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P R O C E E D I N G S

OF

CONFERENCE OF ADVISORY COMMITTEE

DESIGNATED BY THE UNITED STATES SUPREME COURT

TO DRAFT

UNIFORM RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

UNDER THE ACT OF CONGRESS PROVIDING FOR SUCH UNIFORM OR UNIFIED RULES.

Washington, D.C.,

Thursday, November 14, 1935.

The Conference of the Advisory Committee designated by the United States Supreme Court pursuant to Act of Congress, to draft proposed Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, in both law and equity cases, met in the Conference Room of the United States Supreme Court Building on Thursday, November 14, 1935, at 10 o'clock a.m.

The following members of the Advisory Committee were present:

Hon. William D, Mitchell, former Attorney General of the United States, 20 Exchange Place, New York City, Chairman;

Dean Charles E. Clark, Yale University Law School, New Haven, Conn.;

Major Edgar B. Tolman, Room 5211, Department of Justice, Washington, D.C.

Scott M. Loftin, Esq., Grahan Building, Jacksonville, Florida;

Hon. George W. Wickersham, former Attorney General of the United States, 14 Wall Street, New York City;

Prof. Wilbur H. Cherry, University of Minnesota, Minneapolis, Minn.;

Prof. Armistead M. Dobie, University of Virginia, Charlottesville, Va.;

Robert C. Dodge, Esq., 53 State St., Boston, Mass.;

George Donworth, Esq., Hoge Bldg., Seattle, Wash.;

Monte M. Lemann, Esq., Whitney Bldg., New Orleans, La.;

Prof. Edmund M. Morgan, Harvard University Law School, Cambridge, Mass.;

Warren Olney, Esq., Balfour Bldg., San Francisco, Cal.;

Prof. Edson R. Sunderland, University of Michigan, Ann Arbor, Mich.

There were also present the following gentlemen, at the invitation of the Advisory Committee:

Edward H. Hammond, Esq., Attorney, Department of Justice, Washington, D.C.;

Leland L. Tolman, Esq., Department of Justice;

Edward C. Jaegerman, Esq., Assistant to Dean Clark;

James William Moore, Esq., Assistant to Dean Clark;

Ferdinand F. Stone, Esq., Assistant to Dean Clark.

RULE 2.

(The Shorthand Reporter's Note Book No. 1, covering Mr. Mitchell's opening statement, and the discussion by Dean Clark and others of the Supreme Court Order and the Act of Congress and also the Preparation of the Tentative Draft, and also referring to Rule 1 of the proposed Rules, was left by inadvertence at the Supreme Court Conference Room, and will have to be inserted later. It occupied about one and one-half hours of the morning session of the first day--the first hour and a half. The Stenographer left all the note-books there throughout the Conference, and did not bring any away until Conference was concluded.)

RULE 2 (CONTINUED.)

Mr. Wickersham. "All distinctions between actions at law and suits in equity are abolished;" and that is coupled with the provision that hereafter there shall be but one form of civil action.

Dean Clark. Rule 2 says, "All distinctions between actions at law and suits in equity, and in the forms of actions and the practice and procedure thereof, are abolished, and hereafter there shall be but one form of civil action." That seemed to us to be language that had been generally used and interpreted.

Mr. Loftin. You have provided in Rule 1 that it is to apply in the Federal District Courts; and it seems to me that the way you have done it is to specify what courts are governed by these rules. I agree with Mr. Wickersham that that is the keystone of the whole arch, and I like the second form of statement. I do not want to go into precise wording and determine exact proceedings; and I think it is best not to spell things out in detail, or you may spell too little.

Mr. Lemann. It says, "All distinctions between actions at law and suits in equity are abolished." Now, there is a distinction in certain matters provided by the Constitution of the United States. We cannot, of course, amend the Constitution here and take out of the Constitution the things that are protected by it; but you could have a qualification

as to that. When you say all distinctions are abolished, you include a lot of things that are matters of principle and covered by the Constitution. You could say, "All distinctions are abolished, except as otherwise provided in the Constitution of the United States."

Mr. Morgan. Would that not be a matter of interpretation anyhow?

Mr. Mitchell. Later on it could be provided by procedure.

Mr. Lemann. I do not see how you can abolish all distinctions between law and equity. I mean, so far as we are endeavoring to secure one form of procedure, that might be done; but the fundamental distinctions between a law case and a suit in equity must remain.

Mr. Wickersham. That general form of language goes back to 1848, upon the adoption of the first code. It said, "there shall be but one form of action for the redress of wrongs, which shall be denominated a civil action." It does not say that all distinctions between the principles of law and those of equity are abolished. It is only between these forms of procedure, and substituted for the forms heretofore prevailing there is to be one form of civil action. That is the theory on which the code legislation has been passed.

Mr. Lamann. Why not say "All distinctions between actions at law and suits in equity."

Dean Clark. Well, if you want to put in a proviso. Of course, as Gen. Wickersham has said, there is a distinction going back to the beginning of the Code. The present New York form is only slightly changed from the original. There is only one form of action. Now, I should think it preferable not to have any proviso; but we could perhaps use this form:

Provided, however, that the right of trial by jury as declared by common law shall be preserved/inviolate to the parties unless waived, and may be ordered by the Court, as hereinafter provided in these rules."

That would not be denying the right of trial by jury.

Mr. Wickersham. In other words, have the Court exercise the power given by the statute?

Mr. Morgan. It seems to me that that is a useless proviso. It has been so interpreted under every code adopted since 1848.

Mr. Dodge. The distinction between actions at law and suits in equity, so far as the pleadings are concerned, law in the fact that the actions at law had to follow a cer-

tain form, and a man was not entitled to the relief he claimed unless it was claimed in a certain form. That was the difference, so far as the pleadings were concerned.

And if we said all distinctions between actions at law and suits in equity are abolished, it might possibly be going too far, in that it did not hit in terms the very thing we are endeavoring to accomplish.

I have drafted something here very hastily, but I think it expresses the fundamental thing that we are trying to accomplish:

> "The term 'civil actions' shall apply equally to proceedings seeking the relief of courts of law and those seeking the relief of courts of equity, according to the distinction heretofore existing between courts of law and courts of equity. All differences in procedure, including the requisite pleading between actions seeking relief to be granted by courts of law and those seeking relief of courts of equity are abolished, with the exception of cases where the relief sought is only such as shall entitle the party to a trial by jury."

I think that is the fundamental thing.

Mr. Mitchell. According to the mere transposition, it abolishes all distinctions between actions in law and suits in equity; and it would say "All distinctions in the form of

procedure between actions at law and suits in equity are abolished;" would you have it that way?

Mr. Lemann. I think that is as far as we are authorized to go under the statute.

Mr. Mitchell. "All distinctions in the form of actions, in the practice and procedure, are abolished, and hereafter there shall be but one form of civil action."

Dean Clark. When you say that, there are some realities there to be considered. This general language is the language that has been followed for years, and it is now established--not so much in New York, for various reasons, but in States such as Minnesota, California, Connecticut, and so on.

In other words, I think we have authority to go that far. Once we make some other modification of that, the question of interpretation immediately arises, and it seems to me that the natural and probable conclusion to draw is that the Code expression goes too far; and if the Code expression goes too far and our rules are to be construed as indicating that we thought so, I think we are in a very unfortunate situation. You will notice that all the way through I have attempted to do away with the words "law" and "equity." I have tried to make it "jury docket" and "non-jury docket"; and in the matter of waiver of jury trial a person can get his constitutional right. But if he does nothing the case goes automatically on

the non-jury docket, without reference to whether it is law or equity.

Now, perhaps all of these qualifications might be desirable for some reasons. But the difficulty is that it is not the language that has been interpreted, and as I say, the question will immediately arise, Why is not the well known language used? And it seems to me that the only answer is that we thought the Code language is going too far. And I think that will be a great misfortune. That provision has been held constitutional over and over again in the Code States--that we can go that far; and I think we should.

Mr. Dobie. You do not think there will be any possibility of misunderstanding of this thing?

Dean Clark. I do not think so. But again I would say that, "The lady does protest too much." It is going away from language which has been thoroughly construed. Now, this is a real question which has caused considerable difficulty in the courts. In New York, for example, the court said that the fundamental differences could not be abolished, and the case should be reversed unless the jury trial had been really waived. There has been so much past difficulty about it. I hate to start new language which will, perhaps, bring up the old battle all over again.

Mr. Dobie. I wonder if the Reporter has not done exactly what he was instructed to do? As I recall it, when I

asking if this should be changed, he said this language should be used in preference to new words, even if it might be thought the new words would be more appropriate.

Mr. Mitchell. I came from a Code State, and there would never be any question in my mind as to what is meant. It means to abolish all distinctions between law and equity in practice.

Prof. Sunderland. Would it complicate it at all to say "original distinctions"? Would that not make it clear?

Mr. Wickersham. Would you not at once raise a question? You have got the language that has been used since 1848. Now, it has been construed many times; and as I said at our last meeting, and one of the things that I have contended with the American Law Institute was that the language that has been used and has been thoroughly construed would raise no question, but if you substitute for that some other language, that would at once raise some line of discussion in the courts. After all, this language is now thoroughly understood. The law authorized the Court to unite the general rules governing practice and procedure in law and equity cases so as to secure one form of civil action. Now, in exercising that power it is proposed to say that "all distinctions between suits at law and in equity are abolished; hereafter there shall be only one form of civil action." That is what the Congress empowered the Court to do. And the simpler the

language the better it will be, it seems to me; and I am afraid that if you qualify that language you would open up new lines of interpretation at once. And this would accomplish the same thing as the Codes, because there the language is the same.

Mr. Dodge. So far as questions of the Code States are concerned, just as Attorney General Mitchell said, where this language has been interpreted there is no doubt about it at all. But I was thinking about that New York case to which Dean Clark has referred, and thinking of the districts or circuits in which the Code practice was not particularly familiar; and I was afraid that it might result in decisions somewhat along the lines of that New York decision, and thinking that way, I thought perhaps a little more careful definition might prevent any question on the subject; of course, this language has received interpretation in many States.

Mr. Dobie. Those States have got to adjust themselves to the new viewpoint; and you take Virginia, which is a common law State, and North Carolina, which is a Code State; and after listening to this discussion I am inclined to think that you had better let it stand as it is. I think you could express it in language that is better. But I think Dean Clark's point is right, that it is the usual stereotyped way, and no one will think anything revolutionary is attempted here if you use that language.

Dean Clark. Will that not be further evident to us as we go along?

Mr. Dobie. I think so.

Dean Clark. That New York case, Jackson v. Strong-- it seems to me that the whole question there was waiver of jury trial. It should have been stated interms of waiver of jury trial, and an adequate provision ismade later to cover jury trials; and there is adequte provision in the law for that; and what you say here would not necessarily control. All it would do would be to set up ideas in the judge's mind. Suppose we were to make it "We do have the two things, actions at law and suits in equity, and therefore it is proper to have a calendar for actions at law and a calendar for suits in equity, and to have the party come in and show which it was, and so on."

Now, it is all of that that I am trying to get away from.

Mr. Wickersham. Even in New York today, we have equity calendars.

Dean Clark. Yes.

Mr. Wickersham. And then we have separate jury calendars.

Dean Clark. Now, if you have jury calendars and non-jury calendars, this thing can be easily handled; and you will note that jury trials may include both kinds of cases. Suppose that, having followed the machinery, a case that we

would call equitable has gone on the jury calendar, it is quite easy to take care of that. You see, I am trying to make the procedure as much automatic as I can. And the real distinction now is between jury cases and non-jury cases. And that is why I want to get away from the old terminology; and if you provide that all former distinctions are abolished, does not that impliedly say that there are two kinds of suits?

Mr. Lemann. The court said in that very case that the fundamental distinctions between law and equity cannot be ignored; and this language has got to be construed in a way which its phraseology does not necessarily import; and you say that the courts have so construed it.

Dean Clark. Of course, we get into questions of distinctions between actions at law and suits in equity being abolished. The question of substantive right is a different thing. But there is no reason why the right to an injunction should not be recognized the same as before; these remedies are now going to be given by judges who are appointed to administer law and equity. That is, the question of substantive rights depends on history. Well, very likely, even there one thing may be established by legal evidence and another by equitable. But that is a usage which comes from history. And I have lived in States, as many of you have, where the distinctions have been abolished. In my own State, the question does not come up, except on a motion for jury trial; and I think

a procedure of that kind could be worked out.

The suits run along exactly the same way, whatever may be the substantive right involved. If a party claims a trial by jury, he has to file his claim within the time specified. If, having filed it, no one moves in any way the judge does not strike the case from the jury list; it would be tried by the jury. If, however, the judge of his own motion, or a party moves, to strike it from the jury list, then you have a question raised. Of course, the judge's decision is subject to your right of appeal.

Mr. Lemann. The right of appeal is the same.

Mr. Morgan. The extent of review may not be the same.

Mr. Wickersham. Then you have another test, a continuance of the fundamental distinction between what was an action at law and a suit in equity.

Dean. Clark. Well, there are only two possible limitations.

Mr. Lemann. You have abolished all distinctions?

Mr. Loftin. I am subject to correction/but my understanding is that by a constitutional provision in Connecticut the Supreme Court there shall review only matters of law. Now, I know that in Minnesota, the case would have been of equity cognizance, and on review the facts will be open, just as they are in Massachusetts. But of course, there again, under the modern practice, they take account of the fact that the judge has seen the wit-

nesses and they give a great weight to that, but it is not given the same weight as a finding by a judge in a jury case; and it does not make any difference in New York or Minnesota in the extent of review, if you have this provision.

Dean Clark. I think there should be no difference in the extent of review, and I think those States which so provide have the more correct idea; because I think it is unfortunate for the appellate court to have distinctions. But it is quite possible, as these various provisions show, to have the same form of review. That is, that is not a necessary limitation on what we are doing here. The extent of review is not a limitation.

Mr. Wickersham. It seems to me that it is most important that we follow the language that has been used for nearly a century. Despite that language, our judges are constantly bringing in differences in the procedure; and if you modify or weaken it at all, you will expedite that tendency which creeps up, which makes it almost impossible for the judge to absorb the idea that the old distinction has been merged into one civil action, except where the trial by jury is involved.

Mr. Dodge. I wonder if that pulling away could not be avoided? At any rate, as you get further along the line in the direction you should go, if it could be defined more specifically and more accurately what the idea was. This language, taken from the Code States, is open to manifest objection in

certain areas. It speaks of "forms of actions". Now, the only courts that have forms of action are the common law courts. There is no form of action, strictly speaking, applicable to courts of equity.

Dean Clark. Massachusetts does.

Mr. Donworth. Does Massachusetts have the old form?

Dean Clark. Not in an equity suit.

Mr. Dodge. What I say is that "forms of action" applies to actions at law, and not suits in equity. And what we are really doing is to say that the old forms of actions at law shall be abolished; that the procedure in effect should be followed in courts of equity. So far as forms go, they apply to methods of pleading, and there would be no difference in the right of trial by jury.

Mr. Wickersham. What Dean Clark has in mind is the language adopted in the original Field Code in 1848:

> "The distinctions between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished."

Dean Clark. That is correct.

Mr. Wickersham. Now, perhaps that will meet your thought. That was the language that was in the original Field Code. It brings out what was in Judge Field's mind, which is what you have referred to--that there were actions at law, and certain forms of suits in equity, and the purpose was to abolish

the distinction. And so he said, "The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished; there shall be hereafter but one form of action, which shall be denominated a civil action."

Dean Clark. I think you are right, and I am inclined to think now that the older form is all right.

Mr. Wickersham. He was dealing with the problem in the national field, and he was inaugurating the great reform of merging law and equity all over the country, and I will say that some of the provisions seemed to me very clearly thought out.

Dean Clark. The present New York Code has reversed the order a little. This is the present code; it says, "There is only one form of civil action (in law and equity,) and the forms of those actions and suits have been abolished."

As a matter of fact, we in drawing this up started out with the question that there is only one form of civil action. I am inclined to think it is safer if we follow thisgeneral form, which could easily be in the present New York form--"and the forms of those actions and suits have been abolished."

Prof. Sunderland. Is the New York form followed by a large group of States?

Mr. Wickersham. The form in the original code I think was; later on there was a modification made.

Dean Clark. The original form was followed. In 26 of

the Code States--in four of them, Arkansas, Kentucky, and two others, they expressly preserved the distinction between actions at law and suits in equity, although in other respects they made changes. But in the other code States--Minnesota and so on--they enacted the original Field provision.

Mr. Dodge. I think if you will compare the Field definition with the statement you read from New York, I think you will find that the Field statement is accurate but the other is not. The Field statement uses the word "form" in the proper sense, and the New York code confuses the form with the action itself. I think you will the Field statement is much better.

Dean Clark. Of course I am perfectly agreeable to making that change, if it is better. Of course, that is what I am after. The only reason I followed the New York form is that I think its significance was pretty well known; and we could make it more direct. But I think if there is any question, there is this part of the Field definition that I think we can work over; but it is a statement of a distinction contained in the Federal procedure. The Field code says, "That there shall be hereafter but one action for the prevention of private wrongs." Shall we say instead of that, "That hereafter there shall be but one form of action."

Mr. Donworth. The only objection I see is that there is a variance between New York and other States, and it might be said that there is a difference to be made in interpreting

this language and that of New York.

Mr. Morgan. New York has gone sometimes liberally and sometimes conservatively in interpreting that language. That case of Jackson v. Strong I think was a temporary aberration. I think they have got away from that.

Mr. Mitchell. Of course, there is one situation that we have. That is, that under all of the statutory codes it is a question of statute. Now here, the way we promulgate the rules is the way the courts construe them, and they are going to construe them the way they want to. I think you can depend on the courts to go the whole way, so far as forms are concerned; and you do not have to be as careful about that as we might have to be if we had a statute. The impression I have, after all, so far as the rules are concerned, is that we know what we want, and we are not at all interested in style. I wonder if we cannot refer this back to the committee to study the various statements and come back at our next meeting with a final recommendation as to the form.

I will entertain a motion, if anybody has a motion to make.

Dean Clark. May I just ask one question? I was a little troubled on the original Field language and on the past history, and that still troublesme a little. May be it is not worth mentioning it, but I will explain it: The Field language is:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing are abolished."

Now, in New York in 1848 there is no question that there were lots of forms of action existing. Now, in the Federal procedure, I was a little troubled about how to work that out.

Mr. Wickersham. Well, take New Jersey. A person brings a suit in New Jersey. He will file a declaration, modified by the New Jersey practice, and it will be a declaration in assumpsit. So you have in New Jersey just what the Field system has.

Dean Clark. Well, in working out what the present law is, we were troubled a good deal to define the present system of union; because under the Equitable Defense Act, and the Act of 1915, you have a hybrid, which is a union of law and equity.

Mr. Wickersham. Under the Comptroller Act, you still have these various forms of action; and you are establishing here a new uniform procedure for all actions in the Federal courts. Have you not got just the problem before you that Field had in New York State?

Mr. Morgan. Do you think it will be necessary to use the phrase "heretofore existing"?

Mr. Wickersham. It is not necessary. You are in-

augurating a great reform. Of course, it is not necessary to use that language at all. But does it not emphasize the change you are making? You are making a distinct departure, and you are departing from things heretofore existing.

Mr. Cherry. Rule 1 makes a change in the system, and these forms of action have not existed in the Federal system. Now, Rule 1 gets rid of that. I should think "heretofore existing" would be in the State. Now, there is that difference, as compared with the situation here and in New York.

Mr. Wickersham. I understood that Dean Clark meant to combine Rules 1 and 2.

Dean Clark. Well, that is another question.

Mr. Wickersham. Well, if you do that, the objection which is made would be done away with.

Dean Clark. I understood Mr. Cherry's question was that in the Federal system there were distinctions between actions at law and suits in equity. As a matter of fact, it is the situation now that there is a substantial distinction between actions at law and suits in equity, subject, however, to future combinations. I think we nowhave a sufficient number of combinations to shock the old common law courts.

Mr. Wickersham. But after all, there is a great distinction between actionsat law and a bill in equity.

Dean Clark. If you decide to make the change, it can, of course, be done.

Mr. Tolman. Did I understand correctly, Mr. Clark, that as a matter of fact, we want to stop courts from trying to make new ones in the future?

Dean Clark. That is correct.

Mr. Tolman. In other words, I am inclined to think that we want to stop Federal courts from making distinctions between the two in the future, involving the same idea, but which have never been made by any court in the past.

Mr. Lemann. I move that the two of these Rules, Rule 1 and Rule 2, be referred to a committee appointed by the Chairman; and that we take a straw vote as to how many feel that there should be some change.

Mr. Mitchell. Suppose you put it in the form of a motion, and that will allow it to be voted upon.

Mr. Lemann. I will offer a motion that the language be adopted as it now stands.

Mr. Mitchell. Is there any second?

Mr. Morgan. Rule 1 is stated in two forms.

Mr. Mitchell. I was going to ask Mr. Lemann to restrict that motion.

Mr. Cherry. I second the motion.

Mr. Mitcehll. Is there any further discussion?

Dean Clark. The present language does not necessarily mean that every word shall be continued, but just the idea.

Mr. Mitchell. But I understand that before the thing

is through we will refer the whole thing to a committee on form and style; and so we need not consider cutting out words now.

Mr. Cherry. The real idea is that we should confine ourselves to adopting the theory, and as Judge Olney has suggested, not try to spell this out in the exact language.

Mr. Olney. Will you read the full definition?

Mr. Wickersham. Here is the definition:

> "The distinction between actions at law and suits in equity heretofore existing are abolished, and there shall be hereafter but one form of action for the prevention of private wrongs."

Mr. Olney. Now, with the single exception of those words "heretofore existing", that, it seems to me, covers the case and any objection I might have to a different wording. It removes the objections which I have in my mind to Rule 2 as it now reads.

Mr. Donworth. Of course, Mr. Field could not cover cases in bankruptcyand admiralty, and therefore his definition did not cover those. When you speak "actions in Federal courts" you get into a broader field.

My idea would be this: That the Field definition, making it conform to the point I have mentioned, be adopted, unless the Reporter and the other members of the committee

find that there is a better phraseology in some States, for instance, Minnesota, which will get away from the possibly narrow construction of New York. That would be my idea.

Dean Clark. I am glad that Mr. Donworth brought that out . . . In that Strong case private rights were involved; and so many cases are United States cases that we did not think we could use the expression "private rights."

Now, as I sense the discussion, Judge Olney and Mr. Donworth are in agreement. I think Mr. Dodge may have some different idea, as he may possibly feel like standing up for the Massachusetts practice.

Mr. Dodge. Not at all; I am not concerned with that. But I am concerned with the attempt to do the impossible. Very recently the Court of Appeals of New York said that you cannot abolish fundamental distinctions. We are ~~xxx~~ saying that we can abolish fundamental distinctions; and my objection is ~~xxxx~~ simply because we cannot accomplish what we state there. It cannot be done, and you are going to give rise to litigation.

Dean Clark. All I had in mind was as to the form of wording.

Mr. Dodge. I will vote against it on that ground.

Mr. Mitchell. It seems to me that the rule ~~xxxx~~ stated here better states the system. I cannot see myself how any criticism can be made, with the exception of the one which

Mr. Dodge has made, and he makes the point that the wording is the abolition of all differences in substance between law and equity; and that depends on what you mean by "actions" and "suits." If we were doing it for the first time, we would word that slightly differently; but it seems to me that this wording can be thoroughly understood. If we are attempting to make this change in the difference between legal rights and equitable rights, we had better stick to what we had in the past. I do not think any lawyer would assume for a minute that we are attempting to abolish the distinction between legal rights and remedies and equitable rights and remedies. And just as Dean Clark says, this is the difference between actions and suits. It is not the substance of the thing, but it is the form of procedure.

Mr. Lemann. I was wondering what the Circuit Court of Appeals would say, or what that court would do with the first appeal that came before them in what would have been an equity case.

Dean Clark. Meaning as to the scope of review?

Mr. Lemann. Yes, as to the scope.

Mr. Mitchell. We have no authority under the statute as to the scope of review.

Mr. Lemann. Well, when the case comes up, is it a law case or an equity case?

Dean Clark. I ought to say in all fairness to the

committee that later on I will put in a provision which I hope will be considered within the scope of the committee. I have quite forgotten just the exact practice in NewYork.

Mr. Mitchell. Mr. Lemann?

Mr. Lemann. I really meant to present your point of view. I really wanted to know if this language should stay here. That is what I meant by my motion.

Mr. Cherry. I second it.

Mr. Lemann. It seems to me that, as Mr. Mitchell has stated it, it will not confuse anybody, especially as the Supreme Court of the United States must construe this rule. And there are some objectionsto that language; and what the New York courts succeeded in doing to support the original Field language is not important, and such obscurity does not seem to exist. I understand that some members of the committee think it does; and I wanted to get some reaction as to whether it does.

Mr. Dobie. Have you any strong feeling, Dean Clark, as between your language of Rule 2 and the language as Gen. Wickersham read it with the words "heretofore existing" cut out?

Dean Clark. I have no objection. We tried to make Rule 2 what we conceived to be the Field language heretofore existing and the private rights now.

Mr. Dobie. Would you prefer that language to the Field

language with the words "heretofore existing" cut out?

Dean Clark. I think I would, although I would rather have the Field language than any of the other language. That is, I think when you start taking out of the Field language these matters that have raised this discussion, we will not have it much different from this.

Mr. Loftin. I have not participated in this discussion, because in my State we have common law practice, as modified by statute, and I have intended to be governed by those who have had more code procedure. But after hearing the discussion, it seems to me that Rule 2 would accomplish the desired purpose.

Dean Clark. There are two steps, and that is why I did not want to have the vote confusing. The first, as to the Field language: Shall we modify the Field language? The next step is between the two forms of the Field language.

Mr. Wickersham. Would it not suit Dean Clark to have the question referred back for reconsideration, in the light of this discussion?

Dean Clark. I think that is all right. But I thought we would have a general expression as to the direction to go.

Mr. Wickersham. With the general expression that, so far as practicable, the definition of the Field code is the preferable form of expression.

Mr. Loftin. As I understand, Dean Clark preferred

the language in Rule 2; and if you refer it to him without direction it will bring us back to the same rule.

Dean Clark. What I am a little troubled about is that those who want the old Field language and those who want a different expression would both vote against the present rule.

Mr. Dodge. I think he holds the opposite view. But I think he feels that the preponderant view is that we should take the old Field language. Now, I want to adopt the preponderant view as to the difference between those two things. And do you feel, Dean Clark, that there is no fundamental difference between that and the Field language.

Dean Clark. I think, Mr. Dodge, that I would prefer the Field language; but otherwise I would prefer this language.

Mr. Dodge. What I understand from Mr. Mitchell is that there is doubt as to the interpretation which will be put upon the language. I am defending not Massachusetts at all, but I do not like the first few words here, which seems to go beyond what is really desired to be accomplished. If they are to be construed as Mr. Mitchell says, I am heartily in favor of them.

Mr. Mitchell. But if you insist on the phrase that "all distinctions between actions at law and suits in equity are abolished" you abolish any distinction between the two different forms of legal proceedings, and those things are abolished.

But if you say "all distinctions between forms of actions at law and suits in equity are abolished", the principles are not changed. And that was the real objection. Would y ou mind eliminating the words "for the prevention of private wrongs"?

A F T E R R E C E S S.

The Advisory Committee resumed its session at 1:04 o'clock p.m., after the recess.

Mr. Mitchell. We will consider Rule 4.

Mr. Dobie. It says, "Any district judge may, upon reasonable notice to the party", and so on. Would it not be advisable to include in there the Circuit Judge sitting as a District judge?

Mr. Mitchell. I should think so.

Dean Clark. Of course, the expression there "District Judge" includes the judges of the Supreme Court of the District of Columbia; and while it may not be necessary, I think it might be well to include a circuit judge sitting as a district judge.

Mr. Dobie. I do not think there will be any question about that; but I just wanted to make it clearer. I think it would be interpreted that way.

Mr. Wickersham. You see, the Equity Rule was "Any district judge may," and so on; and a circuit judge when he sits in a district court exercises that power.

Mr. Dobie. I think that is all right.

Mr. Lemann. I see that you have changed the word "term" to "session." You have not provided anything about terms, have you?

Mr. Cherry. There is one mentioned in Rule 6.

Dean Clark. I have tried to steer away from the word "term" all the time.

Mr. Cherry. It says the clerk shall keep a journal in which shall be entered all orders, judgments and proceedings of the court in civil actions in "term time."

Dean Clark. I think that might be well left off. I do not think it adds anything. That is the end of the third paragraph of Rule 6.

Mr. Dodge. Was it not the intention to abolish all technicalities about terms?

Mr. Wickersham. There is some statute about that.

Mr. Donworth. In Equity Rule 1, the distinction between judge and court is maintained; and are we not obliged to maintain that; and in Rule 6 that distinction is not maintained. If the court has adjourned, should we not maintain the powers of the judge as a judge?

Dean Clark. Well, in the Equity rules you constantly run across the expression, "Any district court or judge;" and it seems to me that this rule, which provides that a district judge may act, extends the power of the court, or the power of the judge to act, when not sitting on the bench; and therefore the word "judge" would not add to his powers, and would not add anything. As a matter of fact, one of my assistants added the word "judge"; so that it is not clear what it means, unless mentioned in connection with this provision--the word "judge" is rather confusing than otherwise.

Mr. Donworth. Should we not make it plain that the judge has the same power when not sitting and holding court as otherwise?

Mr. Cherry. Is that in vacation as well as in session?

Dean Clark. Yes; a judge always acts as a court if the court is open, and with the provision that the court is always open at the beginning of Rule 4, it follows that any action by the judge is action by the court.

Mr. Olney. Then what is the ambiguity?

Dean Clark. I would say that Rule 4 does not go as far as Judge Donworth thinks it should go; he thinks it would be better to make it plain that the judge has the same power when he is not actually sitting and holding court as he has in court.

Mr. Olney. I have written out thissuggestion:

> "Unless otherwise stipulated by the parties, or unless the determination in the first instance is referred to a master all proceedings shall be conducted in open court."

"Any proceeding may, in the discretion of of the court, be conducted otherwise than in open court, and at such time or place as the court may deem convenient, and the trial of any action otherwise than in open court shall be deemed to be the action of the court of which he is the judge."

I think that will just simply wipe out the distinction and make the court and the judge the same, except when it comes down to the trial of an action.

Mr. Donworth. That has a good deal of merti and I think we should emobody that idea. Some fifty years ago there were serious disputes in New York about judges not sitting in matters in which they were not qualified.

Mr. Olney. We have had this experience in our districts: That there would come up the necessity for the obtaining of an immedaite order without any delay whatsoever and there would not be any judge whatsoever in San Francisco, and you would have to go out and find and get your order made.

Dean Clark. Judge Olney, in your suggestion, what is the meaning of the word "trial"?

Mr. Olney. I did not define the word "trial." But I assume for the moment that, by "trial" is meant the trial; that is what a lawyer would consider it. I was not considering

any determination of a question of fact.

Dean Clark. Well, "any proceedings where witnesses were present?. Would that not be a definition of the trial? And How about a hearing on preliminary injunction? Would that be a trial?

Mr. Olney. Those questions I had not thoroughly worked out. It would be a trial as a lawyer ordinarily uses that word. That would not be the trial of the cause. But whether they should be considered a trial within the provision that it must be held in open court, I am not certain.

Dean Clark. What we were trying to do was toprovide that any order entered by the judge should be considered the official action of the court, without considering where he did it he must register it in the clerk's office, and then notice is sent to the parties, so that there would not be any controversy as to whether it was in court or out of court. But Judge Olney's suggestion would still preserve the distinction in determining whether it is a trial or not. We were attempting to avoid controversy by doing away with all distinctions.

Mr. Dodge. Would you have any provision that where the word "judge" is used, or the word "court" is used, it would extend to both? I do not want to keep repeating all the way through; but I just want to make it clear.

Dean Clark. Well, we considered this provision--"that the district courts are always open, and the judge may act.

Mr. Wickersham. Now, they are always open for a certain purpose. And you have in the Judicial Code a provision for holding court, and it must be held at certain times, and there are 50-odd sections providin for that. Evidantly that contemplates holding a term of the court at each of those places. And your proposed rule is only that the district courts shall be deemed always open for the filing of pleadings, interlocutory orders, etc. But if you sought to go further than that and let every judge hold court wherever he likes, and provide for every judge holding court, you would up against provisions of the statute, which provide for holding court at certain places and times.

Dean Clark. I take it that when the court isopen, and whenever a judge makes an order, it is the action of the court.

Mr. Wickersham. Well, is that expedient? Perhaps I am thinking more of the practice in New York State. It is really a judge's order--whether it is a proceeding before a judge in chambers, etc.

Mr. Olney. Is not the distinction between those orders and judgments that ought not to be made other than in open court, and those orders that it is perfectly proper for a judge to make in chambers, or at his house, as he may be called upon to do?

Dean Clark. I think there should be a distinction. What orders are there that it is provided that certain orders which should be made only in open court? Then I would avoid any question.

Mr. Lemann. These questions that are suggested here, are they not covered by the Equity Rules?

Dean Clark. There is a good deal of discussion as to whether the act of a judge is the action of the court.

Mr. Wickersham. Well, look at Equity Rule 1. There is a distinction there between district courts and what a district judge may do.

Mr. Lemann. Do you mean the omission of the word equity" Rule 1 is almost verbatim the same as this; and I wanted to know whether Mr. Wickersham considered those words "courts of equity" being unnecessary?

Dean Clark. There has not been much controversy in the Federal system. The question whether it is the action of the court or the action of the judge has usually risen in the State courts--equity rules make the action of the judge the action of the court.

Mr. Donworth. Should this not be added to paragraph 2 of Rule 4: The trial of all actions and hearings, other than ex parte hearings, shall be as required by law for the holding of the court."

That would give the judge the power; but except in case of emergency or on an ex parte matter, he must be a real

court.

Dean Clark. I am inclined to think that Judge Donworth's suggestion is better than Judge Olney's, on the question of where the dividing line shall be drawn. Judge Donworth's suggestion is an admonition to the court, and the court can act otherwise. I am not sure, after all, that there is an evil here anyhow. If the trial judge wants to act, there is not much trouble it anyhow, and I do not believe he will act more arbitrarily in chambers than he would on the bench. And any rule that you put in is likely to raise a question as to the validity of the order. How you gain enough protection to the litigants and others to justify any doubt that you may have as to the validity of the proceedings? There is always the question of reopening judgments.

Mr. Olney. There are certain things that a judge can not do except in open court. He cannot determine the final merits of the action without doing that in open court, and if he should endeavor to do it otherwise hisaction shouldbe void, and entirely beyond his authority, and is action not taken by a court. But beyond that one thing, if he makes any supplemental order in connection wth a proceeding, it ought to valid, regardless of whether he makes it in open court or not. And those two things, it seems to me, ought to be observed; first, they should have a real right of trial; and second, so as to prevent any question as to the validity if the judge makes the

order.

Dean Clark. If you will turn to Rule 84, you will find that all hearings or trials, the mode of proof shall be by oral testimony and the examination of witnesses, and that means in open court. Well, we did not put in the words "in open court" but we did put in "oral testimony." But here was the idea which is found in the Equity Rule which appears on the opposite page; it says:

> "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules."

I do not think that there is any necessity for the requirement or that it is necessary for the validity of an order that it must be in open court, or as the result of open court hearings, unless that requirement ismade by virtue of some rule of law. That is the difference here between Rule 84 and Rule 4.

And Judge Olney's suggestion is that the question of validity seemed to depend on any orders not so passed.

Now, suppose a judge sits without a jury, and having heard the case in open court holds up his decision for some time, as hisquite usual, and then files his decision with the clerk: Is there any question about the validity of that, although he does not issue it from the bench? Is that an order not made in open court? It is not physically made in open court; he simply notifies the clerk of his decision. In other

words, I think it would be unfortunate to cast doubt upon the jurisdictional validity of orders entered by the court.

Mr. Donworth. I agree fully on that; but I think it would be unfortunate if the rules should lead the lawyers to believe that the order by the court and by the judge are the same thing. I think there should be a provision requiring something akin to the open court idea, if you give the judge the full powers of the court. I have rephrased this part of it to read:

> "x x x except in cases of emergency, shall be held at the courtroom or chambers, at the usual place established by law, or established by custom for holding of the court."
>
> xxx

Or we might put in, "unless stipulated by the parties." But I do want to impress upon the Judge that as an individual his powers are limited.

Dean Clark. Do you include in that chambers?

Mr. Donworth. Yes; it reads, "except in case of emergency, all proceedings shall be held in the courtroom or chambers, at the usual place established by law or established by custom for the holding of court."

Dean Clark. Would that apply where you have two or three places of holding court, as in my State, in Hartford, New Haven, and so on? Could the judge have chambers at all of those places?

Mr. Lemann. Is there a technical definition of

"chambers"?

Dean Clark. I do not think there is.

Mr. Lemann. Would that mean technically any room in the court house?

prof. Sunderland. I think it means anywhere outside of court.

Mr. Lemann. Yes. I was just wondering whether under Equity Rule 1, there would be increasing trouble?

Mr. Donworth. I do not think a judge as distinguished from the court could try a case under the Equity Rule.

prof. Sunderland. The only power of the judge in chambers is that given by statute, and I think the whole idea of what constitutes chambers is very vague.

Mr. Morgan. It means anywhere except in open court.

prof. Sunderland. Now, is this intended to take away the distinction between the court in session and the judge in chambers? Is that the purpose of this?

Dean Clark. This is following the equity rules, and I amreally doubtful about the law. Of course, the law often depends upon statute; but in the absence of express provision, I think it is not necessary that the judge makes his orders in open court. It is hard to generalize, because the whole thing is subject to statute.

Prof. Sunderland. I found that rather vague; but the best I could do, by way of statement, was to make it done outside of court.

Mr. Wickersham. Well, I have been before a United States judge several times where the judge liked to smoke and the lawyers liked to smoke, and the judge would say, "Gentlemen, we will adjourn to my chambers," and they would adjourn to his chambers, and everybody smoked and the proceedings went on. I have known that to happen not infrequently.

Mr. Lemann. Does this permit anything to be done that could not be done under Equity Rule 1?

Dean Clark. No. Let me call attention agai n to Equity Rule 1. The present rule is opposite my Rule 4. Now, my rule 84 was an attempt to cover those provisions. Now, opposite Rule 84, you will find Equity Rule 46, which provides that the testimony in equity shall be taken orally in open court, except as otherwise provided by these rules.

Now, the quotation from the statute, below that, provides that, "The mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided."

I take it that the admonition of the equity rules is that the testimony may be taken in open court, but the passing of orders may be made by the judge or court without distinction as to the two. The dividing point is as to the witnesses, and that is what we were trying to work out by my Rule 84.

Mr. Dobie. Se had an interesting case in Virginia, when the judge was in West Virginia. And when he was out there he had to enter some orders going back to his own district,

and it was not an order that was material, and the Circuit Court of Appeals held that it was all right. I think it would be a good idea to try not to draw too many distinctions. And these are the equity rules as they were known before, and all you left is the equity side. I am a little dubious about making changes about open court, and so on.

Dean Clark. I might refer to the case of Hunter v. Pere Marquette Railroad Co., 151 Fed., 686, where the judge said that it must borne in mind that the action is that of the court itself; and he cited "Daniels' Chancery Pleading and Practice," and Walters v. 50 Fed., 317. And in 39 California, it speaks of the question of chambers, where the chambers of the circuit judges are mentioned. It is said that business may be done out of court. Chamber business may be done and often is done at home, or it may be done in going from one place to another.

Mr. Justice Field could as well issue a temparary injunction or grant a writ of habeas corpus in the district in the dining room as well as at chambers in San Francisco or in the courtroom.

Could not hear at this point.

Mr. Olney. That definition of chambers means any place other than in open court.

Mr. Cherry. Yes. I think it has merit as a definition. It is not a place, but a state of mind.

1st copy.

Collected from Mrs. Campbell by D.J. Lucas on 12/30/35 54 pages. pp 120-121 being one page.

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Mr. Olney. That definition of chambers means any place other than in open court.

Mr. Cherry. Yes. I think it has merit as a definition. It is not a place, but a state of mind.

Mr. Donworth. Rule 84 abolishes the requirement of having a trial in open court; and I think it is Dean Clark's idea here that the judge, even if the term of court has adjourned--the judge can adjourn court for two weeks and be in vacation for a month, and as I understand Rule 4 and Rule 84, all distinction between chambers and court is abolished, and the trial may be held at any place. They abolish all reference to the old rules and the statute.

Mr. Lemann. You would have no objection to the abolishing of Rule 84?

Dean Clark. I had a little objection, but I think Judge Donworth is right, and this would cause more trouble than good. But if that seems going to far, I will put it in. But the essential thing is to limit the requirement to the hearing of witnesses.

Mr. Dodge. Are there objections to Rule 1?

Dean Clark. This matter has been considered in a case in the United States Supreme Court, where Judge Miller delivered the opinion, 101 U.S., page 56.

Mr. Wickersham. In that Engle case, was it not a ques-

tion of holding court? Judge Field was in a restaurant eating his breakfast took place, and Engle stepped in to protect him by killing his assailant, and they held that he was properly protecting the court. Justice Field of the Supreme Court was traveling from Washington to his home in California. That did not raise exactly the question we are discussing. He was not attempting to hold court in the restaurant. He was a Justice of the Supreme Court of the United States, and he was on his way to his home, and stopped off for breakfast, and there was attacked.

