MINUTES OF THE MAY 21-22, 1961 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The second meeting of the Advisory Committee on Civil Rules convened in the Supreme Court Building on Sunday, May 21, 1961 at 9:30 a.m. The following members of the Committee were present:

Dean Acheson, Chairman

George Cochran Doub

Shelden D. Elliott

John P. Frank

Arthur J. Freund

Albert E. Jenner

Charles W. Joiner

David W. Louisell

John W. McIlvaine

W. Brown Morton, Jr.

Archibald M. Mull, Jr.

Roszel C. Thomsen

Charles Alan Wright

Charles E. Wyzanski

Benjamin Kaplan, Reporter

One member, Honorable Byron R. White, was unable to attend due to business of an emergency nature.

The Chief Justice was present during a part of the meeting. Others attending were Senior United States Circuit Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James William Moore, a member of the standing Committee, and Chairman of the newly organized Committee on Evidence Rules; Professor Brainerd Currie, Reporter for the Advisory Committee on Admiralty Rules; Professor Thomas F. Green, Jr., Reporter for the Advisory Committee on Evidence Rules; Professor Bernard J. Ward, Reporter for the Advisory Committee on Appellate Rules; Professor Hans Smit and Mr. Arthur Miller of the Commission on International Rules of Judicial Procedure; Harry LeRoy Jones, Director of the Commission on International Rules of Judicial Procedure; Joel Handler, Research Assistant to Professor Kaplan; Warren Olney III, Director of the Administrative Office of the United States Courts; and Aubrey Gasque, Assistant Director of the Administrative Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

The Chairman welcomed the two new members of the Committee, W. Brown Morton, Jr., Esquire, and Professor Charles Alan Wright. He then invited Judge Maris and Professor Moore to say a few words

with respect to the Advisory Committee on Evidence Rules.

Judge Maris stated that the Judicial Conference approved the recommendation of the Committee on Rules of Practice and Procedure, which was in line with what the Civil Rules Committee had suggested, that a committee be appointed to go forward with the study of the practicability, feasibility and desirability of formulating such evidence rules. The Chief Justice, pursuant to the action of the Judicial Conference, decided not to appoint a full-dress advisory committee for the first step, but to wait until the actual decision was made as to whether to formulate rules, and then to appoint a very representative and strong advisory committee. He has appointed an Ad Hoc Committee for the preliminary task; with Professor Moore as Chairman, and the Chairmen of the five Advisory Committees as members. Professor Green has been appointed as Reporter for this first stage.

Professor Moore briefly outlined the program for the work of the Committee and stated that it was hoped Professor Green would have a tentative draft ready for consideration by early fall. He expressed the desire to discuss informally the scope of the study with the various members of the Civil Rules Committee.

The Reporter thanked the Chairman and members of the Committee for their cooperation, and expressed particular thanks to Judge Maris for his wise counsel and extremely hard work in the preparation of the amendments submitted to the Court in January.

TOPIC A. IMPLEADER AND RELATED MATTERS: RULES 5(a), 7(a), 14(a), Forms 22-A, 22-B

The Reporter, acting upon the Committee's decision at the December meeting, that the impleader should be "as of right" until the time of answer; thereafter application for leave to be made to the court, submitted a draft of Rule 5(a).

He was faced with two drafting problems: (1) If the time of answer is taken as the cut-off point, or the approximate cut-off point, it could not be provided that the impleader of right shall have been completed through service by the time the answer is served, since that would not allow adequate time to perfect the service of the third party complaint. Accordingly, the Reporter drafted the rule in such a way that the third party complaint need only have been filed during the time of the service of the answer. (2) Mr. Doub raised the problem whether the cut-off point should be the actual service of the answer, or its filing. It was concluded that it must be service of the answer rather than the filing of the answer.

In order to solve a technical point raised by Professor Wright involving time, the Reporter recommended the rule be "loosened up" to permit the third party complaint to be filed within twenty days after the service of the answer.

After the explanation of the recommendations made by the Reporter, the Chairman asked for discussion.

Mr. Joiner underlined the importance of the provision suggested in Rule 14(a) that "Any party may move for severance, separate trial, or dismissal of the third-party claim." He then expressed concern regarding the provision as to time and suggested rather than twenty days, instead of "at or before", it should read, "on the same day as, or before."

Various times were suggested: Judge McIlvaine - 10 days; Mr. Jenner - 5 or 3 days.

Mr. Frank said that the bar of his state was in favor of 5, 7 and 14, but was in doubt regarding the requirement of service of answers on all parties because one does not know who the other persons are without having to go to quite a lot of bother.

MR. JOINER: "I still come back to support the draftsman here on this, because it seems to me that we either serve upon a defendant whose address is known, or give copies to the court in the event the address is not known, then every defendant has an opportunity to get a copy of every paper in the case. Now, we may not require the clerk to mail, maybe the defendant has

to go to the clerk's office to get a copy, but at least he can get a copy that way."

MR. DOUB: "The difficulties pointed up this morning all relate to the effort to make the cut-off date the service of the answer. Now, actually we are not dealing with the situation where there is default or loss of rights by anyone. Our whole philosophy, as I recall our discussion at the December meeting, was that we did not need to take leave of court to file a third party complaint down to the time of the filing of the answer, and that is perfectly simple. It is a simple principle, and after that you obtain leave of court. Why shouldn't we change this to merely provide that. In other words, instead of making service the time when you must obtain leave, just say the filing of the answer. If the defendant wants to bring in a third party, he does not need to obtain leave of court during the time he has to file his answer."

PROFESSOR KAPLAN: "That wouldn't in the least cover Mr. Frank's problem. He is raising the general question of the general consequences of striking the whole problem of service as among defendants. As to your point, I don't think you can use the filing of the answer as a cut-off date, or even an approximate cut-off date, because there is no set time for such filing."

JUDGE THOMSEN: "It may not be filed for months after it is served. In our district we always file the answer at once, but that is not universally true. They may be served and not filed."

MR. LOUISELL: "To come back to this 'effective thereby' point. I wonder if there is really enough trouble to justify making a change. It seems to me that the accepted tradition of the bar is to make service as needed, and always to supply a copy when requested. I think it would be well to retain the language 'effective thereby' and avoid all problems when you have an absolute requirement of service, even though there isn't really any effect upon the person served."

MR. ACHESON: "Couldn't we pass this question on 'effective thereby' for a moment because as I understand this discussion, this is not inherently connected with the rest of the amendment. It isn't connected with the principle of the amendment. It comes from another amendment of the Reporter. Am I right about that?"

MR. FRANK: "Mr. Kaplan is presenting this in a bundle."

PROFESSOR KAPLAN: "It is not absolutely integrated. We are intent that the third party defendant shall serve his third party answer upon the defendant. That is important. But the amendment of Rule 5(a) is rather broader than that."

MR. ACHESON: "Are we agreed with the first two purposes that you have tried to accomplish -- as of right up to a date, the date you picked out as the service? We have to add something to the service. We have a discussion of that. Are we agreed that there should be filing "as of right" up to a short period after the service of the answer? Is the Committee agreed up to that point? What would be a good time -- ten days -- Mr. Jenner?"

MR. JENNER: "Ten days or five days."

MR. ACHESON: "Is five days agreeable to the Committee? Without objection, we have five days."

The Chairman then asked for a decision of Mr. Frank's problem. It was proposed to adopt the Michigan suggestion in principle, which is that you serve it on *persons who have cause to be served in answer or other motion in the case. This is the obligation that rests upon the person who is serving.* He has to serve the motion or answer on any other person.

