation.

Mr. Morgan. That is what he read there, final judgment.

Mr. Sunderland. You have to use language which may include things you do not have in mind, that is all.

Mr. Lemann. You do not have the restrictive words that are in the brackets in lines 4 to 7.

Mr. Sunderland. They were stated as limitations.

Mr. Lemann. Did you use them?

The Chairman. The bracketed clause here is an example, and in the bill it is a limitation, practically the same words.

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That has been threshed out before the judiciary committee. Why don't we follow the limitations in that bill?

Mr. Lemann. I see he has a reference here to full faith and credit on which Mr. Dodge has a useful suggestion and when registered that it shall have such faith and credit given to it as it has by law or usage in the court wherein it was rendered. Is that language in this rule?

Mr. Sunderland. I do not think it is here.

Mr. Lemann. I think that helped Mr. Dodge answer his own objection when you referred to that point because it showed it was not to go to the full faith and credit clause, and if you used that same language here, that might meet your difficulty.

Mr. Dodge. Yes, I think very likely.

Mr. Sunderland. That language as suggested was argued before the Judiciary Committee of the House. It was also presented in considerable detail by Mr. Taft, who was chairman of the committee of the American Bar Association at the general meeting at Buffalo, and it was discussed at some length and was adopted.

The Chairman. That all leads to the conclusion that it is wise for us to put in these limitations and the provision about faith and credit because we are going to go before the Bar Association this fall and they have had some reasons for putting those limitations in, and we will invite their support by following what they have done. Also, the same thing would hold true with the Judiciary Committee of the House which would be the one to consider those rules.

Why not leave that with the reporter with instructions to

adopt the same limitations and the same reference to faith and credit as in the bill?

Mr. Donworth. I think that should be done, Mr. Chairman. You can imagine that judgments in the court may be very far-reaching and they might be a final injunction, and to make that applicable in another district without the judge for that district being consulted about it, and so on--it seems to me that this language as you have, as you have indicated in your remarks the Judiciary Committee selected, included certain things that they thought were proper, and for us to extend it generally would not be wise.

Mr. Lemann. I think "full faith and credit" will meet a lot of objection.

Mr. Clark. I do not know that it makes much difference. I understood this was not a Judiciary Committee bill; it was Sunderland's.

The Chairman. He threshed it out with them, and we can say to them that this was all gone over with them before. It is an American Bar Association proposition and we can say to them, "You made no objection to it as to form once."

Mr. Clark. I don't care. With respect to full faith and credit, we are talking about something that I do not know what it means.

Mr. Lemann. You cannot help it because it is in the--we cannot abolish all discussion on points.

The Chairman. You see, that bill related to judgments in state courts, too, did it not? That is why that faith and credit clause was there. It has no relation to the federal judges at all.

Mr. Morgan. One district court does not have to give full faith and credit to another under the Constitution.

Mr. Donworth. Not under the Constitution.

The Chairman. So, the purpose of it is to give it the same force and effect where it is registered as where it was rendered.

Mr. Morgan. We have that phrase in there.

The Chairman. Is it all right to adopt a resolution, then, to place the same limitations in this rule that are contained in the bill?

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

Mr. Clark. I want to make sure I understand it. What was done about the full faith and credit?

Mr. Morgan. That is it.

The Chairman. The phrase "full faith and credit" you would not use, because that is a constitutional provision which relates to state judgments, but you should properly say that the judgment would have the same faith and credit where it is registered as it would have where it is rendered. That may be surplusage.

Mr. Lemann. You have the thought in there.

Mr. Clark. You want the limitations in this bill applicable as far as possible to the federal system. On the point of the ancillary receiverships, the committee's report was expressly that they intended to include it.

Mr. Lemann. I think the bill was limited to final orders, but if it covers ancillary receiverships, all right.

Mr. Sunderland. It does not say interlocutory.

Mr. Clark. It does not. It says: "Whenever any judgment, decree or order shall be rendered."

Mr. Lemann. That is why it might have been construed that the word "final" was in it. I do not see how it could be.

Mr. Clark. "Final" is not in it.

Mr. Lemann. I understand we want all the limitations in there plus the limitation of finality.

The Chairman. We adopted the motion to strike out the interlocutory feature of it.

Mr. Clark. That is all right, only now you cannot rely on that because before the Judiciary Committee that was one of the arguments they were making for the bill.

Mr. Lemann. That is true.

Mr. Morgan. Do you mean the argument on the interlocutory or the receivership?

Mr. Clark. That this bill would do away with ancillary receiverships.

Mr. Lemann. We can say we do not go as far as the Judiciary Committee.

The Chairman. And we will not meet with opposition from local lawyers who want to handle receiverships.

Mr. Sunderland. If they understand it.

The Chairman. Maybe that is why it died in the pigeonhole. Let us pass on.

Mr. Dodge. I wanted to ask one question about line 17. You can move to vacate the registration, but only one ground for so moving is stated, in the 17th line, that the court did not have jurisdiction. Is there not one other ground upon which a judgment can always be collaterally attacked,

namely, that it was obtained by fraud?

Mr. Morgan. You mean by direct attack?

Mr. Dodge. Or by collateral attack.

Mr. Morgan. What do you mean by collateral attack?

Mr. Dodge. The ground on which you can always attack a judgment.

Mr. Morgan. I did not understand that was true. I thought you had always to bring a separate action.

Mr. Dobie. If I get a judgment against you in Virginia, and try to enforce it in Massachusetts, I don't think you could set up that I obtained it by fraud.

Mr. Dodge. I could show want of jurisdiction.

Mr. Dobie. Yes, but not fraud.

Mr.Morgan. You can bring up want of jurisdiction at any time.

Mr. Lemann. May I ask this, if in the state where the judgment was rendered it could have been collaterally attacked for fraud, then you could do the same thing in the other state?

Mr. Cherry. Under that system about the same faith and credit.

Mr. Lemann. I think it is true under the full faith and credit clause.

Mr. Cherry. And the modified statement that we agreed on.

6 Mr. Lemann. Yes, it would still be true; but what Mr. Dodge means to say is that this language here does-- perhaps his point could be met by explaining the language of lines 14 to 20 and making it plain that the judgment may be vacated in the second state on the same ground, or on any

ground, on which it could have been vacated in the state where rendered. Is that what you mean?

Mr. Dodge. I may be entirely wrong on the law but I think any judgment could be collaterally attacked for want of jurisdiction or fraud upon the court. Now, I may be entirely wrong on that.

Mr. Olney. That is the expression here, "did not have jurisdiction of the subject matter or of the movant."

The Chairman. I ruled three days ago that movant was a matter of phraseology.

Mr. Olney. That is not the point of my objection. Where does he have the right to come in and show it?

Mr. Dodge. There are two grounds, not merely one.

The Chairman. Mr. Reporter, before we leave I want to remind you that you are to put a note at the bottom calling the Court's attention to the fact that this is a very desirable rule and asking whether they think we have gone beyond the limits of our statute.

Now we will take an adjournment until 1:45.

(Thereupon, at 12:45 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

AFTERNOON SESSION

(The Committee resumed at 1:45 o'clock p.m., on the expiration of the recess.)

The Chairman. We are ready to proceed, gentlemen of the committee. Is there anything further on Rule A31?

RULE A31 -- Continued

Mr. Clark. There is a long article on this general subject which I can furnish if any member of the committee wishes to read it. We studied several articles on the subject, and this one is just out: It is entitled "Full Faith and Credit in the Federal System." It is 20 Minnesota Law Review, 140.

Mr. Cherry. That is Ed's buddy.

Mr. Morgan. Yes, that is my buddy.

The Chairman. Very well, if we have finished with that rule, we will pass now to Rule A32.

RULE A32

Mr. Clark. You will recall that we had up the question whether it was worth anything to put it in. Mr. Freedman wrote a note about it, and I do not know how much is necessary now, but it refers to Equity Rule 11.

Mr. Dobie. I do not think it is vital but think it should be in there. There are several cases under it. Some of those cases were those of the purchaser of land, and that might be important here.

Mr. Olney. It comes in in connection with purchases or sales under foreclosure.

Mr. Dobie. Yes. That is the case of the Farmers' Loan & Trust Co. v. Chicago & Alton Railroad Co., 44 Federal 653.

Mr. Morgan. I move that it be retained.

Mr. Pepper. I will vote aye on that motion, although I do not know why the effect of such a rule is not the same thing as baldly making them parties. I should think if a person was bound by a decree and the decree could be enforced against him it would be hard to distinguish him except in words from being a party.

Mr. Olney. Come to think about it, under these cases which hold that a person who has purchased at a sale by a receiver takes the property subject to the terms of the sales, and if so, in effect he is a party. They say he makes himself a party.

Mr. Pepper. The point I raised is more a question of terminology than anything else, I imagine, but it does seem strange about having an order against somebody who is not a party, or enforcing an order against him, or giving him the right to enforce it. It would seem he is a party.

Mr. Morgan. It is equity rule now.

The Chairman. Mr. Freedman recommends that it be retained. While it is probably a restatement he thinks its omission might be construed to deprive a court of such power, if you drop the equity rule.

Mr. Pepper. I imagine he is right.

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

It is carried.

RULE A33.

The Chairman. We now come to Rule A33. What have you to say about that?

Mr. Olney. I do not know that this is anything than a matter of form, but as that second paragraph is worded it might lead to the impression that it did not apply to orders granted otherwise than upon notice. I think the rule should be that any district court may make, direct, and award, at chambers or elsewhere, in vacation as well as in session, all such orders as he is authorized to make, and where notice is required, upon notice. It is intended to cover, I take it, orders whether made ex parte or not. That is, that it is intended to give him the party at chambers or in court, in vacation or elsewhere, to make any order that is suitable. It is really a matter of form. I take it there is no doubt about that being what the rule means?

The Chairman. It is taken precisely from the statute.

Mr. Clark. Yes. Equity Rule 1 provided that an order in chambers would be referred to the same as in any other place. We had quite a discussion on that before.

Mr. Lemann. We made this in chambers before, and "or elsewhere" is important.

Mr. Morgan. What do you mean by "which shall be taken as sufficient proof"?

Mr. Pepper. Is there any implication in the term "or elsewhere" that it is to be elsewhere than in the district. It says "at chambers or elsewhere."

Mr. Dobie. I suggested in that connection that you put

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in "within or without the district."

Mr. Pepper. I will say that one of our judges has a place in Bermuda, and two of our judges have places in Miami, and it became necessary recently to fly down to Miami to get an order signed. I wondered if it was intended to cover such a thing as that.

Mr. Clark. We had suggested inserting the words "within or without his district."

The Chairman. Would you require parties to appear outside the district?

Mr. Olney. I will say for the information of the committee that there arose in California quite a number of years ago a case in which a rehearing was granted by four out of the seven judges, and it required four to grant the hearing. One of the judges had left his signature to the order for rehearing, and gone out of the state before it was signed by the other three. It was held that the signature became functus officio when he got outside the state, and inasmuch as there were not four judges present at the time of the rehearing order it was void.

Mr. Dobie. There was a case in our district of Virginia where the judge went out to West Virginia on an assignment, and while out there he signed some orders, and the question arose as to whether when sitting in another district he could sign orders concerning matters in his own district. I think he should be permitted to do that.

Mr. Olney. I brought it up to suggest the necessity for some rule.

The Chairman. What is the law today as to a federal

judge performing acts outside his district?

Mr. Pepper. I do not know, but by custom our federal judges make orders of all sorts when presented to them although outside the limits of their district.

Mr. Donworth. But they do not hold hearings outside their districts.

Mr. Pepper. That is the point we want to know about.

The Chairman. I do not think we should make it so broad that a judge who might wish to go to Miami could have a matter heard there.

Mr. Pepper. I move that the term "or elsewhere" be supplemented by some such phrase as "within or without the district" but that the rule be so phrased as to say that that extra territorial authority is limited to the signing of orders, and does not extend to the holding of hearings.

The Chairman. Is that the sense of the committee?

Mr. Donworth. I second it.

The Chairman. All in favor of that will say aye. (A chorus of ayes.) Those opposed will say no. (Silence.) It is carried. Is there anything else under A33?

Mr. Morgan. I do not know what the last relative clause in lines 27 and 28 mean.

"Which shall be taken as sufficient proof of due notice of the order or judgment.)

Mr. Clark. I believe Mr. Morgan suggested it should be only prima facie.

Mr. Morgan. No. You will never get me to use the term "prina facie." I do not know what it means.

Mr. Olney. That is the last paragraph on this subject.

Mr. Morgan. Does that mean that a person attacking it shall have the burden of establishing lack of notice by a preponderance of the evidence, or does it mean that the notice itself is conclusive, or what does it mean?

The Chairman. What would you substitute for "sufficient proof"?

Mr. Morgan. I do not know what is wanted. What about -

> "where such a note of mailing appears in the docket a party asserting lack of notice of entry in question shall have the burden of establishing such lack of notice by the preponderance of the evidence"?

By "preponderance of the evidence" I suggest makes it clear.

The Chairman. Wouldn't that be done by taking it as ordinary prima facie proof?

Mr. Morgan. That is in a different amendment.

Mr. Clark. It says:

> "And a note of such mailing shall be made in the docket, which shall be taken as sufficient proof of due notice of the order or judgment."

Mr. Morgan. I cannot help that. I want to know what it means if it <u>is</u> in the equity rule. I do not believe anybody meant these people under notes.

Mr. Dobie. I would say that means sufficient notice.

Mr. Morgan. You are going to make it conclusive.

Mr. Dobie. I do not mean to say that is good, but that is the way I understand it. I think it is very bad. It is affirmed in terms of proof.

Mr. Olney. How about this suggestion: It is really bad business to throw anything more on to the clerk of the court than is absolutely necessary. It is far better in the matter of giving notice to require the party who is interested in the giving of the notice to give it rather than to throw that burden on the clerk of the court. That principle runs through a number of these rules.