Mr. Olney. As a result of this discussion I withdraw my suggestion. It seems to me better, after all, so that we will know what we are doing, to follow the Equity rule. And the only suggestion I have to make is that this expression, "in chambers"--that there should be substituted for it some expression which would indicate that it meant anywhere other than the court in open court, and so that the bar will not be misled by the expression "chambers". Because that expression "in Chambers" has given rise to a lot of doubt one way or another. Of course, when the practitioner looks up the law, he finds what it means. That is the only meaning.

Mr. Mitchel. It is quite evident that the word "chambers", is used to apply to any place outside of court. Because in the next sentence it says "or in the clerk's office." So that the word "chambers" I would construe to mean the

court house or where the judge personally uses his office.

Mr. Olney. I did not use the phrase I had in mind could you not use some expression liek this: "Either in open court or otherwise, because that is what the rule really comes down to.

Dean Clark. There are several cases that have come up. This case that I spoke of, Hunt v. Pere Marquette Railroad was on the validity of the appointment of a receiver, and there was quite a discussion of certain things; for example, in Robinson v. Riley, the appeal was heard by a Circuit judge at Atlanta, in the Northern District of Georgia, and not in the Southern District; and that was held to be all right, and in this Hunt case, Justice Bradley in an opinion said that he entertained no doubt that a circuit judge might act in that way. And there is considerable discussion of this holding that the appointment of the receiver, though made elsewhere, was valid.

Mr. Mitchell. You might use the words "or in the clerk's office." The word "chambers" means outside of court.

Mr. Lemann. That would be all right, if you were to just to keep the Equity rule.

Mr. Dodge. Rule 1 has been in force for many years. I would make the motion "That Rule 4, as drawn by the Reporter, be adopted, substituting the word "elsewhere" for the words

"in the clerk's office."

Mr. Dobie. Just substitute the word "elsewhere" for the words "in the clerk's office" in Rule 4,

Mr. Lemann. Yes.

Mr. Cherry. Why not substitute Judge Olney's suggestion?

Mr. Olney. I do not think it would make any difference.

Mr. Cherry. Well, if you say "at chambers or elsewhere" that would define the place.

Mr. Lemann. This rule would include open court, I suppose. That old Equity would not define open court, because chambers is anywhere but in open court, and therefore the judge could not sign the orders in open court.

Mr. Donworth. This section covers that.

Dean Clark. You see, there is the Equity rule.

Mr. Donworth. I withdraw my suggestion, so that when we come to Rule 84, which covers the trial, we can take that up.

Dean Clark. I do not think there is any great objection to Rule 84. The only thing is that these rules provide for special masters; but we can provide specially for masters; but we get to Rule 84, we want to consider not merely hearing by the judge, but consider hearings all the way through.

Mr. Lemann. I second Mr. Dodge's motion.

Mr. Mitchell. The motion is to adopt Rule 4, except to substitute the word "elsewhere" for "in the clerk's office."

(The motion was unanimously adopted.)

Mr. Mitchell. The next is Rule 5.

Dean Clark. Yes. Of course, that is Equity Rule 2.

Mr. Dobie. You want to add those words, do you not--"and for the purpose of receiving and filing all papers mentioned in Rule 4"?

Dean Clark. Well, it ought to be open for that purpose; and if there is any doubt whether it is open for this purpose it ought to be included. But if it is assumed that it would, there might be an advantage in allowing Equity Rule 2 to remain as it is.

Mr. Olney. It seems to me that this very well expressed. As a matter of fact, it seems to me that if it is provided that he should be in attendance for the purpose of receiving papers, etc., the only effect of that would be as a limitation, and that is not what is intended.

Dean Clark. No, quite the opposite.

Mr. Morgan. That last phrase is a limitation which ought not to be there.

Mr. Wickersham. Well, that is taken from the Equity Rule. Has any embarrassment ever arisen from that limitation,

Mr. Olney. The only thing that I thought of was that it does not say what was really intended, and you have got to construe it. All it says is that the clerk's office shall be open during business hours on all days, and that there shall be somebody in attendance.

Mr. Wickersham. I think that is true.

Dean Clark. It says "and the clerk shall be in attendance" therein.

Mr. Olney. It is a very small matter.

Mr. Wickersham. I suppose that was put in for the purpose of making sure that the clerk had certain functions to perform, and he should not leave some deputy in attendance.

Mr. Lemann. Does it include a deputy,

Mr. Wickersham. I suppose it would.

Mr. Lemann. Somebody beside the janitor.

Mr. Dobie. The District Court for the Western District of Virginia sits in seven different places.

Mr. Olney. I drafted this provision, that the clerk shall be in attendance, except on Sundays and legal holidays; and that is exactly what it is intended to avoid.

Mr. Wickersham. There is a provision in the statute about that.

Mr. Sunderland. Could that last phrase be deemed to be a grant of power to the clerk to dispose of motions,

proceedings, etc., without reference to the court.

Mr. Morgan. Then perhaps we should modify that last phrase.

Mr. Sunderland. Yes.

Dean Clark. Of course, this rule goes back at least to the rule of 1842. I cannot tell whether it goes back to 1822. The Rule of 1842 was that the clerk's office shall be open for the purpose of filing all papers submitted by the parties or their solicitors. You see, it is a broadening of the Rule of 1822, which was more restrictive.

Mr. Wickersham. Section 3 of the Judicial Code provides for the appointment of deputy clerks and their assistants, such deputy clerks and assistants as the judge may determine. It also says deputy clerks may be removed, and so on. So that that would settle the question of deputies.

Mr. Olney. "The clerk's office shall be open for business and there shall be somebody in attendance on all days except legal holidays."

Mr. Sunderland. You might add "and at such time and place, he shall have authority to receive and file motions, etc."

Mr. Olney. I think that is specifically provided.

Mr. Sunderland. In these rules,

Mr. Olney. Yes, in these rules.

Mr. Lemann. It would be desirable to have that in, and not leave it to implication.

Mr. Morgan. This ought not to be language for the granting of power.

Mr. Lemann. No, I think not. I think Rule 8 covers that.

Mr. Mitchell. Well, with that Rule 8, it seems that Judge Olney's suggestion is enough. Do you make that as a motion, Judge Olney,

Mr. Olney. Yes.

Mr. Lemann. I second the motion.

(The motion was unanimously adopted.)

Mr. Mitchell. The next is Rule 6, Can you tell me, Mr. Hammond whether these requirements for papers in the clerk's office require any action by this committee--the stationery and books of record required for the clerk's office'

Mr. Hammond. I do not know.

Mr. Mitchell. I suggest that you check up that and find out whether or not that is the case--and see whether or not they have to have a lot of stationery, which would cost a lot of money to change; and it may be that this rule should be modified.

Mr. Hammond. I will try to check that up. I took the matter of this rule up with the clerk of the District Court

of Maryland informally, and he suggested, first, that instead of saying "the docket book, we call it the Civil Docket," following the Equity rule shall keep a book known as the "Civil Docket" to distinguish it from the admiralty and criminal dockets. So that I think that is a very good suggestion.

I also took up with him the question which Dean Clark raised, whether you could combine the order book and journal, and he seemed to think that was very feasible and a good thing to do.

Now, on the question of putting the jury cases and the non-jury cases all in one docket, he thought that could be done also. But if the marking of the cases as Dean Clark suggests as "court cases" and "jury cases" is adopted, it would make it all right to do that.

Mr. Donworth. I think in line 4 of Rule 6 the word "suit" should be changed to"action."

Dean Clark. I think that would be better.

Mr. Donworth. And with regard to the combination of order book and the journal, in view of the difficulty of changing that, we would alter that provision by saying at the end that with the consent of the court the order book and the journal may be combined, so as to leave it discretionary.

Mr. Olney. Do they keep now a separate journal and

order book?

Dean Clark. I think there is a great variety of practice in the different districts; and we found the greatest variation in the clerks' office as to all these details. So that, in spite of the rules, I do not think there is any great difficulty now.

Mr. Lemann. I would state, that in actions at law the State courts, as well as in the Federal court, we have a minute book which gives all that happened that day, while this journal is restricted to the orders, papers and proceedings; and the proceedings include when the jury is impanelled. For instance, in all the appellate courts, I believe--I was just wondering whether that would include the minute book.

Mr. Morgan. That would include every action taken.

Mr. Lemann. It may not be an order of the court. Suppose this motion is granted, and a jury is impanelled, and the case is tried.

Mr. Morgan. Chronologically.

Mr. Lemann. Well, we have a separate book, and then we have a judgment book and a minute book.

Dean Clark. In the Connecticut District Court there is a minute book and then a judgment book.

Mr. Lemann. The judgment book is only as to the

final judgment.

Mr. Morgan. I think at the beginnin you should have a transcript of your minutes--minute entries, about drawing the jury, appearances, and so on.

Mr. Wickersham. Yes.

Mr. Lemann. I think "minute book" would be the more usual expression.

Mr. Olney. The journal provided for in Equity Rule 3 is different from the minute book. The minute book which the clerk keeps is just a diary of what goes on each day, and there may be the entries in half a dozen cases all in one day. Now, the equity journal is apparently a separate book, in which he keeps all orders and proceedings that occur in equity.

Mr. Lemann. Mr. Dodge suggests that in civil actions it ought to be sufficient to cover it by a general provision.

Mr. Olney. In this rule, does he make it clear that we are not attempting to limit the books to be kept?

Mr. Dobie. Well, they must keep these books and may keep any other they want.

Mr. Lemann. I think it ought to be provided for by the rule. Unless it is covered by the journal part of it, I understood Mr. Olney's suggestion to be that the minute

book shall include the journal.

Mr. Olney. The minute book is entirely separate from that.

Mr. Lemann. I think it is very desirable, in connection with any inquiries that we may make to the National Commission, that we ought to make this rule fairly explicit as to what to do. If you want to go on and provide what goes on each day in court, of course that can be done.

Dean Clark. Of course, the Department of Justice has established a statistical system which will require the clerks to be more careful.

Mr. Mitchell. I suggest that we pass this rule until we hear from the administrative department about the supplies they now furnish to the United States District Court clerks, including law cases, and tell us what they can do, and then that can be decided. Otherwise we may be upsetting them as to their supply system. They may be able to answer all these questions.

Mr. Donworth. I would like to have noted the suggestion thatat the end of the third paragraph, by order of the court, the order book and the journal may be combined, leaving it discretionary.

Mr. Sunderland. That gets away from the effort to get a standardized system.

Mr. Donworth. You see, the only difference between the order book and the journal is that the journal gives the proceedings in chambers, and the order book gives the proceedings in open court, and logically they should be combined.

Mr. Loftin. Would you have any objection to making the rule itself combine them?

Mr. Donworth. Well, if we have these rules now, which provide for separate books.

Mr. Mitchell. The stuff they have may be absolutely satisfactory.

Mr. Lemann. These rules will not go into effect for a year, I understand; and they may not have any of those supplies on hand.

Dean Clark. Of course, under the present system, they have to file a card at once, showing the case, and file another card showing the termination of the case; and that is sent down here to the Department.

Mr. Olney. We have met with this situation in California: The statute, I think, provides that in the case of motions for dismissals, that certain motions for dismissals shall be effective when entered in the minutes, and that others shall be effective when entered in the judgment book. A distinction is drawn between them, and we should avoid

anything of that sort. The minute book, so far as the proceedings of the court are concerned, is a book of first entry, to make up, analogous to books of account, and sometimes the entry there is sufficient and that is enough. In other matters, orders must be further entered in the special book. All of those things we will have to consider in connection with this rule.

Dean Clark. Does not the minute book serve a different purpose either from the order book or the journal? The minute book is the record of administrative proceedings ~~fm~~ of the court, and not tied up with the cases; because when we investigated the cases we found very often difficulty in getting the case tied up with the record in the minute book; because that was not kept for information as to the case, it was kept for administrative information as to what the court was doing, and the payment of jurors, and so on. And is not the minute book planned to aid in the administrative work and the accounting of the court itself and not as a record the proceedings in any case?

Mr. Lemann. I know. But Mr. Morgan is thinking about the question of making a record for taking the case up to the United States Appellate courts. It goes beyond the question of administration of the courts.

Mr. Cherry. And your minute book is more than a minute book.

Dean Clark. You notice that you have the docket, and the docket should contain every definite proceeding in the case. You have first the civil docket. Then you have this book which records judgments or orders, which, under the rules now is in two parts, order book and journal. Then you have a third diary, and there appears just your minute book.

Mr. Olney. But the minute book goes far beyond what the court does administratively, in California. It is supposed to cover any action taken by the court--judgment for the plaintiff and things of that sort. It is all entered there.

Dean Clark. Is it entered according to the case or is it entered according to the day?

Mr. Olney. It is entered under the day, with a reference to the title of the case, so that you can always identify the entry.

Mr. Donworth. That minute book will be kept whether we do it or not. If the court takes ten different actions in one day they are all entered as of that day. And it seems to me unnecessary to mention that universal practice.

Mr. Wickersham. Well, as has been suggested, we can find out what the actual practice is from the Department.

Mr. Mitchell. Yes. I think we can pass that over until tomorrow.

Dean Clark. In connection with Rule 4 and Equity Rule 1, you will notice that that is also in the statute, and our language would be "at chambers or in the clerk's office", is also in the statute. I do not see any reason why we should attempt to improve upon the statute. (Laughter. But I want you to have in mind that the phrase is a statutory provision, in the Judicial Code, Section 9, which is quoted right after Equity Rule 1.

Mr. Sunderland. We cannot improve the statute.

Mr. Mitchell. May I call attention to the fact that under Rule 1 it was suggested that the drafting committee prepare some rules, and that certain rules be abolished? Would it not be well to leave that to the drafting committee to attend to that?

(The motion was unanimously adopted.)

Mr. Olney. Dean Clark has gone back to Rule 4. I would like to ask in that connection if he has in mind to do anything as to the terms of court?

Dean Clark. I want to speak about that. That has been mentioned several times. We considered putting in definite terms as to the terms of court, but we thought it better not to do so. We thought it would be an easier way to take away any restrictions. So that instead of abolishing the terms and putting in definite provisions about them, what we have done is always to draw the teeth of any re-

strictions of the term.

Mr. Mitchell. That would be a wise move, because if you abolish terms of court, you would have the Congressman from that district objecting to it.

Mr. Olney. All that I am anxious to do is to withdraw the pitfalls.

Dean Clark. We have tried to do that, and if there is anything further necessary we will try to abolish the restrictions here.

Mr. Mitchell. We are now down to Rule 7. That states how the suits shall be commenced.

Dean Clark. No, that does not. Rules 10, 11 and 12 are the commencement of the suit.

Mr. Wickersham. That brings up a question. You take Rule 10 first, before going to Rule 7, which is the commencement of a civil action. Rule 10 provides:

> "Except as otherwise provided by special requirements of specific Federal statutes, a civil action is commenced by the service upon the defendant, in the manner provided by these rules, of a summons accompanied by a complaint(or by acceptance of service or appearance in the case by the defendant sufficient to give the court jurisdiction over him."

In many instances, where in order to get jurisdiction over the person you have got to act pretty quickly, and if you have a summons served on him you get him. I think you ought to have a right to begin an action by the service of a summons. That is the usual order in New York.

Mr. Morgan. First the summons, and then the complaint.

Mr. Wickersham. Yes. But it often happens that you can get the defendant that you want to sue to defend himself in the jurisdiction, but he is going to leave almost immediately. If you get a summons served on him, you have jurisdiction, and if it is an action for money, there is a summons and notice. But I hate to see jurisdiction confined entirely to where you must serve a complaint with the summons.

Mr. Mitchell. You can attach the complaint to the summons, or serve it within ten days in New York.

Dean Clark. All of this here is where lawyers are opposite in their habits. And perhaps we ought to have a discussion of the whole system--as to whether you can file a suit without filing your complaint. Rule 10 and Rule 7 are a good deal connected--but not necessarily do they all hang together. Let me say, first, Mr. Wickersham, that directly in response to your suggestion, we have Rule 14, which you have noticed probably, as to commencement of an

action where service is evaded.

Mr. Wickersham. That does not quite meet this point at all.

Dean Clark. May I say that I am quite ready to go just as far as New York does?

Mr. Wickersham. But in New York you can begin the action by serving the summons. And you can either accompany it by the complaint or you can serve the complaint later. But you get jurisdiction by serving the summons on the defendant.

Mr. Dodge. Is the action treated as begun only when service is actually made?

Mr. Wickersham. Yes; but under certain conditions the action may be regarded as commenced when the summons is deposited, and it is followed by the complaint.

Dean Clark. This Rule 14 is a good deal like the New York provision.

Mr. Sunderland. We have nothing like that.

Dean Clark. Yes, we have Rule 14.

Mr. Dodge. Our system in Massachusetts is a little different. You date your summons and give it to an officer. If you make a reasonable attempt to serve it on the defendant, the action is begun. The action is begun by delivering the summons to the officer and instructing him to make a reasonable effort to serve it.

Mr. Lemann. How about the complaint? How many States have this practice? In our State when you are sued you know what you are sued for; whereas in New York all you know is that a fellow has sued you for a million dollars. And if you wait awhile you know what it is about. And I was wondering whether we are peculiar, or New York is peculiar.

Mr. Loftin. I am just wondering how this will work out, and the lawyers will have a chance at it, and I get out of patience telling what happens in their States, and it is really a nuisance, but I do not know how to avoid it.

Dean Clark. It is one of the cases where you really do have a variation. Here is an idea of the diversities that exist. I have here a list of the States where the action is commenced by filing the complaint with the clerk--I am afraid to read it because you may say that I am wrong. But it includes Montana, Idaho, Missouri, Nevada, Ohio, and Texas.

Mr. Dodge. Those are begun by filing a complaint in court?

Dean Clark. Yes. And in these States the action is beg n by service of summons issued by the clerk: North Dakota, Pennsylvania, Massachusetts, Michigan, Ohio and Wisconsin. And in these States it is begun by service of summons by plaintiff's attorney--in Connecticut we call them

commissioners of the Supreme Court; or attorneys or commissioners--Connecticut
New Jersey and New York. And by service of notice of motions for judgment, Virginia. They just move for judgment down there. They do not need anything formal down there. I can not say that my list here is complete; but it gives you an idea of the diversity and it does show that there is a large block of States where the summons is issued by the plaintiff's attorney.

Mr. Morgan. In Connecticut, the complaint is accompanied by the summons.

Mr. Lemann. Do you get any idea of what the man is suing you for?

Mr. Donworth. Do they know that in New York?

Mr. Wickersham. You can either serve a complaint or a summons without any indication of what the action is.

Mr. Lemann. It might be a divorce suit.

Mr. Wickersham. Then the defendant serves notice of appearance, and admits jurisdiction and the complaint must be served on him in a certain number of days. Then he may answer. But the thing is that you get jurisdiction and begin the suit by serving the summons, and as I say, very often if you cannot do that you do not get the chance to get that defendant in that suit. It is a useful provision in a transient State, where people are going and coming.

Mr. Olney. What happens if the complainant does not file his complaint,

Mr. Wickersham. The defendant files and appearance containing a notice and demand.

Mr. Olney. The plaintiff is at no cost when he serves a summons upon the defendant?

Mr. Wickersham. And if the defendant does not appear in a certain time, he can take judgment by default; but if the defendant serves notice of appearance, then the plaintiff must serve his complaint upon the defendant within a certain time and he gets jurisdiction by the service of the summons.

Mr. Tolman. It can be done either by the service of a summons or the filing of a complaint.

Mr. Donworth. I do not quite agree with Dean Clark that we must make things one way. I do notthink we will get this thing through unless we recognize local sentiment. I am in favor of recognizing the New York practice as permissible.

But what I have to say bears upon another important point.

I think the rule should be substantially like this:

"Except where otherwise provided by the special requirements of specific Federal statutes not superseded hereby, a civil ac-

> tion is commenced by the service upon the defendant, in the manner provided by these rules, of a summons accompanied by a complaint, or by filing a complaint in the clerk's office: Provided, That unless service of summons has been made upon the defendant, the action shall be deemed commenced within ninety days from the date of filing the complaint."

I understand the law is pretty well settled that certain orders of court can only be made in a pending action, and that will be particularly true if we abolish the distinction between the court and the judge. I do not think John Smith can make an order except in a pending suit; and I think that to protect jurisdiction in equity and other suits, we should provide that an action shall be commenced by the service of a summons. So that I advocate that method. I doubt if the judge could issue an injunction order unless you had served the defendant; and of course, in an injunction suit you cannot serve the defendant until you get your order.

Mr. Sunderland. That would have the advantage of leaving the statute of limitations. It seems to me that this New York practice is very awkward.

Mr. Dobie. Under that provision, you have to serve him within a certain time, and if you have not served him

within a certain time it might take away the running of the statute.

Mr. Wickersham. If you serve a summons and the defendant demands the service of a complaint, and you do not serve the complaint within a reasonable time, it is of no account.

Mr. Dobie. I think that is reasonable.

Mr. Wickersham. But you do not have to serve your complaint, and very often before you can serve your complaint, you lose jurisdiction over the defendant.

Mr. Mitchell. I think we can provide that you should accompany the summons by the complaint. I think the lawyers in 20 or 30 States request that the complaint be ready before the issuance of summons; they can file a copy with the clerk, first issuing the summons alone. But the idea that a man can issue a summons, and then decide whether to sue the defendant does not seem reasonable. Is that permitted in other States?

Dean Clark. Yes.

Mr. Mitchell. You classified Minnesota as a State where you just have to issue the summons.

Dean Clark. The issuance of a summons is included in a number of States, and I read you a list of a number of States where a man was required to file the complaint also.

Mr. Cherry. As I understand it, the chief object

of the New York statute is the desirability of getting jurisdiction. This would be a Federal rule. In State cases there might be jurisdiction. He might be removed. But this would not be denying the court in New York the chance to get jurisdiction of the action, because they could still get the Supreme Court of New York.

Mr. Dobie. But in cases where the jurisdiction of the Federal court is exclusive, it would be different.

Mr. Cherry. Yes.

Mr. Wickersham. After all, the fundamental basis of jurisdiction is that notice has been given to thedefendant of the fact that John Smith has been sued. I would not surround that by any more difficulties than are necessary. The defendant has a right to appear and know what it is about. And he gets the complaint, and the case proceeds.

Mr. Mitchell. Under the Equity Rules--

Mr. Wickersham (Interposing). Under the Equity Rules you have to file a bill.

Mr. Mitchell. Yes; the court insists that you file a document.

Mr. Wickersham. In an equity case you could appeal to the chancellor; but in the common law action you have a right of action; you do not have to ask for permission; you have a right of action, and you give notice to somebody that you have this claim against him.

Mr. Tolman. I think I ought to say that by far the larger number of the committees have recommended that suits be begun by filing a complaint and causing summons to issue.

Mr. Mitchell. By the clerk?

Mr. Tolman. Yes, by the clerk.

Mr. Cherry. I can answer for the Minnesota committee, that they did not think it would appear if begun otherwise.

Dean Clark. I thought there was one difficulty in the comments of the district committees--that so many of them did not seem to have the points and the opposing ideas in mind. They were following their own habits. So that while Major Tolman is correct in his estimate, I am not sure that that is final, because it did not appear that those suggestions really weighed the objections that we have got to weigh.

Mr. Tolman. I agree with you on that but there are some of them that make a definite argument about allowing the summons to be issued by the plaintiff. For instance, Judge Chestnut distinctly evades the question and says he thinks the jurisdictional paper ought to be issued by the clerk and certified by the marshal.

Mr. Mitchell. But I wonder if he has had any practical experience.

Mr. Sunderland. I think that will arouse a good deal of antagonism.

Mr. Tolman. Judging by the atmosphere I am familiar with, I do not think anything would arouse more antagonism than to take away the right to begin a suit by the lawyer himself.

Mr. Olney. In addition to allowing the lawyer to issue the summons, there is this thought that seems to me abhorrent: That you should serve summons on the defendant requiring him to answer without knowing anything about the case, or identifying the cause of action that you have in mind. You say that you are going to sue him for $50,000, and that is all.

Mr. Dobie. He does not have to do anything.

Mr. Tolman. He finds out soon enough? (Laughter.)

Mr. Olney. Suppose he leaves the next day and does not know what it is about.

Mr. Mitchell. The trouble is that there are different problems involved. First is that question whether the summons should be issued by the clerk or by the lawyer. That is entirely different from the question whether he should have a copy of the complaint or not. There is also the question whether the complaint must be filed, or when it comes sub rosa. And it seems to me that we ought to keep those questions separate. On the question of the summons being issued by the clerk or by the lawyer, I think the committee will find that there are a very large number of States which

permit the service of summons to be made by the attorney. Now, the only objection to that is that it mightlead to irregularities. But after 30 years of practice in Minnesota, I cannot remember any difficulty having arisen.

Then we come to the question of serving a copy of the complaint; and I think it might be admitted by lawyers generally that to start a suit and serve a summons--or by filing it--you should state the nature of your complaint. The idea of serving the summons, and if the man defaults you can then decide what your cause of action is is a rather shocking idea. It may have worked well.

There is another thing: When it comes to a requirement to file a complaint, whether it has to be filed or can be served without filing. I think it is of vital importance that there should not be a requirement that it be filed in cases where the parties do not desire to have it published. You could have a complaint in the hands of the lawyers, and possibly compromise cases like that. And it has always seemed to me that the requirement to file a complaint and make ~~it~~ a public record so that you cannot draw back and settle it and keep the thing from the public is a rather unfortunate situation. Those are my views on these points. I think we ought to take them up separately. I think you ought to decide first whether the summons can be issued by the clerk or may be issued by the lawyer.

Dean Clark. Then there is the additional question of whom shall serve it?

Mr. Mitchell. Yes.

Dean Clark. And while not absolutely connected--though not far away--there is the question of serving the pleadings.

Mr. Wickersham. There was a rule in New York that pleadings must be iled with the clerk within ten days after the request to file is served by the opposite party. If you have served the complaint and do not file it, the defendant may give notice to file the complaint. And therefore, you must file the complaint or it will be dismissed.

Dean Clark. As I understand it, the Federal district judges are now individually trying to establish a rule requiring the filing of the pleadings.

Mr. Wickersham. Yes, they are, but it is very hard to enforce it. In many cases the parties do not want to have it spread upon the record for the press and others to see it.

Mr. Lemann. In that case they are not required by law to file pleadings.

Mr. Wickersham. There may be a stipulation that they will dismiss the suit after the pleadings are filed.

Mr. Lemann. Then a suit was never brought. It is like a separate suit in an incipient stage.

Mr. Wickersham. What you do then is to file an order of dismissal, and that must be done on the record. And that settles the question whether that suit was disposed of or is still pending. But some shyster lawyer might try to get in a claim that there was a suit, and very often the defendant will want a record of the suit.

Mr. Lemann. Why is that the judges had a hard time getting the pleadings filed in a case pending?

Dean Clark. In the Federal District in New York they have a rule requiring the filing.

Mr. Mitchell. Suppose you bring a suit and prior to the issuance of summons there is a pending suit. When the party is ready he files the notice of trial with the clerk, which makes a record in the clerk's office and places the case on the calendar. In that case the rules require that the pleadings be filed. And sometimes they are not filed until the case is ready for trial.

Mr. Lemann. They have to file it within a certain time.

Mr. Wickersham. When they come to judgment they must file the pleadings.

Dean Clark. The Federal District judges have tried to establish a rule requiring filing pleadings at once, and the Federal rule is different from the State rule.

Mr. Wickersham. Well, it is more honored in the breach

than in the observance.

Dean Clark. Yes. I had a talk with Judge Knox about that.

Mr. Lemann. If the Federal judges could do what they are trying to do, it would require the complaint to be filed when the summons is served.

Dean Clark. Or a short time thereafter. But it will not greatly different under this.

I wonder under the New York rule of keeping pleadings concealed how long you could do it? If you do it for 20 days, as provided in these rules, would that not be enough? What I suggested is a compromise between the New York provision and the requirement of starting suit by filing the complaint with the clerk. And under these rules you do have to file a complaint, but not within 20 days. But when the case is supposed to be ready, it has to be served. Gen. Wickersham, do you think that is too great haste?

Mr. Wickersham. No, I do not mind that. But my point is that the summons ought to be tied up with the complaint, and I think in the Federal practice it is easier to accomplish that than in the State courts. After all, in New York when you file a complaint it is practically lost. It does not make much difference whether it is filed or not; but nobody objects to that.

Mr. Lemann. Well, how about the other States besides

New York that permit a suit by the service of a summons? Is that true in Minnesota?

Mr. Mitchell. You have in Minnesota the summons issued by the lawyer, and at the time of the service of the summons you either file a copy of the complaint with the clerk, or attach it to the summons, so that you cannot issue process there to bring a man into court without having stated your cause of action and having it attached to the summons and filing with the clerk. You have to state the nature of your demand.

Mr. Dodge. Massachusetts goes a way beyond that.

Mr. Tolman. What do you do in Massachusetts?

Mr. Dodge. Because we can not only start a suit, but we can get an attachment against the defendant, and the defendant cannot know for three days what it is all about. That is in an action at law. A suit in equity is begun by putting up a bond with the attahment.

Mr. Wickersham. Is that bond not filed with the summons?

Mr. Dodge. No, but the summons contains the facts stated in the writ.

Mr. Donworth. Does not your writ start before you start any of those things? In New York they write out the complaint four or five days after they serve the writ. And the plaintiff is committed before he issues this attachment as to what he is charging the defendant with.

Mr. Wickersham. We cannot attach in New York except on an affidavit setting forth the cause of action and giving a bond.

Dean Clark. Mr. Moore is making list of the requirements of the different States.

Mr. Lemann. I suppose when they started it in New York it was quite unusual. Where did you get the thing in New York? Was it the practice in New York when you came to the bar to sue a man without telling him what you were suing him for ?

Mr. Wickersham. I think it has always been done.

Mr. Lemann. Is it the English practice?

Dean Clark. It is the English practice, but they state the nature of the case.

I should think under the New York practice the only thing to do would be to serve and find out later whether you want to go ahead.

Mr. Wickersham. Well, of course, we are now making common law rules, and if we attempt to go too far from common law procedure which is recognized and has been in force for a long time, you will have a lot of opposition. Theoretically, why should not a suit be begun by summons so that jurisdiction is obtained over the defendant? Then the complaint must be served within a reasonable time. But after all, the beginning of the suit is notice that the claim has

been made in that particular court. It seems to me that the beginning of suit ought to be facilitated, rather than be surrounded with technicalities.

Mr. Lemann. Well, if you want to sue a man--there are not so many cases on the subject; but it seems to me the remedy is worse than the disease. I do not know what the Congressional lawyers will say on the subject.

Mr. Wickersham. I do not know the exact language of the/rule. New York

Mr. Mitchell. You wait to see whether a man defaults, and if he defaults you can fix up a cause of action.

Dean Clark. I have read you a list of States where the summons can be issued without the complaint, including Massachusetts, Wisconsin and others. And I gave a somewhat larger group where it was required to be issued with the complaint. May I make two or three suggestions. I am a little hesitant about saying anything too definitely, because often there are alternate provisions.

Mr. Lemann. Neither alternate would permit you to dispense with the complaint.

Dean Clark. This is a kind of problem that is close to the lawyer's heart, and I did not want to have much trouble about it, because, frankly, I do not think you will have much trouble about it if it works. It has been assumed that it is important when the suit begins that you serve the com-

plaint if you are going to attach. And later on we made a provision trying to restrict the proceedings in the case of provisional remedies. But further than that, I hope that we do not get in a situation where we are offending the local bar and upsetting the local practice. That is the problem I referred to somewhat earlier.

Mr. Mitchell. Here is Rule 11 that the summons must be directed to the defendant and served on him and requires the defendant to file his answer within 20 days after the summons. Now, where is the requirement that he must serve the complaint?

Dean Clark. Rule 10.

Mr. Morgan. In those rules you talk about summons, and not summons and complaint.

Mr. Wickersham. This is predicated upon the thought that the complaint shall follow.

Mr. Lemann. I have never heard of any complaint of the practice of beginning suit by the service of summons without complaint.

Mr. Wickersham. I never heard any criticism of it, but I think you would hear criticism if you tried to abolish it.

Mr. Lemann. You would have complaints if you tried to abolish it?

Mr. Wickersham. How is it in California?

Mr. Olney. You are required to file your complaint before you could get your summons, and to serve with the summons a copy of the complaint.

Mr. Lemann. As a matter of fact, there are not many cases where that cannot be done.

Mr. Wickersham. I do not know what the rule now is in Pennsylvania.

Mr. Mitchell. What is the rule in your State, Mr. Donworth?

Mr. Donwort . You have the option of beginning the suit either by filing the complaint, or serving the summons with the complaint without filing, and as I say, I think that option should be preserved for a number of reasons. But on this specific wuestion of the New York practice, I am disposed to do whatever will get the most votes.

Mr. Dodge. That practice is also followed in Minnesota.

Mr. Morgan. I think Wisconsin is the same as Minnesota.

Mr. Mitchell. And Iowa is about the same. A summons is issued with the complaint and you can either serve it or file it.

Mr. Morgan. I think that North Dakota and Wisconsin a re the same as Minnesota.

Dean Clark. When you say there are not half a dozen

States permitting the attorney to do it, I think you are confusing the two. Do you mean there are not half a dozen States that permit the attorney to serve the summons without the complaint? If so, I think you are not correct about that.

Mr. Donworth. It is very customary to serve the summons without the complaint.

Mr. Wickersham. I think that is the substantive form of the New York summons.

Dean Clark. The only thing is that we should provide for the service of complaint with the summons. As a matter of act, that is not really concrete, because there are several alternate forms.

Mr. Lemann. Where the distinction between law and equity is maintained, it is generally the practice to begin an equity suit by filing a complaint, is it not?

Mr. Wickersham. Yes.

Mr. Dodge. Yes.

Mr. Wickersham. You could not begin a suit in equity without filing a bill of complaint.

Mr. Olney. How about the State courts?

Mr. Wickersham. The State court, that is what I am talking about, the equity procedure. It is the old chancery practice.

Mr. Dodge. In the State court can you begin an

suit by mere service upon the defendant?

Mr. Wickersham. Yes.

Mr. Mitchell. Yes.

Mr. Wickersham. The judicial position, Mr. Chairman, is whether the summons must be issued out of the court in first instance, or, whether the lawyer can issue it.

Mr. Mitchell. Yes.

Mr. Wickersham. Because if it is provided that the summons must be issued out of the court, then you must go to the clerk's office, and if it is closed, you have to wait until the following day.

Mr. Mitchell. Then suppose we take up first the question whether the summons must first be issued by the clerk or the court, or whether the attorney can issue it.

Mr. Donworth. I move that we approve the signing of the summons by one of the attorneys.

Mr. Dodge. Is that in the alternative or the only way?

Mr. Mitchell. It is the only way.

Mr. Wickersham. You say it is the only way?

Mr. Mitchell. Yes.

Mr. Wickersham. Why not have the alternative? Why not allow it to be done either way?

Mr. Donworth. I think our statute allows it to be done by the plaintiff himself or the attorney always; never

by the clerk.

Mr. Mitchell. If there is no further discussion, all in favor of that motion will say "aye"; those opposed "no."

(A vote was thereupon taken, and the motion was adopted, all members present voting "aye" except Mr. Loftin.)

Mr. Mitchell. The nest question is whether the complaint can be either filed or served with the summons.

Mr. Donworth. I move that the manner of commencing an action be optional with the plaintiff, either by the filing of a complaint or the serving of the summons; that the two methods of beginning an action be maintained, namely, either by filing in the clerk's office or serving the summons.

Mr. Wickersham. In the latter case, you would have to have them follow it by the filing of the complaint in a reasonable time.

Mr. Donworth. You are quite right. But I mean there are two methods of beginning an action, by the filing of a complaint or the service of a summons. What shall be left in the summons we can take up afterwards.

Mr. Olney. In California you are required to follow it up within a year or it will be dismissed; but the action is commenced for all purposes when the complaint is filed; otherwise the statute of limitations runs.

Mr. Wickersham. That is usually followed up by a requirement of the service of the complaint within twenty days, or some reasonable time.

Mr. Olney. Is that not a question of when a suit is commenced?

Mr. Mitchell. Can we not consider that later? It seems to me that the question of the statute of limitations is a separate and distinct question. The question I have listed here is the question whether the complaint has to be ready when the summons is issued--in other words, either filed or served. That does not involve the question of what constitutes an action.

Mr. Olney. I move that the complaint may be filed with the clerk or else served with the summons.

Mr. Dobie. I second the motion.

Mr. Mitchell. Do you want to discuss it?

Mr. Cherry. That is opposed to the New York practice.

Mr. Wickersham. Yes; that is opposed to the New York practice.

Mr. Mitchell. I think you will find that the court will be reluctant to turn you loose with a summons without any complaint, on the ground that, under the Equity rules, they are required to be filed, and under the statutes generally, it requires some formal action by the court.

Now, the motion is that the rules provides that, when

the summons is issued, simultaneously with that the complaint must either be filed or a ttached to the summons for service.

Mr. Donworth. Do you mean exactly that?

Mr. Mitchell. I mean precisely that.

Mr. Donworth. You said "simultaneously."

Mr. Mitchell. Yes. What is your pleasure about that? All in favor of the motion will say "aye"; those opposed "no."

(A vote was taken and the motion was adopted, all the members voting "aye" except Mr. Wickersham.)

Mr. Mitchell. Now, you get down to the question of who serves the summons--whether it shall be served by an official, or by--

Dean Clark(Interposing). Either by an official or by any person.

Mr. Wickersham. I move that it be either by an official or by anybody.

Mr. Morgan. I second the motion.

(A vote was taken and all the the members voted "aye" except Mr. Loftin.)

Mr. Mitchell. That brings us ~~down to the question~~

down to the question of what, under this system, constitutes the commencement of the action , as suggested by Mr. Donworth.

Mr. Donworth. That was not my question. UnderRule 10 as written no action is commenced until you get hold of this man. I think it is very important to have an action pwnding for the purpose of various provisional remedies, before you get service on the defendant. Now, I think that embodies what we voted for without any further motion.

Dean Clark. I would like to comment on that. It is the system in many States. I do not know what need there is for it. The starting of a suit is important in connection with the statute of limitations. The idea that a man can stick in a summons and then wait a year is bad. It occurs to me that Rule 14 was intended to take care of the limited class of cases where service is evaded; but the idea that you can, when you have a weak case, and have waited six years, you can commence suit by filing a complaint, is not good.

Mr. Morgan. Is there not a provision in the present statute of limitations delaying the time when the defendant is absent from the State; so that there is no reason for any special provision?

Mr. Donworth. I do not care anything about the statute of limitations. I had just as soon put in that the preventing of the running of the statute of limitations is actual service. What I want is to have a suit pending when you go

to the judge for an order. I do not see how any question can be raised about that. If I go to the judge without having a suit pending, I do not think he has any jurisdiction.

Mr. Mitchell. Why not follow the system that has been adopted, that the action shall be commenced when the summons is delivered to the marshal for service, whether it is served or not? And under this rule you have provided that except where otherwise provided by special requirements of statute, a civil action is commenced by service upon the defendant, in the manner provided by these rules, of a summons accompanied by a copy of the complaint, or the filing of the complaint.

Mr. Lemann. That is in the alternative--either way, is it not?

Mr. Donworth. Yes.

Mr. Lemann. We have certain classes of action where the parties sometimes wait for a year, without being subject to reproach, where it is difficult to get service; and they interrupt the statute of limitations by the filing of summons; and that is the important test. Of course, if you have not actually served your summons, you have not anything to bring the man into court, and I think you ought to be required to serve it in a certain length of time.

Mr. Mitchell. Is it not enough to meet Dean Clark's suggestion to provide the following rule, that is in each and all the seven States under this very system, and you have

just approved that in the United States courts you want the suit to commence either--for the statute of limitations, provisional remedies, and so on, your suit can be commenced either by actual service or by filing the complaint and delivery of the process to the marshal; and you put the marshal in charge of the summons and he can serve it and serve it at once; and you are to have the benefit of that, although does not succeed in getting service for a week. And that is the system they follow, and it meets the objection that you do not have to have a pending suit.

Mr. Morgan. You do not have to have it for a year, though, do you?

Dean Clark. Well, in this case, must it be made by the marshal.

Mr. Mitchell. In order to have the suit commenced. It does not commence suit to have the lawyer issue it.

Dean Clark. Suppose he does not deliver it?

Mr. Mitchell. If he does not deliver it to the marshal or sheriffand depends a private person for service, the suit is not commenced, but if he wants to have his action started he delivers it to the marshal or sheriff and it is commenced.

Dean Clark. Does not the marshal have to serve it at this time?

Mr. Mitchell. That is another question, if he does not serve it within a reasonable time.

Mr. Lemann. What do you gain by having a private individual serve it?

Mr. Mitchell. If the private individual actually serves it suit is begun when he serves it. But suppose you want the suit commenced right away, either because of the statute of limitations to get a temporary restraining order, you file it with the marshal or sheriff, and that commences the action the same as actual service by a non-official person. There is no difficulty about that. The reason I am urging it is because of the other resolution you have just taken up.

