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Washington, D.C.,

Monday, November 18, 1935.

The Advisory Committee of the United States Supreme Court on Uniform Rules of Civil Procedure for the district c urts of the United States and the Supreme Court of the District of Columbia, met at 9:30 o'clock a.m., Hon. William D. Mitchell (Chairman), presiding.

Present: All the members of the Committee, as heretofore noted, except Mr. Gamble and Mr. Morgan.

(The Advisory Committee had been in session for about five minutes informally before the stenographer arrived.)

RULES 47 and 65--Depositions and Discovery.

Mr. Olney. It seems to me best, anyway to be very considerate of what we wish to do. It requires a special order, or a special reason, for obtaining the discovery, which, in a way, is the essence of what we desire to accomplish. I say it is much better to leave it entirely to the parties to have the right to take the testimony of these witnesses. But of course, if the witness can be produced and is within the ju isdiction of the court, it is very much better that he should be prodeued. But so ar as obtaining the information in the first instance is concerned, I should put no restrictions upon it. I should have the impression from the provision that we should not, for example,talk to the other man's wi tnesses, and in many instances we refrain from

doing it . Witnesses are supposed to tell the truth, and there is no reason that I can see why both sides should not be informed as to exactly what each witness is going to say, sofar as it comes to the trial. Now, I would not suggest taking the deposition of the witnesses on the other side. I think it is going to be the normal practice and the proper thing to do, as soon as an action is commenced, to take the testimony of the witnesses as to whom we are ignorant of what their testimony will be, and find out.

We are going to have under this practice quite a number of personal injury suits, and frequently those suits are partly in the nature of blackmail suits---certainly, they come into that category, and possibly there is more jugglery in connection with suits of that character than any other. And to my mind, it is going to be a distinct advantage, both to protect them against suits of that character, and also to the interest of men who have genuine causes of action, that they may be permitted as soon as possible after suit is commenced to take the deposition of every witness who saw the accident and find out about it and get it down in black and white, and all the details, and in that way you are going to prevent an enormous shifting of evidence from time to time as the necessities of the case develop.

Altogether too frequently in those cases, the attorney for the plaintiff will, as time goes on, or other things influence the witness, present a very different picture from

that they would have given if their deposition had been taken immediately; and almost immediately the parties defendant will sit back to see what kind of a case is being presented, and then shift their own evidence to meet it.

It seems to me that what you need is just a full discovery. I think it is one of the most salutary things that can be done in the way of getting a trial down to ascertaining what the real facts are.

Mr. Dobie. There is one class of suits where the automobile owner has insurance; and in a number of those cases the man who owns the car says, "The insurance company is back of me;" And I have always thought in those cases that theprovisions would be tremendously helpful.

Mr. Olney. They would be tremendously helpful; but he would have to get his subpoena out and get down to it as soon as the suit is brought, without any unnece sary delay.

Mr. Wickersham. The point arises after the deposition has been taken in that way. When it comes to trial, if the witness is within the jurisdiction he ought to be called.

Mr. Mitchell. That is an important point.

Mr. Olney. I agree with Gen. Wickersham on that.

Mr. Cherry. My thought was to have that changed so so to take care of the situation where the witness was available at the time of the trial.

Mr. Mitchell. In order to avoid this Equity rule against written testimony?

Mr. Cherry. Yes.

Mr. Donworth. I withdraw my suggestion.

Mr. Olney. Mr. Dodge has made a suggestion which I think is of value--that this provision for a free discovery in this way is going to cause a lot of suits to be dismissed and a lot of suits to be settled if they ever come to trial. And a party can find out when the case comes on just what you have and have not. And it is going to stop a lot of litigation at the half-way point.

Mr. Mitchell. Rule 52 provides for notice of taking depositions by oral examination.

Mr. Wickersham. Of course, there you make a provision such as we agreed on yesterday, to have a master before whom testimony should be taken.

Prof. Sunderland. Instead of a master, it may be a commissioner in some States.

Mr. Wickersham. Well, some judicial officer.

Prof. Sunderland. By some judicial officer do you mean anybody that the court will appoint?

Mr. Wickersham. If the parties do not agree, a judicial officer, a judge or a special master--anybody who is empowered to act as the court would do in the taking of testimony, so as to be able to pass on an objection and so on.

Prof. Sunderland. He gets that from an order of the court.

Mr. Wickersham. He gets it from an order of the court.

and he gets it from the rule.

Prof. Sunderland. The rule does not give him power.

Mr. Wickersham. That is what I was suggesting, that this was the place to provide for that in some form.

Mr. Mitchell. I do not think so, because, as I suggested yesterday, this whole structure of the deposition in this place includes, without any distinction, depositions taken according to the old rule, where the right exists under the present law, as to an absent witness, or one who is sick, or something of that kind, and it also covers the new field, we are going into in the way of discovery by a witness or an adverse party.

Mr. Wickersham. That is what I was referring to.

Mr. Mitchell. Well, we suggested yesterday that, instead of trying to stick it in all the way through, we left the structure stand, and then at the appropriate place at the end, or at the beginning, if you like, put in a single paragraph that just covers up this protection of discovery and states that if you are asking for the discovery from an adverse party, or from a witness who could not otherwise be examined because he is going away, either party should have the right to ask for the appointment of a special master. Now, you can stick that all in one place.

Mr. Wickersham. Well, I agree with you; but it seemed to me that this was the place to put it, this rule as to deposition by oral examination; but it is immaterial to me

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where it is put.

Mr. Dobie. I think we had better leave that to the Reporter, because with the whole thing before him he can work it out better. I think it would be very good for us to make suggestions, and then leave it to the Reporter.

Mr. Wickersham. Surely.

Mr. Dodge. I think I will be better to use the phrase "special master", rather than commissioner.

Prof. Sunderland. Is that not the language of the present statute?

Mr. Lemann. The commissioner under the present statute has no such powers.

Prof. Sunderland. That raises the question of a lot of expense, if you are going to get a lawyer at $50 or $100 a day.

Mr. Wickersham. That is what the Chairman referred to yesterday. If a man resorts to that he ought to pay the bill.

Mr. Mitchell. You understand that I suggested that you could still use a notary public or an ordinary commissioner.

Prof. Sunderland. Outside the State.

Mr. Mitchell. You might use it within. Of course, you might abide/the result, and he might be called upon to pay the money in a preliminary way.

Mr. Dodge. If he moved for a master on plaintiff's depositions, he would have to pay the costs.

Mr. Mitchell. He would have to pay them.

Mr. Dodge. That would be the ultimate acceptance of this rule.

Mr. Mitchell. You cannot do it in any other way, because there is no machinery provided by Congress for judicial officers to take over the burden, or to supervise the examinations. There is no appropriation for it, and I do not believe that Congress would pass a law to set up a lot of special masters to handle this thing. The standing masters are busy, and it is the practice anyhow that when you have a special master the parties have to pay his compensation.

Mr. Dodge. It is all right to provide that the parties to pay it in the first instance. My suggestion was that the party who asked for the special master shouldpay for him.

Mr. Mitchell. That was my idea.

Mr. Lemann. The party who lost would eventually pay it.

Prof. Sunderland. The party who asked for it would advance it.

Mr. Lemann. He would advance it, but finally it would be taxed as cost and the party losing would pay it.

Dean Clark. Are the special masters the same as referees? Rule 97 of these rules provides that for the compensation of the masters. I might say that the Chief Justice reported to the Conference of Senior Circuit Judges this fall that the practice of appointing special masters was in violation of

the rule which says that it shall be the exception, rather than the rule, and district judges ought not to do it as readily as they have been doing it in the past.

Mr. Mitchell. You are talking about masters who decide the case and make findings; and we are talking about masters who simply see that objections are sustained or overruled.

Mr. Dobie. These men that we are talking about here have nothing to do with the law or findings.

Dean Clark. I understood that distinction, but I understood that you were going to make these men have that power.

Mr. Dobie. That, as I understand, was not the idea.

Dean Clark. Would it not be better to call them commissioners, or something so that the rule applying to masters would not apply to them?

Mr. Olney. The function here is not that which is generally conceived to be that of a master. It might be well to indicate that his function is not that of a master.

Mr. Mitchell. Suppose we left that to the Reporter and he can work that out.

Dean Clark. Prof. Sunderland suggested "commissioner." Why is not that a good name?

Mr. Cherry. We are familiar with commissioners.

Mr. Dobie. And very frequently they make deeds and things of that kind.

Mr. Donworth. What objection is there to having the standing masters, framing this rule so that an official who

sits in the case may be one of the standing masters or a special master.

Mr. Mitchell. That is all right.

Mr. Donworth. The duties would be defined in many sections with respect to depositions and with respect to the other matters and the other rules; and it does not seem to me that there will be any conflict, because there will be separate and distinct duties exercised by the same men. These standing masters are men of experience and capacity, and I do not think we should exclude them.

