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U. S. SUPREME COURT ADVISORY COMMITTEE

ON RULES FOR CIVIL PROCEDURE

Tuesday, November 19, 1935

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MEETING OF U. S. SUPREME COURT ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE.

Conference Room,
U. S. Supreme Court Building,
Washington, D. C.
Tuesday, November 19, 1935.

The Advisory Committee met at 9:30 o'clock a.m., Hon. William D. Mitchell presiding.

RULE 84. TESTIMONY AND EVIDENCE.

(Continuation of discussion.)

Mr. Mitchell. When we adjourned last night we were discussing a mere matter of form, as to how we would express this exception matter. I think we have chewed that over enough. Can we not leave that to the Reporter now, and come back with the revision and chew it over again at the next meeting?

Mr. Loftin. I make that motion.

Mr. Dobie. I second the motion.

Mr. Mitchell. It will be so understood unless there is objection.

Now we come to the last paragraph, dealing with the appellate court. It is a sort of a delicate subject to put in a clause like that, but we are confronted with the question of

whether we shall say anything expressly about what appellate courts shall do. We discussed that in a general way at our first meeting, and adopted the principle that we were to deal with procedure in the lower courts, and we had no jurisdiction to deal with the appellate courts; but we gave a liberal interpretation to what was meant by lower court rules, and we included in them everything that the district courts had, even though it formed a basis for appeal, to carry the rules affecting all sorts of practice and proceedings in the district court or in anticipation of an appeal so long as they were in the district court.

That was the principle we adopted. You were not there (addressing Mr. Sunderland).

Mr. Sunderland. No, but I think that is a sound principle.

Mr. Mitchell. But we did not have the right to go into the appellate procedure. When we came back I wrote out a statement of the various principles the committee had adopted and submitted them to the court. I am sorry I did not bring that correspondence with me. I stated the thing rather elaborately in that letter, and got back one stating that the court was in accord, at least so far as it had gone into the matter, with the principles we had adopted. I think myself it would be unwise to put any statement here that an appellate court shall or shall not do anything.

Mr. Wickersham. That is clearly a rule for the appellate court.

Mr. Mitchell. But we have said that in the district court --

"It shall suffice for all purposes for which an exception has heretofore been necessary if an objecting party shall make known his objection, or the action of the court desired, and the reason therefor."

That is good, I think. Now, if it is sufficient in the district court, it is naturally automatically good in the appellate court, and we do not have to say so.

That is all I want to say about that.

Mr. Clark. May I make these comments?

Of course I agree with the general principle stated, but it is very difficult to separate matters of appeal and matters of action of the district court; and it seems to me that a rational system, if it succeeds, must cover appeals, too. In other words, if these rules go ahead and are successful, they ought in time at least to cover the other points.

I think, looking to the future a little, it would be unfortunate if we do anything that looks like a retreat; and what troubles me a great deal is this:

The equity rules now cover certain matters of which this is one. You will see that this is just a statement of the equity rule. If we change this, we are going to do less than

the equity rule did. That is, we are going to draw back from one of the most important practical subjects of procedure; and I think it would be rather too bad not to go as far as the equity rules, at least, have gone.

On not quite the same subject, but a subject a little similar -- namely, evidence -- somewhat the same difficulty arises. I have been troubled, myself, as to whether, by establishing a single action and then definitely running away, so to speak, from any reference to evidence, we would not leave the subject in a worse situation than we found it, because there has been a considerable approach to uniformity in the equity system. The danger is that we now do away with the equity system, so to speak, into our one civil action, and we may upset a very desirable trend. I think it would be unwise for us to sit down now and say "This shall be the law of appeals, and this shall be the law of evidence"; but I wonder if we cannot, where the thing seems almost staring us in the face, so to speak, make whatever statement seems to us appropriate in the limited area we are then touching; and, of course, if the court thinks we have overstepped the somewhat shadowy bound that there must always be in this sort of a field -- that is, between matters of appeal and matters of the district court proper, or matters of evidence and matters of procedure -- it can say so; but it would seem to me, on the whole, better to do that than to draw away back from the subject.

On the matter of evidence -- and, of course, the two are not exactly the same; I mean, appeals and evidence -- I ask you to note the letter of Mr. Wiles, of the Chicago bar, back on page 7 of the comments. He wrote quite a long letter; but I was rather struck, in reading it, by his expressing the very fear to which I referred, that we were going to upset, the present rather desirable system, and referring particularly to patent law, but generally to the equity system.

Mr. Mitchell. What rule of equity would he have reference to in the case of evidence? Will you mention that for me?

Mr. Clark. He did not refer to any specific rule. He just wanted no rule which would make a State law of evidence applicable. You will notice that Judge McDermott suggests that, but this gentleman did not want that type of rule.

Mr. Dobie. Mr. Wiles' letter was limited to patent cases; was it not?

Mr. Clark. Yes.

Mr. Dobie. He says that the patent lawyers knew it, and it had become fairly well known and pretty well settled, and if you undid all that you would have to start afresh again. I understood that was applicable alone to patent cases.

Mr. Mitchell. I think the Reporter has a good point in the last paragraph in Rule 84. In the first place, the equity rules which the court has power to enact as applying to all courts contain the rule that a reversal shall not be had for

an immaterial error in the omission or exclusion of evidence. Now, coming to make unified rules, the statute says they shall be for the district courts. If we leave out any reference to the subject we are possibly affecting the type of case which is of equitable cognizance, in which the court, under power to make equity rules, deals with appeals, and yet we are adding something in a common-law case that under this statute we have not authority to put in.

I am wondering if there is not a Federal statute about immaterial errors on appeal that is broad enough to cover both law and equity, and which will make this sort of thing unnecessary. In other words, we could state right here:

"Nothing herein contained shall modify the rule laid down in section so and so of the statutes" --

And there you would have this whole thing covered.

Can you point out any Federal statute on the subject?

Mr. Dodge. Do you not think we have the power, under section 2 of the Act, to go just as far as the Federal equity rules go? There is no limitation of courts in the second section, and the court is given the power to unite the general rules prescribed in equity with those in actions at law; and it seems to me it was meant that the court should go as far as the equity rules now go.

Mr. Mitchell. I supposed under the power to make equity rules they had complete power to control all the

practice and procedure in appellate courts relating to equitable cases.

Mr. Dodge. They are now authorized to unite those rules with the rules at law.

Mr. Mitchell. With respect to the district courts.

Mr. Dodge. No; there is no such limitation. As a matter of statutory construction, I should think that was true. Judge Olney agrees with that.

Mr. Olney. I have not thought of it before, but the language of the Act would seem to go that far.

Mr. Donworth. Why is not the suggestion of the Chairman exactly what we want? We do not want to make a rule and we do not want to abrogate a rule on this point. Why not use some such language as that --

"Nothing contained in these rules shall be held to abrogate this clause" --

Or something of that kind?

Mr. Mitchell. I doubt if, on reflection, Mr. Dodge will stick to his point. Section 1 refers to actions at law, and is limited to district courts. Then it says:

"Section 2. The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law."

I think the fair inference is that it is talking about the rules of the district courts, because its power in section

1 is limited to the district courts.

Mr. Dodge. Section 1 is limited. If you made separate rules for actions at law of course they would have to be limited; but by section 2 Congress seems to me to indicate an intention not to have a residuum of these present equity rules left floating in the air, but to authorize the court to consolidate those rules as they stand with rules for actions at law.

Mr. Mitchell. Then is it your opinion that you have to go the whole way or not at all? -- that under this second section the court may make rules for practice and procedure in all cases in the circuit court of appeals?

Mr. Dodge. No; I would not go as far as that, because there is very little in the equity rules about appellate procedure; but here and there, where the matter is closely involved with the district court, there is a reference to appellate matters; and to that extent I should think it might be contended that we were authorized to go.

Mr. Olney. Mr. Chairman, when I read this rule it seemed to me that it was limited in one sense simply to appeals; but the same principle is applicable to review by motion for new trial or otherwise. Instead of referring to the appellate court, if we simply say that --

"No judgment shall be disturbed on review by reason of the failure to admit evidence " --

We have gone about as far as we can.

Mr. Clark. I ought to say that Major Tolman gave me a suggestion along the line he made earlier, of not disturbing the judgment; but I must say that personally I would rather take the equity rule, because I think it establishes an important point with reference to the power of the court. That is the reason why I took the equity rule just as it was--not that it was the best form of expression, but there is an expression that the court made in connection with the equity rules, and if we do not carry it over we have not covered the whole extent of the equity rules.

Mr. Olney. If we should use the general expression --

"No judgment shall be disturbed on review" --

The language would cover the appellate court as well as the lower court.

Mr. Clark. I think it would. Your language is rather broader than the language Major Tolman suggested.

Mr. Olney. And the point I make is that the same principle should apply to a review by motion for new trial, or anything of that sort.

Mr. Lemann. Have you the language of the statute?

Mr. Clark. Yes; it is opposite Rule 100. The later rule here, Rule 100, is "motion for new trial", and in that rule I have incorporated the language of the statute; and on the lefthand page appears the statute. It is 28 U.S.C., 391.

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Mr. Mitchell. That covers the point. We have a statute that covers it, and we do not have to worry about our power to affect appellate procedure. We can state explicitly here that no error in the admission or exclusion of evidence shall be ground for a new trial or for disturbing the judgment unless the court shall find that material prejudice would result from an affirmance. We can say that --

"Nothing herein shall affect the provisions of section 28, U.S.C., 391".

And we have the equity rule in substance there.

Mr. Wickersham. Do we need even that?

Mr. Mitchell. We do not need to say anything about it.

Mr. Wickersham. No; it seems to me it is covered entirely by the statute; is it not?

Mr. Sunderland. You ought to call attention to it. Do you not think so? (Addressing Mr. Clark.)

Mr. Clark. I certainly do. I think we not only have the power but we ought to exercise it, and it will be unfortunate if we do not.

Mr. Mitchell. You think you have the power to regulate the procedure in appellate courts?

Mr. Clark. So far as it really depends on what has happened in the trial court. I may say that this question is going to affect several sections along here. It comes up, of course, here; but what are we going to do with the findings

of the trial court, and the bill of exceptions, and so on? Several sections along through here are going to present this issue. Possibly you would like to look at them all before you pass on this one.

Mr. Wickersham. But this is a specific mandate to the appellate court. This is not a question of preparing the record for the court of appeals, but it is a rule of decision for the Federal court. You have that rule of decision in the statute. Why need you repeat it here?

I go with you as far as extending to the full the power to control all the proceedings leading up to the argument in the court of appeals; but when it comes to a rule of decision of the court of appeals I do not think we have any right to touch it.

Mr. Sunderland. If we do not say anything, do we in effect drop out the equity rule, which is what Mr. Clark has incorporated?

Mr. Wickersham. This statute we are talking about covers both law and equity.

Mr. Sunderland. The statute is common-law cases, is it not -- cases tried by a jury? Section 391 refers to cases tried by a jury.

Mr. Wickersham. Well, yes.

Mr. Sunderland. Now, on the equity side it is handled by rule.

Mr. Mitchell. The statute says, "on the hearing of any appeal". That is the word that was used in equity cases at the time this statute was passed.

Mr. Dobie. Then it says --

"certiorari, writ of error, or motion for a new trial, in any case, civil or criminal."

That is broad enough to cover, I think, both law and equity.

Mr. Mitchell. I sympathize with the suggestion that we may mention the statute there; but General Wickersham is clearly right in saying that if we do not deal with the subject, we do not repeal or modify a statute that relates to it.

Mr. Lemann. I understood you only thought it a matter of emphasis.

Mr. Clark. Of course we will not repeal the statute; and we will not repeal any statutes, according to the plan here, unless we note that we have done so. I suggested later that we do all our superseding expressly, not by inference. That is true.

Mr. Lemann. Then the only point is one of emphasis; is it not? I was wondering whether it would console you, and be approved by the committee, to put in some language that would largely use the language of the statute; perhaps leave out specifically the word "appeal", and just say that in any case --

"The court shall give judgment after an examination of the entire record, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Mr. Clark. That is already in Rule 100.

Mr. Olney. Does not that cover this? This is just a very special case, and a comparatively unimportant case -- unimportant instances of errors.

Mr. Mitchell. Let me make a suggestion here: Change the paragraph we have been talking about to read as follows:

"Error in admission or exclusion of evidence shall not be ground for a new trial or for disturbing a decree" --

Mr. Dobie. "Judgment" is better there.

Mr. Mitchell. I do not say anything about "appeal" here --

"unless it clearly appears that material prejudice will result therefrom" --

Mr. Donworth. "Has resulted".

Mr. Mitchell. (continuing:)

"has resulted therefrom, in which event such further steps may be directed as justice may require."

Now we are not saying anything about any court.

"And the provisions of Title 28, Section 391, U.S.C., shall remain in full force and effect."

Mr. Clark. That is practically Major Tolman's suggestion--

a little different wording, but the same idea.

Mr. Dobie. I think "judgment" is a better word than "decree" there.

Mr. Clark. Yes.

Mr. Mitchell. I mentioned new trials, too.

Mr. Clark. If the statute is referred to later in Rule 100, it would not need to be referred to here, although I suppose it would do no harm. As Rule 100, which deals with new trials, is now cast, it refers to, and in fact it quotes, the statute.

Mr. Mitchell. My point is that by changing this, and making it so broad that it applies to appellate courts, if we have power to make it apply, we go as far as we can without purporting to claim the right to affect appellate procedure, and we dodge the question in this section anyway. We will meet it in the others as we come to it.

Mr. Dobie. I second the Chairman's motion, and I think it is germane here. Here we are dealing with evidence, and it does not hurt to keep calling the court's attention to it.

Mr. Sunderland. Will you read that again?

Mr. Mitchell. I will read it again:

"Error in admission or exclusion of evidence shall not be ground for a new trial, or for disturbing a judgment, unless it clearly appears that material prejudice has resulted, in which event such further steps may be directed as justice

may require."

Mr. Sunderland. I think that is very cleverly put.

Mr. Dobie. Then you want a reference to the old statute.

Mr. Mitchell. The Dean thinks that had better come in a later section, so I have omitted that.

Mr. Clark. In Rule 100 we already have that. If it comes out of Rule 100, we will come back here. Rule 100 is on new trial, anyway.

Mr. Tolman. I should like to suggest that this point has been decided in favor by the United States Supreme Court in Barber Asphalt Company v. Standard Company, 275 U.S., page 376, at page 381. It involves Rule 75(b), about writing out the record in full or narrative form, which was a rule couched like this to govern district courts only. The point was raised on the appeal that that rule did not bind the circuit court of appeals. Mr. Justice Van Devanter said that it did, that it applied.

Mr. Lemann. What was the page reference there?

Mr. Mitchell. 275 U.S., Barber Asphalt Company v. Standard Company, 376, at page 381.

Was a motion made about that amendment?

Mr. Olney. I move the amendment.

Mr. Dobie. I second the motion.

(The question being put, the motion was unanimously

carried.)

Mr. Clark. I suppose it is a wrong note to be suggesting a rule or two on competency of witnesses. We have done quite a good deal on evidence in the way of depositions, etc.

Mr. Mitchell. Let us reach that when we come to it.

Mr. Clark. I have not put in any rule. I put a foot note in here on the next page, you will see.

Mr. Mitchell. I put that up to the Court, too. I told them that it was the general sense of the committee or impression of the committee that we had complete power over the practice respecting the modes, manner and method of taking testimony, but that we could not deal with the ordinary rules of evidence as to the competency of witnesses or competency of evidence; that that would open up the whole subject of rules of evidence; and I got back an o.k. on that.

Mr. Olney. There is all the difference in the world, of course, in the importance of rules of evidence, between a trial by jury and a trial before the court. The rules of evidence may be very important in a trial by jury, but when a case is tried before the court they are, or ought to be, comparatively unimportant. Out in California we have had at times the most absurd rulings in the way of applying, in trials before a court, exactly the same rules of evidence in all their strictness as in trials by jury. There is a marked distinction in principle between the two cases. I do not know

whether or not it can be covered, or whether it is worth while. I just make that point, because that evil has developed.

Mr. Mitchel. It is probably covered by this rule, "unless material prejudice has resulted". When you are dealing with the court, the admission of prejudicial evidence would not affect the legal mind. It might have affected a jury; so I think it is pretty well covered.

Mr. Olney. I think that is probably true.

Mr. Donworth. Mr. Chairman, on the question of exceptions, I understand we are passing this to consider the whole question of exceptions together, and it comes up in different rules. Is that so?

Mr. Clark. No; I do not think so. Later on we take up objections to the charge to the jury. That is a special point. I took it that now I was to struggle with this language again.

Mr. Olney. All right.

Mr. Mitchell. A lot of suggestions were made, and the Reporter can take that clause and consider it in the light of the suggestion. Mr. Cherry has made some suggestions that seem helpful along the line that exceptions need not be taken, not really saying whether or not they are abolished, but just that they need not be taken. It is all a matter of expression. We have all agreed on the substance,

that it is not necessary to note them any more.

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RULE 85. ALTERNATE JURORS.

Mr. Mitchell. Rule 85.

Mr. Clark. There are two or three rules here with reference to jurors. The first is this rule for alternate jurors. The rule with reference to juries of less than twelve I take it must be limited to agreement, and that is put in as limited. In this one we did not make that provision.

Mr. Wickersham. One little thing, Dean: I notice that in some of the rules you say an action may be tried "with" a jury, and in others the action may be tried "to" a jury. I think the phrase ought to be uniform, whichever is adopted.

Mr. Clark. On that point, somebody last night -- I think it was Major Tolman -- did not like the expression "to a jury", or "to a court", and I suggested "by" a jury.

Mr. Wickersham. I simply make the point that it ought to be uniform.

Mr. Mitchell. That is a matter of form with which our style committee can deal.

Mr. Clark. These are put in here as suggestions of new practice which has been rather generally urged.

Mr. Mitchell. Have you seen the language of the Federal statute in criminal cases? I drew that, and it has been used in the Federal courts, and I was wondering if this rule might

not conform to it.

Mr. Clark. I have seen the statute, but I guess I did not look at it specifically.

Mr. Lemann. We ought to have the text of it here opposite this rule.

Mr. Clark. I guess I should have done that, but I did not call attention to it. I am sorry.

Mr. Dobie. It might be well to read that.

Mr. Mitchell. We have a Federal statute which has been worked out and accepted by Congress, and all we have to do is to strike out "criminal cases" and put "civil cases" in it, and it is safer to take it:

"That whenver, in the opinion of a judge of a court of the United States about to try a defendant against whom has been filed any indictment, the trial is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court, and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors, in its discretion, to be known as alternate jurors. Such jurors must be drawn from the same source, and in the same manner, and have the same qualifications as the jurors already sworn, and be subject to the same examination and challenges: Provided" --

And here is the thing. You have so many challenges in a civil case. Now, if you are going to have some alternate

jurors, you must provide for challenges there, and you have not done that:

"Provided, That the prosecution shall be entitled to one, and the defendant to two, peremptory challenges to such alternate jurors. Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected and must attend at all times upon the trial of the cause in company with the other jurors."

That contemplates that they shall be kept together in the same way.

"They shall obey the orders of and be bound by the admonition of the court upon each adjournment of the court; but if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors, and except, as hereinafter provided shall be discharged upon the final submission of the case to the jury. If, before the final submission of the case, a juror die, or become ill, so as to be unable to perform his duty, the court may order him to be discharged and draw the name of an alternate, who shall then take his place in the jury box, and be subject to the same rules and regulations as though he had been selected as one of the original jurors."

That may be too much in detail.

Mr. Wickersham. You were dealing with a criminal case, though.

Mr. Mitchell. It calls attention to the fact that you have to provide for additional peremptories, and that we have not done.

Mr. Donworth. What is the number of that section, please?

Mr. Mitchell. That is Section 417-A of Title 28.

Mr. Dodge. Why do you have to provide for additional peremptory challenges? He has three now. Is not that enough, whether you have thirteen jurors or twelve?

Mr. Donworth. What was your question?

Mr. Dodge. The statute provides for three peremptory challenges. Is not that enough, even if you have one extra juror?

Mr. Mitchell. You are cutting down your peremptories in case an alternate is taken. There is no doubt about that.

Mr. Donworth. By a fraction of a man; that is all.

Mr. Dobie. There is one point here that I like better than this. I do not mean to criticize the draftsman, of course. In civil cases, the alternate juror may replace a juror "who for any reason may become unable to perform" his duties. In criminal cases, you limit it to death and illness. A man may be called away, for example.

Mr. Mitchell. We do not want any letting off of

jurors on pleas of inconvenience. I think we limited it carefully in criminal cases because we were afraid it might be a case of misconduct of a juror that disqualified him and that might affect or permeate the whole panel. So we did not want to get into the question, in a criminal case, of substituting a new juror if an old one committed a contempt, or something of that kind. I do not know why it should not be done in civil cases.

Mr. Dodge. Are jurors ever confined in a civil case?

Mr. Mitchell. Sometimes; rarely, however.

Mr. Donworth. In a civil case I would suggest that provision be made for one peremptory challenge to each party. Of course they would have to be treated equally in a civil case. I should think one peremptory challenge on the alternates would be sufficient.

Mr. Wickersham. You might have a protracted civil case, an action for breach of promise, crim. con., or something of that kind. It would not be apt to be in the Federal court, but it might be; or one of these treble-damage suits under the anti-trust law.

Mr. Donworth. Yes.

Mr. Mitchell. I think the rule is better than the statute for our purposes. The statute goes on to talk about a probably protracted trial. I think it is better simply to say that the court may direct this to be done in

any action, and leave it to him to say whether or not it is desirable.

Mr. Wickersham. It seems to me there are a good many details there which you would naturally put in a statute relating to criminal procedure which are not necessary in a rule regarding Federal procedure.

Mr. Mitchell. I suggest that Rule 85 be approved in principle -- it is all a matter of form -- and, with the exception of this motion for one additional peremptory challenge directed at the alternate, that the rule be approved subject to revision as to form later.

Mr. Clark. Just a minute; I want to get it clear. Should I take that statute mainly, or not take it?

Mr. Mitchell. It is not intended that you should follow the statute; simply to get out of it any suggestions you can, in the revision, as to form.

Mr. Clark. I see -- and add one peremptory challenge. Is that the idea?

Mr. Mitchell. For the alternate. That was the motion made. Is there a second to that?

Mr. Dobie. I second it.

Mr. Mitchell. All in favor of adding one peremptory challenge to each side, to be used only against the alternates, say "aye".

(The question being put, the motion was unanimously

carried.)

Mr. Mitchell. It is so understood, without objection -- that that section is approved in substance.

Mr. Loftin. I make that motion.

Mr. Mitchell. It will be so ordered unless there is objection.

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RULE 86. JURIES OF LESS THAN TWELVE -- MAJORITY VERDICT.

Mr. Mitchell. Rule 86.

Mr. Wickersham. This rule authorizes parties to agree upon a smaller number of jurors than twelve.

Mr. Clark. Yes. Of course this is limited to agreement, which is all, I take it, we could do now; but it might help in developing the practice.

Mr. Wickersham. I move we approve that.

Mr. Mitchell. Unless there is objection, Rule 86 will be approved.

Mr. Olney. I do not like the expression "a verdict or finding". You are using there, for the action of a jury, a term which is really strictly confined to action by a court. Every announcement by a jury is practically a verdict.

Mr. Clark. All right; I think that is a good idea. The reason we put it in is, you see, that in, I think it is, the next section we have something we call a finding.

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Mr. Loftin. You take it up in the next section. This will go accordingly.

Mr. Clark. Perhaps you had better read the next section and come back to this, although I am inclined to think "verdict" is broad enough to cover what we have in the next section.

Mr. Olney. We always call those "special verdicts" where they are on special issues.

Mr. Clark. We have two things in the next one -- special verdicts, and answers to interrogatories, really.

Mr. Sunderland. I checked that up. That struck me as wrong; but I checked it up with Bouvier, and I found there was authority for that term as used here, although it seems to me it is better not to use it. It is certainly proper to use it in this way.

Mr. Olney. The bar looks upon a finding as the finding of a court.

Mr. Clark. I do not think it would do any hurt to take it out.

Mr. Mitchell. I think it is a matter of form.

Mr. Wickersham. You mean in Rule 86?

Mr. Clark. Yes. The reason we put it in was to cover the things we have in the next rule, 87.

Mr. Mitchell. Let us pass to Rule 87, then.

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RULE 87. SUBMISSION OF INTERROGATORIES OR ISSUES TO THE JURY.

Mr. Mitchell. Rule 87.

Mr. Olney. I have one suggestion in connection with Rule 87. That is that in case there are special verdicts -- that is, a verdict on special issues, or answers to special questions -- and also a general verdict, the general verdict shall give way to the verdict on the special issues if they are inconsistent.

Mr. Donworth. I think the practice differs as to what would happen in that sort of case. I think very often the court grants a new trial if the jury find for the plaintiff in a personal injury suit and then make a special finding which really is on some point that is vital. I think the court usually grants a new trial. I am not sure. I think the practice varies.

Mr. Clark. That refers to the last sentence. I think you probably all noticed that. I might say we drew this once making the special findings control the general verdict. Then we shifted to this form. I have no particular feeling either way.

Mr. Donworth. The court would usually send the jury back, of course, before reading the verdict, which it can perfectly well do, and ask reconsideration, calling their attention to the inconsistency; but I think if they persist in it, the general tendency is to have a new trial.

Mr. Sunderland. There are two wholly distinct proceedings which I thought were perhaps mixed somewhat in this rule -- the special verdict, which is a finding upon the whole case and which is the sole foundation for the judgment; and special interrogatories, which are used in connection with a general verdict as a check against the general verdict.

Those two are wholly different. If you use a special verdict you do not have a general verdict; and a special verdict must cover the whole case, and be an adequate foundation for the judgment. If you use special interrogatories you use them with a general verdict, and they control the general verdict if they are inconsistent.

It seems to me the two ought to be separated.

Mr. Mitchell. It seems to me there is a distinction between cases of equitable cognizance and those triable by juries as a matter of right. If you are dealing with a case triable under the Constitution as a matter of right, and you have a general verdict one way and a special verdict inconsistent with it, I doubt very much the power of the court to choose between them. I think you have to say there is an inconsistency there that makes it no verdict, and he must call another jury. If you are dealing with a case of equitable cognizance, where we have power to make the verdict advisory, not binding on the court, I think we could properly give him the power to choose the special finding, the special verdict,

as controlling.

Are we not up against that distinction? Can we make a special verdict inconsistent with the general verdict settle the issue in a law case? I doubt it.

Mr. Dodge. Is it necessary to have a general verdict?

Mr. Mitchell. In a law case?

Mr. Dodge. Yes.

Mr. Mitchell. It is if the parties ask for it.

Mr. Dodge. It is not in Massachusetts, which has the same constitutional requirement of a jury trial.

Mr. Cherry. They do not know anything about general verdicts in Wisconsin; do they? They have not had any in so long that they would not know one if they saw it.

Mr. Dodge. Take an action in a personal injury case: The judge can submit three questions to the jury:

"Was the plaintiff in the exercise of due care?"

"Was the defendant negligent?"

"If you answer those two in the affirmative, what are the damages?"

He can let it go at that, and then direct a verdict according to that.

Mr. Mitchell. I misunderstood your question. I thought you meant, Can he submit findings for part of the issues?

Mr. Dodge. Oh, no!

Mr. Mitchell. If your request for special findings

covers the whole case, that is a jury trial.

Mr. Dodge. No general verdict as a matter of form is required in a case like that.

Mr. Mitchell. If the court submitted every issue of fact in the form of a special question, I should not think a general verdict would be required.

Mr. Dodge. It is a very wise practice, because it avoids the possibility of inconsistency with the general verdict.

Mr. Dobie. If I understand you correctly, Mr. Chairman, your point is that the jury brings in a special verdict, or a special finding, and then a general verdict, and there is some inconsistency between the two; and the question is whether or not the court can enter a judgment on that situation.

Mr. Mitchell. In a law case.

Mr. Dobie. Yes; in a law case, in a case in which a jury is claimable as a matter of right. I have the same feeling that you have. I must confess I am somewhat buffaloed by the Supreme Court decisions under the Seventh Amendment, most of which I disagree with quite heartily; and I should like, if possible, to keep those questions out as much as we can.

Mr. Lemann. I am not familiar with the practice. We have no such thing as special verdicts. Why is it common to

ask for special findings and a general verdict?

Mr. Mitchell. It is because the defendant, for instance, or one party, knows that the atmosphere of the case is against him, and a jury out of sympathy may beat him, but he knows that they are honest enough if their noses are pinned down to the facts to render a truthful verdict. He is checking the atmosphere against the special finding; and he will often, in that type of case, get a general verdict for a person that they have sympathy with, and a special finding that beats him.

Mr. Lemann. Is that permitted in every State?

Mr. Mitchell. It is discretionary in most States, even in a law case, for a court, in addition to submitting the whole case to the jury, to ask for special findings.

Mr. Lemann. It seems to me like, in a way, a sort of trap for the jury. I was trying to think why he should not make up his mind whether he wants to find out what they really think, and make special findings which would cover the whole case. He stands on the general verdict. Why should he be permitted to say, "I will take a chance on your general verdict, but I will set a trap for you to walk into"?

Mr. Mitchell. It is hardly a trap. It is a check against their judgment -- the accuracy of their consideration of the facts.

Mr. Sunderland. Then the question has arisen whether the attorney, in arguing his case to the jury, can explain

that trap to them. Some courts hold that he cannot explain it; that they have to do it independently.

Mr. Donworth. If they are educated to watch out for it--

Mr. Sunderland. Then it does not do any good.

Mr. Donworth. It seems to me that would help them to reach a consistent conclusion.

Mr. Sunderland. Ordinarily, they would find the general verdict and then answer the questions to correspond to it. The lawyers explain just how they could do it in order to get that result.

Mr. Dodge. In the last line of the first sentence I would suggest that after the word "and" there be inserted "unless the answers necessarily dispose of the entire case", "to return a general verdict."

Mr. Clark. Is that the sense of the meeting?

Mr. Mitchell. You will find a lot of opposition among plaintiff lawyers against a rule that encourages special verdicts. They do not like them. They want general verdicts.

Mr. Dodge. I think it is a great mistake to require a general verdict where the answers do cover the entire case. It means nothing except possible inconsistency which has to be dealt with as a matter of difficulty.

Mr. Sunderland. The special verdict, if properly arranged, is a very useful thing. As Mr. Cherry says, the general verdict is obsolete in Wisconsin. It is used a great

deal now in Michigan. The trouble with a special verdict, however, is that it is the sole basis for the judgment; and if you leave out anything, inadvertently or otherwise, or if you state something in the form of a legal conclusion instead of a fact, then, when it is all over, you find you have no foundation for your judgment, and the whole thing blows up.

Mr. Wickersham. That is the reason you want the general verdict.

Mr. Sunderland. No; but Wisconsin has a scheme for avoiding that difficulty, and it is this: That as to any fact which is not specifically found in the special verdict, and attention was not specifically called to its omission at the trial, the court shall be deemed to have found that fact in accordance with the judgment, and the parties shall be deemed to have waived a jury trial in regard thereto.

Mr. Lemann. That is practically the same rule as the sentence before the last in Rule 87. It leaves it to the judge to decide the issue as if the parties had waived a jury.

Mr. Sunderland. No; as a matter of fact he does not decide it at all, but it is just deemed to have been decided.

Mr. Lemann. If it has been omitted from the general finding.

Mr. Sunderland. You cannot raise the point. If it was not raised at the trial you cannot raise the point afterward; and the statute says that omission shall be deemed supplied

by finding of the judge in accordance with the judgment, and the parties will be deemed to have waived a jury trial in regard to it. That provides ~~them~~ security against the inadvertent omission of some fact, or the inadvertent improper statement of a finding by the jury in the form of a legal conclusion rather than a proper statement of fact. In other words, it takes out all the risk which inheres in the use of a special verdict. Since they have had that statute in Wisconsin they have absolutely abandoned general verdicts.

Mr. Wickersham. Does the Wisconsin constitution require a trial by jury in common-law cases?

Mr. Sunderland. Yes.

Mr. Cherry. This is complete trial by jury.

Mr. Lemann. In such a provision as in the sentence before the last, why should you be permitted to have those special findings or special verdicts and a general verdict? Why should we not take one or the other?

Mr. Cherry. Mr. Lemann, when you get your special interrogatories that go with the general verdict, the answers to which come back with the general verdict, there is almost never an attempt to cover all the issues in the case by your special interrogatories. Usually, as the Chairman suggested, it is the defendant, who will say, who is conscious of an atmosphere against him. He picks out for

requests for special interrogatories those ultimate facts -- if you want to use that phrase -- on which he thinks that atmosphere would be manifest, and makes those the subject of the special interrogatories. You do not attempt, as you do after a special verdict, as Mr. Sunderland has pointed out, to cover all that is at issue between the parties.

Mr. Lemann. Do you have these interrogatories in Wisconsin? Do they have them there?

Mr. Cherry. No, because they do not use the general verdict at all. We do in Minnesota, where we use the general verdict.

Mr. Wickersham. You have the special interrogatories there?

Mr. Cherry. Yes; we have both, but you do not use special interrogatories unless you have a general verdict.

Mr. Donworth. A good illustration would be something like this:

There is a negligence case, a personal injury case. The plaintiff claims negligence on the part of the defendant. Suppose it was a case of an automobile accident, and the defendant's driver was in control of the automobile. The defendant was not there at all. At the end of the case, in addition to a general verdict, the defendant would submit two interrogatories something like this:

"(1) Was the driver, John Smith, negligent?"

"(2) If you answer Interrogatory (1) in the affirmative, state the acts of negligence."

You see, the purpose of that is to put the jury in a sort of a quandary; to "put them on the spot", so to speak.

That is an illustration of what the defendant endeavors to do, and sometimes very justly, of course.

Mr. Olney. Judge Donworth, I never knew of a case in which a special interrogatory to a jury was not capable of being answered "yes" or "no".

Mr. Lemann. I was just wondering about that.

Mr. Olney. I never heard of one.

Mr. Lemann. Did you, Judge?

Mr. Donworth. Yes. I remember a case where a friend of mine was defending a street railway, and one of his questions was:

"What representative, employee, or agent of the defendant was negligent?"

And the jury put down:

"John Smith".

Mr. Sunderland. Ordinarily, that would be an improper question to ask.

Mr. Donworth. It is all in the discretion of the judge.

Mr. Sunderland. The statute usually provides that it shall be a material question of fact. You cannot go into the evidence. It has to be one of the ultimate facts that

controls the case.

Mr. Dodge. In Massachusetts I think the court would very rarely submit questions for the jury unless they covered the whole case.

Mr. Donworth. I am of the opinion that in the Federal court there should always be a general verdict if the parties insist upon it. Of course I have no objection to these provisions about interrogatories. I do not think the term "special verdict" is used here; is it? But, whether it is or not, I think only with the consent of the parties should the general verdict be dispensed with.

Mr. Dodge. I am inclined not to agree with that, Judge, because, as I said before, if the answers plainly cover the whole case, it accomplishes no good purpose whatever, and simply leads to a possible mistake and difficulty about an inconsistent general verdict. I do not see any reason why it is required at all if the questions obviously cover the whole case.

Mr. Olney. I have never heard of this Wisconsin procedure before, but it strikes me as an exceedingly good one. I think, however, it would be impracticable for us to adopt it here. It would be going too far at the present time. I think we will have to provide for a general verdict; but I do think -- and this is the point where I think I am not in accord with the Chairman -- that where

a general verdict is rendered, and also there are special verdicts on particular questions of fact which destroy the cause of action, for example, those special verdicts should control. They are the ones that really find the fact.

We had these special verdicts and general verdicts in California for a great many years, and the general verdict always gave way to the special verdict.

Mr. Mitchell. In law actions?

Mr. Olney. In law actions. The complaint of them was on the part of personal-injury lawyers, because the special verdict has a double effect. You may have a jury, just as the Chairman has said, that is so honest that its members will not bring in a verdict that they know is not true; and if you ask them, "Was this the fact? What is your verdict in regard to that?" they will find it, because they will not go right back on what they know was the actual fact.

Also, it serves in many instances to clear up in the minds of the jury what their general verdict should be. It brings to their attention what the important features of the case are --the features on which the case should turn -- so that their general verdict is apt to be influenced and brought into accord with their special verdict and the real facts of the case, when otherwise they might have just returned a general verdict the other way.

That is the way the thing works.

Mr. Mitchell. I agree with your proposition that it would be advantageous and proper to have a special verdict over the general verdict. I am not disagreeing with you about that. The question I raise is whether, under the constitutional provision for a jury trial, about which the Federal courts are so strict, it is competent for us to provide that if there is a general verdict one way and a special verdict the other way, there is a verdict at all, and give the court the power to choose between two inconsistent findings of a jury.

I am in doubt about that. Dean Dobie is.

Mr. Dobie. That is my point exactly; and I should like to call your attention to this fact: You gentlemen probably remember it, but sometimes this phraseology gets away from you a little.

The last part of the Seventh Amendment reads:

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

I want to prevent, if we possibly can, the necessity of the Supreme Court writing out the history of the common law, and going back into the Dark Ages, and trying to dig out whether or not any practice similar to this, or anything like it, was ever countenanced by the common law.

Mr. Olney. The common-law courts, if I remember rightly,

I would not be too certain about this -- were constantly submitting special questions to the jury.

Mr. Mitchell. When they had a general verdict and a special finding that were inconsistent, what did they do? Do you know whether they always granted a new trial?

Mr. Olney. They had such control over the jury, in cases of that sort, that I think they usually told the jury, in a case of that sort, "You had better go out and find a general verdict."

Mr. Mitchell. That is all right. Everybody will agree to that procedure. The court would say, "Here: your verdict is inconsistent. I will not receive it. Go back and give me a new one." But I am talking about a case where inconsistent verdicts have been received and recorded, and the jury discharged. I agree that the court ought to have power to send them back.

Mr. Olney. There, probably, is the answer.

Mr. Cherry. May I call the committee's attention to the fact that one of our members is referred to as an author on this subject in the note?

Mr. Clark. There are two of them here -- one member, and one departed member.

Mr. Cherry. Yes, but one who is here present. I wonder if Mr. Sunderland will not give us his views about it.

Mr. Sunderland. At common law, if you submitted

questions to the jury, and they returned answers along with the general verdict, and then the jury was discharged, the only use you could make of those answers, if inconsistent in the verdict, would be to order a new trial; but under the statute, if you have a situation like that, instead of ordering a new trial you can enter a judgment in accordance with the special questions, even though contrary to the general verdict.

Mr. Donworth. That is the Wisconsin statute?

Mr. Sunderland. No; that is a common statute. They have it in Michigan, and they have had it for years in Illinois. It is a fairly common statute. It authorizes the entry of a judgment in accordance with the special questions, contrary to the general verdict.

Mr. Mitchell. That was the State construction of your own constitutional provision about jury trials.

Mr. Sunderland. Yes; and I would agree with Mr. Dobie that it might be a very nice question whether that can be done under the Federal Constitution, in view of the very strict construction the Supreme Court has always put upon the right of trial by jury under the Seventh Amendment.

Mr. Dobie. I should like to ask you a question, Mr. Sunderland, because you know so very much more about this than I do. Is there any warrant or precedent under the common law practice for the resubmission of the question to

the jury, or to another jury, if the judge does not like their finding?

Mr. Sunderland. Yes; I think you can find authorities to that effect; but the judge simply uses that as an indication that there has not been a proper trial, and he can order a new trial in his discretion.

Mr. Olney. What I am trying to get at is this: This new trial simply means additional expense and labor all around. It ought to be avoided if possible.

Mr. Dobie. That is it exactly, Judge, and we want to avoid it if we can.

Mr. Olney. If there is this doubt -- and I give way immediately to it -- if there is this doubt, why can we not put in here some provision that when special verdicts are returned that are inconsistent with the general verdict, the court shall resubmit the matter to the jury, pointing out to them the inconsistency, and requiring that they render consistent verdicts?

Mr. Mitchell. That is provided for here in the rule. We ought to retain that; but then we ought to provide, I think, if possible to do so, that if a verdict should be received that is inconsistent, and then the judge comes to enter judgment, if it is an action triable by jury as a matter of right he must reject the verdict and order a new trial. If it is an action not triable as a matter of right by jury,

where we make it advisory, he may accept the special finding as a basis for judgment.

Mr. Donworth. I think it is a matter of very frequent occurrence that a verdict is informal or obviously wrong. I am not referring to special findings; but very often, I should say -- I should say in two or three per cent of the cases -- a verdict comes in improperly filled out in some respects. Before the judge receives it he looks it over, and he says, "Gentlemen" -- he charges them on the point; "You may again retire." Until a verdict comes in that is received and filed in the court, the matter is subject to reconsideration by the same jury.

Of course if the court, in that recharge, commits any error, that is a matter of subsequent consideration; but any verdict at which the jury arrives is not final as to that jury until the verdict is received and filed in the court.

It is well enough, I think, to continue this clause here at the end; but I do not think you need to go into detail on the general question of the informality of the verdict.

Mr. Dodge. In any case where the answers to three questions disposed of the case in favor of the defendant, but the general verdict was for the plaintiff, would not the judge say, "Gentlemen, you apparently have made a mistake in this verdict, because I have instructed you that if you

answer the first three questions as you have, your verdict must be for the defendant. Now, there is an inconsistency here, and I wish you would retire and correct it."

It seems to me that would happen in every case.

Mr. Sunderland. But the purpose of the statute is not to give the jury a chance. The purpose of the statute is to let them put in their independent answers to these questions, put in their general verdict, and go home. Then the judge looks them over, and if the answers to the special questions are inconsistent with the general verdict, under the statute, then he assumes that the general verdict is wrong, the special answers are right, and he enters a judgment in accordance with the special answers.

Mr. Olney. Professor Sunderland, in view of the question as to whether, in the United States court, under the Constitution, that rule can be adopted --

Mr. Wickersham. I should be afraid of that, under the Seventh Amendment.

Mr. Sunderland. I should be afraid of it, too.

Mr. Olney. (continuing:) Why not follow the other thing, and be done with it?

Mr. Cherry. Mr.Chairman, may I make a suggestion about the Seventh Amendment? As I think you yourself pointed out at our first meeting in Chicago, we have the unusual situation here that the court to whom we report is the court

which will make the ultimate decision on the bearing of the Constitution upon any rule adopted. If this committee should be of opinion that, as a matter of policy, leaving out the Constitution, the result just discussed is a desirable one, I should think it could be submitted to the court with no suggestion as to the question of the constitutional provision; and then if, in the face of that, they decided to adopt the rule, they have by so doing determined that question. I do not think we need to give our construction to the Seventh Amendment on the basis of what we think they will construe it to be.

If, as a matter of policy, this committee should think the answers to special interrogatories ought to have the effect which has been suggested, we can do it, and then call the attention of the court to the fact that there is the Seventh Amendment to be considered in connection with it.

Mr. Mitchell. Is not that a good suggestion?

Mr. Olney. Mr. Chairman, to my mind that is quite wrong, because the adoption by the court of such a rule with the idea that it is all right, and is not prohibited by the Constitution of the United States, is, after all, not a decision. They must have a case before them, a controversy involving it, before there can be any decision upon a point of that sort.

Mr. Mitchell. We agree to that; but if they think it is

clear it is a fair indication that we are safe in pursuing the other course.

Mr. Olney. If they think it is clear, that is one thing.

Mr. Mitchell. Well, it is up to them to say whether or not it is clear, or whether they do not want to commit themselves at this stage.

