MINUTES OF THE SEPTEMBER 8-9, 1961 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The third meeting of the Advisory Committee on Civil Rules convened in the Supreme Court Building on Friday, September 8, 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.

Roszel C. Thomsen

Charles Alan Wright

Charles E. Wyzanski

Benjamin Kaplan, Reporter

Two members, Honorable Byron R. White and Archibald M. Mull, Jr., Esquire, were unable to attend.

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; Mr. Leavenworth Colby, a member of the Advisory Committee on Admiralty Rules; Professor Willis L. Reese and Mr. Arthur Miller of the Commission on International Rules of Judicial Procedure; Ancil Newton Payne, Jr., 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 called the meeting to order and directed the attention of the Committee to the first item on the agenda, namely, Topic A., "Impleader and related matters," and requested the Reporter to summarize briefly this subject.

The Reporter thanked the Chairman and members of the Committee for their willingness to assemble in late Summer and briefly recalled the circumstances of the meeting.

TOPIC A. IMPLEADER AND RELATED MATTERS

PROFESSOR KAPLAN: "This is the impleader problem and as you recall we had reached the general agreement that there should be impleader as of right

if the third party complaint is filed with the court up to a point in time not later than five days after serving the answer. With respect to the basic text of Rule 14(a), some valuable word changes have been suggested by Mr. Doub and Professor Wright, and I have indicated what I would propose to do with those suggestions. I don't think they raise any particular problem. Now there are various amendments -- the basic amendment of Rule 14(a) and its accompanying note. First, we have Form 22-A which is a new form, 'summons and third-party complaint.' These must be served in accordance with Rule 4 like the original summons and complaint, and I have been indebted to Professor Wright for his suggestion that the note accompanying the new Form 22-A shall hint at the fact that the service must be carried out in accordance with Rule 4, and that has been duly taken care of in the note accompanying new Form 22-A.

"Then we come to Form 22-B which is the form of motion for leave to implead where a motion still remains necessary under the amended Rule -- that is to say that the third-party complaint is not filed within the stated time. Here we have a slight disagreement, Mr. Chairman, a disagreement no larger than a man's hand, but it may be worth stating. Mr. Doub would like the form of motion to be rather suggestive of what is involved in Rule 14(a). Professor Wright would prefer the form to be rather spare. Now, as I say, this is a very small difference -- I don't think that

Mr. Doub would stand on his point, or that Professor Wright would stand, on his. I would express a slight preference to Mr. Doub's suggestion."

The Chairman called for discussion on the points raised by the Reporter.

PROFESSOR JOINER: "I would speak in favor of Mr. Doub's suggestion, Mr. Chairman, on this, without wishing to invoke any substantial argument on the point. It seems to me that his suggestion makes the form of motion to conform to the requirement of Rule 7(b) which says that the motion shall be stated with particularity, and he has pointed out the particular grounds on which the motion should be based. I think this ought to be included."

MR. JENNER: "Mr. Chairman, I'm concerned only that this language, 'Defendant alleges that he is entitled to recover from E.F. [all that] [part of what] plaintiff A.B. may recover from defendant,' would lead lawyers to merely state that categorically in a motion -- that he would say -- 'third-party plaintiff is entitled to part of plaintiff's claim against him' -- and not specify."

PROFESSOR KAPLAN: "What it really amounts to is sort of a condensed reference to the nature of the third-party complaint. I think it is harmless and may be suggestive to the pleader. But, it's a very small point."

MR. JENNER: "I think it's a small point as well. I just wonder if it would introduce difficulty to have the suggestion in the motion. When you submit

a complaint which is on A-8 and in which you believe yourself entitled to recover, what does it serve to state in your motion that you are entitled to recover part, as indicated in the attached complaint, or all, as indicated in the attached complaint. It seems to me that it supplies a rigorousness that doesn't advance things. Now if Mr. Doub was thinking in terms that major information to the third-party defendant would come from the motion, then I would certainly agree with him that you must have information one place or the other. Mr. Doub, in considering them together, don't you think the thing you're driving at appears in the Form on A-8 so that you would have the detail you have in mind already submitted together with the motion?"

MR. DOUB: "I hardly think this is worth talking about. I would leave it to the Reporter, really."

MR. JENNER: "My only suggestion, Mr. Chairman, is that there ought to be no form of motion. I see no reason why you have to suggest to a lawyer how to draft a motion."

The Committee agreed to leave this matter to the discretion of the Reporter.

PROFESSOR KAPLAN: "Now the next to final point on this impleader problem: Present Rule 5(a) has the expression 'affected thereby' when it speaks about the service of pleadings and other papers, which would leave us doubtful

whether the answer to the third-party complaint must be served on the plaintiff as well as the defendant, that is to say, the third-party complainant. Considering that fact, we struck 'affected thereby' to make it clear that the third-party answer must be served not only on the third-party complainant, but on the plaintiff. Of course, this amendment has a wider scope because it would relate to all pleadings or other papers referred to in the body of 5(a). That, we also thought, was a good idea. And consequential upon that would be amendments of 77(b) and of 24(c) which now use the old language 'affected thereby' -- that would be stricken and appropriate amendments would be made.

"Judge McIlvaine has raised some interesting questions here -- he has pointed to various papers dealt with in the discovery rules and has asked what the relation between those provisions and the proposed amended 5(a) would be. He raises in particular, four problems -- depositions on written interrogatories -- well, by the very text on Rule 31(a), these are all ready to be served on all the parties -- there is an explicit provision to this effect. So that shows on the one hand that 31(a) was never intended to be covered by the general language of 5(a) as it previously existed. It shows that 5(a), as amended, will be consistent with the language of 31(a). Then he goes on to interrogatories to the parties. Here Rule 33 says quite specifically that these things are to pass only between the party interrogating and the party interrogated. Thus, it is fairly clear that this was a specific case to which 5(a) does not relate and I should suppose the same result would

follow now because the specific would continue to control the general.

"Well, without going through other examples of this sort, we can see now what the relation is between 5(a) and these other cases to which Judge McIlvaine interestingly calls attention. It is not necessary, in my opinion, that any change be made in 5(a) to deal with Judge McIlvaine's point, but I suggest to you that it may be somewhat more artistic to change Rule 5(a) to say, 'except as otherwise provided in these rules, papers are to be served on all the parties.' This would seem to me to have some fractional advantages and I would therefore suggest that -- although, again, the point is not either a difficult point or important. In general, I think this is a salutary proposal because there are some difficulties in definition in this phrase 'affected thereby' as Professor Wright has shown in his writings, and as a general rule it is well that papers should be served on all the parties, and that is the effect of the amendment."

MR. JENNER: "May I inquire -- the insertion of the exception clause will tend to bring about a general serving on everybody of all papers and documents, whether called pleadings or not, or will they tend in the other direction?"

PROFESSOR KAPLAN: "It will tend in the direction of general service on all."

MR. JENNER: "Well, anything that will tend in the way of general service, I would strongly urge. In a case of multiple parties, the odds are that in most instances in the discovery area of the submission of interrogatories and their

responses, the submission of requests for admissions in fact, or other discovery as the case may be, it is a rare case that the other parties, though you might think in the first instance, would not be affected thereby. You could technically say a particular party was not affected, but his counsel must have all that information. His judgment is affected thereby, and I would, and I certainly urge the committee, that wherever it is possible to require all papers to be served, they ought to be served."

Without objection, the amendment was adopted.

PROFESSOR KAPLAN: "The final point on impleader is an observation made by Mr. Leavenworth Colby, who is here with us, and I have set out a digest which I hope is a fair one of Mr. Colby's point in paragraph 6, of Topic A., Reporter's Comments."

MR. COLBY: "I would like to say that some members of the Admiralty bar and some members of the Department of Justice Admiralty staff thought that the proposed changes in Civil 14 were not very serious and therefore not very urgent. And that having regard to the traditional opposition of the bar, and particularly the Admiralty bar, which practices at least as much on the civil side as well as the admiralty side, against all changes, this might result in having a change now and that at a later time, in the event uniformity between the civil and admiralty practice was successfully brought about, a further change.

"Now, this is not the sort of thing which would impress any of us as being very serious. This is the sort of interstitial comment -- I don't have any great feeling about it -- I thought it was my duty since it was brought to my attention by a number of people to call it to the attention of Professor Currie, who thought he should bring it to your attention. Lest anyone not understand the problem -- certainly all of the admiralty bar, I am sure, are in favor of the change that is contemplated. In other words, a short period of time after the answer is highly reasonable for proposing impleaders. Indeed, I think if there is any difference of view about it, it is that there are people who don't see why impleader shouldn't be allowed right down to the date that somebody applies for, or notice is given, of pretrial proceedings. So I see no reason why this can't, too, be left to the Reporter."

MR. ACHESON: "When in the normal course would this be put forward for discussion by the bar?"

PROFESSOR KAPLAN: "I should hope, very promptly."

MR. DOUB: "May I suggest this. I think we should go forward on this and circularize the bar. I think Mr. Colby's point should be considered after we have circularized the bar. I think, too, that perhaps there should be a sentence in the note explaining how we arrived at the '5 days' clause. There was a very definite reason for it and it probably ought to be stated."

MR. ACHESON: "Would it be possible to adopt this change, if the Committee approves, expand the note to explain the '5 days' and then have it come before your Committee [Admiralty] and then have everything coordinated under

you, Judge Maris. And if they want some slight change and the two Reporters agree to it and Judge Maris agrees to it, would the committee go along with that?"

PROFESSOR JOINER: "I so move, Mr. Chairman."

MR. JENNER: "I would agree with that unless the change is oddly radical."