JUDGE THOMSEN: "I would like to speak in favor not of the Michigan Rule, as Professor Joiner just stated, but upon his arguments in favor of the rule as Professor Kaplan has drawn it. If you have to serve upon people who have already made an appearance, you don't know which defendants made an appearance. . . . I think the way this is drawn, so that you mail to the people you know, and when you don't know them you give them to the clerk."

MR. JENNER: "I would like to speak in favor of the Reporter's suggestion, with the further suggestion that in the note you refer back to Rule 5 as to those persons for whom you don't have addresses -- that Rule 5 provide you file those copies with the clerk, and their counsel may pick up copies from the clerk when he enters an appearance."

MR. FRANK: "Word it so that it says that if the party hasn't entered an appearance, you can put it with the clerk."

This was satisfactory to the Committee.

MR. JENNER: "I intended to include in support of the Chairman striking the words 'affected thereby.'"

The second point discussed was whether anything should be done about the added sentence "Any party may move for severance, separate trial, or dismissal of the third-party claim."

Mr. Joiner supported it strongly. Mr. Jenner supported also.

Mr. Joiner raised the question in the Sixth Circuit in the case of Buckner v. Foster, 105 Fed. Supp. 279, which holds that this rule does not apply in the event of a contribution problem.

Mr. Jenner in Rule 5 suggested that the words "because of numerous defendants" be stricken because you should not circumscribe the court on its excusing of service in subsequent pleadings only to the ground of numerous defendants.

The Reporter was granted leave to look further into the matter.

TOPIC B. SUPPLEMENTAL PLEADING PERMITTED ALTHOUGH ORIGINAL PLEADING DEFECTIVE: RULE 15(d)

The Reporter stated that the trouble started with a direction given by the Committee to deal in the note with the statute of limitations and to the general point that the supplement is subject to the same defenses to which it would be subject if it were filed as an original pleading.

Mr. Joiner made a motion to approve the rule and urge the Reporter to redraft the comment to eliminate any reference to the statute of limitations.

The motion was seconded.

MR. DOUB: "If you would interpret the sentence 'So leave to file a supplemental complaint may be properly denied when it plainly appears that the claim freshly stated therein would be barred by the statute of limitations if pleaded in an original complaint in a new action.' If you mean that it will be denied when it plainly appears, I think I could go for it."

The Reporter indicated that was the intention.

Mr. Acheson (after the coffee break) rephrased Mr. Joiner's motion as follows:

"To approve the Rule as drafted by the Reporter. To take the first paragraph of the note as it stands, and add to that, in language to be worked out by the Reporter, a short sentence of disclaimer saying that nothing in this rule is to have any effect whatever upon substantive rights having to do with the statute of limitations or laches or relation back."

The motion was carried.

TOPIC C. SUBSTITUTION FOR DECEASED PARTY: RULES 6(b), 25(a)(1)

PROFESSOR KAPLAN: "The present rule is plainly defective in two respects: (1) that the time for substitution runs from the moment of death even though the time of death be totally unknown; (2) substitution must have been effected within a stated and immutable time which is now two years . . . . Mr. Frank has raised the point whether there is any need for this extension of time provision as it appears on page C-3."

JUDGE MARIS: "It occurs to me that the Reporter's change of 'shall' to 'may' takes care of this and makes unnecessary the spelling out of the power to abstain[?]. It isn't mandatory to dismiss within six months after suggestion of death. It would, therefore, be a discretionary act. If at that time counsel said 'we neglected this' and asked for more time, the court would not have to dismiss. The court would have the opportunity to say 'We will hold this for thirty days.'"

Mr. Jenner also approved the use of "may" rather than "shall" in line 19 of the Reporter's draft on page C-3 (Rule 25).

Mr. Frank suggested the insertion in Rule 25, lines 17-18 of the Reporter's draft, of a time "within such additional period as the court may permit under Rule 6(b)".

Mr. Joiner suggested taking out the clause "or within such additional period as the court may at any time allow" and rely on 6(b) to be the provision which would permit the extension of time -- refer to that in the note.

Mr. Frank asked if Mr. Jenner's and Mr. Joiner's problem might not be solved if a 90 day period was set and state either in the rule or in the note that 6(b) was an available solution. They agreed that it would.

After further discussion the Chairman phrased a motion as follows:

"That the rule should stand as drafted with the exception that the phrase 'or within such additional period as the court may at any time allow' be stricken; put a reference to 6(b) in the note and have a form provided referring to this particular rule."

Mr. Frank asked that the motion include the incorporation in some appropriate way excusable neglect as the limitation (in the note or the rule, leaving that decision to the draftsman).

The motion was adopted.

A motion was made to make the period 90 days. The motion was adopted.

Mr. Jenner informed the Committee of a problem in Rule 6 which contains a prohibition against any extension of time provided for under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g). This has created serious problems with particular reference to motions for extension of time to file motions for new trial under Rule 59. It was agreed that this matter should be put on the agenda for the next meeting of the Committee.

TOPIC D. REGULATION OF TIME AND ORDER OF TAKING DEPOSITIONS; REGULATION OF PAYMENT OF EXPENSE OF TRANSCRIPTION; MINOR LANGUAGE CHANGES: RULE 30(a), (b), (c), RULE 33

A motion was made by Professor Louisell that the Reporter's suggested amendment of Rule 30(a) by adding the sentence "The court may regulate the time and order of taking depositions to serve the convenience of the parties and witnesses and the interests of justice" be adopted. The motion was adopted.

DISCUSSION OF RULE 30(c) RECORD OF EXAMINATION; OATH; OBJECTIONS.

After briefing by the Reporter, the following comments were made:

MR. LOUISELL: "The party who initiates the proceedings of taking the deposition has some responsibility for apportionment, almost inevitably."

PROFESSOR KAPLAN: "So it would not be right to say that the other party must pay it in whole. Is this wrong?"

PROFESSOR JOINER: "I think this is wrong -- completely, and I apologise to you for not being present when this was discussed the last time. I would like to suggest something and obtain your comment.

"My first comment goes to the requirement which is in the rules that the discovery deposition be transcribed unless otherwise agreed. It seems to me this puts too much of a burden, the obligation to require transcription, which is one of the expensive parts of discovery. I would think that the rule at this point ought to be thrust in a little bit different direction, and that it should not be required to be transcribed unless one of the parties desires it to be transcribed.

"The next step: having taken the deposition then, and having one part, this may be the party who takes the deposition to begin with, or it may be the party who appears to cross-examine, to take the deposition to begin with, he believes this to be of some significance now at the trial of the case, or for some other purpose he asks that it be transcribed. I say at that point that he has the major burden of paying the expense of transcription unless the court would order otherwise. Instead of putting the burden upon the person who first took the deposition, it is the person who desires and wants to make use of the deposition, other than just for hearing what the deponent says, to pay the cost initially for the transcription, and then permitting the court to apportion costs otherwise if there are some equitable grounds for apportionment.

"I start off from a little different position, still giving the court

discretion but in the absence of the exercise of discretion, the burden of the cost of the transcription will be borne by the person who is asking that the depositions be written up, rather than the person who initiates the taking of the deposition."