Mr. Olney. I would like to make a suggestion to the draftsman that if he provided for standing commissioners or masters, or whatever you wish to all them, he will act in this capacity, so that there will be one who will habitually do this, and he will have the right to rule on testimony; but if they are appointed as standing officers, with authority to the court to fix their compensation, you are going to get as a rule a better class of men than you will where the court has got to give an order to somebody to do it specially in a case or something of that kind, I just suggest that.

Mr. Dobie. We have standing masters in Virginia, and we have a practice there, by which a party when a case is referred to a master he can pick the one he wants. The way it works out is that the party who asks for it picks one who will do the job and do it promptly.

Mr. Loftin. I should like to raise this question about who is to pay thespecial master: As I understand it, if the plaintiff does not want one and the defendant wants a special master, he will have to pay the special master under the plan proposed. I think from a practical standpoint that will mean that the defendant will have to bear those costs, since the average plaintiff in a personal injury suit, in a State that has liberal exemption laws, like my State, would be simply judgment-proof, and even if there were costs taxed against him he would not pay them. It seems to me that ought to be considered, as to whether or not a judgment-proof plaintiff could come in and have a deposition and if a master is appointed he is not required to bear any of the costs.

Prof. Sunderland. Would it not turn out that the defendant in that case would not ask for it? They would take it before a notary.

Mr. Mitchell. The point that Mr. Loftin suggested is the point that I had in mind. The defendant would have the protection. The plaintiff would not care. If he was on a fishing expedition he would be glad to have it before somebody who would not have the power to rule.

Mr. Dodge. I should not think the defendant would care very much. I should think the defendant would let it go and would allow anything, because questions that were not admissible would not be admitted on the trial. Do you not think that

would be the attitude of the defendant's attorney?

Mr. Dobie. I do not think you will have very much of that in personal injury suits. There will be a great many of these corporate cases, where they will want to go into all kinds of questions.

Mr. Cherry. That ismore likely to be gone into under discovery.

Mr. Olney. So far as that class of cases is concerned--so far as the large majority of the States are concerned, you have under the State practice nowprovisions for taking depositionswithout any restrictions whatever. So that we are not doing anything new at all.

Mr. Mitchell. The reason that I suggested that the party asking for the master be required to foot the bill is that, in many cases, there would be no reason for a master and a notary would do just as well; and if you allow the defendant to demand a master and shovel part of the expense on to the plaintiff, and he may do it merely to block the plaintiff's proceeding, and I think in the great majority of the cases there will not be any special master. It will be in the case where you require the testimony, and if you give one party the right to demand a master in any other class of cases, it might be resorted to for the purpose I have stated.

Mr. Wickersham. I think if the party demanding one

had to advance the money, and it had to be taxed against the unsuccessful party in the end, it would meet the evil.

Prof. Sunderland. I think that would satisfy the bar and they would consider that that would protect them against the evil.

Mr. Olney. I think there is something in Mr. Loftin's point--something that will occur constantly in connection with personal injury suits where the plaintiff will be judgment-proof. Nevertheless, so far as the companies are concerned that have to defend those suits in street railroad cases, etc., it is certain that they would, as a rule, rather be compelled when they took a deposition of this character to pay the expenses, than not to have the privilege of taking them.

Mr. Loftin. I agree with you; but I raised the point whether it is fair, when you knowthat they have to bear the expenses at all hazards, regardless of whom may be taxed for them eventually.

Mr. Lemann. In practice, under these ~~recovery~~ discovery statutes, ~~they~~ are/they being used very much in personal injury cases by plaintiffs?

Prof. Sunderland. I do not think so.

Mr. Lemann. The defendant is more likely to use them. Suppose a man wants to sue you, charging that your automobile or street car ran over him, why, you would want to examine

your motorman or chauffeur in advance. Now, in these strike cases, say you have a plaintiff with at least money enough to pay the costs. If the defendant there want to call for a master, why the plaintiff examining the defendant's witnesses, or the defendant himself--I think the average defendant would be willing to put up this money and take a chance of getting it back.

Mr. Olney. I have known of more than one case in a personal injury suit, in which the conduct of that suit by the defendant--some large corporation--it was not conducted with the utmost good faith, and where the testimony in defense was undoubtedly designed to meet the complaint, and it might have been of great advantage to the plaintiff having a meritorious answer to nail that thing down by taking the testimony of the employee of the defendant.

Mr. Mitchell. Is this not true? Instead of laying down a rule that the man has to advance money to pay for the master, provide generally that in appointing a master the court may make such order respecting the payment of the preliminary expenses as may be just, and he may decide whether it ought to be paid by one party or both parties and cut in half temporarily. Would not that do?

Mr. Dodge. I would prefer leaving it the other way, because there is going to be tremendous opposition to this. There are not many cases of tort action where the plaintiff

would want to use this. There are death cases where theplaintiff has no witnesses at all. In those cases he will not want to use this. And I think if the court could impose on the impecunious plaintiff this burden it would be too bad.

Mr. Dobie. You have to trust the master, on the other hand. I believe it is now the law that the master is never permitted to withhold his report until he is paid. And unless those fellows are reasonably sure, you will not get high class men.

Prof. Sunderland. I have a lot of information as to the actual use of this thing in the various States, which I can put in as annotations when I redraft this thing. I had a man go all over the United States, going over the States in which discovery is used, and talking to lawyers, and examining records in large cities and small cities, and collecting a great deal of information as to who uses it and what cases it is used in--as to whether the lawyer for theplaintiff or the lawyer for the defendant uses it, and in what class of cases and the opinions of lawyers generally as to what advantage they were and what disadvantage; and I have that all available, and I will be very glad to put that in the form of annotations when I redraft these rules, which I think may answer a great many of the questions when you come to go over these again.

For instance, I have a table here of the class of cases in which it is used, In Wisconsin 100 cases were taken, 100

consecutive cases where they used discovery. Forty-five of them were automobile accident cases; 13 were contract cases; 13 were negligent cases other than automobile; 7 cases of fraud; 7 of divorce; 6 were for accounting; 6 on promissory notes; 6 small mercantile cases; 2 mortgage cases; 1 of cancellation of a deed, and 2 others.

Mr. Wickersham. Over how long a period was that?

Prof. Sunderland. These figures were taken from the records in Milwaukee; I have forgotten for what place they were. Oh, do you mean how long a period they covered?

Mr. Wickersham. Yes.

Prof. Sunderland. There is no data on that; but I have here the extent to which it is used. In many of the States it is a matter of course, particularly in automobile litigation, where the defendant will as a matter of course examine the plaintiff and his witnesses at once, as soon as an accident case is begun.

Mr. Loftin. That bears out what I said, that the automobile accident cases is the big class of cases.

Mr. Lemann. Used by the plaintiff or the defendant?

Mr. Wickersham. The defendant.

Mr. Lemann. I would have thought so. That is why I referred to your point that I did not think it would happen very often; the defendant would use the practice, not the plaintiff.

Prof. Sunderland. In 18 cases in Milwaukee the defendant was examined; while in Madison both parties were examined in a large number of cases, and the defendant alone in 16 cases. In 100 cases in Suffolk County, Mass., the figures indicated that the defendant had filed interrogatories five times for every three times by the plaintiff. Well, I have a lot of figures as to different places.

Mr. Lemann. You have not that divided into character of cases, have you?

Prof. Sunderland. I do not think so although I have something on that.

Mr. Dodge. Is it not true that interrogatories are filed in Massachusetts about as often for the plaintiff as for the defendant?

Prof. Sunderland. I think so.

Mr. Olney. I have a feeling, as a matter of personal impression, that this provision is going to be used particularly in the damage cases, personal injury cases, largely automobile cases; and in view of the reaction that we expect from the bar it is rather advisable to arrange so as not to throw the costs of taking the deposition on the impecunious plaintiff, where the defendant is the one that demands that it be conducted before a commissioner who has authority to rule on the evidence that goes in.

Mr. Mitchell. You agree with the idea that the man demanding it ought to make payment of the money in the first

instance?

Mr. Olney. Yes.

Mr. Mitchell. That was the actual sense of the meeting yesterday; and unless there is some further discussion, we will let it go that way for the time being, and to be considered when we get the rules back.

Mr. Loftin. That is satisfactory to me, Mr. Chairman. I understand that Prof. Sunderland is going to give us some annotated information about it.

Mr. Mitchell. In Rule 52, I notice that the only requirement of notice is reasonable notice. I am accustomed to a statute that would make it fairly specific, say 100 miles from the place of trial. ~~It should be~~ Do you think a broad clause for reasonable notice ~~although it~~ may not cause trouble? These lawyers may claim that they have given reasonable notice; they may engage local counsel, and all of that.

Prof. Sunderland. I do not think it would cause any trouble. I thought if objection was not made, they would always tend to resolve it to be in favor of sufficient notice.

Mr. Dobie. Do you not think that comity among the lawyers will have a good deal to do with that, especially in small places? I do not think that you and I would have trouble about that; we would talk it out.