MR. ACHESON: "Well, perhaps then it would be better instead of leaving it to the Reporter to have any proposed change circulated to the Committee. If the Committee objects, then we'll have more discussion."

MR. JENNER: "If the Admiralty bar wants 10 days, no one cares about the extra 5, but if the Admiralty bar should get to the point where there is an indefinite date, such as the eve of pretrial, then I think that is a serious material difference."

JUDGE THOMSEN: "I think the eve of pretrial is a very bad time."

MR. COLBY: "I'm afraid I led you to believe that someone suggested that it could be put off until the eve of pretrial. Now this is positively what we've objected to."

MR. ACHESON: "May we then adopt the changes proposed by the Reporter with the understanding that these changes will be laid before the Admiralty Committee with the request that they either concur or suggest changes, and if they suggest any changes, that these be referred to this Committee and if there is objection to that, we will stick to our Rules, or we will leave it to Judge Maris to arbitrate the matter."

Without objection, the Chairman's suggestion was regarded as approved.

TOPIC B. SUPPLEMENTAL PLEADING

PROFESSOR KAPLAN: "This is the proposition having to do with supplemental pleading; permission to serve a supplemental pleading although the original pleading was defective. Our difficulty here has never really been with the text of the amended rule, but rather with what we should say in the note. If you remember, we had a long discussion on how far we should attempt to instruct the judge on how he should exercise his discretion in allowing the supplemental pleading, particularly where some question of the statute of limitations was involved. We finally resolved that by saying that we should not attempt to direct the hand of the judge, but should deal with the matter generally in the note. Now Mr. Doub has written that he personally would feel somewhat happier if we attempted to say something about the statute of limitations. But I'm bound to say that we've been over this -- I think we have now reached the right result -- and I think there are difficulties in attempting to speak directly to the question of the statute of limitations without knowing the particular facts on which the problem arises. And, so, unless Mr. Doub wants to argue the matter further, I would propose that we stand by the note as written"

MR. DOUB: "No, I won't press the point."

MR. JENNER: "I would share Mr. Kaplan's comments."

Rule 15(d) and the note were adopted without objection.

TOPIC C. SUBSTITUTION FOR DECEASED PARTY

PROFESSOR KAPLAN: "We are agreed, as you recall, that whereas a motion to substitute for a deceased party must be made within 90 days after the suggestion of death, otherwise the action is to be dismissed as to the deceased party, a party can move for substitution without awaiting the suggestion. It is open to any party to move a substitution for the deceased party, but if a suggestion of death is laid on the record then the motion must be made within 90 days. Now upon a reading of my proposed language, Mr. Doub suggested that perhaps the language was not absolutely clear that the motion could be made at any time prior to the filing of the suggestion of death. Well, I went to work and changed the rule somewhat. Then, I had a letter from Professor Wright, in which he said he had preferred the original language. Well, of course, I think both forms of language are nearly perfect -- I find it difficult to make up my mind between the two -- perhaps that might be left to me. I hate to put myself forward in this way, but this may be the easiest way to manage a point like that."

MR. JENNER: "Ben, I think it might help the rule if in lines 7 and 8, instead of saying 'The motion for substitution may be made by the successors or representatives,' to say, 'motion may be made by any party or by the successors or representatives' because the fewer instances will be motions by successors and the normal instances will be motions by a party. The language would then read: 'The motion for substitution may be made by any party or by the successors or representatives of the deceased party.'

"On the underlined portion of lines 12 through 17 on page C-3, there is presented this problem. You say '90 days after the death is suggested upon the record by service.' That presents the problem of 'when is service?' In multiple-party cases there will be service upon different parties perhaps on different days. When is service complete for the purpose of the running of the 90 days? Now here is a very technical situation -- when does that 90 days begin to run and when that 90 days has run, the end of the road has come. And one of the things you wanted to do here is to alleviate that strictness of the old rule. There is no help in the rule as to when service is complete -- would it not be well to say that it runs to the day the death is suggested upon the record by service and filing?"

PROFESSOR JOINER: "I think this is covered by Rule 5(b)."

MR. ACHESON: "Is the important service here service upon the estate or upon the counsel for the party who brought the suit?"

MR. JENNER: "In some cases it may be, Sir, it may be that the important service is upon persons who are not even parties to the record."

PROFESSOR JOINER: "Doesn't our trouble come from the fact that we use the term 'suggested upon the record?' Isn't the significant fact in each instance the notice that's given to an individual defendant and in each instance the notice that's given to an individual defendant will come from the service that's made upon him and he should have 90 days from that period of time to make the substitution. Now, if we did not use the term 'suggested upon the

record,' but, 'suggested to a party' or some such language as that, it would be rather clear what we're talking about -- 90 days would run from the time that the service was made upon an individual party -- so if party A was served on January 1, the 90-day period would run from him from that time, but it would not be for party B if service were not made until January 10."

PROFESSOR KAPLAN: "Well, isn't that fully suggested by the phrasing 'by service of a statement of the fact of the death' as we have it now?"

PROFESSOR JOINER: "I would hope that, but I was trying to clear up this problem of Bert's by a little more clarity."

JUDGE THOMSEN: "Do the words 'upon the record' add anything to it in line 14? Doesn't it create a possible confusion -- if the emphasis is to be on 'service,' this could possibly be confusing."

PROFESSOR KAPLAN: "Well, it corresponds to a similar expression which can be found elsewhere in this rule and I don't think it's particularly confusing because it is promptly followed by the phrase 'by service.'"

MR. JENNER: "The words 'suggested upon the record' leave it to counsel to be sure that these papers reach the court and the clerk's office."

PROFESSOR KAPLAN: "Mr. Jenner, isn't it suggested that we have no real problem here -- that the Illinois statute contains no particularly different language and has given rise to no trouble?"

MR. JENNER: "I must confess that you're absolutely right."

MR. DOUB: "And yet this language absolutely literally read and interpreted means to me that there must first be a suggestion of death on the record and then a motion."

PROFESSOR KAPLAN: "That is the point you made and to which I responded by an amendment, but Mr. Wright tells me that the language that appears here [indicating the original draft] is clearer than the other."

MR. DOUB: "I think you're both dead, then. I agree with Mr. Wright that the amendment didn't quite take care of it either, but it seems to me that we should be able to make clear what we mean."

MR. JENNER: "Mr. Doub, I have a suggestion in that connection. I think the language as it stands in this particular area is sufficient. I would suggest this, Ben, in your note in C-4 that you insert after the end of the first sentence in the second full paragraph something substantially along these lines -- 'Indeed, this will be the usual case and in that event the motion to substitute will also serve as the suggestion of death.' Now the normal case is that the motion and suggestion are made in one document and if you put in something along the lines that this will be the usual case, you will suggest sufficiently in the note that in some cases it [the suggestion of death] will be filed at the instance of a party wishing to start the 90 days going although he's not the person who has to take action on the substitution. There will be a separate document and that will be the only suggestion of death on record. In the

normal case, however, it will be the motion on the plaintiff's side, the motion of the successor or representative in which he will come in and say, 'CD, administrator of the estate of X appointed by the probate court of Cook County on such and such day, suggests the death of record of the plaintiff,' and then he moves to the next paragraph and moves for the substitution of himself in the place of the deceased party. And it seems to me, Mr. Doub, that if that additional sentence, or something of that nature, is put in there, that emphasizes the fact that you may have a separate document, but normally will be one paper."

PROFESSOR KAPLAN: "Well, I'll make a treaty. I will consider the language which I originally used to which Mr. Doub objects; I will consider my alternate language to which Professor Wright objects; I will consider the possibility of some mediating language between the two; and I will also consider the language now proposed in the note by Mr. Jenner all to the end that we may have perfect clarity."

MR. DOUB: "Well, with that understanding, I move that this section be adopted."

Without objection, the amendment to Rule 25(a)(1) was adopted, with the understanding that the Reporter would clarify the language discussed.

PROFESSOR KAPLAN: "I want to call attention to two minor matters. On page C-4, Mr. Doub proposed a change in the note to which I confess I was initially lukewarm, but Professor Wright argues that the change should be made and I

think it ought to be made. This appears in paragraph 2 of the Reporter's Comments. I called Mr. Doub's change merely a matter of taste and Professor Wright thinks it is not merely a matter of taste and I'm perfectly prepared to make it.

"Then, we considered last time whether a form of suggestion of death should be included in the forms. We reached no decision on that. I don't know what the general attitude of this group is on forms. This is a very simple form and I'm just wondering if it is worthwhile incorporating a new form in the book of forms to cover this matter of circularizing the parties with a suggestion of death."

PROFESSOR JOINER: "I would think it would be, Mr. Chairman, particularly when we have a number of states in which this is not a commonly known procedure. I believe it would be helpful to the lawyers in those states."

PROFESSOR KAPLAN: "If that is how the members feel, then I will collaborate with Mr. Jenner and we will put out a form."

MR. JENNER: "I'd be inclined on the question of policy, Mr. Chairman, to say that normally I would think the Committee would avoid suggesting forms, but here is a material change in the procedure whereas now we have this two-year sharp cutoff and in at least a respectable number of states the suggestion of death of record. It will be new to a great many members of the bar in those states that don't have it. It might be well to suggest a short form and I have a short form and it is really very simple."

Without objection, a form is to be adopted.

TOPIC G. DISMISSAL FOR LACK OF INDISPENSABLE PARTY

PROFESSOR KAPLAN: "The effect of this amendment is simply to say that dismissal for want of an indispensable party shall be a dismissal not on the merits and without prejudice. The note on this matter has been improved at Professor Wright's suggestion, and I can see no further problems."