JUDGE WYZANSKI: "I suggest that the form as it now is drafted is really the right form. One can't really foresee all the possible situations. But let me give you one that will show that the way it is now drafted is quite right. The plaintiff refuses to take the deposition of the witness for the single purpose of finding out whether he was present at the scene of the accident, and that is the only question he intends to put. He gets an answer quite contrary to what he expects, and he doesn't want the deposition transcribed for any purpose whatsoever. He thought that "W" was not present. It turns out that "W" in fact was present . The examination, though it purports to be a cross-examination is in no real sense a cross-examination of the defendant but the contrary of everything "W" would say. Under those circumstances, of course, the defendant wants the transcription. It would be quite right, it seems to me, for the defense to pay the total cost. It does not increase the plaintiff at all in having any part of the transcript.

"Although it is a hypothetical case, and many different ones can be imagined, I would leave it entirely to the district judge, who may decide that

the whole or some part thereof should be paid by the person who did not call for the transcript."

MR. JOINER: "I think you prove my case, Judge . . . ."

MR. LOUISELL: "It seems to me there may well be some merit to Professor Joiner's argument. It is a radical reversal of the present philosophy, and I think it should await determination and our thorough study on a practical basis of the whole discovery process. So for the moment I would be content to accept the proposed draft of Rule 30(c)."

PROFESSOR MOORE: "If it is not inappropriate -- before you go on with these amendments I would welcome some discussion as to the desirability of putting out this amendment on discovery when you have a study on delay. Presumably there would be other amendments offered. I have no objection to these amendments, but on the whole they are not very substantial. Isn't there a disadvantage to putting out piecemeal amendments? We have one Justice talking about picayune, harmless amendments."

MR. JENNER: "I had assumed that in the discovery field these were tentative. There has been, for example, a gloss added in our district by local rule adopted by the court without consultation with the bar, that unless depositions are written up in file with the clerk you may not even use that deposition on the trial for purposes of impeachment. Whether

the court had the power to adopt such a rule I am not at liberty to say, and I was going to ask Judge Maris if that local rule rose out of any discussion in the Judicial Conference."

JUDGE MARIS: "No, I don't think so."

MR. JENNER: "What it does -- Discovery is expensive now, but this local rule which has been adopted in our court adds tremendously to expense because it requires us to write up and have transcribed all these depositions, most of which are purely for purposes of discovery anyhow. That problem and some other problems I thought would come along. I see now that I was mistaken. I thought areas such as this were being considered tentatively and we were reaching some conclusion in order to set it aside, but eventually we would have a discussion of all these discovery problems. If it is permissible, I want to urge the Committee at some stage, at least, the consideration of the Illinois practice that when you serve notice of taking a deposition you specify whether it is for discovery or whether it is for evidence purposes and with different consequences."

. . . . . .

MR. ACHESON: "I think the Committee wants to take a look at everything proposed about discovery and either decide to pass it or not."

PROFESSOR KAPLAN: "I want to call attention to the fact that this discovery study is a study which we hope will involve fairly extensive factual investigation

so you won't come up with a proposal for some time -- it may project quite considerably into the future. If these proposals have any merit and are tolerably important we ought to go forward."

MR. FRANK: "I feel that the 30 and the 33 changes, all of which I support as the draftsman has made them, ought to be approved tentatively and put aside because they are simply too modest to be worth bothering the bar to adjust to something that insignificant until we are ready to complete the job. But I do not feel that way about Rule 35 which seems to me substantial, useful, and necessary, and that is the one on the blood relationship problem. I would like to know your view. Do you feel that all the discovery proposals should be tentative only, or do you adopt the view that we might adopt some tentatively and others definitively depending upon the drafts?"

MR. ACHESON: "The latter. I thought it would be a good idea to go through everything that we have before us now on discovery, and make up our minds tentatively whether this is useful or not. And when we get through with it see how much is really important to get out now, and if there is something important to get out now -- get it out. I should be inclined to believe that we do not want to 'nibble' at this process.

MR. FRANK: Would a motion be in order that we approve the draft as given us, adding some word to show that we are talking about the original, for Rule 30 approve all of them tentatively, subject to further consideration of Professor

Joiner's suggestion that perhaps we ought to have the opportunity to transfer the whole load to the fellow who asks for the deposition to be typed up, and that we ought to have clearly the right . . . but approve what we have now as far as it goes."

PROFESSOR KAPLAN: "For immediate adoption?"

MR. FRANK: "No, tentatively only, to be disposed of finally in the light of your further recommendations."

PROFESSOR KAPLAN: "You mean at a later point tomorrow we should come back . . . ?"

MR. FRANK: "My suggestion was as to Rule 30 only we regard as falling in the tentative character."

PROFESSOR KAPLAN: "As to that, I have no strong feeling about 30(c) or the minor amendments of 30(b) and 33. But it seems to me a matter for consideration whether the change in 30(a) is not significant enough to be worth pressing now . ."

MR. FRANK: "I would move that we approve 30(a) definitively and 30(b) and (c) tentatively, subject to further consideration.

MR. LOUISELL: "Wouldn't it help our judgment if we first review all the other discovery . ."

MR. ACHESON: "This is what I was proposing. The reason we have these

is solely and only because the prior Committee dealt with them. They are not selected for any other reason in the world. This may not be a good reason for putting them out at this time, or it may be. Therefore, let's look at them, make up our minds what we think, and then review the whole business, and if, as Mr. Kaplan says, this first one is important, put it out and hold the others back, or whatever conclusion the Committee reaches.

"We were discussing Professor Joiner's suggestion."

MR. JOINER: "I hope we do not take any tentative or final decision upon subsection (c) at this time, because this is one of the sections with which we will deal when we deal with expense and this is one of the major criticisms in discovery. And to put out a draft on this particular suggestion and then later come back with a different philosophy may make us look kind of funny."

MR. ACHESON: "Therefore you think it does no good even to discuss it?"

MR. JOINER: "It is all right to discuss tentatively but I don't think we should pass any motions approving or disapproving any particular provision . . My state has specifically authorized the use of electronic devices and recording devices in lieu of court reporters at this point. This is something we ought to give consideration at least. I don't think we are prepared here to adopt it but it modifies this particular section."

MR. JENNER: "We also have that in Illinois and it has been in effect for six years and works fine."

MR. ACHESON: "At the present time we have tentatively adopted (a) as I understand it. We have not talked about 30(b)."

PROFESSOR KAPLAN: "That surely would fall under the rule of de minimis. If there were any disposition not to go ahead with any of the important matters this would plainly be one of them."

MR. ACHESON: "And (c). Professor Joiner says in any event he would rather skip it. That would take us through Topic E -- generally speaking this Committee agrees with Professor Joiner and it would be better to pass over 30(c)."

MR. FRANK: "We have approved 30(a) and 30(b)?"

MR. ACHESON: "No, we have not approved anything at this moment except tentatively 30(a). We have passed over (b) -- we haven't discussed (b) at all, and the Reporter says this is de minimis and would not suggest that we act on it. (c) we are now about to decide whether we shall just not act on it because it requires more study in the light of the whole discovery work. Does the Committee agree with Mr. Joiner's suggestion that we pass over 30(c)? Is there any objection to passing over (c)?"

JUDGE MC ILVAINE: "As I understand it 30(a) will be decided later . ."

MR. ACHESON: "It may be the only one we have left."

MR. FRANK: "I would like also to move that we approve 30(b) to get it behind us so we don't have to fool with it another time -- reserving the question as to when it should be offered."

MR. ACHESON: "Very well -- is there any objection to that?"

There was no objection.

MR. ACHESON: "Very well -- those two are tentatively approved."

PROFESSOR KAPLAN: "You might say the same for 33, John. If it should survive then of course we would want to make (interruption) -- the addition of 'undue' as modifying 'expense' in 33 (E-6)."