The Chairman. This affects the right of appeal, or the time of appeal I mean. In the case of a judgment, for instance, the clerk makes a note in his docket that he has mailed you a notice and when that notice has been mailed it starts the running of the time on appeal.

Mr. Olney. A party to a lawsuit should have to give you notice, and the time run from that.

The Chairman. It is perfectly sufficient to get a postal card from the clerk of the court on the subject, but that does not start any time running that is vital.

5 Mr. Pepper. Why wouldn't Mr. Morgan's suggestion properly state that?

Mr. Morgan. I have no brief at all for this position but I say if you say this you will know what it means:

> "Where such a note of mailing appears in the docket the party asserting lack of notice of the entry in question shall have the burden of establishing such lack of notice by the preponderance of the evidence."

The Chairman. I think that expresses the idea.

Mr. Clark. This rule goes back to the early Equity Rule 2.

Mr. Pepper. Well, as Mr. Morgan points out, we are really

facing the alternative between making the mere entry conclusive and making it something less than conclusive, and I take it we are all of opinion it should not be conclusive. And if it is not to be conclusive is it not reasonable that the person who would be bound by it if he had received notice, should have the burden to establish by the preponderance of the evidence that he did not get it? I do not see any other way out of it, unless you are going to put the burden where it does not belong, and that would be on the party in whose favor the court has acted, to pursue the other party and make personal delivery to him,or something like that, which would not seem to be fair.

The Chairman. For instance, motions for a new trial decided by a court without a jury shall be made within ten days. It is very important that the running of the time be fixed, and the court signs an order and judgment for one side or the other along with his finding. Your rule would make the notation prima facie but the lawyer on the other side would want it that he might serve a copy of the order on his adversary.

Mr. Pepper. That is right. This is merely to cover a case where it is left to the clerk.

The Chairman. It is moved and seconded that the substance of the proposal by Mr. Morgan be put in here. What is your pleasure?

Mr. Cherry. Question.

The Chairman. All in favor will say aye--

Mr. Lemann (interposing). Do time limits for a new trial run from notice or from entry?

The Chairman. From notice.

Mr. Lemann. I assume the reporter of the committee will check up on all these times and see that they are proper. When you look at line 22 you will see it is "entry in the book." What book? Is it the court book? I look at the equity rule and there they had an order book. Of course we have not yet got to the provision for books, but as to this entry "in the book" I do not see anything here about any book. I think you ought to watch the matter and conform all these things.

Mr. Clark. I expect that entry could come out.

The Chairman. In Rule A35 you will find books. We will come to it in a minute.

Mr.Donworth. In line 3, after the word "pleading" I suggest putting in "or other proper paper."

Mr.Clark. Mr. Wickersham did not want to have a motion on pleading.

Mr. Donworth. It looks as though it is restricted to pleading or any other paper.

The Chairman. If there is nothing more on Rule A33 we will now pass to Rule A34. Is there any objection to that?

RULE A34.

Mr. Donworth. I think it is all right.

The Chairman. Then we will next pass to Rule A35.

RULE A35.

The Chairman. What have you to say about that rule?

Mr. Clark. You will recall that Mr. Hammond and Major Tolman were to make a report on that, and they have done so.

They have also drafted a rule which I think is very good and I am perfectly willing to accept the rule, except that I think it wouldbe of advantage to add to the rule they have drawn these instructions we have to the clerk about entering court and jury cases. I think that has two advantages which would seem to me important: First, it is an instruction as to what he should do; and, secondly, I think it will help to do away with the old distinction between law and equity. The clerk may want to know what he has to do, and he may start out on his labors with equity and law, and start the bar and the judge in bad habits. To both as to directions and as tending a little philosophically to push, I think that addition is worth while.

The Chairman. You will find Rule A36 which Mr. Tolman suggests as a substitute rule.

Mr. Clark. I would suggest that we retain these few directions in the draft we have as to the jury cases.

The Chairman. What is the suggestion as to jury cases?

Mr. Clark. I should like to add in the appropriate
6 places; for instance, insert our lines 7 and 9 after their line 14, and insert our lines 16 to 23 at the end of their rule.

Mr. Pepper. It is not clear to me just what the dividing line is between these three books, docket book, order book, and journal. At first I thought the docket would show nothing but pleadings and final judgment or any judgment, but not orders, that they would go into the order book. But it is provided that orders are to be docketed. So they will appear in the docket, and also in the order book, and then finally it is provided that in the machinery "orders, judgment and proceed-

ings" shall be entered, which seems to be a duplication.

The Chairman. You are now looking at the original draft. As the result of information obtained from the Department of Justice as to what the ordinary system is, Major Tolman provided the rule found on page 36.

Mr. Pepper. Well, no doubt that answers my question.

Mr. Clark. They have abolished the machinery, which I think is a very good plan.

Mr. Pepper. I had the other draft.

Mr. Lemann. Is there a book in the substitute rule for the entry of interlocutory orders?

Mr. Clark. Such other orders as the court may direct, I suppose covers that.

Mr. Lemann. Unless the court directed it they would not enter any orders. What kind of record would be kept of what goes on in the court room?

Mr. Morgan. Where is the journal?

Mr. Lemann. Mr. Clark just said there is a change made to eliminate the journal. With us we call it the minute book, and I suppose it is called elsewhere the journal, being the book which shows what went on in court that day. It shows the impaneling of the jury and other matters and it is a record of what happened. For instance, that such and such a motion was made, argued by counsel, and perhaps taken under advisement by the court. Then there may be another entry on motion for new trial, argued by counsel, and taken under advisement by the court. If we have no journal we will have no requirement but as to final orders that would be in the book. There wouldn't even be a requirement as to interlocutory orders, and no diary

as it were of what happened. The present federal practice would require the keeping of a journal or a minute book, wouldn't it?

Mr. Donworth. I think that such a blotter is kept in the court room, and as Mr. Lemann says, the clerk or deputy clerk in attendance does note down whatever is done. I do not know that that constitutes a record to which one goes unless there is some dispute. It is a convenient thing, but how final it is I do not know.

Mr. Lemann. For instance, if you have a question about too many postponements or continuances, the minutes would show that every time a thing came up there was request for a continuance. You might want to show to the upper court that you had had, for instance, five continuances. I think it gives you a record of minute entries that might be quite useful in the writing of briefs for the upper court. Many times you could use it to eke out some description of what occurred in the lower court. Otherwise there would be nothing except what was in the minds of counsel.

Mr. Clark. I did not know there was such a book. I thought it was a curious thing that in one place you would have certain kinds of orders and in another place something else.

Mr. Lemann. I had the impression it was to fulfill the purpose of a minute book in a state court. What is this machinery, Mr. Hammond?

Mr. Hammond. They formerly kept journals in all cases. The purpose of the equity rule, as I understand it, was to have a separate one for the equity cases, from the law cases,

and the journal there referred to is not the court minute book you are referring to. I did not put anything in the rules in regard to court minute books because, in the first place, our rules only cover civil actions. I just assumed that any court would keep a minute book of its proceedings, and that we should not concern ourselves with that, that it did not make an awful lot of difference whether they kept a book or sheets showing a minute of the proceedings.

Mr. Pepper. Wouldn't a note to our rule to the effect just stated by Mr. Hammond clarify the situation, that we assume in each district the court will, either by rule or pursuant to custom, keep its own minute book?

Mr. Lemann. Is that open to the provision that the court may do that?

Mr. Donworth. That would cover everything but criminal; bankruptcy, admiralty, and everything else.

Mr. Morgan. We could not touch that.

Mr. Hammond. You might put it this way: That court proceedings in civil actions shall be kept in the same way, along with other cases.

Mr. Donworth. I do not know but what we might leave it to the districts, but one district might not want to do it. Or you can put something in there requiring them to do it if you want to and assume it is necessary.

Mr. Olney. This rule of Major Tolman's is not intended
7 to discard the minute book at all.

Mr. Hammond. No; absolutely not.

Mr. Pepper. Don't you think we may assume that that is so much the essential practice it is not necessary to do more

than by a foot-note say our rule covers anything of that kind which is the common practice?

Mr. Donworth. I move that that be adopted.

The Chairman. It is moved and seconded that we put a foot-note as to minutes. What is your pleasure?

Mr. Olney. I would suggest merely as an amendment that in the discretion of the drafting committee it may be either by way of a foot-note or rule.

Mr. Donworth. All right.

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

Now, Dean Clark, this rule of Major Tolman's and Mr. Hammond's, found on page 36 of Mr. Tolman's comments, is dealt with on page 34 of your review of the comments. Your first suggestion is to insert in the Tolman rule after line 14 your lines 7 to 9. Now, I understand your lines 7 to 9 require that the clerk shall enter the word "jury" conspicuously in such docket in each case which shall have been properly claimed or ordered for jury trial in accordance with these rules. If there is no objection to that we will take it as the sense of the meeting. But the second thing you ask for is that your lines 16 to 23 be put at the end of the rule. Let me call the attention of the members to what that is. That provides:

> "He shall also, under the direction of the court and pursuant to rules which the court may establish, make and keep calendars of cases ready for trial, in which he shall separate by suitable designation 'jury cases'."

Now, some courts do not keep calendars but make them up at each term, and some of them have running lists. Don't you

think you can cover that by just a general statement that each court may follow its own system as to calendars? Why require a court to keep a continuous calendar? For instance, in the district in Minnesota the calendar is made up a week or two before the term and printed and issued. You do not have to keep a calendar at hand every time. The practice varies so about calendars. I think it would be enough to just mention the fact that the matter of keeping calendars should be regulated by local practice.

Mr. Clark. I do think the first one, lines 7 to 9, is more important than this.

The Chairman. We have agreed to that.

Mr. Morgan. I think what he wants is that any calendar made up shall discriminate as between court cases and jury cases.

Mr. Clark. That is what I am more interested in.

The Chairman. Just put in a clause that in any calendar made up by the court according to local practice shall cover that.

Mr. Donworth. What are we considering?

The Chairman. We are considering Rule A35. But the real rule is on page 36 of Major Tolman's suggestion. The two main suggestions we have dealt with. Are there any other suggestions on that? The rest of your comments, Mr. Clark, call for changes in the terms of your own rule, which it seems to me is inappropriate because we are using a different draft. You call for a change on line 11 of your rule, but we are not dealing with your rule now.

Mr. Clark. I guess you are right about that. It was

getting late at night about that time.

The Chairman. All right. I cannot find any other proposal on Rule A35, so we will pass to Rule A36.

Mr. Donworth. In the communications obtained from clerks
8 of courts, and I think Mr. Hammond obtained them from several clerks, say those referring to orders and judgments is a waste of time, that they never knew anyone to consult such as a journal and an order book; and since typewriting has become so common I do not think I ever looked at a journal to find out what the court had done, or to an order book. I went to the attached files and there is a typewritten order and so on where the judge said enter. Still this has been required for a long time, and it is a safeguard even if it is a waste of money. A document might be abstracted whereas a book would not be abstracted. So I favor ignoring what these gentlemen say, although I believe it is true.

Mr. Clark. Major Tolman and Mr. Hammond suggested that they could use photostats, lines 15 to 19, and there is a note at the bottom.

Mr. Donworth. Do you mean Major Tolman's comments?

Mr. Clark. Yes. To keep a book or an order book in which shall be kept exact copies, I suppose they think that makes it clear that you can stick in carbons.

The Chairman. Books may have loose sheets or anything of the kind.

Mr. Olney. The clerk at home spoke to me about this, and I think he told me, at least as I remember it, that they conceived they are bound to keep this in longhand in the books. Of course that would be utterly foolish.

Mr. Morgan. Why, he is crazy.

Mr. Clark. Why isn't Professor Sunderland's suggestion "entered or inserted" all right?

Mr. Hammond. That was in the equity rule, and we took that out for the express purpose of not requiring it to be written into the book.

Mr. Clark. It said "at length" and we were going to take out "at length" and put in "inserted."

The Chairman. How about putting in an abstract?

Mr. Lemann. If you leave it to a deputy clerk to put in the substance of an order you will get more of an element of uncertainty. And if the rule provided for the substance of it you would have no lawyer to put in the substance of it. I think it better, as Judge Donworth says, to do a little unnecessary work and go to a little unnecessary expense, and put it all in if you are going to put any in.

The Chairman. Does the clerk make a verbatim copy in the book?

Mr. Olney. In the case of equity, in his order book it is supposed to be put in in full, verbatim. The only purpose of an order book is the one mentioned by Judge Donworth, namely, that it will constitute a record in case of the loss of the filed instruments. For that purpose it should be a verbatim copy.

Mr. Morgan. Yes.

9 Mr. Lemann. I will say that every now and then a lawyer takes out a record that he should not take out, and he often fails to bring it back.

Mr. Olney. I should say he does.

Mr. Morgan. There was a case I heard of where they sent a fellow down to a New Jersey court, and what he thought would be a certified copy of an order turned out to be that the fellow showed up in Boston with the original. He got it and came away with it. And he says, "What am I going to do with it?"

Mr. Donworth. Major Tolman says the change will allow photostatic copies to be filed in the book.

Mr. Clark. We were trying to make it clear that the change would admit of that, but whether the language is adequate for the intended purpose or not I do not know.

Mr. Pepper. I am a little disturbed with the idea that it is to become necessary for clerks to spread upon the docket or order book verbatim copies of orders. You take a decree appointing a receiver, for instance, and you make a sort of miniature Constitution of the United States as to what the receiver can do. These things sometimes run to ten or fifteen printed pages. And one wonders whether it is worth while to impose so much labor on clerks. These gentlemen are pretty poten in their influence, and if we try to upset the settled practice too much we may have trouble.

Mr. Lemann. Is it intended to set it up so they will conform to it as a whole? There may be a district here or there that does not do it.

Mr. Olney. They are required by law to keep it.

Mr. Pepper. We have a very admirable court clerk in Philadelphia, George Broderick, who has been there for a great many years, and he is an authority on everything that lawyers do not know, which gives him a large field, and his return is

to the effect that he keeps only notations in a minute book of the briefest sort, that the only things set forth at length are decrees in equity. In law, admiralty, and criminal proceedings there is the mere notation of the filing of an opinion or the entry of an order, without copying it at length.

