

Proceedings
of
Meeting
of
Advisory Committee on Rules for Civil Procedure
of the
Supreme Court of the United States.

February 1-4, 1937.

Washington, D.C.

The Committee met at 9:30 A.M. in the Supreme Court of the United States Building, Honorable William D. Mitchell, Chairman, presiding.

Present: William D. Mitchell, Chairman
Charles E. Clark, Reporter
Edgar B. Tolman, Secretary
Scott M. Lortin
Warren Olney, Jr.
Edmund M. Morgan
Wilbur H. Cherry
Robert G. Dodge
Monte M. Lemann
Joseph G. Gamble
Edson R. Sunderland
(George Wharton Pepper, Vice Chairman, arrived in time for evening session February 2d.)
(Members of the Reporter's and the Secretary's staffs)

James H. ...
Edward B. ...

The Chairman. Gentlemen of the Committee, I think we can come to order. I have a letter from Judge Denworth regretting he is unable to attend, and one from Senator Pepper stating that he will be delayed a day, and possibly two, before arriving.

I hope that this will be our last working meeting of the Committee for a time. What I have been thinking about is that at this meeting we might make what changes we have to make in the form of the rules right here and not refer

them back to the Reporter, and I hope that when we get through with our work we will have them in such shape that we can turn them over to the staff in Washington, instead of to the Reporter, to make fair copies, and then call in the Style Committee to revise, and then we will have to have a verification meeting afterwards, either by the Committee voting by mail or call it if we have to. I hope we won't have to. In the meantime, the Reporter can get up his notes so the staff can distribute the work of the Style Committee with the notes to the membership generally. If there is any serious difficulty with the result, we will have to call another meeting, but if there is not maybe we can turn it over to the staff to get ready for presentation to the Court. When the report is all ready for the Court, there will be notes and the work of the Style Committee and a report of the whole Committee. I thought the Committee better look it over and at least send in their suggestions by mail, and if any oversight had been made they could be readily adopted. I do not think that it will take very long to do it but I do feel it would be better if the Committee had one last look at the final document. Otherwise we might not be able to say that it had the Committee's final action on it. I am just explaining this as a general objective - that is why I think that any amendments or suggestions we have to make ought to be in specific words, so that we do not have to refer for redrafting. One or two rules may have to be revised but we can appoint a subcommittee to redraft them and submit them to the Style Committee.

I had in mind this general scheme for action at this meeting, subject to your suggestions. I thought first we had better take up by themselves this list of suggestions made on behalf of the Government in connection with Government cases instead of waiting for each rule as we go along - adopt or reject what has been offered - then when we get through that we might take up the question of condemnation cases and decide as a matter of policy, after con-

sidering what we have here, whether we want to put in any special rules on condemnation cases in so far as the Government is concerned or whether we want to exclude condemnation cases from the operation of our rules and let them stand as they are. The third item in my agenda was then to proceed to take up the rules one by one, and examine the reports and suggestions that have come in from the bar, and finally to take up the question of how much of the Federal statutes on procedure and practice we want to transplant into those rules. That is a pretty difficult subject. We have now laid on your desk a list of all the Federal statutes that deal with procedure and practice and a digest of them which I asked our staff here to make. It was quite a job. They have been working for weeks on it. We now have it. I have thought we should leave it until last because while we are going over the rules you will have time to examine this schedule of Government statutes out of Committee meetings for the next few days and be better prepared. I suggest that we leave that to the last. Has anybody any changes to suggest? Dean Clark, have you any suggestion that would change that method of approach?

Dean Clark - I have just two or three thoughts. I do not know whether we can settle all the Government questions at the beginning. Maybe we need to postpone some of them. We can certainly settle the policy but some of the changes may need to come up later. Major Tolman could settle that more than I.

Major Tolman - My idea was to go over this list and make such changes in it as it stands as the Government wants, then when we go back to the rule again if there is any other change of another kind we can make it.

Dean Clark - In my letter to you I suggested that it might be a good idea to have the members let Mr. Hammond know when they were planning to leave. If any of them had to leave early and had any special rules they wished changes in, we could be sure to cover them before they left. I also suggested that I

thought that as the sessions were usually so long it would be well to have one evening off.

Mr. Loftin - I have to leave not later than Thursday afternoon at 5:20.

The Chairman - We can work until we get tired and then decide.

Mr. Morgan - I have to leave Saturday.

The Chairman - I do not think we ought to sit later than Saturday afternoon. I think we ought to get through so we could get home over the weekend.

Mr. Gamble - I have to leave Friday evening.

Mr. Clark - There is just another matter. Forms have not yet been acted upon. I do not know what action you need to take but you want to remember there are some forms. Each meeting they have been postponed. Sooner or later some decision will have to be made.

Mr. Tolman - Forms naturally fall to the Style and Form Committee.

Mr. Clark - That is probably all right.

The Chairman - We can leave it to the Style Committee and ask each member of this Committee to study them and send any changes in to the Style Committee.

If there is no objection, let's start in on the Government suggestions as to rules affecting Government litigation. Major Tolman took that up and was appointed a special committee on the subject to take it up with the attorneys of the Department of Justice and other lawyers in the Government service. Mr. Holtzoff of the Department of Justice made a report with recommendations and Major Tolman went over it and made a report of his own. Then he had correspondence with Dean Clark and I. We wrote in our ideas and then Major Tolman conferred with the Department attorneys again. I have asked him to come before us this morning with his recommendations in specific form, which he has done, and you have that before you here. It is item 3 in this list of matters furnished by our staff.

(Reporter was directed to take only final conclusions of changes made in rules).

After a brief explanation by Major Tolman, the following action on the rules pertaining to Government suits was taken:

Rule 4(b) - Judge Olney suggested that "may" should be changed to "shall" in the second line. Major Tolman suggested that it be left for style and form committee.

Rule 4(b)(1) - Line 5 - insert after "employee" designated by such United States Attorney in a writing filed with the clerk of the court". Strike bracketed phrase.

Line 12 - Strike "is sought to be enforced or".
(Opposer - Dodge, Morgan, Cherry - the "Ayes" have it).

Line 12 - After "action" insert "against the United States".

Line 14 - Change the sentence beginning with "If the agency" to the following:

"If the agency named as a defendant is a corporation, service upon it, as hereinbefore provided, shall be made as stated in subdivision 4 of this rule."

Rule 17.- Line 31 - After "order" add "or within such other time as the court may fix". (Substitute for lines 29-34 as proposed rejected).

Rule 18 - Motion made by Mr. Sunderland that suggested amendment of Government be not adopted - Seconded by Mr. Olney - Carried.

Rule 22 - Motion made and carried that Mr. Clark's suggestion for (c) be adopted with the following change - after "rules" insert "within 20 days after a party has served his pleading, he may amend it as a matter of course" and after "trial calendar" in next line add "or set for trial", so it would read thus -

"At any time before the adverse party has served a responsive pleading, or if none is to be had under these rules within twenty days after a party has served his pleading, he may amend it once as a matter of course before the action has been placed upon the trial calendar or set for trial." (Style Committee).

Lines 13-16 - Dean Clark's suggestion adopted.

Rule 31 - Major Tolman withdrew suggestion for addition to this rule.

Rule 40 - Adoption of suggestion for insertion at end of paragraph (c) rejected, on motion.

Rule 41 - At end of this rule add the following as a separate paragraph:

"The expenses and attorney's fees provided for in this rule shall not be imposed upon the United States."

Motion adopted, Mr. Olney voting against it as he thought Mr. Gamble's suggestion to insert it in Rule 63 was better. Chairman stated style committee could decide.

Rules 42-43 - Mr. Morgan moved amendment as suggested by Government be rejected. Carried.

Rule 51 - Suggestion pertains to a note - which can be left to Dean Clark to put in.

Rule 63 - Suggested amendment by Government rejected on motion, at the same time adopting the following changes:

Line 53 - Strike "where and" and "lowever".

Lines 53-54 - Strike the word "provided" and substitute the word "permitted."

Rule 76 - Government suggestion rejected.

Rule 78 - Government suggested amendment rejected because unnecessary.