Mr. Dobie. The New York rule is that you must get service in sixty days.

Mr. Wickersham. Or you can begin substitute service by publication.

Mr. Donworth. It has always been the law that you can not get your injunction without personal service.

Dean Clark. I must agree with Mr. Dobie that in New York they do it right along. In New York you get a restraining order. I do not say you can get a real injunction, but you can get a restraining order without commencing the action. And I think the only real vital purpose of it is as to the running of the statute of limitations, or something like that. It is not necessary, I think, in connection with anything commenced with the suit proper. Any of these suggestions--I do not object to what Mr. Mitchell suggested, but any of

these methods, as I see it, extends the statute of limitations for a slow-moving thing.

Mr. Wickersham. It may not be a slow-moving plaintiff; it may be an evasive defendant.

Mr. Dobie. That is what I am afraid of; an evasive defendant.

Mr. Mitchell. When a files a suit and hands it to the marshal , he has done the best he can, and if the object of that is to save his cause of action, the defendant has no ground of complaint.

Mr. Wickersham. The only thing about that is that it must be followed up with actual service, or saving that, the beginning of substituted service by publication.

Mr. Mitchell. I think we will come to that later.

Dean Clark. I think this is really a substitute Rule 14, is it not?

Prof. Sunderland. That is covered by an alias writ.

Mr. Wickersham. Yes. Of course the waiver of jurisdiction depends entirely on citizenship. The only way you can bring in the defendant if he stays out of the jurisdiction is to enforce some lien, and then constructice notice must be given to him.

Prof. Sunderland. If he has any property there you can attach that.

Mr. Wickersham. Yes; but in case you cannot get ser-

vice on the defendant you must begin proceedings for substitute service .

Mr. Mitchell. In Minnesota it must be done within 60 days.

Dean Clark. There is very little service for publication in the Federal districts.

Mr. Wickersham. That is what you want for establishing liens.

Dean Clark. You would not get jurisdiction there.

Mr. Dobie. Federal courts do not issue attachments ordinarily.

Dean. Clark. Yes; you will not get jurisdiction.

Mr. Wickersham. Not unless you went further.

Mr. Dobie. And that statute has very drastic provisions, and is limited to where there is a preexisting lien before the beginning of the suit. For instance, you cannot condemn property where there is no claim in advance of the suit.

Dean Clark. But I think what Mr. Wickersham has in mind is that in the State procedure, if you cannot get the defendant you can get his property. But I understand that that is not true in the Federal jurisdiction.

Prof. Sunderland. Those are important cases.

Dean Clark. Yes, those are important cases, but it is a lien case.

Mr. Wickersham. Before foreclosing a mortgage in the

Federal court, suppose you have brought a suit but you can not get jurisdiction over A, B, or C, who have a vested interest and are not within the jurisdiction--you can issue your summons and require them to answer the complaint. Now, you must have some provision for serving the summons by substitute service, and you will get complete jurisdiction for the purpose of that suit.

Dean Clark. Yes, perhaps we are in accord on that; but I thought you might go further and say, "I want to sue you for an automobile accident."

Mr. Wickersham. No, I did not mean that at all.

Dean Clark. I beg your pardon.

Mr. Wickersham. I had in mind the Federal jurisdiction.

Mr. Lemann. There must be some method of commencing suit other than by attachment.

Mr. Wickersham. That commencement suit is to be operative as a commencement unless you go further and complete your substitute service within a certain time.

Mr. Dobie. Of course, in attachment cases there is less removal.

Mr. Dodge. That amends Rule 10.

Dean Clark. It would amend Rule 10, and I think it would amend Rule 14, by striking, possibly, all of it out and putting it all in Rule 10; but the only thing that would be left of Rule 14 is that where service is made, where the

suit is commenced by filing the complaint and delivering the summons to the marshal, service must be made upon the defendant within 60 or 90 days, or whatever the provision is. That is, it would modify both Rule 10 and Rule 14.

Mr. Dodge. It might all be embodied in Rule 10.

Prof. Sunderland. But there is no provision for the statute of limitations, and it might very well be that you would lose your suit.

Mr. Mitchell. Of course, if a man is outside the jurisdiction the statute would not run.

Dean Clark. As to the way of using the summons, we have provided that you may leave it with somebody, an adult person.

Mr. Lemann. The only difficulty is that when a man has no home, and you do not know whether he is a non-resident.

Mr. Wickersham. That is a very common case.

Mr. Lemann. So that you might wait two years before starting your suit.

Mr. Wickersham. No; the jurisdiction becomes exclusive and for the purpose of vesting title to property under publication, you go ahead and complete your publication.

Mr. Lemann. No, I am not talking about a, as to serving the defendant in person, but b, by handing it to the marshal, provided the marshal serves it in 60 or 90 days. Now, if he does not serve it in 60 or 90 days--

Mr. Wickersham (Interposing). Then you can get it by

publication.

Mr. Lemann. Not with a non-resident.

Mr. Wickersham. You are out of luck there.

Dean Clark. That can only be a limited number of cases. It is a very rare case.

Mr. Wickersham. It is a case of the "Forgotten Man." (Laughter.)

Mr. Lemann. In my State you hand it to the marshal, and then leave it to the marshal to say whether it is 60 or 90 days. That would take care of the case.

Mr. Morgan. You might issue just one alias writ after another, like at the old common law, and if you do not get him in 60 or 90 days you are out of luck. You have loafed too long.

Mr. Olney. We could provide that the action is commenced either by serving the defendant and giving him a copy of the complaint, or else by filing the complaint and delivering a copy of the summons to the marshal for service; and provided that the summons shall be served within 60 days, unless returns that he is unable to find the defendant within the jurisdiction, in which case, upon proper cause shown, the court may permit a longer period for service. You could cover the thing in that way. And that is really what I think the idea of these rules was.

Mr. Dodge. Is that not a very good suggestion, to give

the court a little leeway to extend the time? The marshal might find that this man had gone to Europe, and is coming back next week.

Dean Clark. Now, suppose it was Judge Wickersham, and he is in New York, and say he never comes to Connecticut, and is sued there.

Mr. Olney. It depends on the court extending the order. If it appears that Gen. Wickersham is in New York and in the ordinary course of things is not coming to Connecticut, you could not sue him in Connecticut.

Dean Clark. Well, the absentee provisions of the statute of limitations cover all of that.

Mr. Lemann. Yes, I think by the rules we have given him all the protection he needs.

Mr. Mitchell. Will you put that in the form of a motion?

Mr. Olney. Yes, I make that motion.

Mr. Lemann. I second it.

(A vote was thereupon taken, and resulted in a vote of 6 for the motion and 6 against.)

Mr. Mitchell. There is a tie, the vote being 6 in favor

of the motion and 6 against it.

Mr. Wickersham. The Chairman has the deciding vote.

Mr. Olney. I did not get the objection to it.

Mr. Morgan. I think it is extending the statute of limitations too long. I think the statute of limitations takes care of these case, and there is no use extending the rule to cover rare cases.

Mr. Lemann. I think you gentlemen have a longer statute of limitations than we do in our section of the country. We have a sutatute of limitations of six months.

Mr. Morgan. Six months. I think the statute of limitations incases of false imprisonment is six months.

Mr. Lemann. All torts are six months with us.

Mr. Morgan. He has to plead the statute of limitations, and he has to prove that he has been there.

Dean Clark. He has sixty days; so we will not vote against that.

Mr. Morgan. How long is a judge going to extend it? Is the judge going to extend it for a year?

Mr. Olney. The judge will extend it as long as may be necessary.

Mr. Morgan. That means that the judge can open the statute of limitations.

Mr. Dobie. I do not think that man would have much of a kick coming to him.

Mr. Olney. It means that the judge can void the statute of limitations.

Mr. Cherry. It means not only that, but it means that a man may evade it; he may be in one jurisdiction but his home may be elsewhere.

Mr. Olney. I will say that in the Western States the statute of limitations is frequently very short.

Mr. Donworth. The laws of the several States shall govern.

Mr. Wickersham. Yes; but you cannot by a rule of the Supreme Court override statutory limitations.

Mr. Dobie. There seems to be a limitation that suits shall be commenced within the statutory period.

Mr. Wickersham. Then those statutes contain provisions that, for particular purposes, the action shall be deemed to be commenced by delivering the summons to the marshal, provided that is followed up by personal service or filing in the court, under the alternative provisions of the statute. But I do not think the Federal rule in the procedure here that we are working on could override the provisions of the statute, except with regard to limitations.

Mr. Mitchell. Well, I am going to put the question again. Major Tolman did not hear it, and did not vote on it; and after further consideration, I think I will go back to the idea of 60 or 90 days, as used in the Western States, and

that that will be satisfactory.

I hesitate about bringing in the rules a scheme by which the judge has to take proof whether an action is pending or not. Maj. Tolman, you did not hear the motion. Will you state it again please, Judge Olney.

Mr. Olney. I make the motion that an action be commenced either by the serving of the summons accompanied by a copy of the complaint, or else by filing a complaint in the court and the issuing of a summons to the marshal by the court for service--with the further proviso that the service by the marshal take place within 60 days, unless the marshal returned that he was unable to find the defendant within the jurisdiction of the court, in which case the court, for good cause shown, might allow additional time for the service.

Mr. Mitchell. The whole point about it is whether the court should have the power to extend the time after the 60 days is up.

Mr. Wickersham. Well, is there not a question there of power? Can the court--and that means, unless Judge Olney covers that a little more definitely, by providing for alternative methods of service, by publication, or service by an order of the court without the State, that would be overruling the statute of limitations. I do not think you can provide by rule for a change of a limitation provided by an act of the State.

Mr. Lemann. We are just assuming that their law will interrupt the statute. I think directly we have no control over the State law.

Mr. Wickersham. Most of the States statutes contain a provision for avoiding the running of the statute, by constructive service, one way or another. Now, should we attempt by these rules to override whatever provisions are contained in the statutory laws of the various States respecting the limitation of the time of beginning an action, which include provisions for the absent or elusive defendant, and getting at him under certain circumstances in some other way than by personal service?

Prof. Sunderland. If we have power to give the marshal 60 days, we have power to let the court extend the 60 days.

Mr. Wickersham. Perhaps so, but I am in some doubt about that, because I doubt if any State--

Mr. Mitchell (Interposing). Whatever we do here will have no effect upon the State statute of limitations at all.

Mr. Olney. I had no idea by my motion of changing the method of constructive service at all. I want to point this out: As this rule was stated, the action would actually be commenced when the complaint was filed and the summons was delivered to the marshal for service, and the statute of limitations would be set aside immediately as long as that suit lasted. Now, the requirement of service by the marshal

within a certain length of time is not one that directly affects the statute of limitations at all. It is one that means that the suit sill be dismissed and fail unless service is had; and all the court does in a case of that kind is to extend the time for service and preserve the pendency of the suit.

Mr. Wickersham. The whole purpose we are ~~stressing~~ discussing now is to avoid the bar of the statute of limitations--the statute of limitations providing that suit must be brought in a certain cause of action within five or six years or whatever it is. Now if the Federal law should say that an action should be deemed commenced by delivering a copy of the complaint to the marshal's office and the marshal might never deliver it to the defendant, yet, that would bar the ~~action~~ statute. I do not believe that ~~that was intended~~ it would.

Mr. Olney. Certainly it ~~is not intended~~ would. There is no due process in connection with the statute of limitations. The ~~beginning of the statute of limitations~~ question of due process does not come in.

Mr. Dobie. I do not think there is any question of due process of law.

Mr. Wickersham. Suppose that two years later the marshal finds the man and serves summons upon him.

Mr. Olney. Well, if the statute provides that the action is commenced when the summons is served--

Mr. Wickersham(Interposing). I do not think you can override the statute. For the purpose of deciding rights in specific property within the jurisdiction, you may, perhaps, do it. But I do not believe you can override the statute of limitations. by putting it in the hands of the marshal.

Mr. Olney. Well, you are looking at the statute of limitations as a specific right. That is true as to property, but when it comes to the statute of limitations, that is merely that a man cannot be sued.

Mr. Wickersham. Well, when is he sued? The mere fact that a paper is served on him or filed in a public office, of which he has no notice, is not beginning a suit.

Mr. Olney. You will find that in the Code States they provide that an action is commenced when the complaint is filed. The statute of limitations depends on that, and does not depend on the time of the service upon him.

Mr. Wickersham. I do not agree with that.

Mr. Mitchell. It seems to me that we are attempting to decide whether Congress has the power to prescribe the statute of limitations, but what we are trying to do here is to provide when the statute begins under the State statute. That is an idea of adopting the State statute, and if we can say anything as to when an action is commenced, it will have no effect on the State statute if we make it 60 days or whatnot. So that the argument extends to the power of the court

to extend the time based on the limitation of the power of Congress, when it comes to the question of 60 days.

Mr. Wickersham. That brings up the question of whether the right to plead the statute of limitations is a substantive right. If it is we cannot alter it.

Mr. Dobie. I think it is a procedural one, and it is always governed by the law of the forum.

Mr. Wickersham. By the law of the State of the forum.

Mr. Dobie. Yes.

Dean Clark. That does not constitute due process of law.

Mr. Dobie. In the case of Campbell vs. Hull, they held that it was all right to extend it.

Mr. Mitchell. That is a question as to whether we shall let it stand at a fixed period, or whether we shall give the court power to extend it. That is the question involved.

Mr. Olney. I think what we should consider is that what we are doing here isto provide that, as to the defendant that cannot be found--we will say the plaintiff cannot find him--the plaintiff may bring his action by filing his complaint and handing the summons to the marshal. And then we are going further and requiring that that action be dismissed unless the marshal finds him in 60 days, under any and all circumstances.

Mr. Mitchell. Well, it is the law generally, and I do not know of any cases where the court may extend the time.

Mr. Olney. You are putting on a new law.

Prof. Sunderland. In Illinois and Oregon if you have made diligent attempt to get service and have not been able to do it, you can get a new summons.

Mr. Wickersham. How long does that run?

Mr. Morgan. It is the old common law method. You can get as many as you want.

Mr. Lemann. In my State on the service of a summons there is no time limit.

Mr. Wickersham. Well, as I recollect our statute I think it requires service to be made by the marshal in really some reasonable length of time, 60 or 40 days, and then it is considered as dating back to the delivery to the marshal for service.

Mr. Mitchell. What happens if you do not get service?

Mr. Wickersham. Then you are out of luck. You have not avoided the statute running. But I am rather questioning whether we could by rule practically indefinitely extend the time of limitations fixed by the State law.

Mr. Olney. What we are doing is not so much that, as to provide that you must serve in 60 days or the suit is dismissed.

Mr. Wickersham. That is true, unless you get another one.

Mr. Olney. It seems to me that is a very short time.

Mr. Tolman. There is one other thing that should be considered. These State statutes all of them provide that the

statute of limitations shall run against a cause of action unless suit is brought within a certain number of years. I do not know of any State where the statutory provision defines what constitutes a suit. In Illinois I think the rule is that the filing of the declara tion or complaint or delivery of the process to the sheriff for service is the commencement of the suit; but that is not a part of the statute. Now, it seems to me that an adequate treatment of this matter, within the power of the Supreme Court under this statute, is to define what is the beginning of the suit in the Federal court. That seems to me not to be an act that affects any State action. And therefore it seems to me the suggestion about extension is not necessary. It is possible here to make a rule that the suit shall be begun by the filing of a complaint and the delivery of process to the marshal, with instructions to serve the same.

Mr. Wickersham. In some of the States, New York particularly, the statute provides that under those circumstances the process which you put in the hands of the sheriff ~~may~~ must be served within a certain length of time. In other words, the statute of limitations would be highly illusory if it could be extended indefinitely simply by putting a summons in the hands of the official, to lie there three or four years.

Mr. Olney. I can assure you that the provisions that we have in California have not worked that way.

Mr. Wickersham. Your suggestion seems entirely proper, that it must be served within 60 days, or some reasonable time; then suit shall be regarded as begun.

Mr. Olney. We have very liberal provisions in California for obtaining service or extending the time of service in those cases where you cannot find the defendant, and particularly where he is seeking to evade service; and I know of no instances in which those liberal provisions have operated to unduly extend the statute of limitations, or where there has been any difficulty in that way about it at all.

Mr. Donworth. I will vote against Judge Olney's motion. I think I appreciate the value of State statutes. The statute of limitations is passed by the State as a matter of strict local policy. There is a good deal of jealousy about the Federal judges infringing upon the power of the State; and I therefore hesitate to give any discretionary power to a judge upon this matter; and the extent to which courts in modern cases may go is not a technical defense but a meritorious defense. We can fix a reasonable time for the service of the summons, and if the defendant is not served and the plaintiff loses his cause of action, it is a question of the policy of the State, fixed by the local authorities, by a method approaching unanimous consent. What do you think about that view?

Mr. Olney. We are not here concerned with the statute

of limitations. And this rule gives the judge no authority as to the statute of limitations. The rule that I suggest is merely that we do not have so short a period as 60 days within which service has got to be had upon the defendant, whether you can find him or not, or else your action fails or is dismissed. That is too short a time to get service upon the defendant. Its effect upon the statute of limitations is merely incidental. But the thing you are doing here, if you put on that 60-day limitation without anything further, the plaintiff has got to find and the marshal has got to serve the defendant within 60 days, or the action just passes out.

Mr. Mitchell. It does not pass out. His cause of action does not disappear.

Mr. Olney. Well, he can start another one.

Mr. Mitchell. So that it brings you back to the statute of limitations. There is no great harm done, as long as the plaintiff delivers his summons to the sheriff, and if you cannot get service within 60 days he must start again. Now, I am excluding the statute of limitations, because the judge said it was a secondary matter.

Mr. Olney. Now, he says that is a very short period. The statute of limitations in our State provides that it shall be interrupted by the commencement of an action.

Mr. Lemann. No, it does not read that way. The statute simply says that if no action shall be commenced within a year.

Mr. Olney. Well, that brings up again when you must file in order to avoid the statute. He can go into the State court and file his papers and he is protected against the statute. And it is in effect saying, If you put it this way, that I will not be able to go into the Federal court as I can into the State court. I have got a six-month statute, and I bring my suit at the end of five months, and I cannot find this man within 60 days, and I have not any chance in the Federal court. Because the first suit is out of the picture; and there is a question in my mind--I know there are a number of States in the same position as California--whether allowing the judge who might be hostile to make a cast-iron rule, that would cause hardship.

Mr. Morgan. How many cases would there where he could not bring his action in the State court?

Mr. Lemann. I could not say. I think we are talking about something that is not of enough practical importance to justify it. I do not think the thing that Judge Olney has in mind is very important. I do not think we will make much of a mistake whichever way we vote.

Mr. Cherry. But you have this condition in those States where the statute provides 60 days, as Judge Wickersham said, as the time within which you must get service by service or publication, That the sentiment as to the local policy would be inoperative if the Federal judge could extend the time.

Mr. Lemann. I do not think in those cases the judge would be likely ~~to~~ to extend the time. He is apt to be pretty close. I think we ought to give him discretion.

Mr. Mitchell. Well, suppose we vote upon the question. All in favor of giving this judge the power to extend the time will raise their right hand.

(A vote was thereupon taken and resulted in a tie vote of 6 to 6.)

Mr. Mitchell. The vote is 6 to 6. The Chair has the deciding vote. I will vote "No."

Mr. Lemann. How does the question now stand?

Mr. Mitchell. The matter now stands that suit shall be commenced when summons is served upon the defendant, or when the summons is filed and delivered to the marshal for service, provided service is completed by the marshal within 60 days. The only thing that is dropped is the provision for extension upon cause shown.

Mr. Donworth. Are we going to adopt the provision that when service is by the marshal's office the suit shall be filed?

Mr. Mitchell. That will be a question that will come up later.

Dean Clark. Yes.

Mr. Donworth. I thought while we were on that subject we might consider it now.

Mr. Mitchell. When a case is ready for trial it ought

to be tried. That is the usual provision.

Dean Clark. The rule before you cover that, in Rules 15 and 16. Rule 15 deals with the summons alone, and has the provision that it shall be returned as promptly as possible and not less than 7 days after the service. Rule 16 provides for an alternative. That is, on the draft before you we have separate filing of the two, somewhat on the theory that it is more convenient. Suppose the marshal is in another part of the State trying to serve still other defendants. Then we require the attorney in effect to file the complaint. Originally wehad tied up the filing of the summons and the complaint together. But ~~when~~ then the suggestion was made that, as a matter of convenience, you might provide difficulty in that way; so Rule 15 provides for the summons and Rule 16 provides for the complaint.

Mr. Mitchell. I would like to ask, where it is possible to commence suit by attaching a copy of the complaint to the summons, why it is required that it should be filed? I made the point a moment ago that ~~you could~~ by this method of having the lawyer serve the summons you could make it possible to keep it out of the public eye and compromise and settle the matter. And if that is so, why should it not be sufficient to require proof of service ~~and~~ of summons and all of that, at least where it is by a private party--leave that until we go to court for something--notice, or note of issue or something of that kind. Your rule makes

it incumbent f r the parties to dispose of their difficulties practically at once.

Dean Clark. Well, of course, what you stated is what is permitted under the New York system. What we try to do here is to have all proceedings be in the court, beginning with the time stated in the summons for the answer. You will recall that the summons requires the answer within 20 days. And the thing here is that the pleadings are in court, all pleadings are with the court, and the clerk has them all. Now, we suggested that as the most orderly procedure all the way through.

Mr. Morgan. Rule 7 comes in on this. If you are not to follow this systen, Rule 7 must be changed, because Rule 7 will not apply. I am just wondering how necessary it is to have this procedure running along with the attorney and nothing in court about it at all--particularly in the Federal system, where you have 20 days in which you can settle; and if you do not settle, why should it not be for the court having control of the suit to have all papers in it? And furthermore, the judge may--I do not know whether "suppress" is the right word--but they suppress the proceedings as a matter of scandal, and not a proper suit.

Mr. Mitchell. Is that in the Federal suit?

Dean Clark. Yes, in the Federal court. But in addition, we have the general matter of control of the course

of proceedings, in the way of having proceedings general--we thought that was the more orderly way, and that proceedings probably could be in the court after the 20 days.

Mr. Mitchell. Suppose a man is sued for breach of promise or alienation, or something of that kind?

Mr. Wickersham. They would not be apt to bring those in the Federal court.

Mr. Cherry. Out of the State they may do so.

Mr. Wickersham. Of course, a lot of those actions are abolished in New York.

Mr. Morgan. They have them in Tennessee. (Laughter.)

Mr. Wickersham. But there are not very many of them.

Dean Clark. I suggested 20 days, and I think Maj. Tolman suggested a shorter time--10 days. I suggested 20 days. I have a sort of feeling that if you do not adjust within 20 days, the case ought then to be in the control of the court. But even a shorter period may be possible. So that you will find here (indicating) the suggestion of 20 days, or 7 days.

Mr. Donworth. I suggest in Rule 16, in the second line, after "clerk's office", insert three words, "either before or."

Dean Clark. Yes, that is what I meant. If there is any question about the word "within" it could be changed; I used the word "within."

Mr. Dobie. Within 2- days after the service, it says.

Mr. Donworth. I think the word "service" is implied--in the clerk's office, to be filed either before or within 20 days after the service.

Dean Clark. What I meant is not later than 20 days.

Mr. Wickersham. Then you had better say that.(Laughter.)

Mr. Morgan. "Not later than" is better.

Prof. Sunderland. You can say "not more than 20 days."

Mr. Morgan. Not later than that is what I had in mind.

Dean Clark. Well, if there is any doubt I will, change it to "not later than." I do not see why "within" will not

cover it.

Mr. Wickersham. How about that clause in parenthesis? "In default of such filing the service shall be of no effect." Suppose it were the marshal?

Dean Clark. Well, under this provision as to summons and complaint the marshal does not ever do it.

Mr. Morgan. To make service of any effect it must be filed in 20 days.

Dean Clark. Well, suppose you leave that out.

Mr. Dobie. Then what happens?

Mr. Morgan. Then a motion to strike out would be in order. It seems to me that is altogether too strong.

Dean Clark. All this says is that the service is of no effect, that does not prevent you from surrendering to the jurisdiction of the court.

Mr. Morgan. Yes, but the defendant can get out.

Mr. Donworth. It is a pretty severe penalty for forgetfulness.

Mr. Lemann. Would you not have to say what would happen if you did not do it?

Mr. Morgan. The court would have the right to deal with that.

Mr. Lemann. I do not object to extending the power of the court at this time.

Mr. Morgan. I think that the failure of the complain-

ant to file a paper. when the court already has jurisdiction -- to say that the court will lose jurisdiction is altogether too strong for my stomach.

Dean Clark. Well, I do think we ought to put something in.

Mr. Morgan. All right, but I want to see what is to be here.

Dean Clark. You can say that in default of ~~action~~ such filing, the court may dismiss the action or make such disposition of the action as the circumstances warrant.

Mr. Donworth. But not a disposition of the action.

Mr. Wickersham. May dismiss theaction or take such other proceedings as may just and equitable in the premises.

Prof. Sunderland. Would that not require an alias writ?

Mr. Wickersham. That would be in the court's discretion.

Mr. Lemann. Would it not be possible to fix the time limit in which he must file?

Mr. Donworth. Or in default of such filing, the court may dismiss the action, or may make such order relating to the filing of the complaint as it may deem proper.

Mr. Wickersham. Does not the greater include the less, so that it would be enough to say the court may dismiss the action?

Prof. Sunderland. I think so.

Mr. Wickersham. How is that, Mr. Clark?

Dean Clark. I think that is all right. I thought somebody would raise the point that the court might think it must--but in default of such filing the court may dismiss the action.

Mr. Donworth. It is a small matter to require papers to be filed, and I think it should be borne in mind that that is not the only thing we had in mind.

Dean Clark. Well, of course, if you put in "the court may dismiss the action" that would cover any other action, would it not?

Mr. Morgan. Well, if the court, followed the usual rule with reference to the filing of papers, it would do no more than require the filing of papers or within such time it will provide a remedy, and I do not think you need "to say" dismiss the action."

Mr. Wickersham. Well, the court would have discretion as to requiring the papers to be filed.

Mr. Mitchell. Now, have you finished with Rule 16?

Mr. Donworth. Have we decided as to the 20-days or 7-days?

Dean Clark. I suggest that we get Mr. Mitchell's views.

Mr. Mitchell. I have no any special views on the subject. I think we ought to keep the troubles off the record

as long as we can--so far as the court is concerned, until the court is asked something about it.

Mr. Morgan. Well, I think under this rule, if both parties want them filed and there is no motion about it, you might have them filed.

Mr. Dobie. Well, I know one judge that would do it; others might not.

Mr. Mitchell. They might if there was a note of issue filed.

Mr. Dodge. My experience is that generally there is only one party who wants to keep it off the record.

Dean Clark. Rule 3-a requires the original summons and complaint to be filed within ten days after service, and if filed within ten days it shall be binding upon the attending parties. That is my own interpretation, which the courts have difficulty in enforcing. But that is the rule in New York.

Mr. Lemann. That would not dismiss the action.

Mr. Loftin. I move that we adopt Rule 16.

(A vote was taken and the motion was unanimously adopted.)

Mr. Wickersham. You skipped Rule 14.

Mr. Mitchell. That is another question.

Mr. Wickersham. In Rule 16, I move to strike out "the service shall be of no effect," and to insert "the court may dismiss the action."

Mr. Morgan. I do not think I would put in anything. Just strike out the whole thing. in parenthesis and let the court decide what to do. I think the court may dismiss it if it wants to, and unless the papers are filed in a certain number of days the action would be dismissed. I do not think we need to tell the court what to do.

Mr. Lemann. I think if you do not put this in, the court might strike out, in effect, that the service must be within 20 days.

Mr. Morgan. There are rules of that kind now. In Minnesota when I was there when the parties have not filed the court will say "the papers will be stricken unless it is filed within 20 days."

Mr. Lemann. Well, if you do have that, might not the court have it discontinued?

Mr. Donworth. "In default of such filing the court may dismiss the action or take such action as the court may deem proper."

Mr. Wickersham. "The reason ~~was~~ I did not suggest that was that I thought it was optional with the court; that the court may dismiss it but my motion was when the papers had been filed, that is what would probably happen.

Mr. Mitchell. There is no motion pending.

Mr. Wickersham. I move to strike out the words "the service shall be of no effect," and insert "the court may

dismiss the action.

Mr. Donworth. I move to amend the motion by adding to the words quoted by Mr. Wickersham "or may take such further proceedings as the court shall deem proper."

Mr. Dobie. I think that would be clearer; I think Judge Donworth's amendment removes all possible question.

Mr. Mitchell. The question now is on Judge Donworth's amendment to Mr. Wickersham's motion.

(A vote was taken and the motion as amended was unanimously adopted.)

Mr. Mitchell. Now, let us go back a little.

Dean Clark. Rule 7 can now come up. We can consider the manner of serving the pleadings. We have considered the manner of serving the summons, and we voted that it could be by the marshal, or by any person other than a party.

Mr. Mitchell. Now, what is the next thing under Rule 7?

Dean Clark. That concerns the manner of serving the pleading, and Rule 7, as I indicated before, applied to the proceedings in that respect.

Mr. Loftin. It not only provides that, but provides that he must file a copy of the pleadings for each defendant. We had a statute of that kind in our State, and it proved very unsatisfactory and burdensome, and it was repealed after two years.

Mr. Mitchell. The clerks do not want to bother with it.

Mr. Loftin. We had cases down there growing out of the boom transactions, where they had 40 or 50 defendants under mortgage foreclosures and bills to quiet title; but it proved very burdensome, and they went back to the old practice, of furnishing notice of pleadings to the defendant.

Dean Clark. It seems to me that that problem arises whatever the manner of service; that is a question to be considered. I do not see that it touches this point. If you are going to serve pleadings on the opposite parties, you might be even worse off where you have 50 or 100 attorneys. That situation can be taken care of by a limitation. Certain jurisdictions have a limitation that not over six copies need be supplied. And if it is an important part we can put a restriction on that. I considered the insertion of a restriction, but considered that, in general, the parties were entitled to notice of proceedings but where the situation got very dreadful the court will probably adjust it without any provision. In other words, if a specific limitation was necessary--we have no such limitation in my State, and we have got along without it. But a limitation can be inserted. That seems to me, however, an additional question.

Mr. Dodge. We have a rule in Massachusetts that the parties shall be supplied with copies after the initial paper.

Mr. Donworth. Do you leave them with the clerk?

Mr. Dodge. No, we leave it with the parties.

Mr. Mitchell. Why not do it that way?

Dean Clark. Then you have a specializing of the whole matter--it is not a question that is in any way up in the air.

Mr. Mitchell. That prevents a lot of uncertainty, but puts a lot of work on the clerk.

Dean Clark. May I dissent. First, it does not lose a day. The thing is done when you hand it in in the clerk's office.

Mr. Donworth. No, this would cause a delay.

Mr. Morgan. He means the lawyer who is served that way loses a day.

Dean Clark. Yes, he loses a day.

Mr. Dodge. What has Rule 4 to do with it? That is, Equity Rule 4.

Mr. Morgan. That is the second paragraph.

Mr. Dodge. There is nothing the Equity rules now with reference to the service of copies of pleadings to the clerk.

Dean Clark. That is true; but this is under the Conformity Act; it is the way it is done in Connecticut.

Mr. Donworth. I move that we add as the concluding half of Rule 7 the following: "The parties filing any of the papers mentioned in this rule shall ~~cause~~ deliver a copy thereof to ~~be delivered by the party to~~ every other party or his attorney,

and that if an acknowledgment or proof of such delivery as to any party or his attorney be filed in the clerk's office within one day hereof, no copy shall be left for mailing by the clerk to such party. One copy may be left by the party in the case of several parties represented by the same attorney."

Dean Clark. I do not see why you provide that that be done within one day, provided the clerk cannot do it automatically when the pleading comes in.

Mr. Donworth. It must be filed in one day.

Dean Clark. My point is this: That whenever the clerk follows this rule and mails the pleading, he cannot do it until one day after the pleading is filed.

Mr. Donworth. He will not receive any copies where I serve my adversary.

Dean Clark. Then do you have some proceeding whereby you notify the clerk that you have filed a copy?

Mr. Mitchell. I do not think he should place this very very heavy burden upon the clerk. First of all, it is an inconvenience to lawyers; and I cannot walk across the hall to serve the papers and have to file them. Then comes the question of fees and it increases the expenses of litigation in the Federal courts, and I do not know of any practical reason why it is not competent to follow the usual practice; and as long as we have already taken the bit in our teeth, and said, "You

do not need to file your complaint if you do not want to," I do not see why we should load the clerk with the job of filing the papers. Let the lawyers serve every one of them.

Mr. Lemann. Is this practice common in the States?

Dean Clark. It is the practice in several of the States. In my State it is done in the open court. And that is why, to a local lawyer Mr. Mitchell's suggestion would seem very strange, because one of us might run up to Hartford and try to get the lawyers to agree, and certain lawyers would never agree.

Mr. Mitchell. You can drop it in the mail if the lawyer is outside of the city.

Mr. Wickersham. We do not have any difficulty in New York. You serve your complaint on the attorney for the defendant. If there are twenty defendants, he serves the twenty attorneys for the defendants.

Dean Clark. On the question of time and expense, there is no question that the clerk should get any fee for this, and I do not think it is very difficult. The clerk now has to make an entry in the docket when the pleading is filed. The only thing he has to do is to take the Government envelope and stick in the name of the opposing counsel. It is not a big job, and then it is entirely in the control of the court. There can be no question about any finding ~~where~~ whether the service has been made. No proof is required, because it is a regular matter of duty

of the clerk. The Clerk, in turn, has to keep the situation moving, and you would not have the situation as you have in New York, where I understand that you have to have somebody go down and see if they have served the pleadings.

Mr. Wickersham. In New York you serve your answer on the other side and get proof of service.

Dean Clark. And the next day you have to send down your office boy to see that the clerk has noted it.

Mr. Wickersham. I do not know of that ever being done.

Dean Clark. That is just another example of putting all proceedings under the control of the clerk and the court, and not leaving them to the chance conduct of thelawyers. Now, here also this is a variation from the New York system. Perhaps that is a stronger reason for not adopting it. But you must adopt some rule, and if you adopt the New York system you will find it very strange.

Mr. Wickersham. Well, under the New York system it is served by the plaintiff, or whoever he is, and he gets proof of service whoever it is served by.

Mr. Mitchell. If he or the attorney are out of town, he mails it to him?

Mr. Wickersham. If he is out of town he mails it to him, but that sort of thing happens.

Mr. Cherry. When we get outside of New York and Connecti-

cut how do the States go?

Dean Clark. I cannot answer that fully. There is a variation. I think that it is quite likely that the majority do provide for the service of pleadings on the opposing counsel.

Mr. Morgan. Do they do that in Louisiana, Mr. Lemann?

Mr. Lemann. They do not serve it. Just file it.

Mr. Morgan. Do you get any copy from the clerk?

Mr. Lemann. No. The only information you get is where the law requires service to be made. Otherwise you are dependent on the courtesy of your opponent. You go down to court and get a copy of it.

Mr. Loftin. In my State it is really a matter of courtesy among the lawyers.

Mr. Mitchell. You are required to file then?

Mr. Loftin. Yes.

Mr. Mitchell. If you are not courteous the clerk gets a copy and advises your adversary?

Mr. Loftin. Yes, or the lawyer on the other side will give it to you.

Mr. Lemann. If you know him pretty well he will give it to you. Otherwise you will go to court and get a copy.

Mr. Dodge. This paper that I have here says there are about six States that have that provision--Arkansas, Wyoming, Iowa, and others.

Prof. Sunderland. In Iowa that is not the case.

Mr. Dodge. It says here "on request of the other side".

Mr. Dobie. Does your motion, as I understand it, Mr. Donworth, provide that either method is all right?

Mr. Mitchell. Yes, I think either would be all right.

Mr. Donworth. I have it here that if a party, in advance of the filing of a paper, has delivered it to the other party, he need not deliver it to the clerk for service upon him.

Mr. Dobie. I second that motion.

Mr. Donworth. I think all of these matters relating to substance and the wording could be covered this way:- ~~—and of course,~~ I would leave the two paragraphs of the rule as they are, and then say: "A party filing any of the papers mentioned in this rule may cause a copy thereof to be delivered in advance of filing to any other party or his attorney, and if written acknowledgment or proof of such delivery be filed in the clerk's office at the time of filing such paper, no copy need be left with the clerk for mailing to such party. One copy shall be sufficient for delivery or mailing in the case of several parties appearing by the same attorney."

Mr. Lemann. In the last sentence, where you said "deliver" I was wondering whether you meant delivery by mail or otherwise.

Mr. Donworth. Let me take it. I will read that again.

"A party filing any of the papers mentioned in this rule may cause a copy thereof to be delivered in advance of filing to any other party, or his attorney, and if written acknowledgment or proof of such delivery be filed in the clerk's office at the time of filing such paper, no copy need be left with the clerk for mailing to such party. One copy shall be sufficient for delivery or mailing in case of several parties appearing by the same attorney."

Mr. Dodge. It seems to me that this is a very long ~~view~~ rule of what is not an important matter, and I thought it would be well just to make it the duty of the party to furnish a copy of the pleading to the other parties. You do not eliminate by this amendment a large part of the burden that they are under.

Mr. Donworth. For instance, what would the clerk be doing?

Mr. Dodge. He would have to fill the gap.

Mr. Mitchell. I think the matter of burdening the clerk with this job is a very serious consideration.

Mr. Olney. This is a matter which seems not very important, and yet it is a matter that a local lawyers may resent very decidedly.

Mr. Dobie. They would not object to being given the option.

Mr. Olney. No, I think not, if they have the option.

Mr. Dobie. I think that was Judge Donworth's motion.

Mr. Olney. Perhaps not, but the clerk may claim that it was lost in the mail, or something of that sort.

Mr. Loftin. I see practical difficulty on that very point, that is, that the clerk shall mail it if he is not represented by an attorney. Suppose a party has filed a personal appearance, not giving any address. The question is, how will the clerk know where to mail a copy to him?

Dean Clark. Well, we have covered that by the provision for appearance later on. Now, on the matter of hardship of not receiving a copy, nothing very drastic is likely to happen anyway. You see, the judge can adjust all questions of penalty.

Mr. Olney. What will take place is this: That the party, the defendant, for example, will have actually received the paper, receives it by mail, and then denies that he ever got it, long after the time.

Mr. Wickersham. Of course, he has been served with a summons, and therefore he has had notice and he has had a copy of the complaint. Now, the question is about the answer. The clerk has the answer, and if the party does not get it he sends to the clerk's office and gets it. Then suppose there is a reply to the--

Dean Clark(Interposing). All you can do is to make a motion for default, because he has not done it, and he now knows it is there; and the judge says, "File the pleading at once," and there is almost no chance of his being really harmed. He may be able to get a little delay, if the court believes him. But the penalty for not complying ~~for~~ with the day-limit is not very severe anyhow.

Mr. Mitchell. Another thing is that this rule has nothing to do with anything except pleadings.

Mr. Donworth. Well, a motion is defined by the rule to be a pleading.

Mr. Dodge. A motion is a pleading.

Mr. Donworth. It is under the rule.

Mr. Mitchell. Is there a motion before the Committee?

Mr. Cherry. Mr. Donworth has a motion. Prof. Sunderland, I would rather cut out that provision as to the clerk. I think this is a matter that goes along from the words and the general system and we should not have a number of provisions that we would be startling the lawyers with.

Mr. Mitchell. That is very true. We can cover the whole thing by service.

Mr. Wickersham. Why should it not be sufficient to require him to serve the complaint on the defendants--

Mr. Donworth (Interposing). In my State that is the rule. In reference to my motion, I am perfectly willing to

withdraw it, at the sense of the Committee that this method of returning a copy shall be the only method. I have no choice.

Dean Clark. Well, but should you require any service anyhow? In Louisiana and Florida they get along without any proof of service.

Mr. Wickersham. Well, is not that the important thing? Filing seems to me not to be the important thing. The plaintiff files his suit and must get an answer. Now that joins the issue. What should be required of the defendant is to serve his answer on the plaintiff's attorney. I think that is fundamental. Let him file it if he wants to. But the first thing is that the plaintiff who has brought the suit should know the answer of the defendant.

Dean Clark. Of course, here is another point where any rule established is going to cause a good many lawyers to change their habits now.

Mr. Wickersham. Well, throughout the country do not the defendant's attorneys serve their answer on the plaintiff's attorneys? Is that not the customary procedure? The complaint is served by somebody on the defendant, and the defendant serves his answer. Is that not the rule?

Prof. Sunderland. Yes, that is the general rule.

Mr. Loftin. They furnish copies.

Mr. Wickersham. Perhaps so; but why not say, "Give a copy to the defendant"? Why not give it to the defendant

requiring him to answer, which contributes to making up the issue to be tried.

Mr. Dodge. I think that is true, and I think it should be in Rule 7, that where answer is made a copy shall be given to the other side.

Mr. Wickersham. I think that is a burden that should be on the defendant's attorney, rather than on the clerk.

Mr. Mitchell. I think the same should be true of all cases; the answer and motion ought all to be covered by general rule, and the method of furnishing your adversary with a copy should be retained. I do not see any distinction between the answer and any other provision. It is clear, I think, that the great majority of lawyers do those things themselves and do not rely on the clerk. I understood Judge Donworth to include that in his motion. I am not sure about that.