Mr. Wickersham. But ought we to submit to them a rule that we think transcends the limitations put upon their powers?

Mr. Mitchell. You can do it the other way. You can put the conservative rule in, and state the alternate rule, and state, if that is true, that the committee thought as a matter of policy the rule ought to be that a special verdict overruled a general one, but that we were afraid to put it in because we had doubt about whether that constituted a jury trial; but if the Court thinks there is no doubt about it, we recommend the adoption of the broader method. We can put in the conservative one, and state our inclination toward the adoption of the broader one.

Mr. Wickersham. But, still, do they not expect us to exercise our best judgment in the first place? If we assume it is the general consensus of opinion of this committee that the general verdict would prevail, and that the judge might not constitutionally say, "Well, it seems to me that this special verdict is better than the general verdict; I will

render a judgment according to the findings on the special questions" -- assume that we thought that would not be admitted; ought we to submit a rule in accordance with it?

Mr. Mitchell. It depends upon what you think about the question.

Mr. Wickersham. It depends upon what you think about it. In other words, the Court is entitled to our best opinion about it.

Mr. Mitchell. If the committee are of opinion that it is unconstitutional, they ought to say so.

Mr. Dodge. Would you have any doubt about this very simple case:

Suppose the court put one question to the jury in an action to recover land:

"Does the land belong to the plaintiff?"

Suppose the court put nothing else to the jury. That was the only issue. The jury answered that question, "Yes", and the court directed a verdict for the claimant. Is there any doubt about the constitutionality of that procedure?

Mr. Mitchell. Has he asked for a general verdict?

Mr. Dodge. No; he has not.

Mr. Mitchell. Well, no; of course not.

Mr. Dodge. Then if he goes beyond that, and directs them, if they find for the claimant, that they must return a general verdict for him, and they do not do it, you get

yourself into a difficulty which would not exist if you had not asked for the general verdict -- I mean, on the constitutional question.

Mr. Mitchell. You are raising another question, Mr. Dodge; and that is whether, if you submit special interrogatories that cover the whole case, you are required to call for a general verdict, too. I agree with you, and I have noted your point here -- that the provision requiring a general verdict is to be applied if the special interrogatories do not cover the whole case. That was your point, and I have noted that here for the action of the committee.

That part of it is all right. We are dealing with the case where the court submitted a special interrogatories on some branch of the case, and also called for a general verdict, in a law case, and gets inconsistent verdicts there: Can he take the finding and disregard the other, and is that a jury trial?

Mr. Donworth. I think this discussion is very largely academic, or may become academic, because I think we should announce as a matter of policy that we favor a general verdict in every case, with discretionary power on the part of the court to submit special interrogatories in every case on anybody's motion, or on the court's own motion, but the matter of drawing up particular issues and submitting those to the jury without a general verdict should apply only in case of

mutual consent. I believe that a rule having the effect of a statute that we would submit to the bar of the country, that the judge may do away with the general verdict without the mutual consent of the parties, would be a very undesirable thing to submit to the bar of the country. I think the idea here could be met without shocking anybody's sensibilities by leaving the first sentence as it stands; and in the next sentence, where it says "Or, in any action tried with a jury, the court", I would insert "by consent of the parties", "may submit to the jury", etc.

Then, at the beginning of the next sentence, where it says "When the statement", I would say, "In such case" -- that means in case of consent -- followed by the figure (1), so as to read:

"In such case (1) when the statement of issues omits issues claimed for jury trial, and no objection is made prior to the submission to the jury, the parties shall be deemed to have waived jury trial of such issues; and (2) the court shall enter the appropriate judgment on such answers or findings" --

And so forth.

Mr. Mitchell. Why do you insert the clause requiring the consent of the parties in the sentence reading:

"Or, in any action tried with a jury, the court may submit to the jury a concise, written statement of the

several issues to be determined by it" --

And so forth?

Mr. Donworth. Because the context shows that that was intended to dispense with the general verdict. That is your intention, is it not, Mr. Clark, in the sentence --

"Or, in any action tried with a jury" --

To dispense with the general verdict?

Mr. Clark. That is true. Professor Sunderland was quite correct when he said that this combines two procedures. I did it intentionally because I thought it could be done. I did have two rules drawn for the purpose of doing this separately, but I thought we could save space and bring up both points at once in the same rule. Maybe that is not correct; maybe there should be two rules; but, nevertheless, I did intend to cover two points -- special interrogatories (that is, answers to questions), and the special verdict on special issues. In the case of the interrogatories, we have the general verdict; in the case of the special verdict, no.

Mr. Dodge. What is the difference between a special verdict and answers to special interrogatories?

Mr. Clark. The special interrogatories are questions propounded along with the general verdict. In the special verdict we have them decide on special issues, whether the plaintiff was guilty of contributory negligence, etc.

Mr. Sunderland. Without any general verdict.

Mr. Clark. Yes.

Mr. Sunderland. It covers the whole case.

Mr. Dodge. The interrogatories are of the same nature in either case.

Mr. Clark. I suppose you could make them run together, except in deference to the text-writers; they make a distinction.

Mr. Lemann. The difference is that the interrogatories only go to part of the case, and the special verdict must cover the whole case, whereas the interrogatories may only go to one issue.

Mr. Sunderland. As against the general verdict.

Mr. Donworth. One issue, or part of an issue.

Mr. Olney. Judge Donworth has brought out what seems to me a very fundamental point of difference. He feels that the general verdict should always control. I feel just the other way about it.

The great difficulty with jury trials is that there is not sufficient control of the verdict of the jury to bring about a just result. We have had for years out in California, and in most of the code States, and most of the States of the Union, for that matter, a provision that the judge shall not be permitted to charge the jury upon questions of fact -- I mean, even to advise them upon questions of fact -- or do anything more than state the evidence to them. There has been a feeling that the jury should be left entirely to itself to

decide the whole case. The result is that we have mistrial after mistrial; we have most atrocious verdicts rendered; and now in California we have gone back and abrogated that rule, and are permitting the judge to charge the jury properly upon questions of fact.

Now, the jury trial will not succeed unless there is a very considerable measure of control over its verdicts given to the judge; and this device of special verdicts is nothing more than a bit of machinery for that object, to bring the jury right down to the essence of the case, and make them decide upon that. If they decide upon that, and their decision is inconsistent with the general verdict, the general verdict should give way.

I am personally opposed to requiring that in every case there shall be a general verdict, and that the general verdict shall govern, no matter what the jury may find in other respects.

Mr. Dobie. I agree with Judge Olney there. The whole history of the common-law jury has very largely turned on the methods of control by the court.

In connection with the last sentence, Mr. Sunderland, with regard to resubmission, I think that is quite all right; do not you?

Mr. Sunderland. I have no doubt about that.

Mr. Dobie. The matter goes away back to the year-

books. There was a question as to whether a child was legitimate. The jury brought in a verdict, and Rouberg sent it back, and said, "How say you he is lawful heir?" The jury said he was begotten by the same mother, before marriage and after betrothal, which made him illegitimate at common law. Under the Redman case, I am satisfied the Supreme Court would go with us there.

Coming back to what Judge Donworth and Judge Olney have said, my own idea is that we ought to do everything we can that is clearly constitutional to keep the jury from bringing in a defective verdict; and if these special verdicts or special findings on interrogatories, whatever you call them, are controlling or can be made controlling under additions to this statute such as you have in Wisconsin, I am very much in favor of that, without the general verdict. The only point I was making first was that I had grave difficulty, under the Seventh Amendment, when you had a special verdict and a general verdict on a matter of fact, as to whether or not the judge could overrule the general verdict, and then, in the light of the special verdict, enter a judgment that finally disposed of the case.

Mr. Mitchell. Let me see if I can state the question here so that the committee can get some action on it.

We are dealing here now with general and special verdicts after they are received, assuming that they ought not to be

received and the court ought to ask the jury to correct them; but assuming that you have the verdicts, and the jury has been discharged, and the general and special verdicts are inconsistent, there are three alternatives here.

One is to make the general verdict controlling over the special finding.

The second is to make the special finding controlling over the general verdict.

The third one is to say that in cases triable as a matter of right by a jury, if the verdicts are inconsistent, the court cannot accept either in a jury trial, but must grant a new trial.

There are three specific alternatives.

Mr. Donworth. Does any one here advocate the first proposition?

Mr. Mitchell. I thought you advocated it.

Mr. Donworth. Judge Olney entirely misunderstood me. Never for a moment have I suggested that.

Mr. Mitchell. You have not suggested that the general verdict should control the special one?

Mr. Donworth. No; never.

Mr. Mitchell. Then I can strike that out as a matter for discussion.

Mr. Clark. Is there not another alternative, and that is that you would not have general and special verdicts at the same time?

Mr. Sunderland. He is talking about special interrogatories to accompany a general verdict.

Mr. Lemann. Before we get to the issue the Chairman is formulating, have we not got a preceding issue as to what we are going to permit in the way of special verdicts and interrogatories?

Listening to this discussion, I got the idea that there were four theoretical possibilities:

(1) Only a general verdict. I got the impression that perhaps some one around the table favored that.

(2) A general verdict plus one of these alternatives; say, interrogatories.

(3) A general verdict plus the other of these alternatives, either with consent of parties or without the consent of parties; and

(4) Permit it all, as I understand this rule would undertake to do; permit the court to do any one of these things.

Mr. Cherry. Your third alternative is out, Mr. Lemann, I think.

Mr. Mitchell. Let me put your three problems up as a preliminary question.

The first is to permit only a general verdict.

The second is to permit only special findings, without any general verdict, in an effort to cover every issue by a special finding.

The third is a discretionary provision to the court to ask for both -- both general and special.

I think those are the three cases.

Mr. Lemann. Would it not also be possible to provide for a general verdict with interrogatories, which, as I understand, would not go to the whole case? As I understand Professor Sunderland, the difference between interrogatories and a special verdict is that interrogatories may only go to part of the case, and the special verdict is supposed to go to all.

Mr. Mitchell. That is covered by my three cases: (1) only general; (2) only special; (3) both general and special.

The third does not settle, of course, whether the special should cover every issue or part of them.

Mr. Sunderland. The case of only a general and special together is non-existent. That is, nobody ever has suggested the practice of having a general verdict, which of course disposes of the whole case, and a complete special verdict that disposes of the whole case. Nobody has ever advocated that. It is either a general verdict for the whole case or a special verdict for the whole case, or a general verdict checked against special interrogatories on certain points.

Mr. Dobie. Which do not cover the whole case.

Mr. Wickersham. Mr. Chairman, it does seem to me we are conjuring up a situation that would scarcely ever arise. If a judge submits special questions to the jury, and the

jury brings in answers to those questions and a general verdict, and that is handed to the judge, he will read it, and he will then say, "Gentlemen, your final conclusion is wholly inconsistent with the answers to these questions. Now, you take that back, retire, and do one of two things."

Mr. Mitchell. Well, he often should.

Mr. Sunderland. No, because the statute tells him to do something else.

Mr. Wickersham. But we are making a statute, so to speak. Personally, I do not believe that in a Federal jurisdiction, under the restrictions of the Seventh Amendment, when a jury brings in answers to certain questions and a general verdict, the judge can disregard the general verdict and enter a general finding or a verdict on the answers to the special questions which do not cover the whole case.

Mr. Mitchell. As to the question whether the judge sometimes fails to insist that the jury reconsider inconsistent verdicts, I have had many such cases. That inconsistency may not be obvious at the start. Verdicts are received and recorded, and the inconsistency discovered later. Where the parties agree on a sealed verdict, and the jury in the night time reach inconsistent verdicts, and the foreman hands it in the next morning, you cannot call them back and remove the inconsistency; so it is a practical question.

Let me submit this question:

All those in favor of having only a general verdict, and no special findings at all submitted, say "aye". (No response.) Opposed, "no". (A unanimous negative vote.)

All those in favor of omitting the general verdict entirely, and having special findings attempting to cover every issue, say "aye".

Mr. Dodge. That is, omitting the general verdict where the special findings cover the case.

Mr. Mitchell. Yes.

Mr. Dodge. That is our practice, and I vote in favor of it.

Mr. Sunderland. I vote in favor of it as optional; alternative if the parties agree. I would question whether that was within the Federal Constitution, because at common law the jury could not be forced to render a special verdict. They could do it if they pleased, but they could render a general verdict.

It seems to me that we ought to provide that if the parties consent, a special verdict only shall be rendered. That is the Wisconsin practice, and that is the Michigan practice, and that is the practice they tried to get in Illinois, but the legislature beat them. It is a very good practice.

Mr. Lemann. Would the parties have to agree to it in

Wisconsin?

Mr. Sunderland. In Wisconsin they do not have to agree, but they can do it.

Mr. Lemann. Your point is, by agreement of the parties, a special verdict only covering all issues?

Mr. Sunderland. Yes. I should like to have the Wisconsin safeguard put in -- that if anything is inadvertently omitted and not called to the attention of the court, it shall be deemed to have been found by the court in accordance with the judgment.

Mr. Mitchell. Let me change my second proposal, then, to read in this way:

We have rejected the idea that no special verdicts are ever to be asked for. We want to leave it open to have them.

Now, (2) shall we authorize only special verdicts on all the issues, without a general verdict, if the parties consent?

Mr. Sunderland. That is what I should like to see.

Mr. Wickersham. I agree to that.

Mr. Mitchell. Then it is the sense of the meeting that (2) can be taken care of.

Mr. Dodge. I should vote against the condition requiring the consent of the parties.

Mr. Sunderland. Do you think you could force the jury to render a special verdict rather than a general verdict at common law?

Mr. Dodge. Take the land case that I supposed: I think the judge could put the question to the jury, "Does the plaintiff own this land?" It covers the whole case. I do not see where there is any denial of a jury trial.

Mr. Lemann. I do not see where there is any difference between a special verdict covering all issues and a general verdict.

Mr. Olney. Some time I think we shall come to the point of having a general rule that the court shall submit matters to the jury for such a verdict as will best serve the interests of justice, and require either a special verdict or a general verdict as it may see fit at the time; but I do not think we are ready for that yet.

Mr. Dodge. I may be influenced too much by the well-settled practice with which I am familiar, and which I have never heard objected to, in a State where jury trial is maintained as fully as anywhere in the country.

Mr. Wickersham. Mr. Dodge, do you mean that in your practice the jury may be asked to pass on certain specific questions, but they must cover the whole case?

Mr. Dodge. Not necessarily. It must be a general verdict if they do not. If they do cover the whole case, there need not be a general verdict, because this is a matter of order by the court. There is a general verdict then by order of the court, after the questions are answered.

Mr. Wickersham. What I meant was this: Suppose the special findings are inconsistent with the conclusion in favor of one party or the other: What happens then?

Mr. Dodge. The judge orders a verdict on the answers.

Mr. Wickersham. He orders a verdict?

Mr. Dodge. Yes.

Mr. Wickersham. On what?

Mr. Dodge. On the answers.

Mr. Wickersham. But he does not enter a general verdict which would be inconsistent with the answers?

Mr. Dodge. Oh, no! He orders a verdict in accordance with the answers. That becomes the general verdict.

Mr. Wickersham. I wanted to be sure what your practice was.

Mr. Mitchell. The inconsistent end of it I am going to take up later.

Now we have agreed that we reject the idea that only general verdicts shall be called for. We are up to point (2): Shall we provide that the court may submit only special questions covering the whole case, without a general verdict, if the parties consent?

Mr. Lemann. I understood everybody was in favor of that, but Mr. Dodge did not like the limitation of consent; but otherwise everybody was in favor of it.

Mr. Mitchell. Is that the sense of the meeting?

Mr. Wickersham. I agree to that.

(No dissent was expressed.)

Mr. Mitchell. The third question is whether we shall provide for machinery by which the court may call for a general verdict and also submit certain special questions to the jury.

Mr. Dodge. Whether they cover the whole case or not?

Mr. Mitchell. Whether they cover the whole case or not.

Mr. Lemann. With the parties' consent, or without it?

Mr. Mitchell. No; without it, as a matter of discretion with the court. They have the power to do it.

Mr. Sunderland. Why not let the parties have a right to put in those questions if they want to?

Mr. Mitchell. Every trial then would be encumbered by all sorts of cross-examination.

Mr. Sunderland. No; that is not the experience. We have such a right in Michigan, and it is not used very much.

Mr. Olney. That was just our experience. I have known of jury trials where counsel for one side or the other proposed question after question, question after question, and it was done just to complicate and embarrass the situation. We met with that very difficulty.

Mr. Dobie. Was the idea there, Judge, to complicate things, and lay the basis for a possible appeal, or something of that kind?

Mr. Olney. Yes; just to ball up the whole business.

Mr. Lemann. Is there a certain inconsistency in saying that the court shall have power, without consent of the parties, to submit a particular issue, but has no power, without the consent of the parties, to submit all the issues?

Mr. Donworth. That is the law in every State now unless changed by special statute such as some of these gentlemen have.

Mr. Olney. In order to bring the matter before the committee, I move that the Court have the power, in its discretion, to ask the jury for both special verdicts or answers to interrogatories and a general verdict at the same time.

Mr. Dodge. And may, with the consent of the parties, omit the general verdict if the special answers cover the whole case.

Mr. Mitchell. You are confusing, now, three different cases. I am trying to split them.

We have agreed to reject the idea of general verdicts only.

We have agreed that the court may avoid the general verdict and call for special verdicts only on special issues supposed to cover the whole case, if the parties consent.

The third question is, Shall we give the court discretionary power, where he does call for a general verdict, to

ask for special findings?

Mr. Dobie. Without consent of the parties?

Mr. Mitchell. Without consent of the parties. Now we are down to (3). We have settled the first two.

Mr. Wickersham. Will you state the last one again, please?

Mr. Mitchell. The last one is that the court shall have power, in his discretion, to call for a general verdict, and also to submit special interrogatories on certain facts.

Mr. Wickersham. You have not yet considered the question of what happens?

Mr. Mitchell. Not at all.

Mr. Wickersham. As to that, I am in favor of that.

Mr. Mitchell. Are we agreed on the third? I think we are.

Mr. Donworth. Will you kindly state that again?

Mr. Mitchell. The third is that the court shall have discretionary power, when it calls for a general verdict, in connection with the general verdict to submit to the jury special interrogatories or questions.

Mr. Donworth. I am for that.

(No dissent was expressed.)

Mr. Mitchell. That is agreed to.

Now we come back: Suppose that the two types of verdicts are called for, general and special.

Mr. Sunderland. You mean special interrogatories with the general verdict?

Mr. Mitchell. Well, it is a matter of phraseology. We all know that if we say "special verdict", we mean a verdict on a special question, not the whole case.

Now, we have got the verdicts in. They have come in. There is provision here made that if they are inconsistent, the court need not receive them, but may call the jury's attention to their inconsistency and ask them to reconsider. That is understood. But suppose he does not, and they report, and the jury is discharged, and the general verdict is inconsistent with some special finding:

The first question is whether we will have the general verdict control.

The second is whether we will have the special verdict control.

The third is, in law actions, whether, in case the general and the special verdicts are inconsistent, the court shall treat it as no verdict, and call for a new trial.

Mr. Wickersham. Mr. Chairman, does not that come down to a question of constitutional law?

Mr. Mitchell. That is Point (3).

Mr. Wickersham. I am referring to the last point -- that is, where there are answers to special questions submitted, and a general verdict, and there is an inconsis-

ency between the answers and the general verdict. We would like -- the Reporter would like, and I am with him in that -- to have the court empowered thereupon to enter the proper verdict; but the question is, can he overrule the general verdict and find in conformity with the special findings?

That is a nice question of constitutional law. I am not sure about it. My impression is that it cannot be done; and yet, looking hastily at some decisions here, I am not so sure about it. If it can be done, I should like to see it done. I think we want to be sure that it can be constitutionally done before we formulate the rule.

Mr. Dobie. We agree that there is no constitutional question there that the court can order a new trial.

Mr. Wickersham. Oh, the court can order a new trial. The question is, can the court enter a verdict on the special findings absolutely inconsistent with the general verdict which the jury has found?

Mr. Tolman. In Illinois the special verdict controls; the answers to the special interrogatories control. I understand it is the same in Wisconsin.

Mr. Clark. In Washington, too.

Mr. Sunderland. It is the same in Michigan and in a number of States.

Mr. Tolman. Every State carved out of the Northwest Territory has in its constitution a provision that the right of

trial by jury as at common law shall be forever maintained. It could not possibly be done in Illinois by virtue of the statute if it was unlawful at common law to do it. I feel very sure that the decisions in Illinois are on the constitutional point, and that these doubts will disappear when we get the cases before us.

Mr. Clark. Mr. Chairman, I think that under the Federal Constitution, so far as we can see, it is also all right. I have passed over to Mr. Lemann a case that went up from Washington, on the Washington statute, which is of this type. The court says, "It may be a nice question under the conformity act whether the statute controls". It makes no intimation of any kind of constitutional question, but says, "Assuming that it does, we will try to read them together", which I suppose they should do anyway so far as they could.

Mr. Sunderland. Was that a case which went up from the Federal district court?

Mr. Lemann. Yes; it was a case under the employers' liability act. It went up from the district court of the United States, and presented a number of questions; and they did not pass directly on the matter, as the Reporter says. It might be cited as inferential recognition that the Washington provision was constitutional; otherwise they could just have said this was unconstitutional. Instead of that, they proceeded to try to harmonize the different moves in the

code. It apparently did not occur to them that there was any constitutional question involved.

Mr. Dobie. I should like to ask Major Tolman this question:

In the cases that you mentioned in which this practice has been sustained under State constitutions similar to the Federal Constitution, was there any discussion by the highest courts of the States of the constitutionality of this practice, in the light of this provision as to jury trial and re-examination?

Mr. Tolman. I can only give you my impression from recollection. I think so, because I do not see how it could be avoided.

Mr. Dobie. It can be avoided by side-stepping it.

Mr. Tolman. My impression is that Judge Cartwright wrote an opinion on that statute at an early day, and sustained it as being in accord with the common law.

Mr. Wickersham. That statute, as I understand, authorizes the court to disregard special answers and enter a general verdict, or vice versa.

Mr. Tolman. Or vice versa. The answers to the special interrogatories control.

Mr. Wickersham. Therefore, he cannot disregard them and enter a general verdict.

Mr. Sunderland. They control, and he enters a

judgment in accordance with the special findings.

Mr. Wickersham. That is what I mean. That means you disregard the general verdict if that is inconsistent with the answers to the questions.

Mr. Sunderland. Yes.

Mr. Tolman. Yes, sir.

Mr. Olney. Is it not evident that we cannot really wisely decide this question until we know how serious the constitutional question is which has been suggested?

Mr. Mitchell. Probably.

Mr. Sunderland. It has never been held unconstitutional; I know that.

Mr. Lemann. Suppose we make a motion that we approve this provision subject to the constitutional inquiry, and that the Reporter be requested to examine into that?

Mr. Mitchell. Approve the idea of having special findings overrule the general verdict if it can be done constitutionally?

Mr. Lemann. Yes; ask the Reporter to examine into that, and perhaps let us have the citations so that we can give our own judgment on it, unless it is perfectly plain.

Mr. Dodge. I second the motion.

Mr. Mitchell. All in favor of referring that to the Reporter say "aye".

(The question being put, the motion was unanimously

carried.)

Mr. Mitchell. Now I should like to make a suggestion to the Reporter. I do not know that we need to discuss it.

We have been talking, of course, about actions triable by juries as a matter of right. As this rule is worded, in the first paragraph of it, in actions of an equitable nature which are tried by a jury it would be necessary for the court, when he is submitting special questions to a jury for special findings, also to call for a general verdict. Of course the rule ought to be so drawn that in jury cases where the case is not triable as a matter of right by a jury, the court does not have to call for a general verdict, obviously. I think that is a mere matter of verbiage here.

Mr. Clark. That can be done very easily. Of course I have tried all the way through to assimilate the two. Why should he not do the same in equity cases? There is no constitutional compulsion there, certainly; but why should he not do the same in order to make the practice in the two situations as nearly analogous as we can make it?

Mr. Mitchell. Why force them to do it when in an equitable case there is only some particular question of fact -- fraud or deceit, or something of that kind -- and a lot of other issues in the case not specially fit for a jury's consideration? Why should he have to ask for a general verdict?

Mr. Donworth. I think you are absolutely right. I think what we are talking about is confined, as you say, to cases where a jury's presence is demandable as a matter of right.

Mr. Clark. I can attend to that.

Mr. Mitchell. Is there anything more on Rule 87?

Mr. Tolman. There is one suggestion -- perhaps it may be almost a matter of phraseology, but I think it has some importance -- and that is the phrase "written charge" at the end of line 3 and the beginning of line 4.

I do not like written instructions or written charges. They are out of place in the Federal system, I think. I have suggested that the words "with such explanation" be substituted -- "submit to the jury with such explanation".

Mr. Dodge. Does not that follow as a matter of course? I was going to ask why those clauses in parentheses are here at all. It is perfectly obvious the judge has to charge the jury.

Mr. Mitchell. I think our general instructions require recasting this whole section. I think we had better let it rest there. Then we can chew it over and come back again. We cannot follow the exact language of this section.

RULE 88. RESERVATION OF DECISION ON MOTION FOR DIRECTED VERDICT.

Mr. Mitchell. Then we will pass on to Rule 88.

Mr. Clark. Of course Rule 88 is simply taking the Redman case, the reserved-decision case, over into Federal practice.

I presume you probably all recall that case. That is a very recent case which definitely limits the old Slocum case, the Slocum case holding that the upper court when it reversed could not order the judgment, but had to order a new trial. The Redman case says, where in a Federal case tried in New York under the conformity provision under New York practice there is a provision for reserving decision, that that was well within the common law, and therefore is within trial by jury, and therefore the C.C.A. was in error in feeling that it could not direct a dismissal of the complaint in that case.

This is what happened: It was a case of negligence. The case went to the jury. There was a verdict for the plaintiff. On appeal, the C.C. A. said that there was not sufficient evidence, but felt it had no power to do anything but order a new trial. The defendant then appealed on that point, and the Supreme Court in the Redman case held that it was in error in not directing a judgment for the defendant.

Mr. Wickersham. The point had been reserved in the district court?

Mr. Clark. Yes.

Mr. Dobie. I have just one suggestion there. I am heartily in favor of this rule. The only problem with me is whether or not, when the trial judge refuses to give the instruction for the defendant, it ought not to be compulsory on him to reserve it so that the appellate court can enter final judgment. In other words, if he says, "I refuse to give that instruction", I should like to make him do it subject to this reserved question.

Mr. Sunderland. You would compel him to reserve the point?

Mr. Dobie. Yes. That is, if he refuses to give a peremptory instruction for the defendant, have it so that that would make him put it in such shape -- not merely give him the power to do it, but make him do it -- that the upper court can finally dispose of the whole thing.

Mr. Dodge. That is not necessary. This is just a matter of his own power, after the verdict, to set it aside and order a verdict the other way.

Mr. Dobie. But if he refuses to give that directed verdict, and he does not reserve the question of law, then, under the Slocum case -- which is still the law -- the upper court cannot dispose of it finally. He can do this, and ought to be given the power, and I am strong for that. I think this is fine. I was going to suggest it if it had not been put in here; but I think where he refuses to give the

instruction, some Federal judge might well say, "Well, I will not do this subject to this question of law; I will just refuse to give the instruction, and let it go at that." Then, under the Slocum case, all the appellate court can do is to order a new trial.

Mr. Dodge. You think, although he is firmly convinced he is right, he ought to be compelled to reserve the question?

Mr. Dobie. Yes.

Mr. Dodge. This is a practice with which I am very familiar. We have it in State and Federal law; but there is one technicality: The reservation must be made with the consent of the jury.

Mr. Cherry. After all, there are three methods of dealing with the matter.

In Massachusetts, there is provision for reservation with the consent of the jury.

In New York and in some other States there is a provision that it may be reserved with the consent of the parties.

I hate to mention Minnesota again, but we in common with some other States have a provision of absolute power to the judge without the consent of either jury or parties not to reserve anything, but to rule on the motion for a directed verdict, and then the power to grant judgment notwithstanding it exists specifically in cases where the appellate court decides that there ought to have been a directed verdict.

Now, if it were not for two phrases in the Redman case, I should say that the United States Supreme Court could permit action in the Federal court of Minnesota, for example, in accordance with the State practice; but there are two phrases there. It is noticeable that that opinion in the Redman case was by Judge Van Devanter, who also wrote the opinion in the Slocum case.

Mr. Dobie. The majority opinion.

Mr. Cherry. Yes. There it was a five-to-four decision. Here, it is unanimous. He wrote the opinions in both cases. He said, "the unwaived right" at one place in the Redman case, and he spoke of "the reserved power". Now, I think that what they have indicated so far is only a method by which, and indicating present limits, at least, within which the court, trial or appellate, can constitutionally act upon the verdict by giving judgment against it; but I do not think it at all concludes the thing. It does not indicate the final result which may be reached. I think here we may have a situation where we may want to suggest to the court settling that question by rule.

Mr. Dodge. Was it done with the consent of the jury in the Redman case?

Mr. Cherry. No; the New York practice does not provide for consent of the jury. The Massachusetts practice does.

Mr. Dodge. It is thought that that makes it the verdict

of the jury?

Mr. Cherry. It does in Massachusetts. In New York they say "if counsel do not object". There is a provision for objection or exception. In Minnesota we say it is not a question of waiving the jury or getting the jury's consent; we say this power is co-extensive with the power to direct a verdict.

In fact, our statute bases the granting of judgment notwithstanding on two things: First, that you asked for a directed verdict; and, secondly, that the judge ought to have granted it in the first place.

On principle, I cannot help feeling that there is no more interference with the right to a jury trial by granting judgment notwithstanding than there is by granting a directed verdict. In either case the actual result is that the deliberation of the jury does not determine the judgment. That is the actual fact, whatever we call it.

Now I should like just to raise the question whether this is a situation where we ought to have asked the court frankly what shall be done, pointing out that we realize that in the Redman case they have not gone that far, but they are going the length that has been gone under State statutes in the light of State constitutional provisions, which, as the Major said a while ago, are just as broad as the Seventh Amendment in their preservation inviolate of the right of

jury trial.

Mr. Mitchell. I should like to ask whether, in your opinion, under the Redman and other decisions, there is any difference in the Federal courts with respect to the powers of the trial court and the appellate court in the matter of granting judgment notwithstanding a verdict. Have they made any distinction?

Mr. Cherry. No; they have not dealt with that point. It is all a question of a court, some court, entering a judgment which does not conform to the actual vercict brought in by the jury. It seems to me it is a pure matter of procedural detail where that power is lodged as between or among courts. Is not that right, Mr. Sunderland?

Mr. Sunderland. I think so. I do not think there is any question about it.

Mr. Dobie. The Supreme Court did not think so in the Slocum case.

Mr. Cherry. If any court has the power, you may constitutionally asign it to any one that is thought appropriate in the scheme of courts. It is a question of any court as against the jury's verdict.

Mr. Mitchell. This rule is drawn on the theory of the Redman case, that unless the court does reserve decision on the motion you cannot get a judgment notwithstanding verdict.

Mr. Cherry. I would point out, however, that the

proposed rule does not provide for anybody's consent; does it?

Mr. Clark. No.

Mr. Cherry. And yet the Supreme Court of the United States specifically said the Massachusetts practice is all right where the jury's consent has been obtained. It has now said in the Redman case that the New York practice is all right where they say there was no objection by the parties, which means, it is true, that under the New York practice they could have objected, in which case presumably or possibly you would have had a different result in the Redman case. They have not had to face the question that would be involved specifically by the Minnesota practice, where nobody's consent is required; where, in fact, the judge rules. He does not reserve anything. He denies the motion for a directed verdict specifically, and then he reverses his own ruling, or the appellate court does, later, by giving judgment notwithstanding.

Mr. Mitchell. If we make a rule that allows the court to grant judgment notwithstanding the verdict where the question was not reserved with somebody's consent, we are asking the court to overrule their earlier case on the subject, the Slocum case; are we not?

Mr. Cherry. That was a five-to-four decision.

Mr. Dobie. Yes; that is what we are asking.

Mr. Tolman. That has been specifically overruled in the Redman case; it has been distinguished, at least.

Mr. Dobie. Not overruled.

Mr. Mitchell. It has been distinguished where the parties acquiesced in the reservation of the motion.

Mr. Dobie. They did not overrule the Slocum case; but Justice Van Devanter, who wrote the opinions in both cases, did say that certain expressions in the Slocum case not necessary to a decision of that case were no longer the law. What those expressions were, he studiously refrained from mentioning. (Laughter.)

Mr. Cherry. And he did use the two phrases I have mentioned. He said in the Slocum case there was the "unwaived right" to a jury trial, and he did refer here to the "unobjected procedure" -- procedure not objected to.

Mr. Mitchell. Why would it not do for us to put up two rules -- one of them like this, that he may reserve decision if no objection by the parties is made, and an alternate rule giving him a flat right to grant judgment notwithstanding the verdict, and let them settle what the Slocum and Redman cases mean?

Mr. Cherry. That is what I had in mind suggesting.

Mr. Lemann. I should like to ask the Reporter and Mr. Sunderland what they think about the constitutional question. Do you think there is any doubt about the validity

of this rule?

Mr. Clark. If you ask me, I think the Slocum case is on the way to going into the discard, and the court wanted to take it in several bites.

Mr. Donworth. I recently had occasion to discuss this matter with three of the judges of the Circuit Court of Appeals in the Ninth Circuit. They had not seen this rule, nor had I, but we were discussing the proposition. One of them said, "We understand that the Constitution, as interpreted by the Supreme Court, on the question of trial by jury, requires us to send back for new trial a case where the judge erroneously denied a motion for a directed verdict at the close of all the evidence." He said, "Doing that inevitably invites the making up of evidence at the next trial to get by the missing point." He said, "Of course if we say the plaintiff failed to make out a case because he did not show so and so, that is an invitation for some evidence at the next trial"; and his view, very informally expressed, was in favor of something of this kind.

Now, I have two suggestions to make about this.

In the first place, in a trial of this character a motion for a directed verdict is usually made twice. It is made at the close of the plaintiff's case, reserving the right to put in further evidence if denied, which the court usually permits, and it is made at the close of all the evidence. Now, of course what we are talking about here is a motion made at

the close of all the evidence, and I think that should be made perfectly plain. I think in the first line --

"When, in an action tried with a jury" --

There should be inserted "at the close of all the evidence", "a motion is made"; not simply at the close of the plaintiff's case.

Then, in the final sentence, it says:

"The court shall then render judgment with the same effect and in the same manner as if its decision had been rendered before submission of the case to the jury."

I wonder if that is apt language. I am not sure whether, after the words "the court", there should not be inserted "if it grants such motion". If we make the idea compulsory, as Mr. Dobie suggested --

Mr. Dobie. Only if he refuses the peremptory instruction.

Mr. Donworth. It seems to me the rule, perhaps, could be worded in this way -- that whenever a motion of that character is made at the close of all the evidence, the judge may either grant it or may postpone the decision until after the verdict of the jury. That is, you get my idea: He can grant the dismissal at that time, but he cannot deny it. He may grant it, or he may take the verdict of the jury subject to the motion.

Mr. Dobie. On a question of law, as they call it.

Mr. Donworth. If he denies it, then I am afraid we

get back into the old Slocum case. Now, here he just reserves his decision. He could have granted it. Not granting it, the thing to do to bring it under the later case is just to say, "I reserve; I take the verdict de bene, or conditionally, and then I will decide the motion."

I do not know but that a rule might be valid that would say he may grant the motion, or he may defer ruling on it until after the verdict is returned.

Now, Professor Dobie's suggestion is, practically, that he will be compelled; is it not?

Mr. Dobie. Yes. I do not think that can do any harm. He does not have to exercise that power, but it just puts it in such shape that the upper court may then finally dispose of the case.

Mr. Clark. Your two suggestions are identical; are they not?

Mr. Donworth. I am inclined to think so, except the phraseology.

Mr. Mitchell. I have a suggestion, if you will allow me to make it. I think we ought to draw one rule that is literally according to the narrow interpretation of the Redman case. There I think we ought to draw another one that grants the general power for the appellate court to grant judgment notwithstanding the verdict where a motion to direct has been denied, and put the alternatives up.

If we made Rule 88 conform entirely to the narrow interpretation of the Redman case, we should have to insert, after the word "reserve", the words "if neither party objects". Nobody can say the Redman case went beyond that, because the court specifically states that neither party objected to the reservation of the decision on the motion. So if we insert "if neither party objects" after "reserve", we have a rule that conforms to the narrow and strict interpretation of the Redman case; and that is as far as the court has gone in overruling the Slocum case.

Let us put up an alternate rule, if we think it is advisable, that the trial court or the appellate court -- we should have to confine it to the appellate court in our words -- may order judgment notwithstanding the verdict after the court has refused the motion to direct, and let the court say whether they intend to have that practice. I think we all agree, do we not, that if the court has power under the Constitution to grant judgments notwithstanding the verdict if it has denied a motion to direct, it ought to be given the power?

Why can we not do it in that way? Then we may say, "Why, your Honors, here is a rule precisely as we read the Redman case. We know the Redman case goes that far. The court may reserve decision on the motion if neither party objects. The committee felt, on the other hand, that it is

possible the general power to render judgment notwithstanding the verdict ought to be granted, and here is a rule to that effect."

Mr. Wickersham. I move that we do that.

Mr. Dobie. I second the motion.

Mr. Dodge. Have you covered Mr. Dobie's very interesting suggestion that it be required?

Mr. Mitchell. That is an alternative, but in practical effect it is whipping the devil around the stump; and there is another thing about it: If it is required, that eliminates the element of consent; and the Redman case, on its face, is limited to a consent case.

Mr. Dodge. I understand your two alternatives, but I thought there was a third choice.

Mr. Mitchell. I do not think there is, because the third choice -- to require you to reserve it in all cases without consent -- is equivalent to a flat statement that the court may grant judgment notwithstanding the verdict. It is nothing but a rigmarole.

Mr. Sunderland. There is another possibility, though. The Supreme Court has indicated that the Massachusetts practice is all right. In Railway Company v. Page, 274 U.S., they dealt with a case that went up from Massachusetts where the matter was reserved with the consent of the jury, and no question was raised about its propriety. Now, the jury

always consent, but the parties will not. I would rather have the consent of the jury than the consent of the parties.

Mr. Mitchell. I do not see why a jury has a right to waive a man's constitutional right to jury trial.

Mr. Cherry. That has always seemed to me the worst thing they have done.

Mr. Sunderland. So under the Massachusetts practice you will get the benefit of the very thing they overruled in the Slocum case.

Mr. Mitchell. I do not think the Court, on reflection, is ever going to hold that a jury can waive a man's right to constitutional trial.

Mr. Olney. I do not think a jury could delegate its function to the court, either.

Mr. Dodge. The case of Railway Company v. Page, which Mr. Sunderland refers to, was my case. I was for the defendant, and there was a heavy verdict against me in a personal injury case; and Judge Morton, in the district court, reserved decision on the motion. I had forgotten that. Upon argument afterward he concluded he was wrong in submitting it to the jury, and directed a verdict. That was upset by the circuit court of appeals, two-to-one. Certiorari was granted, and the Supreme Court held that Morton was right; and the practice all through was never questioned by anybody.

Mr. Dobie. There was a very cavalier opinion. The

court did not discuss its relation to the Slocum case. In the Page case they just went right along and took it very gently.

Mr. Dodge. It was a very satisfactory opinion. (Laughter.)

Mr. Dobie. Yes; I agree with you.

Mr. Mitchell. Mr. Dodge, do you not agree that an alternate rule that in any case where a motion to direct is denied the court may grant judgment notwithstanding the verdict is the substantial equivalent of a rule that in every case he shall reserve decision with or without consent, and then may grant judgment notwithstanding the verdict?

Mr. Dodge. Yes; but, as a matter of fact, we have had for many years a very valuable statute in Massachusetts that the Supreme Judicial Court, if a verdict ought to have been rendered and if it feels that the case was fully tried, may, in its discretion, order judgment for the defendant. It is a practice constantly invoked; and its constitutionality, if attacked, was sustained long ago.

Mr. Olney. If we have authority over appellate procedure, I think we ought to adopt it.

Mr. Donworth. As a matter of self-defense.

Mr. Dobie. The State courts do not follow the Slocum case under their constitutions. They have very generally departed from it. You gentlemen may remember that in one

case the district judge violated the Slocum case flatly, did it deliberately, and then suggested to the circuit court of appeals that they certify the question to the Supreme Court of the United States, under the idea that it was a five-to-four decision, and the Court had changed its make-up. The circuit court of appeals, however, said, "We do not like the Slocum case at all, but when it is foreclosed by authority we will not certify questions."

Mr. Dodge. There was no act of Congress in the Slocum case. It was not a question of whether Congress could deal with the situation.

Mr. Dobie. No.

Mr. Donworth. I should like to ask this question, Mr. Dobie. I am not clear whether this has been decided:

Suppose, as a final result of all this, the district judge denies the motion for a directed verdict, and enters judgment on the verdict in favor of the plaintiff. The defendant takes writ of error, and the appellate court then finally disposes of the case by reversal vote. Must they not send it back for a jury trial? That is, where the local judge finally denies the motion, must it not then go back?

Mr. Dobie. Unless there is this reserved question of law.

Mr. Donworth. But even if he does reserve it, is there any case which holds that the circuit court of appeals may reverse a final judgment for the plaintiff, even though

the point was reserved by the local judge?

Mr. Dobie. I do not know of any such case as that, where it was for the plaintiff.

Mr. Donworth. Is not the question a little different when it gets to the Supreme Court of the United States between the two cases -- one where the district judge finally grants the motion to dismiss, and secondly where he finally grants judgment for the plaintiff?

Mr. Dobie. I think under the Redman case the court can do that, subject to this reserved question at law.

Mr. Clark. In the Slocum case, they dealt with trial by the Federal court dealing with the Pennsylvania statute. (Reading:)

"A statute had enlarged the device so that whenever either party moved for a directed verdict which was denied, the movant could subsequently ask the court to have all the evidence taken upon the trial certified and filed so as to become a part of the whole record and then move for judgment non obstante veredicto."

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I guess I am wrong about it because -- I said it was the Circuit Court -- the Pennsylvania Supreme Court held that the statute did not infringe upon the province of the jury but merely gave the court the power -- but the United States Supreme Court by a vote of five to four held that such practice violated the Seventh Amendment.

MR. MITCHELL: May I state my proposition, and if somebody else has a better one we can try to bring it to a head? My proposal was to submit two alternative provisions to the Court; one should be Rule 88 made to conform to common law within the Redman case by inserting the words "if neither party objects" after the word "reserve" in the third line; the alternative proposition is one to provide for the granting of judgment notwithstanding the verdict, even though the decision has not been reserved, when there has been a ruling in the trial with reference to a directed verdict.

MR. SUNDERLAND: You would have no objection to having that "must" instead of "may" -- "must reserve if the parties do not object"?

MR. MITCHELL: If either party objects?

MR. SUNDERLAND: It must reserve.

MR. MITCHELL: I would have no objection to that.

MR. SUNDERLAND: Then you always get the material for final disposition of the case.

MR. MITCHELL: I think that is a good suggestion, -- if neither party objects he must reserve the point if he does not

grant the motion.

MR. DONWORTH: It does not say "must".

MR. MITCHELL: It say "the motion is made".

MR. DONWORTH: That would compel him in every case to submit the case to the jury.

MR. SUNDERLAND: Then you get a verdict which you can proceed with.

MR. CLARK: He can grant the motion.