Mr. Wickersham. But that is not the type of lawyer that this rule is intended to cover.

Mr. Donworth. One clause that is sometimes used is "sufficient time"--using the appropriate language--sufficient time to cover the trip by the usual travel route and three days for preparation--time for travel and three days for preparation. It seems to me that that is a pretty good rule, something of that kind.

Mr. Mitchell. It is sometimes expressed as three days and one additional day for each 100 miles of travel. That is a specific rule. The lawyers often arrange it for shorter or longer time, but there is a protection there. I do not urge that, but just raise the point.

Mr. Olney. I think your point is absolutely good as a matter of practice; in dealing with things of that sort the more specific we make it the better it is. And there will be a provision that the court may modify the time if a specific time is provided.

Mr. Lemann. Should it not be "unless the court should otherwise direct"?

Prof. Sunderland. In those cases outside of 100 miles, you will not have any trouble, because that will operate under the present practice for a notary to be used, and some proceeding by notice.

Mr. Mitchell. You would not have it "unless the court should otherwise direct" unless you applied to the court to shorten the time.

Prof. Sunderland. My understanding was that outside the 100 miles we would proceed on notice.

Mr. Donworth. Well, you are going to proceed in that way in every case, unless the party issuing notice requests of the court otherwise.

Mr. Olney. It ought not to go to the court. We should relieve the court of any part of the machinery of taking a deposition. But even when you take the deposition of a man who is in the same town, there should be a provision giving a certain amount of notice in advance, so that the lawyer can arrange his engagements and so that the witness can be there; and as a rule he should not be permitted to have the examination of a witness forthwith, without giving reasonable notice.

Prof. Sunderland. Perhaps we should say "reasonable notice but not more than so much."

Mr. Olney. If you have a specified time and make it possible for the court to issue an order changing that time, you are going to change the whole business.

Prof. Sunderland. We are not going to the court at all.

Mr. Mitchell. You would have to make a special application to the court.

Mr. Olney. You would have to make special application to the court. Here is what would occur. You give notice of taking a deposition. The defendant thinks the time is too short; he will take it up with the other side. If they cannot come to an agreement, they have to go to the court.

Mr. Wickersham. The statute says that reasonable notice must be given in writing to the opposite party.

Mr. Mitchell. Is that the Federal statute?

Mr. Wickersham. That is a deposition debene esse. Section 639 provides for the taking of a deposition upon order of the district court de bene esse, etc., and that "reasonable notice must first be given in writing to the opposite party or his attorney of record," and so on.

Mr. Mitchell. How do you raise the question under these rules? Do you go to court?

Mr. Wickersham. It does not say so; but I assume that is implied.

Mr. Lemann. That has given rise to some discussion, and it seems to me that we lose nothing by putting in a general provision that notice shall always be given of three days unless on notice to the other party there might be some other period.

Prof. Sunderland. I think that is the reason the statute reads as it does.

Mr. Wickersham. It says "reasonable notice must be given in writing to the opposite party or his attorney of record." Now, if notice is given which the party thinks is not reasonable, he applies to the court.

Mr. Mitchell. If that is the statute, I withdraw my suggestion. I know the State practice, but if that works well it is all right.

Mr. Wickersham. That has worked well for many years.

Mr. Olney. The practice of taking depositions at the present time in the Federal court is going to be no test of the working of this scheme, because you rarely take depositions now in the Federal court. Does the suggestion call for taking depositions in the Federal court?

Mr. Wickersham. I do not agree with that.

Mr. Lemann. It will be much extended here.

Mr. Wickersham. It will be much extended when you get this common law practice, but I think a great deal of testimony is taken on deposition in the Federal court.

Mr. Olney. Well, you do not do itas a matter of course.

Mr. Wickersham. Well, you give notice to a witness who is a party, and that is the way it comes up principally. In New York we use it a little, because the witnesses are floating around, and a party gives notice that one of his witnesses is going to Europe.

Mr. Olney. But those cases are in a different class from these cases, of pure discovery.

Mr. Wickersham. I do not know. It seems to me that these cases are not going to very greatly stimulate resort to the Federal court over the natural flow of business there.

Mr. Lemann. But they will very much increase the number of cases in the Federal court, in which you can take deposition, because now we can only take them in the Federal coubts--

Mr. Wickersham (Interposing). I do not think the matter of going into the Federal court is involved. That is a matter of jurisdiction.

Mr. Olney. The suggestion is that it be left simply with "reasonable notice."

Mr. Wickersham. Yes.

Mr. Olney. On the other hand, the suggestion is that we specify a time in the first instance, with the right in the court to change the time if it deems it advisable. Now, that is the only difference. I think it is going to make quite a difference in the actual practice, and relieve the court of applications that might otherwise be made to it.

Mr. Wickersham. Now, take the admiralty rule. That is where they use the deposition more than anywhere else. I think all the testimony in admiralty is taken under that statute, or under the de bene esse.

Mr. Olney. You are dealing with a very different character of depositions in admiralty cases.

Mr. Wickersham. Not with a different character of witnesses.

Mr. Dobie. Are you not dealing with witnesses who are about to be more on the jump, and especially when the ship is about to go out?

Mr. Wickersham. Yes, in admiralty the witnesses are.

Mr. Donworth. Let me make this suggestion: It has been said that discovery is going to be resorted to. Now, take

the case of filing interrogatories, etc. Now, a reasonable time for attendance is a little different from a reasonable time for preparation. For instance, the plaintiff brings a strike suit, and he immediately gives notice that he wants the deposition of the president of the defendant, and he lives in the same city. Under the law it can be tomorrow or the day after tomorrow. That is a little different from calling a fact witness; so that it seems to me more important to define the thing than it used to be in the former practice. So that I think that the provision of three days, with the provision that the court may shorten it is all right.

Prof. Sunderland. Three days, with additional time for distances.

Mr. Wickersham. How would it be to say three days, but in the event of any dispute it should be decided by the court?

Mr. Olney. What is the objection to providing a specific time?

Mr. Wickersham. I think the more we go into particulars with this rule the less desirable it is, as to the time of time, etc.

Mr. Mitchell. The fishing expeditions of a party in the suit wants to attempt to get every witness on the stand in very quick time; and you will have some trouble unless you have some minimum limitation.

Mr. Wickersham. I do not object.

Mr. Loftin. I agree with Mr. Olney that it is better to fix the specific time, with authority to the court, and then the bar will know exactly the time. There is always a question between counsel as to what is a reasonable time. Sometimes they go to the court and complain that the time is not reasonable and take up the time of the court to determine that question. If you fix the specific time, the bar then knows what the time is, and if they are not satisfied with it, they can go to the court in any event and have the time fixed.

Mr. Dobie. How about a reasonable time, not less than a certain number of days, and make it optional with the court?

Mr. Loftin. That might make it less desirable.

Mr. Wickersham. Of course, if you are practicing with attorneys in good faith, you will have no trouble. It is only when you have "sniping" attorneys that there will be any trouble.

In New York, they say reasonable notice in the State courts, and then it goes on to say that on any question of time or place, it may be modified.

Prof. Sunderland. Of course that motion to vacate or modify the notice has caused interminable litigation in New York. They always make a motion to vacate a deposition and they keep right on with those motions to vacate and new notices.

Mr. Wickersham. I will tell you one reason for that. We have those infernal $10 costs, and there are lawyers who

live on those $10 costs, and if you abolish costs-and there are no such costs in the Federal court, you will not have those things come up.

Mr. Mitchell. If you have three days, and additional days for distance, and say provided that the court may give the power to enlarge it, you are going to have all of this motion business under the New York system and have trouble. If you merely give them power to shorten it for emergency reasons, then you are all right.

Mr. Wickersham. I do not think that is true. I think they ought to have power to enlarge it. Suppose notice is given to examine the defendant; they will want to shorten the time. And the applications will be to give them more time to enable counsel to make preparations and get rid of that.

Mr. Mitchell. I was thinking of the time of three days.

Mr. Wickersham. But three days might be entirely inadequate under certain conditions.

Mr. Mitchell. That is true.

Mr. Wickersham. I think we should make it three days but give the court power to fix such time as in its disretion may be reasonable.

Mr. Mitchell. Then you will have the New York trouble.

Mr. Wickersham. After all you must have reasonable protection for the parties. That is what the courts are for.

Mr. Mitchell. The New York statute requires reasonable notice and then contains another section that on motion you may apply to the court to modify the time.

Mr. Dobie. I think you may trust the Federal judges as to that.

Mr. Olney. If you provide in the first instance for a specified time, and then simply add a provision giving the court the power to change that for good cause shown, you are goingto   and the court is going to be rather impatient of applications which just take up its time and have no merit--without following the procedure prescribed in the statute, unless there is good cause for a change.

Mr. Mitchell. You could not do that without giving a prima facie reason to have your rule established.