Mr. Donworth. I imagine from the discussion that the majority of the Committee favored the existing method, in use among lawyers. I think that might be a more drastic motion. So that if somebody will make the motion that the reporter be instructed that this provision be that service be through the parties or their attorneys, instead of through the clerk's office, I think that will be a good idea.

Mr. Wickersham. I make that motion

~~papers after the complaint I make that motion~~ the clerk's office,

Mr. Mitchell. Your motion is that the service of all papers after the complaint be made, not by the clerk's office,

but be made direct by the parties or their counsel. Is that correct?

Mr. Wickersham. Yes.

Mr. Donworth. And that that be put in the appropriate rule.

Mr. Mitchell. The Reporter will have to revise it on account of the action taken.

Mr. Donworth. The other part of this is a wholly different matter. It seems to me that this should come more appropriately in connection with answers.

Mr. Lemann. Well, it will cover other papers. There is room for other pleadings than answers, and I think we might make it a more public in a general statement that would apply to all proceedings. I think we might vote on that theory at this time.

Mr. Mitchell. The question is on Mr. Wickersham's motion. Is it the sense of the Committee that the service of all papers after the complaint be made, not through the clerk's office, but by service by the parties or their attorneys?

(A vote was taken and the motion was unanimously adopted.)

Mr. Lemann. Will such service be permitted by registered mail?

Mr. Mitchell. I think you will find a very simple statement as to that if you will turn to the Minnesota rule;

you will find that you can get judgment after service by mailing it--if counsel is in a different State you can mail it to him and attach an affidavit.

Mr. Lemann. Can you mail it to him in town?

Mr. Mitchell. No, you cannot.

Mr. Wickersham. You can leave it at the office with whoever is in charge.

Mr. Mitchell. Yes; and you can cover the whole thing in one provision.

Mr. Lemann. I thought of cases where it was in the same town, but four or five miles away.

Mr. Wickersham. In New York we have to send somebody to Richmond, or to the wilds of Brooklyn.

Mr. Mitchell. Then let us deal with whatever else there is in Rule 7.

Mr. Dobie. The rest is practically a repetition of the Equity rule.

Mr. Morgan. It is very important as to the time running for appeal, and so on.

Dean Clark. What was your question?

Mr. Dobie. I say this is practically Equity 4.

Dean Clark. Yes, with the pleading provision added. You will note that I have suggested eliminating a lot of jobs. I want to go back to the question of mailing. Do you think additional time is necessary? I believe three days more is

allowed in New York. Where there is a 20-day limit that is not important; where there is a 5-day limit, it is.

Mr. Wickersham. Well, that is for subsequent pleadings, and you have to serve it within that time. But if you serve it in one day, then the reply pleading may be served at any length of time.

Dean Clark. That is a question I wanted to have clear, whether to put in an additional provision. Now, in that connection, with motions there is a provision that a party may file opposing reasons within five days.

Mr. Wickersham. He may file that with the clerk. That is a different thing. Then you have made a provision that a statement of the reasons must be filed with the clerk.

Dean Clark. That is, you are not to serve a motion on the clerk. Now, I had the idea of treating all these things the same way.

Mr. Wickersham. Well, can we do that? Is there not a difference between pleadings and papers on motion? Very often you have a motion on 24 hours notice. But your pleadings are a different thing.

Mr. Lemann. That brings up the question of what a pleading is. As I understand it, you abolish the system as to the abatement of the cause. Well, now, suppose that a motion is filed. How do you get to fixing a hearing, if it is to be an oral hearing?

Dean Clark. Well, of course I was trying to avoid oral hearings, unless the court ordered it. The thing that I was trying to get there was, in the case of a demurrer, in the old days, or in this day an answer, You file your supporting reasons. I suppose it will be served on opposing counsel, and counsel will reply. There will be no hearing unless the court orders it.

Mr. Wickersham. Well, take a case of summary judgment, for example. I think it is very important that those things should be orderly, because that leads to the merits of the case. And I think you wil find it very wrong that summary judgment be rendered merely on written papers.

Dean Clark. Yes, but what I am trying to do is to get away from a motion like the old demuerrer.

Mr. Wickersham. Yes, but there are a good many motions that are so important in the controvery that they ought to be heard orally.

Mr. Donworth. It seems to me that the question raised by Dean Clark ought to be ~~connoted~~ upon notice. The question raised by Dean Clark is a different thing. But when it comes to pleadings, I think if you are going to provide proper security, provision must be made for protection of the adverse party, and I think there should be a rule on that.

Dean Clark. We might leave that until we get to these other pleadings.

Mr. Wickersham. For the purpose of eliminating unnecessary technicalities, there are grouped here in this rule pleadings, orders and judgments, and it is sought to include them all in one rule. I am inclined to think that pleadings ought to stand categorically by themselves.

Mr. Dodge. It is certainly going pretty far to call a brief a notice.

Mr. Wickersham. Well, there is a subsequent provision that a motion shall constitute part of the pleadings.

Mr. Donworth. I think there is a difference between the short motion and the notice of motion If there is no hearing, you do not need any notice.

Dean Clark. Then probably we will have to wait until we get to those provisions.

Mr. Mitchell. Do I understand that the last provision in Rule 7 is satisfactory to the Committee?

Mr. Loftin. What do you think about the words "court or judge"?

Dean Clark. I want to leave out the words "or judge." You see, in Equity Rule 4 it includes the judge. But I think under our decision we can eliminate that.

Mr. Wickersham. Well, as I understood, a motion was adopted applying to pleadings under Rule 7.

Mr. Morgan. It does not apply to all pleadings.

Mr. Donworth. I would like to ask this: Should a

party who has not appeared be entitled to a copy of the judgment? Oftentimes you name a lot of defendants, and this rule says "Neither the noting of order or judgment in the docket or its entry in the order book or journal shall of itself be deemed notice to the parties or their attorneys; and when an order or judgment is made without prior notice to and in the absence of a party," it seems to me it is not necessary to send notice to all the defendants who may be in default--or in the case of any default judgment.

Mr. Olney. Why should a copy of the judgment be served on the man?

Mr. Donworth. Well, through courtesy, generally we hand the opposing party a copy of the judgment, if he has appeared in the case.

Mr. Olney. In our practice we require them to furnish the other side a copy of the proposed finding. Judgment is something he is required to make a copy of himself.

Mr. Morgan. Well, you have to give notice of the judgment in order to start the appeal or review time running.

Mr. Olney. Yes.

Mr. Morgan. That is not a copy.

Dean Clark. This is where it is made in the absence of a party.

Mr. Morgan. Would you want all parties included who had not appeared?

Dean Clark. I think it should be limited to those who

have appeared .

Mr. Mitchell. Do you accept that, Dean Clark?

Dean Clark. Yes, I accept that.

Mr. Mitchell. Is there anything else in that 7th rule?

Mr. Olney. How can you say the judgment is rendered without notice? The judge takes it under advisement, perhaps, and then renders his judgment. Both parties are required to take notice of the action of the court.

Mr. Donworth. I had an idea that Dean Clark's motion was, what Dean Clark had in mind was that the judge rendered his judgment, and perhaps the defendant was not there.

Dean Clark. This is an attempted reconstruction of the Equity rule. I think it could be said in that case that the judgment is made after notice, because it is made at the hearing. But if you want to try to improve this language you can do so.

Mr. Lemann. If you put in that construction, that would be all right.

Dean Clark. Is a judgment made after a long trial a judgment made without notice?

Mr. Donworth. Why make any change? The question is understood. When it comes to a copy of the judgment, that is another matter.

Dean Clark. Well, if you left out judgment then

what is a judgment by default? Is that an order or a judgment?

Mr. Olney. A judgment, I think.

Dean Clark. Well, why should it not comply with the rules? There should certainly be notice given of that. You see, there can be defaults where there has been an appearance; that is, a failure to comply with the rule, and that is a penalty for it.

Mr. Lemann. It should apply to any failure at all.

Mr. Donworth. We have in our State a provision that the time does not begin to run until he has entered judgment. I think there is a reason for that clause.

Dean Clark. Would this meet the objection? Without sending a copy say "Shall forthwith be notified thereof" instead of sending a copy.

Mr. Wickersham. Would that not apply to personal service?

Mr. Lemann. Could you not say "When an order is made in the absence of a party"?

Mr. Wickersham. Well, that covers--~~you are speaking~~ you are speaking of an ex parte order.

Mr. Donworth. No; the court has rendered an opinion, and you are not obliged by law to give a copy of that judgment in advance, as I understand. You usually do. He has filed his answer in the regular way.

Mr. Wickersham. You send him a copy of it.

Mr. Dodge. It is an important question whether the court ~~shows us~~ draws up the order or the opposite party. The obvious duty of the clerk is to require it.

Mr. Mitchell. Well, if he has sent a copy of the judgment he has to pay for it. The usual practice is to send a notice of judgment entered for the defendant, and then for the man to go there and find out what it is.

Mr. Lemann. You could cut out the word "copy."

Mr. Mitchell. "Send notice of the entry thereof by mail to such party or his attorney, who has appeared; ~~or to the attorney who has appeared~~."

Mr. Cherry. Well, if you put in both, you will not have to repeat it; then you can say "such party" below.

Mr. Dodge. Where you say the entry of the order in the order book of the noting of an order, you can simply say the noting of an order.

Mr. Donworth. As we have mentioned both order and judgment?

Mr. Dodge. We did mention both here.

Mr. Mitchell. Is the order usually effective until it is filed?

Mr. Olney. It may not be; but what we are doing is to notify the man of the making of the order. That means nothing, and you are adding nothing when you say that.

Mr. Mitchell. It says "notice of the order". That

might apply to sending a full copy of the contract, and somebody would have to pay for it, and the other side would have to be furnished a copy. I merely suggested the word "entry" because of the fact of the making of the entry that was required to be obtained by the notice. I may be wrong about that. I think the Reporter can work that out.

Dean Clark. All right, I will do that. Was that a suggestion to take out the final word?

Mr. Cherry. Yes; say "in the absence of a party."

Mr. Chairman, I think the Committee should stop and consider whether, when it adjourns it will adjourn until later in the evening or tomorrow morning.

Mr. Wickersham. I move that we adjourn until 8 o'clock tonight.

(The motion was duly seconded.)

Mr. Mitchell. Is there any discussion of the motion?

(The motion to adjourn was unanimously adopted.)

(Thereupon, at 5:30 o'clock p.m., the Committee took a recess until 8 o'clock p.m.)

EVENING SESSION.

Thursday, November 14, 1935.

The Advisory Committee met pursuant to adjournment at 8 o'lock p.m.

Mr. Mitchell. Where did we leave off? We finished with Rule 7, I believe. We are now up to Rule 8.

Dean Clark. That Rule 8 is now mainly Equity Rule 5. In that I think I would eliminate the words "for entering judgment by default." Now, we have been using the word "default", without saying "judgment by default", and trying to keep the idea of default, or order of default as not in the nature of a final judgment, on the theory that the entry of a default makes the case ex parte, and there must be further proceedings to go forward and establish the amount by another judgment. In other places we have limited the expression to just "default". And the other point I have in mind, to take out the words "or the judge" is the same point that we have discussed before. Those are the words used in the Equity rule.

Prof. Sunderland. Did we not adopt something about the judge as distinguished from the court?

Dean Clark. We did not do very much; and it is possible that we should do more. But you will remember that we provided that

"Any district judge may, upon reasonable notice to the parties, make, direct and award, at chambers or in the clerk's office and in vacation as well as in session, all such process, commissions, orders, and other proceedings, whenever the same are not grantable of course, according to the rules and practice of the court."

That is Rule 4. Now, it is possible that the word "such" is a limiting word in that expression. That is in Rule 4 that I am referring to.

Mr. Dodge. Is it customary to file motions in the clerk's office for things that the clerk can do himself?

Mr. Morgan. If they have to be done after notice, I think he will have to have a notice of motion or a motion.

Mr. Lemann. Well, that is for anything he can do; that is just a ministerial thing, and we can just send a messenger or office boy. I do not think we would ever file a motion.

Mr. Morgan. Do you have to give notice of that?

Mr. Lemann. No.

Mr. Morgan. Suppose the clerk taxes costs and you have to give notice of taxation of costs. In good many of the code States, you do not file a notice of motion. The notice is not in writing.

Mr. Lemann. That stands a little different from the oral application granted as of course, just to issue a

complaint, or file something of that sort.

Dean Clark. That is the process of initiating suit.

Mr. Mitchell. Yes.

Dean Clark. That is true except in a case of provisional remedies. I am not sure the word "process" is not misleading here.

Mr. Donworth. Dean Clark suggests eliminating "judgment by default", which I think is an improvement.

Mr. Lemann. Suppose the defendant is defaulted for not appearing in court at the time of the trial, and default is entered at once, the clerk's function would be what there?

Dean Clark. We have not made any specific provision, except that the case shall be proceeded with ex parte, and I suppose judgment then must be entered by the judge.

Mr. Lemann. Are you speaking of when he first appears for trial?

Mr. Dodge. Would that be a default?

Mr. Morgan. There could be default in appearance, in pleadings, or at the trial.

Mr. Lemann. Well, does default cover default at the trial? In our State we use it only in default in answering and not in appearing at the trial.

Mr. Morgan. Then you would have two cases where you would use it; the first where there was no appearance of

the defendant, second, where there was no pleading.

Mr. Lemann. We have no special way of entering an appearance. The only way you appear is by a motion or an answer.

Mr. Morgan. So that you cannot plead unless it goes on later.

Mr. Lemann. No. We take a trial judgment by default, and two days later a final one.

Mr. Morgan. Yes, but the defendant could not appear at the hearing on damages.

Mr. Lemann. He has two days after answering in which to ~~appeal~~ plead.

Mr. Morgan. How does he plead?

Mr. Lemann. The only way he appears is to plead. He can cut off a dilatory plea. You could not ask for a bill of particulars any more.

Mr. Dobie. You mean you do not have any such thing as an appearance without pleading?

Mr. Lemann. No. Well, if the defendant pleaded and does not show up, and usually somebody says what has happened to them and they grant a continuance; but if the judge is hard-boiled he might say, "Go ahead and try your case," and the judge tries the case for the defendant.

Mr. Morgan. That is it, if he does not appear at the trial; but if he joins issue and there is a trial but if

he has not put in an answer, in a good many States, you can just appear before the clerk.

Mr. Dodge. We would have him defaulted for liquidated damages.

Mr. Morgan. If it is liquidated damages; if it is not, you would have to have a hearing on damages.

Mr. Dodge. Yes.

Mr. Morgan. But if he has not appeared he is not allowed to appear as to the damages.

Mr. Dodge. No.

Mr. Lemann. I think that is doubtful, unless he had the default removed.

Mr. Morgan. In some States he can appear and give testimony on damages.

Mr. Lemann. Perhaps he can, I do not know.

Dean Clark. Rule 17 deals with default; the last paragraph.

Mr. Mitchell. I will call Dean Clark's attention to the fact, that, under this system we adopted this afternoon, the summons may be served without a copy of the complaint attached, and the complaint placed on file. We can revise those provisions, so that the 20 days begin to run after the summons is handed to the defendant. The general rule is, if we follow that system and elect to serve the sum-

mons without complaint attached, that the defendant may demand a copy and the plaintiff has a few days to hand it to him; and then he answers it. That is a mere detail.

Mr. Donworth. I thought we had adopted the system whether or not the complaint is filed with the clerk.

Mr. Mitchell. No, we passed a resolution that a man can either file his complaint with the summons, or in certain cases not file it, but state that he attached a copy, and state in the summons that copy is attached. But when a man asks for a copy of the thing, he has 20 days. That I understood would be worked out by the drafting committee.

Dean Clark. I think we can work that out by the drafting committee. I think we can work that out. When you say Mr. the comp'aint is on file, cannot the defendant go and look at it?

Mr. Morgan. Yes, but he will not have twenty days to answer. The time allowed will be shut off.

Mr. Mitchell. I was speaking of the customary provision for the serving of summons with copy of complaint.

Mr. Dodge. Twenty days is allowed to answer; but suppose you serve a summons without a copy of the complaint, the usual system is to allow him to demand a copy of the complaint and then give him twenty days after he has received it.

Mr. Morgan. I thought he had only ten days after he had received it. I think it is only ten days in New York.

Mr. Wickersham. No, twenty days after the service of a pleading he has to reply.

Mr. Morgan. If he demands a copy, then he is allowed twenty days.

Mr. Mitchell. No, ten days is allowed him to ask for it. I think that is a detail that they can work out.

But now, about Rule 17, as to default. I was wondering whether this rule, and all of these that we are considering make sufficient provision for default in practice by providing how the plaintiff shall prove the default and get a judgment entered without action by the court.

Mr. Lemann. Does not Rule 17 contemplate a pleading? Suppose I enter my appearance.

Dean Clark. Yes. Now, on the appearance I had a rule that covers that, that filing an answer shall be an appearance. But in the case of other parties, under Rule 16, they can enter their appearance. That is quite the point that Mr. Mitchell has in mind.

Mr. Mitchell. No. You say here if the defendant does not file an answer the plaintiff may take a default against him, and thereafter the action shall be proceeded with ex parte. Now, my experience has been that where there is lack of answer in default, the rule ~~and~~ under the code statutes should provide for the entry of judgment, and in cases where the claim is liquidated the clerk enters the judgment. If it is an unliquidated claim, there has to be machinery provided for the ascertainment of the amount of damages. And I was wondering whether the drafting committee has covered those alternatives.

Mr. Donworth. Do you think the clerk under any circumstances should have the right to enter a judgment? Under our practice it is always done by the judge. I do not know how extensive the practice is, if it exists at all, about the clerk entering the real judgment.

Mr. Mitchell. Well, when I talked about the Code States, I was referring to States like Minnesota, Iowa and North Dakota, and perhaps a number of those States in the Northwest. And

their statutes provide that a case is in default--and the summons, in the first place, has to be either for a liquidated sum stated in the complaint, or an unliquidated damage claim. If it is an action on a note, for instance, for a specific sum, you file your affidavit with the clerk, following the answer, and the clerk pro forma enters judgment in the amount of the claim. But when the claim is an unliquidated claim for damages, for malicious prosecution or personal injury, then the statutes provide for the assessment of damages and the clerk can enter judgment on default if the claim is of a liquidated type like a note.

Mr. Donworth. I see the distinction, but there is a little difference in the two forms of action, but in any case the proceeding is before the judge.

Dean Clark. Well, we did not cover that. We had a little hesitation about doing it. If the Committee thinks it should be covered, of course it can be very easily done along the line suggested. The Equity rules do not cover it. This is in effect the Equity rules taken over. The Equity Rules say the order shall be taken pro confesso. Of course, that is if it is liquidated.

Prof. Sunderland. In our State it is a question of how you ascertain it.

Mr. Mitchell. When a party or his lawyer is in

default I think it ought to be like a liquidated judgment.

Mr. Morgan. It ought to be covered one way or another.

Mr. Loftin. In our State we also have the practice of entering judgment on liquidated damges. Do they do that in Massachusetts, Mr. Dodge?

Mr. Dodge. Yes.

Mr. Lemann. That is done by the clerk, is it?

Mr. Mitchell. Yes. The set of rules prepared by the Bar Association of the State of Minnesota provide--and it is generally the same in the middle west: "Default judgments--It shall be the duty of the defendant to appear and file in the clerk's office a demurrer or answer to the complaint within twenty days after the service of the summons, or such additional time as allowed by law, unless the time shall be enlarged by stipulation of counsel, or by a judgment by the court for cause shown. In default thereof judgment may be entered as of course upon the filing of an affidavit of no answer ~~or~~ in actions upon contract for the payment of money only, in which there is a demand for a sum certain. In all other actions, after default, the plaintiff may apply to the court to have the relief to which he is entitled, ascertained either by the court or by a jury or reference for that purpose, and when so ascertained judgment may be entered therefor."

Now, that, generally speaking, is the problem I wanted to bring up, and I could not see anything here about it.

Dean Clark. We just did not make express provision as to how the court would fix the judgment. If it is to be done by the clerk, without action by the court, a few words here may be changed:--The plaintiff may take a default against him, and the action shall be proceeded in ex parte as to him, and the clerk may enter judgment for the appropriate relief, subject to the power of the court to reopen the case as hereinafter provided.

Mr. Mitchell. They would apply to the judge in every case for judgment by default.

Mr. Morgan. Do I understand that in Louisiana the judge merely enters an order?

Mr. Lemann. We enter a judgment and the clerk gets it on the minutes, and two days later we appear and move to confirm that default. If it is a promissory note, we offer it in open court.

Mr. Morgan. And what does the judge do?

Mr. Lemann. The judge says, "Let there be judgment."

Mr. Morgan. He signs the judgment?

Mr. Lemann. Yes, he signs the judgment, just like he does in a contested case.

Mr. Morgan. He does not in a contested case in many States.

Mr. Wickersham. Why is not the Equity rule a good one to follow? It could be adapted to common law practice. If

it is an equity case the rule says the plaintiff"may take an order as of course that the bill be taken pro confesso;" that is, in other words, the decree that the defendant is in default and that judgment shall be entered.

Mr. Lemann. Is that not signed by the judge?

Mr. Wickersham. No, that means by the clerk. Now, when the bill is taken pro confesso the court may proceed to final decree, and so on. There you have got the distinction; first, the decree pro confesso, which is taken in a common law action judgment by default, then, if there is anything to be shown in the way of damages, that proceeds ex parte and the judge enters the final judgment.

Dean Clark. Yes, that is what follows. The only difference would be to put in the expression. We could have it as I have indicated, and after "the action shall be proceeded in ex parte as to him", then put in this expression, "and the court may proceed to final judgment."

Mr. Mitchell. Well, under that rule, there is a question in my mind as to how you will get judgment. Will you have to go to the court and get an order, or get a judgment as a matter of form from the clerk?

Mr. Donworth. Under our practice, even on a promissory note, the twenty days have expired, and you go into court one morning and the judge says, "Are there any motions?" And you say, "Yes, I have an action in which the defendant is in

default." it is always with the judge. But as I say, the other method is all right. We have followed the same practice in unliquidated cases as well as liquidated cases; except that the judge will require proof on an unliquidated claim, and on a liquidated one he would say, "What is this about?" And you would say, "A promissory note," and he would give judgment.

Mr. Mitchell. I think the other raises the question as to who shall settle what is to be done.

Mr. Lemann. In some places it is done one way and in other places it is done in other ways.

Mr. Mitchell. That is what I am getting at.

Mr. Lemann. The usual rule may be for the clerk to do it; and I can see where it would be objectionable to put it on the judge; and perhaps we might compromise and fix it so that the clerk could enter what corresponds to pro confesso or preliminary default.

Mr. Wickersham. Well, if there is a default, and there is no question of unliquidated damges, and the action is on a promissory note, for example, why should not the order on that be entered by the clerk? For example, in Pennsylvania they have a practice by which a man who borrows $500 and gives a promissory note--what they call a shirt-tail note, there is a provision that, in the event of failure to pay, the

maker of the note constitutes any attorney in the State as an attorney for the purpose of entering judgment against him. So that when that note become due, if it is not paid on presentation, any lawyer who is the holder of the note goes over to the court and presents the form, and the clerk signs and stamps it, and that is the judgment.

Mr. Lemann. Now, is there to be a distinction in law cases and equity cases? In our State we have a preliminary judgment by default pro confesso and a final judgment. Now, in law actions generally, under the code, you do not have that.

Mr. Loftin. Not where it is a liquidated sum under contract; that could not be equity.

Mr. Lemann. I understand that. Now, so far as it is tort action and there is a default--in case of personal injuries where the person was run over by an automobile, what happens?

Mr. Loftin. There would be no preliminary judgment.

Mr. Lemann. You would get your judgment right off?

Mr. Loftin. That is it.

Mr. Lemann. Whereas, under our statute you would have a period of grace to come in and defend, except that equity allows a large period of grace and we allow a small one. Now, it seems to me that these uniform rules are intended to reconcile those differences; that is the first thing to decide.

Mr. Loftin. What good does that period of grace do?

Mr. Lemann. For instance, if you have a default taken, you had better go down and do something about it.

Mr. Loftin. In our State you cannot enter judgment by default, unless you have a notice. But in our State the defendant never answered until you got a judgment against him, and then if he did not answer ~~xxx~~ the court passed a rule that they could put in a default judgment--and the legislature repealed that rule the next term. You see, it is just another reason for delay. I think interlocutory judgments are just a stench.

Mr. Mitchell. Let us look at it from a practical standpoint. In the administration of justice, the courts are overworked. Now, we have two systems to choose from in the case of default on a liquidated sum under contract: Either you can take five or ten minutes of the court's time to make an order, or under the other system you would file an affidavit with the clerk for a liquidated claim, where the demand is a sum certain, and save five or ten minutes of the judge's time. Now, that is the practice. My experience has been that where you have this code system in a liquidated claim, in an action under contract for a sum certain, and the clerk can enter judgment on an affidavit and no answer is filed, it works perfectly and saves five or ten minutes of the judge's time.

Mr. Lemann. What would you do with unliquidated claims?

Mr. Mitchell. In unliquidated claims you file an action, and by court action get the assessment of damages.

Mr. Lemann. You would have no period of grace.

Mr. Mitchell. No.

Mr. Lemann. Then what do you do with days of grace in equity if you are going to have but one system? I suppose that goes out.

Mr. Mitchell. Yes, that goes out. You could file an affidavit that no answer has been filed, and it shows a default, and the court goes on and has summary hearing to see whether you are entitled to the relief sought.

Mr. Lemann. But here you have a final judgment, because you get that judgment right off the bat. Is that right?

Mr. Mitchell. No, there have been two decrees.

Dean Clark. I think there are two different questions that need not necessarily be taken up at one time. One is the question of the affidavit to be used with the clerk. The other is to use stamps, even if the clerk does it. Now, under the question of whether you have two steps, how about the situation where default is entered for something other than non-appearance? It is now provided in the rules, that a failure to comply with the rules may result in the entry of a default; and then you should provide that notice must be

given of that entry of default; in that case you would not have it in two steps.

Mr. Morgan. You might have it in two steps. This notice might be merely to make a motion to have the judgment set aside, for neglecting, and so on.

Dean Clark. Yes.

Mr. Donworth. I would like to ask Mr. Mitchell to state the practice in Minnesota. Does it have to be on notice and does the court have to pass on it?

Mr. Mitchell. No.

Mr. Donworth. That is on a promissory note, or something of that kind?

Mr. Mitchell. That is an unliquidated claim for damages, such as damages for personal injury, and there you have to have the court rule on the amount.

Mr. Wickersham. Well, ought not the rule to set forth the proceedings when the suit is for a fixed sum of money?

Mr. Mitchell. Yes.

Mr. Wickersham. Whether or not it is unliquidated or for other relief?

Mr. Mitchell. Yes. You have a choice of putting it up to the court and getting an order from the court in every case. The other is to have in certain types of cases judgment entered by the clerk and in the other entered by the court.

Mr. Wickersham. Well, with regard to liquidated

claims, where there is no question of judicial action in acting in the amount of relief to be granted, but it is a pure matter of computation, ought that not to be entered as of course by the clerk? Then when you come to unliquidated damages, you must have proceedings by the court, and when you come to the proceedings followed in equity, then you must have an injunction.

Mr. Mitchell. That is the Western code system.

Mr. Wickersham. That is a logical system.

Mr. Mitchell. It works well and saves a lot of time for the court.

Mr. Wickersham. Yes. There is no use using the time of the court. He does not use any more judgment in those cases than the clerk; and the defendant retains a remedy. He can make an application to the court to reopen the judgment.

Dean Clark. I think that is quite all right; but I think that is a definite change from the Federal procedure. I suppose we can change the form of proof. In fact, I was rather inclined to argue in general that we could change the rules.

Mr. Morgan. I understand that is the rule.

Dean Clark. But as I understand the rule now, the clerk does not enter judgment.

Mr. Mitchell. If the court thinks it wants to be relieved of that, I see no reason why it should not be.

Mr. Lemann. In your Federal courts, do the clerks

enter judgment?

Mr. Dodge. No.

Mr. Lemann. On a liquidated claim?

Mr. Dodge. No; it has got to be approved by the judge.

Mr. Lemann. And the judge signs the order?

Mr. Dodge. He does not sign anything; he directs action.

Mr. Donworth. How about in Minnesota? Does the judge perform the action?

Dean Clark. Well, I am more familiar with it in our State. In our State courts it is done. The Federal court clerk says he never enters the order.

Mr. Morgan. He follows the usual rule, that he has got to have either a rule of the court or a statute; otherwise the clerk has no power to enter judgment.

Mr. Donworth. How about a foreclosure?

Mr. Mitchell. The rule is the same. A foreclosure action is heard on motion day.

Prof. Sunderland. There are two steps on that.

Mr. Mitchell. Not two steps in a foreclosure. You get an order for a judgment of foreclosure. Of course, there is a second rule. I think When he reaches that stage, the thing for him to do is to take a rest. He cannot do the impossible.

It is a matter of discretion.

Mr. Wickersham. These discussions are off the record.

Mr. Mitchell. I suppose we ought to be more orderly in our proceedings, by requiring each person who speaks in this conference to address the Chair.

Mr. Lemann. How would it do to pass this, with the understanding that the Reporter will make an investigation as to the actual practice in the Federal courts with regard to entering judgments, and report on that at our next session. I do not at all oppose the idea of entering judgment on liquidated claims, if that is done. I do say that that is not usually done in the Federal courts today.

Mr. Olney. It is done in our courts.

Mr. Wickersham. Would not the court follow the local practice?

Mr. Olney. Certainly, it is done in California.

Dean Clark. It is not a uniform practice. I wonder if it would not necessarily follow the "Uniformity Act" anyway? It is a matter of evidence.

Mr. Mitchell. My attention has been called by Mr. Hammond to the fact that the Federal courts follow the State practice, and in our State they do allow default in liquidated cases. It follows the rule in Minnesota.

Dean Clark. Is there a local rule?

Mr. Mitchell. Yes, there is a local Federal rule.

Mr. Morgan. We have a local Federal court rule.

Mr. Mitchell. I thought we could find out from the Secretary of this Conference. You do not know, Mr. Hammond, do you?

Mr. Hammond. No, I would not know that.

Mr. Dobie. Suppose that investigation shows that the practice is not uniform, and under the Uniformity Act the court would not permit the clerk to enter judgment. We want the clerk to enter judgment in the case of liquidated claims. Is that the idea?

Mr. Morgan. The judge is willing to have it done where it is the Federal court practice, and saves considerable expense.

Mr. Olney. In what cases are they allowed to permit judgments to go without proper default? That means in those cases judgment is a purely ministerial thing, and requires no judicial action in any sense, but can be left to the clerk, instead of being ordered by the judge. In cases of that kind I am not willing to permit judgment to go merely upon default.

Judicial action is required, and there should be some kind of a hearing before the judge, and this should be along that line.

Mr. Mitchell. Yes, and we ought not to be hide-bound by the practice. Where the system is entry of judgment by

the clerk, and it is an efficient and satisfactory one, we ought to insist upon it and not be too timid about upsetting the old system in the Federal courts.

Mr. Lemann. Why not refer the question to the Reporter, with instructions to draft something along that line?

Mr. Mitchell. Well, is there any motion?

Mr. Morgan. Is there any doubt that ~~in~~ this group, ~~where~~ that where the claim for a liquidated amount, no judicial action is really necessary?

Mr. Lemann. I thought everybody was agreed about that but let us keep a record for the Reporter, let us make a record of that fact.

Mr. Mitchell. Suppose you make the motion to raise the question.

Mr. Lemann. Yes, I make that motion.

Mr. Morgan. I second the motion.

Dean Clark. Would you require then an affidavit, or would it ~~be~~ simply require a showing of the instrument of indebtedness?

Mr. Morgan. An affidavit of default.

Dean Clark. That is what I supposed; that is, the plaintiff files an affidavit of indebtedness and shows the instrument, if there is one.

Mr. Mitchell. That is right, and then he gets a judgment by default.

Mr. Wickersham. Where the claim is in a fixed sum which is ascertainable by ready and easy computation.

Mr. Mitchell. Yes, you will find that in our code.

Dean Clark. Yes. Judge Olney suggested that this was a ministerial act, because there was nothing more than a default, and he did not quite mean that it requires any kind of proof other than the affidavit.

Mr. Mitchell. Other than the affidavit; but I think you will find in many States that if it is on a note you are required to file the document.

Mr. Cherry. That is by rule of the court.

Mr. Mitchell. That is a matter of ~~skill~~ detail that can be worked out.

Well, the motion is clear. All in favor of that will signify by saying "aye", those opposed "no."

(The motion was voted upon and unanimously adopted.)

Mr. Lemann. I think the affidavit should also bring out the amount of difference, ~~because that is not customary.~~

Mr. Mitchell. It has to show, the form of affidavit, non-appearance, and I suppose they have to show the sum claimed, and that there is no appearance.

Mr. Olney. May I inquire if this affidavit that you have in mind is an affidavit as to the merits?

Mr. Mitchell. No.

Mr. Olney. That is the affidavit simply of default?

Mr. Mitchell. The affidavit states the sum under contract, and gives the amount with interest, and states that there is no appearance and no answer, and on that affidavit the clerk makes entry and gives judgment for the exact sum.

Mr. Lemann. It is not an affidavit on the merits in the final sense?

Mr. Mitchell. No.

Mr. Lemann. You shake your head, so that is not settled.

Mr. Cherry. In Minnesota, you stick that in your bill of costs, but it is not sworn to.

Mr. Donworth. You make an affidavit of non-appearance.

Mr. Cherry. That is all.

Mr. Olney. If a man has not answered in the prescribed time, that is the end of the matter.

Mr. Mitchell. Yes, if he has not that ends it.

Mr. Olney. The clerk adds the interest and includes it in the judgment.

Mr. Mitchell. Yes, it is purely a ministerial act.

Mr. Morgan. And the clerk also taxes the costs at that ~~time~~ time. If a person is in default, he is not entitled to notice of default.

Mr. Lemann. Well, there are two kinds of claims. If it is a liquidated claim, you get it from the clerk; if it is an unliquidated claim you get it from the judge.

Dean Clark. In cases where the judgment is not for failure to originally appear, but for some subsequent default--

Mr. Wickersham (Interposing). There should be an entry of an order from the judge.

Mr. Donworth. It is only for non-appearance.

Mr. Mitchell. There is only one thing, that you affidavit is merely for non-appearance. In New York, in the State procedure, do you not have to file a verified claim?

Mr. Wickersham. Of course you have to file a verified ~~paper~~ claim.

Mr. Mitchell. My impression is that that is not as it is done in Minnesota.

Mr. Wickersham. In New York the verified complaint sets forth a cause of action. If it is on a note, the proceeding is of the simplest character. Nevertheless, it is a verified pleading.

Dean Clark. Now, the complaint does not have to be verified, unless the clerk chooses; in this case it would have to be verified.

Mr. Wickersham. In this case it would have to be verified; otherwise he would have to go to court and prove his claim.

Mr. Mitchell. In Minnesota the clerk can give judgment for the sum when an affidavit is filed.

Mr. Lemann. If the man does not come in and put in an appearance.

Mr. Morgan. Yes, you are answering it on his non-appearance, and not default. And by not answering the thing he has personally confessed it; just as by answering only one allegation you can take judgment on the other.

Dean Clark. I think in some respects Minnesota is better than New York.

Mr. Wickersham. Mr. Hammond calls my attention to one variation of that rule in New York. You can serve a summons with notice, and that notice is a demand for a fixed sum, with interest. In that case, you do not have to file a complaint if there is no appearance or answer; you can take judgment by default.

Dean Clark. Do you not have to file a verified complaint in that case?

Mr. Wickersham. No. That is a variation.

Mr. Mitchell. We can provide that he can file it where it is for a definite sum.

Mr. Wickersham. In New York we have that variation of a summons on a note. That is, that in the summons he says, "Take notice that the plaintiff demands the sum of_____ dollars, with interest on such a date." Now, if there is no appearance and no answer to that, then you may enter judgment by default. But ordinary cases you have to serve a complaint and verify it before you can get judgment.

Mr. Donworth. Well, this clause remains, by which after mentioning these things it says it may be rescinded or sus ended by the court on special cause stated.

Mr. Cherry. In Minnesota, you issue a summons and you state the consequences of default, and if it is a liquidated amount that you will take judgment.

Mr. Wickersham. That is substantially the same as our notice in New York.

Mr. Morgan. If you say you are going to demand the relief stated in the complaint.

Mr. Mitchell. If you have a liquidated claim, then you can take judgment for a stated sum, plus interest from a certain date, and it works very well.

Mr. Tolman. Mr. Chairman, there is one other clause here that it seems to cover an entirely separate thing. That is this clause which says, "and for other proceedings in the

clerk's office which do not require any allowance or order of the court or of a judge." I am wondering where we can ascertain, either under these rules or elsewhere, what are those proceedings?

Mr. Morgan. What rule is that?

Mr. Tolman. Rule 8, "and for other proceedings in the clerk's office which do not require any allowance or order of the court or of a judge."

Dean Clark. Major Tolman is quite right. The Equity rule did not specify, and I frankly did not know what to do myself about it. It is left somewhat doubtful in the Equity rules.

Mr. Wickersham. That language was taken from Equity Rule 5.

Mr. Tolman. It seems to me that the situation is different.

Mr. Wickersham. I mean that language is taken from that rule.

Mr. Morgan. What about the taxation of costs? In a good many of the Code States that is provided for.

Mr. Wickersham. The matter of taxation of costs is determined by the court.

Mr. Morgan. The costs may be disbursements.

Dean Clark. This Equity rule goes back to the earlier Equity Rule of 1822. The court said as to that, that ~~what~~

what constitutes a motion for the grating of costs is to be inferred from the 5th Rule of Equity.

Prof. Sunderland. That same idea is included as to the court; it says when they are not granted by the court. It is the same question as raised in the other case.

Mr. Mitchell. We have got to have all of these rules, under any view that is expressed here, on the theory that they will go to the court in order to get judgment.

Mr. Morgan. Then we do not have these double steps now when the clerk takes the second step.

Dean Clark. There are still certain things that the clerks can do with the writ of saquestration or attachment, where the party has complied with the decree. That is in the provision for execution of judgment, at the end. Also I find in one of the courts that the admission of the attorney is taxed as costs. (Laughter.)

Mr. Wickersham. I did not know there was any State left where that was still true.

Dean Clark. None in the Federal court. In the State court, you have to have a lecture from the presiding judge. (Laughter.)

Mr. Mitchell. Dean Clark, in view of the fact that it seems sort of inconsistent here, do you not think you have sufficient

instructions to put that in shape?

Dean Clark. I think I have sufficient instructions with regard to Rule 17.

Mr. Olney. Before we leave Rule 17, I notice that you use the language, "If the defendant does not file his answer or other defenses in the time provided, the plaintiff may take a default against him, and thereafter the action shall be proceeded in ex parte as to him." That would not leave out my way, I think, that the complaint or the bill would be taken pro confesso. It would not be taken pro confesso; but the man would be required to produce some kind of proof of all the averments of the bill. He would be proceeding ex parte without any opposition, but he would be required to bring proof.

Dean Clark. Yes, that is what we contemplate, that he would have to produce some evidence.

Mr. Olney. Of all the allegations of his bill.

Dean Clark. Well, that is what I had in mind, that your affidavit would be on the merits.

Mr. Morgan. Not on the liquidated claim.

Mr. Olney. When you were speaking of the judgment on default of unliquidated damages, for example, the practice was never for the court to concern itself with the merits of the case, or with anything but merely the question of the amount of damages. That has always been my understanding.

Mr. Mitchell. Will the rule not have to be com-

pletely recast, Dean Clark?

Dean Clark. Yes.

Mr. Olney. That expression in my jurisdiction, in my State, would mean that that judgment is the same as pro confesso.

Mr. Morgan. While you are on that, you might change that property rights in the action shall be proceeded in, and so on.

Mr. Donworth. Are we adopting that now?

Mr. Mitchell. We have adopted the principle, as I understand it, that in case of liquidated claims the clerk may enter judgment, but where it is unliquidated it will have to go before the court; and I think Rule 17 will have to be recast.

Mr. Donworth. There is an independent point in Rule 17 that I would like to discuss. That is, I do not find anything in the rule regarding the form of the summons. In some jurisdictions the form of the summons is set up. I think it is objectionable to allow the court to extend the time for service of the summons. In all cases, the defendant should be allowed 20 days. Now, if there are additional remedies those are taken care of by motions or special notice. For instance, we often in an injunction case file a complaint, and the summons is in an invariable form, but we apply to the court for an order to show cause in 10 days why the defendant should not be enjoined so-and-so. Now, that is in 10 days.

Dean Clark. The rule, Judge Donworth, leaving out the question of the form of the summons, is in Rule 11; that gives the form of the summons, and then there is the provision in brackets, which seems to cover what you have in mind.

Mr. Donworth. I think it is objectionable to require an invariable time for the answer; but I think there should be no change whatever in the form of the summons or the answer.