MR. MITCHELL: What I mean is if he does not grant it, he must reserve it, submit the case to the jury, and render a decision. Do you want to vote on that?

MR. CHERRY: There has been a motion made in connection with that.

MR. OLNEY: Mr. Chairman, the rule giving the court power to enter the judgment notwithstanding the verdict is so much in the interest of speedy justice that I would suggest that we formulate the rule along that line and then attach merely a note for the information of the Supreme Court that we believe that this rule is not in opposition to the ruling that is announced in the Redman case, just call it to their attention if they think it is all right. I think the courts are inevitably going to come to the conclusion of permitting the judgment to be entered.

MR. MITCHELL: My personal opinion is that they will have to back away from the Slocum case further than they have in the Redman case to justify that. I am not willing to subscribe to the view to the contrary. I think we have to put it up to them.

MR. DODGE: I have the Redman case right here and it seems to me they have not got to do any further backing away than they did here. You will note on page 4 of the opinion, after pointing out that there was a consent in this case, they say: "At common law there was a well established practice of reserving questions of law arising out of trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved", and they go on to say that that was the well established practice when the 7th Amendment was adopted, and, "therefore must be regarded as a part of the common law rules to which resort must be had in testing and measuring the right of trial by jury", and I should say that is very persuasive and that they mean that to be the law and not hinge on something which is not mentioned in that part of the opinion.

2 MR. MITCHELL: Then I will amend my proposal that we put brackets around the words "if neither party objects" and let them strike that out or put it in.

MR. DOBIE: I hope the Redman case goes thatfar. I do not think the Redman case required the consent of the parties. I think it recognized the general validity of that practice at common law without consent.

MR. CHERRY: I would agree with that if the court had not said in the Slocum case that there was the inherent right. They used that language unfortunately.

MR. DODGE: Yes, they said that first.

MR. MITCHELL: Is not the point that by putting the words "if neither party objects" in brackets and putting that right up to them to strike it out or consent to leaving it in?

MR. DOBIE: All right, I make that motion, if it is not before the house.

MR. CLARK: I see this little difficulty: It seems to me that your second rule, while it is pretty close to the old Slocum case, and that is asking them to swallow the Slocum case at once and they might be unwilling to do that, which throws it back to this rule which is now considerably emasculated.

MR. MITCHELL: No, it is not; you have struck out "may" and put "must".

MR. CLARK: I mean, it is emasculated by that requirement of not objecting.

MR. MITCHELL: But we have put that in brackets and given them a chance to strike that out, and called special attention to it.

MR. DOBIE: With the recommendation that they approve it or strike it out.

MR. MITCHELL: With the recommendation that they ought to go as far as they can.

MR. DOBIE: I make that motion.

MR. CHERRY: I second it.

(The question was put and the motion unanimously prevailed.)

MR. MITCHELL: I would like to make a suggestion here that has occurred to me. I do not know whether it is covered by any other rule. In the Federal courts, as distinguished from most State practices, if the defendant rests at the close of the plaintiff's case, for the purpose of making a motion for directed verdict, he has not the right to go on with the evidence unless he gets the court's consent. Now, I would like to see that rule abolished and give the defendant the right for the purpose of making the motion and not have to ask the court's consent in case the motion is denied, to put in his defense.

MR. DONWORTH: What kind of a motion is that? There are two kinds, of course; final judgment or dismissal in the nature of a non-suit.

MR. DODGE: A directed verdict, is it not?

MR. MITCHELL: The directed verdict is what I am talking about.

MR. DONWORTH: I wanted to make that clear.

MR. MITCHELL: It is purely a technicality and sometimes a lawyer who practices in State courts forgets when he makes the motion for the directed verdict to say, "I would like please to make the motion without waiving my right to put in evidence", and he gets caught in a trap. He ought to have the right to make that motion and get a ruling on it without being deprived of the right to put in his evidence if the motion is denied.

MR. DODGE: Do you mean to give him a right to except

from it if the motion as a matter of law should have been granted to the defendant but the court declines to grant it because he thinks the plaintiff may get some benefit out of the defendant's evidence?

MR. DONWORTH: The appellate courts always hold that if the defendant, notwithstanding the denial of that motion, goes on and puts in his case, he waives any error in the first ruling.

MR. MITCHELL: That is not my point.

MR. DONWORTH: That is Mr. Dodge's point.

MR. MITCHELL: That is clear enough.

MR. DOBIE: Are you referring to the idea of where the defendant makes the motion at the end of the plaintiff's case? Of course, if there are defects in the plaintiff's evidence that are supplied by his defense, it looks like the ruling on the motion is proper.

MR. DODGE: Should not the court have the power to do as judges usually do, to say, "I am not going to rule on the motion if you are going to put in evidence"?

MR. MITCHELL: Yes, but that is not what happens. The defendant makes a motion for a directed verdict at the close of the plaintiff's case, and unless he gets the consent of the court in the Federal court he does not dare make that motion unless he is ready to quit right there and rest his case.

MR. DODGE: The mere making of a motion is a waiver?

MR. MITCHELL: Of the right to put in evidence in his case if the motion is denied.

MR. DODGE: Is that the law?

MR. MITCHELL: That is the Federal rule.

MR. DONWORTH: I understand it is discretionary with the judge to let him do that or not.

MR. MITCHELL: Ought he have the right?

MR. DODGE: The mere presentation of the motion is not a waiver of the right to put in further evidence?

MR. MITCHELL: If the motion is denied.

MR. DOBIE: I second that motion.

MR. CLARK: Do you want a new section?

MR. MITCHELL: You can stick a sentence right in there.

MR. OLNEY: If the motion is for a directed verdict it results in a judgment at the bar; otherwise it will just be a motion for a non-suit.

MR. CHERRY: I think not. We have both in Minnesota and you will recognize plenty of cases where you know the judge is not going to give a directed verdict but where he might dismiss without prejudice, or a non-suit. You may make both, but you will obviously have to have a different type of case to get your directed verdict when you have not put any evidence than might support a motion for dismissal without prejudice or a non-suit.

MR. DODGE: Is that not what is meant by a motion for dismissal? I am not familiar with that at all.

MR. CHERRY: Yes.

MR. DODGE: In the first line?

MR. CHERRY: Non-suit.

MR. DODGE: There is only one motion that I have ever heard of and that is the motion for a directed verdict.

MR. SUNDERLAND: That is the only motion there is. The Federal courts have said over and over again that in Federal practice there is no such thing as a non-suit.

MR. WICKERSHAM: Under the Code practice it is always a motion to dismiss. You move to dismiss the complaint at the close of the plaintiff's evidence, and you move to renew the motion at the close of the defendant's evidence.

MR. DOBIE: Does that preclude him from bringing another suit? Suppose it is granted; does that preclude the plaintiff from bringing another suit in that cause of action? In other words, is it a ruling on the merits or without prejudice?

MR. WICKERSHAM: Not at the close of the plaintiff's case, but after all the evidence is in a motion then to dismiss the complaint would be on the merits because all the evidence is in pro and con. The motion in the first instance is like a demurrer to the evidence, the old fashioned demurrer to the evidence, thatthe plaintiff has failed to make out a case, in other words, and the defendant moves to dismiss the complaint on that ground.

MR. DONWORTH: Mr. Dodge inquires about the use of the

word "dismissal". My understanding is that you always dismiss the action, whether it is with prejudice or without prejudice.

MR. WICKERSHAM: Our practice is that you dismiss the complaint.

MR. DONWORTH: Either one, but in our State you put in the words "dismissed with prejudice" or "without prejudice".

MR. WICKERSHAM: We do not put that in. It is intended to be without prejudice.

MR. DODGE: Does not the court in your practice direct the jury to return a verdict? Is not a verdict returned in regular course by the defendant?

MR. WICKERSHAM: Yes, that is another motion.

MR. MITCHELL: This word "dismissal" in Rule 88 ought to be stricken out or we ought to say "dismissal with prejudice" and avoid the idea of dismissal without prejudice. There is no need of dismissing without prejudice.

MR. WICKERSHAM: Dismissing it on the merits?

MR. DODGE: Mr. Sunderland says that practice does not obtain in the Federal court.

MR. DOBIE: This is how they avoid it down there in Virginia. It has been held binding in the Barrett case. Where in a Federal court a motion for a directed verdict is asked and the judge indicates he is going to deny it, the plaintiff takes a non-suit. In Virginia we do not have directed verdicts in civil cases.

MR. DONWORTH: Dismissal of the action on its merits.

MR. DOBIE: They held in the Barrett case that it was binding on the Federal courts.

MR. BLACK: The reason I put this in was because it is interstate practice and I thought it might be held to be in Federal practice under the Conformity Act.

MR. DONWORTH: You have "on the merits", and that is entirely equivalent to the words "without prejudice". I did not know it was there, but that answers it.

MR. MITCHELL: The words in brackets?

MR. DONWORTH: Yes.

MR. WICKERSHAM: That means it is res adjudicata.

MR. TOLMAN: Those were the words used in the Redman case.

MR. WICKERSHAM: Where did the Redman case come in from?

MR. CLARK: The Circuit Court of Appeals of New York.

MR. MITCHELL: You are liable to get some more light on the Redman case shortly. I think our office has a case pending on certiorari, an application for certiorari in the Second Circuit.

MR. DOBIE: There are several of these case pending.

MR. MITCHELL: The court made findings as the case went to the Circuit Court of Appeals and the question arose there whether the Circuit Court had a right to award a judgment or whether it had to send it back for a new trial. The court is evidently in trouble about that because they have held that case up for

some time.

MR. DOBIE: The Circuit Court of Appeals for the Second Circuit refuses to do it.

MR. MITCHELL: The Circuit Court of Appeals refuses to award a judgment.

MR. DOBIE: Yes, they refused a mandate.

MR. MITCHELL: Yes, but they may have done that on the ground of discretion, on the ground that there might be other evidence, but whether they did it on the question of power or not, is not clear.

MR. DOBIE: That is right.

MR. MITCHELL: This is a tax case against the collector and our office was handling it, and you may get some more light on the Redman case. I think we have passed Rule 88 and we may go to Rule 89.

MR. DONWORTH: Let me say, in answer to an observation made the other day that I was going to telegram my office and find out whether the State statute allowing the deposition of an adverse party in our State is a matter of discovery when used in the Federal court, and I got the reply and it is not. It is considered that there is no discovery in the Federal court except in accordance with the original bill of discovery, the idea of interrogatories, and so forth. That is what we thought.

RULE 89

INSTRUCTIONS TO JURY; OBJECTION

MR. MITCHELL: We will take up Rule 89.

MR. CLARK: Of course, Rule 89 covers the points which seem to be troubling lawyers and judges, but they are quite split, as far as I can see. The lawyers want to tie the judges down and the judges do not want to be tied down. If you will look through the comments you will see a diversity of opinion. A good many lawyers want written instructions by the court and instructions in advance of argument, and so on.

MR. DODGE: What was that last statement?

MR. CLARK: I beg your pardon?

MR. DODGE: What was that last statement?

MR. CLARK: I simply say, that a good many lawyers would like to have the court required to instruct in writing, and also to instruct in advance of argument of counsel. You will see that the District judges in Washington --

MR. DONWORTH: I am strongly against it.

MR. CLARK: Yes. This rule does not make much change either. The only change that it does make, if any, and I am not sure it does in view of the various provisions in the Conformity Act, is to permit the lawyers to file written requests for instructions and to make failure to charge in accordance with those written instructions itself a ground of error.

MR. WICKERSHAM: Yes, but suppose in his charge the judge

covered certain things not embraced in those requests, but which counsel on one side or the other conceive to be erroneous, and to which he objects, you do not mean to deprive the defeated party of the right to review those objectionable portions of the charge on appeal?

MR. CLARK: There I have kept the old rule, that he must state his objections before the jury retires, the second sentence.

MR. WICKERSHAM: That is all right.

MR. CLARK: You see, the Supreme Court rule, Rule 8, on the opposite page, is pretty strict in requiring objection before the jury retires. This modifies that just a little. It gives the lawyers something, although not nearly as much as some of them would like to have.

MR. MITCHELL: I notice that you have not made provision here that when the parties submit requests for instructions to the courts, the court shall indicate whether he grants them in substance or not.

MR. CLARK: I have not required that specifically. Of course that is often required and could be easily added. The way it stands here, you have to decide that inferentially from what he says.

MR. MITCHELL: You do not require him to say a word about the thing. You submit a lot of requests to him and if he does not want to say anything you have to argue your case to the jury

before you hear his charge and you do not know whether he is going to grant your request or not. I think it is only fair to require the trial judge, when written requests are submitted, and indicate before argument if he is granting in substance or denying the requests, so the lawyer can say, "The law is going to be, as I understand it, thus and so, and here are the facts." What is the objection to that?

MR. CLARK: I have no personal objection and I suppose it could be done. I do not suppose the judges would like even that, would they?

MR. DONWORTH: I had the impression that it was the feeling throughout the country that they wanted the benefit of the arguments, not only as a matter of time to study the instructions, but also a matter of the points made by the lawyers, as they wanted until the end of the arguments to make up their minds whether they would give these or not.

In answer to the objection mentioned by the Chairman, they have said, "We are always ready to indicate to lawyers before they begin their argument what our view is on the points of law involved, but we want the right to change our views as the result of the argument and then to tell the lawyers that we have modified our views as they go along."

5 In other words, they do not like to be foreclosed from the opportunity for deliberation on these requests.

MR. MITCHELL: Could we put in a clause suggesting that

they do it where practicable and not make it mandatory? Is there any way to do that?

MR. CHERRY: From the lawyers' point of view, the idea is, is it not, that he wants to close his argument not in objectionable form as far as the law of the case goes and his permissible comments on the evidence, as determined by the law of the case as it is going to be announced by the judge. Now, he does not want to transgress nor does he want to be in a position where after he has finished his argument the judge's charge is going to throw out whole parts of his argument by saying that that does not apply here because the law is the other way.

Now, I have known, under our State practice, where exactly what the Chairman speaks of is done, and where you can compel the court to rule, that the judges frequently, where a question of law is raised in the case, will ask counsel to submit them then and not wait until the close of the evidence, to give their views of the law in the form of requests to charge so that the judge may have those and be ready to pass on them at the end of the evidence. As soon as he senses a rather clear question of law he will ask for that very thing, and, so, instead of the judges objecting to it, those who use it like it and make that additional use of it. It tends to get those questions of law settled as early as possible in the case.

MR. DONWORTH: Have any judges outside of the State of

Washington written on this subject?

MR. CLARK: Yes. I suggest that the Committee may be damned either way on this, as a committee, unless it has already done so, might well look over some of these suggestions so as to be prepared for whatever you do. You will note the way the comments are arranged. First are the suggestions of local committees, of which there are a good many, and then, beginning at page 7, the suggestions of the members of the Bar and the judges.

MR. DODGE: Mr. Chairman, do you think there is really much difficulty about knowing what the judge is going to rule in advance? It is so obvious that counsel must know it that I have never had the slightest difficulty conferring with the judge beforehand. You say, "Your Honor, I must know how you are going to rule on that point before I argue", and it is so obvious that you must know that --

MR. MITCHELL: I have forgotten whether in my experience the judges have indicated what they will grant because they are compelled to or because they are willing to, but I know it is done. In Minnesota is there any requirement that he shall indicate?

MR. CHERRY: Yes, in the statute.

MR. CLARK: You could easily put in here, something to adopt that view, that the court should rule on these requests in advance of argument but may change his ruling with proper notice

to counsel.

MR. WICKERSHAM: Suppose at a trial, before the close of the case, before the summing up is begun, counsel on each side submit requests to the judge; while the counsel are summing up the judge is reading the various requests and noting what he is going to do with them, and when he comes to the charge he weaves into his charge the answers to the various questions. I have known them many times at the close of the case to turn to counsel and say, "I have included in my charge my answers to your requests, and except as I have charged I deny them all." That is customary practice.

It has this advantage; counsel, as Mr. Dodge says, has got a pretty shrewed idea which way the judge is inclined in the case. He knows by the time the evidence is all in and they are going to sum up, what the questions are. He is prepared, he has had his requests prepared, and knows what they are. If the judge has got to wait and rule on those requests, before counsel begins summing up, he will have to take a recess of perhaps two or three hours -- I am speaking now of a long trial -- while
6 he goes over all these requests and rules on each one of them and then comes back and hands it to counsel, and then counsel has to go over it and see how far he has gone before they begin summing up. There is a lot of lost motion.

MR. MITCHELL: I have not found any difficulty with the mandatory practice. I think it is a mistake to make it manda-

tory in the sense that if the judge says he is going to grant a request, then when he comes to his charge he varies from it—I would not make that mandatory so that that change of front on his part constitutes an error.

I tried cases for 25 years continuously under that practice, and along towards the end of the trial our judges would say, "Have you gentlemen any requests for charges you would like to have made? I would like to have them when we adjourn tonight so I can consider them over night."

As the end of the trial approaches the lawyers have got to have their requests ready. They type them and prepare them when the case is coming to an end. They hand them to the judge and he has time before the end of the case to look them over. Sometimes he takes them right at the bench, he looks them over, "Denied; I can not grant that; I think my theory of the law is this --" and then on another one he will say, "I will grant it with qualifications". On another one he will say, "I am going to charge that in substance."

Then the lawyers know when they get before the jury how to guide their argument on the facts. Otherwise they would not know how the court is going to charge on the questions of law.

I think if you will agree to put a clause in here directing the court, as far as practicable, to indicate whether he is going to grant these requests or the substance, but without making

it an error if he says he is going to do one thing and then does another -- I should like to see it in, not as a mandatory provision, but as a sort of admonition.

MR. DOBIE: Mr. Chairman, I would like to ask a question if I may from the gentlemen who have had wide practical experience, which I apparently have not: Is it customary at all to argue instructions? It is very common in a number of States, including Virginia; the jury are sent out and the lawyers argue the instructions before the court.

MR. LOFTIN: It is not done in my State unless the judge requests it.

MR. DOBIE: It is a very common practice in Virginia. The jury is excluded and the judge says, "Now, gentlemen, bring your instructions up here."

I am for one side and Mr. Cherry is for another and we present the instructions and argue them before the court, and the court will sometimes spend a good deal of time arguing the propriety of them.

MR. MITCHELL: It is discretionary. If he thinks he wants advice on the law at that stage he can excuse the jury and call on the lawyers.

MR. DOBIE: I wondered if that practice was at all common.

MR. MITCHELL: I think it is. Of course, in Missouri the only charge the court can give is the written requests of the parties.

MR. DOBIE: That is a Virginia rule. They do not permit the parties to comment on the evidence at all.

MR. MITCHELL: I am not talking about commenting on the evidance, but in Missouri the plaintiff and defendant write out certain requests and all the court can do is to grant or deny those requests, and he reads them to the jury, those he has granted, and he does not read those which he has denied, and he can not say a word about the law.

MR. DOBIE: You mean he can not add --

MR. MITCHELL: Not a word, unless they have changed the practice since I have tried a case.

MR. DOBIE: I know in negligence cases and certain others they have certain printed instructions that they always have in there.

MR. MITCHELL: This is Missouri.

MR. DOBIE: In Virginia the State judge can not give instructions on his own.

MR. MITCHELL: Outside the requests?

MR. DOBIE: He can not. He can only give those that are asked for. He can amplify, and if he knows of a particular case he can give the exact law. Our judges can not say a word otherwise.

MR. MITCHELL: He is nothing but a moderator?

MR. DOBIE: That is it.

(Discussion off the record.)

MR. MITCHELL: I would like to ask the sense of the meeting on the question whether or not some provision ought not to be put in this rule that is not mandatory as a basis for error, but which puts pressure on the trial court to indicate, so far as he can, whether he is going to grant or deny the requests.

MR. DONWORTH: I think that is pretty good.

MR. TOLMAN: I make such a motion.

MR. DOBIE: I second it.

MR. WICKERSHAM: Ought that not to be left to the discretion of the court?

MR. MITCHELL: I am leaving it to his discretion but I want to say something about it so that it will not be overlooked.

MR. DONWORTH: The law is out our way, in practice under the State practice, that the judge instructs the jury in writing and before the argument of the lawyers, and the jury take these instructions with them. He can add anything he wants to, of course.

MR. WICKERSHAM: Orally?

7 MR. DONWORTH: No, unless the jury comes back. If they come back later then he can charge them.

MR. MITCHELL: You do not propose to make the judge give these instructions before the lawyers argue?

MR. DONWORTH: I most emphatically do not, but I am saying this, that under the practice in our State the lawyers want what is suggested by the Chairman, that the judge tell them at any

rate before they argue what he is going to do. I did not know how the Chairman's suggestion was going to be phrased, I did not know whether you would say pro forma, or something like that which would indicate his view before the argument but that is subject to his final determination.

MR. MITCHELL: With the understanding that the committee will merely try to put that idea into proper form I will submit the motion.

(The question was put and the motion unanimously prevailed.)

MR. MITCHELL: Now, your statement calls my attention to the fact that there is no express provision in this statute that requires the court or allows the court to charge the jury after argument. Is it necessary for us to say anything about it?

MR. DONWORTH: That is the universal practice.

MR. MITCHELL: Hold on. You have a State practice that requires the other way, and if we do not say anything about it the Conformity Act steps in.

MR. WICKERSHAM: I wish you would put it in.

MR. DOBIE: I do not believe the Conformity Act would be binding there, gentlemen. I think it is a question of the personal conduct of the trial by the court.

MR. MITCHELL: You do not think it would be desirable to say that the argument to the jury should precede the instructions?

MR. DOBIE: I wanted to raise that question. I am, frankly, very much in doubt about it and I would be very largely bound as to the opinions of the gentlemen who have had practical experience.

MR. MITCHELL: The Maryland practice is to give the argument after the instruction, and I think that lawyers may wonder about that.

MR. DOBIE: That is the Virginia procedure.

MR. DONWORTH: That is not the universal practice in Federal courts, regardless of State laws, for the charge to be after argument?

MR. MITCHELL: Not in Maryland.

MR. OLNEY: On a point of that sort there ought to be the greatest flexibility and not control the judges as to how they do it.

MR. MITCHELL: No; the Maryland judges probably feel they have to conform to the State practice.

MR. CLARK: It has been held to the contrary, that they do not need to.

MR. MITCHELL: But they do.

MR. CLARK: It has been held that in such case, it is not binding on the Federal court.

MR. MITCHELL: Let us concede that they are not required to do so. Now, in certain States they do, and they do it out of deference to the State practice, but we do not approve of it.

Why not give them an excuse for telling the local lawyers they can not do it that way any more, that the rules tell them that they must give the instructions after the argument?

MR. OLNEY: I can imagine, Mr. Chairman, a case in which giving the instructions to the jury prior to the argument would be a very great assistance. It might work exceedingly well.

MR. MITCHELL: Why, how could it?

MR. OLNEY: In many a case I have had this experience: If you read the instructions to the jury the lawyer is going tocall their specific attention to that particular instruction, which may go right to the heart of the whole matter.

MR. MITCHELL: He gets that under our practice by getting an indication from the court in advance whether or not he is going to charge a certain request.

MR. OLNEY: There is all the difference in the world in the fact that the jury has been instructed in that already. All I am saying in that connection is that the method of instruction to the jury, whether it is before argument or after argument, in matters of that sort, I would leave to the discretion of the district judge, the man who is actually conducting the case. It is one of those things he can handle better than anybody else.

MR. DONWORTH: I believe in the main with Judge Olney. A large number of lawyers throughout the country, as you will see by these comments, are asking positively that the instruc-

tion be given in advance of the argument. Have we already passed that motion that you suggested about the judge indicating a tentative view, or is that what we are now discussing?

MR. MITCHELL: Yes, we passed that with the understanding that it only applied where the instructions followed the argument.

MR. DONWORTH: I shall then reserve further comment.

MR. OLNEY: I notice in these comments that from Arizona, for example, there comes a strong request that the judge be required to instruct the jury in advance of the argument. That is not the ordinary practice.

MR. WICKERSHAM: Let me understand. The charge of the judge, of course, is the last thing after the argument?

8 MR. DONWORTH: In the Federal court.

MR. WICKERSHAM: I am speaking of the Federal court. I think that is so, the judge has the last word to say. Now, the whole point is, as I take it, at what stage must written requests to the judge, which have been handed him by the respective parties, be ruled on by him?

MR. MITCHELL: We have passed that.

MR. WICKERSHAM: We have passed that. Now, I do not see quite what question it is that is open.

MR. MITCHELL: The question now is whether -- of course, that rule which has just been passed was only necessary or useful where the court reserved his charge until after the argu-

ments have been made, and I accepted that motion with the understanding that it applied to that system. Now, the question arises here that we shall make it mandatory on the trial court to withhold his charge to the jury until after the argument of counsel, and attention has been called to the fact that in most Federal courts the charge is given last, but that in certain districts like Maryland, the courts at their discretion follow the State practice and give their charges before the arguments. Judge Olney wants it discretionary with the trial court whether he will give his charge before or after argument of counsel.

MR. WICKERSHAM: On instructions to the jury, or charge to the jury, I think it is important to preserve trial by jury as it has been always followed in the Federal courts, so that the last word to the jury comes from the judge. I think that is one of the essential parts of trial by jury as it was at common law and as it always has been in the Federal courts.

MR. DOBIE: I would like to hear a little more on that point. I do not want to put words in Mr. Cherry's mouth, but he feels that the judge ought to have the last word to the jury.

MR. CHERRY: That is what he generally does.

MR. DOBIE: I would like to have you develop that a little further.

MR. LOFTIN: I would say that in my State the Legislature passed a statute requiring the judge to charge the jury before

argument of counsel, and it proved so unsatisfactory that at the next session of the Legislature, two years afterwards, they repealed the statute, and the practice there now is for the judge to charge after argument of counsel.

MR. MITCHELL: The only purpose of it really is to notify the counsel what they will have to deal with before they argue the case.

MR. CHERRY: That is the obstenible purpose, Mr. Chairman, but have we forgotten the Caraway Bill which was passed in the Senate but not passed in the House, where the avowed purpose was to get into the Federal courts the system which obtains in certain southwestern States, in Senator Caraway's own State particularly, which involved more than this? It involved the throttling of the judge in the trial, it involved the idea, not that he was going to help the lawyers by giving his instructions first to the jury before argument, but it involved the distinct notion that the jury would have forgotten those instructions by the time they went out; and it also involved the provision that it should be reversible error for the judge to make any comment on the facts of the case. Now, Judge Trevor -- that is another Federal district -- has said what happened in colloquy between himself and the Senator which I think points exactly to the argument involved, and what is involved in some of these statements by lawyers involved. He said he met the Senator on the street in Little Rock, they had been old friends, and he said, "Senator, what is the matter with me and my court that you want

to try to throttle me?"

The Senator said, "Judge, your court is a fine court for good lawyers but for a lawyer like me it is Hell. It does not give me any chance with the jury."

Judge Trevor has said that publicly so I think there is no harm in that being quoted here.

That is the point that is involved here. It is not really the idea that it is more helpful to the jury and counsel to get those instructions, as distinguished from rulings, but I felt it was discretionary, I saw that it was going to admonish the court and diminish the situation we have today.

MR. MITCHELL: It allows the lawyers after the judge is through to get up and rant around about all sorts of distortions of one thing and another and get away with it without the judge straightening the jury out. I think it is an abomination.

This is in the interest of the forgotten man.

MR. CLARK: Or the lawyer who needs to be forgotten.

MR. DODGE: Do we need to say anything about it in this rule?

MR. CHERRY: I think so.

MR. MITCHELL: We do, because certain Federal district courts now -- I do not know whether they are forced to do so or not -- do conform to certain State practice on the subject.

MR. DODGE: Anywhere outside of Maryland? They do not in Virginia, do they?

MR. DOBIE: I do not think so.

MR. DODGE: They do not in Washington?

MR. WICKERSHAM: They do in the southwestern States to a large extent.

MR. DONWORTH: In the Federal courts?

MR. WICKERSHAM: In a number of cases that my attention has been called to.

MR. MITCHELL: I think that by the requirement that the judge shall indicate in substance on the requests to charge whether he is going to grant them or not, seems the only sincere and genuine reason for having the charge first, and that is to let counsel know what law they can stand on when they are dealing with the facts, and there is no excuse then for depriving the judge for the right to give his charge after the argument.

MR. DODGE: You would add to this the words, "and shall instruct the jury after argument of counsel"?

MR. MITCHELL: I would put some clause in here that specifically states that he shall give his charge to the jury after and not before.

MR. WICKERSHAM: I think it is important to state that in these rules.

MR. CLARK: Do you not make it after? That he shall instruct the jury after argument of counsel, if any change is made? I suppose counsel will always want to argue before.

MR. MITCHELL: That will be ample, I think.

MR. TOLMAN: I suggest another insert in another place, in regard to the proviso that the "party objecting shall before the jury retires have stated simply to the court the several matters of law in such charge to which he objects." I suggest that in line 9 we add: "Opportunity shall be given to make such statement to the court in chambers out of the presence of the jury."

MR. DONWORTH: That I think is very important. I notice the lawyers in various parts of the country -- down in the Fourth Circuit one lawyer said he knew a Federal court case to be lost because the lawyer for one side had to state his exceptions in the presence of the jury and they inferred that the court was very much against him because he took so many exceptions and they decided against him.

MR. DODGE: We always do it in whispers at the Bench.

MR. DONWORTH: It is a very embarrassing thing and the present rule ought to be changed.

MR. TOLMAN: Look at page 9 of the judges' comment, and see what Judge McDermott says on that very subject.

MR. DONWORTH: What does he say?

MR. TOLMAN: He says: "I have found it quite simple in the practice to spend ten or fifteen minutes with counsel before the argument in discussing the charge and then advising them on what theory the charge will be based. I think a rule could be made that the trial court should, upon request of either party,

advise counsel of the theory of law on which the case will be submitted to the jury before argument."

Also, on the point of exceptions to the charge, he states in another communication that is not covered here, that his custom is to go into chambers and let them make the record on the objections that they want to make out of the presence of the jury.

MR. WICKERSHAM: Before his charge?

MR. TOLMAN: He takes a short recess and they make the objections that they are now compelled to make in open court, in chambers, and put it on the record.

MR. DONWORTH: That is one way of doing it. Another way to accomplish the same result is to say: "Unless the party objecting shall immediately after the charge and before a verdict is returned."

Let the jury go to the jury room instead of holding them in court; let them go to the jury room and then the judge receives the objections. As the parties make their objections, if he says, "I did not intend to say that", he can call the jury back and in the meantime their deliberations have not gone very far.

MR. WICKERSHAM: It often occurs, when you are objecting to a charge, that the judge will hear the objection and say, "Well, perhaps I might put it more clearly, gentlemen of the jury. This is what I meant to say --" and that obviates the

effect of the objection. I have known that to occur many times in the course of a long charge, when counsel says, "Your Honor charged so and so but you have neglected this, that, the other thing, or you have overlooked so and so", the judge says, "That is perfectly so. Gentlemen, what I meant was this --" and he explains it then and it gives him an opportunity to clear up many things which, it may be subject of exception, on a motion for a new trial or in the appellate court would permit or perhaps give rise to an unnecessary reversal.

MR. DONWORTH: I think we are all agreed on that, but the point is this: If the judge sticks to his ground and the jury is present when the judge says, "No, Mr. Smith, the law is as I have stated", the jury listening to all this quickly gets a wrong impression.

MR. CHERRY: Is not the essential part met if it is out of the hearing of the jury, whether it is in chambers or in the court room?

MR. CLARK: You could say, "make such objection in chambers or otherwise out of the presence of the jury".

MR. MITCHELL: It is enough to say, "out of hearing". I will entertain a motion to put in in an appropriate place the provision here that exceptions to the charge shall be considered out of the hearing of the jury.

MR. CHERRY: Was not that the point that Judge McDermott made, from the Fourth District, that opportunity should be given

for the lawyers to make such objection?

MR. MITCHELL: Not make it mandatory?

MR. CHERRY: I think their difficulty was, as stated, that they did not get that chance, and the emphasis, I should think, might well be on just that.

MR. MITCHELL: I think that is well stated. Opportunity should be given to consider exceptions to the charge out of the hearing of the jury.

MR. DONWORTH: And it should be before the jury returns the verdict.

MR. MITCHELL: I would not want to go so far as to say you can note your exceptions to the charge while the jury has the case under consideration. The main object is to give the court a chance to make corrections before the jury considers its verdict, but I think it is a mistake to get them considering it and then call them back.

MR. CHERRY: I was afraid that the suggested amendment implied even more.

MR. MITCHELL: No, leave in "before the jury retires".

MR. CLARK: Yes, that is taken from the Supreme Court. Mr. Chairman, before you put that motion perhaps you ought to consider some of the requests of the various committees that we not have this requirement of objections. What do you think of that?

MR. MITCHELL: I do not agree to that. I think the lawyers

ought to help the judge all they can and not lay traps for him.

MR. DONWORTH: In the second line, what do you think, Mr. Clark, of striking out the words "testimony" and inserting "evidence"?

MR. CLARK: All right.

MR. DONWORTH: It is the proper word.

MR. MITCHELL: I would like to strike out the words "on appeal" and say in lieu thereof, "in further proceedings in the case". That is in line 4. Also, in line 7 I do not like the word "appeal", the implication we are regulating proceedings on appeal. I think it should be "or further proceedings in the case". That goes as far as we can go, and we have done it in other sections.

MR. CLARK: All right.

MR. MITCHELL: I understood it was the sense of the committee that the provision be put in for an opportunity to present exceptions to the charge out of the hearing of the jury. If there is no objection, that will be understood.

MR. CLARK: Now, going back to the written requests to charge and the court indicating his action, do you wish him formally to endorse it or not? Going back to the Minnesota suggestion, and I think there are others, they wanted a mark opposite each one. I suppose that helps them out on appeal. On page 2 they say:

"After the close of the testimony and before the argument begins, either party may submit to the court proposed written

instructions to the jury, opposite each of which the judge shall write the words 'given', 'given as modified', or 'refused'; and the court in its discretion may hear arguments before acting on such requests."

Do you want anything to cover that?

MR. MITCHELL: That was not my idea. You mean it is required generally that he shall indicate to counsel? I do not think we ought to tie his hands.

MR. CLARK: I suppose when he indicates to counsel, that goes into the record?

MR. DODGE: No, it ordinarily would not.

MR. MITCHELL: My point is that it ought not to be a ruling that would be considered an error.

MR. SUNDERLAND: It is not in the record. His instructions are just orally, and they are not on the record.

MR. MITCHELL: That is right, and if he makes an indication and does not live up to it, that can not be assigned as an error. You have to depend on the good faith of the judges to some extent.

MR. CLARK: I just wanted to make that clear.

MR. WICKERSHAM: With reference to the rule that where both parties move to have a directed verdict, whether that shall not constitute a waiver of jury trial, it should when both parties move for a directed verdict.

MR. DODGE: I do not like that. Talk about your 7th

Amendment; I think this is the worse pitfall that there is. The 7th Amendment has been forgotten once in awhile.

MR. DODGE: Absolutely. It seems to me a ridiculous thing to say that if I move for a directed verdict I have to be careful and look around the corner to see whether the other fellow has done so or else I am in a pitfall.

MR. WICKERSHAM: If both parties move it is an agreement, there is no question for the jury.

MR. DODGE: I do not agree with it.

MR. WICKERSHAM: That is the theory we have had from time immemorial in New York.

MR. DODGE: It is a subject that is full of pitfalls, and it seems to me a difficult thing which accomplishes no useful purpose whatever.

MR. CLARK: That is partly why I did it that way. There is a division of opinion as you see here, although I wonder if the point could not be met by allowing the motion that did not mean that.

MR. DODGE: I should like a rule to the effect that jury trial is not waived by either party because both parties have requested a directed verdict.

MR. DOBIE: I agree with Mr. Dodge because I think that is bad.

MR. CHERRY: Of course, General, you can have the situation where the requests for directed verdicts are such that they do

constitute a waiver in fact because they indicate that there is no question for the jury.

MR. WICKERSHAM: The rule in New York has always been that if both parties move for a directed verdict the jury trial is waived. That is an admission by both of them that there is no question to go to the jury.

MR. CHERRY: It may not be an admission of any such thing. The plaintiff says, "On my theory of the law there is no question for the jury", and the defendant says, "On the defense theory of the law there is no question for the jury."

MR. MITCHELL: Do you want to take a vote on that?

MR. WICKERSHAM: No.

MR. MITCHELL: We ought to give the reporter something --

MR. CHERRY: If Mr. Dodge will make his suggestion as a motion I would like to second it.

MR. DODGE: Yes, I make the motion that we have a rule to the effect that the jury trial is not waived by the mere fact that either party has requested a directed verdict.

MR. CHERRY: I second it.

(The question was put, and the motion prevailed with one dissenting vote.)

MR. CLARK: I take it that this means there has to be a specific rule?

MR. MITCHELL: Yes.

MR. OLNEY: Before we pass this Rule 89, I want to call

attention to something that may be considered merely a matter of words, and yet it goes a little further than that. Instead of "may assign as error the refusal to give", I would put that: "may assign as error the failure to give in substance".

MR. CLARK: That seems to be all right.

MR. OLNEY: Not the refusal, but the failure.

11 MR. MITCHELL: That is right; you are right about that.

MR. OLNEY: Failure to give instructions.

MR. CLARK: Yes, I covered it but with more language. I put next: "or the giving with modification".

MR. OLNEY: I would leave out "the giving with modification"-- "failure to give in substance the thing requested".

MR. MITCHELL: We have left under 89 the suggestion that has been made by a good many judges that we make some rule which allows the court and not the counsel to examine the prospective jurors. That is a matter that I think could be left to the local practice in the discretion of the judge. If you want a rule on it, here is the place to put it in.

MR. DOBIE: Do you mean the voir dire?

MR. SUNDERLAND: Why not put it in that it is discretionary; otherwise the judge would not know that he had the right to deal with it.

MR. MITCHELL: I think that is all right. Otherwise he might feel bound by the local practice. Is it the sense of the meeting that we state that it is discretionary with the judge?

MR. DODGE: Is there any statute on the subject?

MR. MITCHELL: Not Federal, no.

MR. OLNEY: May I ask what this is?

MR. MITCHELL: It is the last three lines; the suggestion has been made that the examining of prospective jurors be limited to the court, and we propose to say expressly that that is a discretionary matter.

MR. DONWORTH: That practice has grown up lately, it is rather recent; I think it is a good rule. I think that some of the judges require counsel to hand up their questions to the judge that they want asked and the judge does the whole thing. The other way has been abused, you know, with protracted proceedings.

MR. CHERRY: You try your case with each juror.

MR. DOBIE: It has been abused in insurance cases. They would ask a man, "Have you any stock in the Ocean Guaranty & Accident Corporation", which was not a stock held in the State.

MR. CLARK: You do not want a rule on any other thing? There has been a suggestion that there be a rule on other details as to qualifications of jurors, and there are several other suggestions here, various people want different things.

MR. MITCHELL: I do not think we can deal with them.

MR. WICKERSHAM: Does not the statutes cover that?

MR. CLARK: Pretty much, I think. There are statutes on various details.

MR. WICKERSHAM: Minnesota recommends a rule on the selection and examination of jurors based in part upon the following: "28 U. S. C. Sec. 424, Mason's Minnesota Statutes, 1927, Sec. 9292-9294, U. S. District Court Rules (Minn. 1927), No. 16."

MR. MITCHELL: What page is that?

MR. WICKERSHAM: I am reading from page 6 of the suggestions.

MR. MITCHELL: What is that that they refer to? I do not think we ought to deal with the qualifications of jurors.

MR. WICKERSHAM: The statute or Act is section 275 of the United States Code.

MR. DOBIE: It adopts the State rule as to competence of jurors?

MR. WICKERSHAM: Yes, it provides that jurors serving in each case shall have the same qualifications and be entitled to the same exceptions as such State may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned. That is the conformity rule with respect to qualifications of jurors.

MR. LOFTIN: I do not think, Mr. Chairman, we have anything to do with the qualifications of jurors.

MR. WICKERSHAM: Utah wants a rule on peremptory challenges.

MR. MITCHELL: That is a matter of practice and procedure.

MR. WICKERSHAM: And so does Arizona; I see they want a

rule on peremptory challenges.

MR. DONWORTH: Should we not have a procedure rule, as the conformity is being done away with? Should we not put in a rule of our own just saying that they will conform with local practice?

MR. MITCHELL: Are Federal courts bound by State practice?

MR. CLARK: I do not think they would be bound.

MR. WICKERSHAM: Do you not think they would be bound by this provision of this statute?

MR. CLARK: Yes, they would be bound by that.

MR. DOBIE: As to qualifications?

MR. CLARK: Under the Conformity Act.

MR. WICKERSHAM: Under the Conformity Act.

MR. DOBIE: By express statute.

MR. SUNDERLAND: Unless there is a superseding statute.

MR. MITCHELL: What is the statute?

MR. DOBIE: 28 U.S.C. 411.

MR. MITCHELL: The statute on qualifications of jurors conforming with State law? It says challenges in the case of alternate jurors.

MR. DODGE: Section 287 of the Judicial Code, referred to here by Judge Tuttle, does that deal with the number of challenges?

MR. CLARK: I think there is a statute. It says that the Federal statutes give three peremptory challenges.

MR. DONWORTH: That is criminal, is it not?

MR. DODGE: There are more than that in criminal.

MR. DOBIE: It is 28 U. S. C. 424.

MR. MITCHELL: That is criminal?

MR. DOBIE: No, I think that is civil. It says, "In all other cases, civil and criminal, each party shall be entitled to three peremptory challenges."

MR. DONWORTH: Section 424?

MR. DOBIE: Yes.

MR. MITCHELL: Would it be useful for the lawyers, in order to relieve them from going through the Federal statutes, when you are dealing with challenges of alternate jurors, to repeat that statute with respect to three peremptory challenges on each side?

MR. DOBIE: Yes; they provide in criminal cases for many more, and then it says: "In all other cases, civil and criminal, each party shall be entited to three peremptory challenges." It goes on to say that if you have six parties defendant you still only have the three peremptory challenges for the defense, not eighteen.

MR. MITCHELL: We can do it this way: When we are talking about the alternate jurors, in addition to the challenges permitted by section so and so of the Revised Statutes, each party shall be entitled to one peremptory challenge for the alternate jurors. That will take care of it.

MR. DOBIE: I think that is all right.

MR. MITCHELL: We ought to say something about it. Well, we are through with Volume 1.

MR. CLARK: At the beginning of Volume 1 we took up the subject of masters, and a good deal of this is the equity rule. I do not know how far you will find it necessary to go in detail on some of these.

MR. LOFTIN: Mr. Chairman, on that point, the equity rule has made no provision for the appointment of masters except by showing that some exceptional condition exists. As a matter of fact, in practice the judges have not lived up to that. In my district the judges say they can not live up to it and expedite the business. Therefore, they appoint masters in all kinds of cases where there are no exceptional circumstances shown.

MR. MITCHELL: The exceptional condition is they can not get a trial unless they do it, is it not?

MR. LOFTIN: They might put it on that ground.

MR. CLARK: The Chief Justice criticizes the practice.

MR. WICKERSHAM: Yes, very severely.

MR. CLARK: At the meeting of the Senior Circuit Judges, as printed in the last part of the Bar Association Journal, they have a specific reference to that, criticizing the practice of appointing masters, calling attention to the difficulty where that is done, saying it burdens the parties with expense and

the Federal judges ought not to do it. Perhaps we might get that particular Bar Association Journal and read it.

MR. WICKERSHAM: I have it right here.