The Chairman. I was thinking more of law than of equity. Suppose a court tries a case without a jury, any law case, and after elaborate findings on one thing and another he gives an order for judgment. Would you have to set that order out? Suppose I make a motion for a new trial,notwithstanding the verdict, or in the alternative, and the motion is denied, cannot the clerk just stick in the book "Motion for new trial denied", or something like that? Or does he have to state the whole thing verbatim? That is the thing that troubled me about it.

Mr. Lemann. Doesn't this thing try to define orders?

The Chairman. Yes, it does. I should like to hear from Mr. Hammond about that. There is a new rule that he and Major Tolman has drawn, which is limited to final judgments, decrees, and orders.

Mr. Morgan. But lines 7 to 11 by Mr. Mitchell provided for the kind of record you are thinking of, to the effect that all papers and orders filed with the clerk, and so forth, shall be entered chronologically on the book, and shall be brief but sufficient to show the nature, and so forth. That is the kind of record you want for the interlocutory things.

The Chairman. Yes.

Mr. Morgan. And this other for the final.

Mr. Donworth. You go to the docket and you learn every-

thing that has been done in a case, within a brief compass.

The Chairman. Do you want the committee to do anything more in regard to limiting this, Mr. Hammond? That seems agreeable to everybody.

Mr. Hammond. We limited it because we thought it was too much of a burden on the clerks to put in the language of every order, in every case, like the equity rules.

Mr. Donworth. This say: All appealable orders and such other orders as the court may direct.

Mr. Lemann. There ought to be a protecting record of that. I do not think it ought to be floating around on a piece of paper that might be abstracted or lost. Somebody might take out a judgment in a thing of that kind, an appealable order.

Mr. Morgan. That is right.

Mr. Pepper. I move that we adopt the rule as reported, with the changes suggested.

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

RULE A36.

The Chairman. That takes us to Rule A36.

Mr. Clark. That has quite a little in it, as you will see. Now, Major Tolman has something about these other things--well, I guess--wait a minute.

The Chairman. We want the phrase "sitting in the several states" put in in order to exclude any argument as to whether it covered United States courts of the District of Alaska, or

Puerto Rico, or Hawaii.

Mr. Clark. He points out that certain courts in Puerto Rico and Hawaii should conform by separate statutes, but I guess that takes care of this. There is a statute that these courts shall proceed therein in the same manner as the district court.

Mr. Lemann. What about lines 2 to 5:

"These rules shall apply in the district courts of the United States, sitting in the several states, and in the Supreme Court of the District of Columbia, governing the forms of process" and so on.

Do these rules govern them?

Mr. Clark. Somebody wanted to add something to that.

Mr. Morgan. And shall govern.

Mr. Dodge. Why do you repeat that twice?

Mr. Dobie. Is it only verbiage?

Mr. Dodge. It is stated twice, in lines 4 and 16. That these rules shall apply in the courts of the District of Columbia. Why not strike it out in line 4?

Mr. Lemann. And you put it also in line 16.

Mr. Morgan. But they shall not apply to proceedings in bankruptcy; is that right?

Mr. Dobie. No, he is talking about lines 16 and 17; that these rules shall applyto the Supreme Court of the District of Columbia.

Mr. Clark. That is, that we could take out everything referring to the Supreme Court of the District of Columbia and put it in subsection (b)?

Mr. Dobie. Yes.

Mr. Pepper. Mr. Chairman, when we come to adopt Rule 1 I suppose that will include a definition of the term "civil action" and will show that we are providing for a single form of action to be known as a civil action. Assuming for the moment that that is so, then ought not this rule to read, in lines 2 to 6 thus:

> "These rules shall apply in the district courts of the United States sitting in civil suits, and in the Supreme Court of the District of Columbia, and shall govern the forms of process, writs, pleadings, and motions, and the practice and procedure in all civil actions"?

Mr. Morgan. Yes.

Mr. Pepper. It seems to me unnecessary to go on and speak of controversies of which such courts have jurisdiction when we are at pains to state that all these controversies must be reduced to the form of the civil action.

The Chairman. Your point is well taken, but couldn't you simplify it by saying: These rules shall apply in these courts and shall govern the forms of process, and so on?

Mr. Pepper. I think that is all right.

The Chairman. Why do you have to say all that? Why not say they apply, and be done with it? You have already said in an hundred places as to the applications of rules of civil action.

Mr. Pepper. That would be better still, but it seemed to me we ought not to supplement "civil cases" by a phrase which opens up the question as to whether these rules do apply to something besides a civil action.

Mr. Clark. I thought you proposed to put in the exclusive

clause. We were told to take this out.

The Chairman. To take what out?

Mr. Clark. You see, the bankruptcy and copyright rules do not apply here.

Mr. Pepper. I did not mean to strike that out.

Mr. Clark. I think your first suggestion is all right. That is, that we say "in all civil actions." Do you want to say of which such courts have jurisdiction, or strike that out?

11 Mr. Pepper. It seems to me it is implied in the use of the term "civil action," that it is an action pending in court of which it has jurisdiction.

Mr. Clark. All right. And you can take out the whether clause down to exclusive. We are going back to the statute here, and it may be this other is not necessary.

The Chairman. They apply to the extent that our rules deal with forms of process. You can just say the rules apply.

Mr. Pepper. You might say: These rules shall apply to all civil actions in the district courts of the United States sitting in the several states and in the Supreme Court of the District of Columbia.

Mr. Clark. And then "exclusive of proceedings," and so forth.

Mr. Pepper. And then have the exclusive clause.

Mr. Clark. We have already taken that out about the District of Columbia.

Mr. Lemann. Take the last sentence of clause (b) and move it up.

Mr. Dobie. That would cut it out of the general clause and put it in clause (b).

The Chairman. You say several times it applies to the District of Columbia.

Mr. Clark. We did not want to let those fellows get away.

Mr. Pepper. I move that the rule read thus:

"These rules shall apply in all civil actions in the district courts of the United States, sitting in the several states, and in the Supreme Court of the District of Columbia, exclusive of proceedings in bankruptcy and copyright" and so forth,

down to the end of line 11, and then in subsection (b) that we strike out lines 16 to 20, inclusive, and retain lines 21 to 24, which read:

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

Mr. Dobie. Don't you think you had better retain the part there where it says district judge, that that means a justice of the Supreme Court of the District of Columbia?

Mr. Pepper. Yes.

Mr. Dobie. Subject to that I second Senator Pepper's motion.

The Chairman. Is there any further comment?

Mr. Clark. When you say retain subsection (b), shall we keep it as a subsection or consolidate it?

Mr. Pepper. I think it would be a good plan to keep it as a subsection, but it might be consolidated.

Mr. Lemann. What is meant by the term:

"by the rules governing bankruptcy and copyright"?

Are there copyright rules?

Mr. Clark. Yes.

Mr. Lemann. Provided by whom?

Mr. Clark. By the Supreme Court of the United States. The suggestion was made that we might present to them the proposition of amending those rules. And if you will look at the footnote, page 5 of the notes, right after we suggest that amendments be made in those rules, you will see the present bankruptcy and copyright rules we are quoting here say that the federal equity rules shall apply.

Mr. Lemann. Is it proposed that the copyright rules shall make these rules applicable?

Mr. Clark. Yes.

Mr. Lemann. Then why make an exception, because simultaneously with these rules the Supreme Court can promulgate a change in the copyright rules, and you will not need an exception here.

The Chairman. I asked about that before, but this is the way it was done. I should think this would do. You say these rules shall apply in civil actions exclusive of proceedings in bankruptcy. That implies that a civil action is a proceeding in bankruptcy. Why not put a period there and instead of "exclusive" say they shall apply to proceedings in bankruptcy and copyright only to the extent that they are made to so apply by the rules governing bankruptcy, copyright and admiralty? We put that in there because here is the Supreme Court of the United States that has the power to make statutory rules on bankruptcy, and we were afraid if that were not done they would

26b

be exercising their power under the bankruptcy act in a way they did not intend to. So we thought it was the part of safety here to connect the two sets of rules together and make it clear that the court did not in these rules, although acting under another statute, cancel the rule in bankruptcy and admiralty.

Mr. Lemann. Why not put it this way: The Supreme Court has the power to regulate bankruptcy and copyright--and are we dealing with admiralty? I do not think we are putting that aside, but bankruptcy and copyright and proceedings in admiralty, and that does not contemplate that they will be made applicable.

Mac fls
2?45

The Chairman. That is right, so that ought to go out.

Mr. Lemann. It seems to me, if the Supreme Court has power to regulat bankruptcy and copyright, and we contemplate that they will make these rules applicable, we should cover it all, and let the Supreme Court do it in one job. The only reason that they had separate rules before was that their power was limited. Now it is extended to cover this class of cases.

Mr. Pepper. The Chairman is clearly right, that whatever we do in the matter to which Mr. Lemann is addressing himself, it should be made the subject of a separate statement in a separate sentence.

Mr. Lemann. I agree with that.

Mr. Pepper. Because, to begin with, the "exclusive" implies that something is being taken out of what has previously been comprehended, but it is not. It is a new thought.

Mr. Lemann. I suggest that we add a sentence, perhaps in another section or another paragraph of this rule, to the effect that they shall also apply to bankruptcy rules, to the extent it is proposed to have them apply, and that they shall also apply to copyright rules.

Mr. Clark. There are two points:

First, as to making a separate sentence, so far as I can see, that is going to wring Major Tolman's heart, because he has from time to time brought out that all these other things are civil actions, and he cites cases on that point.

Mr. Lemann. Why would that break his heart, if we did that? Take the first sentence:

"These rules shall apply to all civil actions."

Major Tolman's heart is intact up to this point, because we

have not said anything to the effect that bankruptcy and copyright are comprehended within the terms of "civil actions".

Mr. Clark. His point is that they are comprehended. Turning to your other point, I might say that in our first draft we were going to do it all at one time. After long and strenuous debate, we were ordered, directed, and compelled to do it separately here. Further, there is some argument for separation, because obviously not all bankruptcy proceedings covered by the bankruptcy rules are going to follow this draft.

Mr. Lemann. No; but we could provide in here what the difference would be.

The Chairman. We have a statute here to the effect that we can make uniform rules in civil actions, whereas civil actions in that statute were never intended to cover bankruptcy and copyright. There was already a statute that gave the Court power to make rules in bankruptcy, and neither Congress nor we anywhere have used the words "civil action" to apply to bankruptcy.

I will not admit for one minute, no matter what Major Tolman's memorandum says, that the words "civil action" as used in the statute we are dealing with, or in the rules anywhere, should be construed to include bankruptcy proceedings. There may be decisions arising under different situations, and one thing and another, where, for the purposes of the case, the Court had reason to give that meaning to "civil actions", but I do not think we should use a sentence that contemplates that we thought that unless we excluded bankruptcy it was within our authority under this statute. That is why I said that instead of saying "exclusive of" we should say, "They shall apply to

proceedings in bankruptcy and copyright only to the extent that by the rules covering those subjects, they are made to apply."

Mr. Lemann. I agree with that as far as it goes. I would like to know whether you see any objection to fixing here the extent to which they are made to apply, and let the lawyer not have to hunt around.

The Chairman. The lawyer in a bankruptcy proceeding will not look at these rules to find out what the rules of procedure are. He ought to be able to go to his bankruptcy rules for it, and the only reason we are putting it in here is to avoid putting the Supreme Court in the position of having said, in the bankruptcy rules, that they shall apply, and here saying that they shall not. So that I think they ought to be in the bankruptcy rules, and the lawyer in bankruptcy ought not to have to be chased into this section to find out.

Mr. Dodge. I agree with that entirely as to bankruptcy, but I am too ignorant to know why a copyright case is not an ordinary civil action.

The Chairman. I was talking in terms of bankruptcy.

Mr. Lemann. The same argument you made would show that it was not within "civil actions" as used in this statute, because there were independent provisions. That argument might also be made applicable to copyright proceedings.

Mr. Dodge. Are we supposed to absorb the rules as to copyright cases in here?

Mr. Clark. There are a series of copyright rules, you know.

The Chairman. By the Supreme Court.

Mr. Clark. Yes; by the Supreme Court.

Mr. Dodge. Is that the procedure in litigation as to copyright?

Mr. Clark. Yes.

Mr. Dodge. Why should they not be embodied in these rules? They are ordinary civil actions, are they not?

Mr. Clark. The way it stands now is that the first section of the copyright rules is like the way we have it here, except that they say that they shall follow the equity rules so far as they may be applicable.

Mr. Dodge. We certainly ought to embody them, if that is the case.

Mr. Clark. There are others.

Mr. Lemann. Mr. Chairman, how would it do to do both things -- to put in a sentence here saying how far this thing goes with bankruptcy proceedings, and another sentence saying how far it goes with copyright proceedings, and then it is all tied in here. Then, to get your point, that the bankruptcy lawyer might not expect to find it here, amend the bankruptcy rules as proposed and the copyright rules as proposed. I do not think it is very important. I think the way you suggest would be perfectly adequate. It is a matter of taste.

Mr. Pepper. Is the copyright field more distinctive than the patent field?

Mr. Clark. There are no patent rules, and there are copyright rules.

Mr. Dodge. I thought copyright cases were less distinct than patent cases.

The Chairman. We suggested amendments to the bankruptcy

and copyright rules.

Mr. Lemann. I saw that. I thought it really came down to the question whether we would just put them in here.

The Chairman. The fellow in bankruptcy would never see them.

Mr. Lemann. We can put them in there, too.

Mr. Clark. Section 25 of the copyright act deals with infringement, and who shall have certain damages; (a) injunction; (b) damages; (c) accounting; (d) destruction of copies and plates; (e) royalties.

Then it says, under "Rules of Procedure":

> "Rules and regulations for practice and procedure under this section shall be prescribed by the Supreme Court of the United States."