Dean Clark. Rule 11 does provide for the form of the summons, and if this provision of Rule 7 should remain the summons would have to state the time. That is the provision in brackets in Rule 11. Now, on the matter in brackets, that was merely put in there to show what the Committee thought about it. But as a matter of fact, we desired to have justice expedited; and on purely formal matters is there not something to be said about the power of the court to shorten proceedings. In a good many matters, there is nothing but formal proof; and that is why we have provided for this method; it is a method of speeding up the process.

Mr. Donworth. The court may make an order ex parte.

Mr. Morgan. Yes, ex parte; that is the trouble.

Mr. Olney. Well, although the court makes an original order shortening the time, if that is injurious to the other party, he can go to the court and have that time set aside and be allowed additional time.

Mr. Lemann. Is that the rule in California?

Mr. Olney. Yes.

Mr. Morgan. You are putting more work on your judge.

Mr. Lemann. That is a new thought to me.

Mr. Dodge. It is frequently done in Massachusetts. The complaint is filed and the time for answer is set, and the defendant comes in, and the court orders the case up forthwith; and it is referred to a master. It is a great engine for speed.

Mr. Cherry. Except for the temporary injunction, that would be for the defendant's protection.

Mr. Dodge. Not necessarily.

Mr. Lemann. Of course, on your temporary injunction, that allows you time to plead to the bill

Mr. Dodge. The judge may want the case to be decided at once, in order that the whole issue may be determined quickly. It is an important power for the court to have.

Mr. Wickersham. How would it be, instead of having a uniform rule, to have an exception that in actions to recover a fixed sum of damages, the answer must be served in 10 days.

Dean Clark. In many States, I think in actions concerning the holding of real estate the time is made very short, in order to get a speedy determination.

Mr. Wickersham. In summary proceedings you mean?

Dean Clark. Yes.

Mr. Wickersham. But in certain cases in the city

courts it is 6 days after service of summons and complaint. But in dealing with these Federal district courts, you might if you want to expedite the thing provide for a further time in action to recover a sum certain. It may be ten days instead of twenty.

Mr. Donworth. It seems to me that it would be difficult to get support for the rule with anything as unusual as that shortening of the time on an ex parte application, because it will be considered tyrannical; and the possibility of a tyrannical proceeding is not to be thought of.

Mr. Dodge. Suppose it is on a return day, on short notice.

Mr. Morgan. It does not apply to time to plead after the return date.

Mr. Dodge. I thought the rule required that the answer would be ready in 20 days.

Mr. Cherry. No, the question is whether the court can, on an ex parte order, fix that time.

Mr. Lemann. If you have a suit you can file your complaint in the clerk's office, and go to the judge and say, "Judge, I would like to have quick action, and I would like you to issue a summons for the defendant to answer in ten days." And the judge may say, "I think you are right. We will make this ten days." And of course the man may

come in and say, "Judge, look here. That fellow is not telling the truth. I need the twenty days," and there will be an argument.

Mr. Wickersham. Now, as a matter of fact, now important a subject is this? The number of suits to recover a fixed sum, actions at law in the Federal court, is not very large. Those cases get into the Federal court largely by removal at the instance of the defendant but if you have a suit on a promissory note for $3,000 or $5,000, you do not sue in the Federal

court; you sue in the State court. It is a simple remedy. It is an exceptional case where you will go into the Federal court to recover a fixed sum for damages under contract.

Mr. Olney. If you think there is going to be much trouble, and you bring suit on a promissory note, you bring it in the Federal court in order to make sure of getting the correct result. (Laughter.)

Mr. Lemann. Are we going to give any consideration, when we are talking about this, as to the logical time being 20 days and then, as mentioned, refer to an earlier day, to provide for some elastic time. We have ten days now; but it may be advisable to make it twenty days. But in Wyoming they think that 20 days is short; and in New York or Philadelphia they think it is a long time. We could make it not exceeding 20 days. But if you make that less than 20 days in any case, your argument would not be so potent. Otherwise, if you had a provision that might give you 40 days, it might be more potent.

Mr. Loftin. I thought we adopted this afternoon a motion to fix the time at 20 days. There were two alternatives, 20 days and 7 days, and I made the motion to make it 20 days.

Mr. Lemann. I thought we had just settled that. It is res adjudicata.

Prof. Sunderland. If there is no defense, could you use a summary procedure? If there is going to be

contest, there is no objection to 20 days. If there is no defense, you want a short notice.

Mr. Lemann. Do you mean by default?

Prof. Sunderland. Summary judgment on affidavit proof.

Mr. Lemann. Well, could you force them to answer?

Mr. Mitchell. There are some special provisions later on about summary judgment. We jumped over to Rule 17; and I had an idea that if we went back to Rule 8 or 9, we would reach that in due course.

Dean Clark. On Rule 8, I think you asked if I had sufficient instructions. Of course, I have not quite know how to make that more explicit. It was not very explicit in the Equity rule. Possibly you do not want it in at all; you do not want any attempt to define the clerk's job. But I should say that anything we can do to have the clerk do things this is desirable. We have later on, in the provisions for making up the record, if the provision stands, giving certain powers to the clerk in the first instance--to determine as to the record, and determine as to the limination or condensation of the record, with an appeal to the judge.

Mr. Mitchell. Why would it not do to let it stand for the present and later on we can decide whether we want it back?

Mr. Tolman. That is true. I can prepare something and submit it as to that.

Dean Clark. All right; that will be very fine, and

we will be glad to have it.

Mr. Mitchell. Then we will pass on to Rule 9.

Dean Clark.

Rule 9 is in part a development of of Equity Rule 6. Without requiring the motion day once a month--that is a part--because the latter part of the provision is new and is designed to make unnecessary a good many of the hearings; and the latter sentence is an attempt to provide that the normal course shall not be an oral hearing on a motion. As to that, this is like the English procedure, and there were several suggestions from different places. Judge McDermott, of the Illinois district, has a rule, and there were other suggestions that I think we have here from the local committees. I have not got the hang of these papers yet. I will ask Mr. Hammond about it. (After conferring with Mr. Hammond). Now, if you take the suggestions of the local committee, Kansas has such a suggestion; and as I say Judge McDermott has one. And I think the Colorado district judge made a suggestion of that kind.

Mr. Loftin. As I understand, Dean Clark, there is no such practice in any State at the present time?

Dean Clark. Yes, there is. It is true that the practice is not very general. The practice exists, as I understand, in Texas. It is substantially the English provision. It exists in the Federal court in Illinois, as I understand it, Judge McDermott said that he applied it when he sat in the

district court. He is now on the Circuit Court of Appeals. He applied it without formal rule.

Mr. Lemann. Is there not practice in New York by which you hand up the papers to the judge, and he deliberates without any hearing or oral argument?

Mr. Wickersham. It all depends upon the judge.

Mr. Lemann. There is no rule?

Mr. Wickersham. No, there is no rule. Of course, on appeals from certain orders of the Appellate Division, there are certain matters of appeals in which no oral argument is heard unless the court requests it.

Mr. Lemann. I think in our district, the judge would take a long time to decide it; unless you decide it then and there it will a long time.

Mr. Wickersham. I think in New York the judge decides motions, generally speaking, on the argument and closes out the matter in the district court.

Mr. Loftin. That is so in Florida, and I have considerable doubt in my mind, whether this will expedite handling the business. In other words, take it from the lawyer's standpoint. If the lawyer knew he was to say anything, or what the judge thought about it, he may file a much more elaborate brief in support of his motion than he ordinarily would if he prepared an oral argument. And the same thing would be true of

counsel on the other side. And as I see it, there would be much more time taken by counsel, to begin with. And then it is submitted to the judge, with elaborate briefs on both sides; and he might not be ready to take them up and it might be some time before they are disposed of. Whereas, on oral argument, they are sometimes handed ended abruptly.

Mr. Lemann. In my State, I would ask the judge to decide it very quickly. But this can do no harm, Mr. Loftin.

Mr. Dodge. It is not optional with counsel.

Mr. Loftin. No, it is not optional with counsel.

Mr. Lemann. I was about to say that the second party, the moving party, may apply for a motion.

Dean Clark. May I say that the general trend has been to cut down the stages of preliminary trial, and it does not get you anywhere, and that is why the movement for the abolition of the demurrer has been so extensive. And then, by the Equity rules, the word was abolished. And hence the attempt made in the English rule. And we tried to carry it out in Rule 26, as to defenses in an effort to avoid, generally speaking, a preliminary argument on the law, except in cases where it seemed apparent that that preliminary ground of battle, so to speak, would get you somewhere. Generally speaking, it does show that very strikingly. Rarely not. Some of the judicial statistics that we worked out

is a case decided on demurrer. You have all the time and trouble of moving around.

Now, this is another attempt to prevent another kind of sham battle that can be made generally by the defendant, and can slow things up very dedicedly. The whole attempt here is to get away from a formal hearing, to shorten the time of the ~~party~~ parties to bring the case on, and to speed the whole process up, and generally speaking, I take it that it will mean that most motions will be denied, as they should be, and the whole practice of filing motions will be lessened; because if you file for purposes of delay, you will not get anywhere.

Mr. Dodge. This seems to me to include a motion for defining the issues. That is not a motion that would be denied in an ordinary matter. And a later rule provides that the motion shall be decided after hearing.

Dean Clark. Yes, it is possible that that particular provision ought not to be exempt. I am not sure that is not correct. The later provision, as to the formulation of issues is in Rule 38.

Mr. Lemann. Would there be any more delay in other cases, rather than less delay? If you want to level some motion at your opponent's pleading under this, you would file it and have five days, and the other fellow would have five days and the judge gets down to it when he can.

Mr. Olney. This would work exceedingly well if the judge had a good secretary, a good law clerk, who would go through these briefs for him and present a report. But if he himself has to go through and examine and read the briefs and look into all the points to see what is there, it is not going to prevent any delay or help him at all.

Mr. Wickersham. That is a matter for the sub-judicial officers that they have in England.

Mr. Dodge. Yes, that would be a matter for them; but I doubt if it would work otherwise. Would you describe that as the equivalent of the judge taking a case under advisement?

Mr. Mitchell. The English have statutes providing for a standing master.

Mr. Wickersham. Yes, they provide by statute for standing masters, and they do not bother to take the time of a judge with a salary of ten thousand pounds a year for passing on this.

Mr. Morgan. Do you think it would result in the judge spending any time on the briefs? He might just depend on his conscience.

Dean Clark. That is true. I was trying to get it so that you need not file a brief. He could file a brief stating reasons in support, and not a brief.

Mr. Wickersham. You cannot take out the briefs.

Mr. Olney. You would have to limit the number of pages that could be used if we are to change it.

Mr. Lemann. I think there is nothing so clarifying as the oral hearing. The judge says, "Mr. Smith, what is your point?" Mr. Smith says, "The point is so-and-so." The judge says "Denied." (Laughter.)

Mr. Wickersham. There spoke the experienced judge.

Dean Clark. That shows the different ways those things come up. When these cases are heard first, the defendant files a motion to respond, and then he files a demurrer, and so on, and then he does not do anything more, and after that, after a time the other side has it set for hearing, and at the first hearing the excuse is made that counsel wants to go fishing, and it goes over several motions days, and is eventually heard. And the parties talk at length and get nowhere. When I was in practice I remember one case where the judge held up the decision for over a year.

Mr. Wickersham. Well, that is not the rule in the Federal District Court in New York. There they are disposed of very promptly.

Dean Clark. Yes, in New York they might not as well make the motion at all.

Mr. Wickersham. Unless it has substance. If it has substance the judge will give it attention, but if it is the

ordinary motion, he will delay.

Dean Clark. I understand that in the State courts you can hardly get the words out of your mouth before you are out.

Mr. Dobie. If I understand it correctly, if he files a statement of reasons his opponent is to have five days to reply. So that in all cases you must have five days.

Dean Clark. Yes.

Mr. Lemann. How does that work if they stay there five or six days? He may not stay there five days. In the Western District of Louisiana the judge goes to different places and spends two or three days in each place.

Dean Clark. He can pass on these things anywhere. On your point about the five days, of course not, according to the rules, it goes for a month, or such part of it as you have to wait for motions day.

Mr. Wickersham. Well, of course, you have got to give your notice of motion in the first place, and then you have him file a motion and file a brief, and the other side would not have to appear for five days, and if he has got that time to file a reply, I think that would answer that. I was wondering whether the suggestion made is not a sound one, as it would really shorten it too much.

Mr. Lemann. If the judge does it in his bedroom, it would not delay it, and unless it has to happen in the court room it could be speeded there.

Mr. Dodge. Why not provide for standing masters and give them the function that standing masters in England have?

Mr. Wickersham. That brings up there questions of appropriations by Congress. I have always advocated standing masters. I think they are just like referees in bankruptcy. Those are standing appointments, and I have always advocated that. We will come to it later on, when we come to consider the question of examination before trial, and discovery, and that sort of thing. I feel very strongly that those examinations ought to be in the presence of some judge or officer having power to rule on evidence. There you have a use for a standing master.

Mr. Dodge. There are many cases where he could be could used.

Mr. Wickersham. Yes; it would save a very large increase in the judiciary if we had standing masters.

Mr. Mitchell. We will have difficulty in setting up, or attempting to set up, additional machinery; and I am afraid we will run into difficulties about that, because this Congress will not appropriate money for the job.

Mr. Wickersham. It might give a place to the unemployed. (Laughter.)

Mr. Mitchell. Dean Clark, what do you think of the suggestion of Judge McDermott about the time in which a notice

of motion shall be filed? Judge McDermott is a pretty clever fellow. There is no limit as to the time in which to make a motion to reform the pleading. Should there not be some provision for stating the term?

Dean Clark. That is covered by the 20-day provision. It goes back to the provision that within 20 days after the summons, the answer or other pleading must be served, and I provided that a motion is a pleading.

Mr. Mitchell. But suppose your motion is directed at the answer, should there be a time limit?

Dean Clark. That I attempted to cover by the time for the reply, which is 10 days.

Mr. Mitchell. That ought to be in Rule 31.

Dean Clark. Yes.

Mr. Mitchell. This Rule 9 seems to relate to motions with reference to the form of the answer, for instance. Gentlemen, we are still on Rule 9. Now, what is just the problem that you are going to decide there?

Mr. Lemann. Does it not mean that the discussion is that we should strike out all after the words "disposed of" in the fourth line?

Mr. Dodge. All after the word "causes," is it not?

Mr. Mitchell. Up to the word "causes", you would let that stay in?

Mr. Morgan. That is the first sentence.

Mr. Mitchell. Yes.

Mr. Lemann. Yes; strike out all after the word "causes".

Prof. Sunderland. I think many lawyers would resent that restriction.

Mr. Loftin. I talked with one of our leading lawyers about this very thing, and he made just this comment--that it would deprive a party of his right to be heard in court.

Mr. Mitchell. Why could you not say: "Unless the court shall direct otherwise, each motion directed to a pleading or concerning the formulation of the issues in an action may be determined primarily on such hearing as the court may allow." Now, provide for the oral argument and the brief and allow the time. That would give the judges some flexible authority.

Mr. Dodge. I think that is about as much as you can hope to accomplish. Under the present organization of our courts, I think you can accomplish as much by such a provision as you can any way.

Mr. Lemann. Would it not well enough to provide "Summarily, within such time as the judge may decide"?

Mr. Dodge. I should say "heard and determined", instead of "determine."

Mr. Mitchell. "Heard and determined."

Mr. Loftin. The only thing about that is that you must appear the second time, and have two trips to the court and two actions of the court if you say "Such time as the court may fix."

Mr. Lemann. Would you say "disposed of promptly",

Mr. Loftin. If you could fix the time, rather than go to the court to fix the time.

Prof. Sunderland. The rule applies to a r egular motion.

Mr. Mitchell. Your point is that the motion should specify the date of hearing?

Mr. Loftin. Yes.

Mr. Wickersham. Yes, the usual practice today is to move the court, on a certain day at a certain time and place.

Mr. Mitchell. Well, do you think a motion of that kind ought to be stated after the pleading?

Mr. Wickersham. The court may pass an interlocutory order. There are all sorts of things that might be determined, and how can you fix the time in which a motion may be made?

Mr. Mitchell. Well, this says it is a form of pleading.

Mr. Wickersham. I was getting at the purpose of the rule itself. The proposed rule is not so limited.

Mr. Lemann. Judge McDermott or his successor could

try the supplemental rule.

Dean Clark. He has tried this rule and says it works well.

Mr. Lemann. It might work in some cases but not in others. There might be a supplemental rule.

Prof. Sunderland. Now, things that would work with Judge McDermott might not work with many others.

Mr. Dodge. It seems to me that it is a novel thing that the formulation of the issues should be treated in this way.

Dean Clark. I think you are correct about that. That should not have been put in here.

Mr. Mitchell. That may be formulating of the issues in an equity case, and not in a jury case.

Mr. Dodge. Yes.

Mr. Mitchell. Are you willing to strike out the phrase "or concerning the formulation of the issue"?

Dean Clark. Yes.

Mr. Lemann. Had you Perhaps you had better not have a broader motion?

Mr. Dodge. Would you not confine this to a motion directed to the sufficiency of the form of the pleadings?

Dean Clark. Yes.

Mr. Dodge. Of course, that is the character of motion you have in mind.

Mr. Dean Clark. That is true.

Prof. Sunderland. That is not sufficient as to the form.

Dean Clark. There are certain provisions that you can raise the questions in advance of trial, provisions that the defense may make motions to abate the action.

Prof. Sunderland. And questions of law you raise on the answer?

Dean Clark. Yes.

Prof. Sunderland. That would be sufficient.

Dean Clark. Yes, that provision at the end is Rule 26.

Mr. Mitchell. I confess that I have no clear in my own mind a motion directed to the pleadings.

Mr. Morgan. A motion to make it more definite and certain.

Mr. Wickersham. Or to strike out.

Mr. Morgan. Yes.

Prof. Sunderland. Anything going to the sufficiency would come under Rule 26, I should think, and would not require an answer.

Dean Clark. I suppose that is so. It would require a preliminary motion to abate the action.

Mr. Wickersham. Well, we are not discussing Rule 26

yet, are we because I want to say a few words about that.

Mr. Donworth. In view of the fact that Rule 37 deals with motions to correct or strike out, it would it not be well to strike out everything here after the word "cause"? To get it before the Advisory Committee, I make a motion to that effect.

Mr. Loftin. I second the motion.

Mr. Mitchell. The words from there on are to be stricken out. Is there any discussion about that? Dean Clark, is there any objection to that?

Dean Clark. Well, I am sorry to see it go out.

Mr. Mitchell. You did have a motion as to pleadings, and Rule 37 provides explicitly for that.

Dean Clark. Are we going to leave it in in Rule 37?

Mr. Mitchell. That is all that is left here.

Mr. Donworth. There might be a stump speech.

Mr. Mitchell. The question is on Judge Donworth's motion. All in favor of it will say "aye", those opposed "no."

(The motion was adopted, all voting in favor of it except Dean Clark.)

Mr. Mitchell. It is carried. Now, you can take up Rule 37, if you want to say something about prompt hearings. We are on Rule 10.

Mr. Dodge. Rule 10 we have dealt with before, have

we not?

Mr. Olney. There is one correction in Rule 9.

Mr. Mitchell. Rule 11, "Form of summons." Now, that will have to be changed to provide a form for unliquidated claims and liquidated claims in the usual way.

Mr. Donworth. I do not think so, Mr. Chairman. I think that requiring him to file his answer in 20 days, that takes care of the whole matter.

Mr. Mitchell. This is Rule 11, form of summons.

Mr. Donworth. I do think he should be required to serve his answer on plaintiff's attorney.

Mr. Mitchell. This says something about the form of summons. Now, we have already agreed that we are going to have a system by which the clerk may enter judgment as of course in a claim for a specific liquidated sum under contract; and wherever that system is used the form is in the alternative. If it is a liquidated case, it states the amount; if it is not, it asks for such relief as the court may assess. So that the form of summons may--

Mr. Wickersham (Interposing). How about adopting the original New York Practice Act on that point, of summons with notice?

Dean Clark. You mean the provision for liquidated damages?

Mr. Wickersham. The form of summons for liquidated

damages.

Dean Clark. I might say that I am a little reconciled about your judgment by default.

Mr. Wickersham. Well, that particular system has worked very well.

Dean Clark. I mean about not requiring an affidavit.

Mr. Wickersham. There is some question there.

Dean Clark. I mean it is a question of fact under the New York law.

Mr. Dodge. Is it not following the English practice?

Dean Clark. I think it is.

Mr. Dodge. It is the same thing.

Dean Clark. Mr. Wickersham's suggestion is that we follow the New York practice, but I think that is what he had in mind.

Mr. Mitchell. It is just a matter of detail. If you have a liquidated claim, you state the amount you are asking for; if you have not you state you are going to ask for judgment for the relief claimed.

Mr. Lemann. It seems to me that you have to attach the summons and file it in the clerk's office, and it might be simple to say that you sign the complaint which is attached, and a copy filed in in the clerk's office.

Mr. Mitchell. That is the form used. It says, "Within the time stated the plaintiff may take judgment against the defendant or apply to the court for judgment.

Mr. Lemann. It is the same form.

Mr. Mitchell. Yes, it is the same form in either case.

Mr. Morgan. It will give him notice of what will happen.

Mr. Donworth. Is there anything in that about having to serve a copy of the answer upon the plaintiff?

Mr. Mitchell. Yes, it says you are required to serve your answer within 20 days after the service of this summons. And it seems to me that if he fails to answer the complaint within the time stated the plaintiff will take judgment for the amount asked, or will apply to the court if it is unliquidated.

Dean Clark. Of course, this requirement of filing an answer with the court and filing the pleadings should be changed.

Mr. Lemann. Under this rule, he does not have to serve his answer on the plaintiff, and does not have to file it in court at any time.

Mr. Mitchell. There is another rule which requires the pleading to be filed.

Mr. Dodge. Rule 17 provides for a period of 20 days for filing the answer or other defense.

Mr. Mitchell. I think we have covered that.

Dean Clark. There is just one other matter, in regard to the matter of service. This matter in brackets goes back to Rule 7.

Mr. Lemann. May I ask about this rule of requiring a man to file his answer in court--does that include that?

Mr. Loftin. Yes.

Mr. Mitchell. That was the intention. The summons requires him to serve his answer, and not file it. Dean Clark has just called attention to that. He said the words "file his answer" should be changed to "serve his answer."

Mr. Lemann. But there is a later rule on that.

Mr. Wickersham. That later rule is about advancing the time; but the general consensus of opinion is against that.

Mr. Lemann. Well, what are we doing about requiring the defendant to file his answer in the court?

Mr. Mitchell. Right; but my understanding is that under the system we have adopted, the practice is to serve his answer.

Mr. Lemann. And not file it?

Mr. Mitchell. And not file it.

Dean Clark. Well, Mr. Lemann, we still have the pro-

vision that the claim must be filed in the court within 20 days, that is, we have the summons and complaint, and then we go right into court within 20 days. Now, what are we going to do with the answer?

Mr. Lemann. That is what I had in mind. Mr. Dodge referred to Rule 17, and I turned to Rule 17 and put it 7 days, and if that is the way we will leave it, the summons ought to cover that.

Dean Clark. Of course, we could say "serve and file."

Mr. Lemann. Yes; "serve and file."

Mr. Mitchell. We ought to be consistent. If we are not going to require the plaintiff to serve his complaint, there is no sense in requiring the defendant to serve his answer. My theory is that they ought to allow them to be served on each other. The question of filing is a matter of having the court deal with it, and the system that I have in mind simply contemplates filing the pleading a sufficient time before the trial so they will be there and the court can find them, and the case is tried. And that system usually provides that pleadings shall be filed when a notice of trial is served, and note of issue filed. Why file them sooner if they do not have to be filed when they are served?

Mr. Olney. Suppose a man files pleas and motions in abatement, and so on?

Mr. Mitchell. Well, then the court will say "close

your pleadings and file your answer."

Mr. Olney. Suppose the defendant makes a motion to strike something from the complaint and the plaintiff has not filed the complaint?

Mr. Wickersham. Well, he serves it with his notice of motion, and it comes up under his notice of motion and the court will have nothing presented to it before that.

Mr. Olney. But it is the other man who is moving; the defendant is moving.

Mr. Wickersham. Well, how does he move except on the complaint? He moves on the complaint with notice of motion.

Mr. Olney. Why should not the plaintiff file his complaint?

Dean Clark. I thought we decided that in Rule 16 which we discussed, and that is where we had our discussion of what to do if the complaint was not filed, and the suggestion was made that the filing be left with the court, and we make such reference to the filing as the court may deem proper. As I understand it, that was the decision, that it should be filed in not less than 20 days.

Mr. Dodge. It seems to me that if this case is pending at the time in the court, other parties may be interested in knowing whether the case is pending. I do not think that litigation ought to be kept out of the court, as a private matter.

Mr. Mitchell. The papers ought to be filed in time for the court to pass on the merits.

Dean Clark. If the answer is served, why should it not be filed?

Mr. Lemann. Why could that not be 20 days, stating that he must serve his answer on the plaintiff and file it in court.

Dean Clark. Later on we have a provision that when the pleadings are closed, the case goes on the trial calendar. Of course, you can change the rule. That follows Equity Rule 56. At the expiration of that time, the case goes on the trial calendar. Now, the new rules provides that when the pleadings are closed, the case automatically goes on the trial calendar.

Mr. Mitchell. Several members of the Committee suggested to me that we ought not to sit after lo o'clock, and that time has passed by five minutes. I think you are right about it.

Mr. Wickersham. What time shall we meet in the morning, Mr. Chairman.

Dean Clark. Eight o'clock. (Laughter.)

Mr. Mitchell. You cannot floor this gentleman.(Laughter.)

Mr. Wickersham. I move, Mr. Chairman, that we meet at half-past 9 o'clock tomorrow morning.

(The motion was unanimously adopted.)

(Thereupon, at 10:05 o'clock p.m., the Advisory Committee adjourned until Friday, November 15, 1935, at 9:30 o'clock a.m.

Rec'd from Mr. Morgan 9/5/36 - pp. 266-289 1 orig 2 carbons

IX

P R O C E E D I N G S

OF

CONFERENCE OF ADVISORY COMMITTEE

DESIGNATED BY THE UNITED STATES SUPREME COURT

TO DRAFT

UNIFORM RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

UNDER THE ACT OF CONGRESS PROVIDING FOR SUCH UNIFORM OR UNIFIED RULES.

Washington, D.C.

Friday, Nov. 15, 1935.

The Conference of the Advisory Committee designated by the United States Supreme Court pursuant to act of Congress, to draft proposed Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia, in both law and equity cases, met in the Conference Room of the United States Supreme Court Building on Friday, November 15, 1935, at 9:30 o'clock a.m., pursuant to adjournment on the preceding day.

Present: All the members of the Advisory Committee and its assistants and representatives of the Department of Justice, as noted at the beginning of yesterday's session.

Mr. Mitchell. I want to go back for a moment to Rule 11. That is the rule that requires the defendant to answer within 20 days; and I want to call the attention of the Reporter at this time to the fact that we will have to deal with the question of answer in removal cases. I do not find any rule on that, and under the present law, in a case of removal, I believe 30 days is allowed to answer after the removal is made and the papers are filed in the Federal court. There has been a good deal of complaint about that, and the Association of the Bar in New York unanimously passed a resolution for a change in the statute to shorten that time. And I merely bring it up now so that it will not be overlooked, that we ought to consider the question of the time in connection with those cases.

Dean Clark. Perhaps you may turn for a moment to Rule 115.

Mr. Mitchell. Have you got it there?

Dean Clark. Yes.

Mr. Mitchell. I had overlooked that. Then we will not bother with it now.

Dean Clark. What we did in the second sentence of Rule 115 was to provide that in a removal case if the defendant

has not answered he must present his defense pursuant to Rule 26 at the time of filing the transcript of record.

Mr. Mitchell. Let us drop it them for the present.

Rule 12 we seem to have agreed on, and we are down to Rule 13, "Manner of serving summons."

Mr. Olney. In regard to 12, there is one little change in the language that might be suggested. It may make it clearer if you say "The summons may be served" and not "shall be served" by the marshal or by any person, and so on. It does not make much difference, but I think it is a little better.

Dean Clark. Are we on Rule 13?

Mr. Mitchell. Yes.

Dean Clark. I was going to say that this presents a problem of putting in a short setence all the variations in fact calling for various differences in service; and we tried to cover that by a series of paragraphs, as you will see; and the first sentence in effect does not upset the present Federal practice. There are some Federal statutes a s to service, particularly service upon the United States, by serving a copy, often with the Attorney General or the United States Attorney, and I think there is another statute about foreclosure of liens which was passed very recently, which I hope to add if we refer to the Federal statutes by name.

Mr. Wickersham. Why would it not be just as well to

say where there is a Federal statute on the subject?

Dean Clark. I am not sure it would not better.

Mr. Wickersham. Yes. Otherwise we might overlook something.

Dean Clark. Yes. We put it that way, because you can not always tell--but there is a difficulty that some may be overlooked.

Mr. Lemann. There is one point of phraseology in several places in these rules. In a large number of cases there is a provision "Unless otherwise provided by Federal statute". Now, we are superseding a lot of statutes, and that expression I think is too broad, because we are changing a number of statutory provisions. I think that might be cured without changing the wording in the different rules, by a rule that wherever a Federal statute exists it is not superseded by these rules.

Dean Clark. I think that can be very well done at the end, that wherever a Federal exists it is not superseded by these rules.

Mr. Mitchell. I notice in Rule 10--I did not raise the point before because I thought it was a question of form rather than of substance--that says "~~that where~~ except where otherwise provided by special requirements of specific Federal statute." I do not know whether there is any legal definition of "specific

Federal statute." I do not know what the phrase means.

Mr. Dobie. That takes care of a particular case. They will have a provision under the Interstate Commerce Act or something of that kind. I think the language is "except where otherwise provided by special requirement of specific Federal statute."

Mr. Mitchell. What is a "specific Federal statute"?

Mr. Dobie. I think a specific Federal statute is one that takes it out of the general rule. For instance, in patent cases, ~~then you~~ the venue can be in any place where the infringement takes place.

Mr. Mitchell. My thought is that "Federal statute" has no particular meaning, and I do not think the word "specific" identifies the statute.

Mr. Olney. I think it is a statute making specific provision.

Mr. Mitchell. Well, all statutes make specific provisions.

Dean Clark. We might have in mind the arbitration agreement, where you could go in court on a simple motion in five days. I suppose if we put that in we hit arbitration.

Mr. Mitchell. I think we will find difficulty in finding just what was meant by that phrase.

Dean Clark. Subdivision 2 is perhaps the main one in Rule 13, that service upon the defendant may be made personally

upon him by leaving a copy of the summons and complaint at his usual place of abode, with some adult person. Subdivision 3 of Rule 13 is an attempt to cover service on corporations. Subdivision 4 is an attempt to cover service, if the defendant is subject to the jurisdiction of the court, according to the law of the State in which the action is brought.

Mr. Dodge. Suppose a man lives alone?

Dean Clark. In that case he cannot do it. Of course, in my State, and probably in yours, you do not need that. It is sufficient if served at the usual place of abode; so that you can leave it at a man's home when he is in State prison.

Mr. Dobie. Are there not a number of States that provide that you can mail it on the door?

Dean Clark. Yes, there are a number that provide that. This is more directly following Equity Rule 13. I have no objection ~~about~~ to taking out the clause about delivering it to an adult.

Mr. Wickersham. If you leave it with a designated person it ought to be an adult, because a child would not do.

Mr. Mitchell. The language used in many States is "on a person of suitable age and discretion."

Mr. Wickersham. Yes. That would exclude a child.

Mr. Cherry. Do you prefer this detailed provision to the alternative, Dean Clark?

Dean Clark. No, I do not.

Mr. Cherry. I rather like that alternative provision. I think that uniformity in method of service is of no particular consequence, and the comfort and convenience of lawyers who are able to serve in the way in which they are accustomed to do so in the State court of their own jurisdiction, where it is pretty well settled by decisions what the meaning of statutes and rules of their own court may be, would be much more important than uniformity.

Dean Clark. I do like the alternative better. The alternative is on the next page to the tentative rule. in brackets; it is a short provision, and provides that service shall be according to the law of the State, except where a different method is specifically provided by Federal law.

Mr. Lemann. The alternative leaves out one clause that is found in the third line of the rule, and that is that the summons must be served in the district where the action is instituted; but in the alternative Rule 13 there is no specific mention as to that.

Dean Clark. Yes, that is true.

Mr. Loftin. I will also call your attention to the fact that it has been decided, under the previous rule, that it can be served by the marshal or some other person. I think there might be some question there as to whether there is a conflict. In my State it could not be served by any one but an officer.

Mr. Cherry. I would not suppose there would be a conflict in that. It is a question of method.

Dean Clark. Well, of course, if there is any question I suppose the best thing would be to say at the end, "Provided that nothing herein shall prevent service,"—

(Interposing)

Mr. Morgan. According to the law or rule in that jurisdiction.

Mr. Dobie. Of course, that raises the problem of how far in these cases you want to adopt a local practice, which, of course, does not accomplish uniformity but just the other situation, and particularly in connection with the Circuit Court of Appeals and the Supreme Court of the United States, in those cases ~~that~~ they have to go technically into the law of the individual States, which is quite a burden.

Mr. Cherry. Well, I have in mind on the other hand, this thought: That subdivision 2 is just minor differences. For example, in the Minnesota statute it would be likely to plague a lawyer. Now, that would be true whatever form that detailed rule might take. There will be minor differences from the local practice, not of any special significance, but any rule that was adopted would have to be different in almost every district, in a matter which there is no necessity for uniformity. I should like to modify a part of the alternative rule.

Mr. Morgan. That is, to rephrase it?

Mr. Cherry. Yes.

Dean Clark. On that, I want to raise this question: The reason we did not put any of these provisions in this alternative rule is that we tried to keep it very limited as to matters of service, and of jurisdiction. Now, you will notice the language of the rule is "Unless waived by voluntary appearance or otherwise." In this rule we have not stated anything about jurisdiction at all. Now I do not know if we can cover all we ought to cover by putting in that the summons must be served in the district. And should we put in anything about waiver?

Mr. Lemann. Could you not put in, "unless authorized by Federal statute, or waived by voluntary appearance or otherwise by the defendant in the action, the summons shall be served in the district in which the action is instituted, ~~in the same manner as this~~ except under the laws of the State in which the district is located, service by publication." Would that not cover it?

Dean Clark. Yes; do we need the affirmative there? Would you say "where service is covered by special provision of Federal statute," or is that sufficient?

Mr. Lemann. I thought you would take the first two lines of the original rule and put that in the alternative.

Mr. Tolman. I think there is one objection to this rule. Instead of determining the precise way in which the service shall be had, why do you not make a rule authorizing

the service to be had by different methods? One I think would be the matter of service by a private person; another by the marshal; and the third in the manner provided by the local statute. Would you not in that way have a single conformity rule, rather than make a number of conformity rules? Then let the lawyer act according to whatever practice he wanted to. And in precise conformity I find a difficulty in those States where the law and equity practice have not been made uniform, where there are different methods of serving the process in law and serving the process in equity, so that a doubt arises in my mind as to just where you are.

Mr. Lemann. There is something in that suggestion.

Mr. Tolman. I suggest that we have another paragraph regarding service of summons, which should consist of definite alternatives.

Mr. Mitchell. Well, if a State law makes a different method for law and equity, Rule 13 would require you to analyze your case at once, in order to know how to make service.

Dean Clark. Yes.

Mr. Dodge. I did not know there were ever any differences in methods of service.

Mr. Cherry. Well, ~~if the State is different~~--you could just say "law."

Mr. Lemann. In other words, where the State practice is different, adopt the law rule?

Mr. Cherry. Yes.

Dean Clark. Maj. Tolman, what States do you think would have a difference in the two forms of service?

Mr. Tolman. I have a memorandum on that subject; and I find three States, Delaware, Florida, andMichigan, where there are distinct provisions; and I find a list of five other States in which it looks as if there were differences, but I have not been able to make a careful analysis to determine.

Mr. Wickersham. New Jersey is one.

Mr. Cherry. Three would be enough.

Mr. Dobie. Do I understand that Maj. Tolman did not finish?

Mr. Mitchell. Would it meet your point, Maj. Tolman, if you inserted the word "law" in Rule 13?

Mr. Tolman. I think that particular point would be met.

Mr. Dobie. Do I understand that Maj. Tolman desires the manner of service prescribed, and if so, will the service be good if it does not comply with the rule that we formulate, but if it is good under the State law? Is that the way you originally drew the rule, Dean Clark?

Dean Clark. Yes, that is the way I originally drew

the rule; because you will notice that subsection 4 of Rule 13 provides that service according to the State practice will be good.

Mr. Lemann. Even so, if you have that variation, then in order to determine how to follow your full rights, you would have to have a cause of action and fall back on that; otherwise you might have to have your action presented under paragraph 4.

Mr. Mitchell. Maj. Tolman's suggestion is that we provide for a rule of our own, and another to follow the State practice; and that has another merit; and that is that the court may raise a question about generality and uniformity; and that would leave it in the position of either adopting it or striking it out, as to the local practice, and you would still have one method left.

Dean Clark. Well, I think you would have to have that considered the main rule, because this (indicating) is my attempt to state a rule of our own.

Mr. Wickersham. The point that Maj. Tolman mentions, I understand, is to adopt the fourth paragraph of Rule 13, "in addition to the methods of service above set forth, any service, other than service by publication, shall be valid if made upon a defendant, subject to the jurisdiction of the court, in accordance with the law of the State in which is located the district"--if you add--"according to the law

of the State applicable to common law actions."

Dean Clark. Yes, I think we should have that provision in there.

Mr. Lemann. "Common law actions."

Mr. Donworth. Take out the word "common."

Mr. Lemann. Yes, "actions at law."

Mr. Wickersham. Actions at law.

Prof. Sunderland. Would it not be possible to extend the territory over which summons could run? The summons is required to be served in the district. It seems that it ought to be served anywhere in the State; it ought to be "within the State;" it ought to be, it seems to me, in order that the end of justice might be served.

Mr. Wickersham. "The law of the State applicable to common law actions."

Mr. Dobie. This provision in the Federal statute, I think, where there are different defendants in the same State in different districts in the same State should be considered.

Mr. Lemann. I have a case now where there are 36 defendants, and one lives in the district; so that there are 35 who do not; that comes under Section 113, Revised Statutes. There is considerable resistance on the part of the other 35 defendants; and if you extend that to

Mississippi--and one lives in Louisiana and another in Mississippi--I think you would increase that considerably. Of course you can leave it to the discretion of the judge.

Mr. Mitchell. You would have one great difficulty in extending the right to serve a man outside the district: You will have an almost insuperable objection in Congress. They are extremely jealous of any attempt of a Federal court to require a man to respond in any district in which he does not reside; and the practical situation is such that it is hard to overcome. I know that many lawyers think that service in the Federal court ought to be permitted anywhere within a radius of 100 miles from the place where the case is brought, but where their attorneys may be in other States. There is much to be said in favor of that, but Congress is jealous.

Mr. Dobie. This is a broad general question; but it will affect all we do here. Do you anticipate that when the rules are adopted by the United States Supreme Court, with such variations as the Court wishes to make, there is going to be any active attempt in Congress to try to analyze them step by step, and have long debates, and have a committee appointed on them?

Mr. Mitchell. Well, nobody knows. There is considerable opposition among members of the bar. Lawyers always

disagree; and the matter will undoubtedly be referred to the Judiciary Committee in both Houses of Congress, and they may have hearings; and if somebody pops on to the provision as to jurisdiction of Federal courts, etc., outside of their own district--by service, I mean--you will have difficulty right away. I do not think you can enlarge or alter the venue or t heright to compel a man to respond by service outside of the district of his residence, without raising trouble.

Mr. Dobie. You do not think there will be any difficulty about permitting service in different districts in the same State? I think the Congressmen will think in terms of the State.

Mr. Morgan. Do you think this shouldbe considered as a matter of venue, rather than jurisdiction--allowing service anywhere in the United States, in order to change the venue?

Mr. Mitchell. No, I do not think so. Does the law now permit service outside of the district where a man is temporarily staying?

Dean Clark. If he is a resident of a State, he can be served in the district, even though it is outside the district where suit is brought.

Mr. Morgan. Is that true at the present time?

Dean Clark. Yes, that is the present Equity rule.

Mr. Morgan. But not thelaw?

Dean Clark. But not the law.

Mr. Mitchell. Well, I just wanted to mention the practical difficulties--that is, those connected with Congress.

Dean Clark. How far did yours go, Prof. Sunderland? Is it limited?

Prof. Sunderland. This permits service anywhere in the district.

Dean Clark. Now, by Section 113 you can sue in suits of a legal nature which will affect defendants residing in the district. Have we got a copy of the United States Code?

Mr. Dobie. What section do you want?

Mr. Lemann. These sections, 112 and 113, are in our book. But in the first place, Section 113 of the U.S.Code provides for service in the district. Suit may be brought where defendants reside in different districts; suits may be brought in any district but service of the summons must be made in the district where the man resides. But if suit is brought in the Western District of Louisiana and the man resides in the Eastern District, the summons is sent down to the Eastern District. But that is only within the State.

Prof. Sunderland. But that is under Rule 13.

Mr. Lemann. Well, it says, "unless otherwise authorized by Federal statute."

Mr. Donworth. No; this would supersede that.

Mr. Dobie. Well, that is one of those specific cases; at least, that is my impression.