MR. DONWORTH: In the Southern California case they held that the fact that the judges were too busy down there justified doing it in a mandamus against Judge James. Do you recall that, Judge Olney?

13 MR. OLNEY: No, I do not.

MR. DONWORTH: I think there was such a case, and in the circumstances he would not be compelled to hear the case.

MR. CLARK: It is the report of the Conference of the Senior Circuit Judges in September, which would be in the last number of the Bar Association Journal.

MR. WICKERSHAM: No, I have not got that.

MR. CLARK: May I just tell you generally about these next sections so you will have them in mind? The section on masters goes from Rule 90 through Rule 97, and they are almost all a copy of the Equity Rules except that I think that unless you want to go into the Equity Rules a good deal you will not need to consider them much. The first is the question of reference, which occurs right at the beginning of Rule 90, and the second important thing is Rule 96 on masters. I am not sure that the others will be so important.

That is all I have to say in advance.

MR. DODGE: In Rule 90, what do you mean by a referee?

MR. CLARK: There are references in the statute to the referree which, I suppose, is the common law master, but we did not think the two terms would now be necessary, but in order to get it included we took the suggestion that was given to us and we are just going to call a referee a master. There are no provisions in the statute that clearly define what referees are to do. They speak of referees incidentally. That title appears in the statute.

MR. DODGE: You do not use the term which is so familiar to us, the auditor?

MR. DONWORTH: I am going to try to answer that because in the matter of Patterson the Supreme Court held that it was proper to appoint an auditor in a complicated jury case, and I think after the word "referee" we should insert "auditor".

MR. DODGE: I have written in that word here.

MR. CLARK : Don't you think "masters" is a good term for the whole business?

MR. WICKERSHAM: Why don't you say, "reference to a master, which in these rules includes a referee or an auditor"?

MR. MITCHELL: You have got to make some reference to or a new idea of having discoveries by masters.

MR. CLARK: I was suggesting that you call those fellows "commissioners".

MR. MITCHELL: I am not speaking of their labels, but something to show that we are not talking about them here, some

exceptions wherever necessary.

MR. SUNDERLAND: It would seem to me that those were taken care of.

MR. DONWORTH: I thought the court would be likely to appoint the same man and that it might be good practice to have the same man. I had not thought very much about it, and so I thought that word "master " was all right, but a short sentence could be inserted here at the end, something showing that this does not take in what is provided for in addition to the other, or something showing that they are consistent.

MR. DODGE: What rule is that?

MR. DONWORTH: The second Rule 90, Mr. Dodge, and the question whether the use of the word "master" here in some way runs counter to what we have been saying about a discovery, taking the deposition of a party, where we ruled that the party, if he elected so to do, could require the examination to be before a master or a special appointee of the court.

MR. SUNDERLAND: You might say, "except as otherwise provided in these rules".

MR. MITCHELL: I merely brought the point up so that the reporter would have it in mind to insert some reference if necessary to it. I do not think we need to decide it now.

Shall we take an adjournment now? It is 1:00 o'clock. To what time do you want to adjourn?

MR. DONWORTH: Twenty-five minutes of two.

(Whereupon, at 1:00 o'clock p.m., a recess was taken until 1:35 o'clock p.m., of the same day.)

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AFTERNOON SESSION

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MR. MITCHELL: We will go ahead with Rule 90.

RULE 90

REFERENCE TO MASTER--EXCEPTIONAL, NOT USUAL

MR. CLARK: You see, so far as masters in actions at law, or, as we put it, in jury cases, are considered, we have stated in a very limited way, as, I suppose, the law would require.

MR. LOFTIN: You do not feel, Dean Clark, that there should be any relaxing of the rule about exceptional conditions regarding the appointment of a master?

MR. CLARK: I do not know, I am sure. I will read this report of the conference of the Senior Circuit Judges. This is made as an argument from more judges. It is signed by Chief Justice Hughes, October 7, 1935. There is a recommendation for a great many additional judges. I have not as yet seen whether there was one for Florida or not.

MR. LOFTIN: No, none for Florida. I have read that.

MR. CLARK: Then, at the end, it says:

"Appointment of masters: In making the above recommenda-

tions for additional judges, the conference has in mind the importance of compliance with Equity Rule No. 59, that save in matters of accounts, a reference to a master shall be the exception, not the rule, and shall be made only upon a showing that some special condition requires it. (Los Angeles Brush Manufacturing Company v. James, District Judge, 272 U. S. 701.)

"The conference has found that on account of the lack of an adequate number of judges the practice has been freely indulged in, in certain districts, of appointing masters to hear equity cases. This practice imposes upon parties an inordinate expense which should be avoided wherever possible. It is essential to the proper administration of justice that adequate provision be made for judicial administration through judges."

And the next thing they talk about is the appointment of this committee.

MR. MITCHELL: In view of that, I do not think we better tamper with the equity rule.

MR. LOFTIN: In view of that, I do not think we better tamper with the equity rule.

MR. DONWORTH: Is not this rule good enough for present purposes? I do not think of anything to add to it.

MR. MITCHELL: Let us pass to 91, then.

RULE 91

PROCEEDINGS BEFORE MASTER

MR. CLARK: This follows Equity Rule 60, on the opposite

side.

MR. MITCHELL: Any exception to that rule?

(No response.)

MR. MITCHELL: If not, we will pass to 92.

RULE 92

POWERS OF MASTER

MR. LOFTIN: That is the same as Equity Rule 62, is it not, Dean, without any change?

MR. CLARK: Yes.

MR. OLNEY: There is just one little change that I had to suggest in 92. You say, down toward the end: "to examine all depositions taken and filed pursuant to these rules (or to statutes)." I thought it would be better, instead of "these rules (or to statutes)" to say, "all depositions duly taken and filed".

MR. CLARK: That is quite all right. The reason I put "(or to statutes)" was that I did not know whether we were going to continue any statutes or not.

MR. MITCHELL: All right, we will make that change, "duly taken and filed".

MR. CLARK: Is that broad enough for your purposes?

MR. SUNDERLAND: I think so.

MR. MITCHELL: If there is no further exception to Rule 92, we will pass to 93.

RULE 93

FORM OF ACCOUNTS BEFORE MASTER

MR. DODGE: This reads to me like some very archaic rule that has come down from the past.

MR. CLARK: It probably has.

MR. MITCHELL: Is that not already covered by our examination of adverse parties?

MR. DODGE: I should think so.

MR. OLNEY: It can go a little further than that and make trouble. If it is taken to mean if the party who is called on to account in the first instance produces his account in debit and credit form and with every item specified, you are going to find cases of accounting where that is simply imposing a terrific burden on the party and without rhyme or reason. In a case of that character, involving literally thousands or tens of thousands of items, there should be no exact rule, but the master should be permitted to accept the report of a certified public accountant as prima facie correct and require the other man to specify what objection he has got and concern himself with the objections to the account.

MR. DODGE: Do you see any need for this rule at all?

MR. MITCHELL: I do not. Certainly, a master can call on people to bring in their accounts if he wants to, and if there is any question about them he can give the right of examination to the other party. It seems to me to be surplus. Do you

know of any special reason for it?

MR. CLARK: I do not know. Of course, as suggested, it does come down. It was promulgated March 2, 1842, and may go back of that. That is as far back as I have gone.

MR. DONWORTH: Any citations under it?

MR. CLARK: Yes.

MR. OLNEY: If you want a rule -- I wrestled with this to the extent of drafting a substitute, and as a rule covering a matter of evidence, I put it this way:

"When the party accounting has kept books of accounts the master may accept as prima facie evidence the testimony or written report of a certified accountant based upon his examination of such books, provided he also testifies or reports that his examination indicates that the books of account had been honestly kept and in such manner as to enable him to check their correctness."

MR. MITCHELL: That can be done now if the books themselves are in evidence as a basis for the expert's opinion.

MR. OLNEY: I think it is perhaps better just to leave it out.

MR. DODGE: I so move.

MR. CLARK: I have no objection. The idea of the thing seems to have been to shorten the proceedings. Stone, J., in the C.C.A., says, "The evident beneficent purpose of this rule was to narrow the scope of this examination before the master."

Then another Federal judge said that the old mode of taking testimony before the master by proving every item under the 61st rule of the English Chancery practice, adopted in 1828, has been adopted.

MR. MITCHELL: That sounds as though there was some reason for it.

MR. OLNEY: When I read the rule I thought it meant a statement of every item in debit and credit form.

MR. CLARK: There are several cases that discuss it. Here is a case construing it at some length.

MR. MITCHELL: This means, as I understand it, instead of brining in the books and laying the foundation to offer all the books in detail and everything, you can set up a separate statement without proving your books in detail, by competent evidence.

MR. DONWORTH: I do not think that this has anything at all to do with proof. It is to prevent a man, as I understand, from putting in a long rigmarole, and this answers it. It says it is set out in the form of debit and credit.

MR. SUNDERLAND: Does the form, debit and credit, refer to an accountant's account where he would summarize in this form a great mass of individual items?

MR. CLARK: Any form admissible, a debit and credit statement. The rule indicates that it must be a cash statement of accounts received and disbursed. It is analogous to an ac-

count of agents or fiduciaries. If the statement is not acceptable, then the hearing is upon exceptions to the account, the same as any trustee. The account as stated by the defendants is one thing and the evidence upon which the master finds is another thing. Care should be taken to keep the distinctions clear, and there should be a financial statement of the cash accounts simply, but it should not be a list of possible witnesses, and so forth.

MR. SUNDERLAND: It seems as though a certified accountant's account would come under that.

MR. OLNEY: To give you an idea of the difficulty that sometimes presents itself in that case, I was defending a co-operative association against whom one of its members had brought suit for an accounting. Now, he was entitled to an accounting, there is no doubt of it at all, by virtue of his membership in the association. But, this association was a very large one, and did business all over the United States. We rendered the man an account, gave him an account attached to our answer, that it was impossible on that account to state all of the items that entered into it. We then gave him full opportunity to examine the books and he took advantage of that opportunity.

When the case came on for trial he had certain objections which he made to the accounts. Those were gone into thoroughly and the judge decide them all against him. After the judge had

done that, then he insisted that the burden was on the defendant in the case, as a part of a necessary accounting, to produce proof of every single item that entered into the account, everything that had come into it, and he has gone up on appeal to the Suprme Court of the State of California on that contention. I do not think he will last very long when he gets up here, but it is something we should think of.

What I am getting at is that so much depends on the particular case as to what accounting should be required, and this rule that is stated here in the EQuity Rules is a rule that is not merely for trustees' accounting or executors'.a There are many other cases where a man is entitled to an accounting and where the rules that are applicable to a trustee who was supposed to account for every thing that he received and show everything that he paid out, are simply not applicable at all and you can not get at it in that way.

We ought to leave the thing for sensible attention by the officer who is looking into the account in the manner that will best meet the necessities of the situation.

MR. DONWORTH: I am not sure this does not have a real function. I get the idea it is intended to simply the issues. In a way it is like any situation where you require a man to set up the account according to your theory. For instance, in the income tax law we have to put in a return. The United States is not bound by it but that is your situation, that is your way

you claim it is. Now, it is very easy for those who controvert it to point out the items which they controvert.

I think, Judge Olney, it has been in force so long and no attempt made to change it -- it seems to me requiring the party to bring in his account in debit and credit form and then the opposing party, as this rule goes on to say:

"Any party who shall not be satisfied with an account so brought in shall be at liberty to examine the accounting party viva voce, or upon interrogatories, as the master shall direct."

It does not have the effect of compelling the party to state his theory of the account in controvertible form, but in a definite way so that any items that are not in controversy can be eliminated.

MR. OLNEY: I think the requirement that the accounting party submit the account in some form in the first instance is almost implied in any action for accounting. The objection I have is that this may be taken as a limitation on the method or as requiring a certain method to be pursued that may not be advisable.

MR. DODGE: Furthermore, are you going to let the plaintiff suspend the hearing and say, "Now, the opposing party is right here, but I choose to examine him by interrogatories", and force an adjournment so he can prepare some written interrogatories?

MR. MITCHELL: It is up to the discretion of the master.

MR. DODGE: It seems to me to be very inconsistent with modern ideas that rules should be general and not try to state specifically just the form of the evidence.

MR. DONWORTH: My attention is called to the recommendations under the Code. There are quite a number of them, and without boring the Committee, I will just read the first one:

"Purpose and Scope of Rule: The rule is framed upon the theory that at the outset the accounting party will obediently to the decree bring in a statement of account embodying on the one side the items with which he is properly chargeable, and upon the other the items claimed to be allowed", just as anyone, conceding that a relation of debtor and creditor exists between himself and another, will being in a statement what he conceives to be the items of debt and the items of credit. In this way, the opportunity is at once afforded of ascertaining the real issues before the master on the accounting. This is a means of limiting the trial before the master to sizeable items. That this is the purpose of the rule is clearly indicated by its language conferring upon the adversary the right to proceed directly in case he is not satisfied with the account, citing Beckwith v. Malleable Iron Range Company, 207 Fed. 255, and others.

These are evidently patent cases where there have been profits which required an accounting. There are other cases which I will not give to the Committee.

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MR. CLARK: Could we do it in some fashion by making the account submitted, say, a verified account, as prima facie, or something like that?

MR. DODGE: Why pick out one class of cases and deal with what should be prima facie evidence in that particular class?

MR. CLARK: I suppose because we want to limit the master somewhat. They are extra-judicial organizations and may delay the case.

MR. MITCHELL: Instead of saying anything about prima facie evidence, we could say: "When the account is brought in here the parties shall designate the items with respect to which he raises an issue."

I do not know anything about the rule. Maybe we better just leave it stand and on further consideration the reporter can advise us whether he thinks it is essential or not.

MR. DODGE: Yes. I was going to suggest a substitute motion that the matter be referred to the reporter and that he advise us as to whether this rule really answers any useful purpose or is just an added cause of trouble.

MR. MITCHELL: Is that agreeable to the Committee?

(No response.)

MR. MITCHELL: If there is no objection, it will be so ordered.

MR. CLARK: Did you write out something, Judge Olney?

MR. OLNEY: From the experience I have had in this, I will

try to make a suggestion to you.

MR. CLARK: Thank you very much.

MR. MITCHELL: Rule 94.

RULE 94

FORMER DEPOSITIONS, ETC., MAY BE USED BEFORE MASTER

MR. CLARK: This rule troubled me a good deal. I wondered a good deal as to the extent of what it meant. You see, we put in brackets here some suggestion to limit it. It seems as wide as the horizon and everything else. This too is an old rule that goes back to the 1842 rules, and it then read:

"All affidavits, depositions, and documents, which have been previously made, read, or used in the court upon any proceeding in any cause or matter may be used before the master."

This is just the same.

MR. MITCHELL: That means any proceeding in the same cause?

MR. CLARK: It does not say so.

MR. DONWORTH: In the same proceeding -- the idea being that on reference to a master there might be claimed that he started de novo, and this means that anything already taken may be used, such as depositions and affidavits. I think if we strike out "in any court of record" and leave in the other matter that is in brackets, it will be all right.

MR. OLNEY: Why should there be depositions that were previously read or used?

MR. CHERRY: "Made, read, or used".

MR. WICKERSHAM: Rule 34 says, "In the court". Is that not practically in the same controversy?

MR. MITCHELL: That is what I thought it was.

MR. DODGE: But it does not say so. It says any proceeding in any cause or matter.

MR. WICKERSHAM: The equity rule reads: "Made, read, or used in the court upon any proceeding in any cause or matter --" in any cause or matter, yes.

MR. MITCHELL: That must mean at some prior proceedings in the same case.

MR. CHERRY: Has that been construed?

MR. DONWORTH: Where is that rule?

MR. CHERRY: The opposite page.

MR. MITCHELL: It is opposite Rule 94.

MR. DONWORTH: I do not find it opposite Rule 94 -- oh, yes.

"All affidavits, depositions, and documents which have been previously made, read, or used in a court upon any proceeding in any cause ormatter --" I understand those words, "in any cause or matter" really could precede and be at the beginning of the sentence: "In any cause or matter all affidavits, depositions" etc.

MR. CLARK: What does "any proceeding" mean, then?

MR. OLNEY: I wanted to ask the reporter if there was really any necessity for this rule at all in view of Rule 92, which

says: that the master shall regulate the proceedings, and so on, and gives him authority to examine depositions duly taken and filed.

MR. CLARK: I do not know that there is. I puzzled over this.

MR. DOBIE: It is pretty broad, and I do not knowwhether there is any reason for it. But it says "All affidavits, depositions, and documents".

MR. DODGE: If you had an affidavit on a motion, such an affidavit is not admissible in a hearing on the merits. It seems to me absurd that an affidavit useful by the court on an application for a restraining order could be put before the master as evidence of the facts contained in it. It seems to me there is a positive objection to the rule, and as to the rest of it -- of course, the depositions taken in the case are admissible before the master. I do not see how anybody could make any contrary contention.

MR. WICKERSHAM: I wonder what the purpose of that was?

MR. DOBIE: I wonder if there are any notations on that.

MR. CLARK: There is one, at 32 Fed. 549. This note does not mean that the former evidence is to be considered; it must be analyzed and called to his attention.

MR. SUNDERLAND: If that is all the rule has produced in one hundred years, it seems to me we might let it go.

MR. CLARK: It might be concluded that it does no harm.

MR. LOFTIN: Mr. Chairman, I regret that I have to go now, and I ask that the Committee excuse me for the remainder of the session. I have enjoyed the delightful association, it has been a very liberal education in code pleading. I must admit that at first I was somewhat amazed, and as we proceeded I was shocked; now I have become very much reconciled. I hope that you will still remember that we are just a common law State and ask the reporter to be a little more liberal with us. I will have a few criticisms as to the remainder of the rules which I will send to the Reporter.

MR. CLARK: All right, I will be glad to receive them. I am sorry you have to leave.

MR. MITCHELL: Thank you, Mr. Loftin.

MR. LOFTIN: I hope you gentlemen will have a delightful session for the remainder of the time, and I look forward to seeing you next February.

MR. DOBIE: I am rather inclined to agree with Mr. Sunderland that if it had produced only one case in one hundred years with this mystic phrase, we should let it go.

MR. MITCHELL: If there is no objection, we will consider it as adopted that Rule 94 go out. Rule 95.

RULE 95

CLAIMANTS BEFORE MASTER EXAMINABLE BY HIM

MR. CLARK: We made practically no change in that. We put in the suggestion in brackets which, of course, is not neces-

sary, but we thought there might be cases where you could avoid having a stenographer and a transcript of the testimony.

MR. DONWORTH: Just what is the difference between the evidence and the report thereof?

MR. CLARK: The report thereof could be made without making a transcript.

MR. DOBIE: He might do it in narrative form instead of questions and answers.

MR. OLNEY: Is not this matter again covered by Rule 92?

16 MR. CLARK: I did not quite hear what you said, Judge Olney.

MR. OLNEY: Is not practically everything in this rule covered already by Rule 92, stating the general powers of the master?

MR. CLARK: I suppose in a way it is probably true, but they had 92 before and yet they apparently felt that this rule was necessary.

MR. SUNDERLAND: When was this dated?

MR. CLARK: This is another one of the antiques.

MR. SUNDERLAND: It was not something that was added after they had experience with 92, as a supplement to 92, was it?

MR. CLARK: Rule 65 is Rule 81, and Rule 81 was 1842. Let us see when the other rule started. That was formerly Rule 76.

MR. DONWORTH: I would think that the matter in brackets might well be left out in view of the language, "The evidence upon

such examinations --" omitting the brackets -- "shall be taken down by the master or by some other person by his order --" that meaning the stenographer -- "and in his presence, in order that the same may be used by the court if necessary." It seems to me quite important to have the evidence preserved. But it does not seem to add anything to say that the evidence or a report thereof should be taken down. That would not seem to fit, would it?

MR. WICKERSHAM: How would it do to put in "a summary thereof"?

MR. DODGE: I think we deal with a report of the evidence in the very next rule. Why is it necessary to treat in this of an intervenor who has come in?

MR. MITCHELL: I think we can probably omit Rule 95. It is covered by 92 and the later provisions.

MR. DONWORTH: Yes -- "The master shall produce a transcript of the evidence."

MR. CLARK: This one has produced no cases.

MR. SUNDERLAND: It seems to me that a rule which does not produce anything we should leave out because it makes for confusion.

MR. WICKERSHAM: I move that we dispense with the rule.

MR. DODGE: Second the motion.

MR. MITCHELL: If there is no objection, it is so ordered. Rule 96.

RULE 96

MASTER'S FINDINGS --OBJECTIONS--
JUDGMENT THEREON

MR. CLARK : Rule 96 I guess you better read over with some care. That is perhaps the nub of the whole reference.

MR. DONWORTH: In connection with it, I would like to call attention to a point of practice that has given rise to a good deal of difficulty where an equity case or, in fact, any kind of a case, is heard by a master. There are two kinds of objections to his findings and recommendations. You have to object before the master to the things you do not like -- I am not speaking of objections to evidence -- you have to object to things you do not like and have him note those objections in his report. Then when it gets before the judge, or within a limited time, usually fixed by the rules, you have an excerpt to those things and the court holds, and I think the equity practice is recognized, that an objection before the judge does not lie to anything that he has recommended or found unless you objected to it before him.

In one or two cases in my experience the master filed his report without the parties having an opportunity to examine it, and so the judge ordered the report recommitted to the master to give the parties an opportunity to object, and they came before him and noted their objections to the various paragraphs, and so on, and he re-submitted his report and then the parties filed their exceptions to the points they had objected to. Some-

thing that would simplify that is certainly very desirable.

MR. CLARK: On the point of exceptions there have been some holdings, it has been held, that a party who fails to file exceptions within the time limit of the old Rule 66 is precluded from attacking the master's findings of fact, but the court will review his conclusions of law.

MR. DOBIE: There are quite a number of those cases that go into the fact of the necessity of making the objection before the master, but if you fail to make it there you can still make it before the court.

MR. CLARK: You will notice that Equity Rule 61½, which was amended and added later, is an attempt to -- it does two things; it says the report of the master shall be treated as presumptively correct and shall be subject to review by the court, and so on, "provided, that when a case is referred by consent and the intention is plainly expressed in the consent order that the submission is to the master as an arbitrator, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator."

We took that holding and tried to shorten the time of Equity Rule 66, which you will see down in the middle: "In all other cases--" that is, in all non-jury cases -- "his findings and conclusions, if any, shall be presumptively correct, and shall stand as the court's findings and conclusions upon which a judgment may be entered as of course within 20 days from the filing

thereof, unless within 10 days after such filing, objections thereto are filed and the court acts thereon within the aforesaid 20 days to modify or reject the findings in whole or in part when it is fully satisfied that error has been committed or to order hearing on such objections."

Then we put in a proviso where the intent is to make him the arbitrator, just the same as in the equity rule. All that does is to provide the machinery whereby the master's findings stand as those of the court unless rather speedy objections are made.

MR. SUNDERLAND: Suppose you can not find the judgment in 20 days?

MR. DODGE: Suppose the report is filed August 1st?

MR. OLNEY: There is one class of cases which almost of necessity must go to a master, and that is the class of cases in which a public utility claims that its property has been confiscated by reason of rates fixed by a State authority. Those cases invariably require or present a vast number of issues of fact, questions of fact, and they are so long that it is impossible for a court to give the time to try them, as able as the judge may be, and as much attention he may give to facilitating the case, it is going to take sometimes months to try one of those cases in the nature of things. Those cases are going to be referred to masters, and they are referred to masters at the present time, and it is going to be impossible

for the court to pass upon any master's report in one of those cases after the report comes in within the 20 days. I think it can not be done.

MR. DONWORTH: I think that "within" should be "after" -- "upon which a judgment may be entered as of course within 20 days from the filing thereof." I think the 10 days in the next line should be 20. You want time to turn around. These findings may be very vital and all that, and it seems to me there should be 20 days for objections and then the matter should be called upon motion by either party. I do not think we should be afraid there is going to be delay in these matters. I think one party or the other will move for consideration of the report, or move that his objections be considered, or move for a judgment on it, as the case may be, and I think if you will just say "may be entered as of course after 20 days from the filing thereof,unless within 20 days after said filing objections thereto are filed --" of course, under the other general rule then the court of course has power to extend the time and I think usually would.

MR. OLNEY: Judge Sunderland, the point I had in mind was a little different, and the practice as it stands now under the present equity rule I think I am familiar with. Under those rules the party who objects to a master's report is allowed, I think, either 10 days or 20 days, I am not certain which, to file his exceptions. If they are not filed, if no exceptions

are filed, then the report is accepted and that is the end of it. If, however, the exceptions are filed, then the rules provide that those exceptions are to be heard at the next motion day, and are to come up immediately for a hearing.

In other words, neither party is required to do anything to bring them on for hearing. They will come on for hearing automatically under the rules. But there is no provision that after that time the court shall not take what time is necessary to dispose of the exceptions. The time for filing the exceptions does not have to be, as a rule, so very long, because by the time you get through one of these cases and the master's findings come in, both sides know pretty accurately just what the contested points are and it is not so very difficult to draw exceptions in such a case, and the 20 days, or whatever it is that is allowed, may be a little too short, but you do not require any very great length of time in order to draw exceptions in a case of this character.

That is true, particularly, where you have the rule, as you do out in our district, that the master first prepares a tentative report and you are required to make your objections to that report, make your objections to the master to the report. He then has an opportunity to correct it or to meet any objections that he desires to meet, and then he files his final report. Well, under those circumstances you can see that your exceptions follow right along with your objections.

MR. MITCHELL: Have you made any provision here for tentative reports from the master and exceptions filed before the master?

MR. CLARK: No.

MR. SUNDERLAND: What Judge Olney speaks of ought to be done, but it is not always done.

MR. OLNEY: This matter of objection is covered by the rules.

MR. SUNDERLAND: Yes, but not the tentative copy of the report.

MR. OLNEY: The matter of the tentative report is covered by the rules.

MR. SUNDERLAND: I did not know that.

MR. MITCHELL: It is always open to the master to make a draft and before he files it or makes it official he will give counsel copies to see if they have any objections.

MR. SUNDERLAND: I was not aware that there was any requirement.

MR. CLARK: There are several quotations in regard to it. It is what is known in code practice as settling the master's account. In some practices before the master files his report of record he reads it to counsel and they come in and argue it out. There are no provisions under equity rules that require it. Whether we should require it is another problem, but there are quite a few cases that have to do with it.

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MR. MITCHELL: We probably better not do much about it because it makes complications.

MR. OLNEY: I might say, in looking this over, I found a number of objections to this Rule 96 myself, especially this provision that "unless within 10 days after such filing, objections thereto are filed and the court acts thereon within the aforesaid 20 days."

MR. DODGE: Don't you have to have in some cases a three-day --

MR. MITCHELL: Your point is that it will stand if the court neglects its duty?

MR. DODGE: If the court does not decide in 20 days it stands.

MR. MITCHELL: There is a verbal change that will have to be made there.

MR. CLARK: We could save something by a limit. Mr. Lane, who has written a good book on these things, pointed this out as one source of delay.

MR. MITCHELL: That is not Judge Olney's point. His point is that if the court neglects to file a decision within 20 days you are out.

MR. WICKERSHAM: You might not be able to get a judge for 20 days in the Federal court.

MR. CLARK: Well, we will change it.

MR. DODGE: There is a question that I would like to ask

about the first sentence before this matter is disposed of.

MR. MITCHELL: All right.

MR. DODGE: It is mandatory here for the master to file a transcript of the evidence always. It is comparatively rare with us that a master in any equity case is directed to file the evidence. The courts wants the master to find the facts and does not want to be bothered with the evidence. So, it is quite exceptional with us when the master is ever required to file the evidence.

If you are dealing with an action at law the auditor absolutely never files any evidence. His report is prima facie and it is inconceivable to me that the evidence is to accompany an auditor's report if the parties are to be entitled before the jury to go into details of all the evidence heard before the auditor. So, both in equity and in law this rule is inconsistent with the almost universal practice with us.

MR. MITCHELL: What do you do with a transcript in cases when it becomes important to have it in court to prepare a record for appeal?

MR. DODGE: If the master is required to report the evidence, his findings of fact are final. It is rather unusual, I know, in equity, and parties from other States are often very much surprised by our practice in that regard, but it is for the relief of the court. Instead of going through the evidence, the master is given greater power than is an auditor. In equity

cases his findings are final.

It is a question whether you want to make it mandatory that the judge should never have the power that our Federal and State judges with us are all the time exercising, by referring a case to a master without authorizing him, and, in fact, forbidding him, to report the evidence back.

MR. MITCHELL: If you want to make the findings of the master conclusive, the constitutional question becomes a problem, and I doubt it can be done.

MR. OLNEY: If I might say something in that connection, I would suggest that I think there are cases in which the return of the transcript of the evidence is not necessary. I should think it could be covered by saying that the master shall return a transcript of the evidence where he is required to do it by a subsequent order of the court.

MR. DONWORTH: Mr. Dodge, as he says, was very much surprised by the practice that is followed. But, take a case where the items of the account are complicated and it will be very hard for the jury to carry them, suppose there are 50 items, the court may refer the matter to an auditor and then the court can take the evidence and he says, "I find for the plaintiff on item one". "Item 2 for the defendant", and so on, and then that goes before the jury, if they wish, but very often the auditor's report is taken because the parties do not see the use of further contesting.

MR. OLNEY: I should like to call attention to one thing where this rule differs from the present one. That is with regard to requiring matters to come on for hearing automatically. That provision is not found in the rule that we have here.

MR. CLARK: I thought seeing that the admonition to the court goes out, I better do this. I was trying to do better even than that.

MR. DODGE: You have not provided also for the $5 costs for overruling frivolous exceptions.

MR. CLARK: Yes, I want to bring that up. You will notice that I said that if such procedure is adopted, then Rule 67 may be omitted. Maybe you want to keep it. Equity Rule 67 provides that in order to present exceptions to reports from being filed for frivolous causes, the parties whose exceptions are overruled shall for every such overruling pay $5 costs to the other party and for every exception shall be entitled to the same costs.

MR. DOBIE: I do not like that. $5 -- it is quite a gamble.

MR. DODGE: If he wins one and loses one he comes out even.

MR. WICKERSHAM: That is making a lottery out of a law suit.

MR. DOBIE: There is one question that there is a good deal of doubt about, and that is the duty and power of the mas-

ter to rule on the admissibility of evidence. There is nothing said about it in the rules and there have been a number of holdings on that as to whether or not he should. Some of them adopt the practice that they go to the judge, and Judge Wray in New York said that such a practice indefinitely prolongs a hearing and makes it onerous and expensive. On the other hand, a good many courts holds that the master ought to note the objections, and admit the evidence, and then report it back. There are some who hold that where it is manifestly clear that it is privilege or something of that kind, he should rule on the admissibility, and, of course, if he is held wrong we have a difficult situation because there is no way of knowing what was said.

MR. CLARK: What page in your book are you reading from?

MR. DOBIE: That is page 738.

MR. CLARK: That first master rule is pretty broad. Does that not almost cover that?

MR. WICKERSHAM: Do you mean 96?

MR. CLARK: 92. That is the general rule on his powers. It does not say that specifically, but it says that he shall direct the inquiries and regulate the proceedings.

MR. WICKERSHAM: Is that not sufficient? I think it would be an unnecessary direction because the cases are far and few between. Is not that reference to the master going to be pretty broad? Some State statutes do have references providing for

all sorts of things, and it might be that in certain situations you would want to give the master for a certain kind of hearing all the powers of the court, ruling on evidence, and so on; also, on this question of whether he shall report the evidence by transcript or by report or not at all.

MR. MITCHELL: I am confused about it because it seems to me these rules do not draw a distinction as to the powers that may be given. You may appoint a master, if you call it that, to receive the evidence and who may or may not be given some authority to rule on it. Then he may be asked not to make findings that have any legal effect but make recommendations to the court, or he may be given full power so that he may make findings. It seems to me that in those cases it should be up to the court to state what power he shall have instead of our trying to make iron-clad rules for every occasion.

MR. DOBIE: I think that is very sensible and I fully concur with it. The only thing I want is to have it clear and that in each reference it shall be designated in the reference as to what he shall do. It should be made very clear. It is not now and this is one of the chances we have of making the things clear that are not clear now.

MR. MITCHELL: I think we ought to express the opinion now that the master shall or shall not have the power. You have all these things to consider, rulings on evidence, findings of fact, and the mere making of recommendations rather than find-

ings.

MR. DOBIE: You have got something in here about making objections before him, but you have not adopted it. In other words, would you make an objection before?

MR. DONWORTH: I expect to treat that in my proposed draft that I will send in later.

MR. DOBIE: In settling the report I doubt if it is desirable, and certainly it is going to hold it up, if every time the master has to give copies of the report to lawyers and have them come in and argue it before him.

MR. DONWORTH: I think if it is possible to be clear on that detail we ought to, because there is difference of opinion on that and the cases have held different things.

MR. CLARK: Let me speak of the part which troubles me a little. That is the part where it says that objections must be made before the master if they are to be considered. I do not see how you can do that except on a preliminary order for rulings at the hearings. How do you know what you are going to object to finally until you see his report?

MR. DOBIE: I do not object to that. I think you ought to have the right to object before the report without making an objection before the master.

MR. CLARK: You ought to have the right of objection.

MR. DOBIE: Yes. Some courts have ruled that you have the same right before the master that you have before the court.

MR. MITCHELL: Gentlemen, I wonder if we are not forgetting the type of reference to the master when the court wants him to report promptly on the matter referred to him. If you have tied that up with too much detail in the way of a preliminary report and a final report I think you are getting into trouble.

MR. DODGE: You will agree that the master should have the power, of course, to rule upon questions of evidence?

MR. MITCHELL: Undoubtedly.

MR. DODGE: The point may be raised on objection in the court, but you can not conduct a hearing where we have assumed he had that power of disposal. If there is any doubt about it, the rule should make it plain that he has that power, but, as

19 the Chairman suggested, there should also be a careful reservation of the power of the court to do a good deal in fixing or limiting the power to rule.

MR. WICKERSHAM: I think the master ought to have broad power to rule and there ought to be provision for bringing to the attention of the court anything that is objected to by the accounting party or his opponent.

MR. OLNEY: If I understand correctly, that is not the point that Mr. Dodge has in mind. I am just speaking of it so that we will get this perfectly clear. If we are to adopt a rule, the rule should give the master pretty broad powers.

MR. WICKERSHAM: Yes.

MR. OLNEY: And Mr. Dodge's point is it should be open to

the court either to limit or possibly to enlarge those powers by its order of reference.

MR. MITCHELL: That is my point too. The order of reference ought to give the court leeway to make provision for that.

MR. WICKERSHAM: I am in favor of that.

MR. CLARK: We should do that very probably on Rule 91. We could make 91 even broader, giving power to rule on evidence unless the order of reference specifies differently, and then add a paragraph at the end that the order of reference may do thus and so.

MR. WICKERSHAM: That is right.

MR. OLNEY: In Equity Rule 49 it says that all evidence offered before an examiner or like officer -- it says examiner; it does not say master -- "All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court."

In other words, we have got a matter here and let us clear it up.

MR. WICKERSHAM: What is that?

MR. OLNEY: "All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court."

MR. SUNDERLAND: What are you reading from?

MR. OLNEY: Equity Rule 49.

MR. CHERRY: The examiner is different from a master.

MR. DODGE: Is there any scope left for an examiner?

MR. MITCHELL: My understanding is that our definition of a master is intended to cover anyone, master, auditor, referee, or examiner.

MR. CHERRY: We did not state "examiner", I think.

MR. MITCHELL: Did we not?

MR. CHERRY: We stated the others, but not the examiner. I wonder if we should not.

MR. WICKERSHAM: Is there not in the equity practice a distinction made between the examiner who is a mere scribe to take a report, and a master who has power to rule and passes upon issues which are subject to the court's approval, where the examiner is practically a mere scribe?

MR. CLARK: I left out any reference to the examiner because I thought this rule as to discovery, and so on, took care of them.

MR. DODGE: It seems to me the examiner is out of it. I do not see any place left for the examiner.

MR. WICKERSHAM: He was a scribe.

MR. DODGE: The way they used to try equity cases he had a place; they do not do it any more.

MR. WICKERSHAM: That was the old equity rule, and they recognized the difference between an examiner and a master. The examiner was a mere scribe who took testimony and reported

it to the court for its disposition.

MR. DODGE: I think he is out of it.

MR. WICKERSHAM: I think so. In patent cases they do use examiners a good deal, do they not?

MR. DODGE: I do not know whether they do now or not. I thought they were trying patent cases in open court.

MR. DONWORTH: Usually they do.

MR. WICKERSHAM: Do they not use examiners in some patent cases? I had a case not long ago where the evidence had been taken by an examiner and submitted to the court.

MR. DONWORTH: It is contrary to the rule of equity.

MR. WICKERSHAM: The rule here, Equity Rule 49, says: "All evidence offered before an examiner or like officer, together with any objections, shall be saved and returned into the court. Depositions, whether upon oral examination before an examiner or like officer or otherwise, shall be based upon questions and answers reduced to writing or in the form of narrative, and the witness shall be subject to cross examination and re-examination." Rule 51 goes on, and Rule 52 and Rule 53.

MR. MITCHELL: Those are all covered by our rules on depositions.

MR. DONWORTH: I have been in some patent cases in recent years which were tried in court, and I did not know that they did it in any other way.

MR. WICKERSHAM: Rule 51, Mr. Hammond, just calls my at-

tention to it, goes into elaborately as to what an examiner shall do. My impression is, and I am speaking with some hesitation about it because I very seldom get into a patent case, although I do sometimes -- my impression is that in a great many patent cases the testimony is taken before an examiner under these rules and he simply reports the whole thing back to the court. That saves the time of the court in hearing the evidence, and the court takes it up in hearing on the examiner's report.

MR. SUNDERLAND: Is it the idea of the Committee on depositions, gentlemen, that there be any such proceeding as proceeding before the examiner, that in any every case the officer before whom the deposition is taken shall have power to rule on the evidence?

MR. MITCHELL: No, we have only made provision for the master to rule where the deposition was taken one hundred miles, from the trial.

MR. SUNDERLAND: But we provide a new procedure, not one hundred miles, and not for the few cases, but in every instance it shall be before an officer who is authorized to rule on the evidence.

MR. MITCHELL: That is not an ordinary deposition.

MR. SUNDERLAND: No, I am talking about --

MR. MITCHELL: In an ordinary deposition, as I understand it, when you go out of the jurisdiction then we have to have the

request of either party, and the court has to appoint a master with power to rule.

MR. WICKERSHAM: That is for the protection of the witness.

MR. SUNDERLAND: That is not provided in the deposition procedure expressly, that he shall have power to rule on the evidence?

MR. MITCHELL: That is shown in the rules for the discovery procedure.

MR. CLARK: Do you want to do anything with it? I had assumed that it was all covered.

MR. DOBIE: I think something ought to be done, as I said, with respect to Equity Rule 51. It shows "examiner or like officer". There are a lot of rules about the examiner. It says: "Objection to any question or questions shall be noted by the officer upon the deposition, but he shall not have power to decide on the competency or materiality or relevancy of the questions."

I do not know that the "like officer" includes the master. As I said, I was looking this over and it is not clear what the situation is. Should we have a flexible rule or should we refer this to you and get a rule?

MR. CLARK: I understood that Rule 91 was to give the master power to pass on objections with a later paragraph to the same rule providing that the order of reference could be narrow-

ed.

MR. DOBIE: I think that is all right. This may interest some of the gentlemen -- I do not know anything about that -- but Equity Rule 48 makes rather elaborate provisions for taking testimony of expert witnesses limited to patent and trademark cases. If you leave a lot of this stuff out probably you could eliminate many inquiries.

MR. WICKERSHAM: The old Chancery Rule, did it not, provided for two kinds of references; first, reference to an examiner just to take testimony and report to the court on which the court should act; second, reference of the issues to the masters with power to rule, and so on, and make a report which should be prima facie correct, unless overruled by the court. Now, we have got in addition to that the question of taking the testimony of witnesses which we have talked about, where we felt that the officer before whom that testimony was taken, if either party requested it, had the right to rule on the admissibility of evidence. There were three separate things, and do we want to abolish that and merge them under the general provision?

MR. MITCHELL: We might put a provision in the rule that in appointing a master the court should state his qualifications and power and might or might not direct him to rule on evidence and make findings, or might direct him to make advisory suggestions as to findings, or give him intermediate powers. Then

you cover examiners, masters, auditors, and the whole thing.

MR. WICKERSHAM: Mr. Chairman, before we finally conclude this, I would like to know what the patent lawyers think about it.

MR. MITCHELL: I was just thinking that it is too bad that we have not got a patent or trade-mark lawyer around here.

MR. WICKERSHAM: I know, but I would like to know what the fellows who are always trying patent cases would say about this.

MR. MITCHELL: Can't we pass this along to the Reporter with the suggestion that he take it up with the patent attorneys?

MR. DONWORTH: I think the local practice differs in different parts of the country. I am surprised to learn that the rule contemplates the examiner practice, notwithstanding the discouragement of the master's hearings. I have been in three or four patent cases in the last fifteen years and we tried those in open court before the judge, but evidently I am wrong as to that being the necessary construction. But I think we should examine into that matter carefully.

MR. SUNDERLAND: May I ask one question in that connection? If the scope and power of the master is to be stated in the order of the court in connection with this matter, should there be the same rule applied in the case of depositions?

MR. WICKERSHAM: I should think so.

MR. SUNDERLAND: You ought to have a fixed rule that would

apply on that question.

MR. DOBIE: Are you going to make the provision in the rule that you must object before the master?

MR. CLARK: Yes.

MR. WICKERSHAM: What is that?

MR. DOBIE: To make an objection before the court without the necessity of having to make that objection before the master.

MR. CLARK: I am inclined to say that you do not have to object.

MR. DODGE: On rulings on questions of materiality and rulings on evidence?

MR. DOBIE: Yes.

MR. DODGE: The objections on the report can not be made at the time before the master. Rulings on evidence can be.

MR. OLNEY: Objections to the evidence before the master ought to be made before him.

MR. WICKERSHAM: Yes, because he might correct the situation.

MR. MITCHELL: Let us pass to Rule 97.

MR. DOBIE: There is one more question I would like to raise or else pass it up to the Reporter. There is a lot of law about whether the master's report has any added significance or power or weight where the submission is by the consent of both parties, that he is then an arbitrator. There are Supreme

Court dicta that indicates that ought to be the situation. I do not think it should be and I just pass that on. The case is Kimberly v. Arms, page 747, Dobie on Federal Procedure.

MR. DONWORTH: Some cases make distinctions in the effect of the master's findings where he is appointed by the court or by consent of the parties.

MR. DOBIE: The last sentance makes that provision only where it is clear it is submitted to him, not as a master, but as an arbitrator.

MR. DONWORTH: That is a little different.

MR. CLARK: You will notice that we have adopted that theory and extended it to all cases.

MR. DODGE: Do you deal with the effect of the master's report?

MR. CLARK: Yes, right here.

MR. DODGE: Prima facie evidence?

MR. CLARK: Yes, presumptively correct, is the expression used.

MR. DODGE: Would you not have more weight to a master's report in an equity case than to an auditor's report in a jury case?

MR. CLARK: That is the old Equity Rule 61 and 61½.

MR. DODGE: Well, it has this effect: Suppose the rules of the master do not require him to report the evidence, but simply say that he shall not; if his report comes in and is

only prima facie evidence, the parties are entitled to try the facts all over again, just as in the jury case where there is an auditor's report. I think that ought to be considered very carefully because I do not think that is contemplated in equity by a rule issued by any judge where the rule does not call for a report of the evidence. He means to be governed by the master's findings of fact as, of course, the jury could not be governed by any auditor's findings.