MR. JENNER: "Have we decided in so far as 'in whole or in part' that it would be the sense of the Committee that the court have the discretion either to assess all of the expense of transcription or part of it, and not merely that the rule should be drafted in terms that he can assess part only. I gather that is the consensus of the Committee."

MR. FRANK: "I think your argument is persuasive, but in order to avoid chewing the same thing twice shouldn't we approve tentatively what we have got ;in 30(c) subject to the fact that we may wish to go further -- but shouldn't we go at least this far and get it behind us?"

MR. JOINER: "Inherent in this is whether we want to back up a little bit and not require the transcription al all which the rule does at the present time."

MR. FRANK: "All we need to do -- we mean to say that if we were going to require the transcript then the cost should be assessable."

MR. JOINER: "That takes us to the question as to whose burden it is to go to the court."

MR. JENNER: "Wholly apart from that -- if it is written up -- where it is required to be written up -- if the expense is incurred in writing it up there is still the question who should be assessed the expense."

MR. JOINER: "I think we really would not be very well received if we make an amendment to this rule and then a year later come back with another amendment to the very same rule -- modifying it in some way."

PROFESSOR WRIGHT: "I am sympathetic to Professor Joiner's point that this is probably something you might not want to circularize at the present time. I still think it might be helpful to the Reporter if we were to agree that in the light of our present knowledge this is something which we think is in good form so that we wouldn't have to worry about it. Now, later when we finally decide to put it out in the light of the discovery study, we may want to put it out in vastly different form. But if we could at least kill it off now I should think it would at least help Professor Kaplan."

MR. ACHESON: "Would this help you?"

PROFESSOR KAPLAN: "Yes, it would, but I would take it subject to all of Charlie Joiner's very serious objections[?]. This represents a good grammatical statement but the sense of it may have to be altered after the study is made."

MR. JENNER: "I so move, Mr. Chairman."

MR. JOINER: "I am sorry I am pressed to this. I want to put this issue to you because if we are going to approve it in this form, this means we are approving at this time of (1) a requirement that all depositions be written up in the absence of an agreement to the contrary, and (2) a requirement that the person who takes a deposition to begin with must pay that deposition, that cost of transcription, unless he can get an order from the court otherwise, and I think this is wrong. I think if we are going to approve anything at this time we ought to move in the other direction even if it is tentative. We ought to move in the direction, recognizing that there are many depositions that are taken that do not need to be written up in the absence of a request of one party or the other, and (2) that the person who makes the request that it be written up should bear the additional burden, in the absence of an order of the court to the contrary, of paying the expenses, leaving again to the court the obligation to keplit the cost."

MR. ACHESON: "I apologize, because I thought the motion that had been put was one agreeing with you."

MR. JOINER: "I thought you were trying to approve this in the form that is in (c)."

MR. JENNER: "Only that we at least with all this discussion approve the language of lines 46, 47, 48 and 49 and were leaving open without prejudice the points you have raised. We at least make the progress that this draft

is all right and if we subsequently determine that all depositions are not required to be written up, there still will be some that will be written up and you will have disposed of at least this point at the moment tentatively."

MR. ACHESON: "Now I am mixed up. If we approve lines 46, 47, 48 and 49 then we are approving what Professor Joiner disapproves."

MR. JENNER: "No, it is not."

MR. JOINER: "The language of 46, 47, 48 and 49 places the initial burden upon the person taking the deposition to pay for the cost of transcription unless he gets an order of the court to the contrary. I think this is wrong. I think the initial burden for paying for the cost of transcription of a deposition should be upon the person requesting a copy, or requesting that the deposition be transcribed, gunless an order to the contrary is entered leaving the same discretion in the court as provided in this rule."

JUDGE MARIS: "Now, that is impossible to phrase in this present draft unless you change in the preceding requirement that everyone shall be written up. You can't have your proposal in unless you go whole hog. If you approve this, you are really disapproving what Professor Joiner suggested."

MR. DOUB: "If Professor Joiner's proposal were adopted it would multiply depositions enormously."

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MR. ACHESON: "Doesn't this raise again the undesirability of trying to go at this thing piecemeal? I think we really ought to have a full study before we begin to take up points like this."

MR. JENNER: "If I made a motion I withdraw it." (laughter)

PROFESSOR KAPLAN: "Who pays the initial cost of the stenographer's time in your state?"

MR. JOINER: "The person taking the deposition. The only thing in question is the cost of transcribing the original copy."

TOPIC E: DISCOVERY OF PHYSICAL OR MENTAL CONDITION OR BLOOD RELATIONSHIP: RULES 35(a), (b)(1), 37(b)(2)

The proposal is to enlarge 35(a) in two respects: (1) to include blood examination where blood relationship is in controversy, and (2) to enable a court to make an order against a party to produce a third person for physical or mental examination or for blood examination. The second change is a change in the section provision of 37(b)(2) to correspond the enlargement and alteration of 35(a).

A suggestion was offered to include the word "employee" as well as "agent" in 35.

Professor Wright suggested in the note, rather than referring to an unpublished district court opinion in Colorado, there should be a reference to Judge Gourley's decision in the Dinsel [spelling?] case. The Reporter agreed.

Judge Thomsen made a motion that the Committee tentatively approve subsection (a) with the addition of the word "employee." The motion was adopted.

After discussion of 35(b), Mr. Frank suggested that in the light of suggestions for improvement (1) to include automatic delivery of report without a request, and (2) that it extend to diagnostic material, Rule 35(b) be passed over and no definitive action be taken at this time.

TOPIC F. SANCTION FOR UNJUSTIFIED FAILURE TO ADMIT OR DENY IN RESPONSE TO REQUEST FOR ADMISSION: RULE 37(c)

(This is the last item having to do with discovery)

The present proposal is to extend sanction to the case where a party did not ;give a sworn denial, but refused to admit or deny on the ground that he did not have the information. It does not attempt to enlarge or change the duty which rests on the person upon whom a request for an admission has been served.

Mr. Jenner suggested it would simplify the rule and accomplish the result if you merely provided that a lack of sufficient information upon which to admit or deny is for the purpose of the rule a denial. Mr. Jenner rather favored an amendment to Rule 36 rather than this rule.

The Committee tentatively approved 37(c).

TOPIC G. DISMISSAL FOR LACK OF INDISPENSABLE PARTY: RULE 41(b)

It was moved and seconded that the Reporter's amendment be approved. The motion was adopted.

TOPIC H. POST-VERDICT MOTIONS: RULE 50(b), (c), (d)

Judge Thomsen moved the approval "in principle" of the first change in 50(b) "Not later than ten days after entry of judgment." It was seconded by Professor Elliott.

"In Principle" the motion was approved.

Mr. Frank moved the disapproval of the second change -- "A motion for a new trial shall be treated as including, as an alternative, a motion for judgment notwithstanding the verdict based on the grounds previously stated for the motion for a directed verdict, and the court shall pass upon the motion for judgment notwithstanding the verdict as well as the motion for a new trial." Judge McIlvaine seconded Mr. Frank's motion.

After discussion, a vote was taken and 4 members voted approval -- the remainder of the Committee disapproved the amendment.

The Committee then considered the proposed amendments to 50(c) and (d). After discussion, the Committee voted in favor of the Reporter's amendments -- Professor Wright abstaining from the vote.

TOPIC I. SUMMARY JUDGMENT: RULE 56(c), (e).

After discussion, Mr. Joiner made a motion to tentatively approve the Reporter's draft. Mr. Frank seconded the motion with the proviso

that the Reporter consider overnight whether this language is really enough better than the 1955 language to be worth putting this burden on those states which have adopted the 1955 language.

