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ADVISORY COMMITTEE
of
THE SUPREME COURT OF THE UNITED STATES

Washington, D. C.,
Thursday, December 7, 1939.

The Advisory Committee of the Supreme Court of the United States met at 10 o'clock a. m., pursuant to call, in the building of the Supreme Court of the United States, the Honorable William D. Mitchell, Chairman of the Advisory Committee, presiding.

Present: Honorable William D. Mitchell, Chairman; Hon. George Wharton Pepper, Vice Chairman; Hon. Edgar B. Tolman, Secretary; Hon. Charles E. Clark, Reporter; Hon. Armisted M. Dobie; Robert G. Dodge, Esq.; Hon. George Donworth; Monte M. Lemon, Esq.; Hon. Scott M. Loftin; Prof. Edmund M. Morgan; and Prof. Edson R. Sunderland.

Present Also: Prof. James W. Moore; Edward H. Hammond, Esq.; and Leland Tolman, Esq.

P R O C E E D I N G S

The Chairman. The meeting will come to order.

One of the things that struck me this morning, gentlemen, was the spirit with which this committee greeted one another. I think it is a fine commentary on our relations; it is better than a class reunion.

We have since our last meeting lost one of our members, Judge Olney. I want to bring up now the question of whether or not we should make some formal recognition of his passing in the form of a resolution to be sent to his family, though it

comes a little late. How do you feel about that? Do you think we ought to make some formal recognition of it? If so, how should we arrange it? Should we have a member of the committee draft a resolution and submit it to us?

Mr. Pepper. It seems to me that on the occasion of the reassembling of the committee the Chairman should be requested to express to Judge Olney's family our sorrow in his death.

The Chairman. Do you think that that ought to be in the form of a letter from the Chairman or in the form of a resolution approved by the committee?

Mr. Pepper. It seems to me that a personal letter from the Chairman speaking for the committee would probably be more appropriate.

The Chairman. Then, I shall arrange to take care of it if all the members of the committee acquiesce in that plan.

The question that arises at the outset this morning is, Why are we here and what are we to do? I think we ought to have some preliminary discussion, and in order that the committee may have a background, I will explain what I know about the way this meeting came about and, so far as I am able, will tell you what the Court thinks about the situation.

We have an order from the Court, and then I wrote the Chief Justice a letter, copies of which I think you have, and I indicated to you that I was inclined to the view that the Court wanted to do something by January 1.

In my letter I called attention to the fact that while it is a good thing to have a continuing supervision of these rules with the power to correct them as they needed correction, that had to be weighed against the objections to constant tinkering,

and I personally felt that no defects of a serious nature had been found in these rules to require or to make imperative any amendments. I stated that the courts seemed to be doing very well and that the sort of defects that had developed were minor and did not constitute a major emergency. I said that there were a few small things that might have been done better if we had known better at the start, that might have improved the rules, but I thought that to jump in now in a hurry, and not do a thorough job now, so that we would have to repeat ourselves after another year, was bad for many reasons.

In addition to all the reasons that I set forth in that letter against amendments now and the opposition of many to changing the published editions and opposition to constant tinkering right away, there is another reason to which Mr. Hammond has just called my attention, and it is a very vital one.

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There are many states in the Union that are now busy fighting the battle for uniformity by trying to copy our rules as nearly as they may be able to do so. There is a very strong movement of that kind now on. Mr. Hammond calls attention to the fact -- and he is quite right about it -- that while that movement is on and is in the flush of its enthusiasm, if we start in again to amend these rules and tinker with them, that will immediately create quite a damper on the movement in the states.

One of the most important features of this entire system was to try to get the states to produce generally uniform rules by voluntary acceptance of these rules as far as they fit the state conditions.

I wrote my letter to the Chief Justice in the hope that he would reply with a statement that that was all right, but he evidently felt that the committee ought to meet now and that it either ought to propose amendments or ought to be able to review the situation and report that no amendment should be made. Either action would show that the Court Committee was keeping its hand on the situation and keeping the initiative, as Major Tolman says. I received the impression from his letter that he felt that a number of these amendments ought to be consolidated to make that move and that he did not quite agree with me that we should not do much of anything now. So, it being obvious that there is not a unanimous feeling in the committee about that either, since there were some ideas expressed in some of the responses that made me feel we ought to canvass opinion because of the letter of the Chief Justice, I called this meeting with the idea that when we met we could find out how the Court felt about it, so that we would not be doing anything that was unacceptable to the Court. I felt that if the Court insisted on our preparing some memoranda now to make a showing, we could do so.

(Here the shorthand reporter was directed by the Chairman to suspend reporting while the committee engaged in a general discussion. At the end of the discussion, the following occurred:)

The Chairman. The resolution which is now before the committee for consideration is as follows:

Resolved, That it is the opinion of this committee that under the act of June 19, 1934, the Supreme Court has continuing power to make amendments and additions to the United Rules.

Will all those who hold the opinion that there is a continuing power say aye?

(The resolution was adopted unanimously.)

The Chairman. We are unanimous in that.

We now come to the question of submission to Congress.