21 MR. DONWORTH: I understand there is this very serious difference between the two; in the auditor's case you expect the parties to introduce further evidence, that is their right, and we have to --

MR. DODGE: Try the case all over again?

MR. DONWORTH: Yes; but in the master's equity report, the judge considers the matter of the evidence transmitted by the master and not on new evidence.

MR. DODGE: Yes, but if he has directed the master not to transmit the evidence he does not need to try the case all over again.

MR. DONWORTH: I think that can be brought out without much difficulty.

MR. OLNEY: If you are through with that, there is one thing that I want to speak of in co_nnection with this word "presumptively", that it shall be taken to be "presumptively correct". I am inclined to think that it might be well to ex-

press a little more definitely the difference between the effect of the findings of a master or the report of a master and the findings of the court. Now, in general, the findings of the court stand unless, as far as the appellate court is concerned, the evidence is insufficient to sustain them; while in the case of a master's report the court is at liberty to overturn them, I understand, if it simply disagrees with the conclusions which the master reaches as to the weight of the evidence. In other words, as far as the court is concerned, the report of the master has nothing like the binding effect upon the court like the findings of a lower court have upon the action of the appellate court. We have got to go through this thing again but I am just throwing that out for the attention of the Reporter.

MR. CLARK: I had a good deal that feeling. That is one reason why I did not feel much like disturbing the language of the old equity rule. I shall be glad to make the findings of the master stronger but I did not quite know how we could do it.

MR. DODGE: It is not contemplated after a reference to the master that the case shall be retried in court, and if the master reports the evidence or questions of fact upon that evidence, or if he does not, the court would seem to be precluded by his findings, because it is very different from a reference to a referee or order which contemplates that if the parties desire it a complete new trial may be had. Is that not true? The

reference to a master does not contemplate a retrial of the case?

MR. CLARK: That is true.

MR. DODGE: It will not attempt to say in each case that the report shall be prima facie evidence. I think you have to remodel it to show that in an equity case there is not to be a new trial.

MR. MITCHELL: In an equity case, where the master has authority to make findings, and he makes them, and they are returned to the court and exceptions are taken to certain findings and not to others, those that are not excepted to stand and are adopted by the court. Now, with respect to those which are excepted to, is it not the function of the court to test the findings according to his own judgment?

MR. DODGE: You mean by taking new evidence?

MR. MITCHELL: No, on the record; make up his own mind without any presumption as to the validity of the master's findings?

MR. DODGE: Where he has the evidence that is exactly his function, as I understand it.

MR. MITCHELL: That means that he ought to have the evidence.

MR. DODGE: But if he has referred the case to the master without instructing him to report the evidence, which is the common case as to us, exceptions as to findings of fact amount

to nothing unless there are findings inconsistent with other findings.

MR. MITCHELL: Then in law practice, in order to give any weight to the findings, you have to be careful to have the order of reference call for the return of the transcript?

MR. DODGE: Yes, and if you can get one of our judges to issue such an order you are accomplishing something very great. I have tried that in cases when questions of fact were up to the court and they said, "We are going to get rid of the case by having the master find on facts exclusively," and, strange to say, that is the practice with us.

MR. OLNEY: I do not think we ought to encourage it.

MR. DODGE: It is subject to much complaint by the counsel, but it is easier for the court.

MR. MITCHELL: We are on Rule 97.

RULE 97

APPOINTMENT AND COMPENSATION OF MASTERS

MR. CLARK: The drastic remedy to enforce compensation at the end seems to be pretty harsh, and we can't leave it out.

MR. WICKERSHAM: I do not believe in punishing by arrest for failure to pay a master's fee.

MR. MITCHELL: Is that an attachment against the person?

MR. CLARK: Yes, that is the way the attachment is used in the equity rule. That is what makes it drastic, attachment for the amount against the party.

MR. WICKERSHAM: That old rule was adopted at the time they had imprisonment for debt. I do not think it ought to be there now. I think it is contrary to the whole policy of the law today.

MR. MITCHELL: Ought you not substitute a provision that the court may summarily order execution against the party's property, at least that?

MR. WICKERSHAM: Why should not the master retain his report as security for payment unless the court shall otherwise direct?

MR. MITCHELL: What is that?

MR. WICKERSHAM: Why should not the master have a lien on his report and not be obliged to return it until his fees are paid, unless the court shall otherwise direct?

MR. DOBIE: One trouble is that the fees as fixed very often are subject to review, and in one or two Supreme Court cases they have lacerated the allowance of excess compensation in the lower court and they have cut it two-thirds. In nine cases out of ten they do not fix the allowance until the report is in and being considered.

MR. DODGE: The master would hesitate to say, as a practical matter, "My report is in; now pay me".

MR. MITCHELL: As long as you are taking away the right to imprison the parties, you ought at least to substitute a summary right by the court to execution against his property with-

out requiring the master to bring a law suit for his money.

MR. CLARK: You want to substitute --

MR. MITCHELL: Attachment against the property of the person.

MR. CLARK: It might as well be execution.

MR. MITCHELL: Yes.

MR. CHERRY: The amount has been adjudicated.

MR. TOLMAN: Could you not make that effect by saying, "take such other steps"?

MR. OLNEY: The practice is for the winning party to pay the master's fees. He is usually willing to do it, but I think there should be some provision giving him something.

MR. DODGE: I think so. As a matter of form, what do you say to using the expression "pro hoc vice"?

23 MR. MITCHELL: Aside from that proposal, is there anything you want to do with Rule 97?

MR. CLARK: What do you want to do with pro hoc vice?

MR. DODGE: Change it to special master.

MR. DONWORTH: I have a suggestion. "The district courts may appoint standing masters in their respective districts (a majority of all the judges thereof concurring in the appointment), and they may also appoint a master pro hac vice in any particular case." That, I think, is unnecessary red tape. The standing masters should be appointed by a majority of the judges, but when you have a motion for a master

pro hac vice, the judge who is hearing the matter -- I suggest, instead of that, that it read: "The court, acting by one or more judges, may authorize".

MR. CLARK: I think that is all right to make it clear. As a matter of fact, I do not think it does refer back to the majority. I think it refers to the court, and the court acting by --

MR. DONWORTH: One or more judges.

MR. DODGE: By a judge.

MR. WICKERSHAM: Now you have provided in the earlier part, "acting by a majority of all the judges", is it not just as well to remove any doubt about it and say, "The Court, acting by one or more judges, may also appoint the master pro hac vice"?

MR. DODGE: It is always an individual judge.

MR. DOBIE: You may have a three judge court.

MR. WICKERSHAM: Suppse it were a three judge case.

MR. DODGE: The master gets appointed earlier.

MR. WICKERSHAM: The three judge court might appoint a master.

MR. DODGE: I guess that is true.

MR. WICKERSHAM: Therefore, I think it is just as well to have it one or more judges.

MR. DOBIE: Acting through one or more judges?

MR. DONWORTH: "By".

MR. WICKERSHAM: "Acting by one or more judges".

MR. DODGE: That is a little more complicated. It suggests a difficulty where there is none in fact. Why don't you say that the court in any case which is pending may authorize the appointment?

MR. WICKERSHAM: That is better.

MR. MITCHELL: "The court in which any case is pending may also appoint a master therein"?

MR. DODGE: Yes.

MR. CLARK: I suppose it can not do it unless it has a special or unusual case.

MR. MITCHELL: You will have to say subject to the limitation of the rules.

MR. DONWORTH: I would rather leave it just the way it is.

MR. CLARK: Why can you not say, "The district courts may appoint a special master"?

MR. WICKERSHAM: The court in which any case is pending.

MR. CHERRY: It says in a particular case at the end.

MR. WICKERSHAM: That is right.

MR. MITCHELL: Let us leave that to the reporter to work it out. Anything further on 97?

(No response.)

MR. MITCHELL: If not, we will go on to 98.

JUDGMENT AND APPEAL

RULE 98 - FORM OF JUDGMENT

MR. DONWORTH: This has been in the rules for sometime and in our district it is universally disobeyed and I think will continue to be disobeyed. Lawyers inform me in drawing their decrees in equity cases they do not like to make it as short as this. They recite, "This cause was in reference to a master, and the master's report coming in, and the court being satisfied --" you know, they strengthen it so when a man takes the judgment and goes out it sort of stands upon its own account with the presumptions.

MR. WICKERSHAM: This is generally honored in the breach and not in the observance, but it is a good rule and it has been there for a long time.

MR. MITCHELL: Is it not already covered by the words, "nor the report of any master"? Is not the "report" broad enough to include findings?

MR. CLARK: It has been criticized in the Circuit Court of Appeals because they did insert the findings of fact.

MR. WICKERSHAM: It was not necessary to insert any part of the record.

MR. CLARK: I am speaking more particularly of the findings of fact.

MR. MITCHELL: Is that not a part of the report?

MR. CLARK: No. In this section I put in I put the words "or a master" just to make it complete, but I am dealing par-

ticularly with the findings of fact of the court that you could not put in the judgment or findings of fact of the court itself.

MR. WICKERSHAM: "Nor the findings of fact and conclusions of law of the court or a master"?

MR. CLARK: That is it, and in that case it says by necessary implication that Rule 71, that is, the old 71, prohibits the inclusion of findings of fact in the decree. They are not a part of the final decree and should not be embodied therein, but counsel had done it, so you might put in here they should not do it.

MR. WICKERSHAM: That is what is in the old rule?

MR. CLARK: This language is in the old rule.

MR. MITCHELL: It relates to the inclusion of the findings of the court.

MR. WICKERSHAM: I rather like it in the decree of the court because you see what it is based on.

MR. DONWORTH: It stands out.

MR. WICKERSHAM: Yes.

MR. MITCHELL: In these equity cases, of course, in the old code practice they require the courts to state the facts in making the findings or enter judgment, you are required to have them. Now, in the equity causes there has been no requirement that the courts shall make findings and if a judge enters a bare decree without deciding the findings of fact, then you have

not got any recorded findings at all except the presumption that every fact was found necessary to support it. So, they object to having the findings in an equity decree. If the law required them to be found sufficiently in advance of the decree and recorded, that is all right, but it does not.

MR. OLNEY: Under the present equity rules, the court is supposed to make findings of fact?

MR. WICKERSHAM: Is it not a good thing to have them in the judgment, because you have a basis?

MR. MITCHELL: We have a rule, No. 104, which is based on Equity Rule 70½. That is on the lefthand page.

23 MR. WICKERSHAM: Oh, that is where we deal with that?

MR. MITCHELL: Yes.

MR. WICKERSHAM: This form of judgment which is required does not seem to me to be applicable for a judgment of $100,000,000 in a court case or for a judgment at law for a defendant?

MR. CLARK: Is it not more applicable at law than it was in equity?

MR. WICKERSHAM: "Order it, adjudge it, and decree it", but in a simple judgment for the defendant of $100, or for a plaintiff, why should you begin with all this equity rigmarole?

MR. CLARK: We might take out "was argued by counsel". That might be well.

MR. DOBIE: Would you object to putting "may" for "shall" -- "may begin in substance"?

MR. DODGE: Would you simply enter judgment for the defendant?

MR. CLARK: Don't you enter a formal judgment? I thought that was usual. The judge says, "Judgment for the defendant", and then somebody prepares a formal judgment.

MR. DONWORTH: Suppose you get judgment by default, then this argument by counsel --

MR. CLARK: That can come out anyway. That would shorten it more.

MR. OLNEY: There is a difference in code practice between what you might call actions at law and suits in equity. The court would just order judgment and the court enters it by its entry which constitutes the judgment.

MR. DODGE: Judgement for defendant?

MR. OLNEY: Judgment for defendant, and that is entered by -- in what you call an equity case there is really a judgment signed by the court. The judgment is signed by the court in one case and in the other it is not.

MR. CLARK: Would you not have to have something in the way of judgment in law? What would you do as to costs? The court says, "Judgment for the defendant with costs", and the clerk computes them and sticks them in.

MR. WICKERSHAM: You take the minutes of the trial and the clerk enters the judgment.

MR. CLARK: Does he not enter a formal judgment?

MR. WICKERSHAM: Certainly, a form which he fills out.

MR. CLARK: That is what I mean.

MR. OLNEY: I am inclined to think that the practice ought to be the same in both cases in regard to the judgment and it might be well to have the court sign them both.

MR. DONWORTH: It seems to me, in view of this discussion, we will have to revise this rule and make a form, if we use a form, which will suit both law and equity, which this does not.

MR. DODGE: And make it simple for law.

MR. CLARK: I think perhaps we could do better on that, although this is simpler than many of them, simpler than Mr. Wickersham wants to make it.

MR. DONWORTH: In a judgment at law, after trial by jury, you get the minutes of the trial, take them to the clerk's office, and he fills out the judgment.

MR. CLARK: We have not said anything as to who signs the judgment.

MR. WICKERSHAM: The clerk signs the judgment in the law case.

MR. DONWORTH: Did we not in the default section provide that the clerk may enter judgment for default?

MR. MITCHELL: Then he ought to enter that, an order for judgment made on trial by the court.

MR. DONWORTH: When you get a judgment in an equity case, the judge always signs that.

MR. MITCHELL: That is not true in our system. We do not have any distinction in the form and method of entering the judgment, whether it is law or equity.

MR. DOBIE: Do you need any distinction? Would not the purpose be served by saying -- you do not need all that stuff.

MR. MITCHELL: There is one reference you usually put in where there is a verdict. You do not have to have an order of judgment and the verdict is recorded, as I remember it.

MR. WICKERSHAM: And you tax your costs.

MR. MITCHELL: If there is no appeal, you tax your costs, and the judgment reads, "The verdict having been rendered, costs taxed, the defendant recovered so much money." In a case tried by the court without jury, whether in equity or law, it makes no difference, then there is a finding and order and the judgment recites not a verdict, but an order, the order having been filed there is a judgment.

MR. WICKERSHAM: Then we usually have the judgment in an equity case, signed by the judge.

MR. CHERRY: Is it not the order for judgment that he signs?

MR. CLARK: I thought in New York you said "enter", the

24 judge put his initials on, and said "J. S. C."

MR. WICKERSHAM: That is the same thing. It is not entered until he puts his initials on and the "J. S. C."

MR. CHERRY: That is just a short form "Enter for judg-

ment".

MR. CLARK: Then I thought the clerk did it. The justice having told the clerk to do it by that order. I wonder if it would not be all right to stop with the negative suggestion here and if we are going to have a form later on, to include the form.

MR. DOBIE: Just leave out the positive part and say that it is not necessary to include this, and stop after the words, "Judgement or order" in the fourth line, and not describe how it shall begin. I think it would be difficult to make a section here that would be applicable to the various types of things.

MR. DODGE: I think so. End with the words, "Judgment or order".

MR. MITCHELL: We will pass, then, to Rule 99.

MR. CLARK: I think, then, I will leave out that insertion "Nor the findings of fact" and so forth.

MR. MITCHELL: Rule 99.

RULE 99

JUDGMENTS -- IN FAVOR OF AND AGAINST VARIOUS PARTIES AND AT VARIOUS STAGES

MR. CLARK: Here I have drawn the provision for the so-called split judgment. The New York provision is on the other page. This affects some of your clients.

MR. WICKERSHAM: I am glad you specifically abolished

summons and severance. I think that has become one of the best known of all the rules you have, by reason of that decision of Taft years ago.

MR. DODGE: I was going to mention that.

MR. CLARK: I hope it stays abolished.

MR. MITCHELL: When does the summons and severance have to take place? Is that in the district court under the old rule?

MR. WICKERSHAM: Yes.

MR. MITCHELL: That is where you summon and sever?

MR. WICKERSHAM: Yes, for purposes of appeal.

MR. CHERRY: Purely verbal.

MR. WICKERSHAM: Taft had great fun with that because he caught three or four of his old friends on that, who told him that no lawyer east of the Allegheny Mountains ever heard of summons and severance.

MR. SUNDERLAND: The essence of summons and severance is in this?

MR. WICKERSHAM: Yes.

MR. SUNDERLAND: Why should we not just provide that in this instead of summons and severance; instead of abolishing severance and summons, if we provide for it here?

MR. WICKERSHAM: One or more may appeal from it without respect to the others, upon notice to the defendants jointly liable.

MR. SUNDERLAND: Yes, on notice to the several parties.

MR. CLARK: I should be a little afraid unless you put in there that they could use the notice without summons and severance.

MR. WICKERSHAM: I did not mean the elimination of summons and severance.

MR. MITCHELL: What is your suggestion there?

MR. SUNDERLAND: I thought we should provide affirmatively for notice to the co-parties.

MR. MITCHELL: Notice of what?

MR. SUNDERLAND: Of the appeal.

MR. MITCHELL: Will you put that in, that any one or more may appeal from it upon notice to others "without respect", and so on?

MR. SUNDERLAND: Yes.

MR. MITCHELL: What I am worrying over is this reference to appeals again. If we can word this in such a way as not to say that one or more may appeal -- in all further proceedings every party may take any action without the necessity for summons and severance", then we are not assuming to regulate the appellate circuit's procedure expressly.

MR. DOBIE: But that is done in the lower court. The summons and severance is done in connection with perfecting the appeal in the lower court.

MR. MITCHELL: Yes, I agree with that, but I think we can

provide for it, and I hate to use the word "appeal". That word "appeal" does not appeal to me.

MR. DODGE: We can cover everything down to the perfecting of the appeal.

MR. MITCHELL: We can?

MR. CLARK: Down to and including, is that what you said?

MR. DODGE: Yes.

MR. MITCHELL: As long as the district court has jurisdiction.

MR. DONWORTH: What is the effect of our action with respect to summons and severance? While the technicalities have been abolished the substance has been preserved, and it has a real purpose; namely, three or four defendants are in a case, and one of them is going to appeal; then, to avoid a multiplicity of appeals and to avoid shutting out the others, he serves notice on them that he is going to appeal, and so forth. We do not want to get rid of that idea, do we?

MR. SUNDERLAND: No, I suggest that we provide for notice as such but exclude the summons and severance as a technical process.

MR. WICKERSHAM: Is it not this? If you had a judgment against A, B, and C jointly, A could not appeal without taking a summons and severance against the other defendants; that is, he has summoned his co-defendants to show cause why he should not appeal separately?

MR. MITCHELL: Yes, and then he can appeal separately if they do not come in.

MR. WICKERSHAM: We are simply giving him the right to appeal upon notice to the others.

MR. OLNEY: Why notify them?

MR. SUNDERLAND: Then they can not bring separate appeals.

MR. WICKERSHAM: The theory is that if they are jointly liable they ought to join in the appeal.

MR. OLNEY: They would all be heard together if they did appeal.

MR. DODGE: The appeals would be heard together.

MR. SUNDERLAND: There has got to be some way of preventing a multitude of separate appeals, and the scheme in the Federal court was summons and severance.

MR. DODGE: Suppose there are five defendants in one case, and one appeals and the others do not, it is all one case, it is a consolidated case.

MR. CLARK: Should we add here that if the other parties appeal it shall be considered as one consolidated appeal or something like that?

MR. DODGE: I do not see why that is necessary.

MR. CLARK: I should not think it is necessary, but if the courts are worried about summons and severance it might come to them.

MR. DODGE: It is only one case, and you can not separate

the case and make two appeals out of one case.

MR. DONWORTH: 90 days is allowed for appeal; one fellow is in a great hurry and he appeals in five days; under summons and severance those others must come in promptly and join in with him, they can not take the rest of the 90 days.

MR. DOBIE: The stock reasons given for this principle are that otherwise the decision of the appellate court could not be enforced against the parties refusing to join in the petition for writ of error or appeal, and otherwise these non-joining parties might in turn also seek an appeallate review, and thus vex the higher courts with several successive appellate proceedings in the same case.

Dobie, page 910.

MR. SUNDERLAND: Most State courts do not have summons and severance.

MR. DOBIE: It is absolutely essential in these cases, it has been repeatedly held by the Supreme Court.

MR. DONWORTH: I think the Reporter could devise a modern practice. Perhaps we have no authority, as the Chairman says--

MR. MITCHELL: I think we have. I think we ought to go the whole way and deal with any matter even if it relates to the field that is a function of the trial court.

MR. DONWORTH: Then I think the Reporter should devise, not invent himself but take some of the prevailing modern practices that furnish the substance of the idea, and tell us how

to do it.

MR. CLARK: This is practically unknown in State procedure. You just don't worry about it because nobody is thrown out for appeals on that ground.

MR. DONWORTH: Out in our State when one party of several appeals he must serve his notice of appeal, unless the appeal is given in open court at the time the judgment is rendered. In that case the oral notice is sufficient by one party. The others are supposed to be there. If the appeal is not taken in open court at the time judgment is rendered, the party appealing must serve his written notice, not only upon his adverse party, but upon his co-parties.

MR. CHERRY: Is it not taken care of in some States by making them all parties? If you appeal you have to make them parties, and if they do not join with you as appellants, you make them respondents. They are there before the appellate court and you do not have the question of severance.

MR. MITCHELL: But you do have to serve the notice.

MR. CHERRY: You have to serve notice and make them a party. They can not do any other appealing, they are in on this appeal. There are various ways of doing it.

MR. DODGE: We leave it so judgment can go against those who do not appeal.

MR. SUNDERLAND: The simplest way is to give notice and let them come in.

MR. DODGE: And if they do not, judgment is against them.

MR. DOBIE: In a few cases you do not have to have summons and severance. When it is taken in open court and the parties are there, it is not necessary. There is some sense in that. If those fellows are there and hear you they know you have made it.

MR. DODGE: Do you deal with supersedeas?

MR. CLARK: Not very much. We incorporate mainly the statutes on that, as you will see when we get to that. We refer you to the provisions of the statute.

MR. DODGE: We come to that later?

MR. CLARK: Yes, very soon, now.

MR. DONWORTH: I think, Mr. Reporter, the last sentance of this Rule 99 should provide for a case where plaintiffs appeal from a judgment in their favor because they do not think it is enough. You seem to assume that a man does not appeal from a judgment in his favor.

MR. CLARK: That is right. I did not want to restrict it, of course. I had not thought much about it. I thought he could claim to a certain extent that this was against him.

MR. MITCHELL: Does the reporter understand what he is expected to do under Rule 99 about summons and severance?

MR. CLARK: I can aim at something. I have got the general idea that you want something on notice and the other party joining an appeal, and if they do not join they are bound. That is

about the gist of it.

MR. WICKERSHAM: That is the effect of summons and severance without calling it that.

MR. CLARK: And without the formality of telling you that you are stuck unless you have an order of it.

MR. DONWORTH: It should be restricted to parties who have appeared. Any party who has not appeared should not be entitled to it.

MR. CLARK: Yes.

MR. MITCHELL: Let us pass to Rule 100, then.

RULE 100

CONTROL OVER JUDGMENTS-MOTION FOR REHEARING AND NEW TRIAL

MR. CLARK: Rule 100 is fairly important in several ways, and I have given here quite a long section, much too long, I think; it is in two parts.

The first part is an attempt to cover clerical mistakes, and we will let that go up until the time the appeal has been filed, and the second paragraph --

MR. OLNEY: You mean clerical mistakes that are not apparent on the face of the record?

MR. DOBIE: It says whether apparent on the record or not.

MR. CLARK: I do not know why the distinction.

MR. OLNEY: My impression is that if there is a clerical mistake in a judgment you may correct it at any time, maybe 20

years after, by a nunc pro tunc order.

MR. DODGE: Have you not covered that in the last half of the first paragraph?

MR. CLARK: Equity Rule No. 72 said you had any time before the close of the term. I do not object to having it in 20 years.

MR. DONWORTH: I think we are up against that whole question of terms in some form. It has done a lot of mischief.

MR. DOBIE: Unquestionably.

MR. DONWORTH: At the present time if you had a judgment rendered near the close of the term the only safe way is to ask the court to enter an order that as to this case the term is extended, and they usually fix a date. You remember in some of those Alabama negro cases in the State practice of a similar nature the extension of the term was poorly done and it made trouble. I had hoped that that might be in a general provision which would mean -- I think we can use better language -- but which would mean that the term is extended without any order of the court as to any matter that needs the attention of the court for purposes of appeal.

MR. CLARK: I think I used the term, but it seemed to me that it is rather better here not to use it, and to make a definite period. I do not think we need to use that word "term" and I do think it is better to get away from it by something where we say the time is not connected with the term.

You will notice that in the alternative rule I put it at the top of the page. I thought it was clerical mistakes in judgments, and so on, that they may be corrected by the court, and I put in several alternatives, "At any time", "unless an appeal is pending", "subject to the defense of laches"; and the other provision I made, for a motion for a rehearing, and so on, during the time within which an appeal may be made, that is, 90 days, but I am inclined to think that that is pretty long. There are a lot of suggestions, as you see, on this, and most of them are much shorter. In State practice it is usually a matter of days.

MR. DONWORTH: Where is this 90 days?

MR. CLARK: The time within which an appeal may be taken.

MR. SUNDERLAND: The right to correct clerical mistakes in judgments and orders is an inherent right of the court and you do not have to give it in a rule.

MR. DODGE: A motion for a new trial can not be limited by any time reference to an appeal because there is no appeal from a verdict. A motion for a new trial is ordinarily used after a verdict. You are moving for a new trial, not on account of a judgment, but on account of a verdict.

MR. DONWORTH: Sometimes a judgment does get into it, although you can move a new trial whether or not judgment is entered.

MR. DODGE: We have to move for a new trial within three

days.

MR. DONWORTH: In the Federal courts the time for moving for a new trial, in accordance with the local rules, is much longer. I think it is 40 days.

MR. CLARK: In the equity rules the petition for a rehearing is tied up with the term.

MR. DOBIE: I am heartily in accord with the Reporter in getting away from the term stuff, if you can. A great deal of injustice has resulted from the terms being different, and so on.

MR. MITCHELL: If you abolish the term rule you have to substitute something.

MR. DODGE: Substitute a definite number of days.

MR. SUNDERLAND: That is the way it is done.

MR. DODGE: Give them ten days.

MR. SUNDERLAND: Give the court general control over its judgment for 20 days after it is rendered and that takes care of everything that can be done by means of the term system.

MR. DONWORTH: Why not give them six months?

MR. SUNDERLAND: 20 days are very common.

MR. OLNEY: There are three classes of changes that are made in which judgments are affected. The first is the class of mistakes, clerical mistakes, which are apparent on the face of the record, or where some order is made which just is not the thing the court intended to do at all. Now, certainly, in

cases where that has occurred, where the mistake appears on the face of the record, the court by a nunc pro tunc order can correct the record at any time, it does not make any difference how long ago the mistake occurred, and to some extent, just how far I do not know, even though the mistake is not one on the face of the record.

Then, there is another character of mistakes which is provided for by the code; mistakes where an order has been made through misapprehension on the part of the judge, fraud, mistake, or excuseable neglect -- I think those are the expressions of the code -- and there they can be corrected on motion at any time within six months. They are not ordinary mistakes in the course of the trial and have nothing to do with the new trial at all, but the court can make some order which is improvidently made for some reason or other, and with this six months upon motion that can be corrected.

Then there comes the matter of granting a motion for a new trial or the making of a motion for a new trial based on errors committed during the trial, and there the time is very short within which a party may be permitted to move, and very properly so. He has tried his case, he knows what the contentions are, and if he wants to move for a new trial he can make up his mind and move very quickly.

These other cases are cases of a different sort, where he may not at the time have information on the subject, he may not

know this order was made or may not appreciate its character.

So, there are different kinds of mistakes, and the only point I am getting at is that there are different kinds of reasons for the court revising its order or its judgment and the time allowed should to some extent vary with the character of the reason.

MR. SUNDERLAND: At common law that first type of mistake could be corrected at any time. The second type could be corrected at any time during the term, and the third point could be raised before the entry of the judgment, which is delayed for the purpose.

MR. DONWORTH: I do not know, but there are many instances -- I want to call attention to this -- there are many cases where for a particular class or classes a considerable period should be allowed, but when it comes down to a motion for a new trial, that should be hurried right along.

MR. DODGE: Why should the filing of a motion for a new trial have any effect on the time for appeal?

MR. MITCHELL: In the Federal courts you can not appeal from an order granting or denying a motion for a new trial.

MR. DONWORTH: Sometimes the court enters judgment on a verdict without waiting for the making of a motion for a new trial. There are exceptional cases where that is done, where somebody is going to get away or something. I understand and I concur in what the Chairman said, but I also think that a motion

for a new trial in the Federal courts lies after the judgment has been rendered if you are within time after the verdict. I mean, the fact that the judgment intervenes does not prevent the motion for a new trial being made.

MR. DODGE: The granting of the motion affects the judgment?

MR. CLARK: I think so. I think the time should be much shorter on the question of rehearing or a new trial. I think it should be five days.

MR. OLNEY: In California the time is ten days, as I recollect.

MR. DODGE: A motion to set aside the verdict as against the weight of the evidence can be made in ten days?

MR. OLNEY: Yes.

MR. DODGE: It is three days with us.

MR. DOBIE: As I understand it here, you are putting all this stuff on the same plane, judgments, decrees, and all, as we used to call them?

MR. CLARK: Yes.

MR. DOBIE: Because you probably know, under the old equity practice, the bill of review would lie in the case of an equity decree after the term had ended. As a matter of fact, you could not file a bill of review until after the term had expired. Before that you filed a petition for rehearing, and there is a hideous and fearful lot of technical law on this

subject. I hope you can get away from all that mess and make some provision.

MR. MITCHELL: Mr. Dodge, in your practice you only have five days to make a motion for a new trial on the ground of newly discovered evidence?

MR. DODGE: No, I do not think that is limited in that case. I have forgotten what the rule is there.

MR. SUNDERLAND: Usually there is no limit unless a very long one, two or three years.

MR. OLNEY: In California the time to move for a new trial on account of newly discovered evidence is ten days.

MR. CLARK: Mr. Dodge, you will see that we were giving a fairly long period, and yet trying to keep it within limits. We started with the equity practice which is pretty long, this matter of the term, and so on, and we questioned how far it seemed fair in Federal practice to cut that down. I think it would be fair to cut that down to ten days, but we did not feel like doing it. In this what we have done, however, is by providing that the filing of the motion suspends but does not disturb any judgment, merely suspends it for the period when that is in consideration, and we have also provided for it to be considered in ten days. It means that that can only hold up the running of appeal for ten days. You only have ten days more of the three months at the most.

MR. DODGE: I doubt if you can work it that way. Suppose the judge is sick or on vacation.

MR. WICKERSHAM: You can not get a judge to act within ten days.

MR. CLARK: If he does not act, it is denied.

MR. WICKERSHAM: I do not believe that that is right. I think that is penalizing the parties for the inability of the judge to hear the parties.

MR. DOBIE: That is particularly true with us. We have one judge who has 50 counties, and it is over 250 miles from Big Stone Gap to Richmond.

MR. WICKERSHAM: You can not always get a judge within ten days to hear the motion.

MR. DONWORTH: I understand that the ten days only provides for the filing of the motion.

MR. DOBIE: It says that if it is not passed on in ten days it is a denial.

MR. DONWORTH: It seems to me we should limit the time of ruling for a new trial to ten days after the verdict is received in court or filed, or in the case of a decision of the judge, a petition for a motion for a new trial should perhaps be equally limited.

MR. WICKERSHAM: I do not think that is feasible. Take the conditions in New York; you can not get a judge to hear a motion for a new trial.

MR. MITCHELL: He is not talking about that. He is talking about making the motion.

MR. WICKERSHAM: I agree on making the motion.

MR. MITCHELL: That is all he says.

MR. WICKERSHAM: I am agreeing with you as to the time for making the motion. You can not penalize the parties for the failure of the judge.

MR. DONWORTH: We have got to meet the two cases of a jury trial and a non-jury trial, and I say ten days is enough for filing the motion, so far as that goes, and then it may take six weeks to hear it. I agree to that.

MR. DODGE: But it has no effect on the time for appeal? That should run along, should it not?

MR. MITCHELL: My impression is that when a motion for a new trial is seasonably made and entertained that that operates to suspend the running of the time for appeal until the motion is decided.

MR. DONWORTH: That is correct, but, of course, the time does not begin to run anyway until a judgment is rendered, so this question is moot which we are now discussing unless there is a judgment rendered before the ten days are up.

MR. DODGE: Or a decres.

MR. DONWORTH: Or a decree.

MR. DODGE: I did not know there was any extension of time for any judicial decision.

MR. CLARK: Now, going back to Rule 100, first we provide for the court to have absolute control during the time within

which appeal may be taken or until it has been taken. That is one thing.

Now, next, it shall have power to correct clerical mistakes, and so on; and then we put "unless an appeal is pending" in brackets, and I should say it was well to take that out. Then, next, is the time for moving for a motion of rehearing or a new trial, and I think myself a flat ten days is better, and we can change our little whip on the judges when I get the view of the Committee that the judges can not be treated in that way.

MR. OLNEY: Let me speak of our experience in California and what has happened there. We found that a motion for a new
27 trial could be made and heard and then the court would just sit on it indefinitely and would not decide it. Sometimes they would not decide it for a year or two years, the result of which was that they finally passed a law -- it is the law now -- unless a new trial is granted within, I think, 30 days after the notice for motion for new trial, the new trial is deemed denied.

MR. WICKERSHAM: How does that work?

MR. OLNEY: It means that the parties bring on their motions for new trials promptly and the court has got to decide them, or, if he does not decide them, they are decided for him.

MR. WICKERSHAM: I am in favor of making the party move promptly, but I do not believe in penalizing the parties for delays of the judge. I had a case in the Supreme Court of the United States which was held for twenty-six months after the

argument and then the court handed down an unanimous decision. Now, that is an extreme case, of course, but it was a case which I had. You can not properly penalize the parties for the delays of the judge.

MR. MITCHELL: Are you talking about the extension of the right of appeal by a motion of a new trial?

MR. WICKERSHAM: I think if you make a motion for a new trial you have to extend the time of appeal.

MR. MITCHELL: We can not deal with that because the time for appeal is a matter that is fixed by statute, as construed by the court. Now, as I stated a minute ago, a rule that is universal, that is established, in the Federal court, is that you make a motion for a new trial, if it is seasonably made -- it is stated this way -- in the statute that provides for appeals from the district courts to the Circuit Court of Appeals, if a motion for a new trial or a petition for rehearing is made and presented in season and entertained by the court the time limit for writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purpose of writ of error or appeal. Then there are 75 cases on that, a good part of which are in the Supreme Court of the United States.

MR. WICKERSHAM: Is that a statute or a rule?

MR. MITCHELL: That is a judicial decision as to the effect of a motion for a new trial as bearing on the time of appeal.

MR. WICHERSHAM: I think that is just, because then you do not penalize the parties for the delay of the judge. We have a provision in the New York code, as you know, that if the judge holds a decision -- I have forgotten the exact phrase -- unreasonably, you may give him notice, and if he does not then file the decision you may bring it before somebody else.

MR. MITCHELL: We can not enlarge the time for appeal. Motion for new trial seasonably made and entertained tolls the running time of the appeal. We do not want to say anything about that.

MR. DOBIE: We should prescribe, though, a time for filing the motion for a new trial or a motion for rehearing.

MR. MITCHELL: Right.

MR. CLARK: In one sense that is a little more than suspending the appeal. It really starts it anew because the three months start when you get through.

MR. MITCHELL: It runs from the time the case is disposed of.

MR. DOBIE: What is the time you gentlemen suggest? You have had more experience than I have. How long ought a man have for a motion for new trial or a motion for rehearing?

MR. MITCHELL: My notion is this: If an order granting a new trial were objectionable matter in the Federal court I would say that the lawyers ought to have a longer time than might otherwise be provided to enable them to get the papers and record

into shape with a view of ultimate appeal, but since there is no review and it is a matter for the trial court, and he decides that finally one way or the other, it greatly shortens the time period. He is not troubled with the necessity of getting the record ready for appeal. If you make a motion and it is denied it is just as if it was never made as far as the appeal is concerned, and I should think ten days would be a reasonable time. Minnesota allows twenty, but there you have an appeal from the order denying or granting the new trial.

MR. OLNEY: Let us distinguish and have clear what we have in our minds. We draw a distinction between the notice of the motion and a hearing on the motion itself, and if you are speaking of the motion, the time within which the man may indicate to his opponent and to the court that he wants a new trial, ten days is not too short.

MR. DOBIE: Are you going to have a notice first and then the filing of the actual motion in court?

MR. OLNEY: No, he specifies his ground.

28 MR. MITCHELL: He has to make and present it.

MR. OLNEY: He specifies his ground right in the notice.

MR. DOBIE: How about ten days?

MR. OLNEY: It is equivalent to a motion.

MR. MITCHELL: That is a fair time under the circumstances.

MR. CLARK: Major Colman has called my attention to a case where the Circuit Court of Appeals returned a transcript to the

district court long after the appeal was perfected, retaining jurisdiction of the appeal. That is 275 U. S. 377.

MR. MITCHELL: That was a certiorari in condemnation, was it not?

MR. TOLMAN: No, it was a case where the transcript was not certified by the district court, and, among other things, there were other mistakes, and the whole record was sent back to the district judge to correct the record.

MR. SUNDERLAND: That is appellate procedure. If the appellate court makes the order sending it back, that would be appellate procedure.

MR. CLARK: That may be, but in any event don't you want to strike out the first bracket, "unless an appeal is pending" up at the top?

MR. DONWORTH: That runs into the rule, does it not, that as soon as the appeal is taken all the lower court can do is that in the absence of a supersedeas it may go ahead and enforce judgment, but it can not modify the judgment at all as soon as the notice of the appeal is served because the thing is in the other court? I understand that is a well settled principle of comity of court. As soon as the appeal is taken the lower court is paralyzed to do anything except to enforce its order.

MR. WICKERSHAM: Unless there is a supersedeas.

MR. OLNEY: Do you wish to leave in this statement, "The

court shall have absolute control over a final order or judgment during the time within which an appeal may be taken"?

MR. DONWORTH: Yes.

MR. OLNEY: That allows the court to set aside the whole thing and do anything it pleases with it. When a judgment i s once rendered the judge should have no power to set it aside except in furtherance of certain established principles, and according to certain well fixed proceedings. If you get that far with a case you should not give him absolute control for a moment.

MR. DONWORTH: I understand under the existing law -- all these courts hold terms in our district for six months -- anything the court does may be undone by the judge until the term adjourns sine die, of his own motion or any way.

MR. MITCHELL: What Judge Olney has in mind, and what the Reporter is trying to deal with here, is that the court has jurisdiction to entertain proceedings to that end during that time, and Judge Olney probably makes the point that as the rule is worded it might allow him to make any change in the proceeding without notice or without any legal grounds for doing it. Is that not the point?

MR. OLNEY: Exactly. If it once gets to judgment, the judge has no authority over it unless the appeal is taken or unless it is set aside or modified pursuant to very definite proceedings and for definite grounds.

MR. DOBIE: I did not understand that the Reporter here -- I may be wrong -- intended to extend the power of the judge, or the nature of it. I think he was making just a time provision and substituting for the old term stuff this provision as to the time in which an appeal may be taken. Is that correct?

MR. CLARK: That is what I had in mind.

MR. MITCHELL: Why don't you say that he shall have jurisdiction to entertain proceedings for that purpose during that time? Would that not meet your objection?

MR. CLARK: I suppose it might. I had supposed the power was pretty broad. The trial courts may amend, modify, or set aside a judgment during the term in which it is entered. This power is inherent and settled beyond controversy.

MR. MITCHELL: That means on cause shown.

MR. DOBIE: Yes, according to the accepted principles of law he may entertain a bill of review after the term is over.

MR. MITCHELL: Judge Olney's point is that he might do it on his own motion.

MR. SUNDERLAND: Can not the court on its own motion set it aside?

MR. DOBIE: I think the old books say it is in the breast of the court up to that time, and indeterminate up to that time.

MR. MITCHELL: You mean, he can change his mind without any hearing or notice or cause except that he has changed his

mind, and affect the judgment?

MR. DOBIE: I think he has the power to do that.

MR. MITCHELL: I always thought, although he had the power to do it during the term, he could only do it on notice and for some good reasons.

MR. DONWORTH: If he acted arbitrarily he would be impeached, but I do think the theory is that nothing becomes permanent until the end of the term, absolutely final.

MR. SUNDERLAND: It would seem that the way to handle this, since we can not lay down this general principle, would be simply to provide that the powers which have heretofore been exercised during the term may be exercised for 30 days after the judgment is entered or something of that kind.

MR. CLARK: Mr. Hammond calls my attention to Judge Campbell's suggestion from New York. He wants to have a rule that the term shall be extended for three months after the entry of judgment in every case, the term for that case. Of course, the general idea is all right, but it does seem like an awful hocus pocus to do it that way.

MR. MITCHELL: That is perpetuating the term idea.

MR. WICKERSHAM: This is the point: The thing which should be done within the ten days or the end of the term is the application to the court, but when it comes to the actual definite action to be taken, that being under the control of the court wholly, the suitor is to be penalized for the failure of the

court promptly to act.

MR. DONWORTH: It does go that far, but I think the point under discussion goes even further than that. As I understand it, if the judge renders a judgment on the last day of a term or, we will say, a week before the last day of the term, and the plaintiff files some motion to correct, unless the judge makes an order continuing that motion to correct into the next term, his right to correct the judgment has ceased on the adjournment day.

MR. WICKERSHAM: That is the application of the statute.

MR. DONWORTH: It is implied from the application of the statute? by which

MR. WICKERSHAM: Yes.

MR. DOBIE: That is common law too.

MR. CLARK: And, per contra, if it is at the beginning of the term, he has all the rest of the term.

MR. DONWORTH: He has six months if he acts on the first day of the term, and if he acts on the last day he has one day. So, there is something in Judge Campbell's suggestion; something should be done along that line.

MR. DOBIE: I would rather discard the term absolutely and make some provision some other way. It is a hideous lot of technicalities.

MR. SUNDERLAND: The trouble is that the law has grown up on the basis of the term and if you want to know what power the

court has got it is discussed with respect to the term.

MR. OLNEY: This term business has been one of the worst traps of the profession and it ought to be wiped out. The profession will bless you for doing it. You will have no opposition on that score.

MR. CLARK: I think it might be well to put a provision somewhere in the rule, if necessary, to say that the time limit stated in these rules shall govern without respect to any adjourment of court. If we adopt Judge Campbell's suggestion, I take it that if you act at the beginning of a term you would have six months, and at the end you would have three months.

MR. CHERRY: Six plus three; you would have nine.

MR. CLARK: I guess you would, the way he has worded it. I thought he meant you only had to have three months.

MR. WICKERSHAM: I think that is what he has in mind. He was not thinking of the other time. He is thinking of a case when some action is sought and the term is about to expire, and he says under those circumstances the term should be extended for 90 days from the date of entry of the final judgment or decree. That is to give the judge in a busy court a chance to get around to it and dispose of it.

MR. CLARK: Why can we not provide in terms of days or months and forget the terms?

MR. WICKERSHAM: We should, unless there is something in the statutes that interferes.

MR. DONWORTH: The statute is just stook full of terms. It says, "term of courts".

MR. TOLMAN: In the procedure you can set it aside.

MR. WICKERSHAM: I am not so sure of that.

MR. DONWORTH: You will find the statute is just chucked full of terms, terms, terms.

MR. CLARK: I know that is true, but I still do not think that limits us on this point.

MR. DONWORTH: The State of Washington Bar Association puts in the same recommendation as Judge Campbell, as Mr. Hammond shows me. They say that for this purpose, the making of a motion for a new trial, the term of court shall be extend-

29 ed for three months, after verdict or decision.