Rule 79 - Subject to revision of style committee, Mr. Mitchell's suggestion adopted that at end of line 53 there be added "and no such security shall be required of the United States or of an agency thereof."

(Rule 79 -- contd) -

Amendment re Section 1543 of Title 26 rejected.

Rule 82 - Matter of a note - Dean Clark to put it in.

Rule 90 - Line 16 - Strike out "to naturalization proceedings except appeals in such proceedings" and insert in lieu thereof "proceedings for admission to citizenship except appeals in such proceedings". Motion adopted.

Style Committee to decide whether or not Government exceptions are to be in one place.

Rules 4 and 6 - re adjudication of water rights -

(After some discussion, recessed for lunch at 1:15 P.M. and reconvened at 2 PM).

Major Tolman's suggestion for Rule 4(c) rejected.

Mr. Olney moved (Mr. Dodge seconded) that (c) of Rule 4 be amended to read in accordance with the suggestion which was made by the Chairman - thus - (c) to read - "Service of the summons or of an order of the court summoning parties not inhabitants of or not found within the district in which the action is brought by publication or otherwise", etc.

Style committee to fix title of 4(c).

Rule 6(a) - The suggestion of Major Tolman re Line 4 was not acted upon.

(Amendments of Mr. Ward's to Rules 18 and 20 are unnecessary because of the previous changes in those two rules.)

Mr. Dodge proposed that Mr. Ward's suggestion to be inserted after "mailing" in line 30 be adopted with the following modification -

"[Provided that] in any action in which there are unusually large numbers of defendants [and the question involved is one of common or general interest], the Court upon [motion] of a plaintiff, or defendant, or upon its own motion, may [make an] order [providing] that service of the pleadings of the

defendants and replies thereto need not be made as between the defendants in said suit, and that any new or affirmative matter, cross-claim, or counterclaim contained therein shall be deemed to be denied by all other parties, and that the filing of any such pleading, together with the service of a copy upon the plaintiff, shall constitute due notice of the same to the parties to the suit. [Provided that] a copy of such [order, or] orders, shall be served upon the parties to the suit in such manner and form as directed by the court." (words in brackets are suggested matters of style). Proposal adopted.

The Chairman - The next subject is what will be done with condemnation cases.

Major Tolman - Discussed the Government's desires and submitted his proposed rule.

Mr. Lemann - Moved postponement of consideration of condemnation cases until the last day of the meeting. Adopted.

Major Tolman then presented his proposed Rule 81 - Extraordinary Legal Remedies.

Mr. Lemann moved that Mr. Mitchell's suggestion - that a statement or note be put in Rule 90 or some other appropriate place as agreed below - be adopted. Style committee to determine.

It was agreed that note or statement say nothing about Certiorari:
that Habeas Corpus shall be governed by existing statutes of the United States;
that Mandamus shall be governed by existing statutes of the United States;
that Quo Warranto shall be governed by existing statutes of the United States,

that note or statement say nothing about Prohibition; and that writ of Scire Facias is abolished. (Query - should this reference be put in Rule 30 or note thereto?)

The Chairman - Now we will go back and take up the rules in order.

Rule 1. Scope of Rules.

Line 5 - Strike "whether".

Line 8 - Strike "further end".

(Rule 90 - Line 6 - after "rules" Strike all that follows through "they" in Line 10.)

Note to Rule 1 - that "The phrase district courts of the United States does not include territorial courts, but by the organic acts of Hawaii and Puerto Rico this set of rules will apply" - or something similar - to be dealt with by Style Committee.

Motion to leave Rule 1 as it now stands passed, with Mr. Sunderland opposing.

Rule 2. One Form of Action and One Mode of Procedure.

No change. (Reporter's suggested addition for line 3 disapproved).

Rule 3. Commencement of Action.

Line 3- "But" clause to go out. Rule to end with the word "court".
(Moved and adopted).

Rule 4. Summons: Form and Service.

(a) Issuance and Form.

Line 21 - Strike marginal insertion after "States" and insert in lieu thereof "or any officer or agency thereof".

Line 22 - Strike "its or his" and insert "an".

Mr. Morgan's motion that substitute rule (a) in Reporter's comment be adopted was overruled by following motion of Mr. Gamble:

(Rule 4(a) - contd) -

Mr. Gamble - I move that subdivision (a) of Rule 4 be left as in its present draft with amendments just ordered". Adopted.

(b) Method of Service; Personal Service.

(1) - Line 28 - Strike marginal insert and substitute "or any officer or agency thereof" after "States".

Line 39 - Strike marginal insert and substitute "an officer or agency of the United States is named a party, or", after "whenever".

(2), (3), and (4) - O.K.

(5) - patent provision - O.K.

(6) and (7) - O.K.

(c) Same. Order of the Court Summoning Parties.

See amendment of lines 90-95 under "Rules 4 and 6" - page 7.

Note to be added referring to Federal statutes on publication.

(d) Consent to Jurisdiction

Line 99 - After "service" insert "or otherwise". Strike out "or by any other manifestation".

Line 100 - Strike "of consent".

Professor Cherry suggested that Style Committee consider revision of subdivisions in (b) as follows - 3, 6, 4, 5, 1, 2, 7.

Amplify titles of (c) and (3) and revise main title of Rule 4.

Rule 5. Process: Territorial Limits of Effective Service; Service; Return;
Amendment.

Title to be called to attention of Style Committee - Service and Return of Process suggested.

(b) Service. - Change as follows:

"Service of all process, mesne and final, may be made by the United States Marshal, by his deputy, or by some person specially appointed by the court for that purpose and shall be so made except in the case of subpoena for a witness." (Agreed to).

Add at end of (b) - "Such power of appointment shall be exercised freely when substantial savings in travel fees of marshals will result". Adopted.

(c) Return - No change.

(d) Amendment. - Remove to Rule 4. Referred to Style Committee.

Professor Cherry suggested revising order of subdivisions to (b), (c), (a), and if retained in this rule (d).

(Recessed at 5:55 PM until 8 PM).

Service and Filing of Pleadings and Other Papers.
Rule 6 - Line 7 - insert "of judgment" after the word "offer".

Line 8 - Strike "or permitted".

Line 10 - add "for failure to appear" after "default" (See Rule 38, insert to line 4). Style Committee to consider a general provision for service of all notices only upon parties not in default for failure to appear.

Rule 7 - Time: Enlargement and Computation; ^{On} affected by Expiration of Term;
For Motions--Affidavits, for Pleading or Other Action After Disposition of Motion,
Additional Time After Service by Mail.

Title should be revised - Referred to Style Committee.

Note for Style Committee - Consider whether or not the provisions in rules

(Rule 7- cont'd).

excluding day of service, etc., might not be combined in one provision under Rule 7 - which would include the first and exclude the last day.

Lines 7-8 - "made at any time" - Style Committee to consider omission.
(Suggested by Mr. Olney).

Line 33 - Marginal insert - After "comma" insert "unless the court directs that they be filed at some other time" instead of "unless the court otherwise directs".

See discussion under Rule 43.

Line 33 - After "be" and before "submitted" in the marginal insert, insert "served not later than 1 day before the hearing" striking "submitted at the hearing". The reference in this marginal insert to "Rule 65(b)" should be "Rule 65(c)".

Rule 8 - Use of Forms - Forms to be considered by the Committee and suggestions sent in to Style Committee.

Rule 9. -Pleadings Designated; Motion Defined.

Line 11 - Strike "except when" and insert "unless".

Judge Olney suggested restoration of "ex parte application or" but it was voted to leave it out.

Rule 10. -Signing of Pleadings. No change.

Rule 11. Form of Pleadings: Caption; Paragraphing; Separate Statement; Incorporation by Reference; Exhibits.

No change.

Rule 12. General Pleading Rules.

Line 8 - Agreed to change "simply, concisely, and directly" to "simple, concise, and direct" and to strike "set forth".

(c) - After "demanded" - Style Committee to consider "Such demand shall have the effect of limiting the relief accorded only to the extent as provided in Rule 63(c)." Suggested that it be put in cross-reference note in this rule to Rule 63 - Left to Style Committee.