Mr. Olney. Yes.

Mr. Dobie. I think on that point you can trust the Federal judge not to countenance or favor any improper applications.

Mr. Wickersham. I do not think there is much danger in the Federal courts as there in New York. [illegible] is the $10 costs business that is the prolific father of these unjustifiable motions; but I do not think the Federal court would have any difficulty.

Mr. Mitchell. Do you want to make a motion to get this question up?

Mr. Olney. I should say that the Reporter on this particular phase of the case of our discussion here, has heard all of the suggestions, and I think he can get pretty well the sense of the committee; and after all it is finally a matter of draftsmanship and preparation of the whole machinery in connection with that.

I make this motion, that tentatively it is the sense of the Committee that there be a specific time provided.

Mr. Mitchell. Subject to change by the court?

Mr. Olney. Yes, subject to change by the court.

Mr. Loftin. I second the motion.

(The motion was voted upon and unanimously adopted.)

Mr. Mitchell. Is there anything else in connection with Rule 52?

Mr. Donworth. The notice to the adverse party should always be in writing, I think--"depositions by oral examination may be taken on reasonable notice to adverse parties and to witnesses who are not parties;" and unless that is somewhere else provided, I think that should be changed to "in writing." I would not to have any dispute arise about oral notice.

Mr. Lodge. It says that a copy of such notice shall be filed in court.

Prof. Sunderland. What about the pleadings? If we adopt the system of serving without filing the pleadings? Do

you want to continue that?

Mr. Mitchell. Yes, it ought to be served, not filed.

Mr. Lemann. Well, it would be served. You would have to serve it, and you w uld have to give your opponent notice and you would also give a copy to the court.

Mr. Mitchell. Well, you hve no got anything on file and you do not want it yet.

Mr. Donworth. Under the practice of starting suits filing a complaint, it often happens that the defendant appears before the plaintiff, and there is no real difficulty in that situation. It does not make any difference what the first paper filed in a case is. This may not be germane here. But ve y often under the practice in a case, we will say, of John Smith vs. Thomas Jones, No. 11, there is a motion to strike the complaint. Then again, you have a newspaper--I suppose every city has one--called the Legal Bulletin, or something like that, and in a case of that kind they have each morning a heading saying complaints and they give the complaints filed.

Dean Clark. You will recall that, after long debate, we adopted a plan that all pleasings must be filed.

Mr. Donworth. Within days.

Mr. Lemann. Yes; but the way I understood it is that I serve the defendant but do not file the complaint and I give him a notice next day that I am going to take the testimony

that day, and I give this notice when I have not been required to file my complaint, and I have twenty days to file my complaint.

Mr. Mitchell. Have we got it fixed now so that you are bound to file a complaint? I am like Mr. Wickerham is about "cause of action." I want to go on record as in principle being opposed to requiring the filing of any paper in court until there is occasion for it, and by that I mean any court action in advance of trial. My reasons are, first, the publicity of it; and then the cluttering up of court records and burdening the court with papers and requiring the clerk's office to be paid in thousands of suits that never will be tried. In this class of cases, if we can clean it up without trial, we can dispose of hundreds of cases without the clerk ever knowing about it, or receiving any fees. And I cannot see any reason for requiring it to be filed except the sentimental idea that lawsuits are a formal thing and there should be some sort of record. I just want to say that I am opposed to this 20-day rule.

Mr. Wickersham. I agree with the Chairman. I thought we had disposed of that.

Dean Clark. No. We discussed it and you voted against it, and so did the Chairman.

Mr. Wickersham. All right. I repeat my objection.

Mr. Donworth. I am open to reconsideration on the subject.

Mr. Mitchell. I will not raise it now, but I will on the second draft.

Mr. Donworth. I would like to repeat this: That while there isnothing requiring the pleadings to be filed other than as intended by what has been said; nevertheless, either party may at his option file his papers at any time. If the defendant does not like this kind of information, that the plaintiff has brought a certain suit, the defendant may file his answer or whatever his papers are, in due course and the case is then in court.

Mr. Mitchell. I was talking about a voluntary trial. I was not talking about a forced trial.

Mr. Lemann. Oftentimes the plaintiff is not anxious to take testimony and the defendant is not anxious to have it taken.

I should think within the 20-day limit it ought to come out.

Mr. Olney. There is no occasion for filing notice of taking depositions unless the witness fails to appear. That is the only purpose that that notice serves, is to bring about the taking, and if the taking occurs the notice has served its function and it is out of the way.

Prof. Sunderland. That is true.

Mr. Olney. Frequently in actual practice you simply telephone the lawyer on the other side and say, "I would li

to take the testimony of such defendant--or plaintiff, as the may may be. When can you have him ready?" Well, he may say tomorrow. And you will say, "Do you want notice?" And he will say, "No." And he comes there and that is the end of it.

Mr. Dodge. The notice with us would always be given by letter. Could you file a carbon copy of that letter in court?

Prof. Sunderland. I think so.

Mr. Olney. The filing of notice ought not to be required, unless you are proceeding by way of contempt or some matter of that sort.

Mr. Donworth. You had better strike out all after the word "is to be taken" in the first paragraph of Rule 52.

Mr. Wickersham. That is, the words "and a copy shall be filed", and so on.

Prof. Sunderland. Strike that out.

Mr. Donwroth. In the secondsentence, I should have said, strike out the words "and a copy shall be filed in the court where the cause is pending"; that is in the first paragraph of Rule 52.

Mr. Mitchell. Allow me to go back a minute to the thing we have just disposed of, that is fixing the time for taking the notice. The requirement is as to the case of the ordinary witness; and I suggest that it might be all right to leave it "reasonable notice", and then put in a special requirement that you can examine the adverse party after three days notice, or five days notice. I find in the Federal de-

cisions a lot of cases about one hour and one day, and all that sort of thing is desirable. So that if you have a time for an ordinary witness--say three days--and if a man is leaving town and you have to run to the court for an order, unless you get a stipulation from the other side. And I would suggest, for consideration at our next meeting, the thought that the reasonable notice requirement be allowed to stand, but a special provision for minimum time for discovery of the adverse party, on the theory that he needs some notice.

Mr. Donworth. Could you not have left it as originally written, and in a special section provide for machinery, etc., and in such case provide for three days, etc.?

Mr. Mitchell. That would be a mere question of where he puts it. I suggest that for the Reporter's consideration, to have in mind when we meet again.

Now let us go back to where we were. Are we through with Rule 52?

Mr. Tolman. I would like to make one suggestion with regard to Rule 52, to modify to modify a suggestion that I made yesterday. I think that there is means available to prevent the taking of depositions in all that class of cases--de bene esse, and everything except a matter of examination of an adverse witness; and the suggestion that I made yesterday, that there should be an opportunity given for the other side to admit the thing that was intended to be proven, certainly might prevent the extension of a great many depositions, where

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formal matters were sought to be proven.

So that my suggestion I think should be confined to that part of the new rule that deals with the ordinary deposition, and should not be considered as applicable to the discovery and examination of an adverse witness.

Mr. Wickersham. An adverse witness or the adverse party.

Mr. Tolman. Or the adverse party.

Mr. Mitchell. Well, if there is nothing further to discuss under Rule 52, we will go to Rule 53. And I notice that that seems to provide that subpoenaes for the oral examination of witnesses may be issued out of the court to take testimony anywhere in the United States; and that they may be served outside of the district in which the case is pending. Suppose a man does not obey the subpoena, and he stays in that district, the process of the court issuing the subpoena cannot run against him for contempt. You cannot enforce your subpoena if it is served outside of the district; and that is why the Federal courts have this rule.

The statute provides that if the witness is outside of the district, you may a subpoena from the court there, which has the power there to punish for contempt if he does not obey it.

But as I read Rule 53, if your subpoena is issued in one district and served in another, and the witness is way across the country, then you are somehow depending on the court that issued the subpoena to enforce it, and that cannot be done, unless you want to enlarge the actual jurisdiction of the

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court.

Prof. Sunderland. Well, I undertook to supply a mechanism for that. Wherever a subpoena was to be served outside of the district in which it was issued, to give the local court jurisdiction in contempt. The subpoena should be presented to the office of the local court clerk, under Rule 64, and sealed and attested by the clerk; and then it becomes the process of the local court for the purpose of contempt.

Mr. Mitchell. Let us pass the question, until we get to Rule 64.

Mr. Lemann. I think we discussed that last night.

Prof. Sunderland. Yes.

Mr. Donworth. The thought in connection with subdivision (b) required consideration.

Mr. Wickersham. Well, you have in the statute passed in September, 1928, a provision that in civil cases a witness should not be required to go more than 100 miles from the place of holding court.

Mr. Donworth. That is to require the personal attendance of witnesses.

Mr. Wickersham. Certainly; that is what I was figuring on.