MR. MITCHELL: Are we agreed on the general proposition that the time within which the court may delay that the decision or judgment is to be fixed without relation to the term or continuations of the term, but we will adopt the principle of fixing a time without regard to the end of the term within which such action may be entertained?

MR. DONWORTH: But a definite time.

MR. MITCHELL: Yes, a definite time. Are we agreed to that?

MR. OLNEY: Within which the action may be undertaken but without attempting to penalize the suitors for the failure of the court to complete its action.

MR. CLARK: Do you want to go as far as Judge Olney says they do in California?

MR. OLNEY: He is objecting to that. That is the point of his objection.

MR. DONWORTH: Who is objecting?

MR. OLNEY: General Wickersham. In California you have to move for a new trial within ten days. Now, it resulted out there in a great number of cases in which the judge simply sat on a motion for a new trial without doing something definite, with the result that they finally adopted the statute not so very long ago which is to the effect that unless he decides it within a certain length of time, my recollection is that it is 30 days, the motion is deemed denied. That is pretty drastic and I am not necessarily advocating that, but I am simply calling attention to an evil that resulted from permitting the court to take the motion for a new trial under adivsement indefinitely, which did result in difficulty.

MR. WICKERSHAM: I think that would be penalizing a suitor who had done all he could through the inaction of the judge, and I do not think that is fair treatment of the suitor.

MR. MITCHELL: He is not penalized, because he can turn around the next day and take an appeal from the judgment.

MR. WICKERSHAM: Instead of having the judicial mind apply to his petition and having the proper decision, he is committed to an appeal which may be costly, expensive, and so on.

MR. MITCHELL: That may be better for him than to have his rights left indefinite for years.

MR. WICKERSHAM: It might be, but I do not believe in punishing the suitor for the sins of the judge.

MR. DONWORTH: We hope the Federal judges are of a higher type.

MR. WICKERSHAM: They are, but they are very busy and they have an immense amount of things to do and they sometimes do not get around to these things.

MR. DOBIE: Why not put in here that the Federal judge shall act on such motions promptly and expeditiously.

MR. WICKERSHAM: Yes, you can say that.

MR. OLNEY: My only question is that if a judge can not grant a motion for a new trial or deny it within, say, four months, something is the matter with him.

MR. WICKERSHAM: I agree with you. Perhaps he ought to be removed by impeachment.

MR. OLNEY: About the only thing you can do under those circumstances is to say that the motion is denied.

MR. WICKERSHAM: You can not deem it granted very well.

MR. DONWORTH: Suppose he is under a physician's care, then there is something the matter with him.

MR. WICKERSHAM: I remember one occasion when we had a case that was argued and submitted to a New York judge and no decision came down and finally one day the Major said, "I wish you would go

up and see how Judge so and so is getting on with the motion in that case."

The man went and said, "If your Honor please, I was sent up to ask you how you are getting on with the case of so and so." The judge said "I am having a great deal of difficulty with that case, it has given me a great deal of trouble and I have spent a great deal of time, but I do hope to decide it within the next week."

MR. MITCHELL: I do not quite understand how these rules are intended to operate. They say that the court shall have absolute control over a final order or judgment during the time within which an appeal may be taken, or until an appeal has been taken, as thecase may be, and thereafter, that is, after the time has expired, it shall have such control -- there is no time limit here.

MR. CLARK: That means at any time. This is the case they speak of where it has been done 20 years after.

MR. MITCHELL: All right, it does not say. In the alternative it says they may correct any error apparent on the record or not as the circumstances of the case warrant, taking into consideration such matters as laches and rights acquired in good faith by other parties; that gives the court power to modify a judgment at any time in the future with respect to any error, whether apparent on the record or not. That would mean there is no finality to any judgment.

MR. DONWORTH: I am afraid it would.

30 MR. DOBIE: Would not "clerical" take care of that -- "of record or not"?

MR. OLNEY: There aught not to be any limit on the court's power to correct clerical errors.

MR. WICKERSHAM: That would give him all the powers which a court wouldhave on an appeal or review, would it not?

MR. CLARK: Maybe it is too broad. Instead of that you can take the language of the first sentence of the next alternative rule, that is, the clerical one. I was trying to work out with respect to clerical errors where it would not be too limited.

MR. SUNDERLAND: On the general power of control, if you are going away from the term, here is the way it is put in the Illinois Act: "The court may within 30 days after the entry of any judgment or decree set the same aside upon good cause shown by affidavit on such terms as may be just."

That is just the plain statement that within 30 days time it may set aside any decree or judgment made, upon good cause shown.

MR. DOBIE: Do you think that is long enough?

MR. DONWORTH: That limits the time within the term.

MR. SUNDERLAND: That gives a 30 day term after the judgment.

MR. DONWORTH: I rather favor Judge Campbell's idea. Of course, we have different ideas here. Of course, as to motions

for a new trial, I think they should be made within ten days, after the verdict in cases tried by jury, and in cases tried by the court without a jury perhaps the same ten days.

I am a little bothered about a petition for rehearing which usually applies more to a case tried without a jury than one tried with. As the Chairman has pointed out, it is well settled that a petition for rehearing delays the time for appeal. How much time should we allow for a petition for a rehearing? Under the present law there is no time limit within the term, as I understand it, to put in any petition for rehearing, and if you do it, it delays the time for appeal.

MR. DODGE: What is the difference between that and a motion for a new trial?

MR. DOBIE: The petition for a rehearing is really a new term.

MR. DODGE: This is a petition for a new trial in equity.

MR. DONWORTH: No, you want him to modify his decree. We have the evidence in and we do not want to retry it, but we do want to reargue it, and we want him to make these changes. I am not sure what we should say about a petition for a rehearing, but I am inclined to think the recommendation of Judge Campbell to the Washington Bar is good to meet a difficulty for which there is no perfect solution for the purpose indicated, entertaining motions and changes, and so forth, that whether the term has expired or not, if it would expire by duration, it is deemed to be extended for 90 days after the date of the judgment.

MR. DODGE: The time for appeal?

MR. DUNWORTH: That is fixed by law, of course.

MR. DODGE: Do you mean during the same time?

MR. DUNWORTH: I would not say duri ng the time for appeal because if you put in a petition for rehearing the time for appeal goes on. It is hard to express so much ground in one short thought, but my idea is that the suggestion of Judge Campbell may work out pretty good.

MR. MITCHELL: That is the whole idea of the term, and arose because they had to have something, they wanted to make the judgments final some time, and the ancient limit applied to situations where the judge would hold a term for two or three or four months and then the term would endand they would be out of business for a while. That is not the modern system. Our terms run along now and are usually extended by order until the next term commences. It is artificial although it has been a convenient way of limiting the jurisdiction of the court to disturb a judgment, but it does seem to me that we ought to get rid of the term idea because of the term meant a session held at different districts, and we ought to have a time limit as to jurisdiction to entertain proceedings of this kind based on a reasonable time after the thing has been done, and forget about terms. That is my theory.

MR. DOBIE: I agree with the Chairman. I will adopt any provision which appeals to the common sense of you gentlemen who

have had more practical experience than I, but I am opposed to any rule whatsoever of any kind in any way phrased in terms or terms. I despise it.

MR. DONWORTH: After all, the Chairman goes way back to the notion that the judge got some power from the King that expired. Is not that the way you go back into the court's jurisdiction?

MR. SUNDERLAND: It really goes back to the interference with the church.

MR. CHERRY: I do not think, Judge Donworth, we have to be worried about those things.

MR. DONWORTH: I agree with you, but we can not abolish terms.

MR. MITCHELL: Nobody suggests that.

MR. DOBIE: But we can phrase this and leave the other in as to making motions as to new trial and making motions as to rehearing, and the time in which a judge shall have the power to change the judgments, and so on. I think we can make a definite provision for that and the rule will apply only to that, and will leave the other stuff untouched.

MR. DONWORTH: Then you could add at the proper place that the extension of the term shall not limit the time set forth in these rules.

MR. DOBIE: I am glad to have that.

MR. WICKERSHAM: That is all right; that is good.

MR. DOBIE: What kind of time do you want to fix?

MR. OLNEY: The more general it can be made, the better.

MR. MITCHELL: This is one of the most important subjects we have up because the finality of judgment, and anything in the way of loose language in here which leaves the judgment apparently open, some indefinite grounds on which it may be opened, is a dangerous thing. All the statutes I have known anything about define very carefully the time within which a court may disturb a judgment for one reason or another. Ten days may be all right for a motion for a new trial, if it is on the record, but we have to think about newly discovered evidence. Some of the courts think that you ought to be allowed to bring in newly discovered evidence years afterwards. There is a problem there for us to think about.

Then, when you say the court may correct an error apparent on the record or not, there may be the question of excus-
31 able neglect and what is not. I know there are judgments that relate to real estate under the title to real estate, and the time within which they may be reopened is sometimes carefully guarded. I feel that this section as drawn here is so broad as to the nature of the errors that may be corrected and all that, that it throws the finality of the judgments into the air.

MR. CLARK: How about in the place of the end of the first paragraph, taking the clerical mistakes one over into it.

MR. WICKERSHAM: Doing what?

MR. CLARK: In the first place, beginning with "and thereafter shall have such control", and so on, you could say, "thereafter clerical mistakes and judgments or orders, or errors of omission, may be corrected by the court at any time--" I do not know whether you would put in "unless an appeal is pending". Judge Donworth raises the question as to whether you can do that when an appeal is pending.

MR. OLNEY: I think you can. My impression is that you can.

MR. WICKERSHAM: If the appeal is pending the record is out of the court and the court has lost all power over it unless it is sent back.

MR. CLARK: It still has the judgment before it.

MR. CHERRY: Suppose you leave that out for a moment and we get the rest of the idea.

MR. SUNDERLAND: After an appeal is taken the judgment is in the other court.

MR. MITCHELL: You ought not to have two courts dealing with the judgment simultaneously, so, as a practical matter, that is out.

MR. CLARK: Instead of the language which I was trying to make a little broader at the end of the first paragraph, you practically incorporate the language of Equity Rule 72. That is where I got the next line, you see. I am not sure but what you could go further than that and reach coram nobis. You

could bring up such things as infancy or disability not found on the face of the record, and the consideration of these errors would give the court a chance to do something.

MR. WICKERSHAM: Why couldn't we take Rule 72 and simply modify it by inserting, instead of "before the close of the term", the words "any time within 30 days", or whatever time it may be?

MR. CLARK: That is practically what I suggest in my alternative rule.

MR. DOBIE: If it is merely clerical, you do not want to limit it to 30 days.

MR. CLARK: If I put it in up above here it would not be limited.

MR. DOBIE: I believe that rule, including the words in brackets probably would be a good thing:

"Clerical mistakes in judgments or orders or errors arising from any accidental slip or omission, may be corrected by the court at any time, unless an appeal is pending, subject to the defense of laches upon motion and such notice, if any, as the court shall order."

MR. CLARK: Would you rather have that fitted in with my first statement about the control over the final order?

MR. DOBIE: I thought this was just a separate provision, applicable only to clerical errors.

MR. CLARK: I go on after that to the alternative rule.

MR. DOBIE: I think I would put the clerical in and then come to this other and make a provision in here as to the time.

MR. SUNDERLAND: Why does he not put in the provision as to clerical errors and then put in that the court may set aside, vacate, or modify any judgment or order within so many days after the entry thereof?

MR. OLNEY: Without any grounds shown?

MR. SUNDERLAND: Good cause.

MR. OLNEY: Those grounds are to be specified, good cause. Otherwise you are going to have the greatest uncertainty.

MR. SUNDERLAND: I do not think it is common to specify them.

MR. OLNEY: Indeed it is.

MR. SUNDERLAND: I think the court has general control and can set aside these orders or judgments on any ground that appears reasonable.

MR. DOBIE: I think it clearly could at common law, under the Brunston case in the Supreme Court. I do not object to that phrase, for a good cause according to the separate principles, but I think we ought to fix an absolute time. I am inclined to think that should be 90 days, but I will defer that to you gentlemen who have had more experience than I.

MR. CLARK: I missed this. What is this on?

MR. DOBIE: Just on clerical errors.

MR. CLARK: Only 90 days for them?

MR. DOBIE: No, leave it at any time.

MR. CLARK: I thought you only wanted 90 days.

MR. DOBIE: Not to clerical errors.

MR. CLARK: Clerical errors is any time?

MR. DOBIE: Now, as to the second general provision, control over the judgments, I should think that ought to be three months.

MR. CLARK: Was that not the one we were going to cover with ten days?

MR. DOBIE: No, that is ten days for a motion for a new trial or rehearing.

MR. DODGE: This is for action of the court on its own motion.

MR. DOBIE: Either its own motion or its own --

MR. CLARK: Is it not a fact that the judgments are now up in the air? You can still have the writ of error or bill of review?

MR. DOBIE: I want to stop the bill of review stuff.

MR. CLARK: Can you?

MR. DOBIE: I hope so.

MR. OLNEY: You can; it is stopped in California. For example, quite a while ago we represented a very large taxpayer in an irrigation district. Suit was brought against that district and judgment recovered against it. The taxpayer discovered that that judgment was collusive, it had just been ar-

ranged between the creditor and the district. Ordinarily you could have gotten at that only by a bill of review on the taxpayers of the district to set aside that judgment. If it were not set aside the directors of the district were under positive obligation to levy a tax and collect and pay it, but by way of motion in accordance with the provisions of the code, we were able to take that matter right up with the court that rendered the judgment and indicate how he had been deceived and imposed upon, and have the judgment set aside. It was summary, quick, and efficient, and there was no necessity for a bill of review or anything of that kind.

MR. MITCHELL: Within what time was that done after the

31 judgment?

MR. OLNEY: My recollection is that the time limit is six months, and we discovered it, I should say, within two or three weeks or a month after the judgment was rendered.

MR. DOBIE: If you gentlemen prefer it, I am perfectly willing to extend it to six months.

MR. MITCHELL: What happens with newly discovered evidence?

MR. OLNEY: That is a ground for a new trial.

MR. MITCHELL: Is that six months?

MR. DOBIE: I would stop with six months.

MR. SUNDERLAND: That is very short.

MR. DOBIE: Any time you say, but I should fix a limit.

MR. OLNEY: The grounds for a new trial are very different. These are grounds for excusable neglect and things of the sort. On grounds of that sort the court should be permitted upon motion made within a reasonable time, six months or some such time, to change its order. But the point I am making is that if you simply say for good cause shown, without any definition of it, without anything more than that, you are going to have the court setting aside the judgment just because he changed his mind. That is good cause, but it is not good cause to the rest of the world.

MR. DONWORTH: Mr. Chairman, I will be obliged to leave when we adjourn here at five o'clock, but I would like permission to express some views. I take this will go on tomorrow. I would like to express some view on this and some other rules, with your permission and then, as I said before, I have the greatest confidence in the discretion and judgment of the Committee.

First, as to this matter, I think we are borrowing an awful lot of trouble. If we undertake to prescribe a rule for the rights of the petioner coram nobis, which is a very important branch of jurisprudence, and correct the evils in this whole thing, we are just getting into a realm where there should be a new commission appointed.

Our problem is very simple. The old theory of the courts was the mischief and the remedy. What is the mischief? Let

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us confine the remedy to the mischief.

The mischief is only one thing, and that is that by reason of the expiration of the terms the power of the courts is limited, it expires. The courts have decided time and time again that even if we file a motion for a new trial on the last day of the term, unless the court in some way entertains that motion, continues it, or shows that the court is cognizant of it, the motion dies, on the last day of the term.

I will not say that is true of a verdict without a judgment because that is unfinished business, but if the court enters an equity decree on the last day of the term,or the day before the last, and you file a motion for a rehearing or a new trial, and unless the court shows in some way that it is cognizant of that and continues it into the new term, it dies.

That is the mischief; so, every lawyer who has lost a law suit anywhere near the end of the term gets in and gets an order that shows that the term is extended as to the case for a period of so and so.

I think that is the only mischief we have to deal with; it is a mischief that ought to be remedied. So, my suggestion is to leave the general rules upon judgments and all that to Congress, and for us to put in some provision like this, either that the powers of the court which may now be exercised in term time shall be exercised within so many days after the judgment--that I do not favor; I favor this: That the present powers that the court may exercise with respect to judgments continue

as they are during the term and for a definite time. That definite time may be, say, not exceeding three months from the entry of the judgment or order concerned. When you have done that I think you have corrected the whole thing as far as our present jurisdiction is concerned.

Now, there is another matter that I have given quite a bit of thought to and I was hoping we would reach it. That is a matter that I briefly discussed with Dean Clark last night, and it concerns the preparation of a bill of exceptions and the preservation of evidence for the purposes of review. I have not studied Dean Clark's proposed rules with the care that I would like, but very laudably he is endeavoring to get rid of a bill of exceptions and the settling of them by the judge. I am satisfied at the present time that there is no way of getting rid of the substance that is embodied in the bill of exceptions or the substance of what is involved in having the judge certify the evidence in connection with the case. You can change the name and prescribe different methods -- for instance, in the State of Washington where we have had always even from territorial days a combined law and equity procedure, the thing that goes up each time, aside from the certified copies of pleadings, is called a statement of facts, but you have to go through and formulate it similar to the bill of exceptions.

Now, I understand that these rules try to transfer the

duty now divolved upon the judge of settling the bill of exceptions in part to the lawyers and in part to the clerk. I do not think that can be done. It is true that the lawyers will watch each other, one will press for a statement and the other will watch him, but the clerk can not settle that; the clerk is a clerical man and the lawyers are not going to be satisfied with his settlement of the difficulty. In a large proportion of cases lawyers will differ as to what happened and what is correct. The defeated party has to file something in court, and the opposing has to have an opportunity to study it and it has to be studied by somebody. You can change the name to statement of objections or statement of facts, but I do not think you can get rid of the proposition.

The same way with the evidence in an equity case. At present the defeated party must prepare the statement in narrative form and he files it, and the other party has a right to propose objections, and they can oftentimes agree upon what it should be. But if they do not agree finally it goes to the judge to settle what took place. I do not see any way to avoid that.

32 The stenographer is a very human element as we have all found in the court. We find many errors, and to treat the stenographer's report as the record in the case which goes in automatically and goes up I think would be a very unsatisfactory solution of the problem.

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So, while I sympathize with the difficulties and believe the matter should be simplified, I hope we will not depart from some established practice and substitute something else that tries to set up a separate judge. I do not think you will ever find a satisfactory method of getting a record from the lower court to the higher court -- I mean, as to matters not consisting of the pleadings and things filed in the court; I mean as to what has happened in oral statement to the court and evidence, and so forth -- I do not think you will ever find any way of doing that except by some kind of a certificate signed by the judge after both parties have had an opportunity to consider it.

Now, if I am wrong about that and if there is some way you can get rid of that and still get what happens in the lower court properly before the upper court in a reliable way, I would be very glad to learn of it.

In reference to Rule 37 that I proposed here -- some supplementary rules that I put in for the consideration of the Reporter and they were referred to him -- Rule 37-B:

"After a party has appeared in an action, he shall be entitled to written notice of the time and place of the hearing of any motion or any application not grantable as of course, which notice shall be served on his attorney, if he appears by attorney, otherwise on the party. Such notice shall be served three days before the hearing unless a different time is fixed

by these rules or by order of the court, which order for cause shown may be made provisionally on ex parte application."

That is, a man who wants an order in a hurry not entirely without notice can get an ex parte order shortening the time which will stand until the court on the application of the other party may change it.

Now, I propose to add this:

"This rule is subject to Rule 110 relating to temporary restraining orders and preliminary injunctions."

The notice or the ability to go ahead without notice in those matters is so thoroughly regulated by Rule 110, and, to a large extent also, by statute, that I think it should be made plain that on this three day notice we are not in any way getting into the subject of restraining orders which may be issued ex-parte, and the temporary injunctions which may be issued, I think, in many cases, on shorter notice than this.

That is all I have to say.

MR. CLARK: Have you two or three minutes?

MR. DONWORTH: All the time you want.

MR. CLARK: I feel we have not gotten very far from Judge Donworth's ideas. On Rule 106, where the matter particularly comes up, subdivision (c), the last one, we have tried to make it that the clerk in the first instance settle a record subject to appeal to the judge. If it is thought that that should not be done and you should go to the judge direct, there will not be

any great change. I thought a good deal of this fighting was a kind of a preliminary matter that the clerk might help out on,and perhaps changing subdivision C to make it the judge in the first instance instead of on appeal from the clerk, and perhaps putting in or adding there more definitely than I have done that the judge shall sign a certificate at the end -- with that I should think I almost said what you had in mind.

MR. DONWORTH: That may be. I said that I have not given it the careful consideration that I would like to.

MR. CLARK: That is all.

MR. MITCHELL: I think you made a very clear statement of your views. I understood them, and if I did I think the rest of them did.

MR. DONWORTH: Thank you. I am not in a hurry until five o'clock. I thought we were nearer to it than we are. I suggest you go right ahead.

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MR. DODGE: On Rule 100, as I gather it, we have three different matters to deal with; correction of errors, which may be made any time; filing of motions for new trial or re-hearing, which I think we agree should be done in ten days; and the form of proceeding suggested by Judge Oleny for the correction of errors in judgments resulting from fruad, collusion, or something of the sort, which he suggested should be within the power of the court for six months, but which, I take it, should not prevent the enforcement of the judgment. I do

not think the judgment ought to be held up by that possibility, which must be rare.

MR. OLNEY: Oh, no.

MR. DODGE: Are we not agreed on those three principles, and is that not the substance of what you want to cover by this rule?

MR. CLARK: I think if you are agreed on that I have got the idea so that I can work it out. The only thing I am not sure of is that time of six months. On the other two I think you are agreed and I have got that.

MR. DODGE: If the enforcement of the judgment is not held up, I do not see why there should not be at least six months and perhaps more to correct a judgment for fraud. I do not know just what the effect would be if the judgment had been enforced or honored, but there should be power to deal with it.

MR. SUNDERLAND: Is there not something to be said in having the time for the appeal and for this modification of judgment the same?

MR. DODGE: I should hate to have the time for appeal go beyond the present three months, which I think is too long. If you get a judgment for a plaintiff and there isn't any ground for appeal it is a nuisance to be held up three months. The taking of the appeal is such a simple thing that I should think three months is all that should be allowed for it. However, this other matter, correcting the judgment, that stands on a

different basis.

MR. OLNEY: Let me say in that connection that we will always out in California take a judgment as final if no appeal has been taken, regardless of the fact that the time within which to set that aside on account of fraud or mistake or something of that kind has not passed. Its finality is always taken as the time when the appeal expires.

MR. DODGE: And execution will issue?

MR. OLNEY: Execution will issue unless the man has taken a stay.

MR. CLARK: It protects the innocent party.

MR. DODGE: It protects the innocent party.

MR. CLARK: That is usually by the effect of some special provision of the law that it shall not affect the innocent parties acting under it.

MR. OLNEY: I think it is. But if you should put in a provision that allows the judge any time within six months to set it aside for good cause shown, the finality of it is gone and we would have to wait the six months.

MR. DODGE: I thought we had eliminated that possibility. I had not heard anybody say that the general power without limitation should be indefinitely in existence.

MR. SUNDERLAND: I think that is a very general power.

MR. CLARK: I am a little worried to know just how to express this, that is, this third alternative. I take it that it

is fraud and collusion. How about newly discovered evidence?

MR. OLNEY: Can we get a copy of the Code of Civil Procedure of California? There is a section which just covers it. It is practically the language which is used in this statement here: "The court may at any stage of the proceeding, when the ends of justice shall require and make it just, relieve the party from any fraud or misrepresentation on the part of any other party by accident, surprise, misfortune, or excusable neglect."

If you leave out "misfortune, accident, surprise, or excusable neglect", that practically covers it.

MR. DOBIE: What is that from, Judge?

MR. OLNEY: The third edition of Rule 37, as prepared by Judge Donworth.

MR. DODGE: On the question of newly discovered evidence you have a very different question in law than in equity. An action at law based on that ground must be filed promptly. In equity you have interminable possibility of bringing a bill of review. There is no time limit on that.

MR. SUNDERLAND: There is no time limit in law, is there?

MR. DODGE: I think there is.

34 MR. SUNDERLAND: How could you be obliged to put in newly discovered evidence?

MR. DODGE: You have to do it or you have lost your right.

MR. SUNDERLAND: Where do you look? If you knew, you

would have found it before.

MR. DODGE: The finality of judgments at law must be determined quickly, and I do not think in ordinary practice you can file a petition for a motion for a new trial on the ground of newly discovered evidence except for a limited period.

MR. SUNDERLAND: I think you can.

MR. MITCHELL: Do not the statutes in code States which regulate motions for new trial speicify the time within which a motion on the basis of newly discovered evidence may be made?

MR. SUNDERLAND: It is not the same limit at all.

MR. MITCHELL: I do not say that it is the same limit, but they have some limit?

MR. CLARK: It is done in my State, and it is three years.

MR. MITCHELL: A motion for a new trial ought to be made at once.

MR. CLARK: You have to do it by a new suit.

MR. SUNDERLAND: It should be either without limit or one, two, or three years limit.

MR. MITCHELL: We ought to say one or the other, that is my point, and it ought not to be necessarily the ten day limit that we fixed.

MR. SUNDERLAND: I do not think that would do at all.

MR. WICKERSHAM: Here is the provision in the New York

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practice: "The entry, collection, or other enforcement of judgment does not prejudice a motion for new trial where the new trial is granted --".

MR. DODGE: What does that say about newly discovered evidence?

MR. WICKERSHAM: It does not state it. I thought it did.

MR. CLARK: It is two years in Vermont. It is six months in North Dakota. I have not a complete statement on newly discovered evidence.

MR. DODGE: I suppose it does not make so much difference what the time limit is, so long as it does not affect the entry of judgment and enforcement.

MR. CLARK: In California do you have additional evidence on appeal? Don't you have a provision for additional evidence on appeal?

MR. OLNEY: Not for newly discovered evidence.

MR. CLARK: I mean, just in general.

MR. OLNEY: What has happened there, and it is a very recent amendment, and I think probably handled by the court and it might be a very helpful one -- if the case comes up to the upper court and there is some omission in the evidence to prove some ultimate fact -- for example, take a case in the Federal court which just occurs to me; suppose there was no proof of citizenship and the citizenship had been denied and the jurisdiction depended upon the citizenship; evidence can be taken

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in the upper court to sustain the judgment, so to speak, and supply that omission. It is fairly limited and I may not have stated all the cases in which that can be done. I will say this about it, however; it was designed to permit of the practice in the English courts on appeal where they also at times, as I understand it, will consider some further evidence than that introduced in the lower court.

MR. CLARK: It also exists in some other States. Rhode Island has it.

MR. MITCHELL: Here is an interesting case. I do not know whether it has any special application to patent cases or not. It has to do with the matter of newly discovered evidence on appeal. It is a case in the United States Supreme Court, 261 U. S. 399.

MR. SUNDERLAND: In California I understand that while a case is pending on appeal an application can be made for a new trial on the ground of newly discovered evidence and it can proceed during the pendency of the appeal, the courts holding that it is an outside proceeding. I have read California cases to that effect and it may proceed parallel to the appeal.

MR. OLNEY: Let us get the law straightened out. You can not move for a new trial or to have the judgment set aside merely on the ground of newly discovered evidence except through the machinery of a motion for a new trial, but you can if you have evidence that shows that the judgment was fraudulently

obtained by what they call extrinsic fraud, fraud that goes to the very recovery of the judgment itself. With evidence of that kind you can do it. That is an entirely different proceeding.

MR. SUNDERLAND: That is not the thing I have in mind. I am quite confident there is a California practice on that, and in other States, on the ground that this is a bill of review, it is a separate and independent proceeding where you are basing it on newly discovered evidence, something that could not be expected to be produced at the trial, and raising a point outside.

MR. OLNEY: I am quite sure you have misinterpreted it. I do not have the code here.

MR. SUNDERLAND: I think we have to distinguish between things that develop in the course of a trial and new trials on newly discovered evidence. Whatever difference it will make are matters of opinion, but I think we have to make that distinction.

MR. DOBIE: In the old procedure you had to get leave of the court to do that on newly discovered evidence.

MR. SUNDERLAND: Of course, you have to show diligence.

MR. DOBIE: There are rules in some districts shortening or extending the times for some motions, and there is a mass of material which is pertinent to this issue. Has this not got to go back to the reporter for some further consideration in the light of this discussion?

MR. MITCHELL: I think so. I think on this matter of the motion for new trial on the ground of newly discovered evidence I could not pass on it intelligently. I do not know now whether under the rules of the United States courts the power ends with the term or not.

MR. DODGE: Mr. Dobie says it does in his book at page 766.

MR. DOBIE: I would not be sure as to judgment. I am quite sure it does not as to decree. A bill of review can be filed at any time. There is no limit on it whatever. Is that your idea on it?

MR. SUNDERLAND: I could not say whether there is that distinction between judgment and decree.

MR. DODGE: You say in your book it can be filed at any time, and that the court is reluctant to grant it.

MR. DOBIE: I think on newly discovered evidence you have to get leave of the court, and subject to that I think it is filable at any time.

MR. MITCHELL: Did we not agree that we were not going to make any distinction between them with respect to the time for considering?

MR. DOBIE: I think we did.

MR. DODGE: We ought to make some reference to bills of review, which are not referred to here at all, and which will continue to exist.

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MR. DOBIE: Yes, and we ought to make some reference here with respect to our old friend, coram nobis. I would like to get rid of that.

MR. DODGE: We drew a bill of review in my office which I think must have been ten years after the case.

MR. MITCHELL: Under the existing rule here, if a motion of that kind is made and entertained, can the court act beyond the term unless it extends the term by order?

MR. DOBIE: I think that if the motion is made after term and the court takes cognizance of it, then it can act indefinitely.

MR. MITCHELL: Even though he makes no order extending it?

MR. DOBIE: I think so.

MR. MITCHELL: I should think that is logical.

MR. DOBIE: In other words, if you act du ring the term and get it started, that is all right.

MR. DODGE: I thought we were not going to use the word term.

MR. MITCHELL: I am talking of the present rule.

MR. DOBIE: That is my understanding, that if you act during the term you are all right.

MR. MITCHELL: I think we ought to pass up Rule 100, now, with this discussion. I feel we are somewhat in the air on it, and on many of the things we can not reach an intelligent decision.

MR. DONWORTH: I would like to ask Dean Clark if there is not a principle of equity whereby, independently of a motion for a new trial and finality of judgment and everything else, a bill in equity may be brought to get a new trial in an action at law previously disposed of, on the ground of newly discovered evidence?

MR. CLARK: As a matter of fact, I was a good deal worried about this in that there was no rule to limit that. Of course we have been more conservative than most of you, but I have been ready at times to go quite a ways --

MR. DONWORTH: I understand it is an equitable proposition that where a party by misfortune, and so forth, can bring a strong case in equity, equity will give them a relief against a judgment at law.

MR. DOBIE: And during enforcement of the judgment. There is no question about it. Wells Fargo against Taylor.

MR. DONWORTH: And give him a new trial in equity of the issue determined at law?

MR. DOBIE: I do not think the court of equity will ever order a new trial in the law court, but I think the court in equity has the clear power, and it is frequently exercised, to enjoin the plaintiff from interfering with the inequitable judgment, and that has been held, particularly in the Wells Fargo case.

MR. DONWORTH: We do not have to go into those things in

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too much detail because they are affected by the general principles of equity. The particular concern we have is about the limitation.

MR. MITCHELL: We have to make some provision for motions for a new trial and matters of that kind. It is an important part of practice for the lower court.

MR. CLARK: Do we necessarily have to cover the third matter. I think the first two we ought to cover.

MR. MITCHELL: What is the third one?

MR. CLARK: The third one as it was lined up was the correction of judgments by fraud, collusion, or whatever we made it.

MR. OLNEY: I do not think you have to do it. In other words, this motion that is used is very largely a supplement or a substitution for bills that would lie in equity under the former practice, but it is a most convenient way and a simple thing and worthwhile. I will just read this. I have the section he re now:

"The court may upon such terms as may be just relieve a party or his legal representative from judgment, order, or other proceeding taken against him through fraud, mistake, inadvertance, misfortune, or excusable neglect, provided the application waw made within a reasonable time, and in no case more than six months after such proceeding was taken."

MR. MITCHELL: What is that you are reading from?

MR. OLNEY: The civil code of California, and this is one under which a great many cases have arisen.

35 MR. CLARK: What is the number of it?

MR. OLNEY: 473.

MR. WICKERSHAM: Is that a rule or a section of the code?

MR. OLNEY: A section of the code.

MR. WICKERSHAM: 473?

MR. OLNEY: Section 473 of the California Code of Civil Practice.

MR. MITCHELL: That is by its terms limited to the action in which judgment was rendered?

MR. OLNEY: Oh, yes.

MR. MITCHELL: So it does not touch the power of another court in another suit for equitable principles to take independent action?

MR. OLNEY: No, it does not refer to that at all.

MR. MITCHELL: It does not deny it or grant it, does it? It leaves it open?

MR. OLNEY: It does not touch it. In fact, I think if you leave out the reference to the matter of clerical mistakes and things of that sort, it goes without saying that it is within the power of the court.

MR. DODGE: As to the circumstances under which a court will restrain the enforcement of a judgment in equity, the cases are cited in Dobie on Federal Procedure, page 679. Have you

got a reference to that? That is the WellsFargo case.

MR. DOBIE: That is a leading case.

MR. DODGE: That is a comparatively recent opinion by Mr. Justice VanDevanter.

MR. WICKERSHAM: What is the case?

MR. DODGE: An opinion by Mr. Justice VanDevanter to the effect that the statute preventing the Federal courts from issuing injunctions against the enforcement of a State court judgment,does not prevent the Federal court from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a State court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.

MR. DOBIE: I can tell you what that was, Mr. Dodge. It was a case of an express messenger who had a contract with the express company, and the express company had a contract with the railroad company by which the express company was to release the railroad company of any liability. The express messenger had also signed a complete release for any liability, due to negligence or not, for any injuries received while on the railroad company's train. The judgment went against him, and in spite of the express company trying to do everything they could, the court would not let him in. A bill in equity was filed against Taylor restraining him from enforcing the judgment.

MR. DODGE: Have you got to deal with anything more than the correction of clerical errors and the motion for a new trial?

MR. DOBIE: I do not think we need to go into that phase of it. That is independent bill in equity on the outside to restain a plaintiff. Maybe, as the Chairman says, we better go on.

MR. MITCHELL: I think we have done asmuch as we can with that section. It has raised a lot of questions and we have not settled them all.

MR. DOBIE: I suppose in any of these cases the Reporter will be glad to hear from us if we have anything to say beyond what we have been able to say here?

MR. CLARK: I would be delighted.

MR. MITCHELL: Rule 101.

RULE 101

DECLARATORY JUDGMENTS

MR. CLARK: On that I have done little more than call attention to the recent statute. There have been some suggestions that the procedure could be pointed out more than is done in either statute or rule. I was not sure whether we should deal with it or not. I said here that Mr. Kellogg was willing to supply an annotation suggesting how the procedure would operate. I thought it desirable to bring that statement into the rules but I did not know whether we wanted to define just

how it worked further than I have done here.

MR. DODGE: I suggest it is not advisable to re-enact a part of the statute, which you do by the first four lines, but simply say that in proceedings authorized by the statute the procedure shall be so and so. Is that not better?

MR. CLARK: I think so.

MR. MITCHELL: Yes, I do not see any advantage in repeating the words of the statute.

MR. SUNDERLAND: There should be no difference between the procedure for a declaratory judgment and any other kind of judgment.

MR. DODGE: Just say that, then.

MR. SUNDERLAND: Why not just say: "The same procedure should be employed where the declaratory judgment is sought as in other cases."

MR. CHERRY: There might be something on that in some of the other practice.

MR. CLARK: I went on to say that Professor Borchard has given a memorandum which points out that that is done in several of the States provisions for declaratory judgments for prompt trials.

MR. SUNDERLAND: I think that is very good.

MR. DODGE: Yes, I should think so, too.

MR. MITCHELL: It is interesting to note that in paragraph 3 of that statute the courts recognize the fact that in cases

for trial by jury, such issues may be submitted to the jury with proper instructions by the court whether a general verdict be required or not.

MR. OLNEY: May I ask to be excused? I will be back this evening.

MR. MITCHELL: Very well. On Rule 101 we simply say that the proceedings authorized by that procedure to obtain such judgment should be in accordance with these rules, and we eliminate the sentence beginning "The court may give judgment" down to the words "be reviewable as such".

MR. DOBIE: What is that elimination again? Beginning with --

MR. MITCHELL: We will eliminate this clause, "The court
36 may give judgment declaring rights or other legal relations", and so on, down to the words "and be reviewable as such", as being merely a repetition of the words of the statute.

MR. CLARK: Do you want to put anything in about advancing on the calendar?

MR. MITCHELL: Do you mean in 101?

MR. DODGE: Do you say that is a common State practice?

MR. CHERRY: Yes. Would this not be a place to provide for local rules in particular districts? The calendar matter is the place to provide for the district rules.

MR. CLARK: Would you say that the rules of district courts may provide for advancement on the calendar or shall provide?

MR. SUNDERLAND: I would say they should be advanced as far as practicable to local rules with regard to calendars.

MR. CLARK: That does not help me.

MR. SUNDERLAND: It means they will do the best they can under the local rules, and they will give the preference they can.

MR. CLARK: Then it ought to be that they shall be advanced so far as they can be.

MR. SUNDERLAND: So far as possible under local rules respect the calendars.

MR. WICKERSHAM: Will you accomplish anything like that? You have some statutes that give the right of preference; in some States they say that certain cases shall have the right of preference on the calendar over other controversies of a certain kind. I have not got the exact language of the statute. Is it not a good thing to put that in? You say the court may make rules; some will and some will not; but if you provide for priority and then leave the details to the district courts you have it covered.

MR. SUNDERLAND: I think that is true.

MR. DODGE: After these rules are adopted, as a matter of fact in most districts there will not be any rules, do you think so?

MR. WICKERSHAM: They will have their local rules.

MR. DODGE: Have they many local rules in equity in this

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country?

MR. WICKERSHAM: Yes, we provide in a number of cases for local rules.

MR. DODGE: Are there now many local rules in equity?

MR. WICKERSHAM: Yes.

MR. DODGE: In equity?

MR. WICKERSHAM: Yes. Every district court has a book of rules. We have in New York a book of rules for the district court, and they have over in the Eastern District a book of rules. They have in Pennsylvania.

MR. DODGE: Of course those are law rules, but have you got equity rules? I do not think we have in Massachusetts.

MR. WICKERSHAM: They have local rules regarding the dispatch of business in those courts, quite a number of them. Some of them will be superseded by these rules and some will not, and I think in a good many cases as we have gone along here we have said that the matter ought to be dealt with by the district court and we have left that. Then there are a number of cases where we have not interfered with them at all.

MR. CLARK: What is the final judgment about the calendar?

MR. WICKERSHAM: I move that some expression be inserted in that rule to indicate that proceedings for declaratory judgments shall have preference on the calendar. I do not mean preference over anything else, but preference over the ordinary cases.

MR. MITCHELL: Would that be the suggestion, then, that

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we pass over 101 and go to 102?

RULE 102

JUDGMENT FOR DEFICIENCY IN FORECLOSURES, ETC.

MR. CLARK: 102 is the old equity rule. I do not think it is very necessary. I put it in more because it had been the equity practice.

MR. WICKERSHAM: Well, we have a whole lot of statutes now in the different States, and the statutes of the United States that interfere with the entry of the deficiency judgment and regulating the cases when you can enter it. You have to find that the price bid for the property was a fair price, and so on, and so on; you know what all those provisions are. I think that a general provision of this kind will have to contain some reference, in the absence of some statutory limitation on it -- in almost every State they have enacted some kind of a law providing against the entry of a deficiency judgment for mortgage foreclosure unless and to the extent that it shall be found that the property was sold for a fair price, and so on, and so on.

MR. DOBIE: I think there has been a lot of that in Florida.

MR. WICKERSHAM: There has been a lot of it all over the country.

MR. MITCHELL: Is the effect of this rule to supersede the existing statute granting a sort of moratorium and providing

that the deficiency judgment be rendered except as the court finds there was a difference between the debt and the actual value of the property bought in by the mortgagee?

MR. DOBIE: In Virginia, if you mean by foreclosure of the mortgage, it is much deader than the dodo. We do not have the mortgage; we have the deed of trust, which permits the trustee to sell without any action at all. I have not heard of the mortgage in Virginia for years and years. I understand that Florida will not permit the deed of trust, and the suit there is an equity suit for which they have a distinct proceedure in equity. I understand -- this is purely from hearsay and I am sorry Mr. Loftin has gone -- they have had a terrific amount of trouble there and the courts have been unwilling to give the deficiency judgment in some case where the man got a boom price for the land, collected half of the purchase price, which was much more than the land was really worth, and when the land was sold under the foreclosure proceeding it was terribly difficult to get any of the deficiency judgments.

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MR. DODGE: Is there not a lot of substantive law mixed up in this rule where it is a provision that one party shall pay over money to another? What right have we got to make a rule to say that the trustees should pay money to the beneficiary?

MR. DONWORTH: Is there not an equity rule on this subject?

MR. CHERRY: This is it.

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MR. DOBIE: I think Mr. Dodge's point is right as to whether we are trying to lay down rules on substantive law.

MR. DODGE: Look at that last sentence.

MR. CHERRY: But no more than the court has said.

MR. CLARK: This rule is substantially a reenactment of Rule 92 with the addition of the words "enforcement of other liens".

MR. WICKERSHAM: If you put in that rule you will have to qualify it by reference to any statute of the State, any applicable statute, which affects the deficiency, and say that unless the statute of the State where the property is situated shall provide differently, and so on, and so on.

MR. CLARK: The rule was promulgated in April, 1864, and it was not changed. It was intended to obviate the necessity for a separate action for deficiency judgment; Omaha Hotel Company, 170 U. S. 378. It seemed to me it was procedure well covered by all our provisions.

MR. DODGE: I move that it be stricken out.

MR. DONWORTH: In the State of Washington we have one of the recent statutes which the Chairman referred to. That was one which provides when property is sold the plaintiff must bid it up under certain circumstances to a sum that the court finds is just. I forget the language, but it is something like that. Our State court has held it unconstitutional as to existing mortgages and, so, reference to those State statutes

might be well even though the statute is not constitutional.

MR. WICKERSHAM: I think we better strike the rule out entirely.

MR. DODGE: It does not seem to me to be a matter of procedure, really.

MR. WICKERSHAM: If a deficiency judgment is proper, as a matter of substantive law, you can get it without this special rule.

MR. MITCHELL: Judge Stone has said that no jurisdiction existed in a foreclosure case to render a deficiency judgment prior to the rule, and, in view of that statement, we ought to be careful about striking it out unless the Reporter is satisfied.

MR. WICKERSHAM: He said no deficiency judgment can be entered unless in conformity with the rule?

MR. MITCHELL: He said there was no jurisdiction.

MR. CLARK: That was under the divided practice. Before the rule was adopted in 1860 you could not enter a deficiency judgment. You had to go to law.

MR. MITCHELL: I see; it was because it was a law matter?

MR. CLARK: Yes.

MR. MITCHELL: Then I concur in the idea of striking it out.

MR. DOBIE: I would like to read one sentence from the district court rules. This rule deals solely with remedial

substantive rights. It makes no attempt to confer upon the plaintiff in a foreclosure suit substantive rights not already possessed by him. It merely provides a new remedy for substantive rights. It merely provides that you can get the deficiency judgment in the same proceeding.