(d) - Lines 24-25 - Strike "whenever practicable".

(e) - Style Committee to consider the words "new matter" and all of the first four lines for grammar.

See discussion under Rule 22.

Rule 13. Pleading Special Matters. Capacity; Fraud, Mistake, Condition of the Mind; Conditions Precedent; Official Document or Act; Judgment; Time and Place; Special Damage; Affirmative Defenses.

Strike all in title after "Pleading Special Matters." Agreed.

(d) - Change "plead" to "aver".

Rule 14. Complaint.

Style Committee to consider "sufficient if it contains" and "shall contain".

Consider a note reference to Title 28, § 399, to this rule and Rules 16 and 22.

Rule 15. Answer; Reply.

Line 7 - Insert after "or" the words "in the".

Line 8 - Strike "shall be set forth". Lines 8-9 will then read "separately stated and in the manner prescribed for the complaint in".

Rule 16. Defenses - When and How Presented. - Substitute for Rules 16 and 17 - Dean Clark's revision 1/29/37.-

Various suggestions and motions were agreed to - at the conclusion of which the Reporter was instructed to revise and bring back a draft for the Committee to reconsider before it adjourned.

[The following excerpts of informal discussion on the above revision are included herein for the purpose of reference:

(a) Insert words "notice of" before the word order in line 12.

(b) Strike out lines 14-16, "going to any matter set forth in the complaint or in the answer by way of cross-claim or counterclaim". Agreed.

Line 16 - Strike "made as a defense" and insert "stated".

Line 17 - Strike "made" and insert "stated".

Line 19 - Insert after "defenses" "or objections".

(c) Mr. Olney moved that we change rule so that if a defendant objected by motion to the jurisdiction of the person and, upon motion being over-ruled, filed an answer, he thereby waived his objection to the jurisdiction over his person. The Chairman stated - All in favor of changing the present Federal rule and providing that any defense on the merits absolutely waives the objection to the jurisdiction over the person say aye - Motion Lost

(Recessed at 10:25 P.M.
(Reconvened 9:25 A.M. 2/2/37.

(a) - O.K. with above insertion.

(b) Following suggestions made -

1 - Every defense or objection in point of law or fact and whether to the jurisdiction over the subject matter of the action or over the person or to venue or in abatement or stay may be stated in the answer or reply and shall be so made unless presented in accordance with subdivision (c) of this rule. No special appearance is necessary to raise any defense in abatement of the action or of the service of process and such defense is not waived by being joined

with other defenses in the answer or in the motion provided in subdivision (c) of this rule. (Remainder of (b) the same).

2. Jurisdiction over the subject matter or over the person or to the venue or to the service of process or in abatement or in bar may be stated in the answer, etc. No special appearance is necessary to raise all such defenses in the answer or in the motion provided for in subdivision (c) of this rule. First sentence same.

The court upon motion shall order a hearing of any of such defenses or objections in advance of the trial upon the merits unless it appears that the point is included in the merits - as do not require the presentation of evidence.

Major Tolman and Dean Clark to redraft (b) in accordance with suggestions. Recast Professor Cherry's proposal*- referred to Reporter to bring back revised draft inserting changes ordered.

*Professor Cherry proposed - objections to jurisdiction or venue and objections in point of law whether presented by motion or in the answer shall be heard and determined before trial on application of any party unless the court shall find that such objection can be presented better at the trial.

Mr. Mitchell suggested recast of lines 56 et seq - something on this order -

When a defense or objection is such that a decision thereon may finally dispose of the whole or a material part of the issues, the court shall on the application of either party hear and dispose of it before trial unless for good cause shown - (to be recast and put in)

Major Tolman submitted - unless the court shall be of the opinion that evidence which may be produced at the trial may aid in proper decision of the defense or objection.

(c) - Cover service of process - jurisdiction of person - venue and the sufficiency of the complaint as stating grounds for relief.

The Chairman - When a defense or objection is such that it may abate the action or present an issue of law as to failure to state sufficient grounds for relief or otherwise a decision on the merits of --

Major Tolman - When the defense or objection is such that it may present an issue of law or otherwise facilitate the speedy disposition of the case without a trial, the party may ---

Dean Clark - add to end of (c) - special appearances sentence now in (b).- Defenses or objections or failure to state sufficient grounds of relief and to the jurisdiction over subject matter may also be made at the trial upon the merits and whenever it appears that it does not have jurisdiction of the subject matter, it shall dismiss the action.

(d), (e), (f) - Reporter instructed to provide that all motions must be brought as one except service of process, venue, jurisdiction over the person.

The Chairman - Do we want to combine these motions in one, deferring question of whether we will except process, jurisdiction, venue - (The Ayes have it.)

The Chairman - Shall we except from that, objection taken to jurisdiction over the personal service of process or venue? All in favor of making that exception, say Aye - The Ayes have it.

Judge Olney - Objections to venue should be made only in preliminary motion and no other way.

Dean Clark - Did not agree -

The Chairman - All in favor of adopting his suggestion that objections to venue and process must be raised in advance and cannot be raised in the answer, say Aye. Olney only Aye - all others opposed.

Reporter to bring back fair draft before meeting adjourns.

Rule 18. Counterclaim and Cross-Claim in the Answer.

Major Tolman to examine § 774 of Title 28, and to see also if there is any other statute forbidding bringing an independent suit unless the matter is first submitted to the General Accounting Office - re "credit".

Marginal insert - Put in short form - "or an officer or agency thereof".

Rule 19. Claim Against One Not a Party to the Action - Third-Party Complaint; Counterclaim and Cross-Claim by Third-Party-Defendant.

Line 6 - (Mr. Lemann) - Put "," after "plaintiff".

Line 10 - (Mr. Dodge) - Insert after "defendant" the words "or to the plaintiff". (Carried)

Lines 10-11 - (Mr. Dodge) - Strike "made against him by the plaintiff".
(Carried)

Rule 20. Reply; Counterclaim and Cross-Claim in the Reply or in the Answer to Cross-Claim.

Line 10 - Change "made" to "required of him". (Agreed).

Rule 21. Shareholder's Action.

The Chairman - proposed to add to rule - "In any such action brought by less than all the shareholders, no dismissal or compromise shall be effected without the approval of the court on such notice to the shareholders as the court may require".

Moved that Mr. Mitchell's proposal be held up for the present until class action rule is reached. (The Ayes have it).

Rule 22. Amended and Supplemental Pleadings.

(b) - Lines 17-21 - Strike first sentence and marginal insertion. In lieu thereof the following suggestion of Mr. Morgan was adopted by vote:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings".

Add after sentence substituted for Lines 17-21 - (Mr. Cherry)

"Amendment of the pleadings to conform them to evidence so received may be made upon motion of any party at any time even after judgment, but failure to so amend shall not affect the issues made by such evidence.

(Carried).

Line 21 - Insert "valid" after "is".

The following was discussed but not adopted - On application of any party or on a motion, the trial court or the appellate court may order an amendment.

Line 38 - Strike "so". Agreed to.

The following motion was lost - to add to rule 12 a provision that when a defendant wants to raise an issue as to diversity of citizenship, he must specifically deny it in his answer.

A motion that it need not be specially pleaded was carried.

In Rule 12 - Line 46 - Insert after "averments" the words "including averments of diversity of citizenship". (Carried).

Style Committee - Rules 12 and 13 - cross reference.

To be a reference to Title 23, § 399, in a note to this rule and in the notes to Rules 14 and 16 and to provide the necessary

Rule 23. Pre-Trial Procedure in Jury Actions; Formulating Issues.

The Chairman -- Do you want to limit this rule to cases in which juries have been claimed or strike that limitation out and say all actions?

Mr. Lemann - I move that limitation of jury trial be stricken.

The Chairman - The court may apply this procedure either in cases where jury has been claimed or in jury cases in his discretion.

Suggested clause in Reporter's Comment (d) adopted.

Strike "in Jury Actions" in title.

Strike "in which a jury has been claimed" in line 2.

Strike "for an informal hearing" in line 3 - and substitute "for a conference".

Strike "hearing" in 1st line of last paragraph and substitute "conference".