Mr. Donworth. There is a thought in connection with subdivision (b) of Rule 53 that I do not think was intended by the draftsman. Many persons spend a good deal of the year away from their place of residence, and we ourselves are here

now many miles distant from our place of residence. Should not the provision be that no witness should be required without his consent to attend his examination at any place more than 30 miles distant from the place where he is at the time of the service of the subpoena? A man down in Florida, or in California, engaged in business is in another part of the country for alimited time. Under this provision it would seem that he would be required to go hom to have his deposition taken, and he would not have any option; he would be required to attend at that place.

Mr. Wickersham. I it was more comvenient to him, he could consent to go to this other place. It is only that it cannot be required.

Mr. Olney. Judge Donworth, the point that you make is that you may serve a summons on a man down in Florida, who resides in New York, and you could compel his attendance in New York. He would be more than 30 miles distant from the place where the subpoena is served.

Mr. Lemann. Suppose I am ready to leave here tomorrow night and you should serve a subpoena on me here to attend in three days and testify.

Mr. Olney. That difficulty in holding a person as a witness is a necessary incident of litigation.

Mr. Lemann. Of course, it may be. Of course, I could attend in the District of Columbia if I happened to be here.

Mr. Wickersham. Yes, if you happened to be here. The question is whether if you were residing here, or you were in business here the better part of the year but you kept your residence in New Orleans, and you were wanted to take your testimony in Virginia within thirty miles of this place--say Alexandria--you could be required without your consent to attend.

Mr. Donworth. That is not quite the idea, although it is part of it; suppose Mr. Lemann is here; suppose he was on private businesshere and not public business. As this rule reads he can be required to leave Washington and go down and give his deposition at New Orleans, whether he wishes to do so or not.

Mr. Wickersham. That being hisresidence.

Mr. Donworth. Yes. I was wondering whether it could be put in the alternative.

Mr. Lemann. Is there not a precedent for this somewhere? There must be in many of the codes. Can we refer this back to the Reporter and find out what can be done?

Mr. Donworth. I second that motion.

Mr. Mitchell. It will be so understood if there is no objection.

The next is Rule 54, as to the "Manner of taking Depositions."

Mr. Olney. May I say something about that rule? I have had some experience with the matter of the correction of

[illegible] provided that the witness [illegible] is signed. There is no [illegible] such a provision. Be- [illegible] after taking it down makes [illegible] slip, or something [illegible] not correctly represent

[illegible] when the transcript of [illegible] be some opportunity

[illegible]--and this is my experience: [illegible] deposition was taken where [illegible] what the witness said, but [illegible] why he simply changed the de- [illegible] an entirely different thing.

[illegible] for that--or, rather, you can given [illegible] right to correct the deposition, and when the correct- ion is made it should be noted at the end. The transcript should not be changed, but the correction should be noted at the end, with the explanation by the witness of why the changes are made. If you do that you are going to cover this situation.

Mr. Mitchell. That is right. Did you get that, Mr. Reporter?

Dean Clark. Yes.

Mr. Wickersham. Of course, that would not apply to ordinary corrections that everybody would agree to--such as the word "not" when it should have been"now", or some immaterial

ial correction, but where the witness is making some substantial change.

Mr. Olney. It would be better to have a rule covering that.

Mr. Wickersham. I agree with you, especially in this class of depositions we are talking about.

Mr. Olney. I have seen a deposition changed--

Mr. Wickersham (Interposing). So that you would not know it.

Mr. Olney. Yes.

Mr. Mitchell. It would be the officer who wouldchange "now" to "not". What you mean is that if there is any change in the testimony as given it shall be noted at the end.

Mr. Wickersham. Yes.

Praf. Sunderland. Do you include changes in the witnesses' testimony? You do not mean changes in the witnesses' testimony. You mean where the officer has not got it down correctly.

Mr. Olney. I mean more than that.

Mr. Dobie. You do not mean that the witness may change his testimony. For instance, X.Y. When this thing is submitted to the officer, do you want to permit him to say X.Y. is what I said, but A.B. is what I shouldhave said?

Mr. Mitchell. And meanwhile the cross-examination has taken place and the lawyer has gone home.

Mr. Olney. I think it ought to go that far. I have known of instances where the witness, although the lawyer did

not catch it at the time, the deposition gave an entirely wrong impression as to what the witness had in mind. He should be allowed to corect that, but state his correction.

Mr. Mitchell. But ought it to be permitted if the other lawyer has in the meantime gone home? Ought he to stay there and see whether the witness changes what he said and then cross-examine him?

Mr. Lemann. It would be easy for the witness to get in a statement he wanted to get in and he could not be cross-examined.

Mr. Olney. But the fact remains that he has stated one thing on cross-examination and then it appears that he wants to change it, and he states the reason why he wants to change it.

Mr. Mitchell. I do not see why he should be allowed to change it in substance, unless he is recalled to the stand and reexamined about it; but to make a rule that contemplates that, after a man has given his testimony and the lawyers have gone, and when he reads it over and concludes he wants to change a substantial part of it, I thinkthat is dangerous.

Mr. Olney. We have in California, as I say, the rule that the witness has the right to look over his deposition and to make what corrections he pleases. It has not resulted in any evil or any difficulty along the line that you suggested. It has resulted--because these corrections, by the way, in Cali-

fornia, are made right on the face of the deposition; but as I understand the deposition may be rewritten in that respect, so that it does not appear what he originally testified. It goes that far.

Prof. Sunderland. Ordinarily, these depositions will not be written out for some time if they are taken in shorthand. Everything will go on, and the witness wil get a statement that the thing is transcribed, and nobody is around to do anything about it. And your idea is that he reads it through and if he does not like anything in it, he can add anything further in connection with what appears in the transcript.

Mr. Olney. Yes.

Mr. Wickersham. That is dangerous. A difficulty arises out o the fact that it is required that the witness must sign his deposition, and his deposition is written out in shorthand, and he reads it and says, "You have got this all wrong"--assuming that he is an honest witness--and he will say, "You have got it all wrong; you have it so-and-so and I said so-and-so;" and he is quite right. If counsel are there, he can straighten it out. But if counsel have gone, and he is there, he is left in this position; he is left in this predicament; and he says, "That is incorrectly stated and I will not sign it." What will you do about it? If he was a witness on the stand and he said, "If your Honor please, I have been reading over the stenographic record, and it says I said so-and-so, and you will remember

that that isnot what I said and I want a correction." But if the witness is 500 miles away and in no position to correct it, what are you going to do about it?

Now, there are honest mistakes as well as dishonest ones, and the witness who is called upon to sign his deposition has a right to object to signing it if it does not correctly record what he said.

On the other hand, to allow him to put in his deposition in the absence of the parties or their representatives an explanation of the item would be dangerous.

Mr. Mitchell. He may change anything that he admits that he did say.

Mr. Wickersham. Yes, he may change anything that he did say.

Mr. Olney. Well, you are going to convey the idea as it is written here, that there may be disputes as to what the witness really said. The very case you mentioned will come up constantly, and the reporter is going to insist that he said so-and-so and counsel on the other side will say he said so-and-so, whereas the witness will say that he did not say anything of the kind.

Mr. Wickersham. Yes. You know that in perjury trials, the difficulty is in proving the accuracy of the statement which is the foundation of the indictment.

Mr. Olney. The thing I had in mind was that the reporter's

transcript ought to stand in the first instance. There is no way to settle a dispute of that character. If the witness wants to correct that and say something else, he can put a note at the bottom.

Mr. Wickersham. Would not that open the door to trouble? Suppose after the parties are gone the witness says, "I did not say at all", and makes a lot of statements without the benefit of cross-examination.

Mr. Olney. Exactly; and what I say in reply to that is this: That I think that istrue theoretically. And we have in California the provision for correction, and the witness can do anything he pleases, practically, with his deposition before he signs it. And no difficulty has arisen because of the absence of the right to cross-examination; and if it appears that he testified so-and-so in the first instance, and then it appears that he changed his deposition, the fact that he testified one way in the first instance and then wanted to change it appears on the face of the deposition andwill speak for itself in the trial of the case.

Mr. Wickersham. Suppose the witness says, "I am not going to sign that because it does not represent what I said."

Mr. Olney. It ought not to be required.

Mr. Wickersham. But assuming that the rule requires him to sign it, and he states that, "It is not correct and I will not sign it."

Mr. Mitchell. That is contempt of the subpoena, is it not?

Mr. Wickersham. That is contempt of the subpoena. And then it comes up on application for contempt and he gets a chance to make his objection.

Prof. Sunderland. Equity Rule 51 applies to that. (Reads Equity Rule 51.)

Mr. Wickersham. That is all right.

Prof. Sunderland. That will take care of that.

Mr. Wickersham. Yes.

Mr. Mitchell. Will that not cover the situation?

Mr. Olney. Only in a very general way. You see, the witness will say, "This does not correctly represent me in a number of particulars." Now, it ought to appear on the face of the deposition what he claims as corrections.