MR. MITCHELL: Now we have them united and we are not in that difficulty, so we can strike the rule out.

MR. DOBIE: I think that is the best thing to do.

MR. DONWORTH: I think what has been said here is true, but the question is whether by leaving out a rule as old as this we give a basis for an argument that we are departing from the old idea.

MR. WICKERSHAM: I suggest that we act tentatively on it, subject to further study, because that is hardly a question we can solve offhand.

MR. CLARK: This is the only time I think it would be important: If we strike it out the deficiency judgment calls for a jury trial --

MR. SUNDERLAND: This would not settle the question, rule or no rule.

MR. MITCHELL: It would not be a jury trial as a matter of right because here is a rule of court which says you can get a deficiency without a trial.

MR. DOBIE: That is my opinion. When the courts have taken cognizance of an equitable thing you can go ahead and do

complete justice between the parties.

MR. CLARK: That is my conclusion, but my question is, will some judge be upset about our having stricken it out?

MR. DONWORTH: Because of the union of law and equity, I would like to have it stricken out only tentatively because the distinction between law and equity is much more observed than we have given consideration to here. Say, a plaintiff
38 brings an action on an insurance policy; the court will go on after the fire and give him a money judgment without a jury trial on the principle just announced because, although the two remedies are combined, I think there are issues in which they would be tried by jury.

MR. WICKERSHAM: It may safeguard the rule by some provision -- I am not sure, but it seems to me it has got to be more carefully studied.

MR. DONWORTH: My thought would be to strike it out after the first sentence in deference to the thought suggested by Mr. Dodge, as entirely unnecessary, leaving out all this about the trustees, and so forth.

MR. DOBIE: I think that is covered by our rules.

MR. DONWORTH: All right.

MR. MITCHELL: Any action taken is tentative anyway, and if anybody comes back at the next meeting with any views as to the necessity for Rule 102 there will be no objection to reconsidering it.

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Now, we have reached our ordinary adjournment time unless you want to go on until six o'clock.

MR. CLARK: I might say on the next one, unless somebody can do better, I do not know --

MR. MITCHELL: The next what?

MR. CLARK: The next rule.

MR. MITCHELL: The question is whether we will take up anything more or adjourn now.

MR. CLARK: I just wanted to see whether 103 is going to provoke any discussion. I think we better not get into 104 because that will provoke discussion.

MR. MITCHELL: There is a good deal that will be said and it will take ten or fifteen minutes.

MR. WICKERSHAM: I move that we adjourn. We will get through with the rest of these before five o'clock tomorrow.

MR. CLARK: I should think so, but we can tell better at ten o'clock tonight. The most important left are from 104 on for about five sections, and if we get pass that we will then have clear sailing.

MR. DONWORTH: I will ask to be excused. I want to repeat the remarks of Mr. Loftin, omitting the "shocking". I have not been shocked by anything here. I think it has been a very satisfactory meeting in every way. The exchange of views and the courtesy at all times has impressed me wonderfully. It has been a very pleasing meeting to me and I hope

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we shall have a reasonable number more such meetings before we finish.

MR. WICKERSHAM: I move we adjourn now until 8:00 o'clock.

MR. TOLMAN: I second that motion.

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

(Whereupon, at 5:30 o'clock p.m., the meeting adjourned until 8:00 o'clock p.m., this evening.)

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EVENING SESSION.

RULE 103. COSTS.

Mr. Mitchell. We are down now to Rule 103, costs. I am wondering whether we need to say anything about that, or just let it ride on the statute.

Mr. Sunderland. Is this within our jurisdiction?

Mr. Mitchell. Practice and procedure? I should think it was in the twi-light zone.

Mr. Wickersham. It sheds a ray of light if some of the litigants --

Mr. Sunderland. If we use costs for social purposes, so to speak, to penalize lawyers or parties for not doing what they should, that would seem to be procedure; but to put it in as a matter outside of the running of the mechanism seems as though it is not procedure.

Mr. Mitchell. I think it is a serious question. We certainly do not want to change the amounts, or the conditions under which they should be imposed. So why not drop it?

Mr. Dodge. The difficulty is that the Federal rule makes different provisions for costs in law and in equity. If we are consolidating the two, have we not got to say something about it?

Mr. Mitchell. I imagine we have.

Mr. Dodge. I think Dobie on Federal Procedure indicates

that the rule has a great deal to do with it. He says:

"Costs in suits in equity in the Federal court rest very largely, subject to the provisions of the equity rules, in the sound discretion of the court."

That we have left, and have really brought the fixed requirements of the statute as to law cases into harmony with the equity.

Mr. Dobie. I believe that is about as much as you can provide. I do not think we ought to go beyond this.

Mr.Clark. Mr. Payne wrote in, or somebody -- I have forgotten now who it was -- and wanted a lot done, and suggested his article. We read his article, and we did not get much beyond this.

Mr. Sunderland. Longsdorf, the author of the Federal Cyclopedia, wrote to me, as I suppose he did to the rest of you, about costs. He thought that ought to be straightened out. I do not see how we can do it.

Mr. Wickersham. How can we straighten it out? The statute covers it.

Mr. Sunderland. I think that is a legislative matter.

Mr. Clark. It is twilight, anyway.

Mr. Mitchell. It may not be as to equitable causes, if the equity rules covered it before.

Mr. Clark. No; the equity rules did not.

Mr. Mitchell. I thought Mr. Dodge said they did.

Mr. Clark. I know, but --

Mr. Cherry. He was quoting from Dobie on Federal Procedure.

Mr. Clark. I think I shall have to look up Simpkins. (Laughter.)

Mr. Wickersham. What does the author have to say about that?

Mr. Dobie. I do not think there are very elaborate provisions in there. I think they are largely in the discretion of the court. I think this rule is as wise a one as you can adopt.

Mr. Dodge. There are certain provisions in the equity rules for payment of costs under certain circumstances.

Mr. Wickersham. After all, practically all this rule says is that if you are entitled to costs, you get them. Is not that about all?

Mr. Clark. About the only thing is something about taxing costs. For instance, under Rule 40 on nominal parties, which is one we left out, if the plaintiff shall require him to appear, he shall be entitled to the costs of all proceedings against him. I do not think there is any direct provision.

Mr. Mitchell. There is a provision, for instance, which says that if you are vacating a decree on motion, the motion shall not be granted except the defendant shall pay all the costs of the plaintiff up to that time, or such part as may be deemed reasonable. There is a whole list of

them there -- full compliance with decree before discharge of attachment; costs of plaintiff to be paid before the court will set aside a decree; pro confesso; terms as to costs; further statement of pleading required; stenographer's fees to be taxed as costs; question of competency of deposition to be dealt with by court; provisions as to costs on continuances; reference to master; exceptions to master's report.

Those are not statutory. These rules take the place of the equity rules. If we say nothing, we leave only the statutes relating to common law cases, with an absence of anything on cases of equitable cognizance.

Mr. Dodge. Apparently, we have given the court discretion to disallow costs in an action at law where I supposed the costs were fixed by statute.

Mr. Sunderland. You refer to the last clause?

Mr. Dodge. Yes.

Mr. Sunderland. I do not believe that was intended to mean just that. You did not intend to confer discretion on the court, did you? (Addressing Mr. Clark.)

Mr. Dobie. I have some cases here where they did tax them on the plaintiff:

"When he is defeated on the main issues, but wins on some trivial issue; when he is guilty of some misconduct or laches; when his claim appears to be excessive or of questionable equity; or when he greatly enhances the costs,

by introducing irrelevant evidence, or by similar conduct."

Mr. Dodge. Costs in equity have always been in the discretion of the court except where specifically covered by rules, I think.

Mr. Sunderland. The last clause looks like conferring a discretionary power upon the court.

Mr. Dodge. In actions at law.

Mr. Sunderland. (To Mr. Clark:) Is that what you meant?

Mr. Clark. Do you not think that is a good idea?

Mr. Sunderland. I thought what it meant was, unless the court, when authorized to do so, shall, in its discretion, order otherwise.

Mr. Dodge. You see, this is inconsistent with the last statute quoted on the previous page.

Mr. Mitchell. Costs in actions at law, unless you get into masters and examiners and on discovery and one thing and another, are small and fixed, and ought to be. There ought not to be any power on the part of the court as to not ordering ordinary costs. They do not amount to anything -- $20 for the docket fee, the marshal's fees, and witness fees. They are all fixed by law and handled as a matter of routine. In law actions, masters in discovery cases are paid substantial fees. They have the power to rule on evidence. I think likely the court ought to have discretion about loading those on.

Mr. Dodge. Why not provide that costs, except where

fixed by statute, shall be in the discretion of the court?

Mr. Mitchell. That is fine. In that way you hit the whole thing. Is not that it?

Mr. Clark. To be sure; that is it.

Mr. Mitchell. I do not see how you could say anything in two pages that would cover it any better than that.

Mr. Clark. I do not, either.

Mr. Wickersham. Major Tolman just hands me the case of Barber Asphalt Company v. Standard Oil Company (275 U.S., 376).

Mr. Tolman. For the third time.

Mr. Wickersham. That has the most comfortable suggestion:

"As the rule places the duty of condensing and narrating the evidence primarily on the appellant, and most of the proceedings since the appeal have been attributable to the failure to discharge that duty, the appellant should be required, as one of the terms of the remission, to pay into the Court of Appeals five thousand dollars for the benefit of the appellee by way of reimbursing it for counsel fees and expenses incurred in securing the elimination of the irregular and objectionable statement of the evidence; and also to pay, as one of such terms, the costs in this Court and those in the Court of Appeals up to the time our mandate reaches that court."

That would look as though, in equity cases at least, the amount of the costs was in the discretion of the court.

Mr. Clark. Here is Simkins, if we may cite that in this presence: (Page 236)

"It has become the practical usage of the Federal courts to conform to State laws as to costs, when there is no express provision by Congress, or when no general rule of court exists on the subject. But Congressional enactments prevail, and so State laws allowing extra fees to expert witnesses do not govern. The lower courts may fix costs by rule."

Mr. Wickersham. Are any common-law cases cited?

Mr. Clark. Williams v. Sawyer Brothers, 51 Federal (2d), 1004, 81 A.L.R. 1527.

"In addition to the foregoing, certain Federal statutes should be consulted on costs and attorney fees."

(Laughter.)

Mr. Dobie. There are quite a number of those. I have those in here.

Mr. Clark. What is the case of Williams v. Sawyer Brothers?

Mr. Dobie. I do not remember. I do not think I cited more than about 18,000 cases, and there are two or three of them I have forgotten. (Laughter.) I am afraid that is one of them.

Mr. Clark. How about "the lower courts may fix costs by rule"?

Mr. Dobie. I think they could do that clearly if there is no Federal statute or anything in the equity rules against it. I think the point brought up is whether you can go beyond this, or do we have to watch all the way through here, and remember that this stuff applies both to equity and to law? Is it not true in law cases -- you gentlemen know that better than I do -- generally, all over the country, that usually the costs abide the result?

Mr. Mitchell. Yes.

Mr. Dobie. I mean, there is not nearly the flexibility in law that there is in equity.

Mr. Mitchell. There are certain terms that can be imposed in the granting by the court of a discretionary motion. That is not fixed by statute. He can refuse, for instance, to allow the plaintiff a nonsuit during the course of the trial without prejudice unless he will pay the defendant $50 or $100, or something like that.

Mr. Dodge. A very frequent illustration is where one of the parties wants a continuance, and has to pay the costs of the other fellow.

Mr. Mitchell. He has to pay all his witness fees up to date.

Mr. Cherry. That sort of thing, I suppose, would not be attempted to be covered; would it -- the terms of an order?

Mr. Mitchell. That ought to be covered by a provision that motions of that kind should be granted on terms and conditions in the discretion of the court.

Mr. Dobie. I suppose this provision about his recovering less than $500 was put in there to keep him from trying to "fudge" on the jurisdictional amount.

Mr. Olney. I should think if the jurisdiction of the court depended upon a certain amount -- a jurisdictional amount -- if he recovered anything less than that, the plaintiff ought to pay his own costs.

Mr. Dobie. Well, they had this statute. You saw that over there; did you not, Judge?

Mr. Cherry. Is it not another thing for the district courts to do? How about adding Mr. Dodge's suggestion as a proviso? He says the statute already covers it.

Mr. Dodge. We have put in some requirements already for the payment of costs in certain cases.

Mr. Cherry. Yes; but, subject to that, leave it to the district courts. I think there will be districts in which they will want to approximate the local practice in the State courts.

Mr. Dodge. "Except where provided by statute or these rules?"

Mr. Cherry. Yes.

Mr. Mitchell. "Federal statute."

Mr. Olney. Mr. Dobie says that that section of the Federal Code, fixing $500, was adopted at a time when that was the measure of jurisdiction.

Mr. Dobie. That was the jurisdictional amount, not $3,000, at that time.

Mr. Olney. The rule is quite common that where the jurisdiction depends upon the amount, if the plaintiff fails to recover in that amount or more he bears his own costs.

For example, you can bring suit in the Superior Court in California for any sum over $300. That used to be the law. It is not now, but that used to be the rule, where otherwise you brought it in the justice's court. Now, if you brought a suit for $300 or more, and you recovered only $250, the plaintiff bore the costs of the suit. The court was not ousted of jurisdiction, but the plaintiff bore the costs of the suit.

Mr. Clark. What is the matter with Mr. Mitchell's suggestion?

Mr. Mitchell. What was it? (Laughter.)

Mr. Dodge had a suggestion.

Mr. Clark. I guess it was Mr. Dodge:

"Except where required by Federal statutes, costs shall be in the discretion of the court."

Mr. Dodge. "Or these rules."

Mr. Clark. Yes.

Mr. Mitchell. Instead of "fixed by Federal statute", I should say "fixed or regulated", because in some cases they regulate the right without fixing the amount.

What is your pleasure about that? Do you not think that covers it?

Mr. Clark. I second Mr. Dodge's motion.

Mr. Dobie. It is all right with me.

Mr. Mitchell. The proposal is to provide that except as fixed or regulated by act of Congress or these rules, the costs shall be in the discretion of the court.

(No dissent was expressed.)

RULE 104. FINDINGS BY THE COURT.

Mr. Mitchell. We pass on to Rule 104.

Mr. Olney. May I ask the Reporter why he changed the rule of Federal procedure, the equity rule, which required findings of fact upon conclusions of law in all cases? You require them only in cases involving a constitutional question, or the constitutionality of a State or Federal statute.

Mr. Clark. Yes. Of course the equity rules specified particularly the suits to be heard before three judges; and I thought it clear that the court was fairly likely to insist upon findings on questions of constitutionality and those sufficiently important where findings should be had.

It would seem to me unfortunate to require findings in all cases. Suppose this is just a suit to recover a liquidated sum. No finding is really necessary in a case of that kind. Therefore it seemed to me a little difficult to require findings in all cases -- a little waste of time, and really a hardship on the judge to do it.

Was it desirable, then, to differentiate, to make a line of difference between equity and law cases? I felt doubtful; and, as you have seen, I have tried to avoid making distinctions turn on that. I think that is one way of perpetuating a distinction. If you have another form of division that is just as good, I should prefer to use it; and I wondered if, in general, giving the court some lee-room, with a right in the parties to bring up the point, was not a better way to do it.

Mr. Olney. You are changing the present equity rule, which is not limited by any means to suits before three judges.

Mr. Clark. That is true. We have power to do that; have we not?

Mr. Olney. I may say here that theoretically, of course, there is nothing much better than the judge making careful findings of fact covering the case, so that the case as he sees it on the facts is right there. Then he, in the first place, applies the law to those facts, and then the appellate court can do likewise if his conclusions in regard to the law are incorrect.

That was and still is the system in California. It does not work nearly as well as the theory of the thing would seem to require, and it really results in this in practice: The court makes up its mind how it is going to decide the case, announces that to the counsel, and then tells the prevailing counsel to draw the findings, and those findings are drawn so as to sustain that judgment, and largely drawn regardless of reference to anything else.

It has resulted also in this: Here is the more unfortunate side of it. It has resulted in a good many reversals because of a failure to find on some fact that the court deemed was important, was an ultimate fact. Here is a judgment, we will say, for the plaintiff, and they would find some particular fact that was essential for his recovery which had been overlooked, either by the judge or by the counsel on the other side in drafting the findings. Back the case goes for retrial.

Although I am accustomed to the other thing -- to the requirement of specific findings, and if it could be done in the theory of the law it would be a splendid thing -- I am not at all certain but that this change is, after all, in the long run, in the interest of the administration of justice.

Mr. Mitchell. It is a great relief to an appellate court to have a finding made.

Mr. Olney. It is a great help to an appellate court,

and sometimes a distinct embarrassment.

I can go back to my own experience on the bench. I remember one case that came up where the court made some findings and then held that every allegation of the complaint was true. It just was not true. Some of the allegations were opposed to the evidence, and there was not any evidence at all to sustain other allegations, and you just had to wiggle around to get around this finding. It was just contrary to the real fact of the case.

Sometimes the findings, if they are not drawn with intellectual honesty -- that is what it comes down to, and frequently they are not -- can be quite embarrassing when an appellate court sees where justice lies in the case, and wants to correct it.

Mr. Mitchell. We have had that procedure up in Minnesota, and the court quite often makes findings of its own without asking lawyers for them; but when it asks for them, and you submit them, I think in a large number of cases you find the court modifying them, checking them over quite carefully. If they do not accord with his own views, the court will interfere. He will not blindly accept a set of findings that are handed to him. They are not rubber stamps up that way.

Mr. Wickersham. I think the principal trouble with findings arises out of the right to except for refusals to

find. We got away from that in New York recently, and I think it is a good thing.

Mr. Mitchell. We do not make any provision here for exceptions.

Mr. Wickersham. I was just wondering whether we would assign error on them without exception. We abolish exceptions; did we not?

Mr. Mitchell. You do not have to file an exceptiom to a finding in order to attack it on appeal under that system. The court just makes its findings, and you take an appeal, and assign as error finding so and so, on the ground that it has no substantial evidence to support it.

Mr. Wickersham. There was a great abuse when counsel had a right to request findings, and to except to the refusal to find as requested. Then, in a certain class of cases, counsel would be astute to prepare findings that would bother a judge very much, and finally he would get impatient and refuse a lot of them, and then they would go up to the appellate court and reverse the judgment on refusal of the court to find some fact which the court deemed material.

Mr. Mitchell. I am surprised that we have not any letters from Federal judges on this question. Some of them, I suppose, would object to being loaded with the job of making findings; but they have been given a discretionary power here to insist on a jury trial in a law case if they

want to. They can say, "I do not want to be bothered with findings. I am going to call in a jury"; and in equity cases they are already subject to a rule that they have to make findings in every case.

Mr. Dodge. This would relieve them of that.

Mr. Mitchell. I think it would.

Mr. Dodge. This leaves it up to the district judge.

Mr. Mitchell. Except in certain specified constitutional cases; and the Supreme Court, I know, is very much inclined to insist on it. They do not want to review cases on general findings; and, as you know, they have sent case after case back for specific findings. The appellate courts all want them. It will relieve them of a large load.

Rather than go back on the equity rule, rather than take a backward step there, I believe that we ought not to make any distinction between the nature of the action, whether it is equitable or legal. The system of trial by the court without a jury ought to be the same in both. I am in favor of taking the equity rule and applying it to law cases tried by the court. If the court shrinks from the job of making the findings, he may call in a jury under his discretionary power.

Mr. Sunderland. Would it do to provide that the general findings should be sufficient unless notice of appeal were filed, in which case special findings should be made?

Mr. Mitchell. I do not think it would be practicable when

the court makes its decision, and passes on to other work, and then in the course of three or four weeks the lawyers serve notice of appeal, and then the judge has to take up the thing again.

Mr. Sunderland. It would mean the lawyers would have to make up the findings.

Mr. Mitchell. And the case would not be fresh in his mind.

Mr. Sunderland. It would relieve them of making findings in probably 80 per cent of the cases.

Mr. Clark. I was a little worried about that feature. I supposed that even where the court entered a summary judgment it would have to make a finding if we put in that requirement.

M r. Sunderland. It is made solely for appeal. If we could limit it to cases where there is an appeal, there are comparatively few cases appealed.

Mr. Lemann. Even from the lawyer's standpoint I should think it would be easier to make findings -- assuming they had them -- to draft them when you have the thing right before you, than to wait three or four weeks or maybe longer for the statute, and then go and dig out those reasons that you had in your mind right at the time.

I see that this rule, 70-1/2, was only promulgated in 1930. That is nearly five years ago, long after the equity

rules had been established. That indicates that the Supreme Court has quite recently considered the matter, and it is hardly conceivable to me that they would take it back this soon.

Mr. Mitchell. No; they will not allow you to go back in equity, and they will say that the system ought to be the same in both types of causes now.

Mr. Lemann. I think you have answered it. Where there is no jury, as a matter of fact, I think the lawyers will draft them as they have in the past; and even in the summary judgment cases I should think the task there would be somewhat simpler than it would in the ordinary ones.

Mr. Wickersham. I was just wondering, in the case of summary judgment, what the need is of special finding. The finding is really that the plaintiff has not shown cause of action, or, on the affidavits submitted, it is apparent that there is not any real issue. So I do not see what the finding would do there. You are not finding facts; you are simply finding a conclusion.

Mr. Lemann. You would find the facts to be as the plaintiff claimed them to be, I suppose, or the defendant.

Mr. Sunderland. The point would be mentioned in the motion expressly, as to the ground, as to in what respect there was failure.

Mr. Wickersham. That is a statement of the reasons

for a conclusion rather than a statement of facts.

Mr. Sunderland. And there is no record. There would simply be the pleadings.

Mr. Cherry. Is it not your theory that you do not have an issue of fact, and you do not have a trial? Why should you have findings in summary judgment?

Mr. Sunderland. Suppose the defendant got a summary judgment against the plaintiff because the plaintiff has not any case. The findings would be that only certain facts existed, and they would name all the facts except the one that was missing, and because of that missing one the judgment would go for the defendant.

Mr. Dobie. It is really a finding of law, essentially.

Mr. Sunderland. They would find that that missing one was not proved.

Mr. Dobie. Is it not really a finding of law in a suit, for example, that the scienter was not there? Is it not a finding of law that one fact was absent which is necessary to constitute a cause of action?

Mr. Olney. You mean that the fact does not exist?

Mr. Dobie. Yes.

Mr. Olney. That is hardly a finding of law.

Mr. Wickersham. Suppose the defendant comes in and says, "I have a general release executed, and here is a copy of it. Whatever the cause of action might have been, it has

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been released." That is a finding of fact on the release.

Mr. Sunderland. The really typical case would be where there is no defense.

Mr. Wickersham. Or that the plaintiff's facts do not constitute a cause of action.

Mr. Sunderland. Or the plaintiff gets a judgment against the defendant bedause the defendant has no defense at all. That would be the ordinary case.

Mr. Wickersham. Yes.

Mr. Sunderland. What would the finding be there? He does not show anything.

Mr. Wickersham. A good many cases have come up on motion of the defendant, really, practically on demurrer.

Mr. Sunderland. Yes; but I think 80 per cent of them will be cases where the plaintiff gets a summary judgment against the defendant because the defendant has no defense at all.

Mr. Lemann. What do you mean by that -- has pleaded no defense?

Mr. Sunderland. Has no facts.

Mr. Lemann. He has set up something in his answer, has he not? -- because otherwise there would be a default.

Mr. Wickersham. His answer is inadequate to show a defense.

Mr. Cherry. There it is equivalent to a motion that

it is a sham; is it not? This broadens the base, but the result is the same; is it not?

Mr. Clark. But the judgment is going to be entered on the face of the plaintiff's complaint; and would you not have to go ahead there and make a finding?

Mr. Sunderland. A finding that it does not constitute a cause of action?

Mr. Clark. Yes.

Mr. Wickersham. It would be a great repetition; would it not? You have the complaint, and you have the answer, and the court finds that the plaintiff has not any case or that the defendant has not any defense, and that is that.

Mr. Clark. In my own State, findings are made only when notice of appeal is filed. We do have a practice of finding some time after the judgment, and there is quite an extensive system. The appellant presents a draft finding, and the other fellow presents a counter finding, and the court may make his own. It can be done; but what I was trying to do was to get something similar, only move it up, and move it up through the process of the parties practically serving notice on the judge before he rendered his decision. That is what this motion would mean.

Mr. Wickerhsam. I would not complicate the summary judgment procedure with a requirement to make findings.

Mr. Clark. Then you have to accept it if you make

this rule general; have you not?

Mr. Dodge. No; it is not an action triable by a jury. It is not tried at all. In summary judgments you have to take every fact in the plaintiff's affidavits, so far as contradicted by the defendant, as true; you have to take every allegation made by the defendant as true; and, as Mr.Wickersham says, why repeat all those facts again in a finding? It is just an obvious record for the appellate court. This, however, does not apply to that at all.

Mr. Cherry. May I ask the Reporter a question? In the seventh line is the statement that --

"In all other cases a general finding shall be sufficient."

Then what is the effect of the next sentence? --

"A party may file his motion requesting such special findings at any time prior to the entry of the judgment, and unless he shall do so, he shall not be entitled to assign error for the failure to make such special findings."

Reading a little further:

"Such special findings may be made by the court either as a part of a memorandum of decision or opinion, or as a separate document" --

And so forth. In other words, if the party requests special findings, they must be made.

Mr. Clark. No; the test is back in line 4, where the

court finds that the adequate presentation of the case for purposes of review so requires; and the motion is simply a warning to the court that the parties insist on it, and they can assign error if, having had that warning, the court is not correct when he holds that it is not necessary for appeal.

Mr. Cherry. I just thought that with the sentence that follows that, it might not be clear that that was the meaning, because it says they "may be made" "either" "or", which might have the meaning that they must be made one way or the other if made, or something like that. I wanted to make merely a verbal suggestion. I thought there was a possibility of interpretation in the way I have suggested.

Mr. Wickersham. Yes; especially in view of the statement in the preceding section that --

"A party may file his motion requesting such special findings at any time prior to the entry of the judgment, and unless he shall do so, he shall not be entitled to assign error for the failure to make such special findings."

Mr. Clark. I think that can be improved. I think I would change that in this way:

"Shall not be entitled to assign error in the court's finding that no special finding is necessary for the adequate presentation of the case for purposes of review."

Mr. Mitchell. Of course that is all unnecessary if you

are going to adopt my suggestion. I would suggest that we say:

"In all actions tried without a jury, the court shall find the facts specially, and state separately his conclusions of law thereon. His findings and conclusions shall be entered in the record, and, if an appeal is taken, shall be included by the clerk in the record which is certified to the appellate court."

I would say:

"In all actions tried without a jury excepting summary judgment proceedings".

Mr. Dodge. Those are not tried.

Mr. Mitchell. If they are not, all right.

Mr. Sunderland. They never are. They go right out.

Mr. Cherry. If you put in a separate sentence --

"No findings shall be necessary where summary judgment is entered" --

You beg the question. You would not be saying it is or it is not.

Mr. Mitchell. Summary judgments are a new thing, and they might say, "This is a sort of a trial."

Mr. Lemann. We have spent 15 minutes talking about it, and know less than many of the people around here. I move that the Reporter be requested to redraft the rule as suggested by the Chairman.

Mr. Tolman. To bring up the matter, I move that we

accept the recommendation of the Chairman.

Mr. Lemann. I second the motion.

Mr. Dobie. Do I understand that you want to require special findings in every one of these cases?

Mr. Mitchell. Every case tried by the court without a jury, excepting summary judgment proceedings.

Mr. Dodge. Should we put in the words which are in the equity rule, "including those required to be heard before three judges?"

Mr. Mitchell. There is no harm in putting them in. I doubt if it is necessary, but I should not object to it.

Mr. Dodge. If we leave out that phrase, they may think we want to change that.

Mr. Clark. The three-judge cases are governed by a later rule, and would be subject to these rules.

Mr. Olney. The reason, I think, for putting it in, is that it is in that class of cases more particularly than in others that the Supreme Court wanted specific findings of fact down the line on all those questions.

Mr. Mitchell. I have no objection to adding those words.

Mr. Olney. They are later covered by the other rule, Mr. Clark says.

Mr. Wickersham. How have you got that:

"In all actions tried without a jury excepting summary judgment proceedings"?

Mr. Mitchell. (reading:)

"The court shall find the facts specially and state separately its conclusions of law thereon."

The rest of it is just as equity Rule 70-1/2 is --

"And its findings and conclusions shall be entered of record."

Mr. Dodge. Is that a substitute for all of this rule down to the reference to Rules 106 and 107?

Mr. Mitchell. I think we go farther, down to the words "special findings", because we have abolished general findings; have we not? So we would strike out down to the words "special findings", and then commence a new sentence:

"Special findings shall have the same force as special verdicts or answers to special interrogatories by a jury."

Mr. Dodge. There you are making a tremendous change in the scope of the law on questions of appeal in equity cases, which always took up questions of fact.

Mr. Mitchell. Perhaps we ought not to go so fast on that. All I had in mind was that general findings are not necessarily mentioned here. What I propose is in lieu of Rule 104 down to the words "special findings". Now, let us take up the effect of the special findings as a separate proposition.

Mr. Dodge. You have a double question there. Do we want to narrow the scope of the present appeal in equity, or

do we want to enlarge the scope of the present appeal in a jury-waived action at law, because we cannot harmonize the two without doing one or the other?

Mr. Lemann. We do not have necessarily to harmonize the two there, do we? -- because, just as we are required to draw a distinction between actions fundamentally at law and actions in equity for the purpose of requiring these compulsory jury provisions, we might be justified, I think, in preserving that distinction on appeal, because that is an inherent distinction that we cannot get away from.

Mr. Clark. You can get away from it. It is gotten away from in several States. Of course you do not absolutely need to get away from it. They have not done it in New York; but, as I indicated before, it seems to me one reason which helps the court to talk about inherent fundamental distinctions, is that they try to preserve a difference in the scope of review. I think that difference a good deal of the time is a difference in words, largely. I do not believe it goes to substance except when the court feels like making it go to substance.

Mr. Lemann. I think that is so. I do not see any necessity for a distinction. We have none in my practice, you know. All the facts go up on appeal in cases of law and equity, tried by a jury or tried by a judge. I did not mean to say that there was, in the nature of things, a necessity for the distinction.

Mr. Mitchell. I am wondering about cases involving constitutional questions where there is a claim of taking without due process. It is a rate case, for instance, and the Supreme Court has to go back to the ultimate facts to make up its mind about confiscation. Those cases will come up mainly from State courts now under that new statute, and the court is going to be hampered more than it was before by the general rule that it cannot disturb the findings of a State court.

Mr. Dodge. How do they deal with them in the Code States?

Mr. Mitchell. There is no difference at all in the ones with which I am familiar.

Mr. Clark. It varies somewhat. In at least quite a few States there is no difference.

Mr. Dodge. The facts go up in law as well as in equity?

Mr. Clark. It is the other way around. In quite a few States, including my own, the facts go up in equity the same as at law.

Mr. Sunderland. In mine there are findings at law, but no findings in equity. The whole testimony goes up in equity; but at law they make findings.

Mr. Lemann. That preserves the distinction, although they are supposed to have a uniform system.

Mr. Clark. You do not have to preserve the distinction,

but they do.

Mr. Lemann. I meant, they justify it.

Mr. Clark. How do you mean "justify"?

Mr. Lemann. I mean, there is no inconsistency.

Mr. Olney. In California, a finding by a judge -- it does not make any difference whether it is a law case or an equity case -- in a case that is tried without a jury has exactly the same effect as the finding of the jury would have.

Mr. Dodge. That means that it is conclusive if there is any evidence to support it.

Mr. Olney. It is conclusive if there is substantial evidence there sufficient to support it.

Mr. Sunderland. In your State, in other words, there is no review of the facts in any kind of a case, either law or equity?

Mr. Olney. Either law or equity, if you mean by that that the court cannot disturb the finding. It cannot. The upper court cannot say "The finding is not justified" provided there is evidence there that is sufficient in the mind of a reasonable man to sustain that finding.

Mr. Sunderland. That is a very unusual condition. Most of the States do not take that view. California is unusual in that respect.

Mr. Clark. No; it is not so unusual, I think. I disagree with you.

Mr. Sunderland. I have checked those cases.

Mr. Clark. So have I.

Mr. Olney. I think the thing works fairly well.

Mr. Clark. I think it works very well.

Mr. Dodge. It certainly is contrary to the prevailing view in this country; is it not?

Mr. Lemann. Mr. Sunderland says "yes". Mr.Dodge says "no".

Mr. Olney. They both say it works well.

Mr. Sunderland. In most States is there a review in equity?

Mr. Clark. I think in most States there is, but that is because you have a different attitude on the union of law and equity. I do not think that is a fair way to settle it.

Mr. Sunderland. I am talking about the existing practice. I think the existing practice generally is that there is a review on the facts in equity.

Mr. Clark. I think it is a very poor way, and I think the majority of the more progressive States have it the other way.

Mr. Dodge. How about the cases suggested by the Chairman -- rate cases? Where no preliminary injunction is asked for, are you going to let one judge finally decide the facts?

Mr. Clark. Almost all of those are practically conclu-

sions from the facts anyhow.

Mr. Dodge. There are fundamental findings of fact as to value, etc.

Mr. Clark. If value is not a conclusion, I do not know where you get a conclusion.

Mr. Mitchell. As matters stand, in a rate case which comes up to the Supreme Court, it is an equity case, an injunction case; and so, under the equitable system, they have the power to re-examine the facts. They go right into the question of the weight of evidence. They do not say that the findings of the master or the trial court have some substantial evidence to support them. They make a radical investigation of the facts. In different types of cases I can see where it is quite an upheaval to change that.

Mr. Olney. This is just a question on the spur of the moment; but how would it do to make the findings of fact conclusive -- that is the general expression -- except in those cases where, as it is put here, a constitutional question is involved, or the constitutionality of a State or Federal statute or State enactment?

Mr. Clark. I think that would work all right.

Mr. Dodge. I think that is a very good tentative suggestion.

Mr. Olney. It is thrown out for consideration. I just thought of it this minute.

Mr. Clark. The Federal statutes now provide, in jury-waived cases, that the finding is the same as that of the jury. Let us see what that statute says.

Mr. Olney. That is so generally in this country.

Mr. Dodge. Are there many States in this country where there is now an appeal on questions of fact in a jury-waived case, Mr. Sunderland?

Mr. Sunderland. I do not think there are very many. We have it in my State by express court rule.

Mr. Lemann. In Louisiana you can appeal to the supreme court from a jury finding; but that is a novelty in this country.

Mr. Sunderland. But in England there has been a steady progress within the past thirty years toward a review on the facts in law cases where juries are not employed; and they have got it to the point now where there is a full and complete review on the facts, and the courts even say that there is no presumption in favor of the trial judge's finding. They have gone as far as that.

Mr. Dodge. Is that in Michigan?

Mr. Sunderland. No; in England; and several of the English dominions take the same view. There are Australian cases to the same effect.

Mr. Dodge. There is no presumption in favor of the finding of the judge who saw the witnesses?

Mr. Sunderland. No; that the appellate court must take

the record and decide, on their own view of it, what the final decision should be, subject only to this -- that in judging the weight of testimony in respect to matters where the presence of the judge would be of material importance, they will take the decision of the judge as having special weight -- that is to say, on the credibility of the witness; but in balancing testimony where credibility is not involved they will not even allow a presumption in favor of the trial judge's finding.

I simply mention that as indicating a very strong tendency which has been developing there against this thing that we are suggesting putting in.

Mr. Wickersham. Is it a good tendency? That tends to discourage the trial judge from making a special effort to sift out the case thoroughly. He says, "What is the use? Those fellows up in the court of appeals are going to upset it all"; and he makes a perfunctory finding.

Mr. Olney. He is not much better than a master in the appellate court. That is about the position he occupies.

Mr. Wickersham. No; I think a presumption of finality ought to attach to the decision of the trial judge, but the burden ought to be on him who attacks it.

Mr. Lemann. A presumption ought to attach; but, query: Should it be final? Well, almost final, I suppose, as final as a jury, which means that if it is arbitrary, and

there is nothing at all to support it, you can set it aside. Otherwise, it is binding.

Mr. Dodge. It imposes a great burden on the appellate courts to have these big records of evidence go up and have them pass on questions of fact.

Mr. Wickersham. But the Supreme Court of the United States does go right into the body of the record. They do ascribe a preferential weight to the finding of the trial court.

Mr. Olney. Going back again to the experience that you have had, if you adopt any rule which does not limit the review of the finding to the question of the sufficiency of the evidence, so that it is permitted to an appellant to bring up an argument before the appellate court that really the weight of evidence is against the finding, you are simply going to flood the appellate courts with appeals.

Mr. Sunderland. That is the rule now on the equity side.

Mr. Olney. It may be on the equity side, but you are going to have a large number of law cases.

Mr. Mitchell. Why do we need to say anything about the effect of equity findings? The only object of saying anything about them is to affect the extent of review by an appellate court; and we are going into a field there where we probably have not any business. If we just provide for findings, I assume the appellate courts will say, "Well, this

is a case of equitable cognizance, and we may reexamine the facts"; and if it is a law case they will say, "This is a law case, and we are bound by the rule that we can only examine the sufficiency of the facts to support the findings." I think we ought to say nothing about the effect of special findings.

Mr. Olney. If you do that you are going to tend to preserve the distinction between law and equity, when the real distinction should be between cases tried by a jury and cases tried by a judge.

Mr. Mitchell. I appreciate that; but it is a distinction that is raised in the appellate courts with respect to their powers of review; and under a statute which gives us the right to prescribe practice in the district courts, how can we state that a circuit court of appeals can go this far and no farther in reviewing one of these proceedings? I do not believe we can.

Mr. Dodge. We are going to leave a very wide field of litigation. There is going to be great uncertainty about it until, five years from now, the Supreme Court gets a case and settles it, because we are amalgamating law and equity, and yet we are leaving ungoverned by any rule a situation where law and equity are entirely distinct now in the Federal courts. I think we ought to say something about it, if we have any authority to do it -- that is, the Supreme Court ought to in this rule -- because case after case will now come up, and the

appellate court will not know whether it is bound to pass on questions of fact or not until somebody gets one of those cases up by certiorari to Washington. It will not be settled until that is done. Is not that so, Mr. Clark?

Mr. Clark. Yes; I feel that very strongly indeed. Here is one of the two places to make the union of law and equity effective. The other place is in the jury, and we have done very well on that, I think -- jury waiver. We have gone as far as we can, because there the Constitution comes in; but we have a pretty simple and effective system. The other place is to do away with the differences on appeal; and, as I say, it seems to me in the States that have it, of which New York is a notable one, so far as the typical code State is concerned, that has done more to keep law and equity separate than almost even the jury itself.

Mr. Mitchell. Is this a matter about which we can ask the instructions of the Supreme Court? They have invited us now informally to submit to them the problems on which we are stumped. Why can we not adopt this motion of Major Tolman's and Mr. Lemann's, and substitute what they have stated in lieu of the rule, down to the words "special findings"? Then, on the question of the effect of the special findings, have the Reporter prepare a note stating that under the present system there is a general review in equity cases and a limited review in law cases, and the problem with which we are confronted is, first, whether we have any authority to say what the appellate

court may do. That is point 1. Second, if we have, shall we preserve the distinction between equitable causes and law causes as to the extent of review, and get his reasons against that or for it; or shall we unify them and give only a limited equal review in both cases? We do not draw any rule there on the effect of special findings. We just raise the point of the three alternatives, and we ask for the instruction of the Court, and they will solve it for us.

Mr. Lemann. May I ask this question:

There is a statute, I suppose, that gives the circuit courts of appeal the right to fix their rules. The Supreme Court, of course, has jurisdiction to fix its own rules, I suppose, on appeals going to it; and in so far as this covers appeals going to it we might eke out from that some authority on this point. That made me wonder to what extent, if any, the Supreme Court has any power over the appellate rules generally, even where the appeals do not go to it, but go to the circuit courts of appeal first.

Mr. Mitchell. In equity cases it has general power to establish rules.

Mr. Lemann. I meant at law. In equity, clearly, it has.

Mr. Mitchell. We are not affecting the law situation.

Mr. Lemann. You will be by this. You see, here you are up against that proposition. The point has been made that

you cannot prescribe the effect of findings in an action at law, jury-waived.

Mr. Mitchell. We would not be changing it.

Mr. Lemann. Not if you adopt this particular rule; but if you adopted the method that would assimilate the law situation to the equity situation, you would.

Mr. Mitchell. No; we would be assimilating the equity to the law.

Mr. Lemann. That is what this proposal would be. The other way would be theoretically open.

Mr. Mitchell. That would be enlarging the common-law review. Do you not think that is a way of getting it? How can we decide that question?

Mr. Dodge. I think it would be very advisable, in your suggested memorandum to the court, to include Judge Olney's very interesting suggestion that we adopt this rule here, but make an exception of any case involving a constitutional question. That may be a possible way out of it.

Mr. Olney. Particularly where it is merely a constitutional question.

Mr. Mitchell. In cases where the constitutional question depends on the facts.

Mr. Olney. Yes.

Mr. Lemann. Why should that necessarily go? Put it up to them.

Mr. Dodge. Rate cases are cases where a court, I know, will not give up its right to review the facts. In fact, they have expressly said in a rate case, "In this kind of a case, unlike others, we shall not give the usual weight to a master's report, but will go right into the facts ourselves." They have differentiated between rate cases and others.

Mr. Lemann. Of course in every fact question where the constitutional point may turn upon the fact, they always have a right to examine the facts; have they not?

Mr. Dodge. No.

Mr. Mitchell. I imagine they will tell us to leave the effect of the findings alone, and let that be settled otherwise; it is not within our province. However, why is not that a good way to dispose of it?

Mr. Dodge. I think the Court would welcome a limitation of appeal on facts in the ordinary equity case; do not you?

Mr. Clark. Suppose I prepare a memorandum primarily for the committee. I should be glad, of course, to go further, although I must say that my views on the matter are pretty strong. Unless I had some obligation to be impartial, I should not want to be very impartial. (Laughter.)

Mr. Dodge. You want to limit the review?

Mr. Clark. I do, very decidedly.

Mr. Lemann. You particularly want to make it the same?

Mr. Clark. I want to make it the same.

Mr. Lemann. That is your paramount desire?

Mr. Clark. Yes; and I do not believe there is much chance of making it the same if you do not limit the review. Also, independently, it is a good thing to limit the review as much as you can. I do not believe you will tie the Court very much when it wants to review a case.

Mr. Lemann. The door is always open to say, "We have got to look at the facts to see if the judge was arbitrary." If you carry that out, you have to look at them anyway, all the time.

Mr. Clark. That is one way to open the door. The other way is to say, "This is not a fact; it is a conclusion"; but it does hold them back somewhat. I do not believe you are going to throw the facts open in all cases anyway. Under our system, with the jury trial sticking up, I do not believe you are going to get a complete review like the English system, anyhow.

Mr. Lemann. Of course you may find a considerable number of lawyers who feel that in certain districts you are up against one man's finding on the facts. Of course heretofore you could have a jury; you had twelve men on the facts, and if you had an equity case you had the judgment of three more men on the facts. This pins you down to one man's judgment on the facts unless you can show that he was arbitrary.

Mr. Clark. One thing more on the English practice: The English practice, of course, is not primarily a review anyhow. The English practice is that the appellate court is supposed to look at the whole case and enter the judgment that should be entered.