Without objection the amendment was adopted.

TOPIC H. POST-VERDICT MOTIONS

PROFESSOR KAPLAN: "It would be remembered that the Committee previously rejected a proposed amendment to take care of the Johnson problem. Otherwise, the basic changes in the rule were approved last time. They consist essentially of a statement of the procedure which is to be followed where motion for judgment n.o.v. has been granted with some disposition perhaps in an alternative motion. That is Rule 50(c). It also deals with the situation where the motion for judgment n.o.v. has been denied. That is 50(d). Now to go at this step by step, the language change was suggested by Mr. Doub in Rule 50(c)(1). On page H-3, line 34, Mr. Doub would add 'on appeal' after 'reversed' and that is fine. The same suggestion, I believe, should carry over to another place in the rule, specifically line 59 on page H-4."

After some discussion, it was decided to leave out "on appeal" since it would be ambiguous.

PROFESSOR KAPLAN: "Now there is a further change which I deal with in my paragraph 2 [Topic "H", Reporter's Comments] and that is in the interest of clarification. The proposal on Rule 50(c)(2) which comes from Mr. Doub

and in another sense from Mr. Louisell is to make it clear that the judgment referred to on line 52 is the entry of the judgment upon the granting of the motion for n.o.v. In discussing this with Judge Maris yesterday, he suggested that the appropriate language would be, and I think this is a sound idea, -- 'after entry of the judgment notwithstanding the verdict.' That appropriately describes the judgment we are talking about.

Judge Maris' suggestion was adopted without objection.

PROFESSOR KAPLAN: "Now we come to 50(d). The objections to 50(d) on the part of Mr. Frank -- I think Mr. Doub has misgivings -- I think the objections can be divided into two classes; the one is theoretical and the other is practical. On the theoretical side -- actually it would be best to deal with a typical case -- suppose you have a case which has gone to verdict for plaintiff and there is now a motion by the defendant for judgment n.o.v. accompanied perhaps by an alternative motion for a new trial. Both of these motions have been denied. Now it is proposed that the plaintiff should have an opportunity within a short period of time to put to the district court a conditional motion for a new trial. Now, as I understood part of what Mr. Frank wrote -- he questions the necessity for such a conditional motion and he puts it on this ground -- that it is possible upon the appeal that when it appears to the plaintiff in the illustrative case I've given that the appellate court is about to reverse the action of the district court and to direct the judgment for the defendant, in effect a judgment n.o.v., it would be open to the plaintiff, he

argues, to point to errors made by the trial court in the course of the trial which entitled the plaintiff to another trial. The point is that it is possible in the appellate court for the plaintiff to point to errors committed against himself which at the least entitles him to a new trial. . . . . There is, however, one thing which the appellate court cannot do and that is to give the case a general discretionary review -- that, according to the Supreme Court ruling, is a thing for the trial court to do and not for the appellate court to do. So it seems to follow from a reading of the Montgomery Ward case and the Cone case and other cases that the motion which is dealt with in 50(d), the conditional motion on the part of the plaintiff, is the exact theoretical counterpart of the motion that we deal with in 50(c). To sum up, from the theoretical point of view it does seem to me that a subdivision (d) to Rule 50 is well justified."

MR. ACHESON: "Would you state again what the plaintiff's position is at the time he is to make this conditional motion. Has he got a judgment or hasn't he?"

PROFESSOR KAPLAN: "He has a verdict in his favor. A judgment is going to be entered in his favor. What has happened is that the defendant has moved for judgment n.o.v. and possibly a new trial. That is going to be denied. Now the plaintiff says 'we must look forward to the possibility that the appellate court may disagree with the trial court -- in that event, I ask you, the district court, to say what you would do -- would you allow a new trial in the event the appellate court should hold that you the trial judge were wrong

in disposing of the point of law which was put forward by means of the motion for judgment n.o.v.?'"

MR. JENNER: "Mr. Chairman, pertinent to the Reporter's comments up to this point, and expressing no point of view by myself on the disposition or merits, there is a further element in the area which you now speak and that is: Does the appellate court have power and jurisdiction to pass upon the question of new trial where the issue has not been raised and disposed of in the trial court? The Illinois Supreme Court has held that the appellate courts do not have that power and has remanded with directions to the trial court. It has reversed our appellate courts who got in that practice [of passing on a ground for new trial not raised below] and directed the appellate court to remand to the trial court for a ruling on the new trial. It advanced in those cases the consideration that on the motion for new trial, there are two things which the trial court does which the appellate court could do as well or better than the trial court, but what the appellate court is not able to do is to make a general, broad review of what occurred during the course of the trial apart from errors of law, weight of the evidence, various remarks of counsel, actions that almost led to a mistrial -- but the judge said, 'well, let the case go on, we'll see what the jury verdict is' -- he might very well enter a judgment on the verdict, but if that verdict is not to stand, then on motion for new trial he applies different considerations, or additional considerations on whether he'll grant a new trial."

PROFESSOR KAPLAN: "I would pass from the theoretical point on which I am reasonably confident to the practical considerations on which I am not absolutely confident by any means. It is said that as a practical matter, it is a great hardship to force the trial court to make this kind of hypothetical ruling. Here is a plaintiff who has won a verdict -- a motion for judgment n.o.v. and perhaps an alternative motion has been made -- that motion, or both motions have been denied -- judgment is going to be entered for the plaintiff and you now ask the district judge to rule upon a hypothetical motion -- the plaintiff says 'now if you the district judge were wrong on the point of law in denying the motion of judgment n.o.v., what do you think of the plaintiff's right to a new trial?' It is a difficult judgment to make. Certainly there is difficulty here, but the difficulty is no more serious under 50(d) than under 50(c). The difficulty can be exaggerated because in both situations, 50(d) and 50(c), the point of law has been laid before the district judge. He knows what it is. He is speaking to that point of law and he then asks himself 'what is the plaintiff entitled to if I was wrong in making the judgment that I did upon that point of law?'

"Now I come to the final practical argument which again weighs heavily with me. It is argued that we are adding a new kind of motion to what is already a complicated situation. And perhaps it is also implied that the present attitude of the Supreme Court and of the lower courts following the Supreme Court, is that a plaintiff who has won a verdict and who has managed to fend off a motion for judgment n.o.v. and perhaps a further conditional

motion doesn't need any additional help such as would be provided him by this 50(d), conditional motion for a new trial. And so, one asks oneself whether it is really worthwhile complicating the practice to take care of these relatively rare cases. Now I yield on this point to some extent. I have said in previous memoranda that this 50(d) is not vitally necessary. We could recede to a previously prepared position -- we could write a note saying that we are not spelling out the mathematical consequences of the case where the motion for judgment n.o.v. has been denied. We could say that in such instances, the appellate court should pay close attention to any arguments made by the plaintiff that errors of law were committed against him; we could say the appellate court in appropriate cases remand for an exercise of discretion by the trial judge; we could say other things. I could very well envisage a well-calculated note with the help of the Committee members, which could more or less take care of the 50(d) situation, but as I said earlier in connection with the theoretical argument, you would not come out with a situation which exactly corresponds to the Supreme Court requirements in these fields.

"So to sum up, I say that theoretically 50(d) is right -- practically there are arguments against it which I am perfectly prepared to conceive the weight of. On the whole, my own feeling is that we should put 50(d) to

the bar and see what the response is. If the response is negative, then I will be the first to recognize it. If we recede, we recede to the previously prepared position that I described.

"May I just add one further point. There has been a good deal of grousing both in my own papers and in the correspondence that has come to me; a lot of complaint that the amended Rule 50 is a difficult rule -- that (c) is hard and (d) is even harder. But let us consider what the alternatives are. We are not passing from a simple practice to the complicated practice which I described in (c) and (d) -- I should say as I described them with the help of Professor Joiner -- not at all, the complicated practice now exists, but the point is that it is described nowhere but in a congeries of Supreme Court cases and lower court cases. A lawyer, in order to figure out the practice, has to sit down and study the field and, of course, he forgets it from case to case. So the contrast is not between the present simple practice and a complex practice provided by 50(c) and (d) -- the difference is between a present very difficult and unstated practice and an attempt at accurate statements in 50(c) and 50(d). I think that concludes what I did want to say."

MR. ACHESON: "May I ask this question? Are we by introducing (d) putting the plaintiff in the position where if he does not make this motion in the trial court he is worse off in the appellate court than he otherwise would be in the present practice?"

PROFESSOR KAPLAN: "Well, that bears on a question which Professor Louisell put. We will discuss this, but it might perhaps be put off until the end."

MR. ACHESON: "Very well."

MR. DOUB: "I recognize that from the point of view of symmetry 50(d) does tend to balance 50(c), but in introducing this highly artificial motion, and it is artificial for the plaintiff, which is the usual case, he has gone through all the rigors of filing a suit, discovery, pretrial, interrogatories, trial, obtained a verdict from the jury, had motions for new trial denied, motion for judgment notwithstanding the verdict denied, and then he has to come in and file a motion as to what the court ruling would be -- if the court of appeals reverses the ruling on the n.o.v., whether then he would then be entitled to a new trial -- and on that premise, I say that's a false premise. I don't think we should construct a rule on the basis of a probability or an inference that there is no finality to the judgment at that point and it may be reversed.