Under "Rules of Practice" the first rule says:

> "The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings under this section."

Then there are 12 further rules. The first one is:

> "A copy of the alleged infringement and a copy of the work shall accompany the petition, except in cases of alleged infringement by books, et cetera, where it is not feasible."

Section 3 is with reference to the use of affidavits, the number and location of alleged infringing copies, and so forth, and executing a bond.

Section 4 provides that the bond shall bind the sureties, and they specify quite a little on the bond, and how it is filed.

"Upon the filing of the affidavit and bond the clerk shall issue a writ directed to the marshal to forthwith seize and hold the same subject to the order of the court."

Section 5 provides that the marshal shall seize the same, and that he shall also attach to said articles a tag or label stating the fact of such seizure.

Section 6 provides that the marshal who has so seized shall keep them in a secure place.

Section 7 is a provision whereby the defendant can object to the bond in three days, and what he does.

Section 8 provides that within 10 days a notice of the justification --

Mr. Donworth. Is not that enough to show that we should not try to incorporate them, but refer to them as still subsisting in some way? It is too complicated.

Mr. Dodge. It certainly is.

Mr. Dobie. But where we say, "The existing rules of equity procedure", do we not have to put something in here that substitutes these rules so far as they are applicable?

Mr. Morgan. You have done that, have you not?

Mr. Pepper. That is the Chairman's suggestion.

The Chairman. I say this: "They shall apply to proceedings in bankruptcy and copyright to the extent that the rules governing those subjects so provide."

It is a tie-up. That is all it is.

Mr. Lemann. What are you going to do about admiralty?

The Chairman. Strike it out.

Mr. Clark. Would it not be safer to have it in? It

would not do any harm.

Mr. Donworth. I do not understand the striking out. Do you mean to strike out the statement that these are exclusive of the proceedings in admiralty?

The Chairman. Strike out any reference to admiralty here.

Mr. Donworth. Do we not want to make that clear? The Supreme Court has had rules in admiralty from 'way back, and it is so peculiar in itself, so different from anything else, that I think we ought to say we are not touching those. Admiralty has never been considered a civil proceeding at law or equity.

Mr. Dobie. There are various decisions on that, Judge. They held, in Adkins v. Disintegrator Company, that the rules of venue did not apply to admiralty, and that is what they held in the venue statute. I think we ought to mention them. I think it is clear that the rules do not apply.

Mr. Donworth. I say mention them by exclusion.

Mr. Dobie. Exactly.

Mr. Lemann. How would it do to change line 8 to read:

"but they shall not apply to proceedings in admiralty or proceedings in probate in the Supreme Court of the District of Columbia, and shall apply to proceedings in bankruptcy and copyright only to the extent to which they may be made applicable thereto by rules of the Supreme Court."

The Chairman. That is acceptable.

Mr. Pepper. I second that.

Mr. Morgan. You could put it the other way around, and say:

"nor shall they apply to proceedings in bankruptcy or copyright, except insofar as made applicable thereto by rules governing bankruptcy and copyright, respectively."

The Chairman. Let us leave that to the style committee. We will take that as the sense of the meeting.

Mr. Clark. One further thing on these proceedings in probate. I brought up the question of whether divorce in the District of Columbia was a civil action. There is no case that says it is not a civil action. I suppose we want these rules to apply.

Mr. Morgan. In divorce?

Mr. Clark. Certainly. Why not?

Mr. Morgan. Certainly.

Mr. Clark. Shall we say they apply, or let it go?

Mr. Morgan. No. I suppose the exclusion of probate proceedings in the District of Columbia would mean all other proceedings.

Mr. Clark. I think it is enough.

The Chairman. Is there anything else on A36?

Mr. Donworth. Yes. Beginning with (c) at the bottom of the first page, to get the connection with the next page, it reads:

"(c) Removed cases and cases heard before three judges. These rules shall apply to civil cases removed to the Federal courts from the State courts, and shall govern all procedure after removal, and a repleading shall not be ordered unless the court deems it advisable. In a removed case in which the defendant

has not answered, he must present his defenses pursuant to rule 13 at the time of filing the transcript of the record of the case in the Federal court."

I have two suggested changes there, which I shall explain. Taking them wrong-end-to, I would add, at the end of the sentence

"or within five days thereafter."

The present statute gives them 30 days, and there is a general feeling that that is too long, and all that. He has 30 days after filing his transcript. I think, however, he should have a brief time, such as five days.

The other amendment --

The Chairman. Before you reach the other amendment, may I interject there just a thought for your consideration? Suppose that you have 20 days to answer in the State court, and you are removed at the end of 10 days. Under your rule the time would be shortened. My suggestion is that on removal you have until the time has expired as fixed by State law, and, in any event, five days after removal, or three days. If he still has 10 days left under the State law, or 15, he still has 15 after removal.

Mr. Donworth. I do not oppose that in principle at all, but practically, you see, you have your 20 days, assuming that most States give the defendant 20 days to answer. Assuming that there is 20 days to answer, you can file your petition at any time during that 20 days, even at the end, and often you want to study what to do, whether to remove or not. Then you do not file your transcript in the Federal court. You do not have to until 30 days after you have filed your petition in the State court. So there are two things, two different

steps there, which may be 30 days apart, if the defendant uses all his time, namely, his presentation of the petition to the State court and the filing of the transcript in the Federal court, for which he has 30 days if he wants to use it. During all that time he can be studying what he wants to do. And so this extra time is not so important, but I did think that as long as the present statute gives him 30 days additional, even after the 30 days for filing the transcript, if we cut it down to five it would give satisfaction.

The Chairman. If the delayed filing is prescribed, there would not be any point to my suggestion. There may be cases where, for reasons of expedition, and because he wants some relief or something, he removes the case within 10 days, immediately filing his transcript. Your rule would cut his answering time down, then, to 15 days.

Mr. Donworth. If it can be properly worded, I have no objection at all to the Chairman's suggestion. But perhaps the second amendment will throw light upon the first. It says he must present his defenses pursuant to rule 13. If you turn back to rule 13, that is, the point about objection to the service, and other defenses of law and fact, it says:

"(b) Other Defenses. Every other defense or objection in point of law or fact" --

the word "defenses" is carried over into the late rule we now have in view, but not the "or objection in point of law or fact".

"Every other defense or objection in point of law or fact, whether in abatement or bar, to the right of action or defense set forth in the last pleading on

file shall, except as stated in rule 14 (Motion for Further Statement or To Strike Out) * * * be made as a defense in the answer."

Turning to rule 14, it is an important rule in a removed case. It is the first opportunityyou have to ask the Federal judge to help you out on a defective statement in a complaint, and that certainly should not be cut off. So my amendment reaches that.

Turning now to rule A36, page 2, by simply inserting after "rule 13" "or 14" it means that he must either actually answer or he must make a motion, if he wants to, which he could do if originally sued in the Federal court.

Mr. Morgan. You want "objections" after "defenses" there, too, I suppose?

Mr. Donworth. I think it would be better to say "defenses or objections pursuant to rule 13 or 14."

Mr. Morgan. I think so, too.

Mr. Dobie. You want to give him a certain amount of time, do you not, after the transcript has been filed in the Federal court?

Mr. Donworth. Yes, but I am more anxious not to cut off his right for a motion to make definite.

Mr. Dobie. There is another reason for that. He has 30 days after the filing of the removal petition, but it might take a State judge some time to rule on the petition. He is not going to prepare the transcript until the order has been granted. It is not 30 days from the order granting the removal, but from the filing of the removal petition. But if the State judge takes 25 days before granting the removal order, that leaves him only five days to file his transcript and answer.

Mr. Donworth. I would take up the first amendment first, namely, that you amend lines 29 and 30, accepting Mr. Morgan's suggestion, by adding, after "defenses", the words "or objections"; and then, in the next line, say "rules 13 or 14".

Mr. Morgan. I second the motion.

Mr. Dodge. Rule 14 does not affect the time for filing his answer, does it?

Mr. Donworth. No. It just gives the right to make his preliminary motion.

Mr. Lemann. I thought the Reporter intended, by his reference to rule 13, to cover everything in rule 13, but rule 13 contains a limitation, in that it refers to rule 14. Therefore I thought that taking in rule 13 would carry over with it the reference to rule 14. But that would not be very important.

I am wondering about the reference in rule 13 to rule 41. If we adopt Judge Donworth's suggestion and refer to rules 13 and 14, when rule 13 itself refers to rule 14, and the blank rule, which somebody said should be 41 or 40 -- I had in here "should be 40" -- the point is that rule 13 refers to two rules, one of which is rule 14, and one of which, as left unnumbered by the Reporter, is either rule 40 or rule 41. If we adopt Judge Donworth's suggestion, and refer particularly to rule 14 over here, and not to this other rule which rule 13 incorporates by reference, perhaps we may reach some unintended

cyl result. That is a formal matter. I think we all want to be sure that the removing defendant gets his opportunity to get his bill of particulars or further statement. It is just a question of what is the accurate way to phrase this.

Mr. Pepper. In the light of this discussion, I move that the accomplishment of the purpose of Judge Donworth be referred to the committee on style with a recommendation.

Mr. Lemann. I second the motion.

The Chairman. All in favor, say Aye; contrary, No. The motion is carried.

Mr. Donworth. The second amendment which I had started to discuss first, and on which the Chairman made some observation in point, is this: The language now is "he must present his defenses or objections pursuant to rules 13 or 14" and another rule, perhaps, "at the time of filing the transcript of the record of the case in the Federal court, or within five days thereafter."

I have no objection at all to the suggestion of the Chairman, if it can be practically worded.

The Chairman. Let me see if this fits it. "He must answer or present his defenses within the time fixed by State law, or within five days after filing the transcript in the Federal court, whichever period is the longer."

That covers it. If he has any time left longer than five days under the State law, then he gets it. If he has not, then he has to file within five days.

Mr. Pepper. I move that the statement of the Chairman stand as the opinion of the committee.

Mr. Morgan. I second the motion.

The Chairman. If there is no objection, that will be understood.

Mr. Pepper. Mr. Chairman, may I inquire of the Reporter whether he does not think that this matter in lines 12 to 15

will come more appropriately in a later rule, where we are talking about A38, Statutes and Former Rules of Practice to Apply When.

We are there trying to provide that all matters not provided for by a valid statute or by these rules, or by the rules of the various district courts made pursuant to the authority hereinafter given, shall be governed by the common law as developed and applied in the Federal courts.

It seems to me that in that connection there ought to be the statement that these rules shall be liberally construed with the idea of narrowing, as much as possible, that to which the catch-all provision applies. It is just a matter of form which might be considered by the drafting committee.

Mr. Clark. I have no feeling either way. I am glad of any suggestions. Rule A38 is going to be a bulky rule, with the schedules, but that may not do any harm on this point.

The Chairman. Why not put the little statement in lines 12 to 15 in a separate rule? It will increase your number, but it has not anything to do especially with applicability, or whatnot. It is just a general rule of interpretation, and it is one that ought to be indexed so that the Court can readily find it.

Mr. Clark. All right.

Mr. Pepper. May that be referred to the committee?

The Chairman. That will be referred to the committee for consideration.

Mr. Clark. On the titles, to date the vote seems to be in favor of the first one, so far as I can ascertain.

The Chairman. On what?

Mr. Clark. On the title of this distinguished work we are doing.

The Chairman. We have not reached that yet.

Mr. Clark. It is in the same place we are talking about. The babe ought to be christened by this time.

Mr. Dobie. How about the insertion of the word "Federal" in there?

Mr. Morgan. What line?

Mr. Dobie. Line 14.

Mr. Donworth. I have an idea that is what the lawyers are going to speak of the first thing when they refer to these rules.

The Chairman. Yes.

Mr. Dobie. I suggest "Federal Uniform Rules of Civil Procedure".

The Chairman. "Uniform Rules of Federal Procedure"?

Mr. Donworth. You need the word "uniform" if you have "Federal".

Mr. Dobie. I would put the word "Federal" first.

Mr. Sunderland. Why do we need "uniform"? There is just one sort of Federal practice, and that is this.

Mr. Pepper. "Federal Rules of Civil Procedure."

Mr. Dobie. I am willing to cut "uniform" out.

The Chairman. Make it as short as you can -- "Federal Rules of Civil Procedure."

Mr. Pepper. "And may be cited as 'FROCP'." That will popularize it at once. It will go through Congress with a spring.

Mr. Dobie. If it has four letters in it, it may get past

the Supreme Court. If it has three, you may have trouble. (Laughter)

The Chairman. I am glad we cannot make any word out of the first letters, like EPIC.

Mr. Clark. Then it is "Federal Rules of Civil Procedure." We will go to the christening that way.

The Chairman. We will pass to rule A37.

RULE A37. RULES BY DISTRICT COURTS.

Mr. Clark. Of course, we were asked to present alternatives on rule A37. Messrs. Dobie, Morgan, and Tolman have voted for the second alternative so far. The chief difference is taking out the requirement of a concurrence of a majority of the Circuit judges.

The third alternative makes the rules of the district court subject to the order of the Supreme Court.

The Chairman. I move that we put all three rules up as alternatives to the Supreme Court.

Mr. Dobie. With a preference expressed by the committee, Mr. Chairman?

The Chairman. If you want to.

Mr. Dobie. I second that.

The Chairman. There are questions here that they will know more about than we do.

Mr. Dobie. I second the motion.

Mr. Olney. Why make any recommendation?

Mr. Dobie. I suggest that the three rules be put up to the Supreme Court. I think that would be very tactful.

The Chairman. Let us pass that first, and then come to the

sc 14

preference matter later. Are you agreed to that?

Now, do you want to express a preference?

Mr. Pepper. Mr. Chairman, I suppose it must have been debated at the previous meeting, but is it expedient to -- shall I say impair a little the dignity of the district courts by requiring that their rule-making powers shall have to be approved by the Circuit Court of Appeals?