Mr. Mitchell. That is provided for in the Equity Rules.

Mr. Cherry. That is provided for in Equity Rule 51.

Mr. Mitchell. The notary then certifies that John Smith refused to sign this, and the reason he gave was that the date given in the deposition was not the true date and the true date is thus and so, and that is part of his reason.

Mr. Olney. Suppose the witness says his deposition does not correctly represent what he said without going into details?

Mr. Dobie. I do not think you ought to allow him to do that.

Mr. Olney. Perhaps not. The right way is to require him to specify what objections he wants to make.

Mr. Mitchell. You have to depend on the official who has to correct the transcript if he has satisfied himself that he, the official, has made a mistake. That is not the witness changing it, but it is the officer changing it to conform with what he believes the witness said. Now, if the witness wants to change something that he really did say, it is covered by this Equity rule, which provides that he shall show on the face that the witness refused to sign, and state upon the record the reason for such refusal. Now, the reasons are that he could explain that it was a slip of the tongue, and that he meant 1875 instead of 1874. That accomplishes your purpose and shows that it is desired by the witness to make a correction of something he really did say, and where the official is satisfied that the transcript does not truly specify what the witness said, it is not the witness changing it; it is the official; and you do not need to make any record of that.

Mr. Olney. The object I had in mind would be accomplish- [illegible] is provided that in case of the refusal of the witness [illegible] deposition, he should specify any particular object- [illegible] reasons for so doing, and that the officer shall certify to them.

Mr. Mitchell. But why not have the Equity rule stating that the officer shall sign the same where the witness refuses

to sign, and state upon the record the reasons for such refusal?

Mr. Olney. The reasons, if any; that is where the difficulty comes in. The witness should be required to specify his reasons.

Mr. Mitchell. What difference does it make whether he signs or not? If he refuses to sign, here is an official who certifies thus and so. The matter of signing a deposition is not essential. The certificate of the official is enough to show what he said, without any signature.

Mr. Olney. As long as the certificate of the officer specifies the particulars in which the witness desired to change it, that is all right and I have no objection to it. That is essentially what I desired.

Mr. Mitchell. How can the officer specify the reasons if a man refuses to state them; and if he does state them the officer sets down the reasons he assigns.

Mr. Olney. The officer must specify the reasons assigned.

Mr. Mitchell. But you cannot make him assign any if he does not.

Mr. Dodge. It seems to be covered by the second sentence of Rule 51, and I move that we adopt that sentence.

Mr. Cherry. I second the motion.

Mr. Mitchell. It is moved and seconded that there be

added to this Rule 54, about signing the deposition, the second sentence of Equity Rule 51, that if the witness shall refuse to sign the deposition, the officer shall so state upon the record, and shall state the reasons, if any, assigned by the witness for such refusal.

Prof. Sunderland. What about signing in the presence of the officer? Will the witness have to stand around until the transcript is made?

Mr. Donworth. It is wiser to do so.

Prof. Sunderland. The Equity rule requires the presence of the officer?

Mr. Wickersham. Yes; that has been a standing rule for fifty years. Why should that be changed. After all, the officer has got to be certified.

Prof. Sunderland. Why should the witness have to stick around while they are typewriting a lot of stuff?

Mr. Wickersham. It is important. Suppose when the trial comes on the witness appears at the trial, and they say, "You testified so-and-so," and he says, "I did not." "It is in this deposition," and he says, "Yes, but I would not sign that deposition because it does not correctly represent what I said." And if he has signed it it is very much more difficult for him to dispute it.

Mr. Tolman. That difficulty is frequently cured by

waiver. In 99 times out of 100 the witness who has made the deposition waives signature.

Mr. Wickersham. But when you have the kind of witness we are talking about--

Mr. Tolman (Interposing). He does not.

Mr. Wickersham. It is just like a man acknowledging a deed before a notary public. The object in having him sign it--

Mr. Mitchell. The object in having him sign it would be to give him a chance to clear himself, according to Judge Olney's proposal, under the Equity rule.

Prof. Sunderland. The signature could be made at his own home.

Mr. Mitchell. There is another object. If the witness is not at the trial, and he ha actually signed it he cannot dispute it.

Mr. Wickersham. Yes; and the officer's certificate authenticates the signature.

Mr. Mitchell. And how about having the signature in the presence of the officer?

Mr. Donworth. That is the present Equity rule.

Mr. Mitchell. Yes.

Mr. Dobie. Would there be many cases in which you would take a deposition of, for example, Mr. Cherry, Mr. Loftin and

myself, and one of the witnesses whose deposition you were to take would be pretty apt to leave and not wait for the rest of the stuff, and where he would in a different place from the officer and it would be difficult for him to go to the officer or for the officer to go to him. What would happen? The officer would have to go him?

Mr. Dodge. That is all right. I do not think this would cause any trouble.

Mr. Wickersham. Very generally the witness wants to go, and both of the parties agree to waive signature.

Prof. Sunderland. That could be done, of course. Of course, we expect this thing to be used a great deal more under the new rule.

Mr. Olney. You have to bear in mind, so far as this particular point is concerned, that the depositions of adverse parties are used constantly in State practice, and if established in Federal practice they are apt to follow the State practice.

Prof. Sunderland. Do they require ordinarily signing in the presence of the officer?

Mr. Olney. They are required to be signed, and the officer is required to sign them.

Prof. Sunderland. Does he certify to the signature?

Mr. Olney. Yes.

Prof. Sunderland. I did not think he did.

Mr. Olney. And the witness is always required to sign it.

Prof. Sunderland. Well, perhaps that is not an important point.

Mr. Mitchell. New York does not require any signature at all on a deposition, does it, Gen. Wickersham?

Mr. Wickersham. I do not know, I really cannot say. (Examining book). Yes, I see the New York rule does require it.

Mr. Mitchell. The Federal statute, the de bene esse statute, not the Equity rule, does not require that the signature be made in the presence of the officer.

Prof. Sunderland. I think that is an unnecessary formality.

Mr. Dodge. Suppose we take up Rule 56 temporarily and consider that detail later.

Mr. Mitchell. Yes, I think so.

Prof. Sunderland. What is the statute?

Mr. Mitchell. Well, take Section 640 of Title 28 of the United States Code.

Prof. Sunderland. All right.

Mr. Donworth. On this same Rule 54 I have a suggestion

Mr. Mitchell. Yes.

Mr. Donworth. On the second page of Rule 54 in the tentative draft, at thetop of the page, it says:

"After which it shall be securely sealed in an envelope by the officer and sent by him registered mail to the clerk of the court in which the cause is pending, to be filed in the case."

Now, I think the rules usually provide that the envelope must contain the endorsement of the title of the cause. Merely putting it in an envelope addressed the clerk, so that the clerk receives it with a hundred other things--it is not the practice of the clerk to open a deposition, and the practice that I am famoiar with states that when the clerk receives an envelope marked "Deposition", he drops a postal to the lawyers in the case saying that depositions have been filed, and the question is for one party to move to have them published, whereupon the clerk opens the envelope. There is no direct rule on that, but I do think it is an invariable custom to require the envelope to be endorsed with the title of the cause, so that it will not be just opened by any deputy clerk and put away.

Mr. Olney. I am quite familiar with that rule. It is ordinarily required by our practice, and we ordinarily get an order that the depositions shall be opened. But I do not see any reason in requiring an order of the court to open the deposition. Why not have it done as a matter of course?

Mr. Donworth. I am not very particular about that, but I think it should not come in in a haphazard way when it is so easy to follow the usual practice and have the commissioner or

notrary just endorse "Smith vs. Jones", as is done at the present time. It seems to me that it is a wise thing to adhere to the general practice.

Mr. Dodge. Equity Rule 55. That does not involve that point.

Mr. Lemann. I think it should be put on the envelope, and that he should put in the title of the cause.

Prof. Sunderland. Just the title of the cause?

Mr. Donworth. Yes, the title of the cause.

Mr. Lemann. That would be enough.

Mr. Mitchell. I would like to know why you inserted here the provision in Rule 54 that after the notary or examiner completes the deposition he has go to submit it to both sides for objection before he transmits it to the clerk. That is not the usual practice. It says:

> "Both parties shall thereupon be given an opportunity to inspect such deposition and make objections to its form, and such changes in the matter of form shall be made by the officer as he deems proper, after which it shall be securely sealed in an envelope by the officer," etc.

It seems to me that that requirement could very well be dispensed with. The lawyer who is taking the deposition will see to it that it is in proper form, so that he will not

have any objections to meet at the trial. Why should it be submitted to both sides?

Mr. Lemann. I thought it was to correct any stenographic errors that the lawyers might catch, or perhaps the witness.

Prof. Sunderland. I just wanted to avoid any subsequent objection. I wanted to make it so that they could not raise the points later.

Mr. Lemann. Suppose it had been inadvertently omitted, and one lawyer would say that it had, and everybody would see that.