"Let me point out first this factor. I would suppose that after you have gone through all this, 80 percent of the cases will be settled and only 20 percent will go on for review by the court of appeals. Now of those 20 percent -- I'll say it's 25 percent -- but I know that in the Civil Division where I had 15,000 cases pending, we only had between 200 and 300 pending at all times on appeal. So the number that is settled after judgment before appeal or after appeal has been entered is very large. Then let's suppose it is 20

percent that goes to the courts of appeals. Certainly I would, out of respect to the district courts, assume that 15 percent of the 20 percent involve rulings that are right in about 70 percent of the cases. So you are dealing then with 5 percent that will be reversed. Now in considering that 5 percent, I say that in 99 cases out of 100, the court of appeals is perfectly capable of determining whether that case should be reversed for a new trial or not, and it's this highly sectional, infinitesimal situation that this rule is directed to -- where the court of appeals isn't sure whether there should be a new trial or not, and I say that in case of doubt the court of appeals should grant a new trial. That's what I would do. And I don't see why we need this ballet dance; requiring the district judge to dance the Swan Lake at the end of all this proceeding and to have a final minuet in almost all of the cases in order to take care of a situation that only applies to about one-half of 1 percent, or 2 percent, or 5 percent. So I say you impose on the district judges a great deal of work in cases that are going to be settled, after judgment, or on appeal and then will never get to the court of appeals in the first place, and the situation that this is directed to will never even arise.

"So that in ruling on this artificial, scholastic motion, if I may call it that, Ben, you impose on the district judges an enormous amount of work and most of it is wasted work. And let me suggest another factor here. I

don't think that scholars realize how long and unpleasant and interminable civil litigation is in this country. I think that this will drive cases away from the federal court. I think that the bar will say 'I just don't want to be bothered with such an artificial practice.'

"May I say one final word. I believe the Cone case which you tried to meet here -- I just can't develop any enthusiasm for the practice which you've pointed out -- it's such a highly exceptional situation that it's directed to and therefore it shouldn't be imposed on all cases. The reason I hate to see this even promulgated to the bar is that I think that many will lose some tail feathers if we do. I think that every change we've made we can stand on as desirable, sound policy. But I think this one is so vulnerable and will encounter so much resistance from the bench and bar that it really might hurt the Committee."

COFFEE BREAK

MR. FRANK: "May I begin my remarks on the 50(d) subject with a word of genuine personal apology to Mr. Kaplan and Mr. Joiner. I can only say that in this case I read Mr. Doub's letter and it did persuade me that I should re-examine this matter and in order conscientiously to do so, I mimeographed Mr. Doub's letter and Mr. Kaplan's comments to the rule and circulated them in my own state to a group of really highly experienced court lawyers. I'm too little in that field myself to feel confident in my own judgment. My group consisted of three members of the American College of Trial Lawyers, one

national vice president of the plaintiff's group (NACCA) and other extremely experienced court lawyers -- I would say that their aggregate experience would run somewhere between 1000 and 2500 cases. I tried very hard not to prejudice their independent reaction and simply sent the papers to them and got back letters and phone calls for discussion. I found a perfectly overwhelming opposition to the 50(d) suggestion. The 50(d) suggestions are really fundamentally very, very different and I would like very briefly to identify the factors which have persuaded me to the opposite view from that with which I started.

"First, the principal criticism I think is that it requires counsel to utterly reverse his feeling. The plaintiff's lawyer has just won his case and the motion for judgment n. o. v. has been denied and now he's finished and he should reverse himself and say whether there should be a new trial. I found that, as Mr. Doub suggested in his letter, all of my commentators picked up that point and simply said that it's too unnatural an act for us to want to try to do it.

"Secondly, there is the highly practical consideration that in the 50(c) cases, I am no longer able to agree with Ben that the function for the judge is about the same. In the 50(c) cases the judgment n. o. v. has been granted and we then rule on the motion for new trial, which would go in the same general direction. The judge doesn't have to reverse himself either. In the 50(d) cases, everybody has to reverse himself. More than that, the other aspect of the thing and the economic aspects of it become very important.

In the 50(c) cases when judgment n.o.v. is granted, I think we may assume that the bulk of those cases will be appealed, or there will be a special appeal and hence it becomes useful to move on to this second situation. But in the 50(d) cases in which the motion is denied, my percentages would be different from Mr. Doub's. I think I would go even higher. I would say that in these cases in which the motion is denied I would suppose that 80 percent of them or more are not appealed at all. That of the remainder, the great bulk would be affirmed and of those that are not affirmed insofar as they would be reversed, I can well believe that out of 1000 cases, there might not be any more than 25 or 30 in which this course of conduct would have any practical consequence. In 970 cases out of 1000 we are adding considerable number of hours in lawyers' time and judges' time for nothing and the waste seems to be disproportionate.

"So it seems to me that the 50(d) suggestion is undesirable, not necessarily in order of weight, but first because it requires too much of a shifting of position to be useful -- it's too theoretical -- and second, because in almost all of the cases it will have been a useless act which will merely add time and expense and that on the whole it simply wouldn't be valuable enough to be worth the added burden. Thank you."

PROFESSOR LOUISELL: " . . . . Despite the perfect logic of (d), I think we would be creating more problems than we would be helping to solve by promulgating (d)."

MR. JENNER: "I think in full fairness to Professor Kaplan and for the information of the Committee also I should mention that there is a practice in Illinois due to the stringency of our state constitution on the scope of review that is available to appellate courts and that is the practice in subdivision (d). We were persuaded to adopt that practice in Illinois -- urged on us by that particular peculiarity in Illinois -- to afford the appellee, the successful verdict winner and judgment winner in the trial court, permit him to be in a position in the reviewing court when his judgment is reversed to be able then and there to argue in that court the issue of new trial.

"I'll report to you how it works in Illinois. We have no problem particularly. These motions are made. What happens is an artificial ruling, Mr. Doub. The judge grants the motion for new trial [offered by the verdict winner] conditionally because, having sustained the verdict in judgment, his inclination is to overrule the [losing party's] motion for new trial. So the practice in Illinois has become rather sturdy with an automatic granting of that condition -- the motion for new trial of the successful verdict winner. So, the real problem comes up in the reviewing court. Now whether that would occur in the district courts of the United States -- my hunch is not. If you will permit the personal reference, take Judge Wyzanski -- I don't think he could permit himself to dispose of the motion on an artificial basis and there are many of his counterparts, I am sure, in the district courts. And

that's what concerns me, Ben, that the practice in the district courts in the United States would very likely differ from that in Illinois and differ even from district to district and judge to judge in districts. Some judges would feel, as theoretically they should, to give the motion of the verdict winner for a new trial the same serious consideration that he would give to it without being influenced by his actions in overruling the defendant's motion for judgment notwithstanding the verdict.

"On the over-all consideration, Ben, this being new in a great many jurisdictions, that the bar would be first bothered with the initial presentation, I think they would become accustomed to it rather quickly. What is persuasive with me is this: The courts are congested. This does involve more paper work. It does involve greater expense in that counsel must prepare additional motions for new trial, faced with the proposition that grounds not stated in this motion are waived. It requires the district judges to rule on those motions and we must all presume despite Illinois experience that real consideration will be given the motion. Are we adding here burdens which will result in delay and additional expense that are greater because they have to be done in all cases whether they are appealed or not, and is it worth it?"

JUDGE MC ILVAINE: "I will second what has been said . . . ."

MR. ACHESON: "Do you agree with this Judge Wyzanski?"

JUDGE WYZANSKI: "I do."

JUDGE MARIS: "I'm inclined to agree with what Mr. Doub and the others have said. It is theoretically defensible, but from a practical standpoint I would very seriously question its wisdom. I wonder if perhaps by a note whether it could be indicated that the court of appeals upon considering an appeal from refusal of n.o.v., it could be presented in the court of appeals by the appellee that there should be a reversal entitling him to a new trial." PROFESSOR JOINER: "If we take the case that involves principally an issue of contributory negligence and if the trial judge has gone along with the plaintiff on this all the way through the case, holding that there has been no contributory negligence shown as a matter of law and, therefore, there should be no directed verdict, he is led along in this way -- not to press to the fullest extent the contention that he would have in answer to this and therefore does not introduce substantially the evidence that might be introduced on this point. The trial judge overrules both motions for new trial after a verdict for the plaintiff and the motion for the judgment notwithstanding the verdict. On appeal, however, the appellate court reverses the judgment notwithstanding the verdict holding that there is contributory negligence as a matter of law. There is no square-cut legal issue to present to the appellate court at this time. The appellate court can reverse only on this general concept that there ought to have been more exploration of this issue of last clear chance at this time (the kind of exploration that the trial

judge should rule upon under a general motion for new trial). And this kind of a case persuades me that it is important and significant to ask the trial judge to rule upon this matter conditionally at the trial level prior to the time the appeal takes place. It seems to me we are doing no more than is required at the present time under the holdings of the Supreme Court and that we are alerting the bar to the requirements of the rules by expressly stating them."

PROFESSOR WRIGHT: "I've been doubtful about 50(c) and (d) both and yet if we are to have 50(c), I do not see how we can avoid 50(d), though I recognize the force of all the comments which have been made . . . . If we were to simply leave this to the appellate court to do, then we surely would be flying squarely in the face of the Cone case, and if we are going to leave it to the trial court to do, that we have to provide some procedure by which the trial court can do it. So if we are going to adopt (c), we are going to have to adopt (d)."

. . . . . .