Strike "when filed shall be binding at the trial of the action" in lines 4 and 5 of last paragraph and substitute "when entered shall control the further disposition of the action and the trial thereof".

Strike "jury" in last sentence.

Add to last sentence - "and may either confine such calendar to jury actions or may extend it to all actions".

To be referred to Style Committee.

Rule 24 - Real Party in Interest; Capacity to Sue or Be Sued; Infants or Incompetent Persons.

Line 15 - Change "was" to "is" before "organized".

Rule 25 - Joinder of Claims. No change.

Rule 26. Persons with a Joint Interest; Effect of Non-Joinder. - No change.

Rule 27. Joinder of Parties; Permissive Joinder; Separate Trials; Misjoinder--
Adding or Dropping Parties.

Line 4 - After "transaction" insert "or occurrence". Same in Line 12.
 (Agreed)
 " " After "transactions" insert "or occurrences". Same in Line 13.
 (Agreed)
 Style Committee - for headings and captions.

Rule 28. Interpleader. - No change.

Rule 28A. Class Actions. Left of consideration later.in the meeting.

Rule 29. Intervention.

(a) - Permissive Intervention.

Line 3 - After "permitted" insert "in the discretion of the court".

(See substitute for (a) below).

(Recessed at 1:10 P.M.
 (Reconvened at 2 P.M.

Judge Olney suggested the following substitute for (a):

"Any one claiming an interest in the litigation may at any time be permitted to intervene when it appears to the court that his so doing would contribute to the ultimate doing of justice and such intervention would not unduly delay or impair the determination of the action as between the original parties".

(See revision below).

Mr. Dodge - I move that the substance of Judge Olney's suggestion be substituted for paragraph (a) of this rule (Seconded by Major Tolman). Subject to revision by Style Committee. Adopted.

(b) Intervention of Right.

Line 7 - Insert "upon timely application" before "Anyone".

Lines 8-9 - Strike "so long as the court has control thereof".

(Rule 29 - contd)

Following redraft for (a) suggested by Dean Clark - and referred to Style Committee:

"Anyone claiming any interest in the litigation may at any time be permitted in the discretion of the court to assert such interest by intervention. In exercising its discretion the court shall consider whether such intervention shall unduly prejudice or delay the rights of the original parties".

The Chairman - If any of the members wish to send in suggestions, they will be welcomed by the Style Committee.

Style Committee to consider putting (d) before (c), and the following:

Add to (b) - "and (?) whenever a right to intervene is given by a statute of the United States." and strike "and" in line 13 if (c) to be combined.

Should (c) be combined with (b) or left as a separate subdivision?

Rule 30. Substitution of Parties.

The Chairman - I propose a substitute for lines 2-12 as follows:

"If a party dies and the claim is not thereby extinguished, the court, within two years after such death, may order substitution of the proper party. If substitution is not so made the action shall be dismissed as to such deceased party. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and shall be served on the parties as in Rule 6(a).

Mr. Lemann - Line 13 - Omit first six words. Referred to Style Committee.

Line 16 - Strike "them" and insert "all parties to be substituted". Referred to Style Committee.

Suggested to Style Committee that this rule or a note stating that scire facias is abolished.

Rule 31. Depositions: Their Form; Purposes; Scope; Use and Effect; Costs.

(b) Depositions to Perpetuate Testimony.

Line 35 - Insert "verified" before "petition".

Line 36 - After "residence" insert "or in the district of the residence of one or more of the expected adverse parties" Agreed.

Line 46 - Insert after "examined" the words "and the substance of the testimony expected from each" (Dodge moved and Morgan seconded) Refer to Style Committee.

After "publication" in first line of insert at top of page 3, add "end may appoint an attorney to represent the parties so served at the examination and to cross-examine the witnesses". (See Iowa statutes). (dictated by Prof. Summerland May after meeting.)

Suggestion made by Mr. Gamble - "When it satisfactorily appears to the court or judge that the party interested cannot be personally notified, such court or judge shall appoint a competent attorney to examine the petition". Refer to Style Committee.

Suggestion - If it appears that the notice cannot be given to the interested parties, the court may appoint counsel to represent such absent parties at the taking of the testimony and the fee of such counsel shall be fixed by the court and paid by the petitioner.

(c) Scope of Examination. Line 65 - Before "pending" insert "subject matter involved in the". Agreed.

Line 72 - at end of (c) add "and the identity and location of persons having knowledge of relevant facts". Agreed.

Mr. Loftin - "b" should come at end of Rule. Agreed - or make new rule.

Refer to the following case in a note to the Supreme Court:

Union Solvents Corp. v. Butacet Corp. 2 Fed. Supp. 375

and explain why the Committee does not feel that there are jurisdictional limitations under the rule as drawn and give reasons therefor. (See change in line 36, supra.)

13.

Rule 32. Officers before Whom Depositions May be Taken; Orders for the Protection of Parties and Deponents.

Heading should be changed. Matter of style.

Line 18 - Add at end - "Commissions may be addressed to officers either by name or by descriptive title and letters rogatory may be addressed 'To the Appropriate Judicial Authority in _____' (naming country)."

Rule 33. Stipulations Regarding the Taking of Depositions.

Line 2 - After "default" insert "for failure to appear". Also in Rule 34 and Rule 6 same insertion, or a general rule covering this matter.

Rule 34 - Oral Examination.

(a) Notice of Examination; Time and Place.

Line 30 - After "default" add "for failure to appear" (See Rule 33)

Strike last sentence in marginal insert - Line 36.

(c) Record of Examination; Oath; Objections.

Line 87 - Change "take" to "record". (Style Committee to compare language in insert, line 88, with insertion line 38 of Rule 50 and make the same).

(d) Submission to Witness; Changes; Signing.

Line 101 - Marginal insert - Strike "present at the examination".
(Agreed).

(f) Orders for the Protection of Parties and Deponents.

Line 152 (page 7) - After "court" insert "or that secret processes, developments or research need not be disclosed or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court."

Insert (3) at bottom of page 7 - Strike. (Agreed).

Rule 35 - Examination of Witnesses upon Written Interrogatories.

Line 10 - After "name" in marginal insert add "or descriptive title".

(Agreed)

Line 66 - (Olney) Insert "copy of the" before "notice" in marginal insertion. (Agreed).

Rule 35A - Examination of Parties upon Written Interrogatories.

No change.

Rule 36 - Effect of Errors and Irregularities in Depositions.

Line 44 - Insert after "made" "at the taking of the deposition".

Rule 37 - Out.Rule 38. Production of Documents and Things for Inspection, Copying or Photographing.

Line 4 - After "parties" in margin add "not in default for failure to appear".

Note - Instead of repeating above phrase put in general Rule 6 a statement that notice shall not be served on persons in default for appearance.

Rule 39. Physical and Mental Examination of Persons.

(b) - Strike "and tender of reasonable fees therefor" in lines 5-6 and 12-13 of marginal insert. Strike "demand" in line 12 and insert "request". After discussion the following to be substituted for the first sentence and beginning of second sentence of (b):

"Any party causing such examination to be made shall deliver to the party examined upon his request a detailed affidavit of the examining physician setting out his findings and conclusions. After such delivery, the party causing the examination shall be entitled, upon request, to a like affidavit from every other", etc.

In last paragraph of (b) strike "such" and insert "an". After "affidavit" insert "as aforesaid"; strike "his" and insert "any"; after "privilege" insert "he may have".

Rule 40. Admission of Facts and of Genuineness of Documents. No change.

Rule 41. Consequences of Refusal to Answer Questions or Otherwise to Give Discovery.

Line 18 - After "refuses" insert "to be sworn or refuses".

Line 29 - At end of line insert the following:

"If the motion is denied, the order shall, if the court finds that the motion was filed without substantial justification, require the examining party or the attorney advising the motion, or both of them, to pay to the refusing party or witness the amount of the reasonable expenses incurred by him in opposing the motion including the reasonable attorney's fees."

Line 109 - Strike "refusal" and insert "denial".

Agreed to put in (f) as stated.

Rule 42 - Out.

Rule 43. Motion for Summary Judgment Where No Fact Controversy Exists.