ADJOURNED FOR THE DAY AT 5:05 pm

MONDAY, MAY 22, 1961

TOPIC J. JURY DEMANDS IN REMOVED CASES; MINOR CHANGES IN APPLICABILITY PROVISIONS: RULE 81(a)(4)(6), (c), (f)

The Reporter's recommendation covers two cases: the case where an express and timely demand has been made under state law for the jury. In that case the rule would say that the demand need not be repeated. The further demand need not be made after removal. There is occasional danger where, according to state practice no express demand is needed at all. Judge Maris suggested where there is no statement on the record that a jury is wanted, it should be open to the judge to go to the parties and ask if they want a jury, and hold them to that statement. That could be done in the court's discretion and at any time. Judge Maris suggested adding something to the effect "unless the court directs him to state whether he desires a jury" qualifying the statement that he need not make a demand.

Professor Moore proposed an amendment to cut out in line 55 of the Reporter's draft, after the comma, the words "or who according to state law is not required to make an express demand in order to claim trial by jury."

A vote was taken -- four were in favor, the majority opposed. The amendment was not adopted.

A vote was then taken on the amendment proposed by Judge Maris. The amendment was adopted.

With the amendment as proposed by Judge Maris, the Reporter's draft was adopted.

TOPIC K. VARIOUS AMENDMENTS OF THE FORMS

After discussion, Professor Elliott moved that the Reporter's recommendations be approved. The motion was adopted.

TOPIC L. & M. REPORT OF SUBCOMMITTEE ON RULES 6(a) AND 77(c) (SATURDAY CLOSING OF CLERKS' OFFICES) AND RULE 58 (ENTRY OF JUDGMENT

Judge Thomsen as Chairman of the Subcommittee appointed to consider the problem in December, made a report.

With respect to Rule 6(a) the Subcommittee proposed: (1) that the rule should be amended to provide that Saturday be treated in the same way as a legal holiday; (2) that a definition of the term "legal holiday" should be included substantially as in 11 U. S. C. A. 1(18) or in Executive Order No. 10358 following 5 U. S. C. A. 86a; (3) that the rule should apply to the computation of periods of time prescribed or allowed by the local rules of any district court, as well as by the Federal Rules of Civil Procedure, order of court, or any applicable statute; and (4) that the last sentence dealing with ;half holidays be eliminated.

With respect to Rule 77(c) the Subcommittee recommended (1) that the Clerks' offices should be closed on Saturday unless the district court provides by local rule that the clerk's office shall be open during specified hours on that day; and (2) that a district court should be given authority to provide by local rule or order that the clerk's office should be open on specified state legal holidays which are not federal legal holidays.

Judge Maris made an observation not having to do with the subject under discussion, that after the subcommittee to consider Saturday closing of clerks' offices was appointed, the general matter of procedure was given consideration at the last meeting of the standing Committee, which felt it was unwise to appoint subcommittees. That Committee felt that everything ought to be considered by the full group upon a report by the Reporter, not excluding, of course, extraordinary matters.

Professor Elliott suggested a minor amendment in the proposed draft of Rule 6(a). In referring to legal holidays, he proposed the deletion of the words "the Governor or the legislature of [the state]", and simply use the words "by the state", to take care of the possibility that a state constitution in some instances establishes a holiday.

With the amendment suggested, the Committee adopted the drafts of Rules 6(a) and 77(c).

Judge Thomsen then gave the report of the Subcommittee with respect to Rule 58. The Committee suggested the insertion of the following sentence between the second and third sentences of the present rule:

> An opinion or memorandum of the judge shall not be deemed a direction for the entry of judgment; but there may be appended to the opinion or memorandum an order signed by the judge directing the entry of a particular judgment.

The Committee also suggested the inclusion of the following statement in the Advisory Committee's note to the proposed amendment to this rule:

> When a judgment, decree or order is directed to be entered by an order appended to an opinion or memorandum, the clerk should be careful to indicate on the docket that the judgment, decree or order has been entered, in addition to noting that the opinion or memorandum has been filed.

During the discussion of Rule 58 the Chief Justice paid a visit to the Committee and addressed the members informally as follows:

"Gentlemen: This isn't something that I asked to do myself. But during the coffee break I was asked by some of the members of the Committee to express myself on my view of the manner in which your work should be presented to the Supreme Court for actions, the question being whether you should do it as you complete specific pieces of work, or whether you could hold all of the work until you had a substantial amount and then present it. I told them I knew you were going to discuss that, and I told them I would be perfectly willing to express my views -- not for your guidance, because I want you to do it the best way you think is adapted to the advancement of the cause -- but I told them I would at least

express my own views on how it could best be done, and they would be something like this.

"I think that when we are engaged in governmental work of this kind the best way to make progress is to make a little progress from day to day, and not to hoard everything we have done for a period of years and then present it all at one time. There are a good many reasons for doing that in this situation. One of them is that one of the reasons the Court urged the setting up of these committees is to relieve it from a great deal of work. So I think if the Court would get these rules, proposed changes, from time to time, where we could look at one situation and say 'that's all right;' and let it go through, that it would be much easier on the Court, than to wait until you had completed a volume of work in a variety of fields, and then call for a committee of our Court to sit down and analyse it and see how it would affect us.

"So, I think that's one reason it would be better to present whatever you have whenever you are ready to make your report to the Court.

"Then, we are the creature of the Congress and we go to the Congress every year asking for money to keep the committees alive, and if we don't have something tangible to point to as an accomplishment of the committees, they say 'What are those committees doing over there anyway. They just sit around -- don't produce anything -- here it's been a year, two years, and nothing has come out of them. We don't think you need that', and they start cutting us down, cutting us down, until the first thing you know we might die on the vine.

"On the other hand, if we keep something going through all the time, it will indicate life and action and so forth on the committees, and I think that it would be good from that standpoint to report things as you do them.

"Now, I suppose that some of you have a little concern because the Court was not unanimous in reporting the things that you did suggest. I wouldn't pay any attention to that. Really it isn't anything that should concern you. Now, we've got nine people in the Court and they all have different ideas about rules. Some of them don't like rules at all. They don't believe that we should be hidebound by too many rules. There are others who think that we should have rules but it isn't any of our business -- we should be divorced from it entirely, and that it should be entirely in the hands of the Judicial Conference. There are others who have varying views on the subject, and you are liable to get a little riding any time a rule comes through.

"But I am just sure when they are done, like those last ones that you suggested, that the vast majority of the Court will go along and will

very grateful for what you have done. I wouldn't feel a bit disturbed. One says it is too important to do so fast -- and another one says it doesn't amount enough to report on. [laughter]

"In my own opinion, it is exactly right to do what you did do and the vast majority of the Court feels that way. And all I can do is just urge you to do your work in the way you are doing. It leave nothing to be desired as far as I am concerned.

"Dean, I don't know whether that will enlighten you one bit, but it is my view of your work."

The Committee resumed its discussion of Rule 58.

Mr. Louisell thought that the matter was one that called for additional comprehensive study.

Professor Wright said that if the committee adopted the subcommittee's proposal, alteration would be required in the existing second sentence of Rule 58, since under the subcommittee's proposal the judge would be directing entry of the particular form of judgment in every case, while the present second sentence requires him in some cases to set or approve the form of judgment and in other cases not. He did not agree with Judge Clark's proposal but was sympathetic to what he understood to be his point of view -- that is the danger of delay in order to accommodate counsel. One possibility suggested -- to add in the final sentence of Rule 58 "entry of judgment shall not be delayed for protection of cause", "nor save for good cause shall it be delayed for approval of counsel."