MR. JENNER: "Judge Maris, on appeal, the appellate court has in the eyes of the appellee two problems. The appellee would like to be in a position to do one of two things in your court. He would like to say, 'if you think that the court erred in denying judgment n.o.v., then I have two problems. There are some considerations I wish to advance and I'm entitled to a new trial and those fall into two general areas: (1) An area in which the trial

judge is the part of the judicial machinery best able to pass upon the question and that involves over-all fairness of the trial, weight of the evidence and a few other things; (2) trial errors which I'd like to be in a position to urge in the reviewing court. In the latter area I'd like the reviewing court to be in a position to pass on those if that is the main basis of my motion to new trial.' The appellate court can do it just as well as the trial court, and perhaps better. Better because if it goes back to the trial judge to pass on a new trial for that purpose, it's going to be back here anyhow. So aren't we really in the area of that limited situation where the case is one that the issue would be better disposed of by the trial judge in the first instance being those cases in which the appellate court would say to itself, 'we really aren't in a position to pass upon this issue.' Now, if you have this practice, Ben, and if the judges would rule on the motions for a new trial, as we all must assume here, the appellate court would have in that limited area the judgment of the trial court and could dispose of it. Now is that limited area so small? -- These statistics uttered by John and Mr. Doub -- I can't follow them. What is the narrow thing we're really dealing with here and is it worthwhile requiring the trial judges to rule on every case at the stage when you don't know there's going to be an appeal?"

MR. ACHESON: "Would you state again what this narrow group would be?"

MR. JENNER: "It would be the areas in which the appellate court would say, 'the grounds urged by the appellee for a new trial are grounds that are better

to be passed upon by the trial judge in the first instance.' And even in some cases, say 'we cannot pass upon the judgments and the considerations that would influence the trial judge who sat there and heard that case,' or say, 'well, I'm of the opinion that fairness and justice dictates in this case, much as I regret having to retry the case, that there ought to be a retrial.'"

MR. ACHESON: "In that case, can't the appellate court reverse and remand for proceedings not inconsistent with this opinion?"

MR. JENNER: "I'm pleased you asked the question because I did want to comment further and say: Judge Maris had suggested a note -- in addition to what you had in mind, Judge, I wonder if it would be possible to permit the appellee on review to be able to advance to the court of appeals this narrow area of consideration I'm talking about and say, 'Your Honor, this and this and this occurred in the trial court. I submit to you whether it is not better and in the interest of justice in this particular case for you to remand to the trial court to consider the question of new trial and then bring the record back up so that the appellate court may dispose of the whole case.'"

JUDGE MARIS: "I think that would be better than what's here."

PROFESSOR KAPLAN: Judge Maris, if the 50(d) is voted down, it might be advisable to make some such statement by way of note. But I, of course, am inclined to agree with Professor Wright that that does not meet the punctilio of form which is required by the Supreme Court in the Cone case."

JUDGE MARIS: "Well, with all due respect to the Supreme Court, I think we have our own responsibility here. It involves problems of judicial administration and many other things and I think the Court is entitled to have the judgment of this Committee, of the Conference and of the bench and bar of the United States."

PROFESSOR KAPLAN: "In response to the general suggestions about what might be done if 50(d) should be voted down, it would be quite possible to say by way of note that this matter would be left to case development and then make a series of statements. One would be that the verdict winner would put to the appellate court alleged errors that were made against him. Second, we can recommend to the appellate court that in appropriate cases, it could give consideration to the possibility that discretionary grounds for new trial may exist and remand for such consideration by the district court. Finally, we could even say something about the possibility of a new trial when the judgment is entered by the mandate. The difficulty with it is: First, we would not have the thing stated in the form of a comprehensive rule; second, we would possibly offend against some language of the Supreme Court opinion. On the other hand, I'm bound to say that Judge Maris' point is perfectly well taken . . . . . I must say I think it would be a great misfortune if any overruling of 50(d) should carry with it 50(c). If we recede from 50(d) we ought to adopt 50(c) in its present text and then do what we can in the note to make suggestions in the 50(d) case."

JUDGE WYZANSKI: "I move that 50(d) be eliminated and that we then consider 50(c)."

MR. JENNER: "Mr. Chairman, if we do that -- this problem is one that the bar has been considering -- it is not new by any means. I would feel rather queasy if we eliminated (d) which I'm inclined at the moment to vote for on practical considerations. Though, I think theoretically (d) is sound. But in the material that we send to the bar on Rule 50, I think we should indicate to the bar that we considered this problem and what action we took on it and why we did so."

JUDGE THOMSEN: "If we vote down 50(d), it seems to me there are two alternatives: one is Professor Kaplan's suggestion of a note in which the different things appear and another would be a very simple rule which had the effect of overruling the final dictum in the Cone case and specifically state that the court of appeals may in the interest of justice either grant a new trial itself or remand the case to the district court for consideration of whether in the interest of justice a new trial should be granted."

PROFESSOR KAPLAN: "I think it too strong to say this is an overruling. I think it might satisfy the problem simply to say in the note that these alternatives exist."

MR. ACHESON: "In order to keep this clear, wouldn't it be well to go through Rule 50, and for the moment let's take a tentative vote on all the provisions of 50. Then, in the light of this tentative decision, let's decide

on what we'll instruct the Reporter to do and then we'll have a definitive vote on that. Would that be satisfactory?"

JUDGE WYZANSKI: "Absolutely."

Without objection, 50(a) and (b) were adopted.

The Chairman asked for discussion on (c) and Professor Louisell raised a problem contained in the language on H-3 beginning on line 39 which reads, "In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered." Professor Louisell stated that these words do not make it clear that the appellant may allege the error in cases of the grant as does the following sentence wherein it is stated that the appellee may allege error in denial."

PROFESSOR KAPLAN: "I hesitate to touch this language any further, but we could clarify this in a note."

PROFESSOR LOUISELL: "That would be entirely satisfactory."

JUDGE THOMSEN: "I so move -- that we approve this paragraph and, of course, a line be added in the note."

MR. DOUB: "I move that (c) be adopted."

MR. ACHESON: "The Committee has before it a motion to approve (c) with an explanation of Mr. Louisell's problem in the note."

PROFESSOR KAPLAN: "I would like further to say that my present note explaining (c)(2), I've become somewhat dissatisfied with and I would like

before promulgation to present additional language to that, but I don't think we have to hold up decision pending perfection of that."

Without objection, 50(c) was adopted.

The Chairman then requested a vote on the Reporter's rendition of 50(d). A vote was taken -- two members were in favor, the majority opposed. The amendment was not adopted.

Professor Joiner then submitted the following language of a substitute Rule 50(d):

> A verdict winner, against whom a motion for judgment notwithstanding the verdict has been denied, may, on appeal asserting error in the denial of the motion for judgment, conditionally allege error entitling him to a new trial which, if judgment notwithstanding the verdict is granted in the appellate court, may be passed on by the appellate court or by the trial court on remand if so directed by the appellate court.

JUDGE WYZANSKI: "We are all in agreement as to the substance of that, aren't we? The only question is whether it ought to appear in the note, or whether it ought to appear in that language."

PROFESSOR JOINER: "Well, I don't know whether it should appear in this language or not, but I think it ought to appear in a rule rather than a note."

JUDGE MARIS: "I think it should be in a rule because it seems to me that the appellate court would have great difficulty in determining whether they have power to do this."

LUNCHEON

JUDGE THOMSEN: "I move that the Reporter consider the discussion and consider this draft of the proposed rule and prepare a note and a proposed rule as alternative methods of the handling of it to be submitted to us for our vote at the next meeting."

. . . . . .

PROFESSOR ELLIOTT: "Mr. Chairman, may I offer a substitute motion for the unseconded motion of Judge Thomsen, which is that we do nothing at this time with respect to further change in the rule or the note."

MR. ACHESON: "Surely. I wonder whether it would not be wise to drop this subject for now because we don't have either Mr. Frank or Mr. Jenner with us. Perhaps when they come back, we could state the various possibilities and then take it up in the morning and dispose of (d) finally in the morning. Then perhaps we might proceed to Summary Judgment."

TOPIC I. SUMMARY JUDGMENT

The reporter briefed the Committee on Topic I calling to its attention a proposed change in line 32, page I-3 suggested by Mr. Freund. That proposal was to delete the word "shall" and insert the word "may." It was decided that this would weaken the language and the word "may" was retained. It was also noted that in line 24, page I-2, the words "answers to" should precede the word "interrogatories." The note would be correspondingly amended.

The amendments to Rule 56 were adopted.

TOPIC J. JURY DEMANDS IN REMOVED CASES

After a briefing by the Reporter and some discussion by the members, Professor Joiner suggested that: The words "prior to removal" in line 52, p. J-3, be moved to the beginning of the sentence; and that the words "according to" in line 51, p. J-3, be changed to "in accordance with."

Professor Joiner also questioned the language on the top of page J-4 and made the following statement:

PROFESSOR JOINER: "It seems to me we've missed the situation in which a man in bringing an action in a federal court in a state where a demand is not essential does in fact file a demand. The way it is drafted -- 'if the state law does not require the parties to make demand' -- then there are certain sanctions that can be imposed upon him. I would say that the man who actually makes the formal demand in writing, even though he is in a state where such is not required, ought not to have these further sanctions imposed upon him. I think this needs some re-examination."

The Reporter agreed to look into this.

Mr. Morton pointed out that in line 57, p. J-4, he would prefer to see the word "demands" in lieu of the word "desires." This was agreed to. Mr. Morton made a further comment, as follows:

MR. MORTON: "The other question that occurred to me is what would happen if a district court were by local rule to revert to the present situation by simply saying that in all removed cases a jury will be deemed to have been waived unless a demand has been filed within 10 days. Would that comply with

your notion of direction by the district court, or did you intend this language to require the district court to give a specific direction individually to each party in each case? It would seem to indicate here that we should say that they [the district courts] should do it by individual notice if that is the answer you are addressing yourself to."

PROFESSOR KAPLAN: "Do you think that language ought to be carried in the rule itself, or in an explanation?"