Line 7 - After "thereof" insert "as a separate sentence - "The motion shall be served at least [not later than] 10 days before the time specified for the hearing thereon".

Line 10 - Strike "would require a decision in his favor as a matter of law" and insert "show that there is no issue of fact (except the amount of damages) affecting the rights of the moving party to judgment, and that he is entitled to a judgment as a matter of law (within the amount of the damages)."
(Agreed) Style Committee to choose which of brackets to be retained.

(Recessed 5:50 P.M.

(Reconvened at 8:10 P.M.

(Mr. Morgan not present at this evening session.
(Senator Pepper arrived for remainder of session.

Senator Pepper's motion that the rule be so drawn that the plaintiff might move for a summary judgment twenty days after the date of filing his

(Rule 43 - contd).

complaint was lost.

Line 12 - Strike "present" and insert "prior to the day of hearing the motion file and serve".

Line 13 - Strike "in" and insert before "denial" "sufficient to constitute".

Line 14 - Strike "in" before "avoidance".

Line 16 - at end of (a) - Insert "an order may be entered where damages are subsequently to be assessed". Style committee to decide whether it should go here or in Rule 44. See exact suggestion of Mr. Sunderland as follows: (to be added at end of line 16) -

"When the court finds that the claimant is entitled to a judgment in a case where unliquidated damages are sought an order to that effect shall be made and the court shall direct that the damages shall be assessed."

Line 22 - After "thereof" insert a separate sentence as follows: (same as inserted in Line 7) -

"The motion shall be served at least [not later than] 10 days before the time specified for the hearing thereon".

(On motion of Sunderland, seconded by Pepper, it was agreed that 10 days notice of such a motion shall be given and that the moving party's affidavits shall be served with his motion and affidavits of the adverse party shall be served not later than one day before the hearing. /- Rule 7 to be changed to include this motion and then reference made to Rules 43 and 65. - Mr. Pepper moved that in Rule 7, line 28, 3 be changed to 5 and that it be made to conform to the change just made, saving only as to the length of the notice. (Agreed)

(Rule 43 - contd) -

Lines 19-20 - Strike "after service of the pleading presenting his defense". (Carried).

Line 25 - After "face" insert the same statement as inserted in Line 10 - "show that there is no issue of fact, etc."

Line 27 - Strike "present" and insert "prior to the day of hearing the motion file and serve".

Line 28 - After "facts" insert "sufficient to constitute a" and strike "in".

Rule 44. Defining the Issues When Case Not Fully Adjudicated on Motion for Judgment.

See Rule 43.

Rule 45 -Jury Trial of Right; Waiver.

Line 15 - Strike "20" and insert "5".

Line 16 - Strike marginal insertion.

(Recessed at 10:20 PM
(Reconvened at 9:45 A.M. 2/3/37.)

The Chairman - A suggestion has been made by Judge Olney that we ought to take a little rest in the middle of the sessions. What is your pleasure? We have a great deal of ground to cover and if matters of style and form were left to the Committee on Style and Form we might get along a little faster.

Dean Clark - We might take one evening off if we are going to sit a week. Our sessions are pretty long and at the end we get pretty tired.

Judge Olney - I suggest that we take a five minute rest in the middle of the sessions.

The Chairman - The afternoons are the longest. Suppose we take a five minute rest in the middle of the afternoon. The morning session isn't as long and we are freshest in the morning.

* * *

Vice Chairman - I will take the responsibility from the Chairmen and when it gets to 4:30 will call "Seventh Inning - Stretch". (Laughter).

Rules 16-17 - Defenses-when and How Presented.

Dean Clark submitted redraft (2/2/37).

(b) Defenses by Answer or Reply.

Line 20 - add after "answer" or in the motion provided in subdivision (c) of this rule."

(c) Defenses by Motion.

Line 22 - Strike "for judgment" (Gamble) (Agreed).

Lines 23-24 - Strike brackets.

Line 26 - Style Committee to note -- possible change to "to state a claim upon which relief can be granted". Also the insertion of the words "in a cross-claim" after the word "relief" at end of line.

Line 27 - Strike "for judgment".

(d) Preliminary Hearings.

Line 35 - Style Committee for brackets.

(e) Waiver of Defenses.

Line 39 - (Clark) How would this do? "And whenever it appears by suggestion of the parties or otherwise".

The Chairmen - The Committee on Style in dealing with subdivision (e) is requested to clarify the section so as to make it clear that what Mr. Dodge calls a "demurrer", i.e., an objection on the ground that a complaint does not state a cause of action or that an answer does not state a defense is not waived by not being made in the motion. Agreed.

Line 41 - "all other defenses" instead of "otherwise all defenses"

Line 43 - Style Committee to consider use of word "such."

Line 43 - Insert after "motion" "and not made therein".

(Motion made but not carried that first part of paragraph (e)

be stricken.)

(Rules 16-17, cont'd).

(f) Motion--When Answer or Reply Insufficient in Law; Motion for Judgment.

Lines 49-55 - Style Committee to consider striking lines 44-49 because they may be sufficiently covered by lines 49-55.

Line 53 - Style Committee to consider words in brackets.

(i) Consolidation of Motions.

Line 75 - "party" should be "part".

Line 80 - Bracketed material remains.

Rule 13 - Counterclaim and Cross-Claim in the Answer.

Further report by Major Tolman re "Credit" as requested in earlier part of meeting submitted.

A note referring to the three statutes to cover it - Chairman suggested that at end of subdivision (c) a statement be made somewhat as follows:

Allowance of credits against the United States are subject to the provisions of Title 26, §§ 1672, 1673, and Title 28, §§ 772, 775.

Referred to Style Committee.

Rule 46. Trial by Jury; by the Court.

After considerable discussion, Mr. Dodge moved that in an equity case the judge have the right to send the case on any issues either to an advisory jury or to a common law jury. Dean Clark and Mr. Olney only supported the motion and it was not carried. Then Mr. Dodge moved that rule stand as amended. Mr. Loftin seconded - all were in favor except Mr. Dodge and Judge Olney.

Rule 47. Assignment of Cases for Trial. No change.

Rule 48. Dismissal of Actions.

Mr. Lemann moved that we adopt Mr. Cherry's redrafts showing "with prejudice" and "without prejudice". Seconded and Carried.

The Chairman - To get away from details we might consider inserting in place of (a) through (h) of P.D. Rule 48, the provisions of (a) and alternative (b) of Dean Clark's draft.

Mr. Lemann - I move that the Style Committee be requested to consider the rearrangement of the subdivisions under Mr. Cherry's Rule 48A.

The Chairman - Is it asking too much of Mr. Cherry to give us a revised draft of Rule 48, eliminating the enumeration idea but following the general structure of his rule.

Mr. Cherry - I will be glad to try it.

The Chairman - Referred to Style Committee with the understanding that Mr. Cherry will redraft his rules 48 and 48A and submit them to Style Committee.

Judge Olney - I move that the rule include a provision saying that the plaintiff at any time before judgment may dismiss his suit with prejudice subject to provisions of extraordinary provisional remedies, etc. (Morgan - No). Carried.

Note to this rule and Rule 56 - (See Mr. Cherry's note, last paragraph, page 2, Rule 48A.)

Rule 49. Consolidation; and Severance and Separate Trials.

No change.

Rule 50. Testimony and Evidence.(a) Admissibility of Evidence in General.

Mr. Pepper - I move acceptance of alternative on margin for lines 6-15.

(Mr. Loftin seconded motion) Carried.

(Recessed 1 PM for lunch
(Reconvened at 2:10 PM

Lines 4-6-- Strike "The competency of a witness to testify is determined by the law of the state in which the court is held."

Add to alternative for lines 6-15 at end "the competency of a witness to testify shall be determined in like manner". Agreed.

(b) Scope of Examination and Cross-Examination. No change.

(c) Record of Excluded Evidence; Harmless Error to be Disregarded.

Lines 42-45 - Judge Olney - I move that Mr. Mitchell's suggestion to change lines 43-45 to "will result from a refusal so to do", striking all after "prejudice" in line 43 be adopted. Agreed.