(Here the shorthand reporter was directed by the Chairman to suspend reporting while the committee engaged in a general discussion. At the end of the discussion the following occurred:)

The Chairman. The resolution proposed for your consideration is as follows:

Resolved, That it is the opinion of the members of the committee that the Act of June 19, 1934, should be interpreted as requiring that amendments and additions to the United Rules be submitted to Congress at a regular session and shall not take effect until after the close of such session, in the same manner as the original rules were submitted.

Be it further resolved, That in addition to giving the Court the vote of the committee, a memorandum shall be prepared expressing the views of the majority and minority of the committee and shall be submitted to the Court.

All who are in favor of the resolution say aye.

The record will show that all the members of the committee except Judge Clark vote aye; Judge Clark votes no.

Instead of dealing with this in particularity, I should like to know the consensus of the committee as to whether we can express to the Court from our observation of the working of these rules that there are no defects which have developed that are of such an important nature, laying aside all other

considerations, as to warrant the Court's now undertaking to make amendments. That is a matter separate from the question of whether it is appropriate to make some amendments if the Court desires to make them.

Mr. Pepper. To bring the matter before the committee, and reserving my own right to change my view after debate, I move as follows:

After careful consideration, the committee has reached the conclusion that no amendments to the rules should be recommended at the present time.

If that resolution were to pass, I think that in any report that we submit something like this should be said:

A number of amendments have been brought to the attention of the committee, and these have been examined. It seems reasonable to expect that some of them would commend themselves both to the Court and to the Congress. However, none of them is so important as to require immediate action, and the committee suggests that it would be wiser to allow proposals to accumulate until a more comprehensive review of the rules can be made.

3 Mr. Lemon. Would it not be better before we adopt that to have the various amendments that have been suggested brought before us? I would not know how to vote on that intelligently.

Judge Dobie. I think we should go into those briefly to see whether we ought to consider them.

Mr. Pepper. Sooner or later we shall have to face the issue raised by that motion, and instead of making the motion now, I will give notice that I expect to make it later. In the meantime, we can discuss the individual amendments.

The Chairman. If I were free to exercise my own judgment in the matter, I could vote on that, but after my conversation with the Chief Justice this morning I am afraid that we may be going at it in the wrong way. I think there is a strong disposition on the part of the Chief Justice to want to propose this Longshoremen's Act amendment and any others that we think are appropriate at this time -- at least the former. This resolution would bar that.

Mr. Pepper. I am not pressing the resolution for action now; I am just suggesting it. The thought is that we will take up these different amendments and then decide in the light of those amendments what action to take.

The Chairman. Well, that is all right. I think we ought to go over the field and call upon the Reporter, Mr. Moore, and all the members of the committee here to see, first, whether there are any defects that have developed and whether it is imperative that amendments be made now. Let us get that out of the way, and if anybody has in his mind right now any amendment that he thinks is imperative -- that is, that is of a serious enough nature to cast aside all objections to present amendment and should be made now -- let him bring it up. If we find that there are none that are imperative, we can reach that conclusion and make a report to the Court that none are imperative. We can then pass on to the consideration of the amendments that are in mind and make a report as to those that we think would be appropriate although not imperative.

There is a division of the subject there that I think would expedite our proceeding. I am anxious to find out whether there are any amendments here. That is one of the things we

want to report on. I think if we approach the discussion of this resolution in that way, we are going to save much time. We can call on the members of the committee to bring up any amendments that are of such a desirable nature that we ought to consider whether they are imperative or not, not deciding whether it would be appropriate or proper to make them.

Mr. Pepper. Following your suggestion, I suggest that we ask the reporter if he has any such proposals.

The Chairman. We will start with the reporter and ask him if there have come to his attention any defects in these rules that are of such a nature as to require a change and ~~over-~~ride any arguments that may be made against the idea of ~~con-~~sidering amendments.

Judge Clark. Put in that light, it is a little difficult to answer. I do not think that there is any amendment of such importance that the rules or the operation of the rules as a whole would be greatly prejudiced if we did not make it. There are certain ambiguities in the rules and certain parts of rules that I think have been somewhat misconstrued, so that the process of amendment would help the construction; but if there are stronger reasons for not doing it, they are not things that are going to upset the rules as a whole.

If I tried to make a standard of what Judge Maris suggests -- I do not think it is desirable, but I do not know that I would call it imperative -- but if that is made a standard, I have several that I think are as important as that and possibly a little more so.

Let me just pick out the one I mentioned before, and that is the matter of receivers, which I think is a little more im-

portant than the Longshoremen's Act. The suggestion that Mr. Moore and I made on that was the one that the Major has put in his District Court Rules. We say:

"It should be made clear that in receivership actions the action generally is governed by the Federal Rule. This could be done by striking out the concluding 'but' clause and adding in lieu thereof the following:

"'but in all other respects the action in which the appointment of a receiver or other similar officer is sought, or which is brought by or against such an officer, is governed by these rules.'"

That would be Rule 66. It is the kind of thing that two or three, or perhaps more have suggested.