Dean Clark. But the cases that are specially authorized in particular suits are usually suits involving the United States.

Prof. Sunderland. Why not change that and say "in the State?"

Mr. Lemann. And also it provides for a place in which summons must be served, and under this the summons must be served in the district where he resides. So that is this not right anywhow?

Dean Clark. Well, Prof. Sunderland, I take it, is suggesting a rather small change in the statute, that is, that it does not need to be served in the same district.

Prof. Sunderland. Yes.

Dean Clark. But could we do that? Could we have a process of duplicate writs?

Mr. Lemann. Well, in the first place probably we would not get him except where he lives; so it does not make much difference.

Prof. Sunderland. But it would give the Federal court the same power as the State court.

Mr. Wickersham. You take a man who lives in Albany and has an office in New York City, and he lives in New York City most of the time, and goes home frequently for the weekend. He lives and votes and pays his taxes in Albany, in the Northern District of New York; and you

ought to be able to serve him with a summons wherever you find him in the State. But the suit has to be brought in the district where he resides.

Dean Clark. Now, there is something that I want to call to your attention. I do not know whether the rules need to be changed or not. The practice now required by the statute is that you must go to the other district and get process in that district to serve. Now, we are not requiring that. We have the simple service of summons by the attorneys of the plaintiff. Now, why cannot we require that summons to be served in Alabany?

Mr. Donworth. I think we are superseding Section 113 of the U.S.Code, and if we want to keep in force the portion of Section 113 which Mr. Lemann called attention to, we should specifically reenact it in our rule.

Dean Clark. I think you are right. Something should be done about it; and I am not sure but what Prof. Sunderland's suggestion is the final one--the summons may be served in any district in the State in which suit is brought. Would not that be all right?

Mr. Donworth. I think so.

Mr. Lemann. But if you put it that way--if you omit the present statutory requirement, that there must be another defendant in that district for that to be done--your language would permit me to be sued in the Western District

of Louisiana, where there is no other defendant.

Mr. Mitchell. No; he is not touching venue; he is touching service.

Mr. Donworth. Well, I do not think that is so, because in actions between persons in different States, the venue may be fixed by the residence of the plaintiff and he may sue the defendant in New York; and we make this a general rule.

Prof. Sunderland. The residence of the defendant must be the district where the defendant resides.

Mr. Cherry. That is true. It has got to be the district.

Prof. Sunderland. Then having located the suit in that district, can you summons him in other districts?

Mr. Dobie. Yes, you can summons him in other districts in the same State, but not outside the State.

Prof. Sunderland. I would put it outside the State, but that would raise such a furore that it would not be worth while to try it.

Mr. Donworth. As it now exists, the plaintiff can not sue a man who is outside theplaintiff's own district, in the district of the plaintiff, because of this single defendant. Now, if you make this general as to venue, the statute says it may be in the residence of the plaintiff

or defendant. If you leave it purely to the venue statutes, then I can sue a man in Spokane, Washington, a single defendant, and you cannot do that under existing law.

Dean Clark. Well, now, let us see--

Mr. Dobie (Interposing). You are talking about Seattle and Spokane in the same State.

Mr. ~~Lemann~~ Donworth. Yes, but different ~~States also~~ districts.

Mr. Dobie. Then in that case jurisdiction is not based on diversity of citizenship, and therefore it must be a Federal case, and in all those kinds of cases it must be the district of the defendant. I live in Charlottesville, and if I want to sue a man in Norfolk under the Federal statutes, and we are both Virginians, I have to go down there and sue him. I cannot sue him in my district. It is a single defendant, and both he and plaintiff are residents of the same State, and you have to bring suit in the defendant's district. That is true if the two bases of jurisdiction occur. It has been ~~successfully~~ specifically held that only where diversity of citizenship is the sole ground of jurisdiction can you do otherwise.

Mr. Mitchell. Is it not the sense of the Committee that the rule ~~is~~ be so drawn as to permit service anywhere in the State, provided it is not so drawn as to change the venue or require the defendant to respond in a different

district in any different way than the present law does? Is that not what we want to provide? Can we not agree on that, and let the Reporter work it out?

Dean Clark. Perhaps I did not get it. The summons must be served in the district in which the defendant resides.

Mr. Wickersham. Is that the present law, that it must be served in the district in which defendant resides?

Dean Clark. That is the present law; and then you can make it clear that we are not changing the venue statute. or if you think that is not enough to do, you can add another phrase, "the district in which the defendant resides, and when the defendant is subject to the jurisdiction of the court."

Prof. Sunderland. You cannot do that.

Dean Clark. Why not? We are not changing the venue statute. This is simply a requirement of service, and the only requirement as to service is that it must be in the district where the defendant resides.

Mr. Wickersham. It goes further than that.

Mr. Olney. Why not simply provide that it can be served anywhere in the State? You have your venue already established, and you are not changing that in the slightest; and if you can serve anywhere in the State, the case--

Dean Clark (Interposing). I think that this is extending the statute a little.

Mr. Olney. The venue?

Dean Clark. No; srving on the defendant anywhere in the State. It does extend the present statute a little.

Mr. Dobie. Yes, it extends the present staute.

Mr. Dodge. You can sue him in Brooklyn where he resides; but you can summons him in Manhattan, or wherever his office is; and I make the motion which Judge Olney suggests, that without affecting venue at all, service may be anywhere in the State.

Dean Clark. I think that is desirable but I think that does change the statute.

Mr. Olney. Is that not the idea that the Chairman expressed a few moments ago?

Mr. Mitchell. That is what I intended to express, to permit service anywhere in the district, provided you are not hampering with the rule regarding where the defendant must be found. I said in the district, I meant in the State. It seems to me that Dean Clark's suggestion that he be allowed to be served in the district of the defendant's residence goes too far; because in cases of diversity of citizenship, you can bring the suit either in the residence of the plaintiff or that of the defendant; and if you say that the man in Alabama may be sued by a man in Mississippi and you may serve the summons in the district of the defendant's residence, you would require him to respond in another

State, without changing the venue. Is that not right?

Mr. Dobie. I am heartily in favor of what Judge Olney suggests and allowing service of ~~process~~ process in different districts in the same State. Now, Section 113, U.S. Code--the first provision, down to the semicolon, is a venue statute; and after the semicolon it is the service of process, and any duplicate writs may be addressed to the marshal in another district in the State.

Mr. Olney. What rule are you talking about?

Mr. Dobie. Section 113 of the U.S. Code, which is Section 52 of the Judicial Code.

Mr. Wickersham. That would require a suit in the district where the defendant resides, but it does not provide for the service of process in that district, because that requirement is imported by the following paragraph which applies in a case where two or more defendants reside in different districts.

Mr. Dobie. That is true.

Mr. Wickersham. Now, it does not seem to me that the requirement that the suit shall be brought in one district precludes the provision that process in that suit may be served in another district in the same State. Like the instance stated by Mr. Dodge a few moments ago, a man living in Brooklyn, in the Eastern District of New York, in the

same State, and he has an office in the City of New York, and suit is brought against him in the Eastern District, where he resides--that is, in Brooklyn--but he goes over to New York City--the Southern District of New York every morning, and perhaps stays over there occasionally at night; and in order to get jurisdiction over him, it seems to me you ought to be able to serve summons on him wherever he is found in the State, although it is across the river.

Mr. Dobie. You do not mean to limit that to people who have offices?

Mr. Wickersham. No, I am just giving that as an illustration.

Mr. Dobie. I am heartily in favor of Judge Olney's suggestion. I think it is an excellent one, and I do not think there will be any question about that in Congress, because I am satisfied myself about it--but I defer to the political experience of Mr. Mitchell and Mr. Wickersham. I am glad to say that I have had very little to do with politics, but I do not think there is any objection at all to what is a process statute and does not concern venue.

Dean Clark. That reminds me that when we recommend that a statute be superseded--such as this Section 113--we will have to say "superseded in practice."

Mr. Dobie. It is the practice applicable to process

and not venue.

Dean Clark. Yes.

Mr. Olney. Now, we have an important thing to do. It is important to put it so that he shall know where he is sued, and that he should not have to go out of his home State to defend the suit. But when it comes to service of process, you ought to be able to serve him where you can find him within the State.

Mr. Dobie. I agree with you.

Mr. Mitchell. Without any further motion, I think the principle has been well stated in the record, and unless there is some difference, we will consider the idea adopted. The details will have to be worked out by the drafting committee. Is there anything else in Rule 13, Mr. Clark?

Mr. Dobie. Have we decided whether we will adopt the first one and not the alternative rule?

Mr. Mitchell. We have not. We are just talking and making suggestions.

Mr. Dobie. You can just have absolute uniformity and nothing else, or provide that you can follow the practice in the State rule, or adopt the rule we have here. Now, I think Maj. Tolman's suggestion is that he does not want to put into the rules anything so that we will adopt a State practice that will violate our rule; but if you follow our rule it is all right or if you follow the State method that is all right,

Mr. Mitchell. Well, will you make a motion?

Mr. Dobie. All right, I will make one.

Mr. Cherry. I am wondering about the other effect?

Mr. Olney. Do I understand that if we lay down the rule as to service, manner of service, and also provide as an alternative that service may be made in the manner provided by State law--

Mr. Dobie (Interposing). That is it.

Mr. Morgan. That is it--the first alternative of Dean Clark's draft.

Mr. Olney. It seems to me that is quite right.

Mr. Lemann. Did any one else get the idea from subparagraph 3 that a corporation might be sued in a State in which it was not doing business, by serving the lawyers there? If there is such a contention I think it should be overruled. But does the language leave ground for such an argument?

Dean Clark. Do you mean the expression "authorized to receive process"?

Mr. Lemann. Yes, managing agent or officer.

Mr. Morgan. Well, if you look at the heading of the rule, this is dealing only with manner of service and not jurisdiction.

Mr. Lemann. I do not think the contention would be well taken, but I was wondering if somebody might make it.

Dean Clark. You will notice in the beginning of that

same sentence, subsection 3, at the top of the page, we put in the words, "which is subject to suit as such"--that is, as words of caution.

Mr. Mitchell. Why would it not be wise to put in an express provision to satisfy Congress that nothing in the rules shall change the venue or district in which the suit may be brought?

Mr. Dobie. I think that is wise.

Mr. Mitchell. Then you remove the argument about it.

Dean Clark. Of course, the kind of case you had in mind is some of these automobile cases.

Mr. Dodge. How does that leave service on a partnership, where a partnership cannot be sued in the firm name, and where ordinarily service must be made?

Mr. Morgan. It says, "Which is subject to suit as such."

Mr. Dodge. Does that mean in the firm name?

Mr. Morgan. I suppose so.

Dean Clark. Yes; of course, the law here is a little uncertain. I take it that where, by local law, service could be made in the firm name, this would provide that the Federal court may do likewise.

Mr. Dodge. Why should not we provide that a partnership may be sued in the firm name in the Federal courts, changing the law of Massachusetts and other States?

Mr. Wickersham. Well, the trend of decisions on that

I think is quite in favor of that. Take the Coronado case that has been mentioned.

Mr. Dodge. Yes.

Mr. Wickersham. The Supreme Court held that you could sue an unincorporated labor organization; and there are a number of other cases where there is a recognition of a dual capacity in an association of men who are carrying on business.

Mr. Dodge. Yes; I should like very much to see the law of Massachusetts changed in that respect.

Prof. Sunderland. Would an organization sued in its name extend the jurisdiction of the court over all the individual partners?

Mr. Wickersham. Well, of course, the law has not been thoroughly developed there.

Mr. Mitchell. Now, if that idea is followed, I think it should come up in connection with Rule 39 on the question of suing capacity. You will notice in the footnote, I threw out a suggestion that we might take up the whole question of capacity, as provided by our own rules or the law of the State. Up to date we have avoided definitions further than you see here. It is quite a technical subject, although it is important, of course.

Mr. Dodge. Well, we can take that up under the later rule.

Dean Clark. Yes, I think that is where it comes.

Mr. Wickersham. Yes, that is the place where you really deal with the subject.

Dean Clark. Yes, Rule 39.

Mr. Mitchell. Now, we are discussing the details of Rule 13, to prescribe the method of service, and in view of that discussion, it will not take long to make a rule of our own.

I would like to bring the Committee back to the question whether they want to follow Maj. Tolman's suggestion, and take original Rule 13, with subdivision 4, which gives an alternative method according to the State law. Is that the sense of theCommittee?

Mr. Loftin. Did not Mr. Dobie make a motion on that?

Mr. Mitchell. Well, let us have a vote on that. All in favor of the suggestion laid down in Rule 13 here, with an alternative method of service according to the State law will say "Aye"; those opposed, "No."

(A vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. That seems to be settled. That leaves us to the details as to methods prescribed in Section 13.

Mr. Morgan. Well, in Section 4, I understood you were going to provide, "In actions at law."

Dean Clark. Yes.

Mr. Wickersham. May I suggest you used several times

the word "method." It seems to me better to use some other expression.

Mr. Olney. As to the suggestion made by Mr. Morgan, that the alternative method of service be confinedto actions at la w?

Mr. Morgan. No; the methods used in actions at law in the particular States; because Maj. Tolman has pointed out that there are some States that make a difference between actions at law and suits in equity.

Mr. Dobie. We are following the law practice, under the alternative.

Maj. Tolman. I understand that the Chairman suggested a motion for a rule that it would be better to have it appear at the end of the rules--"Nothing herein contained shall be construed to supersede or alter the action of Congress governing venue and the place of service of defendants." I am not satisfied with that last part.

Mr. Dobie. No, not the last; stop with "venue."

Maj. Tolman. Yes.

Mr. Mitchell. Yes.

Dean Clark. Yes.

Mr. Mitchell. Do you want to vote on that, or just make it as a suggestion to the Reporter.

Dean Clark. I take it that that would be sufficient.

Mr. Mitchell. You can hand it to the Reporter, Maj. Tolman.

Maj. Tolman. Yes.

Dean Clark. I just want to clear up some points in subdivision 2-- questions as to an adult person, etc. I have just quoted the equity provision. Do you prefer the expression there, "adequate age and discretion?" That is the first question.

The second question is, Is the matter in brackets necessary? My own idea is that, with all the provisions as to State practice and service, we do not need a separate provision; we do not need the infant provision.

Those are the two questions on that.

Mr. Mitchell. Your first question is-- Equity Rule 13 uses the same phrase that you do, "adult person who is a member of or resident in the family." Had we better not follow the Equity rule?

Dean Clark. Yes, that is what I am doing.

Mr. Dobie. Are you talking about an insane person or an infant?

Dean Clark. Yes. I do not think it is quite necessary.

Mr. Morgan. May I ask if there is any definition of "adult person", because I think "suitable age and discretion" is better.

Mr. Dobie. I think "adult" would mean not a minor.

Mr. Morgan. I do not know. That would ra ise the question whether is 20 years and 6 months old or 21 years.

Mr. Cherry. No one knows in Minnesota at what age a person is an adult.

Mr. Lemann. "Suitable discretion." What does that mean? Some persons do not have sufficient discretion at an advanced age. (Laughter.)

Mr. Dobie. How about 18 years old, or something like that?

Mr. Lemann. We specify the age--16 or something like that.

Dean Clark. Judge Thacher in New York says the rule has been in effect for 100 years, and no question has arisen under it.

Mr. Mitchell. What rule?

Dean Clark. Rule 13, in slightly varying form. He says this expression has been in effect since 1842--"member of or resident in the family."

Mr. Morgan. Maybe they know what it means, then. (Laughter.)

Mr. Mitchell. Evidently it means some oerson of matur- ity, not necessarily one who has reached his majority.

Mr. Morgan. I always used to think of a Scandinavian servant girl who was not of"suitable discretion", although

of"suitable age." (Laughter.) We had a number of cases where they either threw the paper in the waste-basket or threw it in the fire, and we got a default judgment against them.

Mr. Dobie. There is something in what Prof. Cherry suggests. In Virginia, for instance, if a person is 18 years old he can make a valid will.

Prof. Sunderland. I think that with that language "suitable age and discretion", you would never get into trouble, because nobldy would ever have service made upon a person who could hardly be shown to have suitable age and discretion. I do not think there is any question. If you have a definite age, it might cause trouble.

Dean Clark. I have been told to use the words "apparently of suitable age and discretion." In New Jersey there is a rule--have you got the New Jersey rules, Mr. Wickersham?

Mr. Wickersham. No; I was just looking at the language of the New York rules--

Mr. Lemann (Interposing). We have the language of the Equity rule, and we have an alternative method of using the State practice. Is it necessary for us to stop very long on this? I make a motion that we go on and leave it as it is.

Mr. Mitchell. You make a motion that we confirm the adoption of the Equity rule?

Mr. Loftin. I second the motion.

(A vote was thereupon taken, and the motion was unanimously adopted.)

Dean Clark. Now, what about the provision as to infancy? Is it necessa ry?

Mr. Mitchell. I think it is; because otherwise you could serve a summons on a baby two years old.

Mr. Dobie. I think it is; because some of the States are very technical about that. I had a case about selling the estate of an insane person; and the insane person would get out of it $30--and I spent $400 worth of time on it. In our State there is a very rigid requirement, and selling real estate of an infant in Virginia is even more hideous, and I am inclined to think that is a good thing to put in.

Mr. Mitchell. Is it not true that if you do not put it in, it mea ns that you can leave it with any person, which would authorize on its face service on a baby?

Dean Clark. Yes; but it amounts to that anyway. Suppose service is made on an insane person, and there is nothing to show that he is insane; is the service really invalid? If he appears to contest the service, he knows that he has got a suit, and you can have a guardian appointed. Whenever the case is going to arise, this will take care of it, and whenever the case is not shown, this will not take care of it; there is not any way to take care of it, because the plaintiff knows the facts, and if he does not appear he is not disclosing them.

Mr. Mitchell. Do you not think it is necessary to specify that service cannot be made on an infant?

Dean Clark. I do not think it is necessary.

Mr. Loftin. In order to bring the matter to a head, I move that it be included in the motion.

(A vote was taken and the motion was unanimously adopted.)

Dean Clark. I might ask Maj. Tolman this question: Do you want to bring up your suggestion of service by registered mail?

Mr. Tolman. Well, I suppose I ought to, because it is made by some of the committees, and that was probably my special function, to call attention to those suggestions. A suggestion has been made, coming from Wyoming or Idaho, that there might also be authorized service of process by registered mail. Now, of course, that can be worked out, so that you attempt to get personal service, and if you do not get it, you can send your summons by registered mail. There was a letter, I think, from New Mexico--

(Interposing).

Dean Clark. Mississippi, was it not?

Mr. Tolman. Yes, Mississippi, and also from the Far West, in which they say there are a very large number of defendants, and the distances are great, and the cost of service is enormous, and that it would be well to authorize service by registered mail.

Mr. Wickersham. That is Utah?

Mr. Tolman. Yes.

Mr. Mitchell. I do not know.

Mr. Tolman. Now, it seems to me that if I could make a suggestion that, perhaps, would take cognizance of all the subject, there might be an alternative provision that the District court might make a rule concerning the circumstances under which an alternative method of service by registered mail might be made.

Mr. Mitchell. Make an order permitting it, do you mean?

Mr. Wickersham. I do not think you ought to have that in original process. It is too uncertain. Mail goes astray.

Mr. Mitchell. The mail man brings the mail and takes a receipt, and any bellboy can sign the receipt.

Mr. Wickersham. Yes.

Prof. Sunderland. I think the Post Office Department has a rule by which you can direct delivery to the addressee only.

Mr. Dobie. But in apartment houses and places of that kind they do not do it at all. And I have an idea that Judge Parker and Judge Chestnutt and a number of them are against this. They say original service of summons must be by the marshal, and I am inclined to think that it would be dangerous to extend it any further.

Mr. Lemann. There is only one difficulty about it. If there is any question about whether the requirement of personal service by mail raises any trouble, I think we ought to avoid

it.

Mr. Olney. In those States, such as New Mexico, Utah and Nevada, they are very apt to have local statutes that provide for that particular contingency, by reason of their objection to that, and that being so, in every case wherever that exists, they can serve in the manner provided by the State law. I doubt the necessity here of any provision.

Mr. Dobie. That is a good suggestion.

Dean Clark. I am not sure about the rational thing to do about this. But there is a good deal to be said in favor of it.

Mr. Olney. I think that is true; but we are going to have so much difficulty, and are going to propose so many novel things, so that I think we can leave that out, leave that to be developed further.

Dean Clark. I think there is a good deal in what you say.

Mr. Mitchell. Now, we are down to Rule 14.

Dean Clark. Rule 14 will have to be rewritten, and it is going to be greatly changed, because of the differences we made.

Mr. Mitchell. Suppose we pass it then?

Dean Clark. I think so. I think I got the general idea.

Mr. Olney. Now, is there any necessity for Rule 14,

in view of what has been done in the previous section, in regard to the commencement of an action.

Dean Clark. That is the point Mr. Olney made. Everything will appear in Rule 10; but if we decide that it needs to be separate, Rule 14 will be quite different from what it is now. This feature has to be quite changed.

In Rule 15, I am not sure. We have discussed it. Is there anything more?

Mr. Donworth. Yes, I have a suggestion about Rule 15. What is meant by "exact time of service"? Does that mean the exact day, or the hour? Do you mean the exact day? I think that is all that should be required. I think the word "time" should be "day."

Dean Clark. Well, we thought the hour should go in. But maybe you are right about that; maybe "day" should go in. In cases involving the question of liens, it might be important.

Mr. Dobie. I ~~think~~ think so, and in lis pendens. That old rule about the law recognizing no part of a day has gone to pieces. It might also mean the hour.

Mr. Mitchell. It also might arise in connection with disputed cases.

Mr. Donworth. Is there any necessity for showing the hour of the day? If it becomes material, the court may inquire into it; but I do not think--we propose to empower the

court to proceed in the ordinary case--I do not think we should trouble every man to put in the exact time of service.

Mr. Wickersham. We have in New York no definite return. When the service is made there is an affidavit attached by the process server, and in due time, if anything should be done, and there is any dispute as to service, an affidavit is useful to show that the action is commenced by the service of summons on a certain defendant by a certain person. It is called a return, in the sense of a return writ.

Mr. Morgan. Well, you do have the sheriff serve the summons, and he can make an affidavit.

Mr. Lemann. This is where the summons is served by somebody else.

Mr. Morgan. Yes.

Mr. Lemann. Now, this says you must make return as promptly as possible, and within seven days. But as I recall the provision, his papers may not be filed for 20 days. Suppose I bring suit against you, and my boy makes service; so that you will get a copy of the summons; but I will have 20 days to file the complaint. But under this, I have to file my return within seven days, or as promptly as possible.

Mr. Donworth. I move that we substitute the word "day" for "time".

Mr. Mitchell. Where it says "exact time"?

Mr. Donworth. Yes; "the exact day of service."

(A vote was taken and the motion was unanimously adopted.)

Mr. Lemann. There is another point in connection with that. I think it is the custom to show the place of service with some degree of particularity. In our State we usually name the county. But this is to show that he served it. You want to show, of course, that it was served within the location where the law permits service. And I have suggested, to cover that, the inclusion after the words "set forth in a specific manner the exact day of service," these words--subject to change--"a designation of the city or county and the State wherein the service was made." I think there should be some idea of where it was. Of course if it is his place of abode that might be more definite; but if it is served on the person himself, it seems to me that the return should show at least the city or county and the State where service is made.

Mr. Wickersham. Would not the word "place" cover it?

Mr. Mitchell. "Place."

Mr. Wickersham. Would not that cover that--"place and manner of service"?

Mr. Lemann. It depends on what you mean by service. This language ~~will~~ should be clearer.

Dean Clark. Well, it might be city, town or township.

Mr. Wickersham. Why not have some specific place?

Mr. Donworth. It might require you to name the store or office.

Mr. Wickersham. Yes--serve it at No. 100 Canal St., in the City of New Orleans, La.; that is a specific place.

Mr. Demann. Then you would require him to specify the exact spot, as it were?

Mr. Wickersham. I think the place where it is served should be specified.

Mr. Donworth. Having in mind the rural counties.

Mr. Dobie. Suppose you meet him in his automobile?

Mr. Wickersham. You could say, "In the village of Couhaven, County of Rumford, State of Maine."

Mr. Donworth. That is what I say--the city, the county and the State.

Mr. Lemann. If you say "place", you give room for some argument about the question--if you specify Couhaven, and does not say 15 Canal St. Somebody will raise a question; in other words, some people will take a broad view, and others a narrow view. And I think it should be made plain.

Mr. Olney. Is it necessary to say anything except the city and county?

Mr. Dodge. Yes, in some cases.

Mr. Donworth. Yes, but according to this you would not have to name the county.

Mr. Dodge. I move that the word "place" be included

after the word "manner."

Mr. Lemann. I do not think that is necessary.

Mr. Mitchell. Well, under these rules, we never had any trouble. It seems to me that those are common practices that must be read into the rules. All lawyers know what return of service is; and as long as the Equity rule does not specify what the return calls for, it seems to me that a very general statement as to the manner is sufficient.

Mr. Dobie. The lawyers use mature process servers.

Mr. Mitchell. I suggest the use of the word "date" instead of "day", because date includes month and year; it is better than "day."

Mr. Olney. "Date" is better. "Manner, place and date." I make the motion that it be left that way.

(A vote was taken, and the motion was unanimously adopted.)

Mr. Wickersham. Does that include the word "place"?

Mr. Olney. "Manner, place and date."

Mr. Wickersham. Yes.

Dean Clark. What do you want to do with sub-day?

Mr. Cherry. May I ask about the whole matter of return, the number of days, and further and other summonses, and so on. It seems to me that those are appropriate to the old existing practice, and not to the one provided in these rules, where service may be made by any disinterested person.

I do not quite see the need of a return by such person. That is appropriate to theofficial. He makes proof of service, not a return. Is it not sufficient for this limited purpose? He is doing something for the attorney for theplaintiff; and since the complaint must be filed within 20 days, I do not see the purpose of filing the summons and I do not see any reason for the further and other summons. And it is appropriate to the idea of the writ or summons, and the alias writ. I thought we would get away from that.

Prof. Sunderland. I think that is inconsistent with what we did yesterday, in providing a 60-day limit.

Mr. Cherry. Yes, it is inconsistent with that.

Mr. Wickersham. Well, unless you limit this to the requirement of a return in cases where the summons is served by the marshal.

Mr. Cherry. Yes, that is what I had in mind--a return by the marshal and proof by the other person; and any rule as to time of return I would suppose would be with reference to service by the marshal, and that would mean not having any further summons.

Mr. Donworth. Well, I think that is erroneous, be-cause you often have a large number of defendants. You want to make your return for some particular defendant against whom ~~whom~~ you are asking for an injunction, and so you return it, even though it is signed by a lawyer and served by private individuals

you serve that and you make out a return in your office and try to serve the other defendants.

Mr. Cherry. Why should you make another summons?

Mr. Donworth. Because you want to return the summons.

Mr. Wickersham. Then you are making an affidavit as to service of summons against a defendant against whom you are asking for relief; and the summons you are serving on all sorts of defendants.

Mr. Donworth. It is not the custom in my State; where you are serving a part of the defendants, you do return that summons and make out a return, and then you make out another summons later on.

Mr. Wickersham. Your summons is issued out of the court and served on the defendant?

Mr. Donworth. No.

Mr. Wickersham. You are speaking of the Federal court?

Mr. Donworth. No, the State practice in Washington.

Mr. Wickersham. Well, it is served by the marshal.

Mr. Mitchell. In Minnesota you do not have to make out another summons.

Mr. Wickersham. What Mr. Donworth is talking about is that the summons is issued by the court and served by the marshal, and of course, the marshal makes his return.

Mr. Cherry. It is <u>functus officio</u> as to the one made out

by the lawyer, and I do not see the reason for another return.

Mr. Donworth. Well, it is done under our State law. ~~As I said, if you want to cut out the State law say "in our State."~~ As I said, if you want to get special relief against some defendants, you file a return against those defendants, and then at your convenience you get out a new summons in your office and send it to the other defendants.

Mr. Cherry. We do not get out another summons. You have as many copies as you please.

Mr. Olney. We do that in California; but it is dependent on the fact that the summons is issued by the court, under the seal of the court.

Mr. Donworth. Well, that is what I am talking about. The lawyer does the whole thing; he issues a succession of summonses when necessary.

Mr. Olney. Is not your summons issued under the seal of the court?

Mr. Donworth. Not necessarily.

Dean Clark. It was on account of that that I thought it should be done. Your whole point comes to this--whether the paper that constitutes the summons needs to be returned. That is your whole criticism--the requirement of the return of the paper to the lawyer who signs.

Mr. Cherry. Unless it is signed by the marshal--I do

not see why you cannot make a number of returns as to the one paper.

Dean Clark. There is a little point there about the use of the word "return"." I suppose you could use "affidavit of service."

Mr. Cherry. "Proof of service;" proof would be by the marshal where he serves it.

Dean Clark. Well, you do not want to have any summons go back and forth. That is the main thing, I take it.

Mr. Cherry. Well, if it is served by the marshal, I do not see any need for it.

Mr. Mitchell. Well, let us see if I am clear about it. Now, under this practice it would permit a summons to be issued by the lawyers, and the complaint attached and served. Suppose there are several defendants and you have service on one or two of them. Now, if you have a rule that requires the summons, or affidavit or proof of service, to be filed within 7 days in the clerk's office, and then you find that you can serve one of the other defendants in 10 days, and the marshal or somebody wants to make service on the defendant, he has to get hold of the original document, to take it along and make service. He always carries the original with him.

Mr. Cherry. Does he have to do so?

Mr. Mitchell. Under the State law, he has to exhibit it to them.

Mr. Cherry. No, he just gives him a copy.

Mr. Mitchell. Then the requirement of a copy would give service?

Mr. Cherry. Yes.

Mr. Donworth. Should this not go out as of no consequence? Without making any argument ex nomini, you require a specified place where summons has to be indicated. Now, passing that, I think that the four lines here serve no purpose at all:

"The original summons, together with such return endorsed upon it or attached it, shall be returned to the court as promptly as possible, and not less than 7 days after the service."

I think those words should be left out, and leave it to the old Equity rule.

Mr. Lemann. I should think the summons ought to be in the court. It is the fondation, after all, of your jurisdiction, to show that this fellow is served; but would it be all right to say that it should come back at the same time the complaint is filed? If you file the complaint and say that should be done in 20 days, the return should be in then.

Dean Clark. What do you do in cases where you only give notice to the defendants?

Mr. Morgan. You file them, but do not put in proof of service on them.

Mr. Mitchell. Under your rules that you are providing here, you are going to require the summons or proof of service of the summons with complaint attached, to be filed, promptly in court. Now, I do not know of any purpose in having it filed, until some action by the court would be required. And under our practice in our State, and every other State that I know about, the difficulty is that when you go and file papers in a lawsuit you have to make a deposit of $10 or $15 or $20 for costs; and the advantage is, that, after having proof filed with the court and got nothing done by the court about it, the lawyer has to dig up $10 or $15 for deposit. Now, it is quite common in the Code States, where the complaint has been signed by the lawyer and served, he gets back proof of service, and he holds the papers in his files. He does not have to dig up any other money until the time arrives when he has to make a deposit in court; he does not have any expenses. So I do not see any practical reason for requiring that the summons and proof have to be promptly filed, and compelling the party to place their case on the court record and pay the costs. It seems to me that there is some idea about proof, where it should be promptly required--and I do think you find that lawyers in all the Code States will object very seriously to having to file their papers right away and subject themselves to costs. In many States, you do not ever get into court and do not pay any costs. The suit is dismissed.

Gentlemen, I think the Chief Justice is ready to receive us now.

(Thereupon, at 11:15 o'clock a.m., the Advisory Committee took a recess until 11:30 o'clock a.m., to call upon the Chief Justice of the United States.)

AFTER RECESS.

(The Advisory Committee met after the recess at 11:30 o'clock a.m.)

Mr. Mitchell. Judge Olney is interested again in this question that has arisen under Rule15, as to specifying the place of service.

Mr. Olney. Yes, Judge Donworth was talking to me about it, and he suggests this, and I think there is a good deal of force in it: If you simply say "the place", then your ~~attor-~~ return ~~ney~~ may become very important in matters of title, such as foreclosure, where you ta ke judgment by default, or possibly in suits to quiet title. Now, unless there is something fairly definite about it, those titles will be pass ed on by searchers of records employed by the title insurance companies, and people of that sort, and they may possibly reject a title, or question it, or possibly the thing may be questioned later, if it gives an opportunity for question. It seems to me that the whole thing can be settled, if, instead of saying "place", you simply say "county." Now, the county will indicate at once the district in which it is served. And that is all that is required. If you say "county", it removes any possibility of anything more exact being required, and nothing more exact should be necessary.

Mr. Mitchell. Well, I am curious about this: I find

that the Equity rules do not specify what manner or place of service shall obtain; under the Equity system all that is required is an affidavit of service; it does not say "place", county or date," or anything; and why is it necessary for us then to go into particulars and state the county or place?

Mr. Olney. I am sure that has not given rise to any trouble; because in the affidavit of service the lawyers have been careful to show that the service, as a matter of fact, is within the district.

Mr. Mitchell. Well, here we have Equity rules that have caused no trouble, and we have Code rules. I know this, that the Minnesota requirement is simply that service may be made by any other person, and he shall make affidavit of service, without specifying what it shall contain.

Mr. Donworth. I will be very glad to have that language adopted. The trouble is that you have here now this terrible provision, never prescribed before, prescribing the specific place.

Mr. Mitchell. Then your motion would be to strike that out and just say "proof of service"?

Mr. Donworth. You see, where you have a matter of title and defaulted judgment, it is going to be back on the table years later; and years later your title depends upon the jurisdiction, and the jurisdiction depends upon the return;

that is, proof of jurisdiction depends upon the return; and if you have a specific place in there you are going to find that many titles will be upset collaterally.

Mr. Olney. They may not be upset, but there mere question of them will be a very serious matter.

Dean Clark. Well, the way the discussion is going, I am inclined to think we ought to leave Rule 15 out altogether and go back to Rule 12, simply inserting the Equity rule provision.

Mr. Olney. I think the matter isa matter that can be left--that is, will have to be redrafted, and I think the draftsman can take care of it.

Mr. Donworth. I think so.

Dean Clark. All right. But my present impression is that there is not enough in the rule we have just been considering, Rule 15; and at the end of Rule 12 I will put the ~~service~~ sentence from Equity Rule 15, but change that in the latter case--that is, service by a person not the marshal--"that the person serving the process shall make affidavit thereof."

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Dean Clark. I wanted to ask Mr. Cherry if in Minnesota they attach it to the summons?

Mr. Cherry. Well, I think that is often done. I do

not think they meant to suggest it as a requisite.

Mr. Mitchell. Well, it is always done in an affidavit of service--that it was served by so-and-so, by delivering a copy thereof.

Mr. Morgan. We cannot very well do that.

Dean Clark. What do you want? You would have to serve the summons over again.

Mr. Morgan. Make an affidavit when it is not attached.

Mr. Olney. In regard to the return of summons, the return of summons is important or is material only in a case of default.

Mr. Morgan. Yes.

Mr. Olney. In 99 cases out of 100, it is not material at all, and there is no necessity for returning it. It is only when you want to take a default that it is necessary to return the summons. Why, then, require that any return be made except where there is a default?

Mr. Cherry. My understanding from the Reporter is that he proposes to leave out Rule 15, and simply add to Rule 12 a provision for proof of service.

Mr. Olney. All right.

Dean Clark. Yes; proof of service for a person not a marshal; proof of service by affidavit.

Mr. Mitchell. That raises the question of my object-

ion that I discussed before; it raises the question about any rule requiring you to file papers in court and incur costs before there is some occasion to take court action.

Mr. Wickersham. Yes.

Mr. Olney. I thought we had passed on that.

Mr. Morgan. Yes, I thought we had passed on that, and you acquiesced on the 20-day rule.

Mr. Mitchell. Well, I object to that. I think a rule that requires the papers to be filed before the trial term, or before the court is asked to take any action, is all that is needed; it can be kept off the files as long as the lawyer wants it, and he can save money and postage, and a lot of trouble.

Mr. Wickersham. Well, that would modify Rule 16.

Dean Clark. That is correct; and then you do go ahead.

Mr. Wickersham. Yes.

Dean Clark. I will say this: Of course, there is less reason for the rules now. My original plan was that all things should go through the clerk's office. And for that reason, now I have no feeling either way. I think it will be strange to many jurisdictions, because, you see, there are quite a good many, even of the Code States, that require the summons to issue out of the court after the filing of a claim.

Mr. Wickersham. But it will be a simpler practice for them, and there will be less objection than if you made it

more complicated.

Dean Clark. Well, what is simple to one man does not seem so to another. My problem is that they will think it very strange, and therefore be against it.

Mr. Wickersham. That is true. We have to look at the different views of it.

Dean Clark. How about this suggestion, Mr. Olney? Would it suit you, Judge Olney, if you wanted to make some mention of the other fellow's complaint, if you introduced the other fellow's complaint?

Mr. Lemann. You will have to do that. I think it will strike some lawyers as very extraordinary to suppose that you can take them out and that is all. I was just wondering, if you are going to redraft this, Dean Clark--you said you were going to follow Equity Rule 15, so as to provide, as I understand it, that if the paper cannot be served by the marshal, in the place of serving process you make an affidavit. Suppose they are served by the marshal?

Dean Clark. You would not say anything about it.

Mr. Lemann. You would not say anything about it. The Marshal always makes the return, I am sure, but there must be something that says that he will make it.

Mr. Donworth. Is not that his duty anywhow?

Mr. Mitchell. There is a Federal statute, and we will

say nothing about it, because the statute still stands.

Mr. Donworth. On this question the Chairman has raised about the filing of the complaint, I sympathize entirely with the Chairman's view that the papers need not be filed until there is occasion for it. I do not have before me the exact statutory provisions of the State of Washington; but in practice we do not file them until there is occasion for it. Under rule of court, the judge may order any pleadings that are not filed, or other papers in the case that are not filed, to be filed instanter, and if both parties are before the court they do it; if only one party is before the court, the clerk will communicate to him and enter the court order that the papers are to be filed immediately. And that works very well. But I thought as a compromise between this--but I did not like the idea at all--and our idea, that perhaps this 20 days was all right.

Mr. Mitchell. Can we not leave that to the drafting committee, without tying their hands on it, and let them look into it further and see if they can find any special reason for insisting on 20 days.

Mr. Donworth. I move that the action taken approving Rule 16 be subject to the understanding that the Chairman has just mentioned.

Mr. Mitchell. Is there any second to that motion?

Mr. Tolman. I second it.

Mr. Mitchell. The motion is that the action taken approving Rule 16, requiring papers to be filed within 20 days after the service of complaint, be open for reconsideration by the drafting committee, with a view to substituting some less restrictive provision.

Mr. Loftin. Some less time?

Mr. Mitchell. No.

Mr. Loftin. Some greater time?

Mr. Mitchell. No; abolish it entirely, except when papers are filed with the court.

Mr. Lemann. If parties do not settle a case in 20 days, I think they ought to go into court.

(A vote was thereupon taken, and the motion was adopted.)

Mr. Mitchell. There were three Noes.

Mr. Olney. Let us have a understanding as to what that vote was on.

Mr. Mitchell. Maybe we had better settle it ourselves, then.

Dean Clark. I would be very pleased. I think it is is very important.

Mr. Mitchell. My idea is that the rule be so drawn that there be a rule that requires the party to file the papers if there is any occasion for the court to act on them, and that

there be no requirement for filing them in advance of that. There may be situations, of course, where they have to be filed, to get out substituted service, attachments, or whatnot--that they have to file them. And you can make a motion to file the pleadings. Then they would require you to file them a few days before the term or trial, but beyond that it is not necessary.

Mr. Donworth. But the motion is not that. The motion is that our approval of this rule be open to reconsideration, and that the Reporter give consideration to the thought that you suggested.

Mr. Mitchell. That is the way it stands. It is open to the Committee to take it up again at the next meeting, after the drafting committee has reconsidered it.

Mr. Lemann. Will the effect of the vote on this be that it may be extended beyond the 20 days? Will the effect be that there is no special limitation?

Mr. Mitchell. That is right.

Dean Clark. Do you not want to express you opinion, provisionally, anyway? I am not sure that I can do much more.

Mr. Cherry. I would like to have Mr. Donworth suggest a rule that he is familiar with, about the court issuing an order for filing instanter any and all needed papers. That occurs to me as taking care of the thing without any definite

number of days. There is a suggestion of a requirement in here that they need not be filed until the court needs to take action on them; and there is Judge Donworth's suggestion that the Reporter carry out his own suggestion, for a rule providing that the judge may order the filing instanter. It seems to me that that takes care of the situation.

Dean Clark. It seems to me that there are two different views here, and I do not see how I can reconcile them by thinking about them further. And I wonder if you will indicate just what your desire is?

Mr. Wickersham. I move that it is the sense of the meeting in line with what the Chairman has suggested. That is, that the rule shall not require the filing of pleadings, or the return of the summons, where the summons has been served by a person not the marshal, except when it is necessary for the court to take some action in regard to it.

Mr. Donworth. Mr. Chairman, I did not know that we were taking specific action at this time. What I thought the motion meant was that the Reporter would look up the statutes and the code rules of the different States, and after examining make an extract, or a rule of what he thinks will be the better practice along that line; and then we would have this rule and his view exegesis before us, and then we could take final action.