Style Committee to consider moving last sentence in (c) - lines 38-45 to Rule 70. Style Committee to compare insert in line 38 with corresponding language of insert in line 88 of Rule 34, and adopt a uniform language.

Rule 50A. Official Records as Evidence.

Judge Olney suggested that in place of this rule a simple rule be substituted somewhat as follows:

"That wherever a public record would be competent evidence, a certified copy of it may be used as if the original were produced."

Mr. Sunderland and Mr. Morgan were appointed as a subcommittee to present a redraft of this Rule before the Committee adjourns.

Rule 51. Subpoena for Witnesses.

Line 21 - Bracketed clause to be kept in. Change "agent" to "agency".

Rule 52. Exceptions Abolished.

The Chairman - At the end of this rule I suggest adding -

first - "When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal without the appellant having made in the district court any motion for judgment or motion to amend the findings."

second - "but failure of the court to make a finding on a material question of fact must be called to the attention of the court by a motion for additional finding."

Dean Clark - I agree but think that it should be under Rule 68.

The substance of the first part of Mr. Mitchell's suggestion was agreed to and to be put in either Rule 52 or Rule 68(c).

With respect to the second part of the suggestion, it is rejected and a contrary rule is to be stated in Rule 68(c).

Style Committee to decide where Mr. Mitchell's suggestion should be placed - either this rule or Rule 68 or place a statement in this rule referring to Rule 68.

(Weight of evidence and sufficiency of evidence to be taken care of in Rule 68.)

Rule 53. Examination of Jurors by the Court; Alternate Jurors. No change.

Rule 54. Juries of Less than Twelve - Majority Verdict. No change.

Rule 55. Special Verdicts and Interrogatories.

Line 35 - Strike remainder of sentence after "more" and re: in marginal insert.

Rule 56. Motion for a Directed Verdict. No change.

Rule 57. Instructions to Jury; Objection. No change.

Rule 58. Reference to Master.

Style Committee to consider Reporter's comment.

Rule 59. Proceedings before Master. No change.

Rule 60. Powers of Master.

Line 21 - Strike "the" and insert "may call and examine upon oath".

Line 42 - After "require" insert "that a statement in a different form be furnished, and" [or].

Rule 61. Master's Report.

Lines 32-33 - Restore.

Line 39 - Strike "open" and leave "considered".

Rule 62. Appointment and Compensation of Masters. No change.

Rule 63. Judgments; Costs.

Lines 8-22 - Strike (b) and restore Lines 23-35 with the exception of sentence in lines 30-32. Agreed.

Mr. Pepper - I move that the statement as submitted by Professor McLaughlin be embodied in Rule 63 with power to the Style Committee to shift it to a more suitable position. Agreed. (Professor McLaughlin's statement is as follows: -

"A fraudulent conveyance may be set aside without a separate or previous judgment establishing the plaintiff's claim and without the issuance and return of execution or similar process.")

Also cite in note to Supreme Court Braun v. American Laundry Mach. Co., 56 F(2d) 197, 199.

Rule 63 - (cont'd).(c) Effect of Demand for Judgment.

Strike first bracketed phrase "both legal and equitable".

Strike after "entitled" the words "upon the merits of the case as disclosed by the pleadings and the evidence".

(c) Costs.

Line 47 - Strike "the allowance of", and begin "costs" with "C".

Lines 50-51 - Strike "in the discretion of the court", and insert "allowed as of course to the prevailing party, unless the court otherwise directs" in lieu thereof.

Line 53 - Strike "however" and "where and".

Lines 53-54 - Strike "provided" and insert "permitted".

Rule 64. Entry of Default; Judgment by Default.

(b) (2) - Lines 43-45 - Mr. Pepper moved to change lines so that they would read as suggested in Reporter's comment in margin, as follows:

"may conduct such hearings or order such references as it deems necessary and proper, and shall accord a right of trial by jury to the parties when and as required by any statute of the United States." Agreed.

(In last part of this insert "a" was changed to "any" before "statute").

Rule 65 - New Trials.

Judge Olney - Strike out in lines 32-33 remainder of sentence after "sought. Agreed.

Line 43 - Strike "by any judge".

Reporter's Comment - Lines 10-16 - to be taken care of in Rule 63.

Line 49 - Marginal insert to be stricken.

See discussion under Rules 43 and 87.

Rule 66. Relief from Judgment or Order.

No change in rule, but reference in note to Title 28, § 118.

Rule 67. Declaratory Judgments. No change.Rule 68. Findings by the Court.(a) Findings; Effect.

Line 2 - Bracketed phrase adopted without "but".

Lines 9-11 - The Chairman suggested the following as a substitute for this sentence:

Such findings of fact are presumptively correct and shall not be set aside on appeal unless clearly erroneous, with due regard to the opportunity of the trial court to judge of the credibility of the witnesses to testify in open court. (See revision below).

(Major Tolman made this statement to put himself on record -

"With due regard to the fact that the court has seen and heard the witnesses is the most valuable part of the rule. * * * The other things are technical ones. This is a practical one out of which the others have grown. * * * As to the danger that comes from the use of language that may apply to cases where the evidence was all on deposition, that certainly won't be made conclusive by this language because he did not see and hear the witnesses. I think the Chairman's proposal just as it is is the one that contains valuable material.)

Mr. Lemain - Moved that the Chairman's suggestion be adopted in toto. Adopted. (Clark and Morgan opposed).

The suggestion as adopted is as follows:

"Such findings of fact are presumptively correct and shall not be set aside unless clearly erroneous, having due regard to the opportunity of the trial court to judge of the credibility of witnesses to testify in open court".

Rule 68 (contd).(b) To be Included in Record on Appeal.

Lines 15-19 - Strike entire subdivision (b) . Agreed. (Embodied in R.74).

Lines 20-27 - Stricken because of amendment to first part of rule.

(c) Motion to Amend Findings.

At end of first sentence after "findings" add "or make additional findings, and may correct the judgment accordingly". Adopted.

Strike "This remedy" in second sentence and substitute "The pendency of such motion".

In second sentence strike "but shall be in addition to" and insert after "operation" "and such motion". Strike "the remedy of" and substitute "a".

See Rule 65 - Lines 10-16 - Reporter's Comment.

Mr. Lemann suggests adding to Rule 68(c) the following:

The failure of a party to make a motion for amendment or correction of findings or for the entry of additional findings shall not limit the right of such party to a review upon appeal.

Rule 69. Entry of Judgment.

Line 6 - after "costs" insert "or that there be no recovery". Agreed.

(Recessed 6 PM
(Reconvened 3:10 PM

Line 12 - After "clerk" add "on the civil docket".

Rule 70. Material Error Must Affirmatively Appear.

Style Committee to make language in lines 9-10 same as that in Rule 50.

Mr. Pepper moved that lines 8-10 should read "unless refusal to take such action appears to the court to be inconsistent with substantial justice".

Mr. Dodge seconded. Adopted.

Mr. Pepper moved to strike in Rule 50 Lines 38-45 and to put them into this rule. Mr. Loftin seconded. Agreed. (Errors as to evidence to be specifically mentioned in Rule 70). Cross reference to be made in Rule 50.

Rule 71. Appeal from a District Court to the Supreme Court of the United States.

Line 7 - After "citation" insert "jurisdictional statement and the record on appeal shall be made and certified".

See Discussion of Rule 74.

Rule 72. Appeal from a District Court to a Circuit Court of Appeals.

(a) How Appeal is taken.

Line 8 - Marginal insert - Strike "defendant" and insert "appellant".

(b) Notice of Appeal.

Line 14 - Strike "to" and insert "taking".

Lines 14-15 - Strike "shall be directed to each appellee".

(Senator Pepper made the following motion for (b) - that it should read -

"The notice of appeal shall specify the parties taking the appeal and shall be directed to each other party to the judgment; shall designate the judgment, or part thereof, appealed from; and shall specify the court to which the appeal is taken. The clerk shall forthwith notify each party to whom the appeal is directed of the filing thereof and any amendment thereto. Such notice shall be given by mailing copies thereof to all said parties but failure to do shall not affect the validity of the appeal. Such notification shall" etc.