These suggestions that I have made I do not put up as emergencies. These are things that we thought were desirable. If you will look at Rule 53 in the suggestions here, on page 6 --

The Chairman. Would you mind going back to Rule 66, so that I can understand that point?

"The practice in the administration of estates by receivers or by other similar officers appointed by the Court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules promulgated by the district courts, but all appeals in receivership proceedings are subject to these rules."

4 As I interpret that, it meant that it did not provide that suit for the appointment of receivers, and so on, should not be governed by this rule; it meant that after the suit was started and the Court got into the practical business the rules should not apply.

That is raised because the rule at the end says "appeals in receivership."

Judge Clark. Yes.

The Chairman. Applying to nothing but appeals.

Judge Clark. That is it.

The Chairman. Let us go on to Rule 58.

Judge Clark. As to Rule 58, there is a very nice point, not merely on our rule but also on our rule as applied to bankruptcy matters. The case is stated very briefly in this paper, copies of which have been distributed to you. I will state it again.

A judge in Connecticut heard objections filed by a creditor to an application for discharge. Therefore, you see it was a bankruptcy matter. He wrote a long memorandum which he entitled "Memorandum and Order Granting Discharge."

At the end, having stated his reason for overruling the creditor's objection, he stated, "It follows that the objections are not sustained and the discharge shall be granted. An order to that effect may be entered."

The Clerk immediately wrote in the docket the date and "Memorandum and Order for Discharge Filed," and then he added, "Copy sent to the Attorney General," which he does when he gets a judgment, and he considered it a final thing.

There are 30 days in which to appeal. Almost two months afterward the objecting creditor went around to the judge with a long order reciting a number of things -- because this came in on a report of a referee, and it was an order confirming a report of a referee, and so on, and eventually overruling the objections of the creditor and granting the discharge, which the

judge set aside. Why, we do not know; he did not say.

Then the objecting creditor immediately appealed, and the thing came before our Court on a motion to dismiss because it was too late. My reaction was that the last sentence notation governed; that the date of the order was the original date and that the appeal was too late.

One of my colleagues said, going back to an earlier sentence there, that this could not be an action for money judgment or for costs, and therefore there was no order until the judge had approved an entry which occurred at the later date. We talked that over but never did reach a conclusion. We evaded the issue temporarily, but we shall have to meet it eventually. What is the answer?

Judge Dobie. Don't you think that that is typical of things that ought to be settled but that it is not at all vital?

Judge Clark. I think the heavens will not fall whether we do it rightly or wrongly.

Judge Dobie. The receivership matter, I think, is very much more important.

Mr. Lemon. Isn't it clearly within the second clause? It is not within the first clause.

Judge Clark. Of course, there are these things to be said. From what I gather from your suggestion, which is what one of my colleagues made, that it is the governing thing, then practically never in a bankruptcy can the Clerk act; all judgments must go back to be made by the judge, which isn't so, unless we are changing the rule.

Mr. Lemon. One reason, I suppose, is that in drawing the rule they did not apply it to bankruptcy matters.

Judge Clark. Yes.

Mr. Lemon. I think the result is obviously clear under the present rule, whether it is desirable as a result.

Judge Dobie. What do you think is the result?

Mr. Lemon. I think the judgment would not be properly entered until the Judge set the form of judgment and directed it to be entered.

Professor Morgan. He did not say the judgment should be entered; he said it may be entered.

Mr. Pepper. Gentlemen, the unfortunate shorthand reporter, mystified by instructions that he shall or shall not include such and such things in the record, has now got to the point where he is attempting to take down a discussion in which three people are talking at once. Can we not adopt the rule that the debate is not to be taken down? When we have resolutions, let us have them taken down, and if there is a statement by someone which seems to be important, let us have that taken down.

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(Here the shorthand reporter was directed by the Vice Chairman, in the absence of the Chairman, to suspend reporting while the committee engaged in a general discussion. At the end of the discussion the following occurred.)

Mr. Pepper. I suggest to the Chair that we go through the proposals for amendment that have been submitted with the view to passing upon the merits of each particular proposal and for the purpose of finding out whether, taking them all together, there is a sufficient amount of desirability of amendment to make it necessary to go back and take them up seriatim; otherwise, we shall be debating each one of these things on its merits, and at that rate I do not think we shall ever get through.

The Chairman. That was the general idea I had in my mind about it.

Have you discovered any defect that you think is more substantial and more imperative than the ones you have listed?

Professor Moore. What about your intervention?

The Chairman. I would not consider that.

Let me ask each one of you whether there has come to your attention any defect in these rules which you think is of such an emergency nature as to cause you to think that it really requires amendment at this time.

Mr. Tolman. Would that foreclose consideration of matters which we might think were not real emergencies but which might meet the situation that the Chief Justice spoke of?

The Chairman. No, it would not. My idea is that if we agree that there is nothing imperative, we will report to the Court that these rules can go along well enough without any amendment; but if we think it is desirable to make any at this time, or, say, one or two of those that we have had under consideration, we can say that we think they are the most appropriate and the only ones that we feel justified in submitting in the short time available to submit them.

Mr. Pepper. I answer your question by saying that I see no proposal of amendment which seems to me to be urgent.