Dean Clark. Well, on that may I say that I have already

to a considerable extent digested the statutes, and as I suggested before, there is a considerable variation. Now, I shall if you wish, draw up two rules, an alternative form, one like this with a few alterations, and one substantially with the New York provision; because that is the thing you have in mind.

Mr. Wickersham. Yes.

Dean Clark. Very likely, if New York has a rule which Judge Donworth speaks of, we will put that in. But there are two different points of view--whether you want to draw a rule like this, or whether you want only to express an opinion now. I will do whatever you say.

Mr. Dodge. In how many States is it possible to hold the suit for a year?

Mr. Mitchell. In the code States, I do not believe there is a statute requiring them to be filed, except where you take some procedure. And the matter is handled, in my experience, by a local rule of the court.

Mr. Olney. In California, they require every paper to be filed.

Dean Clark. That would do, Mr. Olney, because there are quite a number of States where it is required by law.

Mr. Mitchell. That is where the summons is not issued by the clerk.

Mr. Morgan. And in some of the States that is absolutely disregarded--that is, that the pleadings shall be filed,

and nothing happens for failure to file, and then pleading takes place. So that it seems to me that there is one consideration that we ought to have in mind, besides Mr. Dodge's notion about carrying the papers in your hip-pocket, and that is whether it is good policy to encumber our public record with lawsuits that are brought and settled. Now, I know that in Code States there is a large proportion of actions that do not get any further than the pleadings. They are settled and dismissed; and if those were added to your judicial sta tistics, and you had that additional number of papers to file, you would have a still greater question of what we are going to do with all the papers.

Mr. Dodge. Well, is there not a right of third parties often to know whether there is any litigation pending with regard to a particular piece of property, and with regard to the solvency of the defendant?

Mr. Morgan. I do not know whether there is or not with regard to solvency of the defendant.

Mr. Wickersham. With regard to the title of property, there is almost always a lis pendens.

Mr. Lemann. Of course, you allow 20 days to settle, and if they do not settle within 20 days it may be pending for a year or two years.

Mr. Morgan. Lots of times in our practice we did not settle until the case was approaching for trial.

Mr. Lemann. That is still true; but you would have to file the papers very often in your practice. You get the papers in the court, do you not?

Mr. Morgan. We get the papers in the court when we get a notice of a trial; that would be the time for filing the papers.

Mr. Lemann. And that would be the time that you would settle?

Mr. Morgan. Yes.

Mr. Lemann. So that you get thepapers into court when you settle?

Mr. Morgan. No, we never get the papers into court when we settle; the only time we put the papers in the court was when the defendant was not competent. We get the approval of the court. We get a release or dismissal, and the lease would knock out the lawsuit, and we get no papers at all.

Mr. Lemann. I suppose Dean Clark would like to have a number of statistics. Would you prefer the filing of cases?

Mr. Wickersham. Mr. Chairman, are we going into court? If so, I think we ought to take a recess now.

Mr. Mitchell. Yes--probably something might happen that will solve this question.

(Thereupon, at 11:55 o'clock, the Advisory Committee took a recess, in order to be present at the opening of Court.)

AFTER RECESS.

(The Advisory Committee reassembled at 12:17 o'clock p.m.)

Mr. Lemann. Mr. Chairman, as I understand it, the present motion is merely to request the Committee to present the alternative rules and exegesis; and it seems to me that we would all welcome further light on thesubject, no matter what our views are. So that I suggest, if we have the same view, we might adopt that resolution without further discussion and pass on.

(A vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. The next is Rule 17, Dean Clark.

Mr. Loftin. I did want to ask Dean Clark the purpose of that last clause.

Mr. Wickersham. In Rule 17?

Mr. Loftin. In Rule 16. Not being familiar with the equity practice, let me ask just what is the purpose of that, if the appearance of the defendant is by filing an appearance?

Dean Clark. It was mainly to allow a person to come in and get papers or notice of action in the case. Of course, if we do not have--the rule needs to be changed somewhat, if there are not going to be papers filed at once. Now, Judge Donworth has just given a rule to come in a little later, which illustrates the purpose of this. I will just read this suggestion. He says:

"After a party has appeared in an action, he shall be entitled to written notice of the time and place of the hearing in the case. Notice shall be served on the attorney or otherwise."

That is the form of notice. Now, this is the way of allowing other people, including change of attorneys, to get it without any particular formality.

That is the form of notice. Now, this is the way of allowing people, including change of attorneys, to know it, without any particular terminology.

Mr. Morgan. It lets the party in who does not want to defend the main action.

Mr. Loftin. That answers my question.

Mr. Dodge. How about appearing specially?

Dean Clark. It appears definitely that he does not want to appear specially. That is under Rule 26, at the very end, where it says, "No special appearance is necessary to raise such a defense; but all such defenses shall be deemed waived if not raised in or prior to the filing of the answer."

Mr. Lemann. Of course, that goes beyond what you would ordinarily call a special appearance; because your preceding language there provides as to a defense which may abate the action or avoid a decision; and Mr. Donworth's question is about challenging the jurisdiction, and there may be some doubt about that. When I read this, I made a memorandum,

"How about the special appearance?" I suppose the answer to that is this:Rule 16 means a general appearance.

Mr. Wickersham. Well, would that quite cover the question? A special appearance which will enable some one to come in without submitting himself to the jurisdiction, and move to dismiss the case for some jurisdictional defect. Now, if he cannot appear specially--you say it is not necessary?

Dean Clark. Maybe our language is not sufficient, because what was intended was to say that if you did not want to appear generally and submit to the jurisdiction, you could appear specially.

Mr. Wickersham. What I was going to add is that it is not necessary to raise such a defense. But on the other hand, in order to be held in case the motion is denied, and on appeal, and still appear specially, it is quite important that you appear specially.

Mr. Donworth. You take the case of the Qaulity Mining News, where the Mining News was not present there. Now, they moved to set aside the service, and they could not appear specially.

Dean Clark. I think the language is not quite as well chosen as it should be. The idea was, in order to enable the defendant to appear specially in order to move in abatement as to the jurisdiction.

Mr. Lemann. That may be the purpose of it, but your

language would include a lot of things.

Mr. Morgan. It would include everything except exception to the jurisdiction.

Mr. Lemann. Yes; that is not the kind of appearance that would save those rights.

Dean Clark. Then my language does not cover it. My idea was to get away from appearance in general terms. I wanted to get away from the question of general or special appearance, because he would raise debatable questions at once.

Mr. Wickersham. But that is one side of it. The other side is, whether, by making a motion the man submits himself to the jurisdiction. It is important that he should be able to make a motion without submitting himself to the jurisdiction.

Mr. Lemann. You take an attachment case. You can appear specially and make a motion. But if you do, you can come in or stay out.

Mr. Olney. A man cannot change the character of his appearance by calling it general or special. It depends upon the character is.

Mr. Dobie. That is not a general appearance, to move to set aside an attachment.

Mr. Lemann. It is in my State. You either ask the court to come in and help you, or relieve you, or stay out of court.

Mr. Dobie. There are a number of cases that hold--

Mr. Lemann (Interposing). There are a lot of cases.

where, if you appear and question what has been done, that is a general appearance.

Mr. Morgan. The question is, do you want to avoid that?

Dean Clark. All I wanted to do was to do away with the useless terminology as to general or special appearance. I was not attempting to change the question of jurisdiction.

Mr. Morgan. You do not pass on the question of whether the proceeding, after there is a submission to jurisdiction, is a general appearance, as to which the cases are in conflict, the Federal cases holding it is not. Of course, Texas has a statute, which the Supreme Court has upheld, that all appearances are general.

Mr. Lemann. So did Mississippi.

Dean Clark. I was trying to do away with useless formalities. Generally speaking, appearance is to be entered by the defendant filing his answer. In his anser he has to raise all his objections. Of course, I suppose a different question of jurisdiction he can probably raise at any time, but in general he must provide all the objections in his answer.

Mr. Lemann. Well, he could not raise the question of jurisdiction in a special answer.

Dean Clark. Yes, he could. At the same time, I want to find another way, and everybody please take note.

Mr. Donworth. How do you distinguish between the jurisdiction of the subject matter and jurisdiction over the

person, like in the Mining News case? It seems to me that the Mining News case, in which the Federal court held that the service was invalid because the president was simply casually there, is in point. Have you not got to have special appearance in a case of that kind?

Mr. Wickersham. Of course, it does not say that there shall be no special appearance. It says, "No special appearance is necessary to raise such a defense, but all such defenses shall be deemed waived if not raised in or prior to the filing of the answer." That would still leave it open to the defendant to appear specially and move to dismiss, on the ground--take the Mining News case--on the ground that the Mining News was not doing business within the State or district, and service upon its president casually there was not binding on the corporation, and therefore they asked that the case be dismissed. And therefore, under this we can take it that the objection is answered that it is necessary for him to do so.

Dean Clark. Of course, I have in mind the purpose to be solved. It may be defective language.

Mr. Morgan. I think it is.

Dean Clark. I just want to get away from this provision of appearing specially, and so on, when the paper shows it. Further on in Rule 26 I provide that, for purposes of a motion, I think it can be done in the answer, and I do not see why it cannot.

Mr. Morgan. Yes, I think it can, and I think you ought to take care of it. Suppose, for a first defense in his answer, he attacks the service of the summons. That would be a good defense in abatement.

Dean Clark. Yes.

Mr. Olney. He attacks the service of the summons?

Mr. Morgan. He attacks the service of the summons.

Mr. Olney. That would be a good defense in abatement.

Mr. Morgan. Oh, yes, it would be a good defense in abatement as to the jurisdiction. Not at common law. He appears specially and pleads in abatement under the common law. As I understand it, in Illinois, he had to do it under the last Practice Act if the defect did not appear on the face of the return; the only way to attack it was by answer, and in a good many of the Code States, you can plead to the jurisdiction and to the merits at the same time, and you can plead to jurisdiction and get that taken care of and ~~act,~~ and you do not have to go on and defend. You do not waive anything. In some States, if you do go on and defend you do waive. Now, as I understand Dean Clark's provision provides for but one answer, and in that answer you can attack jurisdiction over the person, as well as over the subject matter.

Dean Clark. That is it.

Mr. Morgan. If you did that for a first defense, and

for a second defense, and for a second defens go to the merits, you certainly are not providing that it is a waiver.

Dean Clark. That is true. I think that is permitted rather generally under codes. Your answer is partly in abatement and partly on the merits.

Mr. Morgan. Surely.

Dean Clark. Now, the embarrassment is to avoid separate grounds of filing defenses. You get all the issues at once, and the whole purpose of Rule 26 is to bring up all the points at once.

Mr. Wickersham. Yes; but that is just what the defendant does not want to do, in cases such as the Mining News case. Now, you assert jurisdiction over a corporation, serving an individual director or officer. The corporation does not want to come in with its defense. It wants to escape the jurisdiction.

Dean Clark. Now, I was not quite consistent with my own philosophy. I would still in that case like to have him put in everything at once.

Mr. Wickersham. That is what I wanted to ask you.

Dean Clark. And in that case, I put in an alternative.

Mr. Lemann. He could bring it in separately.

Dean Clark. Yes.

Mr. Lemann. But you have really given him another op-

Dean Clark. Yes;

portunity, but I was afraid people would get a little excited about it. The whole idea of Rule 26 is just a momentary weakness. (Laughter.)

Mr. Wickersham. It is a very real question, you know, in a great many cases; unless the defendant can appear specially and move, he gets drawn into litigation in a foreign jurisdiction against his will, and against the law.

Dean Clark. What I intended in this last sentence of Rule 26 was to provide nothing that would waive the question; he has not waived anything by putting in a document that says, "I appear specially and object to the jurisdiction."

Mr. Wickersham. He also may move and appear specially, all right.

Dean Clark. I have put it that way in Rule 26.

Mr. Morgan. I am afraid they will do it both ways, then.

Dean Clark. That is what I am afraid of.

Mr. Dodge. You mean he does not submit himself to the jurisdiction of the court, provided he does not make a complete answer, but appears to contest that?

Dean Clark. That is the idea.

Mr. Dodge. But if a man appears, he should be permitted to move to quash the service of the summons.

Dean Clark. He can, generally, do that. He certainly

can do it in New York.

Mr. Wickersham. What?

Dean Clark. File your abatement motion and your answer.

Mr. Olney. I take issue with Mr. Morgan. When you move the action is not abated. An abatement applies to another action pending, or a plea in bar, under the statute. It goes to the action itself; while a motion to quash the service of summons simply goes to the question of jurisdiction for the time being over the defendant.

Mr. Morgan. You are undoubtedly right in the most active use of the plea in abatement; but most of the common law pleading States, and most of the commentators, class pleas to the jurisdiction, as well as the pleas that you call pleas in abatement, as pleas in abatement. They are all dilatory pleas.

Mr. Olney. Now, a plea to the jurisdiction of the subject matter might well be considered as a plea in abatement.

Mr. Morgan. I am not talking about that.

Mr. Olney. But a plea is made to the effect that there has not been sufficient service on the man, and that does not abate the action.

Mr. Morgan. If it succeeds, it is a plea in abatement to the writ.

Mr. Dobie. But he can get another service, though, can

he not?

Mr. Morgan. Yes, he can bring another action.

Mr. Olney. He might bring another action.

Mr. Dobie. Suppose, in the case of the Mining News, they serve the president in New York, and the corporation not being there, later on it is quashed. Now, later on they decided to do business there and they did begin to do business there.

Mr. Olney. You can go on and sue him.

Mr. Morgan. The writ would make the plea functus officio, and the plea would, of course, be the writ.

Mr. Dobie. Yes.

Mr. Olney. If you mean by abating the writ that it is quashed, that is all right. The action itself is not abated.

Mr. Morgan. What do you mean by abatement of the action?

Mr. Olney. That it is at an end.

Mr. Morgan. Certainly, at common law.

Mr. Donworth. Under the statute, the complaint may be filed as a first step beginning the setion. If the action is begun that way, there is 90 days allowed for service. He may may make a service in ten days on John Smith, who is the janitor. The company comes in by special appearance and says that John Smith is not the janitor, and move to quash the service. It does not abate the suit.

Mr. Morgan. It abates the writ.

Mr. Donworth. We do not use that expression.

Mr. Morgan. I know you do not, because you are under a code.

Mr. Donworth. We can do it at any time within 90 days.

Mr. Morgan. Yes.

Mr. Mitchell. How does this question of terminology in plea in abatement arise?

Mr. Morgan. I suppose because the pleas are all regarded as dilatory pleas, and any dilatory plea is a plea in abatement. Now, as a matter of fact, a plea to the jurisdiction is not a dilatory plea.

Prof. Sunderland. There is no ambiguity?

Mr. Lemann. The only ambiguity, from the standpoint of the average lawyer is that what has been talked about in that connection most lawyers would not call a special appearance. I think we could restrict that to motions to questions or challenge the jurisdiction of the court.

Mr. Mitchell. Over the person?

Mr. Lemann. Yes, over the person, and therefore all we need to do now is to ask the court for further consideration of that question, or thephrasing on this point in the light of that.

Dean Clark. I think I would make my own purpose a little clearer if, I said, instead, "No special appearance is necessary" to raise a defense--"the defendant does not waive

such defenses by not noting a special appearance."

Mr. Mitchell. Without following it up, because it is all in the papers?

Dean Clark. Yes, because it is all in the papers, that have to come in very promptly.

Mr. Wickersham. The practical point is this; A man files an answer and takes objection to the jurisdiction over the person. In the first place, that question does not come up for decision until the case comes on for trial, and if when it comes on for trial he is defeated in that, he has got to go right through the file and authorize a judgment, and he appeals from the judgment, and that is one of the errors assigned. On the other hand, if he appears specially and moves to dismiss, and the motion is denied, he has got to appeal right away from that order and get a review.

Mr. Lemann. Not everywhere. It is an interlocutory order.

Mr. Cherry. It is not a final judgment?

Mr. Wickersham. If he appears specially and moves to dismiss and it is denied, he had a right to appeal.

Mr. Morgan. That is by statute in New York.

Dean Clark. In New York they have appeals on all sorts of things like that.

Mr. Wickersham. Well, a preliminary question like that is settled before we are drawn into the thing, and it is

of great value.

Dean Clark. I must say that I think it is not an advantage. In some cases it may be. In many cases, where the defendant never ~~did~~ ought to win, it is just a loss of time. Now, you just have to try to make some judgment as to how many cases there are of that kind.

Mr. Wickersham. Well, if he does not win, he ought to win.

Dean Clark. Well, unfortunately for him, that does not happen. They never win in New York. (Laughter.)

Mr. Wickersham. If an officer is sued who happens to be in New York, and the corporation is the party, I do not think the corporation is drawn into it.

Dean Clark. I do not think he should have to come in unless he wants to waive it.

Mr. Wickersham. Well, he does not waive it.

Mr. Olney. The trouble is that you put in the category the matter of what we call special appearance--that is, the mere matter of jurisdiction over the defendant personally, personal jurisdiction over him, with such matters as a plea in bar, or a plea of another action pending. Now, so far as such as pleas as that are concerned, which are strictly pleas in abatement, the defendant ought to be permitted to put them in his answer, and try them along with all the rest of the

case. But so far as a motion to quash the service of summons is concerned, and that is practically what it amounts to--he ought to be compelled to make that before he pleads. He ought not to have the privilege of making a plea of that sort, and also of putting in an answer and waiting until the time of trial before it is determinable--if there is going to be any trial at all now.

Mr. Morgan. He get that now under the Federal decisions.

Mr. Olney. He ought not to.

Mr. Morgan. He gets that now, and then he can go in and make his motion on the merits, and it is on appeal--

Mr. Olney (Interposing). But he should make his motion and have the thing determined, and have it determined once for all.

Mr. Morgan. Why not let him plead, and have it decided at the same time?

Dean Clark. Judge Olney suggests that this is an apparent/disadvantage to the defendant. It seems to me it is the other way. It seems to me that the matter of compulsion to the defendant is giving him a chance to delay the case on something that probably does not count. The whole philosophy of making the defendant speak up promptly and at once is to hamper the defendant--to cut down his chances of delay through these motions and proceedings, which Mr. Morgan very properly called, as they are often called, "dilatory motions."

Mr. Lemann. I have always drawn a distinction between these and dilatory pleas. We call these jurisdictional pleas "correctory." And I think the average plaintiff would want to know--pleas in abatement and those things are dilatory--but I think the average plaintiff wants to know whether he has the defendant in or not, and he likes to feel, if the defendant does not raise that point at the jump, that he is out of the picture; whereas the effect of the other method is to keep him in the picture; and many of the defendants take advantage of that, because they do not raise the point whenever it would be helpful to the plaintiff.

Mr. Morgan. Yes.

Mr. Olney. There is this thought about the matter, that perhaps Dean Clark overlooked. I think these motions to quash the service of summons act very rarely as delaying the action, unless there is genuine merit in the motion. It does not come in the class of dilatory tactics at all. It is rarely used for that purpose.

Dean Clark. Have you thoroughly in mind the procedure under Rule 26? Under Rule 26 the defendant normally is supposed to file his answer telling everything, and then any one of the opposing side, or the defendant, can ask the court for a hearing at once, or the court may order it, and they may settle the whole question; that is, you have got the defend-

ant on record; and then if it looked as the matter will end the case, then you may have your preliminary hearing; but you are not supposed to have your preliminary hearing unless it looks that way. That is in the body of Rule 26: "The court may, on such motion or of its own motion, or on motion of the opposing party, if it finds that a decision on such defense may finally dispose of the whole or a material part of the action, order the action set down for hearing on such defenses. On such hearing, the court may take such action, including entry of final judgment, as may be appropriate."

Mr. Olney. Well, so far as the average of what we lawyers would call a strict defense by way of abatement is concerned, this rule requiring the court to consider it in advan ce is a very valuable one. When I found it in the rules, it got my approval, as the result of experiences that I have had. In one case I interposed my plea in bar, and asked the court to consider it, and we spent three weeks on the merits, and then the court decided it on a plea in bar. But those pleas are entirely different from this matter of quashing service of summons.

Mr. Donworth. I think that would be shown by giving consideration to what actually happens. Take the case of the Quality Mining News. The Mining News was sued in its own right. But assuming that Quality was executor of his father's

estate, and he was alive--assuming it was legal. Now, Quality the executor, serves the Mining News, and makes this effective service. If the elder Quality is dead, and therefore the plaintiff has no capacity to sue, that is a plea in abatement, which under Dean Clark's suggestion becomes one of the defenses to be tried, like the others; and under the Constitution of the United States, that issue, whether Quality Senior is living or dead, must be tried by a jury if a jury is demanded, although it is a matter of abatement. But your motion to quash the service in never gets to the jury.

Mr. Morgan. That is right.

Mr. Donworth. And that should be recognized as a very different thing from what we have been discussing. The motion to quash service, if coupled with the justification that this article is true that was published against deceased Quality, where are you going to get? Then you get a jury trial, and you have to prepare your case and go in and try it before the jury, as to whether this company was really doing business here, and all of that. And, gentlemen, this is a very distinct matter--the question of whether you have appeared--the day in court has nothing to do with these matters, really, as to abatement under the modern practice.

Dean Clark. I am sorry to say that I must believe myself that that is more of a dilatory motion than almost anything else, because it is not getting anywhere, really.

Mr. Lemann. I think there you beg the question. I think the average lawyer--you take the practicing lawyers, and I rather think the majority will agree that that motion is rarely made, unless there is real occasion to make it, and that the abuses of delay come a hundred times under the other ~~court~~ Course where they would come one time under this ~~court~~ Course.

Mr. Morgan. Granting that, do you get anything worse if you put that in your answer, and if it is really to be supported by evidence in your answer, you will want to get it out of the way.

Mr. Lemann. Well, I feel that if I ought not to be brought into that court I ought not to be put under the necessity of putting in an answer. As I understand, Dean Clark goes to the other extreme. He says you can in advance of your answer, by motion, present all the dilatory arguments. But certainly, if you are going to do that--

Mr. Morgan (Interposing). But my argument is for cutting out the motion and requiring them to put in an answer, and then there is no reason why it has to be tried by jury. Why can it not have the same effect as a motion?

Mr. Lemann. I think it would be well to say challenge to the jurisdiction must be in 10 days; cut it down to 10 days; say "Come in with your motion to quash the service in ten days." I think that ought to be in a class by itself.

Mr. Morgan. At common law, if the sheriff made the

return, and they answered setting up that the sheriff's retu was false, the charge that it was false would be demurrable, because you could not impeach the sheriff's return. Now, tal it in Illinois, which is has the common law practice. If the exception appeared on the face of the return, then you could attack it, but if it did not appear on the face, the only way you could attack it was by a plea in abatement, or a dilatory pl to the jurisdiction. That was the only way of attacking it in Illiois, and I take it that would be the only way in Illi nois to handle it. You could not bring the thing in your dilatory plea; you could bring in only things that appeared on the face of the record.

Mr. Wickersham. Yes, but we have a different notior in this country.

Mr. Morgan. Certainly, we have a different notion.

Mr. Wickersham. We have a problem of a mobile peop moving from one jurisdiction to another. You have a requir ment that proceedings may be brought in certain places. Y have this question of representation. A man comes to New and works, not having a place there, and not doing all of h business there, but it is sought to extend jurisdiction of New York court over him by service of process in the city o New York.

Now, why should not that question be tried out speedily in the simplest possible way, without subjecting

the defendant to the possibility of being involved in the jurisdiction by being required to prepare his defense, and go into all the rigamarole that is necessary to get ready for trial. It seems to me, in the interest of the business of the court that there is no reason why you should burden the court with all the details of work in a lawsuit which does not belong in the court, and which would not enable the judge to decide promptly--because it did not belong in the court and would be removed from all other business in the court.

Dean Clark. Of course, that is provided for in the rule.

Mr. Wickersham. It is provided in the rule that it is requisite to file the answer.

Dean Clark. No. I was not wholly true to my own convictions, and I put in the motion--

Mr. Donworth (Interposing). Well, you have to file the answer.

Dean Clark. No.

Mr. Lemann. Of course, there is a lot to talk about in addition to this.

Dean Clark. Of course, in New York you can put in your answer.

Mr. Wickersham. Yes.

Dean Clark. But I give him the option.

Mr. Mitchell. And then when you put in the answer,

you give either party the privilege of deciding it in advance.

Mr. Lemann. I am afraid, Dean Clark has not given us a chance to make any motion at all. At the bottom of Rule 26 it says, "When the defense is such that it may abate the action or otherwise avoid a decision on the merits, the defendant may, in lieu of the above, file his motion, in advance of his answer, wherein he may present such defense." Now, a motion of that kind has nothing to do with any defense, either in abatement or otherwise.

Mr. Mitchell. You object to the term "defense"?

Mr. Lemann. Well, I think that language ought to be changed.

Mr. Dodge. Did you intend to raise the point that the defendant could make a motion in which he was trying to raise the question of jurisdiction of the court?

Dean Clark. No, I thought he should not.

Mr. Dodge. Well, I think that should be made plain.

Dean Clark. Now, I am at once at the point that, of course if a motion is not a defense, I should make it clearer.

Mr. Cherry. Your rule suggests that it is.

Mr. Wickersham. What I object to is making a defendant who is sought to be brought in, and it is questionable whether he is brought in--I would like to know whether he

is brought in when he appears to defend the action and instantly raises the objection which goes to the roots of the whole thing.

Mr. Mitchell. He does not have to do it under this rule.

Mr. Wickersham. That is what I would like to know, because sometimes Dean Clark says he does, and sometimes he says he does not.

Dean Clark. No, there is not any question but what I did not. And in the rule I put in theoriginal motion. I suppose the rule would cover the summons matter. But again I say this is a question of words to carry out the idea, and if these words do not do that we want to put in different words.

Mr. Lemann. But suppose I am in court, and I have some dilatory plea.

Dean Clark. He can put them all in his answer.

Mr. Lemann. That is what I am after.

Dean Clark. Well, he does not have to put them all in his answer.

Mr. Lemann. But he would have to put his jurisdictional objections, and his other abatement objection in the one pleading.

Dean Clark. Or in his answer.

Mr. Lemann. Therefore, if that is true, he cannot do what Mr. Wickersham and some of us think ought to be done,

that is, settle the question of whether he has got to defend this suit, before he raises any other issues.

Dean Clark. Why not? He makes his answer in advance.

Mr. Lemann. Yes, but if he has his abatement matter, he must throw them all into that motion.

Dean Clark. No.

Mr. Mitchell. You mean he has to put them all in?

Mr. Lemann. That is what I understood, and that is what I would personally object to.

Mr. Dodge. Most of them cannot be ~~cases~~ raised on motion, because they involve questions of fact--on this question of doing business in the State, it involves a jury trial, if it is a jury case.

Dean Clark. I suppose that comes in where Rule 26 says, "The defendant may, in lieu of the above, file his motion." I suppose you want to put in, "In lieu of," or "in addition to."

Mr. Mitchell. As a matter of practice, is a man entitled to a trial on the question whether he may be sued in that district?

Mr. Dodge. On the question of domicile?

Mr. Mitchell. Yes.

Mr. Dodge. I do not see why not.

Mr. Mitchell. I am talking about the statute.

Mr. Donworth. Well, the provisions of the statute re-

garding the time in which a man must be served are local matters. A man sued in a wrong district may stay there, unless he makes a special appearance; as I interpret this rule, a man sued in a wrong district must file his answer on the merits, in which he must say, "I am sued in the wrong district and I want to get out." It seems to me that a question should not be raised about that.

Mr. Mitchell. He does not have to. He can raise it in advance. But the defense is one that may "abate the action, or otherwise avoid a decision upon the merits." The rule itself states that.

Mr. Olney. I would not agree with Judge Donworth that under this rule as it reads now, a man would be required to make amotion to quash the summons. I think this has no application to it at all, because it deals with the defense to the action; and in these days a motion to quash the summons is not looked upon as an answer as to the merits.

Mr. Mitchell. He said the defense.

Mr. Lemann. How about the constitutional question?

Mr. Mitchell. I never considered the matter as a jury trial, as to whether it is a suit in the right district.

Mr. Dodge. Suppose he pleads in abatement, that he is not sued in the right district, and I think he is entitled to a jury on that.

Mr. Lemann. How about a corporation? That is a mixed

question of law and fact there.

Mr. Mitchell. I never heard of that kind of case.

Mr. Lemann. I have. I know one case that was referred to a master by the district court in New York.

Mr. Dodge. In Massachusetts, a plea in abatement would be the regular method of proceeding, and it would be tried by jury.

Prof. Sunderland. That is true in Illinois; but the Federal court refuses to follow it. They allow the filing of an affidavit.

Mr. Morgan. And of course, if it can be tried on motion, it must mean that it must be possible also in court to put in a plea. You can get out of a trial by the device of a motion, instead of an issue for trial.

Prof. Sunderland. The requirement of the Illinois court is that they must be tried by a jury, but the Federal court refuses to take a plea in abatement, and in taking a motion on affidavit they get somewhere without it.

Mr. Wickersham. I agree with Dean Clark in this, that those things ought to be included in the answer. It seems to me that those things go to the root of the question whether that case belongs in that court or not, and that they ought to be tried out and disposed before you go into the merits of the case. I think it is the business of the lawyers to save the court from being called upon to devote its attention

to a lot of things that it has nothing to do with.

Mr. Mitchell. Well, when this rule expressly provides that--the last sentence of Section 16 gives a man the alternative; instead of setting this up in his answer, he may make preliminary motions.

Mr. Lemann. Well, he has got to put all the other things in the motion.

Mr. Mitchell. Well, you are getting down to details.

Mr. Wickersham. Well, take that line that says, "No special appearance is necessary to raise such a defense, but all such defenses shall be deemed waived if not raised in, or prior to the filing of, the answer." It may not be necessary to raise a defense; but the question is, if the special appearance is not necessary to raise the defense, on the other hand, is the special appearance admissible in order to avoid the consequences of a decision, if it is adverse to the defense?

Mr. Mitchell. What about this language: "When the defense is such"--let us suppose that the word "defense" is broad enough to include service--"when the defense is such that it may abate the action or otherwise avoid a decision upon the merits, the defendant may, in lieu of the above"--now "the above" is to put these things in his answer--"or file his motion, in advance of the answer, wherein he may present such defense and ask immediate hearing thereof."

Mr. Wickersham. I should not have thought that the failure to raise the question of jurisdiction was a defense to the action.

Mr. Mitchell. You are objecting to the terminology?

Mr. Wickersham. Yes.

Mr. Mitchell. But the practice is that he can get those things decided before he puts in his answer.

Mr. Wickersham. But I think the question of whether or not you have got proper service on the defendant was not a defense to the action.

Dean Clark. Well, if it is not a defense I do not know what it is.

Mr. Wickersham. That is not a defense to the action. That is an objection to the jurisdiction.

Mr. Morgan. Well, lack of jurisdiction is a defense.

Mr. Mitchell. It is now 5 minutes after 1. Suppose we take a recess until 20 minutes of 2?

(Thereupon, at ~~12:45~~ 1:05 o'clock p.m., the Advisory Committee took a recess until 20 minutes of 2.)

AFTER RECESS.

(Friday, November 15, 1935.)

The Committee reassembled at 15 minutes of 2 o'clock.)

Mr. Mitchell. Gentlemen, let us proceed. Do you want to consider any question with reference to Rule 16, and take that up now, or do you want to take up again Rule 26? Would it not get a more orderly treatment if we went back to Rule 16 and reserved action as to Rule 26. If that is satisfactory, I will start in that way. Now, is there anything more you want to say about Rule 16? I think not. We passed a resolution about that.

Dean Clark. That is the one that is called for under the statute.

Mr. Mitchell. Yes. That brings us to Rule 17.

Mr. Morgan. Are you going to put anything in Rule 16 about the special appearance; because this is the only rule that has to do with appearances as such, is it not?

Mr. Lemann. As I understood, we will pass that part of Rule 16 until we fight the battle of Rule 26; because it is somewhat tied up with that; and I suggest that we keep that open.

Mr. Morgan. All right.

Mr. Mitchell. All right. We will consider all of those questions when we get to Rule 26.

The next is Rule 17, "Time to defend; default."

Mr. Wickersham. The first question there is reducing the time for service of the summons from 20 days to 5 days, under the conditions specified there. Is that a desirable or possible thing to do?

Mr. Lemann. We discussed that to some extent last night, did we not?

Dean Clark. Yes.

Mr. Morgan. Yes, we omitted that.

Mr. Mitchell. We took action about reducing the time to five days.

Mr. Dodge. That is upon ex parte proceedings, but did that contain notice? I think it is disadvantageous to eliminate it if there is a hearing.

Dean Clark. I might say, carrying out Mr. Dodge's suggestion somewhat, that there are cases where the parties really both want quick action, and later on, in connection with the entry of judgments, the courts are very anxious indeed that it be provided that they be speeded up. But suppose, for example, the parties wanted to get a declaration of rights, of something pending.

Mr. Morgan. Well, the defendant can answer the same day he gets it. There is nothing to prevent his answering earlier.

Mr. Dodge. I had in mind the case mentioned yesterday, where there was an injunction sought, and a short order,

and obviously there should be a preliminary hearing on the merits. Should not the judge be able to order the defendant to come into court promptly?

Mr. Donworth. We have another rule onmotions, and a shorter time. I think in an injunction suit the plaintiff, in addition to his complaint, usually files a motion for a temporary injunction, which the judge sets down for hearing in a very limited time. But the requirement for the answer I think is general in stating what it does.

Mr. Mitchell. Mr. Dodge, do you not think that the time of the defendant to answer, when there is a motion for an injunction, should be fixed at a reasonable time, as a matter of course? Otherwise you would be left rather helpless on the motion.

Mr. Dodge. Suppose there is a short order notice, of three days, and order or notice in three days, and the defendant comes into court, and he has not filed any pleading, and asks to be heard on the preliminary injunction; and the court is functioning, and wants the action tried on its merits very promptly; and the judge says, "I will not issue the temporary injunction, but I want this case tried at once on the merits, so that the issue may be determined with respect to a permanent injunction." I think he ought to have a right to have the order issued at once.

Mr. Mitchell. Do you mean that the other side desire

to go to trial and needed proof.

Mr. Dodge. Well, he may prevent the injunction, and still feel that the matter ought to be tried very promptly, so as to know his real rights.

Mr. Lemann. Now, you can do it in a Federal equity court, but this order that you speak of is in the State practice.

Mr. Donworth. It is a restraining order.

Mr. Lemann. I thought he was speaking of a case where there is no application for temporary injunction, and you wanted to get the case decided, and the judge did not want to issue a temporary injunction, and he said, "I want to speed up this case." Is there any way in Massachusetts of making it snappy? I should not imagine you could do that in Massachusetts.

Mr. Mitchell. My idea was that he wouldissue the injunction until it went to trial, and if the party did not do it, he would still have an injunction; so that I think the rule should give him power to compel the defendant to file his answer. If he wanted to file it, he would be in rather good shape, on a motion for injunction.

Mr. Dobie. Is there any fear of arbitrary abuse of this power? It seems to me that giving the judge power to enlarge the time is going rather far. Should we not also give him the power to shorten it? I should rather favor

that myself.

Mr. Lemann. Do you mean after hearing, or ex parte? Mr. Dodge suggests after hearing. Then, you have another hearing, of course.

Mr. Mitchell. Do you not want to leave in Rule 17 the clause, "Unless the time shall be enlarged by the court for cause shown."

Mr. Dobie. I think we ought to leave that to the judge.

Mr. Lemann. As I understand it, ~~there~~ that is res judicata in this Committee, as we voted really not to give him that power at all. Now, Mr. Dodge wants to go back and give him power after the hearing.

Mr. Dodge. Yes.

Mr. Lemann. And you want to go back the whole way?

Mr. Dodge. Yes; it is a very good way for speeding up that matter. I remember a case where the case could be reached finally in three weeks, but in the meantime we had an injunction trial before the court.

Mr. Wickersham. Did both parties want to expedite it?

Mr. Dodge. I do not recall.

Mr. Wickersham. If both parties want to expedite it they can do it.

Mr. Dodge. But where one of the parties desires it, I think you can trust the judge to exercise the power reasonably.

Mr. Wickersham. But the judge has power, on a motion for a temporary restraining order, to practically make the defendant answer; without technically shortening the time he constrains him to file an answer, because he grants a restraining order, unless he brings in proof of a good defense.

Mr. Mitchell. I would like to ask Dean Clark a question. The first occurs in brackets in Rule 17 and says, "Unless the time shall be enlarged by the court for cause shown." Do you understand that to be an ex parte order?

Dean Clark. I think it can be.

Mr. Mitchell. Now, in the next paragraph, you use substantially the same language, and you want the time shortened without a hearing.

Dean Clark. Well, I supposed the next one also would be ex parte, because I suppose it would be rather difficult to get a hearing without getting a 20-day delay, and I thought there would not be very much harm done. Suppose the court, on the ex parte application, has ordered an answer in 5 days. Then the defendant appears and says it cannot be done. Then the judge says, "If it cannot be done , I will give you ten or fifteen days.

Mr. Mitchell. Well, his being in the court, he can show the defense.

Dean Clark. That is true, but after all, the fault is not very serious.

Mr. Bonworth. We have prescribed the form of summons, and I do not see how this can work in very well with the form of summons.

Dean Clark. I think that can be taken care of very well. Back in the form of summons I had a provision covering this. The plaintiff would go to the judge before using a summons. The summons is issued and the motion is made, and if the court has granted the motion, you must serve the answer within whatever time is specified.

Mr. Mitchell. I am afraid of this reduction. I think there would be a good deal of opposition to five days, ex parte, and all of that. There may be exceptional cases where it would be a good thing.

Mr. Dodge. Do you think there would still be objection if it was not ex parte?

Mr. Mitchell. I do not think there would be so much. Say if the plaintiff should go to court and get an order returnable the next day, and if the defendant should then come in and show that he should have more time--

Mr. Dodge (Interposing). That is what I had in mind.

Mr. Mitchell. It would take the objectionable feature away a little, if you should put in an express provision that it was to be after notice of hearing.

Mr. Cherry. But he would have to have that hearing before he had been served with a complaint or it had been filed.

Mr. Mitchell. The court would take care of that, I suppose, when it granted the application.

Mr. Donworth. Bear in mind that the plaintiff's lawyer will not always be a highminded gentleman.(Laughter).

Mr. Wickersham. Are there any lawyers who are not high-minded gentlemen? (Laughter.)

Mr. Donworth. I think for one case where Mr. Dodge's situation might apply, there would be 100 where there was danger it being abused, and that the bar would object to this shortening before they were heard at all.

Mr. Mitchell. I think they would.

Prof. Sunderland. One of the objections is in regard to summary judgments; one of the objections of the district committees was in regard to the shortening of the time, and they were finally opposed to it.

Mr. Mitchell. Will somebody make a motion to either reject or adopt that clause of Rule 17 that is in brackets?

Mr. Morgan. We have already rejected it once. We would have to reconsider it.

Mr. Mitchell. We have? Well, if that is so, I think a motion would be in order to that effect. This rule requires the defendant to make answer within twenty days after the service of the summons. Remember that under the system we have adopted, the plaintiff has the option to attach a copy of thecomplaint to the summons and serve it with the

summons, in which case the defendant has a copy immediately on service of the summons. And he has the option that the plaintiff had as to the filing of his complaint, or filing the summons without any complaint at all. Now, if the time for answer runs from the date of the service of the summons, bear in mind that the defendant's time is running when he has not had a copy of the complaint that has been filed. Now, the way that is handled in the Code States, where that system is used, is that if the complaint is served with the summons, you get 20 days. If you file your complaint, or serve a copy of the summons without the complaint, then the defendant may make a demand for a copy of the complaint, and he has 20 days from the date the complaint is handed him within which to serve his answer. That ought to be provided in this rule, I think.

Mr. Lemann. We discussed that yesterday fully, and I wonder what advantage there is in giving the plaintiff the option to file his complaint only in court? Now, we require a copy always to be served with the summons. Ordinarily, if a man gets a summons--we have discussed that--and we said that he would get a copy of it; if it is in court he has to go to his lawyer to get it, and of course, he can call on the other man to furnish it; but why should it not always be given to him by the other side.

Mr. Wickersham. [illegible] Rules 22 and 23 also

Mr. Mitchell. I do not know why he should not.

Mr. Olney. I think you have confused the rule on commencement of an action by filing with the Clerk and the rule in regard to service, which is found in Rule 13, which reads, "The service of the summons upon the defendant, when a natural person, shall be by delivering a copy thereof and of the complaint to him personally," and so on.

Mr. Lemann. That is right.

Dean Clark. Then we provide, in the case where the defendant could not be reached, you file your complaint in court, and then it is left to the marshal. But there are two alternatives, that is, if you are required to serve after filing the summons in the court--did we not vote on that?

Mr. Loftin. Yes.

Mr. Mitchell. Well, I was wrong. I overlooked subdivision 2 of Rule 13. I withdraw my objection.

Mr. Wickersham. Well, it says twenty days after service of the summons he is required to serve his answer. Ought that not to be twenty days after the service of the complaint?

Mr. Lemann. The complaint is to accompany it.

Mr. Wickersham. Well, what complaint? The time is so many days after the complaint.