Mr. Mitchell. The usual practice is for the lawyer to say, "You may see the transcript."

Mr. Lemann. Yes.

Mr. Mitchell. But I am not familiar with any rule or statute that requires it to be submitted to both sides.

Dean Clark. That would delay it a great deal.

Prof. Sunderland. It would.

Mr. Dodge. I move that it be stricken out.

Mr. Mitchell. The motion is to strike out the sentence, "Both parties shall thereupon be given an op ortunity to inspect that deposition and make objection to its form."

Mr. Dobie. The last sentence of Rule 54?

Mr. Wickersham. No; that would leave in the part that says the deposition "shall be securely in an envelope by the officer", and so on to the end.

Mr. Mitchell. All in favor of that motion to strike out that part of the last sentence of Section 54 will say "aye"-those opposed "no."

(The motion was unanimously adopted.

Mr. Mitchell. Now, we will take up Rule 55.

Dean Clark. Before you leave that, may I ask whether stenographic notes stentotype notes are included?

Prof. Sunderland. I suppose so.

Mr. Dodge. I have a suggestion as to Rule 55.

Mr. Mitchell. What is your point, Mr. Doge.

Mr. Dodge. I think there is a very good provision in Equity Rule 55. It says, "Upon the filing of any deposition or affidavit"--those words can be left out--"it shall be deemed published unless otherwise ordered by the court.

Prof. Sunderland. You could just add that to that same rule.

Mr. Mitchell. Add that to Rule 54. Without objection, that will be done.

Prof. Sunderland. Now, thishas to be filed in the cause. It comes back to the clerk to be filed in the cause.

Mr. Mitchell. That has to be so. You cannot keep it in your pocket. That ~~xxxxxxxxxx~~/sometimes happens. That is why you put the title of the cause on the outside. (Laughter.)

Mr. Wickersham. I would like to ask the Reporter a question, Mr. Chairman. Rule 55 says: "All objections to the

manner of taking the deposition shall be deemed waived unlessmade promptly." Does that mean prOmptly before the officer who takes the deposition?

Mr. Donworth. Yes, the rest of the sentence shows that.

Mr. Wickersham. Yes, it would seem to, but I think perhaps it had better be stated, because if before the court that is another thing. It says"and then he shall note it"-yes.

Mr. Dodge. It shall be made at the time of taking the deposition.

Mr. Mitchell. That is what it means.

Mr. Wickersham. Yes.

Mr. Mitchell. Made at the time of taking the deposition.

Mr. Wickersham. Yes, I think that is all right. I move that we adopt Rule 55.

Mr. Loftin. I second the motion.

(The motion was unanimously adopted.)

Mr. Mitchell. Now Rule 56.

Mr. Lemann. I want to ask in connection with the oral deposition, is there any time limit? The Equity rule had some time limit. I do not recall whether in your rule there is a time limit.

Prof. Sunderland. I have a time before which you can not do it.

Mr. Lemann. No, I mean a time limit after which you cannot.

Prof. Sunderland. No.

Mr. Lemann. I suppose the idea was that if you wanted to take your deposition you must be reasonably diligent in order to meet the Equity provision that you could not put the case back on the trial docket until the case was ready for trial. Of course, that would not be true here.

Mr. Mitchell. Was that not because, under the old equity system, much of the testimony was taken by deposition, and you wanted to know when the plaintiff rested, and you fixed a time limit which compelled him to rest at a certain date, and then the other fellow took his testimony; and if you did not do that, there was really no rest in the case.

Mr. Lemann. Yes. I do not think you need that.

Mr. Donworth. In subdivision (b) of Rule 56, what is the meaning of the expression, "Rule -- of the District courts of the United States". Do you mean these rules?

Prof. Sunderland. Yes.

Mr. Dobie. These uniform rules of civil procedure.

Mr. Donworth. Well, we have used the expression, "These rules" several times. That means these rules.

Dean Clark. It is "this rule", is it not? That is, Rule 56.

Prof. Sunderland. Yes.

Mr. Lemann. Yes. It will be under Rule 56.

Dean Clark. It will be under Rule 56.

Prof. Sunderland. You see it says the notice directed to the witness shall state that the interrogatories are/under Rule so-and-so.

Dean Clark. Under Rule 56 of the Uniform Rules of Civil Procedure in the District courts of the United States.

Prof. Sunderland. Yes.

Dean Clark. What is Section 3? Is there any difference in the practice?

Mr. Lemann. You mean Clause 3, down at the bottom of the page, do you not?

Dean Clark. Yes.

Prof. Sunderland. Yes. Set out Rule 9, which states the scope of examination and the questions that will be asked.

Dean Clark. Well, does this go to the--

Prof. Sunderland(Interposing). To the witness. My notion is that this wouldbe a very easy way of securing certain types of information, where it would not be at all necessary to go to the expense of a deposition; and you should be free to send this out as you please; and the witness ought to have some information as to what it means; and therefore I have provided in subdivision(b) quite fully what instructions should be given to the witness as to the deposition.

Mr. Wickersham. As a general rule, written interrogatories are sent to some officer, and he sends it to the

witness, and he has the help of an attorney or an explanation or help of an intelligent person in making his answer. If you send the witness written interrogatories in many cases you would not get much satisfaction.

Prof. Sunderland. But in many cases that is what we will have to do.

Mr. Wickersham. I know.

Dean Clark. If he gets many questions, he will get quite a substantial fee. You can see that at the end of subdivision 5.

Mr. Dobie. One dollar a question.

Mr. Mitchell. Where is the provision for cross-examination? It seems to me from this that I can take a man's deposition and use it in the case giving the other side a chance to cross-examine him.

Prof. Sunderland. He can also send him interrogatories, if he wants to.

Mr. Mitchell. I have always supposed that the written interrogatory systen was just a substitute for oral examination, reserving the right of cross-examination.

Prof. Sunderland. What I want to do is to make this very simple, and there are certain preliminary matters as to which there will not be much dispute.

Mr. Wickersham. But you could do that by the other side waiving cross-examination.

Mr. Lemann. You put in here that it costs $2 for every question over 20. This will be a penalty; and you have no cross-interogatory.

Prof. Sunderland. No. I thought that the other party, if he wanted cross-interrogatories, could simply prepare a set of interrogatories and send them in.

Mr. Mitchell. You see it works this way: If you put cross-interrogatories in directly, and then the witness signs the direct examination and refuses to sign the cross-examination, you discredit the whole deposition. But where you treat them separately and the plaintiff sends in his interrogatories, and then as an independent proceeding the other side puts in cross-interrogatories, the witness might sign the direct interrogatories, and then fail to do anything with the other.

Prof. Sunderland. Yes, he might; but do you think the cross-interrogatories would amount to anything? You cannot tell what you would want to ask until you get the answers.

Mr. Mitchell. Is there any system that you know of for written interrogatories without giving the other side the right to see them first and then prepare his cross-interrogatories?

Prof. Sunderland. No, I do not think so.

Mr. Dodge. This practice is very common in Massachusetts, because we have to take depositions this way, unless the court permits oral depositions; and we also have this practice which is very common, that we take depositions in writing.

Mr. Mitchell. Without cross-interrogatories?

Mr. Dodge. Interrogatories of the parties, yes, but no cross-examination of the parties. But where the deposition of a witness is to be taken, it always goes to the notary or officer qualified to administer oaths. No copies of the pleadings or any part thereof go along; but they are filed in court, the opposing party has a certain number of days in which to file cross-interrogatories, as well as interrogatories of his own. And the court sends a commission to the notary public for the other side, with the interrogatories and cross-interrogatories attached.

Mr. Cherry. That is our practice in Minnesota also. The cross-interrogatories go with the interrogatories.

Mr. Lemann. That is our practice also.

Prof. Sunderland. Is not cross-examination allowed?

Mr. Lemann. Of course, you cannot cross-examine very effectively.

Prof. Sunderland. Is it not better to send out separately cross-interrogatories?

Mr. Dodge. I think there are three objections to that theory or rule: First, the absence of cross-interrogatories; second, the sending of material directly to the witness himself, who may not know what it means; and third, the requirement that pleadings accompany them.

Mr. Lemann. Well, as to the pleadings, that would give

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to a discussion as to whether there is a part of them that you should have put in. I do not think that means anything to the witness.

Mr. Olney. I have not dealt with the interrogatories very much; but is it not one of the requisites that an opportunity be permitted to the parties to object to some of the interrogatories and have the court settle what interrogatories should be proposed, or the questions dealt with?

Mr. Dodge. Either in advance, or with us at the trial.

Mr. Lemann. Yes; as a rule the practice is not to pass on objections until the deposition is offered in evidence. However, the. are not passed on in the Federal practice; I looked it up, and you might try to get the court to do it, but ordinarily the court would not do it in advance, and the practice is not to ask them to do it.

Mr. Olney. It seems to me on this matter of interrogatories, that it is something that would be comparatively rarely, and the practice in the State would determine that.