Mr. Sunderland. In other words, it is a re-hearing, and not a proceeding in error.

Mr. Clark. Yes.

Mr. Wickersham. What is the rule on an appeal to the House of Lords? -- because that is the analogy to the Supreme Court here. We have a much broader rule in New York, say, for example, of a review of facts in the Appellate Division, than there is in the Court of Appeals. The Appellate Division can take additional facts, appoint a referee to take evidence, and it does not infrequently take additional evidence to that furnished in the record, and finally make a decree. The Court of Appeals cannot do that.

Mr. Sunderland. I think the House of Lords review is exactly the same as that of the court of appeals. They review the facts.

Mr. Lemann. In England, which I have always had an idea was a model for everything that was fine and good and progressive, a presumption of correctness does not even attach to the trial judge's finding.

Mr. Sunderland. Their rule provides that an appeal

shall be a rehearing.

Mr. Wickersham. The new English rule?

Mr. Sunderland. It has been a rule for many years.

Mr. Wickersham. Does that cover appeals to the House of Lords?

Mr. Sunderland. Yes; I think so.

Mr. Mitchell. Is that only in equity cases?

Mr. Clark. No; that is general.

Mr. Lemann. When I first came to the bar we had a judge in the First District of Louisiana that I think it would have been terrible to have find all your facts. As I said to Mr. Dodge, I have often been told by judges, "You let me find the facts, and I will let you find the law."

Mr. Mitchell. That is like the Irishman who was asked by the judge if he had a lawyer -- that old story.

Mr. Lemann. What is that?

Mr. Mitchell. The Irishman said, "No, your Honor; I am saving my money for witnesses." (Laughter.)

Mr. Dobie. Mr. Sunderland, I wondered if, in the English system, there is any difference between the review by the House of Lords and by the Court of Appeals, due to the fact that the Court of Appeals of course is a part of the Supreme Court of Judicature, and there, of course, you are not really appealing to another court; you are just going to another branch of the same court.

Mr. Wickersham. That is the theory of the Appellate Division in New York.

Mr. Clark. I feel quite confident that the House of Lords takes the same view.

Mr. Dodge. The appeal you refer to there is just like our appeal in admiralty, which is retrial by the court of appeals.

(At this point Mr. Wickersham related an incident coming within his observation in England, where, in the court of appeals, the question apparently turned on the translation of a French word; the court below took a certain view of it which was quoted by counsel, and the official presiding sent for a reference book or dictionary, and the case was decided on the definition there given.)

Mr. Mitchell. The court of appeals there has power to take additional evidence.

Mr. Wickersham. Yes -- well, that is the case with our Appellate Division.

Mr. Sunderland. Judge Olney seems to be entirely satisfied with the rule in California that makes the findings of fact in an equity case conclusive on the supreme court; but I have talked to California lawyers who were very bitter about that. They said they were absolutely helpless in the hands of a hostile trial judge; he could make findings that would beat them every time, and there was no redress.

Mr. Lemann. With a jury, you always had a chance to get at them; but now, because you are going to waive a jury, the situation is different. Of course that was optional with you. You did not have to waive a jury, did you? If you did not want to waive it you could get twelve men to pass on your facts. If you had a tyrant for a judge, you could say, "I will take my chance with a jury". On the other hand, if you had an equity case, you said, "I will take my chance with the appellate court." You were handicapped -- you always are, of course -- with the trial judge against you.

Now, if we are going to have the same rule, and that rule is to apply when you waive a jury, you still could be protected by not waiving the jury in law cases; but in equity cases you have no option of a jury, and you are going to be forced to take the findings of the trial judge, which I think may be a pretty serious matter.

Mr. Sunderland. I am inclined to think there will be a tremendous lot of opposition to it.

Mr. Olney. If you have a hostile or dishonest judge, he can sew you up on the findings so that it is almost inescapable.

Mr. Mitchell. How can he do it with special findings any worse than if there is a general finding? Is not that worse?

Mr. Olney. That is worse. It is more difficult to

overturn a judgment which is based upon a verdict or a general finding. I refer to cases where there are special findings.

Mr. Mitchell. Then the special-finding requirement does not give the judge any more power to sew up a man than a general finding.

Mr. Olney. It would in equity cases.

Mr. Mitchell. Under the equity rule he is obliged to make them anyway now.

Mr. Olney. We are really speaking of the effect of his making them. If this rule here, for example, still permits an examination into the facts by the appellate court to see whether or not the cause has been decided in accordance with the weight of evidence as contrasted with the sufficiency of the evidence, then of course the rule I have suggested here will give the trial court much greater power in determining the cause.

Mr. Sunderland. And, as a matter of fact, the Federal judiciary now have a great deal more power than the State judiciary. They have plenty of power as it is.

Mr. Olney. They do not in that respect. The trouble is, gentlemen, it comes down largely to a practical question as to how you are going to come out in a large number of cases, and what would best facilitate the administration of justice in the large. I have suffered at the hands of judges when I have been just outraged all the way through at what they did

do in the way of findings. Nevertheless, when you take the effective administration of justice, I think it can better be accomplished by forgetting the extreme cases of judges who will deliberately make findings for the purpose of sewing up one side or the other, ignoring that, and giving the trial judge that responsibility; and the cases of injustice that are done, where injustice is finally perpetrated, will be completely outweighed by reducing the number of appeals and the clogging of justice.

When I was on the Supreme Court bench of California, I should guess that in close to 50 per cent of the cases the real, fundamental cause of complaint was a question of fact; and in a very surprisingly large proportion of the cases, although the rule was thoroughly well established that a finding could be reviewed only on the question of sufficiency, the real argument right down the line was the weight of the evidence. If they can consider that weight, you are going to have all kinds of appeals.

Mr. Sunderland. Of course the suggestion here is only to continue what we already have -- not to introduce a more liberal rule, but to hold what we have.

Mr. Olney. But wait a minute. The minute you do that, you still preserve this old distinction between law and equity; and why that distinction should be preserved, I cannot see. There is just as much reason for making final or otherwise

the conclusions of a judge who decides a law case on the facts as there is in an equity case. His function is the same in both cases. He decides the facts. There is no ground whatever for the distinction.

Mr. Mitchell. Does not this added discussion satisfy you further with the suggestion that we refer the matter of the effect of the findings on appeal to the court for instructions?

I will therefore submit for a vote the motion which has been made, which has nothing to do with the effect of the findings. It merely substitutes the general requirement for findings and conclusions in all cases for that part of Rule 104 down to "special findings" in the fifth line from the bottom.

Are you ready to vote on that question -- the requirement for making special findings, without regard to the effect of them, now? We are not touching that.

Mr. Olney. Are you going on to consider the question of effect?

Mr. Mitchell. When we dispose of the first question.

Mr. Dobie. I should like to ask the Chairman a question there, and be guided by his opinion. Do you think there will probably be any more cases in which we will do that? I rather hate to go to the Court with just one case. Do you think they are friendly to that procedure, and will be glad to

make suggestions to you?

Mr. Mitchell. Oh, yes! This is a knotty problem. They have lots of things in their heads about it. I do not think any decision we make is going to cut any figure one way or the other, really. I think they will have notions of their own about it. It is a difficult question. It is appropriate that we should ask for instructions on it.

Mr. Dobie. Under those circumstances I am very willing to support your motion.

Mr. Mitchell. This motion does not have to do with that, yet. I had not reached the effect of the findings. It is a motion, in effect, to require the trial judge to make special findings in cases tried without a jury, except in summary judgment proceedings.

Mr. Olney. I second the motion.

Mr. Dodge. As in equity Rule 70-1/2. It substitutes that for all the first part here; does it not?

Mr. Mitchell. It is, in substance, equity Rule 70-1/2, but it is not worded just in that way. We read it out pretty carefully at the time. We can go back and locate that and read the motion again if you want it.

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

Mr. Mitchell. The next question is whether we will prepare this memorandum with these alternate views and all the

difficulties involved, and ask instructions from the Court as to whether we shall make any provision as to the effect of the findings on appeal, and what provision we shall make.

Mr. Lemann. I should like to see, as a part of that memorandum, a statement of the practice in the Code States, perhaps naming them, also. I think the Court ought to have it.

Mr. Mitchell. Yes; we ought to give them a full memorandum of the law and the practice everywhere.

Mr. Dodge. This provision here making it reversible error to fail to make the particular finding of fact that is requested goes out?

Mr. Mitchell. That is all stricken out. We are not allowing lawyers to go and make requests and take exceptions to the failure to find. That is all out.

Now we have the second proposition. What is your pleasure about asking the instructions of the Court along those lines?

Mr. Tolman. I move that we do.

Mr. Lemann. I second the motion.

Mr. Mitchell. Is there any further discussion?

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

Mr. Clark. I want to raise a couple of questions along that line. I put in a final line about trying to give some force to the findings of a master. Perhaps if we are going

to tackle this, we can leave out the master now.

Mr. Olney. I think he ought to be left out. I wanted to make sure about that. I do not think the findings of a master, unless they are approved by the court, ought to be conclusive on the court.

Mr. Clark. Still, you see, this is limited:

"And, when judgment is entered upon his report, with like effect."

Mr. Olney. Oh, well, that is all right.

Mr. Clark. Do we want that in or not?

Mr. Olney. Yes; if the Court adopts them, they are its findings then.

Mr. Mitchell. I would leave out the words "with like effect", and say:

"A master reporting on the facts under Rule 96 shall make special findings in like manner".

I would leave out "general or" because we have stricken out general findings --

Mr. Clark. Yes; "general or" should go out.

Mr. Mitchell. "General or" should go out, and the words "with like effect".

Mr.Clark. Should not the words "with like effect" stay in, after the court has accepted his report?

Mr. Olney. Can you not put it in this way, and this will cover the case -- that --

"The special findings of a master, to the extent to which they are adopted by the court or approved by the court, shall be deemed the findings of the court"?

Mr. Clark. All right; that would do it.

Mr. Olney. That is really what they are.

Mr. Dodge. One other question here: Have we done away anywhere with the technicalities surrounding the right of appeal in a jury-waived case?

Mr. Clark. I think so. I have covered one single system of appeal in all, and I do not know whether further protestations are necessary or not. I want to ask that question. I have provided an affirmative system. I hope we do not need to negative anything else; but perhaps we can test that a little more as we go along.

Now, two things more: The first is this: You ought to put opposite my statute here, 28 U.S.C. 875, also 28 U.S.C. 773. That is quoted opposite an earlier rule. I am a little puzzled as to whether they mean the same thing. I suppose they ought to be construed together.

Mr. Mitchell. Where is it?

Mr. Clark. I have forgotten, but I know we did have it earlier.

Mr. Hammond. It is under Rule 80.

Mr. Clark. Note this: Is there any difference? I am not quite sure:

"Section 773. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Now, let me see: Was not that amended? That was amended.

Mr. Dobie. It was amended by putting in a provision for stipulation in open court. Did not you do that, General?

Mr. Mitchell. Yes; for the convenience of the lawyers we allowed them to waive a jury orally. If it is entered in the record somewhere, that is enough.

Mr. Clark. That was amended May 29, 1930; but this is what I want you to note:

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

That was in the old rule, and it was in it when it was amended in 1930. By the way, you will see that provides for either a general or a special finding.

Now let us look at the last phrase here in section 875:

"And when the finding is special the review may extend

to the determination of the sufficiency of the facts found to support the judgment."

Do those mean the same thing?

Mr.Sunderland. They certainly could be interpreted to mean the same thing.

Mr.Clark. I suppose they should be interpreted to mean the same thing.

Mr. Mitchell. I should think so, because when you are reviewing the verdict of a jury, the only question is whether there are sufficient facts found to uphold the verdict.

Mr. Clark. The argument could be made, as to section 875, that it went farther than a review.

Mr. Sunderland. "Sufficiency" certainly does not mean "weight".

Mr. Clark. Then I guess that is all right.

Mr. Mitchell. I think they mean about the same thing.

Mr. Clark. The next question is, what my duties are as to the memorandum. When will this go to the Court? Will it go after our next meeting, or what?

Mr. Mitchell. These rules have to go to the Court for consideration before we hand them out to the bar, as soon as they are fit to be exhibited. We could, of course, ask their instructions in advance of submitting the rules to them; but my notion is that it is just as well -- we shall have to make some changes in the rules, probably, after they have

looked at them anyway; we may have to -- and would it not be just as well to await submitting that memorandum until we are ready to hand them the rules, and then they can get the drift of all the relevant things here, like this provision for findings, etc.?

Mr. Clark. Then I will prepare the memorandum for the committee, and at the next meeting the committee will pass on it?

Mr. Mitchell. Yes.

Mr. Dodge. The difficulty about that is that we put this very important question up with a multitude of detail concerning the rules. I was wondering, this being an important matter, if we could not get this out separately.

Mr. Lemann. Would it not be possible for the Chairman, in transmitting this, to say, "The following things are particularly important"? There will be perhaps five or six, and he could direct attention to them specially, so that they would not get lost in the shuffle.

Mr. Mitchell. We can put up this particular question beforehand, if you want to. I do not think there is any objection to it.

Mr. Lemann. You have some more, I think. Do you not think the Court would prefer to have five or six of them put up to them at once?

Mr. Mitchell. If we have five or six.

Mr. Lemann. We have more than one, I am pretty sure. Do you not think so, Mr. Clark? Have there not been two or three others saved for the Court?

Mr. Clark. I do not know whether we so specifically decided on the others. We did raise certain questions. I hope the matter of a permanent committee will be submitted to them in some fashion and at some time.

Mr. Mitchell. Suppose we let the question of when we will put it up to the Court await our next meeting, and then we will see the memorandum, and we will then have pretty well in mind the various things on which we have "passed the buck".

Mr. Lemann. We can see how many there are.

Mr. Mitchell. We can see how many there are, and whether we will put it up then, or wait and give them the whole rules along with it. Of course I can informally tell the Chief Justice what is troubling us about this thing, write him a letter about it and tell him we are going to submit a memorandum of it, and they can be thinking about it.

Mr.Clark. I hope they will not decide it until we have been heard in open court.

Mr.Mitchell. Then perhaps we had better not say anything until that time.

Mr. Olney. I should be quite willing to have the Reporter make the letter.

Mr. Clark. Here is a case where my own rule for filing

56 a motion with a brief statement of reasons is inadequate. (Laughter.)

Mr. Mitchell. Let us let the question of submission rest until our next meeting, as to when we will do it.

RULE 105. APPEAL.

Mr. Mitchell. Then we pass on to Rule 105.

Mr. Clark. Rule 105 is either important or not, as you look at it, depending on whether or not we try to clean up things a little.

Rule 105 -- the original rule, not the alternative one -- is where I have attempted to leave out certain of the "moss", if I may use that word, Mr. Lemann.

Mr. Lemann. I approved it, I think -- the word; not the rest of it.

Mr. Clark. The alternative Rule 105 is simply declaratory, and contains all the "moss".

Now, notice Rule 105:

"Within the time provided by law" -----

Which is generally 90 days, and in the case of injunction it is 30 days ----

"a party aggrieved by an order or a judgment may perfect an appeal therefrom by filing with the clerk of the district court a notice of appeal which shall contain his assignments of errors" ------

And, by the way, I think a sound argument could be made for abolition of assignments of errors; but I have not tackled that. I should be glad to be directed to tackle it. This, I thought, perhaps got into what the upper court wanted.

"And such bond approved by the court as is required by law."

You will notice there that there is no petition for allowance of an appeal, which is one matter that has caused a great deal of difficulty. It has worked out that it is practically a formality. Some judges have declined to allow an appeal, and have been mandamused to allow it. It seems to be the view of the circuit courts that the appeal should be allowed, but you have to get a judge and have it formally allowed.

Mr. Wickersham. What is the use of that?

Mr. Clark. I do not see a bit of use for it.

Mr. Wickersham. There is no use for it at all.

Mr. Dobie. You are talking about a petition for appeal?

Mr. Wickersham. Why should we not just take an appeal?

Mr. Dodge. There is no use for it at all, unless there are some cases, civil proceedings, where, as in some bankruptcy proceedings, you have to get the consent of the court. Are there any such?

Mr. Olney. Yes; in bankruptcy proceedings.

Mr. Dodge. Outside of bankruptcy, I mean.

Mr. Wickersham. There are some proceedings in the State practice where the granting of appeal is in the discretion of either the court ad quo or the court ad quem; but it is usually where cases are not those in which there is an appeal by right. The great mass of cases are appealable by right; and where they are appealable by right it seems to me it is all nonsense to have a petition for appeal and an allowance by a judge. It ought to be a notice of appeal. In those cases which involve an opportunity to review which is discretionary with the court, then of course you must have the petition.

Mr. Dodge. I do not think there are any such civil cases in the Federal courts; are there?

Mr. Wickersham. I do not recall any. There might be in bankruptcy.

Mr. Dobie. In bankruptcy proceedings proper there is the so-called supervisory power.

Mr. Wickersham. But we are not dealing with that.

Mr. Dobie. No.

Mr. Wickersham. Nor with admiralty; but in the ordinary common law andequity case --

Mr. Lemann. You can always go up, but I think it is a question of how you go up.

Mr. Wickersham. Of course in the Supreme Court, the question is whether or not there is a Federal question of which

the Court will take cognizance.

Mr. Clark. Now I go on: --

Mr. Tolman. Dean Clark, did you intend to have all interlocutory motions appealable by this?

Mr.Clark. No.

Mr. Tolman. It is broad enough to do so.

Mr. Clark. Why is it?

Mr. Tolman. The language is:

"aggrieved by an order or a judgment".

Mr. Olney. It should be "by a final order."

Mr. Mitchell. I was going to suggest that the phrase --

"a party aggrieved by an order or a judgment may perfect an appeal" --

May, without our knowing it, enlarge the right of appeal; and I think we ought to say --

"within the time provided by law for taking an appeal."

Mr. Olney. Yes.

Mr. Clark. All right.

Mr. Mitchell. In the first place, a party entitled by law to appeal may perfect his appeal by filing.

Mr. Clark. I think Mr. Dodge wants to say something there. This is the question of whether I was providing for appeals from interlocutory orders. I had not intended to do it here.

Mr. Dodge. Oh, no; I would not suggest anything of that sort.

Mr. Clark. Your suggestion is more limited, I know.

Mr. Dodge. That discretionary power of the court, which is so valuable with us, I am going to put in a memorandum to you later.

Mr. Wickersham. We cannot enlarge the scope of the right of appeal. That is dependent on the statute.

Mr. Mitchell. It is clearly outside of our function.

Mr. Wickersham. Yes.

Mr. Clark. If we put in "a party entitled to appeal", we do not need to say anything about "final order".

Mr. Tolman. No.

Mr. Clark. All right.

Now I go on, in the next sentence:

"The clerk shall mail copies of the notice of appeal" --

I guess probably we go back to serving those.

Mr. Wickersham. I would do it by a notice.

Mr. Mitchell. Do you mean notice on the lawyer?

Mr. Wickersham. Yes; and filed with the court.

Mr. Clark. "Such party shall serve"?

Mr. Mitchell. It ought to be served on the opposing party and immediately filed, and it is not perfected until it is filed. That is the proper practice.

Mr. Clark. All right. Of course you have to have the court issue a citation, etc.

"Shall serve copies of the notice of appeal and bond" --

Do you want a copy of the bond?

Mr. Wickersham. Yes.

Mr. Sunderland. A copy of the bond?

Mr. Clark. I did not think it was very necessary, but I thought I would raise the question here.

Mr. Lemann. The bond is on file in court; is it not?

Mr. Dobie. He knows there is a bond, and if he wants to make any objection he can go there and find it. I do not see any sense in making him file a copy of the bond.

Mr. Wickersham. You do not perfect the appeal until the notice has been served and is on file together with the bond, where bond is required.

Mr. Mitchell. The bond has to be approved by the court.

Mr. Lemann. That is really the only thing that gives any concern to the court now -- that is, fixing the bond. You still have to go and do that.

Mr. Clark. I did not quite see how to get away from having the bond approved by the court.

Mr. Lemann. In some cases does he not fix it? I think he does in a supersedeas.

Mr. Clark. That is it; he does in a supersedeas bond.

Mr. Lemann. He has to fix it there.

Mr. Olney. That is not the appeal bond. That is the stay bond.

Mr. Wickersham. The bond has to be approved by the court anyhow; does it not?

Mr. Lemann. In some cases the clerk approves the formal bond, the sufficiency of the surety.

Mr. Wickersham. If it is only for the nominal amount needed to perfect an appeal without a supersedeas, the clerk can do it.

Mr. Clark. Turn back to page 2 of the comments, 28 U.S.C. 869, near the top of the page, "bond in error and on appeal."

Mr. Dodge. Are we talking about the supersedeas bond here?

Mr. Wickersham. No; that is separate.

Mr. Dodge. Has he a separate rule on that?

Mr. Clark. No; I have not.

Mr. Lemann. That is why I brought it up.

Mr. Wickersham. In the first place, the court has to fix the amount of the bond, and in the second place perfect it, in a supersedeas.

Mr. Mitchell. The ordinary appeal bond that is not supersedeas ought to be in a fixed amount. The supersedeas is a different thing; but if you have both, a single bond ought to be allowed. You ought not to have to have two bonds.

Mr. Dodge. Can we do anything about that great hardship of the supersedeas bond, which sometimes deprives a poor fellow of any right of appeal? If a man is worth only $3,000, and somebody erroneously gets a verdict against him for $4,000, as the thing stands now he cannot appeal.

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Mr. Wickersham. But is not that the case in the State practice, too? He cannot get a stay unless he can secure the payment of the judgment on appeal. He is going to be wiped out and ruined, and he cannot appeal.

Mr. Dodge. I do not know whether we can change it or not. There was a case of an outrageous judgment by Judge Anderson in our district court five or six years ago which would have ruined five bank presidents and eminent men in Boston. Judge George Anderson found a judgment of $6,000,000 against them. It was upset by the court of appeals; but the position of appealing from that judgment put those men in a terrible situation, and if Sherman Whipple Whitwell had not agreed with me that each one of them could assign all of his property to a trustee it would have ruined high officials of the Old Colony Trust Company and other banks in Boston.

Mr. Wickersham. What suit was that?

Mr. Dodge. That was that oil refining case -- a perfectly outrageous judgment -- New England Oil Refining Company. You will find it in the Federal Reporter.

Mr. Wickersham. There was the famous case where Judge Landis imposed a sentence of $29,000,000 on the Standard Oil Company of Indiana.

Mr. Dodge. That case called very dramatically to my attention the fact that the court ought to have the same power

to allow an appeal without requiring a supersedeas bond for the full amount.

Mr. Wickersham. Of course the court ought to have and has jurisdiction. I remember an appeal in a railroad foreclosure case where I got a supersedeas on a bond of $50,000, and it involved several millions.

Mr. Dodge. I think you will find many Federal cases where the court has said, "Unfortunately, we have no discretion whatever in the matter."

Mr. Wickersham. That is not general, I think. I have known several cases where Federal judges allowed a supersedeas on a reasonable bond, in view of all the circumstances.

Mr. Dodge. The situation in which we were placed in that New England Oil Refining case made it quite important for us to examine the law as it was at that time, and we found that there was nothing, apparently, that could be done. If that could be modified in some way by a rule so as to give discretion to the court, it would be a very valuable result.

Mr. Wickersham. What is the statute as to supersedeas?

Mr. Dodge. It says "for damages and costs".

Mr. Clark. In Rule 112, which is the rule governing executions, I did not try to change the law at all. Execution issues unless a stay has been granted.

Mr. Wickersham. There is a difference, I think, between the rules at common law and in equity cases.

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Mr. Lemann. I think there is a general Federal statute on supersedeas.

Mr. Clark. There is a 42-day stay to give time to file in the clerk's office a petition for a new trial. This statute is the supersedeas bond -- 28 U.S.C. 869.

Mr. Wickersham. The case you spoke of, Mr. Dodge, was a common-law case; was it not?

Mr. Dodge. It was in a receivership case. A petition was filed by somebody asking the note-holders' committee, which I represented, to report on certain facts, and we proceeded to file reports and give information about the facts; and all of a sudden Judge Anderson took the bit in his teeth and converted it into an action of fraud against the bondholders' committee and entered a judgment for $6,000,000.

Mr. Wickersham. That was as in a common-law case -- an action of tort.

Mr. Dodge. He treated that report in a receivership proceeding as an action for fraud, and naturally it was upset by the circuit court of appeals.

Mr. Wickersham. Was that one of Anderson's cases?

Mr. Dodge. Judge Anderson was the judge.

Mr. Clark. Section 874 is the section with regard to supersedeas.

Mr. Mitchell. What does it say?

Mr. Clark. (reading:)

"874. Supersedeas. In any case where a writ of error may be a supersedeas, the defendant may obtain such supersedeas by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within 60 days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of the citation".

Mr. Wickersham. "Security required by law" -- what?

Mr. Clark. "Required by law."

Mr. Dobie. That is in Section 869, and it does not specify that it has to be for the amount of the judgment.

Mr. Wickersham. That is what I wanted to know.

Mr. Dobie. It says --

"Shall * * * take good and sufficient security * * * and, if he (the appellant) fail to make his plea good, shall answer all damages and costs."

But it does not specify the amount.

Mr. Wickersham. But it does not say the bond must be in the amount of the judgment?

Mr. Dobie. No; it says he must give a bond with "good and sufficient security". It is only for costs where it is not a supersedeas, but where it is a supersedeas he must give "good and sufficient security" and the appellant "if he fail to make his plea good, shall answer all damages and costs." I do not think it specifically says it has to be for the

amount of the judgment.

Mr. Wickersham. That was my impression, that there was a discretion in the court to fix the amount of the bond.

Mr. Dobie. Was it your impression that there was some Federal statute that specifically said the bond had to be in the amount of the judgment?

Mr. Dodge. As construed by the courts.

Mr. Wickersham. That is in common-law actions.

Mr. Dodge. I am not sure. I think, if it is of any importance, that we ought to have a memorandum on it.

Mr. Wickersham. Yes; I think we ought to know that.

Mr. Dodge. If there is anything we can do, we should do it.

Mr. Wickersham. I recall two or three cases where the court fixed the bond on supersedeas at an amount much less than the amount involved in the judgment.

Mr. Clark. Here is a case where the amount of the bond to be required by the Federal court on supersedeas is to be determined by it in its sound discretion under the laws and rules of the Supreme Court. Here is another, however: This is an old case in the Federal Cases:

"The practice of requiring a bond in double the amount of the agreed costs will not be departed from except under special circumstances rendering it unnecessary."

Mr. Dodge. Here is a statement that --

"Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal."

Mr. Dobie. That is the United States Supreme Court rule.

Mr. Wickersham. To what effect is that?

Mr. Dobie. It says specifically, this United States Supreme Court rule:

"Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal."

Mr. Wickersham. That would fit. In the cases I recall, the judgment was secured in a measure by a mortgage on the property.

Mr. Dobie. I do not know that that has been changed. Have you a copy around anywhere of Martin's Supreme Court Rules? Yes; it is in the Supreme Court rules.

Mr. Mitchell. Do you mean it regulates appeals to the Supreme Court? When you say "Supreme Court rules", you mean that relates to appeals to the Supreme Court?

Mr. Dobie. Yes.

Mr. Clark. It is in the C. C.A. rules, too. Here is the rule of the Fourth Circuit, for example, which is just

the same statement, as a matter of fact:

"Rule 13. 1. Supersedeas bonds in the district courts must be taken, with good and sufficient security, that the appellant or petitioner shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal."

Mr. Dobie. That is an exact reproduction of the Supreme Court rule.

Mr.Clark. There is something more where it is real property, etc. Now, let us see.

Mr. Dodge. I would suggest that we get a memorandum on that, and, if it is within our capacity, that we put this matter in the discretion of the court.

Mr. Clark. In the rules of the Third Circuit there is a rule that looks to be just about the same.

Mr.Dobie. I think quite generally the circuit courts of appeal have adopted the Supreme Court rule.

Mr. Clark. I am a little in doubt about what you want on the memorandum. Have you not got before you almost all we can tell you? Here are the statutes.

Mr. Mitchell. The statutes do not specify the amount.

Mr. Dobie. The statutes do not specify the amount. It is the Supreme Court rule. Do you think it is all

right for us to suggest to the Supreme Court that they change their rules? We can take it up with them, I guess.

Mr. Clark. How would you suggest that they change it?

Mr. Mitchell. Their rule relates only to appeals to their own court.

Mr. Dobie. Yes; and practically all the circuit courts of appeal have the same rule.

Mr. Clark. If you are going to suggest a new rule, what would you suggest?

Mr. Mitchell. Put it in the discretion of the court.

Mr. Wickersham. Here is a Supreme Court rule also which draws a distinction:

"Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages

for delay, and costs and interest on the appeal."

Mr. Dodge. You see, it is entirely a district court matter with us, because it is the bond which you file to prevent the process of the district court in the way of execution being issued; so it is well within the scope of the rule-making power if it is a rule proposition.

Mr. Wickersham. This is the rule of the Supreme Court that I was reading from.

Mr. Mitchell. I think it is clearly within the power of the court in making these rules.

Mr. Clark. The rule in the Third Circuit, which I have just been looking at, is exactly the same as that, including the provision as to mortgages, etc. Let me see if I can find the rule in the First Circuit.

Mr. Lemann. I think you will find that practically all the C. C. A. rules are copied from the Supreme Court rules, where appropriate.

Mr. Wickersham. Mr.Dodge's case was simply a judgment for a sum of money.

Mr. Dodge. It was in a receivership case in equity; yes.

Mr. Clark. The First Circuit has the same rule. What could you suggest by way of change? This is not a double indemnity bond.

Mr. Dodge. Put it in the discretion of the court -- the amount of the bond to be fixed in the discretion of the

court, so that if a man had only $1,000, and had a verdict of $5,000 against him, he could stay the loss of his $1,000 by putting up a bond for $1,000.

Mr. Mitchell. That makes it necessary for everybody to run up to the judge before taking an appeal and find out what the bond would be.

Mr. Dodge. Only to supersede. They have ten days in which to supersede the issue of execution and stay the judgment.

Mr. Lemann. I doubt whether you can get up a workable rule that will relieve the judge of fixing a supersedeas bond; but, really, what Mr. Dodge wants to do is to substitute a more liberal formula. He has one bad case which leads him to desire that, very properly; but I question whether, as a general proposition, it is fair, when the plaintiff has gotten a judgment, to permit a defendant to stay it merely because the defendant has not got that much money. That is really the effect to which he proposes to go. I doubt whether that is proper. There may be hardship cases now and then. You cannot avoid those altogether.

Mr. Wickersham. That is the rule in our State. For instance, you have a money judgment. You can only stay execution by giving a bond with sufficient sureties for the payment of the entire amount of the judgment, with costs, interest and costs, in the event of affirmance.

Mr. Lemann. I think that is the general rule.

Mr. Wickersham. But where, as is the case here, you have property involved, or there is a mortgage, or where there is property which is subject to the judgment, the amount of the bond can be fixed by the court in its discretion.

Mr. Dodge. Suppose you just took the rule as it is here, and added the words "unless the court shall fix some other amount". It applies harshly only where the man has not as much money or property as the amount of the verdict. Then he cannot appeal.

Mr. Mitchell. There is some hardship; but just think what it means to allow people to take appeals by giving a meagre bond, at little expense! You are just encouraging appeals for purposes of delay.

Mr. Dodge. In our State courts no bond is required to stay the execution. It seems very clear to me that a fellow ought to be able to stay the seizing of all his property by putting up all his property, even if the judgment is for a somewhat larger amount.

Mr. Dobie. How about a rule that would enact this rule, but give power to the judge, in his discretion, to fix a different amount if the peculiar circumstances of the case seemed to require it?

Mr. Dodge. That is what I had in mind.

Mr. Cherry. Mr. Dodge, what facilities would the

trial court, the Federal district court, have to determine that he was putting up all his property?

Mr. Dodge. The clerk?

Mr. Cherry. The clerk or the judge, either one.

Mr. Dodge. Oh, you would have to satisfy the judge. You would have to have a very strong case -- either a tremendous verdict for an amount which obviously a man probably could not put up, or else he would have to make a showing of that.

Mr. Cherry. It seems to me it would be a very difficult thing for a judge to satisfy himself about that. If they go and execute, he does not know how much they take. You are assuming that he will put up a bond for that amount. Will he disclose that, or can he really be made to disclose that effectively?

Mr. Dodge. If he wants to appeal to the discretion of the court, he has to satisfy the court. There would have been no difficulty along that line in the case of which I speak.

Mr. Wickersham. I do not remember what bond the Standard Oil Company of Indiana gave in the $29,000,000 case. They got a stay. That was a criminal case.

Mr. Olney. Is not the case you state unique?

Mr. Dodge. I do not know. It was a very large judgment against an individual.

Mr. Lemann. If the judge who gave that judgment had the power you propose to give him, he might not have exercised

it in favor of the defendants.

Mr. Olney. The reason why I am asking is that I never heard of such a case before. I never heard ofan instance where a man was under circumstances of hardship in giving a bond. It is sometimes embarrassing and difficult and all that sort of thing.

Mr. Dodge. I think perhaps I overestimate this, because all my cases are imaginary except that very real case where the difficulty was so tremendous. Here were men, one of whom was perhaps worth half a million dollars, president of the Liberty Trust Company. He had this judgment of $6,000,000 against him, and he was in a very difficult plight. If it had not been for a concession made by opposing counsel, there would have been a seizure of all his property, and he would have been ruined then and there; but it is such a rare case, as Judge Olney says, that I am willing to withdraw the suggestion, and trust that no such case will ever arise again.

Mr. Wickersham. It is an appalling case.

Mr. Clark. Of course it is now covered by the Supreme Court and C.C.A. rules.

Mr. Mitchell. We are not interested in the Supreme Court rule. That only affects appeals to the Supreme Court.

Mr. Dodge. That is covered by the statute, is it not, unless that is changed?

Mr. Mitchell. The Supreme Court rule might affect a

direct appeal from the district court; yes. I did not think about that.

Mr. Clark. The statute is just general.

Mr. Mitchell. You ought to provide, then, that the bond is required by law.

Mr. Olney. How does that happen to get in the C. C. A. rules? Is that supersedeas on going from there, or going from the district court to the circuit court?

Mr. Clark. No; it says "in the district courts", the district courts shall take such bonds as so and so. That is the provision I read you.

Mr. Wickersham. But is not that the provision in the C.C.A. rules?

Mr. Mitchell. It is in the C.C.A. rules, because after the case reaches there they have power to set aside a stay or grant one; so they hit the thing in advance by saying, "If you get your bond in the district court for so much, we will let it stay."

Mr. Dobie. Could not the appellate judges also take the bond and allow the appeal? Is not that generally permitted? In most cases cannot this bond in the perfecting of the appeal be taken, the granting of the appeal? Can it not all be done by the judge of the appellate court rather than the lower court?

Mr. Clark. I do not know. Can it? I did not suppose

it could.

Mr. Wickersham. I think you may go to the judge of the appellate court for your supersedeas.

Mr. Mitchell. In the Supreme Court, under the old practice, before certiorari was provided for, you could get your appeal allowed either in one court or in the other. You could get it allowed by the circuit court of appeals, or by a district court, or by the Supreme Court; but I think as far as certiorari cases are concerned, that is all out of the way anyway.

Mr. Dobie. I think in these cases it is provided that it may be done either by a judge of the district court or a judge of the Supreme Court -- that is, in appeals to the Supreme Court.

Mr. Clark. Is that in the Supreme Court rules?

Mr. Dodge. Supreme Court Rule 36.

Mr. Clark. As long as they have not got any allowance, but just a notice, we do not need to worry about that.

Now, we have the provision for service of the copies of the notice -- leave out "bond" -- upon the opposing parties or their attorneys, and filing it in court at once --

"And no other or further citation or service of the appeal shall be required: Provided, however, that the record as required under Rules 106-108 below shall be filed with the reviewing court and the case there docketed within

30 (or 40) days after filing of the notice of appeal, unless within that period the district court for cause shown enlarges such time."

On the question of time, which is now governed by the C.C.A. rules, which vary a good deal, 30 or 40 days seemed to be a fair average of the rules of the various circuits.

Mr. Wickersham. We cannot change that.

Mr. Sunderland. You think we cannot?

Mr. Wickersham. I do not believe we can. The rules of the appellate courts settle that. The Supreme Court rule would settle it as to appeals to the Supreme Court. The C.C.A. rules would settle it as to appeals from the district courts to the C.C.A.

Mr. Mitchell. Is it not a statutory requirement as to the filing of the record in the appellate court?

Mr. Clark. No; I do not think so. I mean, this is a question of time.

Mr. Mitchell. I know; but does not the statute say when the record shall be filed in the appellate court? Is that all a matter of rule?

Here is the suggestion of John J. Parker, senior circuit judge. He makes short shrift of it:

"The subject of procedure on appeal is one which should, of course, be covered by the rules."

However, his suggestions relate to proceedings in the

district court. We are rather leaving things up in the air a little bit.

Mr. Clark. I do not think the statutes provide it. It is covered by the rules in each circuit, and also in the Supreme Court.

Mr. Mitchell. You have not any express provision here for the granting of a stay of execution by the district court to allow motion for a new trial or appeal. There is a statute which says that the court shall allow a stay of 42 days. For what purpose? Not for taking an appeal, but for filing a motion for a new trial. You know, when lawyers want to get a stay to perfect an appeal, they ask for a stay of 42 days to perfect a motion for a new trial. That is a little bit foolish. Then all you say in your rules is something about "unless the court shall grant a stay".

Mr. Clark. That is Rule 112. I tried just to refer it back to those statutes. I do not make any independent provision on that subject. I say that the writ of execution shall issue unless the court shall have granted a stay, or supersedeas bond shall have been filed.

Mr. Mitchell. I think we ought to have an express provision in the rules that the court may grant a stay for a certain length of time to allow a motion for new trial or for appeal. The statute does not say anything about appeal to start with; and, even though the rule covers it, it makes it necessary for the lawyer not to look at our rules, but to

run back to the statute. Wherever we have a simple thing like that, and can set it up in the rule, he does not have to make cross references all the time to the law. It is a little awkward to refer him back to the United States Code any more than we can help.

Mr. Wickersham. If it is a motion for a new trial, of course it is all within the jurisdiction of the district court, and they can grant a stay on such terms as seem just.

Mr. Mitchell. They can grant a stay of execution to give a man time to make appeal.

Mr. Wickersham. Yes; but in case of notice for new trial there probably would have been no judgment.

Mr. Mitchell. In the United States court a judgment is entered right away, the moment there is a verdict.

Mr. Wickersham. Yes; that is so in the United States court.

Mr. Clark. Here is Section 865:

"Printed transcript of record on appeal to circuit court of appeals. -- In any cause or proceeding wherein the final judgment or decree is sought to be reviewed on appeal to, or by writ of error from, a United States circuit court of appeals the appellant or plaintiff in error shall cause to be printed under such rules as the lower court shall prescribe, and shall file in the office of the clerk of such circuit court of appeals at least twenty days before the case is

called for argument therein, at least twenty-five printed transcripts of the record of the lower court, and of such part or abstract of the proofs as the rules of such circuit court of appeals may require, and in such form as the Supreme Court of the United States shall by rule prescribe, one of which printed transcripts shall be certified under the hand of the clerk of the lower court and under the seal thereof, and shall furnish three copies of such printed transcript to the adverse party at least twenty days before such argument. Either the court below or the circuit court of appeals may order any original document or other evidence to be sent up in addition to theprinted copies of the record or in lieu of printed copies of a part thereof; and no written or type-written transcript of the record shall be required."

Mr. Mitchell. I did not catch the drift of the first part of that. Does that make some provision for docketing your appeal in the court of appeals?

Mr. Clark. No; this is just the filing of a transcript. Printed transcripts of the record must be filed at least twenty days before the case is called for argument therein.

Mr. Mitchell. Then the matter of docketing in the court of appeals is a matter of rule up there; is it?

Mr. Clark. So far as I know; yes, and all of them have provisions on the subject.

Mr. Mitchell. Why do we say anything about docketing,

then -- to make it uniform throughout the country?

Mr. Clark. Partly to make it uniform, and partly for the reason you just spoke of, about chasing the lawyers around. I think there is a good deal to be said for including in here all we can, so as not to chase the lawyers around; but you will notice that at the beginning of this section on appeal we chase them back to the statutes, "within the time provided by law."

Mr. Mitchell. That is a subject we cannot touch. This matter is one that we can touch. That is the point; but instead of doing it in the rules, we are referring the lawyer to the statute. Of course where it is a thing we cannot touch, we have to refer him to the statute. Where it is a thing we can touch, it is a simple matter to include it in the rules, and save referring him to a statute.

Mr. Dobie. A lot of this stuff has to be done in the lower court. Filing this transcript is done in the reviewing court. Do you think there might be some question raised to the effect that we have nothing to do with what is to be done up there?

Mr. Mitchell. I rather think so.

Mr. Dobie. That that is their business and not ours?

Mr. Mitchell. There is no question about it.

Mr. Dobie. That we can prescribe what is to be done in the lower court to perfect the appeal, but when it is up there, when it has to be filed in the appellate court --

Mr. Mitchell. It is a matter to be settled by their rules.

Mr. Dobie. Yes; I think there is a good deal in that. In other words, we cannot touch what is to be done in the upper court.

Mr. Dodge. Was that a statute you were reading?

Mr. Clark. Yes; 28 U.S.C., 865.

Mr. Dodge. What section of the Judicial Code is it in?

Mr.Clark. It has not a Judicial Code number. It is the act of February 13, 1911.

Mr. Dodge. What section?

Mr. Clark. Section 865, 36 Stat. 901.

How would it do to stop after the word "required"? That would make it even neater in length -- a nice little appeal section.

Mr.Wickersham. If you would put in parentheses after that "see U.S.C., section so and so", that would be a help to the bar.

Mr. Clark. Or you could put in "see the circuit court of appeals rules of the various circuits".

Mr. Wickersham. Yes; you could do that.

Mr. Mitchell. I suggest that we strike out this provision about docketing the case in the circuit court of appeals.

Mr. Clark. And stop with the word "required".

Mr. Dobie. Did we not change that provision as to

notice, and cut out the mailed stuff?

Mr. Clark. Yes.

Mr. Mitchell. Do we leave this proviso in or out, before we pass on to anything else -- the proviso which attempts to state when we shall do things in the circuit court of appeals?

Mr. Dobie. I move that that go out, Mr. Chairman.

Mr. Sunderland. I support it.

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

Mr. Clark. In answer to your question, we were going to change that to "notice", something like this:

"Such party shall serve copies of the notice of appeal upon the opposing parties or their attorneys and file it in court at once, and no other or further citation or service of the appeal shall be required."

Mr. Mitchell. It does not have to be filed at once. It has to be filed within the time fixed for taking appeals.

Mr. Clark. All right; "filed in court within the time"--

Mr. Mitchell. It has to be served and filed within the time for taking appeals.

Mr. Dobie. That will be redrafted.

Mr. Mitchell. Yes.

I think we have disposed of Rule 105, then; have we not? If there is no further objection, we will call that finished

for tonight. Are you ready to adjourn now?

Mr. Clark. Does that finish Rule 105?

Mr. Mitchell. That finishes Rule 105.

Mr. Dobie. It leaves us 15 rules.

Mr. Clark. This is fine. I am not sure but that Rule 106 is about the only big rule left, except provisional remedies.

(Thereupon, at 10:15 o'clock p.m., an adjournment was taken until tomorrow, Wednesday, November 20, 1935, at 9:30 o'clock a.m.)