PROFESSOR JOINER: "I should think clause (1) [Reporter's Comments] would be the answer here -- 'shall state whether they desire trial by jury (1) if and at the time they are directed to do so by the district court, . . .'"

JUDGE MARIS: "My suggestion is that the rule require the court to give notice to the party of the existence of that rule."

MR. ACHESON: "Aside from Judge Maris' question, are we all satisfied with the substance of Topic J, under Reporter's Comments, three-quarters of the way down the page?"

PROFESSOR WRIGHT: "Mr. Chairman, I'm not. It seems to me to be seriously unsound principle."

MR. ACHESON: "All right, would you state why?"

PROFESSOR WRIGHT: "If we should help out the lawyer in the removed case, why not also help out the lawyer who commences the case in the federal court and who does not practice there frequently. From the published decisions, the problem in original cases has arisen much more frequently

than in removed cases. I do not see how we can defend saying we will help out the man who has the case removed because he's not familiar with the rule -- unless we're going to help out also the man who commences the case who is not familiar with the federal rules."

MR. ACHESON: "May we have a vote on the substance of the material under the Reporter's notes realizing the language is wrong and realizing that there is the issue raised by Professor Wright and reserving Judge Maris' point."

PROFESSOR JOINER: "I move that we approve in substance the Reporter's draft appearing on the last three lines on page J-3 and that which appears in the Reporter's comments on J-6."

PROFESSOR KAPLAN: "Would it be agreeable to you, Charles, if we also said as part of this motion that we would take care of Judge Maris' point by explanation and make it clear that the particular district court may deal with this by one routine or another at its own selection."

PROFESSOR JOINER: "Yes."

MR. MORTON: "Mr. Chairman, can't we approve the matter at the foot of J-3 with the language changes as a separate matter because there is unanimity on that point."

MR. ACHESON: "Yes, without objection, we approve the language on the bottom of J-3."

After further discussion Judge Thomsen offered the following language changes on page J-4, beginning with line 55: "but the district court

may direct the parties to state within a specified time whether they desire trial by jury and shall so direct them as of course at the request of any party."

The Committee voted in favor of Judge Thomsen's suggestion.

TOPIC K. VARIOUS AMENDMENTS OF THE FORMS

Without objection, amendments to Topic K [Forms 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 18, 21] were adopted.

TOPIC L. SATURDAY CLOSING OF CLERKS' OFFICES

After a very brief discussion, the following minor changes were suggested: delete the words "The term" in line 15 and the word "shall" in line 16, page L-2, and change the word "include" in line 16 to "includes." The sentence would then read: "Legal holiday" as used in this rule and in rule 77(c) includes New Year's Day, ...

Rule 77, line 6, page L-3: The second preposition "on" should be deleted.

Page L-4, "Note": The reference in the fourth line from the bottom to Rule 5(a) should be corrected to read "Rule 6(a)."

The Reporter's draft was adopted without objection.

TOPIC M. ENTRY OF JUDGMENT

PROFESSOR KAPLAN: "I was instructed to work further on this very interesting question and to consult with Judges Thomsen and Clark. I

started with a good deal of worry about this question, but as I went along further and further and consulted the actual factors, it seemed to me that the solution became reasonably simple. To relieve all suspicion as to where I stand on this, I would very vigorously, I think now, support the second alternative draft. It might be well to go back to the source of this question.

"In the Schaefer Brewing case and other cases like it, the judge writes an opinion or a memorandum concluding with words that have a directive or conclusory sense. In the Schaefer Brewing case, for example, the words were 'the plaintiff's motion is granted.' It was a motion for summary judgment. Sometimes, it appears, clerks have run with the ball at this point -- they've simply proceeded to note the entry of judgment on a separate document. But in such a case, where is the judgment proper? More ambiguously, where is the direction for the entry of judgment? So here starts a long inquiry as to whether the memorandum or opinion can be regarded as the judgment proper, or more ambiguously, as some kind of a direction for the entry of judgment. And that's the problem of the Schaefer Brewing case and other cases like it. Now the discussion last time seemed to me to lead inevitably to the proposition on which I think we are now substantially all agreed -- that we should make specific provision that in every case there shall be a separate document to be called 'a judgment,' and that the opinion or memorandum will not serve that purpose.

"So, the first point is that the rule should provide that the judgment be placed on a separate, more or less formal, document. Now there is a further general problem and that is that the practice has developed in various districts that neither the judge nor the clerk does anything unless he or they are presented with forms of judgment by the parties. This stems back to the old New York practice that nothing happens unless a formal judgment is presented. The result is in many cases really unconscionable delay in perfecting and finally disposing of cases. The whole procedure awaits until the party, generally the winning party, presents some kind of an instrument.

"Now, the intent of Rule 58 has been from the beginning that certainly in the less complex case, the procedure of formulating the judgment and of entering it shall be committed to the court and to the clerk so that the new rule deals specifically with this problem and says that counsel shall not present forms of judgment for settlement unless they are requested to do so by the judge and that the judge shall not make these requests as a matter of force. Both proposals that I have set out here, both the alternative draft and the second alternative draft deal with these matters in the same way and, within themselves, push the problem very far along to a solution."

Mr. Jenner then called the Committee's attention to the three sentences beginning at the end of line 11, page M-5, and suggested that their

order be changed to read as follows:

> "A judgment shall be set forth on a separate document. The notation of a judgment as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of a judgment shall not be delayed for the taxing of costs."

Mr. Jenner then suggested an amendment to the second sentence above, to read as follows:

> "The notation of the judgment on the civil docket as provided by Rule 79(a) constitutes its entry. No judgment is effective until it has been prepared, filed and entered as provided in this rule."

MR. ACHESON: "If notation and entry mean the same thing, then let's get rid of one of the two."

Mr. Doub suggested the following change to line 15, page M-5: "constitutes the effective date of the judgment."

Judge Wyzanski suggested the following changes beginning at line 4, page M-5 after the word "denied": "unless the court otherwise orders, the clerk shall forthwith prepare, sign and enter the judgment . . ."

Judge Wyzanski made the motion that the Second Alternative Draft of Rule 58 be approved subject to the above mentioned changes.

The motion was carried. [This would also include corresponding changes in Rule 79].

TOPIC H. POST-VERDICT MOTIONS

MR. ACHESON: "When we came in after lunch, Mr. Jenner and Mr. Frank, we were discussing what, if anything, should be done in view of the elimina-

you. The question was whether in view of the elimination of 50(d) we should (1) have anything at all in the rules, or (2) explain in the note, or (3) do nothing at all, just be silent. Now, as to the first of these, Mr. Joiner has made his suggestion. The Reporter's suggestion is that we should remain silent. Now Mr. Joiner, if you'd like to discuss your suggestion."

PROFESSOR JOINER: "This draft begins with the premise that was certainly expressed by the vote this morning on 50(d), but has been criticized, among other reasons, because it stated too narrowly the grounds that might be asserted for a new trial when it uses the term 'alleges errors entitling him to a new trial'.

[Here Mr. Joiner read his amended substitute Rule 50(d)]

> "A verdict winner, against whom a motion for judgment notwithstanding the verdict has been denied, may, on appeal asserting error in the denial of the motion for judgment, conditionally assert reasons entitling him to a new trial. If judgment notwithstanding the verdict is granted in the appellate court, the reasons asserted for new trial may be passed on by the appellate court or by the trial court on remand if so directed by the appellate court."

PROFESSOR KAPLAN: "Charles, were you intending to exclude the possibility of the verdict winner making his conditional motion to the trial court? Do you want to close off that possibility?"

PROFESSOR JOINER: "I thought we got beat on that this morning, Ben."

MR. JENNER: "No, I don't think we did."

PROFESSOR KAPLAN: "In other words, doesn't this begin to show that any attempt to deal with this by rule once the earlier draft of (d) has been disposed of should take the form either of silence or some form of disposing statement in the note? It seems to me that if you are going to reduce this rule, you would certainly have to say that a verdict winner might make a conditional motion; then you have to ask yourself, 'must the trial court rule on it if the motion is made, or may he pass it by and have it go to the appellate court'. So unless you're really prepared to take decisive action, I think that's out in view of this morning's vote. You must go either to silence, which is not the worst thing in the world, or include a statement discussing the problems."

PROFESSOR JOINER: "It doesn't seem to me that this is any less complete than the draft we discussed this morning in that the earlier draft did not discuss the right of a person to do exactly what this suggests that we could have done anyway."

PROFESSOR KAPLAN: "No, but it [the Reporter's draft] starts with the basic proposition that the motion is to go to the trial court. It certainly answers the omitted question of this draft."

MR. ACHESON: "May I ask a question of your second sentence, Mr. Joiner, which bothers me a great deal? If judgment notwithstanding the verdict is granted by the appellate court, then that's the end of the matter, isn't it?"

PROFESSOR JOINER: "Well, in the same way that after judgment has been entered in the trial court, we sometimes can file motions for new trial at that time. Except that this rule would provide that we now have pending a decision on those questions which would assert that those persons who lost in the appellate court could get a new trial."

PROFESSOR KAPLAN: "I think the Chairman's point, if I may say so, is very well taken because in the normal argument in the field, the appellate court would deal with all propositions simultaneously. What you're really saying here is that if the appellate court shows a tendency to grant the judgment n.o.v., then it should also consider the possibilities of a new trial."

MR. DOUB: "The Chairman made a good point, but I think it can be taken care of by a slight change in language -- instead of saying 'If judgment notwithstanding the verdict is granted', which is not correct, it should be 'If the appellate court determines that the ruling on the judgment notwithstanding the verdict was erroneous.'"