In Mr. Jenner's opinion the area of difficulty is the problem of making sure that the judge is specific when he wants a judgment entered.

A verbal change was suggested in the proposed amendment to Rule 58 to make it read "An opinion or memorandum of the judge is not a direction for the entry of judgment: rather than "shall not be deemed."

Mr. Jenner suggested the draft should be changed to read as follows:

> An opinion or memorandum of the judge is neither a judgment nor a direction for the entry of judgment, but there shall be a judgment or an order signed by the judge directing the entry of the particular judgment separate from the opinion or memorandum.

It was concluded that the proposed Rule 58 would be approved in principle and the Reporter would be given an opportunity to reconsider through the medium of attempting to prepare appropriate forms.

FUTURE PLANS OF THE COMMITTEE

The Chairman asked for discussion of the future plans of the Committee -- whether any of the rules tentatively adopted at this meeting would be transmitted to the standing Committee -- or what action should be taken on this group of rules.

MR. ACHESON: "Are we contemplating now putting another group of published amendments up to Judge Maris's Committee asking them after consideration

of them to pass them on to the Judicial Conference, to publish them, and then on to the Supreme Court. Is that what we want to do with this group of actions which we have taken? If we do want to do that, are we prepared now to take definitive action about anything in regard to discovery?"

. . . . .

PROFESSOR KAPLAN: "Suppose we took all of these tentative votes -- obviously there is a good deal of redrafting to be done. In some cases there is real original exploration. Suppose we point toward circularizing this Committee, as we have done in the past, by correspondence through the summer with a view to reaching a draft agreeable to us all to be put to your standing Committee at its August meeting.

[Judge Maris responded that it need not be at a meeting of the standing Committee but could be at any time]

This would require some time. If we look ahead to a circularization and approval sometime during the summer we could contemplate a printing and promulgation to the bench and the bar, say in September. Is that feasible?

JUDGE MARIS: "Any time you are ready."

MR. ACHESON: "Are we still willing to go ahead when there is perhaps some doubt even in the Committee as to whether we are right. Do we want to have discussion on an incomplete job of work here?"

MR. FRANK: "I have a feeling we've got to get the job done. The Chief has given us a clear indication that he wants us to move on a regular annual basis and it is up to us to produce. Ben has our suggestions. He knows our thoughts -- we have come to our conclusions, and I would think if he gives us a draft that fairly overwhelmingly as to almost all of them when he says they are ready to go we will think they are ready to go. Could we compromise it by having us proceed by mail, with the thought that if so many as three members of the Committee express doubt in a response then that particular rule will be held over for further discussion. But if our acquiescence in the written recommendation is at the 80 percent point, then let's get those out to the bar so that we've got something for 1962."

MR. ACHESON: "Did we reach more than tentative agreement on these discovery matters yesterday?"

PROFESSOR KAPLAN: "My impression was that we were to think about this again and decide which of these discovery matters was in such form and dealt with such a subject matter that we could contemplate promulgating them together with the other amendments, even though we, of course, know that the general study of discovery lies back of this. My feeling about that is that with the exception of these amendments on 30(b) and (c), the others could go. They could be promulgated at the same time as the other changes."

MR. ACHESON: "That is the ones on discovery?"

JUDGE MARIS: "You'd postpone discovery."

PROFESSOR KAPLAN: "No, send them out now as we send out other amendments of the sort we have been discussing these last two days."

JUDGE MARIS: "Without waiting for the end of the discovery study?"

PROFESSOR KAPLAN: "That is right."

MR. ACHESON: "How does that affect Mr. Currie's Committee which at great labor just brought his discovery rules into accord with civil discovery? Then we start out going apart again. Is that important or unimportant?"

PROFESSOR CURRIE: "As I indicated yesterday, Mr. Chairman, don't feel that the interests of the Admiralty Committee would be in any way an impediment to anything this Committee wants to do. On the other hand, there are essential areas now in which the Admiralty Rules are identical with the Civil Rules, and I would hope that the work of the two Committees might be so coordinated that any proposed revisions in these areas of identity might be jointly or at least simultaneously proposed. This refers to the discovery amendments and the amendments to the section on summary judgment, which is also in a common area.

"Of course I can't speak for the Committee, but my impression is that there is nothing very controversial in the event of any distinct admiralty reaction to these. Our only problem is timing. Our present plan is that the

Admiralty Committee will not meet again until September. There may, however, be a possibility of getting the consensus of the Admiralty Committee as to these proposals by mail in the meantime as you consider doing here. And I don't think it is a serious problem if you want to give attention to it.

"There is one little thing that troubles me just a bit, and that is that assuming the best in terms of time schedules and coordination and agreement between the two Committees, we would be confronted with a slight embarrassment in possibly amending next year the rules which we are just now adopting. I don't think that is terribly serious, but I don't think we ought to make a habit of it. But just by way of emphasizing what I think is the importance of this, I think that we are moving in the direction of a long range goal of possibly complete uniformity. We have achieved a very encouraging degree of uniformity and,it seems to me, at least as important that we care about retaining uniformity where we have achieved it as between Admiralty and Civil Rules as it does uniformity with the states which have adopted civil practices . . . . I think with a little effort we might perhaps be able to submit a joint or simultaneous proposal on the changes and if so that would be desirable."

MR. ACHESON: "It seems to me that adds up to quite a lot. Of course this is Judge Maris's worry -- but if he and the Supreme Court are trying to bring

these rules together, it does seem to me rather silly for us to immediately create divergence within a few months of the adoption of the rules by your Committee. That does not seem to me that is the way to run a railroad. You're going to run into one another instead of going parallel."

"If these rules were of world-shattering importance -- that is something else. Then you might immediately amend yours. If they are not of great importance, why can't we adopt them, if we are convinced they are right, put them in the deep freeze and take them out whenever we can persuade your Committee to take them out, and thereafter under the coordinating strong hand of Judge Maris not change any Civil Rule where you have adopted a similar one without having his Committee coordinate the change."

JUDGE MARIS: "I think so, yes. It isn't only Judge Pope's Committee but the Supreme Court has just adopted within the last month these Admiralty Rules. Now, if you go to the Court and say these are not really right, these changes ought to be made, some of the Judges might well say, 'Why didn't you think about this before we did?' I really think it would be better to hold them for a while.

PROFESSOR KAPLAN: "Let me see that I understand this. Will the Admiralty Committee work during the summer just as our Committee is committed to work during the summer?

PROFESSOR KAPLAN: "That is, why can we not circulate to your Committee as well as to this one . . . the proposed changes in discovery and then move forward simultaneously in September."

. . . . . .

"If these rules are prepared and distributed over the summer, they could equally well be distributed with an appropriate covering letter from you [Professor Currie] or Judge Pope to the members of the Admiralty Committee as well. This is an internal distribution."

PROFESSOR :CURRIE: "This is all I could possibly ask for -- a reasonable opportunity to take joint action."

PROFESSOR KAPLAN: "If these drafts are distributed as well to your Committee as to ours, you might then need an extra meeting which might be unnecessary for us. But the two Committees could march along with even step.

MR. FRANK: "Ben, could we live with this? If during the summer you will distribute to this Committee, and I think tentatively agree, subject to a rule of three, you will be able then to give to the public -- could we add to the rule the fact that if the Admiralty Committee disagrees as to any of them, that too will go off the public list until there has been a chance to be a meeting?"

PROFESSOR KAPLAN: "That would be very satisfactory."