Mr. Mitchell. This rule is not limited to interrogatories of the adverse party. I can understand that interrogatories should be served on the opposite party. But what I had in mind was that in calling a witness who is not a party and subjecting him to interrogatories, you ought to have the privilege of cross-examination if you want to exercise it. May be I am wrong about that.

Mr. Dobie. This would not prevent the deposition practice from applying, Prof. Sunderland?

Prof. Sunderland. What is that. I did not understand.

Mr. Dobie. I say, suppose interrogatories are taken under this provision, and they are sent in to court; and I look at them, and I say, "We want to go into this more in detail." That would not prevent my taking a deposition.

Prof. Sunderland. No.

Mr. Mitchell. No.

Mr. Wickersham. No; but when you send in direct interrogatories, cross-interrogatories go with them; and that is the reason why they are usually sent to some official--to counsel or somebody who sends to the witness and takes his testimony under the interrogatories; but the cross-interrogatories are taken at the same time as the original ones.

Mr. Dobie. Would it do any harm to given counsel for the other side that privilege?

Mr. Wickersham. It might do harm to examine them ex-parte, and the defendant would have no opportunity to ask corss-interrogatories if the questions should be asked and the witness should die between the time of taking the direct examination and the time for cross-examination.

Mr. Dobie. Do you think the opposing counsel should have the right to a cross-examination?

Mr. Wickersham. He certainly should have.

Mr. Dobie. Would you object to that, Prof. Sunderland?

Prof. Sunderland. No, except that it means more machinery.

Mr. Cherry. It may make for expedition, because very often you have no cross-interrogatories. Is it not true that often you meet formal matters by written interrogatories?

Mr. Wickersham. No. Suppose the parties do not want to go to the expense of sending counsel to Europe to take the testimony of a witness, and they want to get his evidence, and they think he is an honest man; or at all events he will answer questions, particularly if they are sent to somebody who will explain them to him, and then the commission goes out to get his deposition and they get his testimony in that way.

Mr. Cherry. If you are sending it abroad, yes.

Mr. Wickersham. Well, in this country we do not use written interrogatories very much.

Mr. Dodge. We do, because we have to, because we can not do it the other way without an order of the court.

Mr. Chərry. But you would not unless you had to.

Mr. Wickersham. We do not use written interrogatories very much in the United States.

Mr. Dodge. We do. We have to, unless the court directs the other method.

Mr. Loftin. We do in our State, and the statute pro-

vides not only for interrogatories, but that the parties may attend and be examined orally, in addition to the written interrogatories.

Mr. Wickersham. But if you send interrogatories, you must have the right to send cross-interrogatories.

Mr. Dobie. I move that the Reporter be requested to submit at the next meeting an additional provision requiring that opposing counsel shall have the right, under certain limitations stated, to submit cross-interrogatories.

Prof. Sunderland. That opposing counsel have a right to submit cross-interrogatories before the interrogatories are filed.

Mr. Mitchell. And that that shall not apply to interrogatories of the adverse party.

Mr. Dobie. No. He will be in court himself.

Mr. Wickersham. Then I think those interrogatories ought to be settled by the court. That will avoid a great many questions that come up in the trial if the interrogatories are settled by the court.

Mr. Dobie. I understood that the very purpose of this was to get away from that.

Prof. Sunderland. Yes, that was the very purpose of this.

Mr. Wickersham. Yes; I think it is for the purpose of short-cutting the functions; but I do not think it is

in the interest of justice. The interrogatories are in the form of the questions and the examination should be conducted on interrogatories settled by the court; and that will save unnecessary expense.

Prof. Sunderland. There is no expense involved in answering the questions. If testimony is not admissible at the trial, it will be excluded, and that isthe end of it.

Mr. Wickersham. That is just it. It is a constant expense. But it is the constant practice to have interrogatories settled by the court; questionsare raised there, and the court says, "What is the use of sending interrogatories?" Or on cross-examination, the court will say, "Make your question broader, and we will allow it." But I mean that you get the scope of the inquiry settled by the court in advance, especially where it is a matter of importance. If it is not important, nobody will bother about it and you will go ahead. But you must consider the case where it will be a matter of importance.

Prof. Sunderland. How about providing that it shall be submitted to opposing counsel, and if objection is taken to the question, raise the point in court.

Mr. Wickersham. Surely.

Prof. Sunderland. But if there is no objection it never gets into court.

Mr. Lemann. In our State we do not permit depositions

to be taken out of the State at all. For years in taking testimony out of the State, we have a summary practice providing for that, and you have three days to corss-examine, and then you must make your objections, and if they are not passed on at the time but just reserved, they appear on the face of the interrogatories. Of course, he may have other objections, and it works very quickly. It is not a very effective way of proceeding if you have a right to hold depositions up while considering cross-examination or objections.

Mr. Mitchell. Gen. Wickersham, if you take the deposition of a witness on oral interrogatories and he is more than 100 miles away, so that we do not bring in this master business, you can go and ask him any questions you like, and he can answer them, and of course, in the course of your examination there is nobody to rule on them.

Mr. Wickersham. But you have the defendant represented by his counsel there.

Mr. Mitchell. Of course, but that is not my point. My point ix that if you allow that examination to go without assistance by the court, then should you insist on supervision by the court as to the question having been put right in advance? In other words, it is inconsistent to say that I can take the deposition of a man in Missouri in a case pending in New York orally, without any supervision by the court, and then to say that if I want to take the deposition of somebody

in Missouri by the other metod, I have to go to the court in advance to have the interrogatories settled.

Mr. Wickersham. But in case of the oral examination, counsel for both parties are present.

Mr. Mitchell. But they are present when the writgen interrogatories are prepared.

Mr. Wickersham. Yes, when they are prepared. Now, suppose I get the written interrogatories, and I prepare my cross-interrogatories; but suppose either party objects to the line of inquiry; the rule requires that; but if you can it settled in advance by the court, you narrow thescope of the examination.

Mr. Mitchell. I will say then that in an oral interrogatory you ought to go to the court in advance; otherwise you would be inconsistend.

Mr. Wickersham. It may be so.

Mr. Loftin. I do not think in the practice as to these written interrogatories, you ever go to the court in advance; you reserve your objections.

Mr. Wickersham. We always do. We always have interrogatories and the cross-interrogatories settled by the court in advance, if there is an objection or dispute.

Mr. Dobie. Some of these districts are large. In the Western District of Virginia the court sits in seven places; and my conception is that one of the ideas in drawing this was

to change this and make it quite simple. Under that idea, I am opposed to your suggestion. I am quite willing to give the right of cross-examination. Could we not in part follow Mr. Wickersham's suggestion by inserting an additional clause in here? I would suggest, Gen. Wickersham, that your point might be met, and I am inclined to think that it might be wise to meet it, by a clause properly phrased. The first step is that the proponent propses his interrogatories, and the adverse attorney proposes cross-interrogatories; and either party may object thereafter; and either one may on motion have the matter settled by the court, leaving it entirely optional to--

Mr. Wickersham (Interposing). That is all right; but Mr. Mitchell takes the analogy of the oral examination, and thinks that it is not necessary. In thinking it over, I think perhaps this is the distinction: We do not use written interrogatories to any extent to take the testimony of witnesses in this country--I mean we in New York. We are taking the testimony of a witness in a foreign country, in written interrogatories.

Mr. Mitchell. That is a different thing. When you get to letters rogatory, is there any provision about letters rogatory?

Prof. Sunderland. This covers letters rogatory.

Mr. Wickersham. Of course, you cannot take the testimony in some cases abroad, except under letters rogatory,

pursuant to treaty; and you cannot take testimony on which you could bring any kind of procedure in a foreign country. In some countries, you cannot even hold a voluntary meeting where a witness testifies, in the form of legal procedure, without the authority of the country--and that comes down to a question of what the treaty may be. Now, that being the case, counsel cannot go there--letters carry written interrogatories, and it is important to settle in advance what the scope of the inquiry shall be. I believe that is the thought that I had in mind.

Prof. Sunderland. Yes. I provide in Rule 48 for taking oral testimony or written interrogatories before some officer of the United States or of the State in which examination is held who is authorized to administer oaths, or if taken out of the United States, before the United States Consul or a notary public.

Mr. Wickersham. Now, a notary public in many countries has no such function.

Mr. Mitchell. You have letters rogatory, do you not?

Prof. Sunderland. I cannot see any point in letters rogatory.

Mr. Mitchell. You cannot get a subpoena in some countries unless you have letters rogatory.

Mr. Wickersham. That is the whole purpose of it.

Mr. Mitchell. That is the whole purpose of letters rogatory.

Perhaps we had better adjourn now. The Supreme Court meets in a few minutes, and we would all like to attend the session. So that we will now take a recess until half-past 1.

(Thereupon, at 11:50 o'clock a.m., the Advisory Committee took a recess until 1:30 o'clock p.m.)

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