The Chairman. What do you say, Professor Sunderland?

Professor Sunderland. I have about 15, but I do not think any of them are really urgent. The only one that seems to me to be of sufficient importance to deal with would be the question of the findings of fact, and I think that is a controversial question.

Professor Morgan. You would not call that an emergency at all?

Professor Sunderland. No.

The Chairman. That means abolishing the necessity for findings?

Professor Morgan. Letting counsel waive them.

The Chairman. What have you to say, Senator Loftin?

Mr. Loftin. I do not know of anything that I would call an emergency. I have talked the matter over with our District Judge, and he said that while there were one or two that came up in practice before him, he did not consider that they were advisable and that he himself was opposed to tinkering with the rules at this time because it would be very important.

The Chairman. Mr. Dodge?

Mr. Dodge. Nothing has come to my attention at all that I think involves anything of an emergency nature. I took the matter up with Judge McLellan, who is a very able District Judge, one of our four, and he did not look altogether with favor on the rules originally. He notified me that he had no changes whatever to suggest.

The Chairman. Mr. Lemon?

Mr. Lemon. I took the matter up with our District Judges and with our Circuit Judges. Judge Hutcheson, who talked a good deal about the rules, said he thought it would be best to get better adjusted before changing them.

The Chairman. Professor Morgan?

Professor Morgan. I have none. The only thing that bothered me about the rules was when the District Judges became tangled up on account of the Tompkins case, and you could

not blame the District Judges so much for that.

The questions of power are the ones that bothered me, but I do not think there are any of real importance.

The Chairman. Judge Dobie?

Judge Dobie. I have two or three here, but I do not think they are very vital. One is from Judge Paul, my colleague in the Western District, and Judge Parker has some, but he says, "In my judgment, the rules are pretty nearly perfect, and I am afraid to change them might hurt rather than help."

He makes one suggestion that I think is interesting; namely, whether or not we ought to reach out and go a little further to cover some things that have not been covered. He was before the Circuit Court of Appeals in Baltimore in a bond forfeiture case. He wanted a definite rule in bond forfeiture -- whether it could be done summarily on the spot or whether there had to be some notice. The importance of the record ought to be defined specifically. They waited until almost the end of the time and then rushed in for an extension of time.

I do not think either one of these is vital. Judge Parker is one of the best friends the rules have. I agree with the Senator that we had better not do this unless we do something worth while.

The Chairman. Judge Donworth?

Judge Donworth. I am in accord with the general sentiment expressed here. Any of the matters that I have suggested to be changed can, I feel, be better changed in the light of another year's experience. Even this matter of receivership, which has been brought up, I think can be better clarified a

year from now.

There may be a question whether the right of dismissal until answer is filed should apply to receivership cases, because oftentimes the answer in receivership cases is not filed for months and goes on to all sorts of things. I think an exception might well be drafted when we make all the rules applicable.

Even the matter that has been brought^{up}/here in connection with the Longshoremen's Act, it seems to me, is not an emergency, so I am in favor of making no changes for another year or until some time next year.

Mr. Tolman. Mr. Chairman, I have talked with the Federal Judges in Illinois, and it is quite remarkable how unanimously they approve the rules. I think one of the judges in Illinois has made a very erroneous decision, it seems to me, on the question of our Rule 12, but we could not cure that in any way at all. It is one of those things that has to go through a process of adjudication and appellate review and be settled by the Court. I do not think that there is anything that is essential. I, however, do think that perhaps on the matter of advisability it might be well to submit with the report a very few -- I can't think of more than three or four -- amendments to the rules. It does not make any difference as far as the rules are concerned whether it is done or not, but it might make a difference in accomplishing the purpose the Chief Justice has in mind.

The Chairman. What would you have in mind other than the possible extension of the rules applying to the Longshoremen's cases?

Mr. Tolman. I had in mind the two matters you mentioned

in your correspondence with the southern judges, where there were only two terms of Court a year.

The Chairman. Cases for removal?

Mr. Tolman. That is what I had in mind. I think those matters that were corresponded about would be well to put in, and I think there are three or four of them submitted here that might go forward. I thought we would not discuss particular ones.

The Chairman. But your general conclusion is that there is no urgency as to any of them?

Mr. Tolman. That is my view.

Professor Morgan. May I ask if there is any machinery by which every member of the committee can get the suggestions that have come in from all the other members?

Judge Dobie. Should they not all be sent in to the Secretary?

The Chairman. I send them all in, but the question then arises whether the Secretary has available any funds now out of which he can pay for distribution to all the members of every suggestion that comes in about amendments. Have you, Major Tolman?

Mr. Tolman. No.

The Chairman. The Chief Justice does not want to apply for an appropriation right now, so I think that what we should do is agree that when any of us gets an amendment, we should spend a little of our own money and send copies of our suggestions around to the others. I shall do that from now on. It will not be much of a burden on us.

Judge Donworth. I think it would be a good idea to formu-

late an amendment in each case instead of describing the difficulty.

The Chairman. If you want to, but --

Professor Morgan. It would be quite a big job.