MR. FRANK: "And then that would permit you to have a public meeting in the fall after the Admiralty Committee had met."

PROFESSOR MOORE: "May I ask a question. In relation to discovery as opposed to say the impleader rule and the supplemental pleading rule, I think such rules as those and summary judgment -- you are more or less satisfied that that is what those particular rules need? Now you get over into discovery and you come out with a few little proposals. What are you going to tell the bar? That this is just a nibble at discovery? . . . Discovery is something that the bar -- some are very critical -- some are very laudatory. They've all got ideas. If you come out with just a few of these rules proposals they are going to wonder is this the real treatment of discovery by the committees."

PROFESSOR KAPLAN: "It is very evident that when the general study of discovery is made it will probably be found advisable to rewrite those rules. I think the rule that guided me in saying that we might well promulgate 30(a) and some of the others is that in principle there is likely to be no change from the standard here adopted. For example, I see no possibility that a fresh set of rules will negative the principle that the court ought to control the order in which depositions are taken. I see no chance that there will be anything seriously undercutting the principle that there should be blood examination, or that an order should go against the party for the production of a third person for a physical or mental or other examination. It is where I

find a rule here which in principle is likely to abide I see no particular reason why we should not go ahead with it. Although I have no urgency about it, I must confess. It is just an orderly way of going ahead.

JUDGE MARIS: "In the first one that you mentioned you would find I think a good deal of acceptance with the Advisory Committee on Admiralty Rules. The elimination of the preemption document -- some members of that Committee I think feel very strongly on that subject.

PROFESSOR MOORE: "But they feel very strongly that leave of court should not be required to start taking depositions immediately upon the commencement of the admiralty suit."

PROFESSOR KAPLAN: "We are looking forward hopefully to suggestions from the Admiralty Committee on that score.

PROFESSOR CURRIE: "I am not sure I heard -- you mean the time for taking depositions?"

JUDGE MARIS: "The court controlling the order -- the preemption so-called."

MR. ACHESON: "Judge Maris, am I all wrong? This is a field about which I know nothing. But it would seem to me that if we go about this thing the way we are proposing to do, it would give people who do not like the whole rule-making process, or who are just naturally critical, an opportunity to say that this really is a pretty disorderly performance. Nothing is coordinated. Nobody

knows what anybody else is doing. The Supreme Court is a mere puppet that gets whipped around by committees here that aren't working together, and first of all it promulgates a new set of rules on discovery. Within two months it has to change a lot of those because another committee comes up with some. We are going to have a great study of the matter which is going to do everything all over. It's all mixed up. I don't see that any of these discovery rules are important enough to break up the facade of deep consideration which we want to create in the public mind. Am I wrong about this?"

JUDGE MARIS: "I don't think you are myself. There is a great deal to be said for that. If we advertised and announced publicly everywhere we could that we are engaged in a serious study of discovery and that we are going to come up with a proposal, we ought to stand on that I think and come up with them when we are ready to -- but not piecemeal -- except in an emergency, I don't think we have to."

MR. ACHESON: . . . "We took up certain rules to consider because -- I don't know how many years ago it was started, but in 1955 wasn't it, six years ago, another committee made recommendations about these rules. Six years ago another committee thought these were important changes. The Supreme Court didn't adopt them so six years later we say they must still be the most important ones, and we go ahead studying those particular rules -- maybe they are or maybe they're not. Maybe the rule before or the rule after -- I don't know because I don't know anything about the field. I wonder whether it wouldn't

be a good idea for us not to be quite so precipitant about putting things out for public discussion, and I wonder whether it wouldn't be better now to consider some way of going at the whole rulemaking business for -- I don't mean for all time -- I mean for the purpose of putting things out.

"Now, let's turn to the index of the rules and ask Mr. Currie -- what are you going to do next? You have taken Roman V of the Civil Rules for the depositions and discovery as I understand it, Rule 26 through 37, and you have gone through all of those -- those have all been adopted, and those are being promulgated -- is that right? What are you going to do next?."

PROFESSOR CURRIE: "I think that's a constructive question, Mr. Chairman. Before our Committee was fully organized and the first meeting of the standing Committee, our Committee was requested to give priority to the study of the feasibility and desirability of unifying Civil and Admiralty Rules -- much as law and equity were unified in 1938 -- give priority to that. Shortly after the Committee was organized the Supreme Court decided the case of Miner v. Atlass, withdrawing the discovery practice from the principal maritime districts in which it had been in use under local rules, and this precipitated what we regarded as something of an emergency. And so we turned our attention to the discovery problem, not with the view of making improvements such as we have been discussing here, but bypassing that just to get the discovery practice restored substantially in accordance with the Civil Rules.

"Now we have done that, and now we are reverting to the principal task of studying the feasibility and desirability of an actual merger and when the members of this Committee get hime they will find this bulky document which the Administrative Office mailed out on Thursday of last week, which represents an extremely tentative step in that direction. The members of our Committee haven't seen this yet, only the Chairman has, and so I can't say much for it except that many people, particularly the admiralty bar, don't understand what we mean when we talk about unification. There is some extreme notion as to what this means such as abolishing altogether the distinctive characteristics of the admiralty procedure, jurisdiction or even substantive law. And this has been gotten up mainly as a kind of mock up as we call it to show what a set of unified rules might conceivably look like, and what sort of problems would be encountered if there were to be a merger."

MR. ACHESON: "We have tentatively decided, had we not Mr. Reporter, that the next thing we were going to work on was parties, Roman IV."

PROFESSOR KAPLAN: "There is a start -- a general study of the subject of parties. How extensive our proposals on that will be we have no idea. That was one general subject and, of course, the other general subject was discovery, and I think you will find general agreement that those are the two matters that ought to be considered . In addition we are operating with a highly successful [?] system and on occasion there arise difficulties. The difficulties that were

appreciated by the 1955 committees were not sporadic. They were found to be possible defects in the rules and this was an attempt to patch them up. And so we are going to have additional propositions on which patchwork is needed. Some of them suggested an illuminated memorandum by Professor Wright for example. So we have these two things that we have to hold in balance -- particular corrections and then these two major studies."

MR. ACHESON: "What I am trying to do is to find out what both Committees are thinking about doing so we won't get into the rather unattractive position we are in now where you adopt something just as we are starting out on a major overhaul of it. We can make that look all right. If we put our discovery changes in the deep freeze for a while, and if we went through all the rest of the 1955 amendments and over this summer promulgated what we wanted to promulgate about those, explaining why this has been dealt with in this sort of skippy fashion, this wouldn't make your task any harder or easier or different, would it?"

PROFESSOR CURRIE: "Apart from the areas in which there is now identify I don't think anything you do would make our task any harder."

MR. ACHESON: And the only one that we might change in identity is summary judgment?"

PROFESSOR CURRIE: "And discovery."

MR. ACHESON: "Discovery, I was saying, suppose we don't rock the boat on --"

PROFESSOR CURRIE: "All those we have discussed today."

MR. ACHESON: "Summary judgment you have just adopted?"

PROFESSOR CURRIE: "Yes, and declaratory judgments ...."

MR. ACHESON: "Then if we adopted the rest of the 1955 rules and then went on to study parties, you could study parties too, can't you? We should try and get some sort of system in the hope that we can get these Committees working together."