MR. ACHESON: "I think we would do much better to have a discussion of this in the note following (c) and point out that there are more problems than (c) deals with, but we have not dealt with them partly because its open for the court of appeals to remand for such proceedings [as a new trial?] because they're not inconsistent with its judgment and partly because the case is developed."

JUDGE MARIS: "I'm inclined to agree with that . . . ."

MR. JENNER: "The basic problem here is to afford the appellee an opportunity in the reviewing court if its possible to do so to raise the issue and present it to that court as to whether he's entitled to new trial in the event the court is of the opinion it should take adverse action on the judgment from which the appeal is taken. That, in turn, divides itself into two segments: (1) matters that the appellate court clearly can pass on without embroiling the trial court on remand; and (a) considerations relating to a new trial that should be passed upon by a trial judge. And that's about all we need and I'm afraid, Charlie, that your rule only covers part of what we're talking about anyhow and that it would be better to have it by way of a comment."

PROFESSOR KAPLAN: "Albert, would you exclude the possibility of a motion made to the trial court?"

MR. JENNER: "No."

JUDGE WYZANSKI: "Isn't the substance of the note which you contemplate something like this: 'If an appellate court reverses a judgment on the grounds that the trial court erroneously granted a judgment notwithstanding the verdict, nothing in these rules shall preclude an appellate court from itself considering, or directing the trial court to consider, a motion for a new trial'. Isn't that really what you mean?"

MR. ACHESON: "Exactly."

PROFESSOR KAPLAN: "Does this intend to exclude a motion to the trial judge?"

Several members answered, "Yes, it does."

PROFESSOR KAPLAN: "Then, I think it's wrong. I think we should not cut off the possibility of a nicer compliance with the philosophy of the Cone case."

MR. ACHESON: "I don't think there is any necessity at all of discussing making the motion in the lower court in the note. I don't think anything that would be said by Judge Wyzanski's note would mean that counsel, if he wanted to, could not make such a motion, and that the court, if it wanted to, could grant it, or could say, 'I'm not able to decide on it now without prejudice.' It seems to me that that deals with the thing as much as we need to deal with it at this time."

A tentative consensus was taken as to whether the Committee preferred Judge Wyzanski's statement in the rule or in a note, or perhaps even to remain silent on the issue. The majority were in favor of having Judge Wyzanski's statement in a rule.

ADJOURNED FOR THE DAY AT 4:35 P.M.

SATURDAY, SEPTEMBER 9, 1961

A draft of substitute 50(d), prepared by an informal drafting committee consisting of Mr. Jenner, Professor Joiner, Professor Kaplan

and Mr. Payne, was distributed to the Committee members. The draft read as follows:

> "If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee on the appeal, assert grounds entitling him to a new trial in the event the appellate court should conclude that the trial court erred in denying the motion for judgment notwithstanding the verdict. [If the appellate court reverses the judgment, nothing in this rule precludes it from determining whether the appellee is entitled to the new trial, or directing the trial court to make this determination.] [Or: If the appellate court reverses the judgment, it may determine whether the appellee is entitled to the new trial, or direct the trial court to make this determination.]

Mr. Frank strongly urged the adoption of the first alternative sentence as proposed by Judge Wyzanski. Judge McIlvaine also preferred the first alternative.

MR. ACHESON: "I take it then that the first sentence means that the party who prevailed may assert these grounds wherever he wants to assert them."

JUDGE WYZANSKI: "I take it the note is going to point that out, isn't that correct?"

PROFESSOR KAPLAN: "I'm in doubt as to what the note is going to point out because as I understood Judge Thomsen yesterday, he indicated that nothing was to be said about whether such a motion could be made on the trial level."

MR. JENNER: "As I reflect on the debates yesterday the notion of optional right of counsel to file a motion for new trial in an appropriate case but

being reassured, even though he doesn't file the motion, he can argue the point in the appellate court, was quite fine and that would not encourage the filing of motions for conditional ruling in all cases in the trial court."

Professor Elliott made a motion that the first alternative be adopted.

Before the vote was taken, Mr. Frank suggested the following language changes in the first alternative: "nothing in this rule precludes it from granting the appellee a new trial, or directing the trial court to make this determination."

A vote was taken on Mr. Frank's language -- four were in favor, the majority opposed. The amendment was not adopted.

MR. ACHESON: "We now have a motion by Mr. Elliott to approve the first of these two alternative drafts."

PROFESSOR JOINER: "I should like to speak on that, if I may. I feel rather strongly that unless we adopt the second of the two alternatives, we would really be adding very little to the substance of the law and would be dodging the problem, that is squarely presented by dictum at least and by inference in the Cone case. It's only if we did give some direction as to what could be done that we would tend to obviate some of the implication that might exist in the Cone case. To leave it with the first alternative, would leave, as I understand, the Fourth Circuit deciding cases one way, perhaps, and perhaps the rest of the courts of the United States deciding them in a contrary way.

And so I would urge that we adopt the second of the two alternatives."

MR. JENNER: "I share Mr. Joiner's view for the further reason that I believe that in this area we should be affirmative and state that the court does have that power and not merely state it in the negative fashion that nothing in the rule prevents the court from doing it. I would prefer the alternative to read something like this: 'The appellate court may reverse the judgment n.o.v. and grant the appellee a new trial or direct the trial court to make the determination with respect to the trial.'"

After discussion, Mr. Jenner withdrew his suggestion.

MR. FRANK: "My problem is that I can be for Mr. Jenner's suggestion and not for this one because I think he has inadvertently changed the whole meaning of the thing. The second meaning would be satisfactory for me and the first, not."

After Mr. Frank discussed the reasons for his conclusion, Professor Joiner asked if the following amended language to the second alternative draft would suit Mr. Frank:

> "If the appellate court reverses the judgment, it may grant the appellee a new trial or remand to the trial court."

Mr. Frank agreed with Professor Joiner that this language was highly satisfactory.

Mr. Jenner again pointed out that he would prefer this not to be an 'if' sentence and that it should begin, "The appellate court . . . . . ."

He urged that it be the sense of the Committee that subdivision (d) of Rule 50 consist of the first sentence plus the second alternative, revised in the affirmative.

MR. ACHESON: "We now have Mr. Elliott's motion that we accept the first alternative and that we proceed to amend that.

A vote was taken -- the majority in favor, the first alternative was adopted.

The following amended language to the first alternative was then proposed:

> "If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or directing the trial court to determine whether a new trial shall be granted."

A vote was taken -- the majority in favor of the proposed language, it was adopted.

The Chairman then brought the attention of the Committee to the first sentence of Rule 50(d), and after some minor amendments, the following sentence was adopted:

> "If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial if the appellate court may conclude that the trial court erred in denying the motion for judgment notwithstanding the verdict."

MR. ACHESON: "This leaves the question of whether you wish to have something stated in the note, and, if so, what?"

MR. JENNER: "Or the alternative, Mr. Chairman, that it be in the rule rather than in the note."

MR. ACHESON: "If it's in the rule, then we'll have to change the first sentence some more."

PROFESSOR KAPLAN: "Yes, if it's in the rule, it will require considerable rewriting."

MR. ACHESON: "How about if you take out the words 'as appellee'?"

PROFESSOR KAPLAN: "Would you not have to go into a considerable statement as to what the trial court may do in that event? I think the real alternatives here are to redraft the rule so as to state that such a motion may be made to the trial court, the trial court may grant the motion denied conditionally, and then spell out what the appellate court may do, which would be a job of drafting, but it could be accomplished. Or, to put it in this form and to deal with it or not deal with it in the note."

MR. JENNER: "Could we have the Reporter's views."

PROFESSOR KAPLAN: "It's very hard for me to respond to this question, but my own preference would be that it would be best to attempt a restatement of the rule -- to make it perfectly clear that the motion may be made to the district court, that the district court may rule on the motion conditionally, and then deal step by step with what the appellate court may do. Now this draft would differ from the rejected draft in that it would not make it compulsory for the verdict winner to make such a motion."

Mr. Frank then made the following motion:

"I move that we table the subject of any kind of a motion of the sort we have been discussing (in the district court) for either rule or note purposes."

Judge Wyzanski clarified the motion by saying: "What you mean is no talk at all with respect to a motion in the trial court, is that it?"

PROFESSOR KAPLAN: "Well, must we not at least say in the note that this does not preclude the possibility of a motion in the trial court? What would be your thought on how we could explain this?"

MR. FRANK: "I don't think it needs explanation."

PROFESSOR KAPLAN: "I think perhaps the thing to do is to let us see how the note writes itself."

MR. JENNER: "I would wish to speak in opposition to Mr. Frank's viewpoint. An alternative motion for a conditional ruling regarding a new trial is from our experience in Illinois valuable in some cases -- valuable primarily in those cases that have taken a long time to try, that involve a considerable amount of money, or important issues. And I think the rule -- and I agree with the rule 100 percent as it is now -- negatives without explanation at least in the note the use of the alternative motion for new trial, and the conditional ruling on that, or no ruling on it, as the trial court might wish. I think that for this committee to leave that area without any comment whatsoever involves us in a failure of what the bar and the Judicial Conference expects of this Committee -- that we are not to create something

and then say nothing about it.

"This issue is presented by this rule as now adopted. The Chairman has said yesterday and today -- 'Gentlemen, does this preclude the making of such a motion?' -- Judge Wyzanski has indicated and I think it is the sense of the Committee and the Chairman that it ought not to. In any event, if there is doubt -- and I would suggest to you that there is doubt if you leave the rule without any comment -- we cannot sit here and say nothing about it. Such silence is not only abandoning what I think this Committee ought to do and what the bar expects us to do, but it's creating an area of doubt and then doing nothing about it.