The Chairman. I take it, then, that it is the consensus of the meeting that there are no defects that have developed that are of such an urgent nature as to require any amendment.

Let us now take up the question of whether or not, in deference to the idea of the Chief Justice that the Court may want to do something now, there are any amendments that we think are appropriate to put up to the Court to use if they want to.

First, as he is essentially interested in it, there is this Longshoremen's Amendment.

Professor Morgan. Before going into that, Mr. Chairman, may I suggest that we take a little time for lunch?

The Chairman. Yes, that is a good idea. Let us recess now until two o'clock.

(At 1:00 o'clock p. m. a recess was taken until 2:00 o'clock p. m. The following then occurred:)

The Chairman. When we recessed, I was suggesting that we take up this longshoremen's proposition. I have in mind, in view of the attitude of the Chief Justice, that whether we approve or do not approve of the idea of making an amendment, we ought to formulate it and give the Court a chance to adopt it if it wants to. I have been looking over the statute and also the rule as found in Rule 31(a)(6). The rule states:

"These rules do not apply to proceedings for review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927."

Now, I have the statute here, and I am beginning to think that I did not make so much of a slip after all. I was in grave doubt whether that ought to be abolished or not and whether we ought to make a rule stating that except as especially provided in the statute, the procedure shall be under these rules. The statute is all right. This Workmen's Compensation Act provides for awards by the Commission.

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any part in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the

damage.

"(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

"(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18."

Judge Dobie. Don't you think it would be dangerous if we interfered with that and tried to put that into our mold?

Judge Clark. Before you go further, may I suggest that the suggestion made by the Judge was for the wrong place? The place would be Rule 31(a)(3)? You see, we have something of a formula there:

'but otherwise only to the extent that matters of procedure are not provided for in those statutes."

Mr. Lemon. I move that we recommend that the rules be extended to proceedings for review of compensation orders under

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the Longshoremen's and Harbor Workers' Compensation Act except in so far as the statute provides for them and that the precise wording of the amendment be drafted by the Reporter or the Secretary.

The Chairman. What you want to do is move that it is the sense of the committee that it ought at some time to be amended and that the amendment ought to be in a certain form? That is what you mean, isn't it?

Mr. Lemon. Yes.

The Chairman. Let us put it up to a sub-committee to work it out and we will submit it to the Court. Is that agreed to?

(There was no dissent.)

The Chairman. Suppose we take up now the question of the receivership rules and see if we want to draft and submit to the Court any possible amendment.

Judge Clark. There is a suggestion of a form here in this paper.

The Chairman. Suppose we adopt in principle the proposed amendment to the receivership rules as a suggestion to the Court, leaving it to the drafting committee to check it over again and be sure that it hits the nail on the head.

Mr. Tolman. I so move.

The Chairman. There is the further suggestion that we amend the rule on dismissals.

Judge Donworth. I think it complicates it to amend Rule 41 at all. Where you have a general rule, like 41, and you are simply making a special provision on the subject of receiverships, which you are in Rule 66, it is admitted you are making an exception here, because the practice in the administration of

estates by receivers is really not governed by these rules, both before and after the proposed amendment that we are now considering. The administration is going to be governed by the old decisions that we have in the books. So, I do not see any incongruity at all, if the committee concurs in the idea, in making an exception about dismissals right in Rule 66.

The Chairman. Without any reference in Rule 41?

Judge Donworth. Yes.

The Chairman. The only answer I have to make to that is that in these rules, right through from beginning to end, wherever there is a rule that says a certain thing and we have made an exception to it otherwise in the rules, we have uniformly referred over to the exception. Here we would make an exception to Rule 41 and would depart from that system without making any reference to it.

Mr. Pepper. I move that Rule 41(a) be amended by inserting in the third line thereof, after the words "the United States," the following:

"except in cases where a receiver or other similar officer has been appointed, an action may be dismissed," and so forth.

The Chairman. And that Rule 66 be amended substantially as suggested in this written report?

Mr. Pepper. Shall we take them up separately or take them both at once?

The Chairman. All right; let us vote separately on this proposed suggestion, and if the Court wants to do anything, it can amend Rule 41 accordingly.

Mr. Loftin. Does this motion say that we recommend that

the Court do amend?

The Chairman. No, we are going to report that there are no defects so violent as to make imperative present amendments but that if any amendments are to be made at this time these are desirable and should receive the consideration of the Court.

Mr. Pepper. This does not commit us as to what happens; but if we did recommend doing anything, it would be this.

Professor Morgan. Haven't we passed a resolution that it is the sense of this committee that no amendments should be made at this time?

Mr. Loftin. The motion was not put that way, but afterward the Chairman stated that he understood it was the agreement or sense of this committee that no amendment should be made.

The Chairman. No, it was not quite that. It was the sense of the committee that no defects had developed of such a serious nature as to make immediate amendment imperative. We all agreed to that.

We are now back to the matter of suggesting some amendments that are not really imperative but are desirable, which are about all we have time to consider.