On record vote this motion was lost - For it - Messrs. Leman, Gamble and Pepper.

Against - Messrs. Dodge, Morgan, Sunderland, Olney, Loftin, Tolman, Clark, Mitchell

(c) Bond on Appeal.

Lines 42-44 - Strike sentence.

(d) Supersedeas Bond.

Style Committee to redraft and shorten to avoid duplication and enumeration of specifications for conditions in the bond.

Rule 72 (cont'd).(f) Approved Surety Companies on Bonds.

Strike (f) and put in notes - "For qualification of corporate sureties see 6 U.S. C. §§ 6-15. Also to be added as a note to any other rules where bonds are mentioned.

(c) Failure to File or Insufficiency of Appeal of Supersedeas Bond.

Style Committee to examine -(Mr. Dodge suggests it is uncertain what "application" in the next to last line refers to.)

Rule 73 - Appeal from a Joint Judgment; Summons and Severance Abolished.

No change.

Rule 74. Record on Appeal.

Title - Add "to the Circuit Courts of Appeals".

(a) Designation of Contents of Record on Appeal.

Line 3 - After the second "appeal" insert "to a circuit court of appeals".

(b) Transcript of Evidence or Proceedings.

Line 27 - After "be" insert "available; After "and" insert "then transmitted to the."

Line 28 - Strike "for use in the"; After "court" insert "to be used by it".

(Lines 26-28 - referred to Style Committee.)

(Recessed 10:15 PM

(Reconvened 9:35 A.M. 2/4/37.

(c) Record to be Abbreviated--Penalty for Infraction.

Line 52 - After "irrelevant" insert "and formal".

(g) Record to be Prepared by Clerk--Necessary Parts.

Lines 74-75 - Change to read - "designated, copies of the material pleadings, without unnecessary duplication, verdict or findings of fact and conclusions of law together with the direction for the entry of judgment thereon, the judgment appealed from, the opinion, the notice".

(Rule 74 - cont'd).

Lines 76-77 - Strike "order for allowance of appeal as the case may be".

Lines 77-78 - Strike "and copies of appeal or supersedeas bonds".

Line 85 - Add at end "if such copy is required by the rules of the Circuit Courts of Appeals.

Refer to Rule 71 - Insert after "citation" in line 7 "jurisdictional statement, and the record on appeal shall be made and certified".

(h) Differences, Omissions, or Misstatements--Power of Court to Correct or Settle Record.

See Subdivision (h) of Reporter's Comment.

Style Committee - Suggestion of Dean Clark (below) - and of Mr. Mitchell (page 7) - to be considered - and a separate rule to be made entitled "Disability of Judge" - and inserted after Rules 77 or 89A.:

(Dean Clark's suggestion - "Disability of Judge". In case a judge before whom an action has been tried is, by reason of death, sickness or other disability, unable to perform the duties to be by him performed under these rules, after the verdict or judgment in the action, [as provided in paragraph (a) of Rule 74, or to approve of an agreed statement as provided in Rule 75,] then any other judge sitting in the same court or if none is available, the district judge designated by the Senior Circuit Judge of the Circuit may perform such duties, but if such other judge is satisfied that owing to the fact that he did not preside at the trial or for any other cause he cannot pass on such matters, he may in his discretion grant a new trial.")

Suggestions for Style Committee - regularly sitting in or assigned.

any other judge available in that district.

Mr. Lemann moved that the Reporter's suggestion for subdivision (h) be adopted, with exception of reference to certain assignments by the Circuit Court of Appeals, and changing it to mean either sitting or assigned, and then it be referred to Style Committee for details. (Mr. Pepper seconded) Agreed.

Rule 75. Record on Appeal; Agreed Statement.

Title - After "Appeal" insert "to the Circuit Court of Appeals".

Line 2 - After "appeal" add "to the Circuit Court of Appeals".

Line 15-16 - Strike "or order allowing appeal as the case may be".

Line 16 - Strike "s" of word "dates".

Rule 76 - Stay of Proceedings to Enforce a Judgment.

(Leave in Rule 80 the bracketed material).

(a) Automatic Stay; Exceptions--Injunctions, Receiverships and Patent Accounting. Line 4 - Strike brackets, leaving "Receiverships".

Line 11 - Strike brackets, leaving "or in a receivership action".

Line 8 - Mr. Dodge moved that "notice of it or of the direction for" be stricken" Mr. Loftin seconded the motion. Agreed.

Line 19 - bracket - matter for Style Committee, depending upon whether Rule 77 is incorporated in this rule.

(b) Stay on Motion for New Trial or for Judgment.

Line 31 - Add at end - "or a motion for amendment to the findings or for additional findings made pursuant to Rule 68(c)"

(c) Stay Until Subsequent Judgment is Rendered.

Lines 33-34 - Strike all through "rendered" and substitute "In all cases of separate judgments".

Line 36 - Strike "operation or".

Style Committee - question of repetition between subdivision (c) of Rule 76 and Rule 63(b).

(d) Supersedes Upon Appeal.

Lines 41-42 - Strike bracketed phrase.

(f) Stay According to State Law.

Lines 76-77 - Strike "for one term or more".

Lines 79-80 - Strike "might have been" and insert "would be"; Strike "their" and insert "the".

(Rule 76 - cont'd).

(g) Power of Appellate Court Not Limited.

Line 86 - After "appeal" insert "or to make any order to preserve the status quo or prevent the subsequent judgment of the court being made nugatory.

Lines 86-88 - Bracketed phrase to be retained if Rule 77 is incorporated in this rule, leaving out the last paragraph of Rule 77.

(Style Committee to be sure accounting of an agency is same as that of U.S.)
Footnotes - Subdivision (a) - First sentence states the substance of § 374,

Title 28, U.S.C.; the second sentence is the substance of §§ 227 and 227(a), Title 28, U.S.C.

Subdivision (b) - (the same as on page 4.) (28 U.S.C. 840).

Subdivision (c) - (Same as on page 4).

Subdivision (d) - § 374, Title 28, U.S.C.

Subdivision (e) - is governed by U.S.C., Title 28. §§ 369-870 in first sentence and part of § 842 in second sentence.

Subdivision (f) - § 841, U.S.C., Title 28.

Subdivision (g) - Taken from several statutes.

Rule 77 - Injunction Pending Appeal.

Lines 4-5 - Strike "a justice or a judge who took part in the decision" and insert "the court".

Line 5 - Strike "his" and insert "its".

Line 9 - Strike "he" and insert "it".

Line 29-33 - last paragraph to be enlarged then left or transferred to Rule 76.

Rule 78 - Seizure of Person or Property.

Lines 12-16 - Bracketed phrase (2) to be stricken. Change next number

(3) to (2).

Rule 79. Temporary Restraining Orders; [and Preliminary] Injunctions.

No change.

Rule 80. Receivers.

Mr. Gamble moved that Rule 80 be left in but changed to read as follows:

"The practice applicable to the administration of estates by receivers or other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts." (Carried).

See discussion under Rule 76 for addition to this rule, (retaining the bracketed phrase in Lines 6-7).

Rule 81. Deposit in Court.

Lines 6-7 - Strike "is held by him as fiduciary for another party or which".

Line 7 - Insert before "belongs" the words "that it".

Line 8 - After "party" insert "to the action".

(Recessed for lunch at 1:10 PM
(Reconvened at 2 P.M.
(Senator Pepper absent this
session.

Lines 10-11 - Strike after "court" the words "or delivered to such other party, with or without security".

Mr. Loftin moved that Rule 81 be referred to the Style Committee with power to act and if Mr. Dodge wants to submit a revision based on English Order 22, Rule 1, to submit it to the Style Committee. Agreed.

Rule 82. Offer of Judgment. No change.

Rule 83. Execution.

Lines 4-8 - Bracketed material left for Style Committee.

Lines 18-21 - Strike bracketed phrase. (Agreed).

Rule 84. Enforcement of Judgment for Specific Acts; Vesting Title.

Line 22 - Strike "its" insert "the". Strike "jurisdiction".

Rule 85. Registration of Judgments with Other District Courts of the United States--Effect.