. . . . . .

PROFESSOR KAPLAN: "It would be possible to write a note saying that the practice where the motion for the judgment n.o.v. has been denied below has not become settled through practice or decision, and that the effort of this rule is to deal with the problem as it reaches the appellate court. And then to go on to say that we say nothing here about the possibility of a prior motion in the district court. In other words, the effect of the note would be to say that this codifies only a part of a devolving practice, suggesting that the possibility of a motion in trial court is not excluded by this rule."

MR. ACHESON: "I think you should make it as simple as possible. Well, we have before us a motion to say nothing about this question -- that we do not deal with here in the rule -- and let's vote on that -- if that's adopted,

the reporter will do his best. If it isn't adopted, then I suppose the next thing to suggest is that he write a note and circulate it to us and see if we all approve."

The motion to say nothing in the note was withdrawn. A final vote was taken and Rule 50(d) was adopted in its entirety.

TOPIC P. SERVICE OF PROCESS AND INCIDENTAL MATTERS

The Reporter briefed the Committee on his draft. He stated that it might be wise to get a very quick impression of whether the Committee as a whole was willing to have him attempt a draft which would exclude or bar the compulsory counterclaim in this situation, or whether it would prefer not to say anything about it. He also stated that if it appeared on a quick vote that the idea of eliminating the compulsory counterclaim met with general approval, he would proceed to draft it.

Judge Wyzanski so moved. His motion was seconded by Professor Joiner.

MR. COLBY: "Mr. Chairman, I should like to say as a representative of the Admiralty Rules Committee that we, of course, would like to take over Civil Rule 4. I think one of the principal objections of the Admiralty bar would of course be along precisely this line. One of the reasons that there is no provision for counterclaims in admiralty stems from the fact that in

proceedings in rem and actions with foreign attachments, you are presented with this problem in a most real fashion, and that I imagine that if compulsory counterclaims are not excluded under circumstances like this, it would probably prove to be an insurmountable objection to getting the admiralty bar to accept Civil Rule 4 and make it much more difficult to obtain acceptance of other rules. I am in favor of the motion.

Judge Wyzanski's motion was carried.

PROFESSOR JOINER: "I should like to raise a question about the material that appears underlined in Rule 4(b), page P-3, lines 9-13. As I read the language, this requires the use of the state form of summons in the non-resident motor vehicle cases. I think this is a mistake for us to do that. I think we have to guard very carefully this business of reverting too much to state procedures as we go along here and should not do it in any case except where it's absolutely required, and I think in this instance it is not required at all to do this. The federal form of summons is very clearly expressed and adequate, and we ought to encourage its us and in fact I would suggest that the only time this language should be made applicable is in the attachment cases -- the 'in rem' type cases."

PROFESSOR KAPLAN: ". . . . It seems to me on the whole I simply have indicated by this form of statement that I prefer the regulation to be broader. It seems to me a convenience to the bar where they are following the state

procedure to commence the action to follow the state form of summons also, and I think that equally carries on to the time for filing the answer. If you're following the state procedure, why not at least allow the usual forms to be used subject only to such modification as the federal practice requires?"

PROFESSOR JOINER: "I think this language in lines 9 through 13 should apply only to in rem cases -- I so move, Mr. Chairman."

Mr. Joiner's motion was put to a vote -- the motion was defeated.

Mr. Jenner then suggested deleting the phrase "such a party" in line 48, page P-4 and inserting the word "him". Without objection, this amendment was made.

The Chairman then requested a vote on the adoption of the Rules under Section P. These rules [4(b), 4(f), 12(a), 71A(d)(3)(i)] were unanimously adopted.

COFFEE BREAK

MR. ACHESON: "Our next subject is the notes which will be attached to the rules under Topic P, and there has been a suggestion that some of these notes should be expanded to explain more fully these matters. Judge Thomsen made that suggestion."

Mr. Frank stated that the notes should remain clear, yet brief. Judge Thomsen agreed, but was still of the opinion that since the Reporter raised certain questions in this area, this note should be more elaborate.

Mr. Jenner then suggested permitting this note to be the note promulgated for first consideration by the bar as a result of communications which will be received, especially in this area. This seemed agreeable to all and the notes to the rules under Topic P were adopted subject to the Reporter's revisions.

TOPIC Q. SERVICE IN FOREIGN COUNTRIES (INITIATED ON BEHALF OF THE COMMISSION ON INTERNATIONAL RULES OF JUDICIAL PROCEDURE)

Professor Kaplan pointed out that this new draft of Rule 4(i) was seen and read by the members of the drafting group of the Commission, but it had not been formally approved by them, nor by the Commission. He therefore suggested that the Advisory Committee deliberate upon these proposals in Topic Q, but without any final action at this time. Then the matter could be considered by the Commission, and finally, if at all possible, a draft presented to the bench and bar agreeable both to the Commission and to the Advisory Committee.

Professor Kaplan made the further statement that while 4(i) may not be perfect, it was very advantageous in helping lawyers in some cases. In his opinion, it would be advisable to adopt this rule.

Judge Maris, as Chairman of the drafting group of the Commission, stated that he thought Professor Kaplan had greatly improved the draft of this rule and that he [Judge Maris] was completely in accord with it.

The Chairman then called on Professor Reese.

Professor Reese gave an opening statement covering briefly the background leading up to the establishment of the Commission. He then gave a rather complete statement outlining the points covered by the present draft.

Mr. Doub opened the discussion on the draft with the following remarks:

MR. DOUB: "Mr. Chairman, could I state two points. The first is -- I have no points as to form in the proposed rule -- but I have a very serious question as to (iv) providing for service by mail. And the reason is this. In the countries of western Europe, every one of them require as one of the conditions of the validity of the judgment -- they require that there be some solemnity attached to process and that it be served by an official. Now I have no questions about (i), (ii) or (iii), but as I say, I do have this question about (iv). The members of the Committee should be well apprised as to what we're doing. Chances are that if you send out this notice by mail and obtain default judgment or contested judgment, and you then sue in any court in Western Europe, I don't think the judgment will be sustainable, it will be invalidated. And I believe there should be a sentence in the note to alert the bar. I think we should consider taking out (iv), but leaving (v), as directed by order of the court. The reason I say that is that when we specify four methods and then say 'as directed by order of the court' -- there isn't any other way to do it.

"My other point is this. The courts of Italy require that a translation of the summons be sent. I suggest that in line 22, after the word 'court', there be a sentence to the effect that 'delivery of the summons and copy of the complaint must be accompanied by a translation of them in the language of the foreign country'.

"A third point: In Italy, there is a further notice sent when the court assumes jurisdiction. In other words, the recipient of a paper from a foreign country has no way of knowing whether it complies with the laws of the originating country or not. And, why isn't it sound that he thereafter receive a notice that he has been served with process and without this, how does he know that the paper sent to him is a valid service under the law of the foreign country? . . . . . I think we should consider whether the Italian practice is right in sending this supplemental notice."

Mr. Doub then put his suggestion in the form of a motion -- that delivery of the summons and copy of the complaint must be accompanied by a translation of them in the language of the foreign country.

Mr. Jenner suggested as a possible alternative that the suggestion be incorporated in the note, and stated that he thought it unwise to require what Mr. Doub suggested in every case.

A vote was taken on Mr. Jenner's amendment to Mr. Doub's proposal. Seven members were in favor and the amendment was passed. Mr. Doub's proposal was overruled.

Mr. Doub then pointed out that in line 20, section (iv), the language was very vague and, in order to be more explicit, he would prefer inserting after the word "mail", the phrase "addressed to the party". The Reporter thought it might be well to re-examine this point and stated he would do so.

MR. ACHESON: "I suggest that perhaps what we might wish to do is to say that we approve this rule with the suggestions which have been made to the Reporter for improvement, subject to consideration again after it has been considered by the drafting committee and the Commission."

Mr. Acheson's suggestion was the unanimous view of the Committee.

TOPIC R. TAKING DEPOSITIONS IN FOREIGN COUNTRIES (SAME)

[Judge Maris left the meeting at this point, but requested that he be recorded as approving the draft rule under Topic R.]

The Reporter briefed the Committee on the proposed draft of Rule 28, pointing out that this draft solved several of the problems which exist in this area and stating that depositions on notice are no longer confined to those taken before United States foreign service officers. These depositions may also be taken before any person authorized to administer oaths, and this would include other foreign officers. The draft also provides that a court may make a free choice on the basis of all considerations of the

manner in which the deposition is to be taken abroad and may both issue letters rogatory and grant a commission.

Mr. Doub was not satisfied with the language on lines 15-18, page R-3 and said he would make suggested changes in writing to the Reporter. The Reporter agreed to this.

Mr. Joiner suggested that the phrase "by virtue of the appointment" appearing on line 11, page R-2 be inserted in line 10 following the word "power". It was agreed that this should be done.

Judge Wyzanski made the motion that the draft on Rule 28 be adopted subject to the minor changes suggested.

Without objection, the motion was carried and the rule approved.

III. TIME TABLE FOR CIRCULARIZING AND SECURING ADOPTION OF ANY RULE AMENDMENTS TENTATIVELY APPROVED BY THE COMMITTEE

After some discussion it was agreed that it would be a good idea to try to perfect these amendments and look to a promulgation of these proposed rules by the end of September or the first of October, 1961, giving the bench and bar until February 15, 1962, to comment on them, to the end that these rules would possibly be made effective by July, 1962.

The meeting adjourned at 1:30 p.m., subject to the call of the Chairman.