The Chairman. Let us see what the judges think about that. I thought they would be better posted about the feeling among the judges than we are.

Mr. Pepper. For the same reason, I think perhaps it would be just as well for us not to express a preference.

Mr. Clark. I think you are quite right about that, Senator Pepper. I think that is a bad provision, but, of course, it is the present rule.

Mr. Pepper. Yes.

Mr. Clark. If we are not Senators, we are at least representatives in this capacity.

The Chairman. The Supreme Court will know how the Circuit and district judges feel about it. It is a matter of rivalry between them.

Mr. Dobie. I have no objection to that at all. I just wondered if the Supreme Court would like to know what we think. They have the ultimate power. I just have the idea myself that the Circuit judges ought not to have this power, because, in certain of the districts -- for example, in Virginia -- we have the old common-law pleading, and in South Carolina and North Carolina. In other words, where you have five or six States in a Circuit, I think each ought to make its

own rules, but if you think it is best to let it go in this way, I have no objection to it.

The Chairman. I do not think we ought to express any preference in our report, but I think if they ask me or you which the committee prefers, there ought to be an answer ready, so I think, just for our own records, and to advise the man that has to answer the question, we might express a preference on these rules.

Mr. Clark. Can we not change the order, then?

Mr. Dodge. I was going to suggest putting alternative No. 2 first.

Mr. Lemann. May I ask a question before that? What is the difference between the second and third alternatives.

The Chairman. Do we agree to change the order and put the second alternative rule in the first place?

Mr. Pepper. That is agreeable.

Mr. Dobie. The third requires approval of the Supreme Court.

Mr. Lemann. There are some other differences in wording between the second and third. I do not suppose we ought to bother the Supreme Court with unimportant differences in terminology. That is asking a little too much of them. If the Reporter intended to accomplish any different result by the changes, otherwise than language, it seems to me that we ought to remove those differences if, in fact, the only thing we want the Supreme Court to tell us, as between two and three, is whether there should be inserted the express provision that the Supreme Court could set aside these rules. I rather got the impression that that was the only substantive difference,

but there are some differences in language. In line 12 it says that the district court shall adopt rules

"not inconsistent with the rules hereby prescribed";

whereas, in line 19, the language is

"supplementary to these rules".

I do not suppose we want to ask the Supreme Court whether they care anything about this particular expression I last referred to. Perhaps I am mistaken about that.

Mr. Morgan. "Supplemental to" might go further than "not inconsistent with".

Mr. Pepper. Yes.

Mr. Lemann. Therefore it seemed to me, and my point was, that we should decide which of those expressions we think should be used, and not ask the Supreme Court to settle that.

Mr. Pepper. Mr. Chairman, in order to bring the matter up, I move that we limit our presentation to the first and second alternatives, and omit the third, for the reason mentioned by Mr. Lemann, and for the other reason, that in line 23 there is apparently an intent there to embalm this advisory committee.

The Chairman. I did not see that.

Mr. Pepper. That is a sort of invitation that we would like to be continued indefinitely on the job.

Mr. Morgan. I do not like that word "embalming".

Mr. Clark. I might say, Senator Pepper, that we have previously discussed the recommendation for continuing the committee. I think perhaps all of us feel that if it is done tactfully, the next thing is to make a rule giving us power to

work as a continuing committee.

Mr. Pepper. Is not that a suggestion that ought to emanate from the court?

Mr. Morgan. Make them think they suggested it.

Mr. Pepper. I mean, not to put it in the body of a rule. It seems to me that is one of the things that our Chairman and the Chief Justice might very well dispose of, better than we can. I do not like the idea of the committee, invited by a court to perform a limited function, proposing that the Court should stereotype it or make it a standing body.

Mr. Dobie. Not necessarily that we should be on the committee, of course.

Mr. Pepper. Oh, no.

The Chairman. When this thing came up the first time, I had a feeling -- and I still have it -- about putting it in the rules. I have agreed with those who wanted to have it brought to the attention of the Court before we get through with our labors, at some appropriate time, if it can be brought up tactfully, that it is the sense of the committee that if these rules are adopted, there ought to be a continuing body, and that it would be better to do it that way than in the rule.

Mr. Pepper. I press the motion that we keep alternative rules 1 and 2, and that they be reported in the reverse order.

Mr. Clark. May I speak on two things, or at least on one?

The Chairman. Confine yourself to the manner in which we are going to bring this thing to the attention of the Court. We are not in disagreement at all about the fact that we want to bring it to the attention of the Court. We want to bring

to the attention of the Court the matter of perpetuating the committee. It is just a question of good sense and tact, as to whether we will do it this way or some other. Really, that is all we are deciding. I think we are unanimous that we ought to call the attention of the Court to the subject some time this year.

Mr. Clark. I wanted to speak first of the rule, and, second, of this matter of procedure.

On the rule, I thought it worth while considering the third, and the matter of the advisory committee can be left out of the third, but the third is an attempt to keep these rules uniform. Mr. Lemann is correct in saying that we tried to state it rather more broadly, because the central body, namely, the Court, would be able to adjust any differences.

Mr. Lemann. Not only the difference in language to which I referred, but the further provision in the third rule that the Supreme Court could set aside these rules. I first said to myself, when I read that, "Is that necessary?" Would not they have the right to set them aside anyway, if they wanted to, without expressly saying so here?

But, on reflection, I am not sure that that is a good answer, because the grant of power, saying that they should file copies with the Supreme Court, might imply that the Supreme Court was not expecting to use the power to set aside a particular rule.

Perhaps it should be expressly said that a particular rule might be set aside by the Supreme Court.

Mr. Pepper. I do not like the idea, at this particular juncture, Mr. Chairman, of recommending to the Court that they

adopt a rule rubbing in their supervisory power, even to the extent of controlling the rules of the lower courts. They have whatever power they have, and they will use it when they think best to use it.

Mr. Lemann. It might be a little offensive.

Mr. Pepper. It is not the tactful thing to do at the moment, I should say.

Mr. Lemann. The Reporter points out that that is why he uses broader language in paragraph 3 than in paragraph 2.

Mr. Pepper. Yes; I appreciate the reason. It is a real question. I am just stating one side of it. I did not mean to minimize the importance of the Reporter's view.

The Chairman. I think we could make more progress if we decided which of the general rules we are going to submit, and then go down over each one and deal with such things as you are now discussing. I think we ought to take up each rule that we decide to submit, and see whether we like the form of it. That is a thing we will want to go into.

Mr. Lemann. It comes down to whether we will put up three or two.

The Chairman. The first broad question is whether you put up two or three.

Mr. Dodge. Is there not a motion that we put up only two?

Mr. Pepper. That was the motion, and I thought we adopted that.

The Chairman. Let us vote on that. All in favor of putting up only the first two, say Aye; contrary, No. The motion is carried.

Now, do you want to consider the first rule in its details, and see whether there is anything you like?

Mr. Clark. May I say, as to the matter in brackets at the end, that that was supposed to be just a way of finding out where these rules are. It is a curious thing, but it is a very difficult thing to find out where they are. They are not required to be filed. As a matter of fact, some courts really have not any formal printed rules, so far as I can find out. If you went back through their records from time to time, probably they have established rules. Others have not changed them for years. This is just a way of getting it someplace where you can find it.

Mr. Lemann. I think that is right, but I am just wondering, myself -- Do we want to put up two rules? Do you think it is that important, to suggest to the Supreme Court that the Courts of Appeal should be brought into this thing?

The Chairman. That is the present rule.

Mr. Lemann. It is the present rule?

The Chairman. And I would not vote to put up a rule abolishing the Circuit Courts' interference. I think that is a matter of tact between those judges, and the Supreme Court knows more about the feelings of the judges than we do. Let them decide whether they want to retain supervision.

Mr. Lemann. I did not know it was the present rule. I was under the impression that my district judge fixed his rules and changed them when he wanted to. I did not know he had to go to the Circuit Court of Appeals.

Mr. Clark. This is the equity rule.

Mr. Lemann. He does not in law, but does in equity. I

agree that if it is required in one branch we ought to put it up to the Supreme Court as to whether it should be taken away.

Mr. Pepper. We do not want to get our fingers in the crack of the judicial door.

Mr. Lemann. No. I did not realize that we would be changing something. That is equity rule 79.

The Chairman. Mr. Hammond makes a suggestion. He says that if you are going to just take rules 1 and 2 here, and not the third, you could make the rules identical, and write a single rule, putting in brackets the words "with the concurrence of a majority of the Circuit judges for the Circuit". All the Supreme Court would have to do would be to scratch that out, if they did not like it. Why have two different rules, if that is the only difference in substance?

Mr. Olney. I move that that be done.

Mr. Pepper. I second it.

The Chairman. Is there any difference in substance, otherwise, between 1 and 2?

Mr. Clark. No. The second bracket comes first.

Mr. Pepper. Yes.

Mr. Morgan. You are going to keep in this provision for filing copies?

Mr. Clark. I hope so.

Mr. Morgan. That is in brackets.

The Chairman. That ought to be here, because it is a fine thing to have a set of all these local rules in the Supreme Court library, where lawyers can get at them.

Mr. Morgan. Yes.

The Chairman. Now they are over in the Department of

Justice, and nowhere else.

Mr. Lemann. What do you mean about the second bracket coming first?

The Chairman. The second alternative rule.

Mr. Lemann. There will be only one rule now, as I understand it.

Mr. Clark. The one which would cover the second alternative is to come first --

"Each district court, by action of a majority of the judges thereof"

and so forth. That is the first bracket.

Mr. Lemann. There is no bracket there. It says:

"Each district court, by action of a majority of the judges thereof"

and then a bracket:

"(with the concurrence of a majority of the Circuit judges for the Circuit)".

You would have to have the first in. You would always want a majority of the district judges, where there was more than one district judge. That ought not to be bracketed.

Mr. Clark. All right.

The Chairman. I think the Reporter ought to be able to work that out.

Mr. Dobie. Thereis quite a lot of law about these rules in the district courts. There are a number of cases. Judge McDowell, in Virginia, divided his district into two divisions. There are a number of provisions in the Federal venue statutes in connection with the division in which a man must be sued. Does that apply to a division created by Congress, or only by

rule of court? There are a number of these cases.

Mr. Clark. Now that we are discussing the other point, about continuing the committee, it seems to me that we ought to decide it. It seems to me the matter ought to be suggested now. I think we may rely on the Chairman for the proper way. I think the matter ought to be suggested with the first statement of the rules, and, unless the Court has some question about it -- and I do not believe they will have; I think they will feel greatly relieved -- it ought to appear when the rules go to the country, so to speak, because I think that will have two results:

First, it seems to me that it will be a thing the lawyers will appreciate. They will have some place where they can complain if the rules do not work.

Secondly, it will make the rules appeal much more to the scholars, because they are all united.

Therefore, it seems to me that our recommendation ought to be made at this time, with the hope that the Court will pass upon it now.

The Chairman. I suggest this, to solve your troubles. Suppose you write out for me a rule A37-A, which embodies as much of the third alternative rule as relates to the perpetuation of the advisory committee, and give it to me. I will give the Court an opportunity to put it in the draft that goes to the bar, if they want to.

Mr. Clark. All right.

Mr. Lemann. Would it be advisable, if you have a suggestion of perpetuation, to give it a slightly different name, and not call it the "Advisory Committee", but call it the "Standing

Committee on Rules". That, it seems to me, would negative any assumption that we expected it to be this committee.

Mr. Donworth. The Supreme Court has been quite anxious to emphasize the word "Advisory" in this connection.

Mr. Clark. How about "Standing Advisory Committee"? I do not think you want to go back to the uniform rules here for the district courts. I think that should be in a separate rule.

The Chairman. We struck that out.

Mr. Clark. Yes.

The Chairman. The only part we are talking about in the third alternative rule is the part about the advisory committee. Suppose you draw up a separate rule on the advisory committee and give it to me. It is the sense of the meeting, I know, that a recommendation ought to be made to the Court, and I see no reason why it should not be called to their attention in some way.

Mr. Lemann. If you have such a provision, Mr. Chairman, should it be limited to this particular rule, or should not the functions of such a committee be also to report to the Court from time to time? Perhaps that ought not to be in the rule.

The Chairman. I think it should.

Mr. Lemann. Then I think it ought to be somewhat broader than merely to pass on additional rules that the district judges might have.

Mr. Clark. No; as I understand it now, there will not be anything said about that, because I did not think you wanted that. Might I read this as just a suggestion? This is the one we had before:

"There shall be a standing committee of the Supreme Court of the United States which shall be known as the Advisory Committee on Civil Procedure, the members of which shall be appointed and hold office at the pleasure of the Supreme Court."

That might be all we need, but these are the other provisions we had in.

"Said committee shall meet at least once each year and may meet at any time upon the call of its chairman or the Chief Justice. There shall be referred to such committee any matters upon which the Court shall request its advice, and any matters subject to its jurisdiction under these rules."

That would come out, because there is no matter officially made subject to the jurisdiction.

--"and it may receive suggestions and itself make recommendations to the Court for changes in or for modifications or omissions of or additions to these rules"

and so forth.

The Chairman. The only thing I object to is that the rule, as written, requires that the committee be made up of members of the Supreme Court.

Mr. Cherry. "Standing Committee of the Supreme Court of the United States."

Mr. Clark. That would shut us out.

The Chairman. "There shall be a standing committee of the Supreme Court of the United States which shall be known as the Advisory Committee on Civil Procedure".

Mr. Clark. Perhaps you are right.

The Chairman (continuing). -- "the members of which shall be appointed and hold office at the pleasure of the Supreme Court."

They pick some of their own members.

Are we particularly anxious this afternoon to try to formulate the thing?

Mr. Morgan. I do not think so.

The Chairman. The Reporter has it very much at heart, and others have. After all, what I want it now for is just to open the way up to bring it up.

Mr. Pepper. I move that the Reporter be requested to do as the Chairman has suggested.

The Chairman. All in favor, say Aye; contrary, No. The motion is carried.