PROFESSOR KAPLAN: "The only possible dissent that I can register, and it is not a very strong one by any means, is that it would be possible to run particular amendments of the discovery rules with the cooperation of the Admiralty Committee, but I would by no means urge that as of first importance. For example, I ask you would it be our general feeling that the amendment on physical examination be deferred for the two or more years which would be necessary before a general revision of discovery is possible. It may prove politic simply to postpone this for a while but not to go forward with it in the fall, but I would hate to have us adopt the proposition that we will not do anything in the discovery field until the general study is completed. That is my only point of difference."

MR. ACHESON: "I wouldn't necessarily say we would keep it for two years, but I do really shudder a little bit at the position the Supreme Court is in when we promulgate changes in a rule which has not yet come into existence in admiralty due to their own statement."

MR. JOINER: "I am a little puzzled about the time problem here. We talk about promulgating rules immediately after the Supreme Court has passed the Admiralty Rules. Perhaps my conception of the amount of time that it will take to actually get the rules effected by the Supreme Court is a little bit different than yours."

MR. ACHESON: No, I just meant that if we put out in September to the bar for discussion changes in rules which the Court had just had in effect in July, this is a pretty fast change."

MR. JOINER: "It seems to me that it is going to take almost two years, or a year and a half from the time that we publish anything for the bar before we ask the Supreme Court."

MR. ACHESON: "That isn't the time I am talking about. I am talking about the lapse of time between the moment when the Supreme Court says 'these are good rules for admiralty on discovery.' Three months later we say 'these rules aren't very good -- they ought to be changed.' Then we say why don't you tip off the Chief Justice. He didn't know what was coming on that pitch.

JUDGE MARIS: "I think there is great force in that. I think they ought to be postponed.

. . . . .

PROFESSOR SMIT: "We propose a rule making 28(b) which is also in the area of discovery, and we have the amendment of the admiralty rules submitted the proposals to Professor Currie suggesting the areas in which we thought improvement

should be made. I have recently read the accompanying report of the admiralty rules and I got the impression from that report that the main purpose of the adoption of discovery rules at this time was to stop the gap which had been created by the Miner decision, and that the Supreme Court made no commitment in any way, nor did the Judicial Conference, as to desirability of amendments which might come up on further study of the Civil Rules."

JUDGE MARIS: "I really think we ought to allow a little period of time to elapse between the promulgation of these new admiralty rules and the suggestion that they really weren't quite right after all -- that they should have been put in different form.

MR. FRANK: "I have a question on Items in our agenda D, F and G. I confess that they seem to be so minor and so trifling I would reach the same result simply on the ground that they don't much matter. But I do not have the experience myself to form an opinion as to Item E, the matter of physical examinations on blood and on .... and I simply don't know whether that is in fact a pressing problem in trial cases in the United States. Can anyone who has more knowledge and experience advise us as to whether that is a serious and pressing problem or whether that too is a problem that is more apparent than real?"

PROFESSOR WRIGHT: "I have just completed a complete study of the decisions on Rule 35. If it is a problem, it does not appear in case law. Blood tests are

being routinely granted over and over again. There has not been a decision since Wadlow v. Humbert in 1938, which everybody agrees is wrong, which denied a blood test. As to agents, there are only two cases that I know of -- one is the unreported Colorado state court decision, which refused to allow it, the other is Judge Gourley's opinion which indicated that he would allow it if need be. If there is pressure to get to this it does not appear in the cases.

"And I think there is this further problem about doing anything on Rule 35, which if any rule is urgent apparently some people think this is. And that is we cannot amend Rule 35(a) without amending Rule 35(b). Some amendment is necessary merely to tie on to the new scheme. Yesterday we could reach no decision, or even so far as I could detect, any general consensus as to what we are going to do on 35(b) with regard to reports. I doubt that the difference in views as expressed in reports is something that can be solved by correspondence. I think that is something that will have to be studied by the Reporter and we are going to want to debate about and find a meeting of the minds about. So, I can't think that Rule 35, which is the only one of these that seems to me to have any kind of urgency, is ready to go at this time."

PROFESSOR KAPLAN: "I must say that shakes me. And it seems to me that if there is any strong feeling that it would be worthwhile postponing action until we should do it - so let me recant and suggest that the rule for discovery should be put in the freeze for at least some period of time. This, of course, would not

prevent our working on them."

MR. ACHESON: "We ought to bring them to the point where we are agreed as far as we can be at this time."

JUDGE MARIS: "What is being proposed, as I understand it, is simply to defer their public circulation."

MR. ACHESON: "This would seem wise to me."

JUDGE THOMSEN: "I move that we attempt to reach agreement among ourselves on the discovery rules, and to have the admiralty group reach a concurrent agreement with the admiralty field -- not to be publicly circulated."

A vote was taken and the motion was adopted.

MR. JENNER: "Am I correct in my understanding of Judge Thomsen's suggestion was that as we work through the discovery rules, and we determine as a matter of policy finally, or reasonably finally, that we think this is a desirable amendment, we will then circulate that to the Admiralty Committee?"

MR. ACHESON: "We will be working on it together. In fact it would be a good idea if the two Reporters brought things up to their Committees at the same time so that we would be concurrently working and discussing these matters."

"Do we also agree as to the other matters discussed in accordance with the Chief Justice's views this morning, that we perfect those over the summer if we can get agreement by correspondence we do it. If we have to have a meeting

in September about it and that we then ask Judge Maris's Committee to circulate these to the bar with the explanation that this completes the consideration of all matters which were pending from our predecessor, with the exception of discovery. Is that a working schedule that you would like to adopt?"

It was agreed that there would be some effort to circularize

PROFESSOR KAPLAN: "There are two further things that do fall within the range of the 1955 amendment -- that is the important rule on service of process and that is very definitely connected with the proposal of the International Commission.

P. PROPOSALS REGARDING SERVICE OF PROCESS AND CERTAIN INCIDENTAL MATTERS: RULES 4(b), (d)(4), (7), (e), (f); 12(a); 30(f)(1)

The Reporter briefed the Committee on his draft.

Mr. Frank said that in his opinion the Reporter had given the Committee substantially what it asked for, and that it should be put on the docket for circulation to the bar along with the other matters coming out of this session. He pointed out that this is the one on which the Committee will get the most help from bar conferences.

Mr. Frank moved that the Committee approve the suggestions in principle and ask the Reporter to prepare a definitive draft with a definitive note which he thinks are ready to go to the country on that subject.

Mr. Louisell asked how many subjects were included and Mr. Frank said all the matters outlined by the Reporter except the matter on service of process, the radius problem. To approve the matters considered by the Reporter

on pages P-1 - P-9 down to No. 2 in the middle of page 9 (line 70 of the draft).

A vote was taken and Mr. Frank's motion was adopted.

[Mr. Joiner said that he very much hoped the Reporter would bring a draft with appropriate notes to the September meeting regarding the 100 mile radius which if accepted or modified could then be incorporated in the draft of rules to be submitted to the bar for discussion, and if rejected at that time would not be incorporated in those rules. Judge Thomsen asked that he consider the possibility and feasibility of including as an addition to the 100 version rule the circuit rule.]

Q. PROPOSAL REGARDING SERVICE OF PROCESS ON A PERSON IN A FOREIGN COUNTRY:: NEW RULE 4A

Professor Smit briefed the Committee on the problems involved in Rule 4 as seen by his Commission.

The Committee was urged to give thought and consideration to Rules 28, 43 and 44 and let the Commission have the benefit of their suggestions.

The Committee committed itself to a study of Rule 4.

The Chairman expressed the regret of the Committee that Deputy Attorney General Byron White was unable to attend the meeting because of the emergency in Alabama.

The date for the next meeting was set for Friday and Saturday, September 8 and 9.

The meeting adjourned at 4:00 pm.