Mr. Pepper. Leaving open the question, after we have perfected them, of what we are going to do with them. I cannot help feeling that up to date it looks as if the mountain had been in labor and that two or three little mice are going to come forth.

Mr. Tolman. I should like to second the Vice Chairman's motion.

The Chairman. The motion relates to the proposed amend-

ment of Rule 41. If it is going to be amended, it will be amended by inserting in the third line, after the words "the United States," the following:

"except in cases where a receiver or other similar officer has been appointed."

All in favor of that say aye.

(The motion was carried unanimously.)

The Chairman. Let us turn to Rule 66 and see whether we want to make the amendment suggested by Judge Clark, which removes the ambiguity as to whether or not Rule 66 leaves suits for the appointment of receivers subject to the equity rule.

Mr. Pepper. I move its adoption.

(The motion was seconded.)

The Chairman. Is there any further discussion? If not, all in favor of the motion say aye.

(The motion was adopted unanimously.)

The Chairman. Is there some other rule that we want to bring up that is of exceptional interest?

Professor Sunderland. I suggest a change in Rule 52, which deals with special findings by the Court.

"In all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunction the Court shall similarly set forth the findings of fact and the conclusions of law which constitute the grounds of its action."

I would suggest a provision that the Court may in its discretion make special findings in the form of a written opin-

ion in the case.

Then make a corresponding change in Rule 75, "Record on Appeal to a Circuit Court of Appeals," adding to 75(a) something in substance like this:

"In a case tried on the facts without a jury, if special findings have not been made, such designation shall constitute a request for special findings, which shall thereupon be made in the form provided in ^{Rule 52} (a)."

In other words, you will always get your special findings if you take an appeal, but you will not get them necessarily if you do not take an appeal.

The Chairman. That proposal assumes this: that we have a system that is not working well and we ought to admit it and change it right now rather than wait and give it a further trial. It may be another year or so before we do anything. I am not so sure we ought to be starting in to rehash these questions that seem to be giving trouble and saying now that it has been demonstrated that our system is a poor one and ought to be changed.

I sympathize with you busy judges, but I have seen this system working in a dozen States of the Union to the utmost satisfaction. The truth of the matter is that the district judges are generally balky about it because it makes a little work. They are not sympathetic to it at all. I do not think they have met it half way and tried to work it out in a reasonable way. I do not think they have exercised their means of calling on the lawyers to draft findings for them as much as they could.

Whether I am right or wrong about this, I do not think we

ought to take up a fundamental question of policy under these rules as to general methods of procedure and rehash now on the experience we have had. I can think of a good many other things under these rules that we have tested under a great deal of trial and tribulation that may not work out to ultimate satisfaction, but are we going to throw up our hands on any of them without a further test? I think that is the real problem here. If we are going to settle down to this sort of thing, we are going to be here for a week; there is no doubt about it.

Professor Morgan. I think that if we are going to settle down to that sort of thing, we shall have to give the Reporter a job and have him come back with something that we can fight about.

The Chairman. And that cannot be done by the first of January.

Professor Morgan. I do not agree with Mr. Sunderland's motion at all. The most I would vote for, without a demonstration that it might not work, would be a right to waive findings. Certainly if I were trying a case before a judge, I would not want his hunch; I would want the findings of fact.

Judge Donworth. I think there is much in Professor Sunderland's motion, but I think another year of experience should be had with the rules.

Professor Sunderland. I suggested it only because you said the Chief Justice wanted something and you were trying to get contributions of something that you could hand over to the Court.

The Chairman. I had in mind things that were obviously needed.

Judge Dobie. How about putting Fraud in Rule 60?

Mr. Pepper. Of course, you ought to remember that when you select some things and put them up to the Court, and the Court presents them to Congress, all the fellows who have things that they think are just as important or more important than the things that we put up to the Court will raise a howl and say, "This process of revision has been begun, but it has been hurriedly done, and we have not been considered."

Mr. Lemon. We can say that we might put in the amendments relating to longshoremen and receivership, but the minute you get beyond them I do not know how you can very well pass upon the differences and degrees of importance of the others. If we put in three or four of the other sort of things, we have practically said everything else if O. K. We have a dozen here. Once we get beyond those first two, it seems to me we ought to do nothing, or else go down the line with everything which is here, which we cannot do.

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Judge Dobie. I would much prefer to do nothing.

The Chairman. Let us stop now and see whether we want to go ahead and bring up other amendments. Many of us have brought up other amendments that we think are not of special importance. Are we now in a position to say, "Well, we are not going to draft any amendments except one or two that we have already made on receiverships and longshoremen"?

Mr. Tolman. Do you consider Rule 24, Intervention, important?

The Chairman. No, I would not rate that as deserving the attention of this committee right now. It is just one of 30 or 40.

Mr. Tolman. Or the removal question, which the attorney raised?

The Chairman. No.

Mr. Tolman. I do not think of anything further myself beyond those we have been talking about here.

The Chairman. Do you want to consider whether we should stop now and say that we will not draft any other amendments at this time?

Mr. Dodge. Has it been decided that we shall submit an amendment to Rule 41?