We will pass to rule A38.

RULE A38. STATUTES AND FORMER RULES OF PRACTICE TO APPLY WHEN.

Mr. Clark. This has some matter of importance -- not merely the first part, which is an attempt to schedule the statutes, which is a difficult job, but one which needs to be done very carefully. Of course, I think you will probably want to read with care lines 8 to 11.

Mr. Pepper. Those are the lines which I ventured to suggest a while ago might be consolidated with the lines in an earlier rule which the Chairman suggested, A36, should be taken out of A36 and made the subject of a distinct rule. You will remember,

in A36, we had:

"These rules shall be liberally construed for the purpose of effectuating a simple, uniform, and efficient procedure."

and so forth.

If there is to be a separate rule beginning in that fashion, would it not naturally also include lines 8 to 11 in rule A38, so that it would be first stated:

"Liberality of construction"

with the idea of limiting any hiatus that might exist, and then this provision for closing the hiatus:

"All matters not provided for by a valid statute"

and so forth.

Mr. Clark. That might be. The important thing I thought you might want to think about there is that we did not bring the conformity back here. We are trying not to. We say we have the old thing abolished. Let us not bring it back.

Mr. Sunderland. As a matter of fact, we have not got it abolished entirely.

Mr. Clark. Of course, in a certain sense, one might refer to the common law as applied to the Federal courts, as often now applied to State law, but they do it by virtue of past rules, so to speak.

Mr. Sunderland. I think it would be quite a difficult thing, sometimes, to determine what the common-law administration by the Federal courts is, in view of the fact that they have been administering the conformity act all these years.

Mr. Clark. There is not so much left uncovered, and this gives them practically a free hand. The objections to bringing

the Conformity Act in are, first, that it is no good anyhow; and, of course, the second is the law and equity matter.

Mr. Lemann. Could you not just say that on any matter not covered by these rules the Court will employ the local law of the State?

Mr. Pepper. I had suggested a while ago this, as a possible alternative for the matter in lines 8 to 11, but, on reflection, I am not so sure that it is any better:

> "Nothing in these rules shall be deemed to deprive the Court of jurisdiction to give relief for which no provision is herein made if under a State statute or otherwise such jurisdiction would have existed if these rules had not been promulgated."

It seemed to me that got us away from anything like a reiteration of the Conformity Statute, and it obviated the difficulty Professor Sunderland suggests, about the common law which has been developed under the Conformity Act.

Mr. Lemann. Does it make it plain that this applies only to matters not covered by these rules?

Mr. Pepper. "Nothing in these rules shall be deemed to deprive the Court of jurisdiction to give relief for which no provision is herein made if under a State statute or otherwise such jurisdiction would have existed if these rules had not been promulgated."

Mr. Lemann. That is stated in jurisdictional terms.

Mr. Pepper. Jurisdiction to give relief.

Mr. Lemann. It does not say how they shall give it.

Mr. Sunderland. That sounds like the kind of relief they get -- a substantive right.

Mr. Olney. It is not practice. It is relief.

Mr. Pepper. "Nothing in these rules shall be deemed to deprive the Court of power to give relief for which no provision is herein made if under a State statute or otherwise such relief could have been granted if these rules had not been promulgated."

Mr. Donworth. What would you think, Senator Pepper, of saying: "To prescribe the mode of granting relief"?

Mr. Pepper. I was anxious to make clear to the profession that if, for instance, in such a proceeding as a mandamus, which we find explicitly provided for here, it were to appear that we had failed to provide that relief now given under a State statute dealing with that subject, that the Court, having the right to apply that statute now, might hereafter go ahead and do the same thing, just as though these rules had not been promulgated. That was the thought I had, but I think possibly the suggestion is not as good as what is in the rule as drafted.

Mr. Lemann. I think there is quite a difference.

Mr. Clark. May I talk a little more about the policy before you get to the wording? I think you had better have the policy clearly in mind, and I think it is fairly important.

You will recall that the Conformity Act dealt mainly with steps before trial, and that the trial steps were not covered by the Conformity Act. It was held that it did not apply. Particularly with reference to the matter of prerogative writs, of course, you cannot apply the State law, because the Federal courts cannot issue these writs, as they can be issued under the State laws.

Mr. Pepper. You say they cannot issue a prerogative writ

of mandamus, for instance?

Mr. Clark. Not in equity, except in aid of their jurisdiction.

The Chairman. That is the established rule of the United States District Courts.

Mr. Dobie. That is correct, I think.

Mr. Clark. In other words, we have probably covered more completely than anywhere else the exact field covered by the Conformity Act. Taking this segment out, suppose we said nothing? There would be very little, or perhaps nothing, that the Conformity Act proper now would apply to. If we put in there that the Conformity Act is to apply in some ways and in some places, we might be extending the Conformity Act over what it is now. In fact, we would have a rather difficult job in keeping the thing straight. We have to try to see that every rule dealing with trial, verdict, and so forth, is retained, and not only that, but what would be the effect of the kind of common law that has grown up in the Federal courts as to verdicts, properly covered by statutes, and so forth, in view of the situation that the Conformity Act does not apply to the trial end of it?

What I fear there is that not only is the Conformity Act principle the one we are getting away from, but, further, that we might even, in certain places, be bringing it back further than it ever was.

The Chairman. The principle you want to bring up is, as I understand it, that except insofar as these rules otherwise provide, and as may be supplemented by local rules consistent with them, the law stands just where it is, and if there is any-

thing left of the Conformity Act, it stays.

Mr. Clark. That is what we were trying to say, and not thrust it directly to the Conformity Act.

Mr. Sunderland. That is not what you said.

Mr. Dobie. It is the Federal court construing the common law, and not the State practice.

Mr. Lemann. I thought you said expressly a while ago that you wanted to get rid of the Conformity Act, and I thought you had in mind that the Federal courts are going to build up their own jurisprudence or rules of procedure, just out of their own notions.

Mr. Clark. They have, generally, in the places that are left. I do not think it is really different than the law now applies in general, but in general it is their own law. As I have said, it is the law of trials, which is not the Conformity principle now. I am not sure but it would be a good idea if we struck out "common law" and let the rest stand.

The Chairman. Why could you not say this, to carry out your principle:

> "Except as provided by these rules and by local rules made consistent herewith, the practice and procedure shall be as now established by law."

If the Conformity Act operates in that field, all right.

Mr. Lemann. I do not think he likes that.

Mr. Dobie. I am a little afraid of crucifying it again on the present practice, and limiting future procedure and devices that may be established.

The Chairman. "Now established by law." The Conformity Act accepts every future State statute.

Mr. Olney. This covers only the very extraordinary case where it is not either covered by these rules or the rules of the district court. They are going to cover practically everything and, if they are changed or modified from time to time, they will apply. Beyond that point, it seems to me that the proper rule to apply is to go along without any question, and raise no difficulty whatever, and say that if there is any case where these rules do not apply, or where the rule of the district court does not apply, it should be determined by the practice in that particular State. That is what all the lawyers and everybody would be accustomed to. We can just go along that way without any difficulty whatever.

Mr. Dobie. There you will have a germ for the development of different rules in different States.

Mr. Olney. Exactly; and it will be so small that it will not amount to anything at all, so far as the lack of conformity goes. It will not apply to anything of importance, and it will accord with what they are accustomed to.

The Chairman. It will not in equity cases. There is no conformity there.

Mr. Donworth. Dean Clark has a real point. There is a real point in the fact that the Conformity Act never did reach what the court does in the course of a trial.

Mr. Morgan. The mechanics, as they call it.

Mr. Donworth. The court says, "Nothing to it. We have our own system of running the court and jury and all that." Dean Clark is afraid we might import some of those conformity acts into some of these reserved matters.

Mr. Lemann. How would it do to say something like this:

"In any matter not provided for by these rules or by statute, or by rule of the district court, the court shall apply the rules heretofore prevailing in the courts of equity in the United States, or the rules approved by the Supreme Court of the United States and, in default of such rules, shall apply the rule provided for by the State law."

Mr. Clark. That is just the point that Judge Donworth brings out, that they never did apply State law to trials.

Mr. Lemann. I have reserved it in my statement.

Mr. Dobie. I think that is a little broad.

Mr. Lemann. I only let them fall back on the State law where everything else fails.

Mr. Morgan. Do you think we have to have anything about this?

Mr. Lemann. It all depends on how confident we are that we have not left any serious voids. Judge Olney says, "Well, the district courts will provide for it by rule." But some case is going to come up where there is no rule. What is the judge to do?

Mr. Dodge. He will proceed as heretofore.

Mr. Morgan. What he has always been doing.

Mr. Lemann. Heretofore, in a law case, he has followed the State practice.

Mr. Cherry. Not at the trial.

Mr. Lemann. Heretofore, if it has not been covered by these rules or by statute, he first sees if it is something which Judge Donworth has called the machinery of running his court. He has done that according to a Federal rule. If it is

not that kind of thing, then he has said to himself, "Is this an equity matter?" If so, he follows the Federal rule. If it is not covered by those two things, and is a law matter, not within the machinery of the court, he uses the State practice.

Mr. Pepper. Do you mean that the equity rules survive the adoption of these rules?

Mr. Lemann. No; but I meant the equity practice. We have used that phrase before in these very rules from time to time.

"The procedure shall be as heretofore in courts of equity of the United States."

I think we have used that phrase, have we not?

Mr. Morgan. Yes.

Mr. Olney. Mr. Dodge has a suggestion which, it seems to me, would meet the situation.

Mr. Dodge. It is simply the suggestion to leave it all out, because then, certainly, the judge will proceed as heretofore, as I think they all do.

The Chairman. You might, except that there is always the inference that if you are covering the whole field, your action is exclusive in its application. If you intend to cover the whole field --

Mr. Olney. Is that quite true, Mr. Chairman, in view of the fact that you provide for additional rules of the district courts, supplemental rules? Do we not there recognize the possibility that there is room for something in addition?

The Chairman. That militates against it, of course.

Mr. Dodge. I do not think the equity rules contain any blanket provisions of this sort.

Mr. Olney. A good deal must be left to the local court, in

the way of regulating its own procedure.

Mr. Dobie. I think, in the equity rules, they followed the British High Court of Chancery when it was not covered. I would like to eliminate this State thing, if we can do it. The only thing that troubles me at all is that I do not want to crucify the common law as it now is. I want to keep a flexibility. Perhaps we might put some phrase in there like:

--"shall be covered by the common law as it will be developed,"

giving it room for expansion. I think the rule stated here by the Reporter is a good one.

The Chairman. Where does that leave you in equity cases?

Mr. Donworth. I am inclined to think, as a result of this discussion, that it is safe to leave it out.

Mr. Dodge. There is not any common law as to some of these details of procedure.

Mr. Dobie. There is the spirit of it.

Mr. Dodge. We certainly do not want to provide that if a State law provided that no jury could be discharged, in disagreement, without being kept out 24 hours, without being allowed to sleep during that time, it should be followed here. We do not want that made applicable in Federal courts.

Mr. Morgan. They refuse to do that.

Mr. Dodge. We have had a great deal of trouble in the Massachusetts State courts with keeping juries out all night.

Mr. Olney. You could leave it to the local court to handle.

Mr. Morgan. If they are confronted with something there, they are going to get out of it. You do not have to take a

handkerchief and wipe their noses all the time.

Mr. Lemann. Of course, if this is checked up against these codes of civil procedure in every States as I assume it has been already checked, and will be again checked, you can be reasonably sure that you have covered all the important things.

Mr. Morgan. What do they do in the codes of civil procedure? They could not possibly have the spirit of clairvoyance to see everything. They had to develop it. There will have to be a development under these rules.

Mr. Pepper. In order to bring the matter before the committee, I move that the matter now contained in lines 8 to 11 be eliminated.

Mr. Dodge. I second the motion.

The Chairman. All in favor, say Aye; contrary, No. The Ayes seem to have it. The Ayes have it.

Mr. Clark. I wonder if we could have a specific provision abrogating the equity rule.

Mr. Morgan. Does not our provision that these rules shall apply in all civil actions abrogate the equity rule?

The Chairman. Yes; that covers it.

Mr. Clark. I suppose it would. In the equity rules they said:

> "All rules heretofore prescribed by the Supreme Court, regulating the practice in suits in equity, shall be abrogated when these rules take effect."

I think it is clear.

The next question I wanted to ask is whether this method of listing the statutes, which is a little difficult, is the one that appeals to you.

The Chairman. Why do we have to list them? I do not quite get the idea.

Mr. Clark. Of course, we could say "any statute inconsistent with these rules is hereby repealed."

The Chairman. That follows as a matter of course. If you adopt rules and the district courts supplement them, and then if there is any statute left that fills a gap, it operates. We do not have to say anything about it. If you start listing them and saying what are modified and what are repealed, we are on dangerous ground.

Mr. Clark. On the other hand, if we do not do it, the lawyer is going to say he does not know where he is. It is difficult to do it. In so many of these rules, some of them adopt the statutes about in exact form, as in injunction suits, and so many of them adopt the statute, or change it. Take the matter of supersedeas, where we have combined the matter of stay on new trial and stay on appeal. I think it would be pretty tough for the lawyer, and eventually for the court, to be sure what we had done.

Mr. Lemann. Another point you made was that frequently you did not want to say that a statute was not interfered with because it would cause a good deal of repetition to say that

"Nothing herein shall change"

such-and-such a statute. I think, in the course of the rules, you have explained that you did not find it necessary to do that because you were going to annex a schedule at the end which would indicate what statutes had been superseded and what had not. If you do not do that, you may have some argument as to whether particular statutes have been retained or not.

Mr. Dodge. It is a good deal of a red flag to wave in the face of Congress to say that we have repealed 47 statutes.

Mr. Dobie. It would be an impressive loss, would it not, Mr. Dodge?

The Chairman. Wherever the rules cover the case, the statute is out. In cases where they do not cover it, there is a gap. Let the statute operate automatically. That is a safe course, and we do not have to say anything about it.