Lines 5-7 - Strike "for the purpose of enforcement or utilization thereof"

Line 8 - Insert after "thereon" the words "in the court in which it is registered".

Line 9 - Change "the" to "that".

Line 19 - Strike all after "court".

The Chairman suggested that the Committee in its report to the Court state that we feel that it is beyond the scope of the power of this Committee under the statute.

Mr. Lemann moved that we leave it in with a specific note stating that the Committee approved it but was doubtful as to the power.

Vote taken as to whether within the scope of the Committee's powers -
Within authority - Tolman, Morgan, Cherry Dodge, Lemann, Sunderland, Clark, Olney.

Not within power - Mitchell, Gamble.

Doubtful - Loftin.

Judge Olney - I am not in favor of this rule as it reads.

Judge Olney moved that "for the recovery of money" be inserted after "judgment" in Line 3. Motion lost.

Lines 25-29 - Bracketed phrase to stay in.

Rule 86. Process in Behalf of and Against Persons not Parties.

Line 8 - Insert "lawfully" at the end of line. (Olney).

Rule 87. District Courts Always Open; Orders at Chambers; Clerk's Office and Orders by Clerk.

No change.

The following changes were made in Rule 65:

Line 21 - Insert after "after" the words "the filing of findings of fact and conclusions of law".

Line 49 - After "verdict" insert "or if the case is tried without a jury after the filing of the findings of fact and conclusions of law".

Mr. Morgan - Make note for the Style Committee ^{File} on 7/65(d) - that "within the time in which a party may move for a new trial" be considered instead of the above.

Rule 88. Motion Day--When Hearing Required. No change.

Rule 89. Books Kept by the Clerk and Entries Therein.

At end of Rule 69 add "on the civil docket". Agreed.

Line 16 - Insert "verdicts" after "all". Strike "acts" and insert "judgment".

Mr. Dodge moved that there should be no mention of minute books in the rules. Mr. Morgan seconded. Agreed.

Rule 89A. Stenographer; Stenographic Report or Transcript as Evidence.

Line 5 - Bracketed clause stays in.

Line 10 - Strike "advanced" and insert "paid in the first instance".

Strike (b) and substitute the following:

"Wherever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony."

Rule 90. Application to District Courts; The District of Columbia;
State Law Defined; Removed Actions; Actions before a Special District Court;
Actions Under the United States Arbitration Act.

Lines 10-11 - Moved to strike the words "proceedings in eminent domain up to and including the entry of judgment". Agreed.

Line 36 - Strike "applicable" and retain "appropriate".

See Government suits for other changes in this rule.

See reference to discussion on for change in rem on page 25.

Rule 91. Jurisdiction or Venue of the District Courts of the United States
Not Extended or Limited.

No change.

Rule 92. Rules by District Courts.

Alternative to go to Court.

Line 12 - Add Major Tolman's paraphrase of Admiralty Rule 44 - as follows:

"In all cases not provided for by such rules, the district courts may regulate their practice in such manner as they deem most expedient for the due administration of justice but not in any manner inconsistent with these rules." Agreed.

Rule 93. Title.

No change - Motion for striking out rule lost. Motion to add at end of line 3 "or an abbreviated form as F.R. followed by the number of the rule" also lost.

(Mr. Loftin L.P. et al. - P. 2).

Rule 94 - These Rules Effective When.

Change dates.

Rule A: Standing Committee on Rules of Civil Procedure.

Line 12 - Strike after "meet" remainder of sentence, and insert "at such times as the court may direct."

Lines 13-16 - Strike through "court", and substitute the following:

"The Committee shall not incur expense or make any financial commitments except upon the approval of the Court as certified by the Chief Justice or upon his order during a recess of the Court". Agreed.

Mr. Dodge moved that it be in the form of an order of the court rather than a rule. Agreed.

Lines 19-21 - Strike "and the Court may refer to it other matters concerning which its recommendations may be desired".

Lines 25-26 - Strike "At or before the beginning of each October Term" and insert after "Court" "on or before September 15th".

Official Records as Evidence.

Rule 50A - Redraft requested earlier in the meeting presented.

After "evidenced" in line 2 insert "by any official publication thereof or".

Leave "authenticated by" in each place and strike "under".

Moved that this draft be accepted with the addition of a sentence for certification when no record available as follows:

A written statement signed by any officer having the custody of an official record or by his deputy and certified as above provided that after diligent search no record or entry of a specified tenor is found to exist in the records of his office is admissible as evidence that the records of his office contain no such record or entry. (Agreed).

At the Chairman's suggestion it was agreed to have Major Townshend act as a subcommittee to revise condemnation rules and report to the Style Committee within three weeks with the understanding that if he can he will send copies around to anyone of the committee he wants to consult. The Chairman stated that he had received a letter from the Attorney General requesting that we provide rules for condemnation cases, and stated that as it was the only request we had received from the Attorney General he felt the the Committee should comply.

Lists - U.S.Code -

The Chairman - Do you want to incorporate these statute lists or leave them out with notes to rules?

Mr. Lemann - I suggest that a statement be sent to the Supreme Court stating that these lists have been assembled but that it would have caused delay in submitting the rules if they were given detailed consideration, and suggest that this work be done later.

The Chairman - These lists will be of great importance to the Reporter. Certain of them refer generally to matters subject to the rules and referred to in other statutes. A great many of these references are just authorizations of actions in the district court. Mr. Reporter, when you get your revision of the notes, which will be your job from now on, the notes ought to be divided under two categories - those notes you think ought to be and expect to be printed in the final order promulgating the rules, and another category in the nature of an informal note to the Supreme Court which you rather expect will be left out of the promulgated rules.

Mr. Dodge - Is there any topic we ought to deal with in the rules?

Dean Clark - I can not answer absolutely but I do not think so, but I will look them over.

The Chairman - Judge Olney has made a motion to the effect that we do not attempt to transplant them and that we make such a mention in our report to the Court. Carried.

Forfeitures in rem - Mr. Hammond and the Reporter to put in some provision to show that the practice is to be maintained as today - cases such as United States v. 100 lbs. of butter, etc.

Mr. Lemann moved that they be excluded from the operation of these rules and leave them where they are. Agreed.

Rule 28A. Class Actions.

Mr. Pepper - I move that we do not include in our rules any statement respecting the estoppel of judgments, any statement respecting jurisdiction as affected by interventions or any statement in regard to so-called spurious class actions which are actions bound together by the mere tie of similarity of the questions of fact or law likely to be presented. (Motion not acted on).

I move that the rules have no statement by us in this connection respecting the effect of the judgment. (Mr. Lemann seconded) Carried.

I suggest that we do not undertake to make any statement respecting jurisdiction and so move. (Mr. Lemann seconded) Carried.

The Chairman - The motion is whether we will strike out from the rule the equivalent of Mr. Moore's subdivision 3 of paragraph (a) as amended (dealing with spurious class actions). Mr. Sunderland for. Motion lost.

Mr. Lemann - I move to substitute the Equity Rule 38 for Mr. Moore's subdivision (a) as amended - Motion lost.

Line 2 - after "persons" insert "constituting a class".

Line 10 - Insert the word "or" after "joint".

Line 18 - Add at end "and a common relief is sought".

(a) - adopted without further amendment.

Moved to adopt paragraph (a) of Mr. Moore's rule as amended. Adopted.

The Chairman - Members of the Style Committee are asked to sit down separately and prepare themselves in advance and note all suggestions they want to make, and if any of the other members are willing to do the same and send in their suggestions, so much the better. Send them in to the Secretary and if he finds it possible he will have them copied and sent for an interchange of views. The Style Committee would then be ready for a business meeting the early part of March, and then make up their report. The Reporter will have his notes revised and put

in shape by the time the rest is ready. I will try to make a short report to the Court. It will then go to the members of the Committee. If they are willing to vote by mail and approve it, all right. If not, we will have to have another meeting.

Motion made that the chairman's suggestions be adopted in a general manner. Adopted.

Meeting adjourned at 10:45 P.M. - 1/14/57.

I.G. LeDane
Stenographic Reporter.