The Chairman. No. There is a reservation by Senator Pepper that after we have drafted all the amendments we think proper to bother with this afternoon, we should go back and decide whether we will put them up. The problem now, however, is whether we should stop now and consider his reservation or those two amendments we agreed to and not consider any more.

Mr. Tolman. That is, Rule 66 and the Longshoremen?

The Chairman. Right.

Judge Donworth. I move that we consider no more questions than those that have been so far tentatively adopted.

Judge Dobie. I second the motion.

The Chairman. Is there any discussion on that? If not, all in favor of the motion will say aye.

(The motion was adopted unanimously.)

The Chairman. Now, let us go back to Senator Pepper's suggestion that we formulate or direct the Reporter to formulate amendments to the Longshoremen's and receivership rules.

Senator Pepper. Would it not be proper, in that general connection, if our general policy is not to recommend amendments

at the present time, not even to recommend those but to say generally something to the effect that we do not recommend any; that we have had a number submitted to us; that no doubt some of them will ultimately receive approval; but that the two that most impress the committee are those annexed to this report; and let it go at that?

The Chairman. Two about which there could be the least difference of opinion or need to consult the Bar about.

Senator Pepper. The original resolution was:

"After careful consideration the committee has reached the conclusion that no amendments to the rules should be recommended at the present time."

That is our recommendation, and that was the whole resolution.

Then I read a little memorandum that I had written while we were talking here, which reads this way:

"A number of amendments have been brought to the attention of the committee, and these have been examined. It seems reasonable to expect that some of them would commend themselves both to the Court and to the Congress. The two that most impress the committee are those appended to this report. However, none of them is so important as to require immediate action, and the committee suggests that it would be wiser to allow proposals to accumulate until a more comprehensive review of the rules can be made rather than that the process of piece-meal amendments right now be encouraged."

Judge Dobie. That puts it up to the Court.

Senator Pepper. We say that as far as we are concerned we

do not see any reason for recommending the changes at the moment because we deprecate piece-meal amendment. A number of amendments have been suggested. We have looked at them. It looks to us as if a number of them would commend themselves both to the Court and to the Congress. The two that most impress us are those pertaining to receivers and longshoremen.

4 The Chairman. Do you think a report like that could not be published?

Mr. Pepper. I don't know. Why not? We would be telling the Court we do not think the rules should be amended at all, and then they would turn around and amend these two.

(Here the shorthand reporter was directed by the Chairman to suspend reporting while the committee engaged in a general discussion. At the end of the discussion the following occurred:)

The Chairman. In order to expedite the thing, suppose we agree that the resolution that we passed a moment ago, proposing amendments to Rules 41 and 66, be considered modified by eliminating the amendment to Rule 41 and by adding to the amendment to Rule 66 an appropriate provision that the dismissal should not be had without order of Court when a receiver has been appointed. Let us deal with it on that basis.

What do you say about putting these two amendments up to the Court?

Judge Donworth. Your suggestion is that we put them up with a statement stronger than that suggested by Senator Pepper -- stronger in favor of their adoption and submitting them to Congress?

Mr. Pepper. If the Chairman wants to do it in such a way.

The Chairman. So that the Court can jump either way.

Mr. Tolman. I wonder if it would be in order to authorize the Chairman to prepare a report in accordance with the general sense of the discussion at this meeting as to these two amendments to Rules 66 and 81.

Mr. Dodge. The motion is that the Chairman should send such a letter as he indicated a few minutes ago?

Judge Dobie. We think the Chief Justice has the idea that if we do nothing, Congress will step in and say, "Those boys are asleep."

Mr. Tolman. He knows the tendency of the Legislative Department to tinker, and he wants to have these in order to show that this has been taken care of.

The Chairman. Well, what do you say? Shall I prepare that report, sending each of you a copy and asking for your suggestions as to changes, so that I might be justified in putting your signatures on it?

Mr. Loftin. I second the motion.

The Chairman. Is there any further discussion? If not, all in favor say aye.

(The motion was adopted unanimously.)

Judge Donworth. When we get back to the tall firs after a visit to civilization here, the Bar Association often calls on us to tell what we have done here, and so forth. My idea is that all formal publicity must come from the Chairman, and I assume that we can say that the committee was not in favor of general amendments but that there may be one or two matters of a formal nature that they will submit to the Court? Would something like that be all right?

The Chairman. I am wondering whether we had not better say we have made a report to the Court and feel that until the Court has considered it and published it, we do not think it would be appropriate. Don't you think that that is the better thing to do?

Judge Dobie. It would certainly be safe.

Mr. Loftin. I would think that that would be better, Mr. Chairman.

Judge Clark. Would it be a good idea or not a good idea to incorporate a suggestion to the Court that perhaps we could ask for suggestions during the next year and have a meeting some time thereafter. That would be a suggestion that we are ready to go ahead. I myself would be prepared to say that next year we ought to do something.

The Chairman. That is the way I feel, and I made the same suggestion to the Chief Justice this morning. I think we can put that in general form without any date and say that at an appropriate time in the future the matter ought to be handled thus and so by consulting the Bar and the Bench and by studying the District Court decisions. We can leave the time out, and then we can keep watching the thing; and if the Court does not do anything and we think something ought to be done anyway, we can go to the Court in the spring and say that the ball ought to be started and an organization got going to consult the Bar and the Bench to do something before 1941. It ought to be as early as March or April. I do not think we ought to mention any particular time.