Mr. Clark. I can say personally that it would be a great relief, because this is a big job, from the mere standpoint of work, but I do not think it is quite fair to the lawyers, because it is a terrible mess.

Mr. Dobie. That is the only hesitation I had, Mr. Reporter. If you could be quite sure that you could make an inclusive and accurate list of all these statutes, I think it would be superb. But if there is danger of omitting some of them, it would be different.

Mr. Lemann. Mr. Dodge's very cogent point would be mitigated by making a list of the statutes and saying "Nothing herein shall in any manner affect any of these statutes." Then Congress could figure it out.

Mr. Pepper. It seems to me that these schedules, whether included in the rules or not, will have to be made up, really, by the Reporter, just for his own information and the information of the committee. In other words, we have to be sure of the relation between the statute law and our work, and that implies preparation of these schedules. Then would it not be possible, in our report to the Supreme Court, to say specifically that in the event that rules are approved by the Supreme

Court, that then in the transmittal to Congress the Court may desire to ask Congress, in adopting or approving these rules, to accept our recommendation that such-and-such statutes be repealed.

The Chairman. Congress does not have to do anything. We hope they will not. If they do nothing, the rules then become operative.

Mr. Pepper. It is phrased that way?

The Chairman. They have to veto it in order to stop it.

Mr. Pepper. I see.

Mr. Clark. Our statute also says that all laws inconsistent with what we have done will be no longer of any force and effect.

Mr. Pepper. Then we could meet Mr. Dodge's point by inserting schedules which, pursuant to the action heretofore taken by Congress, are repealed.

Mr. Clark. Not repealed; are inconsistent, or superseded.

Mr. Pepper. Whatever the phraseology. But let us tie it up, as Mr. Dodge intimates would be better, to the action of Congress, rather than the action of this committee.

Mr. Lemann. What he is afraid of is that Congress did not quite realize the action they took, and if it is made too plain, somebody will introduce a bill. They will say, "We never thought they were going to repeal 47 statutes. We had better change this."

As somebody pointed out, the President could veto that bill.

Mr. Dobie. I think the number of statutes is not going to

be very vital, with Congress. They are not going to check on them and say, "There are 48 statutes here", without going into them. I do not think it is a vital matter whether there are 432 or only nine. I do not think we are going to have any numerical count, and have them say, "Here, they have repealed 11 statutes", and, as O. Henry said about the forged check, "They went too far." (Laughter)

Mr. Clark. As a matter of fact, our task is practically limited to a judicial code. That is a big enough job, heaven knows.

The Chairman. Instead of putting them in a rule repealing anything, why could we not put in a note, and quote the language of the act under which we are working, which says that the rules supersede the statute, and then say, under that, that it is believed that the following statutes are, in whole or in part, superseded by these rules, by virtue of the act the Congress has already passed? We did not do it. They did it.

Mr. Pepper. That is the point.

Mr. Lemann. That is Senator Pepper's point; but I wonder whether the psychological effect might still be what Mr. Dodge suggested.

The Chairman. I would like it in a note better than a rule, because, if we have made a mistake, in our schedule, it will not do us any harm. We have tried to list the things we think are affected, but we have not said they are the only ones.

Mr. Clark. The Supreme Court could say, "This is what the committee did, and we publish it for what it is worth." I do not know whether they would want to say, "We, the Supreme

Court, believe these statutes are inconsistent with the rules."

Mr. Dobie. I do not think they would be bound by it at all. When it comes up before them in a case, I do not think they would feel that a statute that we had enumerated had been absolutely repealed.

The Chairman. They might feel that way if we are given authority under this statute to repeal laws.

Mr. Olney. Are not all the statutory provisions which we affect in the judicial code?

Mr. Clark. I think they are.

Mr. Olney. Instead of saying "the following statutes are repealed", you can say, "The following provisions of the judicial code". That will not arouse political antagonism.

Mr. Clark. That may be a good idea.

Mr. Donworth. Would the expression "superseded hereby" seem less grating?

The Chairman. Yes.

Mr. Clark. That is what we put.

Mr. Donworth. Not "repealed".

Mr. Clark. We did not use the word "repealed". As a matter of fact, we were trying to soften the blow by making two schedules. Schedule A will be those that are definitely superseded, and schedule B will be those that they can find still in our rules. That is in the form of a stop.

The Chairman. What do you mean?

Mr. Clark. Those that we have taken over. A good many times, pursuant to the suggestion that we should not chase a lawyer around, we have put in the statute here.

Mr. Lemann. I wonder whether it would be more positive to

say:

"The following provisions of the judicial code are not affected by these rules".

That would be a very imposing list, I take it. There are quite a lot of them still.

Mr. Donworth. You are getting into a bad enumeration idea there.

The Chairman. You would have to put in all the statutes.

Mr. Lemann. We could cover it by titles of the judicial code -- sections Nos. 1 to 110, or something like that.

Mr. Pepper. Are we agreed that we are not on safe ground until at least we are assured by the Reporter that he has made up this schedule? It seems to me that is almost essential to the integrity of our work. That is the first question.

The next question, after that is made, is, What are we going to do with it?

How would it do, Mr. Chairman, to let the matter stand, that the Reporter will do this work, as he has indicated his willingness to do it, and that we reserve for decision when we come to submit our report to the Court, the precise form in which we will submit that schedule, if at all.

The Chairman. Of course, that involves the question of procedure from now on. I had not supposed it was going to be necessary to call the committee together as a whole.

Mr. Pepper. I think that question might perfectly well be left to the Chairman to determine, because he is going to have a conference with the Chief Justice, necessarily, at or before the submission of our report to the Court, as to the tactics that we ought to follow respecting the statutes that are in-

cluded in this schedule. I am pretty sure the Court will have some preference as to the way in which that should be handled, and whatever their intimation is is something that we want to respect, so I should be favorable to the preparation of this schedule.

The Chairman. You might get the schedule, but I am afraid it is going to be difficult for me, before the thing goes to the Court, to get a ruling from them on a thing like that. The Chief Justice would not want to act alone on it.

Mr. Donworth. We must use our best judgment.

The Chairman. Yes.

Mr. Donworth. It will come as a matter of new impression to them, and they will want a body like this, that has studied the matter carefully, to make the real recommendation.

The Chairman. Do you not think there is something in my suggestion, instead of trying to put in a rule, to say nothing about the rule? The legal effect is that to the extent that our rules and the local rules are inconsistent with law, the statutes fall. We do not have to say in what respects they fall. That is a matter that arises every time a case comes up, and it is very dangerous for us to try to settle all that in advance. So, if we say nothing in the rules, the legal result would be that in fields not covered by our rules or the local rules, whatever statutes there are on the subject automatically apply, and then put in a schedule in the way of a note, if you want to have it in, calling attention to the statutes that we think are probably affected or superseded, but not put it in the way of a definite rule, which has the effect of law, that they are superseded. It leaves each case open on the law as it

comes up, to say whether it is superseded, and whether our rules are inconsistent, or the district court rules are inconsistent. But if the Supreme Court says they are now, in a rule, that has the effect of law, that is a different situation. I do not like it in the rule. I would rather have it in the schedule.

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I don't like it in the rule. We had better have it in the schedule and just attempt to indicate without a binding opinion that it is probably the rule.

Mr. Lemann. Why not have two tables annexed to these rules, a table of statutes referred to in these rules, which would be very convenient for reference. The first table would refer to all these statutes that are referred to in these rules. There must be 50 or 75, and give the reference to them. Table 2 would be a table of statutes superseded by these rules.

Mr. Olney. That is directly opposed to the chairman's suggestion.

Mr. Lemann. Is it? I thought it was in line with the chairman's suggestion. It would not be a rule.

The Chairman. It would not be a rule, but I would want to qualify "superseded" and put it in as a schedule and say that it was a schedule of statutes which in the opinion of the committee are affected or superseded, and put a note on that that this may not be entirely complete, and so on, and so on. Then it does not bind the court that they are superseded or not.

The only object in the schedule is just to have it informative. It is perfectly clear that if we say nothing, any statute that remains which is inconsistent with our rules or with the district court rules can be resorted to.

Mr. Pepper. I move you, Mr. Chairman, that the suggestion last made by you stand as the sense of the committee, to-wit, that these schedules be prepared, that they should not be embodied in a rule or rules, and that they should be dealt

with in a note, and that the substance of the note should be in accordance with the chairman's suggestion.

Mr. Donworth. Senator Pepper, do you mean a note? Don't you mean a schedule, a thing headed schedule?

Mr. Pepper. It is a schedule but it is not a part of the rules.

Mr. Donworth. I second the motion.

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

Mr. Clark. Now, may I ask one thing about this first table? Will they be just the statutes referred to specifically by name in the rule? We are going to have foot-notes, as I understand it, giving derivations, and we will say, for example, that the rule is in substance statute so-and-so. Does that go into the table?

Mr. Pepper. I think Mr. Lemann's suggestion was comprehensive enough to include in that schedule all statutes which have been transcribed in the rule, or all those which, being mentioned in the foot-note, are part of the pedigree of the rule. Would that not be right?

Mr. Morgan. I should think so. I should hope that would be so.

Mr. Pepper. Yes.

The Chairman. Let us so understand it.

Mr. Clark. I think then probably these two appendices may overlap a little.

Mr. Morgan. They might, sure. They might very well.

The Chairman. We are down to Rule A-39.

RULE A-39
THESE RULES EFFECTIVE WHEN

The Chairman. I have a note there that some time should elapse after Congress adjourns before the rules go into effect. After it appears that Congress is not going to interfere, there should be time for lawyers to learn about the rules.

I remember the bill fathered by the American Bar Association, which was passed by Congress on their recommendation with reference to writs of error and right of appeal, and that bill went into effect the day the President signed it, and weeks and months before the average lawyer would know anything about it. The result was frightening, the lawyers were taking appeals and writs of error under the old practice and some of them were losing their right of appeal. Some of the Justices of the Supreme Court caught it and rushed through a bill to save the situation.

So, our rules ought to provide that they do not go into effect immediately at the close of the congressional session, and I suggest something to the effect that the effective date be made three months after Congress adjourns, and, in any event, not earlier than September 1, 1937, so that if Congress adjourned more than three months before that date we would still have them taking effect on a day certain. I think that is a section that would have to be changed after we found out when the rules would likely be filed with Congress.

Mr. Clark. Major Tolman wants to go the other way and he believes it might be well to expedite the time for the rules taking effect.

The Chairman. We do not want to fool with Congress about

this thing.

Mr. Olney. I move that the chairman's suggestion be adopted as the sense of the committee.

Mr. Pepper. Second it.

The Chairman. Now I have another question with respect to pending cases. There is a case pending, and then along comes the rules right in the middle of the lawsuit, and I am not at all sure that this is complete enough:

> "It shall govern all proceedings and actions then pending or after brought, save that when in a pending case an order has been made or acts done which cannot be changed without doing substantial injustice, the court may give effect of such order or act to the extent necessary to avoid any such injustice."

I am wondering, for example, whether that is broad enough in a pending action where a man has not made any claim for a new trial and the time under these rules has gone by. That is not an act done or order made; it is an act omitted.

Mr.Pepper. There is one thing certain, if the act has been done it cannot be changed.

The Chairman. It is a very difficult thing to deal with.

2 Mr. Clark. This is not broad enough.

Mr. Donworth. Mr. Chairman, I think that in some states, particularly in Massachusetts, where there is such a substantial difference between the old and the new practice, there

? should be a making over period. I would suggest this:

> "These rules shall be in force on and after so-and-so and shall govern all proceedings in actions then pending or thereafter brought, save when in any then

pending cause any pleading has been filed or any order made or act done under the practice heretofore prevailing, the court shall give effect to such act, and so forth, to the extent necessary to avoid injustice."

Surely we do not expect the pleadings to be cast again, do we?

Mr. Morgan. Oh, no; certainly not.

Mr. Pepper. Would it not do, Judge, if, consistent with your thought, we did not name the specific items, but simply said that it shall apply to cases pending except to the extent that, in the opinion of the court, its applicability would work injustice or would not be feasible, without specifying the various items?

Mr. Donworth. Something of that kind.

Mr. Lemann. Say that in pending cases when, in the opinion of the court, these rules could not be applied without working injustice--

The Chairman. Or denying a right.

Mr. Lemann. --or denying a right, the court may direct that the rules be not complied with.

Mr. Pepper. Yes.

Mr. Lemann. Something like that.

The Chairman. That would cover my idea. I was thinking especially of jury trials, denying the right, so they shall not be foreclosed on a right.

Mr. Pepper. I move that the chairman's statement stand as the judgment of the committee.

The Chairman. Not mine alone, but with the other suggestions.

Mr. Dobie. That includes the time?

Mr. Clark. I think it did not refer to the time.

The Chairman. That is another thing.

Mr. Morgan. We passed on that before.

Mr. Lemann. That we have approved already in accordance with the chairman's suggestion.

Mr. Pepper. My function is to back up the chair because I am probably the only living vice-president who is praying for the life and continuance of health of the president.

The Chairman. We will turn a somersault and go back to Rule 1.

FURTHER CONSIDERATION OF RULE 1
ONE ACTION, PRACTICE AND PROCEDURE

The Chairman. I call attention particularly to the redraft of Rule 1 prepared by Mr. Hammond with the cooperation of Senator Pepper. You all have copies of it.

Mr. Morgan. I move its adoption, Mr. Chairman.

Mr. Dobie. I second the motion.

Mr.Morgan. Without the parentheses, because we have another section that takes care of the parentheses.

Mr. Pepper. Yes, I think the parentheses ought to be left out in each case.

Mr. Morgan. Yes, because we have that elsewhere.

Mr. Pepper. It would be this way, Mr. Chairman:

"Hereafter there shall be only one form of action and one mode of procedure to obtain the relief heretofore obtainable by civil actions at law and suits in equity. The form of action shall be known as 'civil action' and the procedure shall be known as 'civil procedure' and

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they shall be as prescribed in these rules."

I move them.

Mr. Morgan. I move the adoption.

The Chairman. I was waiting for the statute. If not, are you ready for the question?

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

Mr.Donworth. I have a new rule to suggest.

The Chairman. Let us have it.

Mr. Donworth. This is a rule that a great many lawyers in my State have said to me, "For heaven's sake, do something about this." I want to do my duty in that regard. This is just the substance; I hastily wrote it out here in the last few minutes, and it is only the substance. It will be Rule blank:

> "For the purpose of a motion for new trial or judgment notwithstanding a verdict, or for a rehearing, or for action with respect to settling objections or exceptions, and other matters in connection with appeals, the term of court at which a judgment or order was made shall be deemed to be extended for three months beyond the end of such term otherwise fixed."

In many jurisdictions in the state law there are no terms of court and the practitioners are confused by the existence of terms in the federal court. If they present a petition for rehearing or a motion for a new trial and do not get the court to entertain it, or something on the record to show that the court has entertained it during the term, they are out of luck.

So, the practice is to move the court for an order that as to the case of Smith against Jones, number so-and-so, for the purposes of new trial and appeal this term is hereby extended to such a date. The members of the committee may remember that in one of the recent Alabama negro murder cases the court made an order which was not quite long enough and the Supreme Court of the United States had a lot of difficulty in extracting the unfortunate from that situation.

This is not artfully drawn, but it is especially needed where a judgment or decree is rendered about the last day of the term and nothing is done to start the thing during the term. I wonder if other members of the committee have given consideration to this subject.

Mr. Morgan. I thought it was agreed last time we were not going to have terms of court.

Mr. Clark. I thought so, too, and I should say if we are going to have anything said about it we could do it this way--if we have anything said about it, why should it not be something like this, perhaps in our rule on time:

> "The times hereby stated for the doing of any act under these rules shall not be affected by the fact that the term has expired."

Mr. Morgan. I thought we had it some place.

The Chairman. I am afraid we have slipped somewhere.

Mr. Clark. We did not say so expressly.

The Chairman. There would be an implication.

Mr. Olney. Can we not simply abolish terms of court?

Mr. Clark. We might, but you see there is a lot of stuff in the statutes that a term should be held on so-and-so at

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such-and-such a place and all that sort of thing.

The Chairman. We do not abolish them. It gives them a chance to do this as long as under these rules there is time allowed for doing it.

Mr. Clark. I should think this should very properly come in Rule 7, which is the computation of time.

Mr. Donworth. Make it very plain.

Mr. Morgan. Yes, it is bound to be, Judge.

The Chairman. It is a vital thing.

Mr. Clark. I have a couple of things more.

The Chairman. That statement is the sense of the meeting.

Mr. Clark. Those suggested changes in the bankruptcy and copyright rules, were those approved?

Mr. Morgan. I suppose they were when you approved the other because you just merely changed them.

Mr. Clark. I think it ought to appear somewhere that we are going to recommend those also.

Mr. Morgan. That is A-37 and A-38?

Mr. Clark. A-36.

The Chairman. It is on page 5 of Rule A-36. We did not consider them.

Mr. Clark. Of course, dropping out of here all the titles except "Federal Rules of Civil Procedure," that is a new name.

Mr. Morgan. I move they be approved, Mr. Chairman.

Mr. Olney. Second the motion.

The Chairman. It is so ordered unless there is objection.

Mr. Clark. Now, the other thing Mr. Morgan was going to give was a little speech onRule 21 that he got stopped on

because it was late at night, on the real party in interest. I would like to hear it.

The Chairman. Rule 21 or A-21?

Mr. Clark. Rule 21.

Mr. Morgan. Mr. Clark has asked me to make a talk on the phrase "real party in interest" simply because of the trouble it has made. I should be very glad to have substituted for it the phraseology that the party in interst is the party who by substantive law--what was that phrase?

? Mr. Sunderland. Has a right sought to be enforced.

Mr. Morgan. Yes, of the substantive law, but I should not want to do what he wants to do with reference to lines 3, 4, and 5.

Mr. Clark. Never mind, I will accept your suggestion. I will join hands with you.

Mr. Morgan. Because "real party in interest" has certainly caused a lot of trouble in the codes where they use it, as to who is the real party in interest.

The Chairman. There is no consideration there for us.

Mr. Clark. Yes, there is, unless you are all agreed to what Morgan and I are suggesting. It is only fair to say that the last time you voted the other way.

Mr. Morgan. That is when I was not here.

Mr. Lemann. Were you assuming this was going to be done without debate, Mr. Chairman? I do not know that I would object to it but I would at least like to hear it considered. I think I know what it is about, but the thing that worries me is that when you put in a new expression, the arguments that are raised about the new expression. I know there have been a

good many arguments about real party in interest. I know a great many of them have been resolved so that by a process of elimination you can tell in the federal courts pretty much what it means.

Mr. Morgan. Except in a new case.

Mr. Lemann. In a new case involving something that has not come up before.

Mr. Morgan. Yes.

Mr.Lemann. You do not mean every new case?

Mr. Morgan. Oh, no; certainly not.

Mr. Lemann. I think it is an objectionable phrase to begin with, but after you have fought for fifty years there are some limits to the number of new cases that may arise under it.

Now, if you take in some new language, I was wondering whether you would make some new controversy. I am not wedded to the present phrase, and I am not at all sure I would tear the heart of Mr. Clark or Mr. Morgan out by opposing this change.

Mr. Morgan. I will not shed any tears at all.

The Chairman. We have got time to consider it. Let us consider it.

Mr. Lemann. What do you think, Mr. Dodge?

Mr. Dodge. I am not familiar with all this.

Mr. Olney. If we consider that we are opening up a new field of difficulties.

The Chairman. You mean if we approve the change?

Mr. Olney. If we change it.

Mr. Morgan. If we change the old phraseology, you mean?

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Mr. Olney. I am right with Mr. Lemann on that. That language as used in the Code is bad, it does not genuinely express the idea, but the courts have enforced it in accordance with the real idea, and we just better stick to that language. If we open it up and take some other language, a substantially different method of expression, we are going to have trouble.

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Mr. Morgan. I realize there is that danger when you introduce a new phrase. They may have to interpret a new phrase.

Mr. Lemann. May I ask, has not a lot of this trouble come up in state courts, and is not the trouble because you have different interpretations given from one state court to another state court? Here you have it limited to one jurisdiction and there is no final authority that says what it means. Doesn't that take a good deal of the sting out of it?

Mr. Olney. We have it pretty well settled in our state after a number of years and it is about in line with what they do in the federal courts. If you adopt any other method or a substantially different method of expression you are just going to make trouble.

Mr. Donworth. Every case would be a new case if you changed the language.

Mr. Morgan. I realize that. I am not going to fight and die for this.

The Chairman. Well, if there is no motion to the contrary, Rule 21 will stand as previously approved.

Mr. Dobie. The real party in interest? I would like to bring that before the committee. I would like to vote on it without any further discussion, if you wish. I move that the words be amended in accordance with Mr. Morgan's and Mr. Clark's suggestion.

Mr. Clark. Second the motion.

Mr. Donworth. If I were in Congress I would like to filibuster until the banquet begins this evening.

(The question was put and the motion was lost on a

show of hands by a vote of 6 to 3.)

The Chairman. Have you anything else?

Mr. Clark. That is all.

The Chairman. How about Judge Donworth's poem?

Mr. Donworth. Haven't you a couple of things, Mr. Chairman, that you want to do?

The Chairman. Yes. Mr. Hammond calls my attention to this memorandum from Mr. Wigmore that wants us to codify the federal statutes about substantiating by evidence official records. Do you want to take any action on that?

Mr. Lemann. A new memorandum by Mr. Wigmore?

The Chairman. This is the one introduced February 18. It has just come in.

Mr. Olney. The committee already discussed that matter.

The Chairman. I know it, but we had not the memorandum before us. I think it is probably the sense of the meeting that we should do nothing today. If later we want to add a codification of the federal statutes we can consider it. I doubt if we can undertake to do it between now and May 1st with all our other work.

Mr. Olney. I move that we do not endeavor to do so.

Mr. Donworth. I second the motion.

The Chairman. Would it not be more courteous to Dean Wigmore to lay the matter on the table until our next meeting on the ground that it comes up so late that we have not had time to study it, and so report on it?

Mr. Olney. I make that motion.

The Chairman. It will be so understood if there is no objection. Instead of turning him down flat without

consideration, I think it is wiser to tell him that the memorandum came in so late we are going to consider it at our next meeting. We will not meet until fall, I hope, but we can still do it then if we want to.

Mr. Lemann. Have you some points that you want to bring out?

The Chairman. I have a letter from Mr. Gamble that I wanted to call attention to. You all have had it. He regrets his inability to attend and makes some suggestions about rules that have been considered as we went along. He asked me to convey his regards to the other members of the committee present. He says he is still ill but hopes to be able to go on with the work.

I am informed that if any member of the committee wants to send a telegram or telephone on official business of the Advisory Committee, instead of bothering to pay the bill yourself and then getting a receipt and making a claim for it, when you send the message you mark "Government message" on it and charge it on the books of the telephone or telegraph company to the Supreme Court Advisory Committee on Rules, Supreme Court Building, Washington, D. C., and the charge will be made direct and the bill will come here and be paid. That is especially important in telegrams because the Government has a lower rate. If you pay the full rate, as you would in charging it to yourself, all you can get back is the Government rate.

Mr. Donworth. Does that apply if we send a telegram to you, not to the Marshal, but to you in New York?

The Chairman. If you send a telegram on official business

of this committee, whether it is to another member or to the Marshal or anybody else, you can charge it to the Supreme Court Advisory Committee on Rules. The same thing is true as to telephone charges. I am assuming they will believe you when you say you have the right. The telephone company may not trust you, and that is another matter. However, you can do it.

There is another matter: If you have any papers with you that you do not want to carry home, if it is inconvenient for you, just bundle them up and hand them to our secretaries here and they will ship them back for you.

I have one other matter. We have talked about it informally among ourselves. That is the future proceedings for the next month or two.

Fortunately, we have a fine stenographic force here that has been getting out these transcripts for us. They have already got out the Sunday's transcripts, and they will have today's transcript in two or three days, and that will enable the reporter to get busy at once on his revision.

My thought about it is that if the reporter would get his revision out and complete his revision before the first of April, that instead of attempting to call the committee together again, we could arrange for the appointment of the committee on style and form and expression, and entrust it to a committee of three of us, to take the reporter's draft as it comes out, his third draft, and go through with it with a fine-toothed comb, a quality of work that cannot be done in a general meeting like this.

If that committee is authorized, it will be my idea that

they be men who are not engaged in drafting. It has been said that the men who had drafted a document were the least qualified to interpret it because they were always thinking of what they had in mind instead of what they said. If we get a committee that has not been in the drafting work to take a fresh look at it, and if they go over it, and then before they reach a final conclusion about the revision they get in contact or conference with the two reporters, Mr. Sunderland and Mr. Clark, in their respective fields, and check over their suggestions and see that there has been no slip made of any kind, that will take care of it. If it is understood that that committee cannot make any changes in substance you might be justified in letting that committee, after their work is done, transmit this document to the Supreme Court.

If you do not do it that way, I do not believe you are going to get it before the Court. It seems to me that is our best hope of getting the report by May 1st, and that is the time limit the Chief Justice has laid on it. He expects the Court to let us send it to the bar before the summer vacation. That will shoot the thing out to the bar, coupled, of course, with the statement that it does not represent the work of the Court at all, they do not stand committed to it, or have any part in it; it is just the suggestion of this committee; we admit it is a preliminary draft and requires considerable revision, and we are putting it out now because we want suggestions from the bar, and if there is anything wrong with it we would like to know it. That will sort of take the kick out of it, if we do not claim too much for it.

So, I would like authority, if you are willing to give it to me, to appoint such a committee. I think I would like to put Major Tolman and myself on it ex officio, although I do so as far as I am concerned more for the purpose of keeping informed about the situation, so I will know how to act, because I shall not be able to give very much time to it. I have got a case coming on that will keep me busy up until the first of May.

I would like to appoint, say, three of the members of the committee, outside of the secretary and myself, with the understanding that in a general way they will operate in that way, and each one of those men can work independently on the revised draft as it comes out in the quiet of his own study and then at some proper time if they are able to meet together I am sure they will meet.

Mr. Donworth. I move we proceed as indicated by the chairman, and that he have authority to appoint the committee suggested.

Mr.Dobie. I second the motion.

The Chairman. Are there any other suggestions about procedure that anybody wants to make before we pass on the motion? I don't want to be dictating the procedure, but I just thought that this might work out.

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

The Chairman. Is there any other business?

Mr. Morgan. I have a communication I want to read.

Mr. Dobie. I want to make a motion, if you do not mind. I would like to make a motion that the thanks and appreciation

of this committee be conveyed to the stenographic reporters. They have had a very difficult job, we have talked very rapidly and talked together, and I think they have given us a very wonderful performance.

Mr. Morgan. I second the motion.

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

Mr. Donworth. I move a vote of thanks to the reporter and his assistants, the associate reporter and his assistants, and to the chairman for his patience.

The Chairman. Why don't you include the young men who are the real brains back here?

Mr. Donworth. I did.

Mr. Dobie. I gladly second that.

The Chairman. I will let the vice-chairman put the motion.

Vice-Chairman Pepper. Gentlemen, all in favor of the motion which has been read in your hearing, say "aye."

(There was a chorus of "ayes".)

Vice-Chairman Pepper. Differing from the chairman, I will call for the "noes". Those opposed, "no".

(There was no response.)

Vice-Chairman Pepper. The "ayes" have it.

Mr. Clark. Thank you, Mr. Vice-Chairman.

(There was further colloquy, and so forth, off the record, which was not recorded by the stenographer.)

The Chairman. If there is no further business, we will stand adjourned.

(Whereupon, at 4:40 o'clock p.m., the conference was closed.)

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