Is there any further business? Is there anything that we have that we ought to consider?

Mr. Secretary, have you anything special in mind?

Mr. Tolman. No, I have not.

Mr. Dodge. Is the Secretary's office still maintained here?

Mr. Tolman. Do you think anything should be said here about the work that Judge Knox's committee is doing? The first draft of his report has been sent to you. It is only a first draft.

The Chairman. No. I think that one of the things we ought to say in this report is that we not only want to study the decisions of the lower courts interpreting these rules, but we want to study the local rules that have been adopted with a view to seeing whether there is anything good in them that could be transplanted to our rules and eliminate as far as possible the diversity of district court rules. I think that is all we ought to do about that.

Mr. Tolman. But I think we should recognize the fact that we cannot have everything uniform on local rules. You cannot have perfect uniformity.

The Chairman. No.

Mr. Pepper. Is the Secretary's office still maintained here?

Mr. Tolman. It is not maintained except that our staff is being kept here. The work is being done by the assignment from the Department of Justice of Mr. Leland Tolman and Mrs. Dennis to carry on the work of taking care of details, research, and so forth. It has gone on to a very considerable measure. There has been made a very careful analysis of legal reports. The topical index and table of district court rules has been

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nearly completed, so there is very little more that is going to come out of it of importance. We have in our office here the best collection of district court rules anywhere to be found.

The Chairman. Suppose a lawyer writes in to one of us -- or suppose a judge writes in -- and say he thinks that the rules ought to be amended in such and such a way. I take that suggestion or that letter and answer it. Then I send that suggestion for amendment and my reply to it to the Advisory Committee. When it comes down here, is it properly filed and arranged?

Mr. Tolman. Oh, yes, it is properly filed and indexed. That is being continued. I think that perhaps the Chief Justice does not know quite to what extent the sort of continuous supervision of correspondence that is necessary, but it is being done.

Judge Dobie. Should he not know about it?

Mr. Tolman. Well, I would not bother him about it now.

Judge Dobie. I think he would be glad to learn of it.

Mr. Tolman. The transfer will be effective until the first of October. That takes care of everything because this other work --

Judge Donworth. Do you mean that Mr. Leland Tolman and Mrs. Dennis will occupy these offices?

Mr. Tolman. These offices here.

Judge Dobie. How about sending out suggestions that come in to you? Have you facilities to make copies for distribution?

Mr. Leland Tolman. There are if they do not become too voluminous.

The Chairman. If we have up our minds that something ought to be done next year with a view to submitting it in 1941,

and the Court does not do anything about it, and we go to them, or they on their own initiative do something about it, and we undertake next spring to get organized in the work of making a thorough study of the things in the way suggested, the Court, I suppose, can go to Congress, which will be in session perhaps until June or May, and ask for some little appropriation, if the department cannot handle it, to do the extra work. It will not do to ask for an appropriation now as long as we can go along with the staff that the Department has furnished us. We might as well let well enough alone.

Judge Donworth. In our formal report, when we made it, the report very accurately called attention to the fact that the able Assistant Attorney General, who has the intents and purposes, a member of the committee, at this meeting today has said a great deal of things whom I refer. I think we might have some of the suggestions that he has made.

Mr. Hammond. As far as the committee is concerned, I have read all the decisions, and I have read the report of Mr. Deland Tolman and I have picked up all the suggestions that we think ought to be made, but I do not think of immediate importance; that is why I did not say anything before.

I am interested in this question of having money enough to carry on the work of the committee. It seems to me that the Court has now gone ahead and kept the committee going, and we ought to be sure that there will be money enough to keep the office here. This can go along, as Major Tolman has said, but I am not familiar with the exact details of his arrangement. I did think that perhaps the attention of the Chief Justice ought

to be called to the fact that in some way or another there ought to be money enough available in case Congress is not in session to appropriate it, even if it just takes the form of his getting a little larger miscellaneous appropriation, so that he will have it available. I know that Mr. Waggaman is up against the proposition of having practically all his miscellaneous appropriations, which he now has, used up. Maybe if we could just increase that to take care of this possible and probable need for more funds, it ought to be done.

The Chairman. Isn't it your impression that the existing arrangement, that is good through October 1 next, will not carry us along?

Mr. Hammond. I may be wrong, but I did not understand that it had been arranged that everything would go along until October 1.

Mr. Tolman. It is in the making.

(Here the shorthand reporter was directed by the Chairman to suspend reporting while the committee engaged in a general discussion. At the end of the discussion the following occurred:)

The Chairman. I suggest that we leave it to the Secretary to keep watch over the situation and to do his best in working out an arrangement by which the office will be continued with such staff as conditions require. Then, if we get into a big job next year, it will have to be taken up specially.

If there is no further business, we will adjourn.

(At 4:30 o'clock p. m. the committee was adjourned sine die.)