Mr. Lemann. Well, if you serve the summons with the complaint, he has the same time to answer.

Mr. Wickersham. Now, if you serve the summons and start

the action--and I think you have the right to serve the summons without the complaint; but the time to answer ought not to run until the man has a complaint.

Mr. Mitchell. But the rules we have now adopted require that the summons and the copy of the complaint should go with it.

Mr. Wickersham. Is that in there? You worked that in over me. (Laughter.)

Dean Clark. I understand that you did oppose it. I think you remain true to your convictions.

Mr. Wickersham. I think so. I may be overruled but I will adhere to my opinion.

Mr. Mitchell. Is there anything more on that subject, Dean Clark? Then we will pass to Rule 18.

Mr. Wickersham. I do not like that phrase "all technical forms of pleading are abolished." Forms of action are abolished. But what is it to abolish technical forms of pleading? Every pleading must have a certain technical form if it is going to state a cause of action as known to the law. Of course, if it is an "old wife's tale," that is a different thing.

Mr. Morgan. Are we abolishing the common counts here?

Dean Clark. Then we had better put it the other way--"no technical formsof pleading are required."

Mr. Morgan. That is probably much better.

Mr. Wickersham. That would be better--"no technical words of pleading are required."

Mr. Dodge. Equity Rule 20, on the left hand side, does not have much application.

Rule 18 is, "unless otherwise prescribed by statute or these rules, the technical forms of pleading in equity are abolished."

Mr. Donworth. Where is that?

Mr. Lemann. Equity Rule 18. But he referred to Equity Rule 20, and placed that on the opposite page, instead of Equity Rule 18.

Mr. Donworth. Equity Rule 18 is not properly in there?

Mr. Lemann. No, there (indicating) it is very short.

Well, Equity Rule 18 says, "Unless otherwise prescribed by statute, or these rules, technical forms of pleading in equity are abolished." That is a different thing.

Dean Clark. Now, the latter sentence of Rule 18 compares to the latter sentence of Rule 19.

Mr. Wickersham. I would like to suggest an amendment to Rule 18: Instead of the present form, add to it something like the clause in both Illinois practice and the New York Civil Practice: "But every pleading shall contain a plain and precise statement of the facts constituting a cause of action or defense."

Dean Clark. Now, I was going to say that the object-

ion of many to this rule that it may be covered later, but perhaps if we protest several times it will do no harm.

Mr. Wickersham. Yes.

Dean Clark. But we do cover this thing later on.

Mr. Wickersham. Yes; you have "Form of pleadings" in Rule 20.

Dean Clark. Yes.

Mr. Wickersham. And you have Rules 22 and 23 also stating the same subject?

Dean Clark. That is true.

Mr. Wickersham. Yes, because all of those rules more or less refer to the point that I made the suggestion about. It brings up that question of what the pleader shall state. You have got three or four different phrases to choose from. The rule in Section--

Dean Clark (Interposing). Well, I presume there is no inconsistency, and I cannot see any inconsistency; it may be that you "protest too much." The condition that you are complaining of now always comes in the complaint, and I have got in there Rule 23.

Mr. Wickersham. Yes, but Rule 22 is "amendment to pleadings", and then there is Rule 23, "Complaint--contempts." For the moment waiving the form, I will ask generally whether that Rule 18 is necessary or important enough to have. Before you get the amendment of the pleadings, etc., ought you not to deal with the subject of what are the pleadings that may be amended? the complaint, the answer and reply, etc.? Ought they not to precede the provision regarding amendment of the pleadings? That is a mere matter of order, of course.

Mr. Olney. Are you discussing the last sentence of Rule 18?

Mr. Wickersham. Yes.

Dean Clark. I do not know that Rule 18 is specially

necessary. It is probably along the line a little of the Equity rules. If you want to save space, you could leave out Rule 18, or I could add another sentence in Rule 22 from Rule 18.

Mr. Mitchell. That would be better.

Mr. Wickersham. That would be better.

Mr. Olney. Well, it seems to me, Mr. Chairman, that if there is a change in the last sentence of Rule 18, the rule is of value, because most motions that are mostly used for purposes of delay are motions in connection with pleadings--to strike out this or that, or to require fuller proof, or something of that sort. Now, that is where motions of that character, that are used for purposes of delay, take the time of the court and all the rest of it. It seems to me that at this point a statement that has the idea of the last sentence of Rule 18 is worth while. I do not like the wording of that last sentence of Rule 18, because it fails to distinguish between the effect of an error or defect in the pleadings before trial, and at the trial, and the effect is quite different. Here is the suggestion that I have drafted: "Prior to trial, errors or defects in the pleadings or procedure that do not substantially affect the just dtermination of the cause upon its merits are to be disregarded, and after trial no rehearing or new trial shall be allowed, nor any judgment or order set aside or vacated by reason by reason of any

error or defect, unless it affirmatively appears that the same has substantially prejudiced the party in the presentation of his case, or has caused an erroneous termination of the cause upon its merits."

I think something of that sort, that lays it down as a principle that the judges might follow might be of value.

Mr. Morgan. I think the suggestion of requiring the prejudice affirmatively to appear is important, because this language here (indicating) is used in a good many codes and a good many courts construing this language are going to assume that it did appear affirmatively when it did not appear affirmatively, and I think that is important.

Mr. Mitchell. You said "before trial". You mean before the conclusion of the trial?

Mr. Morgan. No.

Mr. Olney. I simply said "prior to the trial."

Mr. Mitchell. Well, if you meant trial, or the commencement of trial, the same condition would not exist during the trial; so that I thought you meant really--

Mr. Olney. Prior to the decision.

Mr. Mitchell. Prior to thedecision. You did not mean prior to the trial?

Mr. Olney." Errors or defects in the pleadings or procedure that do not substantially affect the just determination of the cause upon its merits are to be disregarded."

And then he comes in and says some "i" is not dotted, or some "t" is not crossed, and then the same thing happens again, where it says, "unless it affirmatively appears that the same has substantially prejudiced either party."

Mr. Mitchell. I thought you meant during the trial.

Mr. Olney. Yes.

Mr. Mitchell. You meant upon completion of the trial?

Mr. Olney. Yes, that is true.

Mr. Mitchell. What is your pleasure about Rule 18?

Mr. Cherry. That would be a general rule that would not take its place among pleadings. I think putting it in some place where it has general application to the whole procedure would be wise.

Mr. Olney. That is true, but the point made is that a reiteration of the point would not do any harm; and I thought it was of value here in connection with pleadings, because the dilatory motions on the different points, and all that sort of thing, are costly to the client.

Mr. Cherry. Might there be some danger under this subheading of 4 of its being narrowly construed to affect only pleading?

Dean Clark. Possibly it should be put right after Section 3.

Mr. Cherry. Yes, I had some suchthing in mind of putting it somewhere to make its application general; the earlier

the better.

Mr. Mitchell. Do you like Judge Olney's substitute for the last paragraph of Rule 18?

Mr. Dobie. I like that. I think Judge Olney's suggestion that it must be made affirmatively to appear is a good one. This report here a stock report on Rule 19, which is rather a general provision or statute, and I think it is a good suggestion.

Mr. Mitchell. Could we not refer it to the Committee for revision?

Mr. Morgan. I move that that be done.

(The motion was unanimously adopted.)

Mr. Dobie. I agree with the suggestion that Mr. Cherry made that we put this thing further back, and if we did that it would be better.

Dean Clark. It seems to me it might come in under Rule 2. We can insert this as Rule 3.

Mr. Lemann. Is there a general Federal statute as to the record on appeal? In that connection, will you have your staff give a general reference to the statute, and we would see where the provisions of these statutes would be found here. Then we would find the corresponding Equity rule under the statute. Now, I would like to know which of these rules correspond to the Equity rules, and which of

them correspond to the Federal statutes; that is the advantage of showing that you have not overlooked anything.

Dean Clark. Do you mean the next time we meet? (Laughter.

Mr. Lemann. Yes; I am just asking about the Federal statutes.

Dean Clark. Yes, there are several Federal statutes. The amendment statutes are referred to in Rule 22 and are copied here, "Sections 767 and 777 United States Code."

Mr. Dobie. 777 is a general one, 28 U.S. Code, 777.

Dean Clark. Now, there is one on appeals that I refer to later.

Mr. Donworth. Where is Section 767 to be found?

Dean Clark. Opposite Rule 22. Now, Mr. Lemann you asked about the appeal one; that would be 103 or 104.

Mr. Lemann. That has some language resembling this language we are now discussing, about prejudicing or affecting substantial rights; is that right?

Mr. Morgan. Yes, that is common Code language.

Dean Clark. Yes, I am pretty sure I have got that in there.

Mr. Dobie. What is you are after?

Dean Clark. The appeal section. Well, here it is, opposite Rule 100; it is 28 U.S.C., 391. It says, "The court shall give judgment after an examination of the entire record before the court, without regard to technical errors,

defects, or exceptions which do not affect the substantial rights of the parties." And I put that in at the end of Rule 100. You see now we have this in as a warning to the court.

Mr. Wickersham. Yes.

Mr. Mitchell. I wonder how about affecting the action before the court where the practice says they may make rules of practice for the district court. I have proceeded on the assumption that they could deal with anything the district court had to do, in the form of settling bills of exception, and whatnot. But when you come to telling the appellate court what it could or could not do, it is outside the statute, because there is no reference to that in it. It is all a question of practice and procedure in the district courts. And that is one of the questions that I wrote out and handed to the court, and they confirmed the impression I had that we had to limit ourselves to District Court practice, including such practice in the District Court which forms the basis for appeal. This matter of settling bills of exception is a matter of practice in the District Courts, and included all of that ~~stock~~ and the statute. But to say that the Circuit Court of Appeals cannot do this-and-so, that reaches out beyond the statute. I think that ought to be stricken out. However, we are not on that rule yet.

Mr. Wickersham. The statute requires that.

Mr. Tolman. That occurs in one of these rules now. That is to say, there is a provision that says that these defects shall not be the cause for a rehearing or a new trial. Now, that rule as originally drafted provided for no person. Now, Judge Clark changed that language only so far as it refers to the trial court.

Mr. Mitchell. You mean on a motion in the trial court?

Mr. Tolman. On a motion in the trial court. But in addition, I find a situation such as arose in the case of Barbour Asphalt Paving Co. vs. Standard Asphalt & Rubber Co., reported in 275 U.S., page 372. That went up from Chicago, and the opinion was written by Mr. Justice Van Devanter, and it dealt with the rule made for District Courts, and it held that that rule was to be considered by the court on appeal, and it was arule which provided that the narrative form of statement should be employed, and prohibited the filing of questions and answers. A full shorthand report in nine volumes was filed, and went up to the Court of Appeals, notwithstanding this District Court rule. The Circuit Court of Appeals declined to look at it, reversed the case, and it went to the Supreme Court, which said that under the circumstances, because they always have allowed it to be done--that that was an abuse of judicial discretion and you should have reversed the case, with instructions to file, instead of the full record, a narrative statement. And the case reiterates

that this rule, which was a ~~difficult~~ District Court rule, be reflected in the other courts. Therefore, I think if we take the form of providing for a rule that it shall not be cause for motion for new trial or rehearing, we use all the force within our disposition. And it was on this very rule that the first change was made.

Mr. Mitchell. Yes. But there is that case that I talked about a few moments ago, that under the rule making power of the trial court, rules may be made in the trial court which will form a basis for appeal. That is a liberal view of the statute that you ought to take. I am not referring to the fact that the Circuit Court of Appeals may do thus-and-so after it reaches them. And I do not think they ought to have this in there.

Mr. Wickersham. It does this: It necessarily applies to appeal, and would it not be a technical rule for the District Court? "No rehearing or new trial shall be allowed or any order or judgment set aside or vacated by reason thereof."

Dean Clark. Yes.

Mr. Wickersham. Do you have an application for a new trial in the District Court?

Mr. Mitchell. I am talking about the end of Rule 100.

Mr. Wickersham. I did not know that.

Mr. Mitchell. It says, "On hearing of any appeal or

motion for a new trial,"

Mr. Wickersham. Well, I was referring to Rule 18.

Mr. Mitchell. I was speaking of Rule 100.

Mr. Dobie. Ithink that is applicable to both the appellate and trial courts, that 28 U.S. Code 391; it refers to an appeal, etc., "in any case, civil or criminal" and also refers to all U.S. courts. So we cannot legislate for the appeallate courts, but I think this will be takenas applying to the District Court, and on theother hand it will have a good effect in the appellate court. I do not think we need--

Dean Clark (Interposing). I do not think we need to consider Rule 100 yet.

Mr. Dobie. I am talking about Rule 18.

Mr. Mitchell. We have not settled the matter of the first two sentences in Rule 18. You have taken the last paragraph and you have accepted Judge Olney's provision. But the first two sentences here, "all technical forms of pleadings are abolished. For the purpose of determing the effect of the pleading, it shall be liberally construed, with a view to substantial justice between the parties." What is your action on that?

Mr. Cherry. Was that what the Reporter meant to include in Rule 20?

Mr. Morgan. Yes, that would be added to Rule 20.

Mr. Cherry. The substance of the first two sentences?

Dean Clark. No; when I made that suggestion I was thinking of leaving out the first two sentences, and adding the last setence to Rule 22, "Amendment."

Mr. Dobie. How about Rule 20, which has to do with the form of pleadings? I u derstand that the first two sentences were thought possibly appropriate there rather than in a separate rule.

Dean Clark. The first two sentences can be brought in there.

Mr. Wickersham. Do not Rule 18 and Rule 20 deal with the same subject, form of pleadings, and should we not combine those two and make one rule of them?

Dean Clark. It can be done. I take it that Judge Olney's suggestion goes to Rule 3, and this goes to Rule 20.

Mr. Cherry. Yes.

Mr. Mitchell. That settles that. I wanted to ask about Rule 17. The last paragraph says a default may be taken against him. There is nothing said there about procedure, or entering judgment assessing the damages; and I was wondering if there is any place where that is dealt with?

Dean Clark. We do deal with that. We had expected that the case would proceed ex parte, but yesterday it was voted that there should be an affidavit, and it has got to be rewritten on that basis.

Mr. Mitchell. You have that in mind?

Dean Clark. Yes, I have that in mind. I shall not have to say anything about covering that default, other than a default by non-appearance; but I understood the judgment was that all such defaults went to the court.

Mr. Mitchell. That is right.

Dean Clark. Well, I have that in mind.

Mr. Mitchell. Now, Rule 19.

Mr. Wickersham. I do not understand the last paragraph of Rule 19, where it says, "Any application to the court for its order prior to the trial shall be by way of motion, which, unless otherwise specified, shall be in writing and shall set forth the relief or order sought, and shall be considered as a plea and be subject to the ~~rule that~~ rules applicable to pleadings."

Dean Clark. Well, I may say that what I wanted to do--although I hesitate to say it, but this is the practice that I am familiar with--I wanted to have all these papers, following the orderly procedure, of answers and so on--which would mean that under the suggested system they would have to be filed with the court, and copies furnished; and now they would have to be served, and if the signing by counsel would carry the effects stated here, that signing by counsel, and with the allegations there contained, should be simple. In other words, these are general formal rules.

Mr. Wickersham. What do you mean? Do you mean sup-

pose I make a motion to obtain a more definite complaint, and the court makes the order; the complaint then amended in accordance with that order is a pleading, but the motion is not a pleading, and the order is not a pleading?

Dean Clark. I treat the motion as a pleading, and of course what I assume is that it is to be called a pleading.

Mr. Wickersham. Well, I do not understand how you can call it a pleading. It is not a pleading. The pleading is an orderly statement of the facts constituting a cause of action or a defense. You may call it anything you like, but the question is, is it correct?

Mr. Dobie. Is not a demurrer a pleading?

Mr. Wickersham. A demurrer is a pleading, because it is well recognized as such.

Mr. Morgan. Well, the English court said it was so far from being a pleading that it was an excuse for not pleading.

Mr. Wickersham. Well, that is true, but technically it is regarded as a pleading.

Mr. Olney. When I read this, the thought that occurred to me was exactly the same as Mr. Wickersham's suggestion; but I think Dean Clark had in mind, so far as the motion itself was concerned, and so far as pleadings were concerned, the rules with regard to pleadings should cover it. Now, I have written out this as a suggestion: "Any

application to the court for an order other than an ex parte order shall, unless otherwise specified, be on written petition or notice of motion, which shall, as to the order sought, be considered as a pleading and be subject as to its contents to the rules applicable to pleadings.

Mr. Wickersham. Now, my first question is, what is it that is considered as a pleading? Is it the application to the court for its order?

Mr. Olney. Yes.

Mr. Wickersham. That certainly is not a pleading.

Dean Clark. If you get out of Westchester and get over to ~~Milwaukee~~ Greenwich you have a motion as a pleading.

Mr. Wickersham. I never heard of it.

Mr. Olney. This was limited in this way, "Which shall, as to the order sought, be considered as a pleading and be subject as to its contents to the rules applicable to pleadings.

Mr. Wickersham. Now, it is a motion. It says, "Any application to the court for its order prior to the trial shall be by way of motion, shall be in writing, and shall set forth the relief or order sought, and shall be considered as a pleading." That is a motion to the court.

Mr. Lemann. Why should we not call it that? In the part of the country that I come from, and possibly some other parts of the country that is what they would call it. Now we call everything of this sort--every document that is signed

by counsel and goes into the record is a pleading.

Dean Clark. So do we.

Mr. Lemann. And it is a bad idea. I looked at "Clark on Pleading," and I saw that it is mostly considered as a pleading.

Mr. Olney. All that Clark had in mind in this provision was that the moving papers on motions should be subject to the same rules as pleadings; was not that all, Dean Clark?

Dean Clark. That is all.

Mr. Mitchell. Why not say that?

Dean Clark. I want to know what Mr. Wickersham has in mind, because I can see the advantage of having one immediately applicable. But if we want to call it a pleading, why should we not do so?

Mr. Wickersham. Because it is not. What is a pleading? A pleading is a statement of the facts constituting the cause of action or defense. It has been so recognized by officials and courts.

Mr. Dobie. The line between one of these motions and demurrer is very thin. And Judge Clark in his book has a reference to 20 cases. The complaint may fail to state a cause of action, and some courts say, "This is a rule of law subject to a demurrer," and others say, "No, it is not a rule of law, but the fact, but it is a cause of action, and therefore the motion to make more definite and certain." It seems

to me that you can go on with a demurrer and get at this.

Mr. Wickersham. Then the amended order is a pleading but the motion is not a pleading.

Mr. Lemann. Is the motion to dismiss the bill in equity a pleading?

Mr. Wickersham. No, it is not.

Mr. Lemann. ~~No,~~ It is not?

Mr. Wickersham. No. It takes the place of the old demurrer, and the demurrer became a pleading. A motion to dismiss takes the place of a demurrer, but how can you say that the motion papers on an application respecting pleading is part of the pleading? I cannot imagine that.

Mr. Lemann. Are we not directed to abrogate all technical rules here?

Mr. Wickersham. I know, but there is a limit to that. One man will come in and tell a story, and somebody will come in and tell another story, and the judge will do something for him. That is one thing. But I am opposed to abolishing every form of judicial procedure.

Mr. Cherry. In Rule 19, I think the only words that will cause difficulty are the first words in the next to the last line, to-wit: "be considered as a pleading and subject to the rules applicable to pleadings." If that was left out, that setence would simply say, "be considered as a pleading" and not "shall be subject to the rules applicable

to pleading."

Mr. Wickersham. Now, what are the rules?

Mr. Cherry. They are the rules in subdivision 4 on pleadings.

Mr. Wickersham. Well, you say as to the form. That is one thing. But there are a lot of rules as to pleadings--when the pleadings shall be served, he shall answer; and so the rule applicable to the motions will not do.

Mr. Cherry. But they are not in this group, are they, as to service?

Mr. Wickersham. No, but they are part of the rules applicable to thepleadings.

Mr. Olney. Can you not say, "as to their form and contents?

Mr. Wickersham. That would be all right.

Mr. Donworth. I never heard of anything but three things, the complaint, the answer, or the reply, being called a pleading. But when I read this thing I thought I must have been asleep. I think in some of the rules we have passed, the question has been raised, and on that same question we have passed on it hypothetically. Now, if this rule stands different when you are served with a complaint and you make a complaint and you make a motion to make definite and certain--you have pleaded to that complaint for the time being, and then the court disposes of your motion one way or another and it will be another pleading.

Mr. Wickersham. Well, as a general rule, but in many cases when you make that motion you get an extension of your time to plead until the decision of the motion. This motion is not a pleading.

Mr. Donworth. Yes.

Mr. Wickersham. You delay the time for the service of your answer until the time for a motion to make more definite and certain.

Mr. Mitchell. It seems to me that on the question of the use of the word, there are some people here who think that the pleading includes such things, and others who do not. Now, there are other in use, and it does not make any difference what use we apply it to; if you want to avoid the issue, why not adopt Mr. Cherry's suggestion and strike out "as a pleading" and add "special applicable to the form and the contents;" thereby you would avoid the issue. Is there any reason later on in the rule for calling a motion a pleading?

Dean Clark. I will have to check that, because there are some other things that will have to be covered. Now, here is the point--I hesitate to throw this out: The rules as to the answer provide that the defendant must file his answer or other defense within 20 days. I think that amotion to make more definite is a defense.

Mr. Donworth. In order to bring about action by a

rule--

Mr. Olney (Interposing). You are going to open the whole matter to delay. When I read that I did not understand what was meant, but I suppose you had in mind requiring the defendant to answer, and if you wanted to facilitate that and avoid delay that is the thing to do.

Dean Clark. Of course, I think there is a danger, but I have covered that in my 5 and 6 in here. If that goes by the board, I think that had better be stopped.

Mr. Donworth. Well, you would have a rule substantially to this effect, that a man has a pleading and extends the time for the next pleading, subject to such terms as the court may impose. That is usually done by a motion to make more definite and certain, but it does extend the time, subject to the discretion of the court, and I think it ought to, because the complaint then is defective, and that should be the case for that reason.

Dean Clark. I have answered your question, Mr. Chairman. This will have to go back and be worked over, particularly on those questions of time, because this interpretation of time would automatically be taken care of, if this is a pleading, and it would not be if this was not a pleading.

Mr. Wickersham. Suppose the judge says, "Yes, I grant the motion to make more definite and certain, and I require that to be done in five days." Any judge that regards

himself as bound by the 20-days rule regards a motion to make more definite or strike out as being redundant.

Mr. Dobie. He may extend the time.

Mr. Wickersham. He may extend it or shorten it. He is not bound by the rules as to the time within which pleadings may be filed. This is as to the time in which pleadings may be filed, and I think you would run into difficulties there, and you would take away from the court plenary power, and I do not think it tends to make the proceedings simpler. I think the reverse.

Mr. Mitchell. I am not clear as to what you are driving at. Is there any discretion as to whether a motion to make more definite and certain is a pleading? Now, there is not any objection to taking either way out of that if you find there is any advantage in it. And the question I meant to ask you, Dean Clark, is whether the rule that his statement be considered as a pleading would upset some of the other rules. If it does, you can strike it out. If it does not, it would seem easier to take the statement, that it should be considered a pleading, in order to prevent the redrafting of other rules.

Dean Clark. I think it does upset some of the others, but that is not an incurable matter.

Mr. Lemann. As I understand it now, a motion is not a pleading, and I would not have to do that under the rule.

Mr. Dodge. The question is whether it is subject to the rule.

Dean Clark. My suggestion was that we put in that as to the rule and the content of pleadings.

Mr. Dodge. Why not leave those words out?

Dean Clark. I prefer that.

Mr. Wickersham. Pardon me there. How can you make a motion to strike, or to move to amend a pleading, subject to the rule regarding the form and content of the pleading? It does not conform. There is no reason why you should attempt to make it conform or not make it conform. I attack that because I say it is redundant, or it does not clearly set forth what the gide is as to that, and I ask that it be made more specific, or that certain things be removed. If that application is to conform to the rule of pleading, why should you attempt to use it?

Dean Clark. Well, it will not do anything more than it should do. We would start off with the heading as suggested, and have the pleading give the name of the case, the name of the court, the name of the docket on which this case would be a notion, and allegations divided into paragraphs, ending with signing by counsel, whi h signing shall be significant.

Mr. Wickersham. It would be significant that it is brought in good faith, but you overlook the fact that then

you must set forth a statement of facts, whereas the motion to make the complaint more definite and certain does not state that at all.

Dean Clark. That is a premise that we cannot accept, from the history of my own State. You accept the premise that that is necessary to a pleading. I cannot accept that premise, because I have lived for years where it is not necessary.

Mr. Wickersham. In Connecticut you are require to set forth in your statement the facts upon which you depend.

Dean Clark. Not in your pleading.

Mr. Wickersham. I find in Section 30 that the complaint must state a cause of action. I find in Section 33 that there may be separate causes of action. I find in Section 36 where there are separate causes of action; and so I find all through that they practically take a statement of requirement for those which are causes of action or defense.

Mr. Morgan. For specific papers, that was not called a pleading; that was called a complaint.

Mr. Wickersham. Well, is that not a pleading?

Mr. Morgan. Well, you admit that a demurrer is a pleading. What does a demurrer say?

Mr. Wickersham. The demurrer says that the complaint does not state facts constituting a cause of action. We have

abolished demurrers, and we have now a motion to dismiss.

Mr. Morgan. Well, if a demurrer is a pleading, a demurrer does not state the facts. It does do other things, like the motion to make more definite and certain.

Mr. Wickersham. From time out of mind a demurrer has been called a pleading, it is not, but it has been called such.

Mr. Mitchell. I would like to take a vote on the question whether the words "be considered as a pleading" be allowed to stand in Rule 19?

Mr. Loftin. I thought there was a motion to strike that out.

Mr. Cherry. I make that motion.

Mr. Mitchell. It is seconded.

Mr. Morgan. I will second it.

Mr. Lemann. Tell us how much more resistante there is. All we want to do is to make a motion to dismiss in the same category as a demurrer.

Mr. Mitchell. I am in favor of leaving the words in, on the statement of Dean Clark that he will leave them out where they interfere with some other rule. Is there any further discussion?

Mr. Dodge. It does not involve the amendment of other rules, if you just leave out the words "considered as a pleading."

Mr. Cherry. I think that is the motion.

Mr. Olney. In many Code States they have no notion of a motion as a pleading. They draw a sharp distinction between them. We had better avoid that question if we can.

Mr. Mitchell. I know. In my part of the country if the judge asks for the pleadings, everybody knows that he means the complaint, the answer, the reply, and nothing else.

Mr. Olney. Yes; and in view of the fact that there is a difference in the ideas on the subject of the provision let us avoid raising the question here.

Mr. Donworth. I am inclined to agree with Judge Olney, as a result of this argument, that being an innovation it is better to avoid it; but if you do strike out a reference to a motion as a pleading, you should have something like the following, which is the rule in many districts:

"A motion addressed to a pleading, or a demand for a bill of particulars or the items of an account, shall extend the time for the making of the pleadings next required on the part of theparty moving, until the decision of the motion, and for five days thereafter, unless the court shall fix a different time, and the court in granting or denying such motion may in its discretion impose such terms as it may deem proper."

That is what is actually done, as I understand, and I think it should be adopted.

Mr. Mitchell. Let us take the sense of theCommittee on the motion to strike out the words "be considered as a

pleading and."

(A vote was thereupon taken, and the motion was unanimously adopted.)

Mr. Mitchell. That is carried. Now, the next question is whether the words "and shall be subject to the rules applicable to pleadings," ought to be limited to some particular kind of pleadings. Is there some ~~discretion~~ discussion about that?

Prof. Sunderland. How about having that say something like this, "the rules of pleading which are applicable thereto"; some are applicable to motions and some are not.

Mr. Donworth. How would you know?

Prof. Sunderland. It is easy to find out. There are the rules by which you can attack a pleading by a motion to make more definite and certain--

Mr. Wickersham (Interposing). Why is that necessary?

Prof. Sunderland. It seems to me it is very easy.

Mr. Lemann. It seems to me to make good sense.

Mr. Mitchell. It excludes the idea of a rule as to the time it shall be served.

Prof. Sunderland. Yes.

Mr. Mitchell. The rules relating to the time you are interposing an answer.

Mr. Wickersham. Why should you try to make any rules as applied to these motions? unless applicable to the pleading/

The office of a motion is to point out some defect in the pleading. Now, if it is not pointed clearly and fairly it will not be granted. It is unlike pleadings that tends to the formation of an issue which is going to be tried by the court or jury.

Mr. Mitchell. Perhaps Dean Clark can tell us what he had in mind in telling us it should be subject to the rules applicable to pleadings.

Dean Clark. The rules as to the time, the rules as to the form, the rules as to the signature, and the rules as to filing ~~pleadings~~.

Mr. Mitchell. What do you mean by the rules as to time? The answer has to be served in 20 days.

Dean Clark. The answer or other defense, including the motion.

Mr. Mitchell. Then a motion to make more definite and certain would have to be made in 20 days.

Dean Clark. Yes.

Mr. Lemann. I think the language leaves it doubtful as to whether it relates to this. You see, a large number of lawyers throughout the country will have to go to school over again over the rules. We have a small structure. If we had 48, we might have a different reaction. As I say, we must get by, because it is new; many of these rules will be new to a lot of people. We have to get them used to

these new rules. And we have to be guided by new considerations--first, getting simplicity in this thing so that it will accomplish the whole purpose intended. That is what we are here to do; and if we cannot do that we had better not go on with the job. Second, subject to that paramount first consideration, the second consideration, is that of confusing the bar; therefore the members of the bar would feel that if I were one, or two or three, or if we were ten, and everybody else was used to the other way, of course it is ~~easy~~ easier to take ten than forty. But we have got those difficulties to consider no matter what we do; and the first consideration will always be what is really going to make for simplicity and clearness.

Mr. Wickersham. That certainly would leave a great ambiguity.

Dean Clark. I suggest that this ought to be considered: Practically all the steps we have taken to date have been by the adoption of the New York rules. Now, as I sense Senator Walsh's objection, which stood for 25 years, it was that the code in New York was unsuccessful, and he did not want foisted on the country the procedure of the New York rules. And it seems to me that we run into a very great danger in Congress, when the objection can be made that the Committee is pushing along the line of the New York system. Now, we have many things that will be strange to the bar in

my own State. I am sorry that Mr. Loftin thought I had thrown him no sop--because I will be glad to throw him some; because the more we can get language that will meet the different points of view in the different parts of the country the better. But to date it seems I am very much troubled about following the New York procedure.

Mr. Wickersham. The New York procedure became very burdensome, and the recent forms of procedure were brought about by the infinite number of details in the procedure. It is true they were legislative regulations but the rules became a monstrosity by putting in all sorts of petty requirements that became necessarily exasperating to the bar. Now, we have a very great modification about the practice and the rules of practice. I will not enthuse about that, but they are a great improvement over the old code. Why should we try to impose infinite restrictions and try to make the motion papers part of the pleadings, or subject to the rules as to pleadings? Now, if you are going to bring an action in a Federal court under those, the question will be raised, "What does that mean?

Dean Clark. This is not a restriction. This is an enlargement.

Mr. Wickersham. I think it is a very great restriction. A man knows what a motion is to make more definite and certain, or to strike out certain things; but if that is

applicable to pleadings, the question will arise, "What does that mean?" That would bring up troublesome regulations. I do not se why you should ~~strike~~ surround a motion of that kind with all the regulations governing pleadings. It seems to me that is a matter of ordinary judicial procedure.

Mr. Mitchell. That clause is ambiguous to me, because I had asked the question as to whether you meant in that clause that the time within which a motion should be made is governed by the same rule as the time within which an answer should be made. I do not know by reading it; it is ambiguous and you cannot get away from that. It is so much that I object to having that same system applied to all of these documents as the complaint and answer, but the question is just what we mean by it.

Mr. Lemann. I was wondering if you could get away from the word "pleadings" and spell out what you must do with the other papers, and use some other expression. It could be spelled out by taking up each one of the things separately.

Dean Clark. I suppose that could be done. Of course, I attempted to make general rules applicable. There are several exceptions here which are not subject to these general rules. One thing is that this Rule 35--that may not be the exact one. I thought it provided for brevity and directness in stating the general principles. But of course, any other system might do that.

Mr. Wickersham. Well, Dean Clark, these motions with respect to pleadings are not very formal. When a man makes a motion for making more definite and certain, he says, "Here is a complaint that contains certain allegations, but it is not clear whether he is trying to do this or that, and I want it to be made clear." That is a very simple form of motion. I remember hearing a man asking in the United States District Court for such a motion, and the judge said the motion was for a bill of particulars, instead of a motion for making more definite and certain; and the judge said, "Would you rather have a motion for a bill of particulars, and if so I will consider that," and the man said, "I have not made that motion." And the judge said, "Yes, you have, because you are entitled to some further explanation of what the plaintiff desires and I will give it to you in whatever form you like, by making the complaint more definite and certain, or by bill of particulars." But those are separate forms of application. They are not pleadings, but sometimes a motion is a pleading, and I do not see why we should surround them with technical difficulties.

Mr. Lemann. Well, on this general subject, how about the statute of limitations? A man sues me, and I have a number of defenses to put in. Am I right that under Rule 26 that could be brought up separately by motion, or by pleading? I do not have to wait for my answer if I want to do that under the last paragraph of Rule 26. I bring that up now, for

general light on the subject of how this thing will work.

Dean Clark. That could not come up under Rule 26, because that goes to the merits of the action.

Mr. Lemann. Well, is that on the merits? I wondered what that meant.

Dean Clark. I take it that Prof. Sunderland has provided for taking up the question of that kind on motion. But that is a summary proceeding.

Mr. Morgan. That is 112 and 113 in New York now.

Dean Clark. Yes.

Mr. Mitchell. Mr. Morgan, are there any special actions that you want us to take up?

Mr. Morgan. No.

Mr. Wickersham. Just to bring up the subject, I move to strike out the words "and be subject to the rules applicable to pleadings," at the end of Rule 19.

Mr. Lemann. We voted on the other one.

Mr. Wickersham. Yes, we voted on the other one.

Mr. Olney. Your motion is to strike all out after the first sentence of Rule 19 "any application to the court for its order prior to trial shall be by way of motion."

Mr. Loftin. Prof. Sunderland, what was the language you suggested in lieu of what Dean Clar had written out?

Prof. Sunderland. My suggestion?

Mr. Loftin. Yes.

Prof. Sunderland. There were some questions asked as to the validity of my suggestion, and one of the things Dean Clark said he thought was included I did not think was. (Laughter.) I withdraw my suggestion.

Mr. Donworth. I second the motion.

Mr. Mitchell. That clause is ambiguous. If you strike it out, it may be necessary to make some special rule regarding motions, or put in another clause here. But we will take a vote on it. All those in favor of striking out all after the word "sought" in Rule 19 will say "aye"; those opposed "no."

(A vote was taken and the motion was unanimously adopted.)

Mr. Donworth. I have no private opinion about this objection. I think in view of the fact that the pleadings has gone out, we must provide for the case where a defendant moves against the plaintiff, and the court rules against the plaintiff, and so on, and my understanding is that the actual practice is important in connection with what I hastilywrote--and I do not know whether it is a proper proceeding or not; I do not know whether it would be a proper proceeding to refer this to Dean Clark for further suggestion. But I will say it again. It is my idea of how to take care of the provision, (Reading) "That the defendant shall answer," and so on; I will read it again:

"A motion addressed to a ~~the~~ pleading or a demand for a bill of particulars, or for the items of an account, shall extend the time for the making of the pleading next required on the part of the party moving, until the decision of the motion, and for five days thereafter, unless the court shall fix a different time, and the court on granting or denying such a motion may, in its discretion, impose such terms as it may deem proper."

Those terms might be nothing or everything; if it was purely frivolous it might be of serious character, and I think that is essential, if we are going to know what to do with a complaint that ~~is destructive~~ we think is obstructive. What does Dean Clark think about it?

Dean Clark. I think it has got to be covered somehow, and I think very likely it is all right. I would just as soon have a chance to go over it and consider it and compare it with various rules, although so far as I know now it is all right.

Mr. Mitchell. If there is no objection, it will stand referred to the drafting committee for further consideration.

Dean Clark. Yes. We thank you very much.

Rule 20.

Mr. Mitchell. Rule 20. What do you mean by "the first adversary party on each side"?

Mr. Donworth. Well, John Brown et al sues Richard Jones et al. Is that the idea?

Dean Clark. Yes.

Mr. Morgan. Well, if the case is Jones against Smith, and everybody else in the action in the beginning, but should he not have the names of the parties who are brought in later?

Mr. Donworth. It seems to me that in the first pleading, the complaint, the full names of all the parties should be inserted in the title.

Mr. Morgan. That is the usual rule.

Mr. Donworth. And after that you can make use of the expression "et al."

Mr. Morgan. That is the general practice.

Mr. Wickersham. Yes, because the pleading has got to state who the parties are.

Mr. Donworth. That would come inserting ~~by answer, and~~ after the word "pleading" in the fourth line of Rule 20, substantially this language ~~would be used~~: "In the pleading the title shall contain the names of all parties."

Mr. Wickersham. Well, does not the paragraph on the complaint cover that?

Mr. Donworth. That is not covered there.

Dean Clark. That is Rule 23, I think.

Mr. Morgan. Rule 23.

Mr. Wickersham. No, that does not apply.

Mr. Dobie. It uses the word "caption."

Mr. Morgan. Rule 23.

Dean Clark. No, it is Rule 25; it is not Rule 23.

Mr. Wickersham. That is on joinder.

Mr. Morgan. It says, "Either the plaintiff or the defendant."

Dean Clark. It says, "The usual caption;" that is carried over under Rule 23.

Mr. Mitchell. The Equity rule requires the residence of the defendant.

Dean Clark. And I could not see why you need it in the caption.

Mr. Mitchell. What is your pleasure about Rule 20?

Mr. Wickersham. I want to ask Dean Clark whether he takes out those words in brackets. Did you mean to exclude those?

Dean Clark. I put those in in the alternative. The first two suggestions have been covered by Mr. Donworth's suggestion. I was raising the question whether you need all the names. As it is now, you will have the word in brackets, and then add the further time for the plaintiff that he is given. The next one is the word "transactions" or "occurences." I just gave you two nouns meaning substantially the same thing. The word "transactions" is used very often with a certain significance. That is familiar. I think

I prefer the word"occurences" because it has not the moss that is attached to the word "transactions." But I do not think it makes very much difference. here, except that the phrase will occur later, because you will note that the separate statement is only an admonition here, and there is no particular penalty for not doing it. I have definitely tried to do away with a fight over a simple statement. And so I put it in this way: "Each defense shall be separately stated and numbered where such separation is desirable or necessary for the clear presentation or adequate understanding of the matters set forth." That is, in other words, now, after the admonition, I do not believe there is much chance of having a fight over it, whether you have a separate statement or not, which I think is one of the several useless things that can occur in your pleading.

Mr. Mitchell. The word "transactions" is a common dxpression in joinder, and perhaps might be used instead of adopting a new terminology.

Prof. Sunderland. You might use both.

Mr. Mitchell. That is quite all right.

Prof. Sunderland. To get away from a technical definition.

Mr. Tolman. Something that occurs is something that happens. I think they both apply.

Mr. Wickersham. Is that not in effect, anticipating what I was

going to suggest by using in these cases the words ~~used were~~ "cause of action," which Dean Clark, in drafting here, has generally boycotted, and which I think is very essential. Suppose we pass Rule 20 until we come to discuss a little further on Rule 23, which is the content of the complaint, and so on.

Mr. Olney. I quite agree with Mr. Wickersham, in regard to that; but you want some such thing in as this, "Each defense shall be separately stated." Now, each affirmative ground of defense should be separately stated, but the denials of the allegations of the complaint--there may be several denials, any one of which is sufficient to end the action. They are all one and they need not be separately stated; but where one has affirmative defenses, those should be separately stated.

Mr. Morgan. Do you provide for a general denial, or do you abolish general denial?

Dean Clark. They may have abolished the general denial; that is for youto decide.

Mr. Dodge. It seems to me that Rule goes into unnecessary detail. They did not find it necessary in the Equity ~~Code~~ rule to provide that a copy of the documentshall be annexed to the pleading, or that the answer must refer to the paragraph of the bill by number. Cannot we assume some of those things, and rather follow the more simple form of the Equity rule?

Dean Clark. The important thing is that the more

important of these rules were thought over, and I was trying to avoid the possibility of a fight. I think you can do most of those things myself.

Mr. Dodge. You must insert a copy of the document sued on.

Dean Clark. I mean under the procedure in several States you cannot do it.

Mr. Morgan. The common law rule did not allow it. You could not plead it at common law and some of the States do not allow it.

Mr. Wickersham. Why not have the provision in the New York practice act, to the effect that if you should sue on a written instrument for payment of money you usually simply insert a copy of the instrument.

Dean Clark. That is covered, though not as completely, perhaps, as desirable, but later by a general rule. I think you should have ~~that~~ in mind several of the rules. Rule 35 is a series of things.

Mr. Wickersham. Rule 35, General Rules of Pleading.

Dean Clark. Yes.

Mr. Wickersham. That is true.

Dean Clark. And you want to look this over. Well, there are several of the rules here--Rule 23 on the complaint.

Mr. Mitchell. Then let us pass over Rule 20 and get back to it.

Mr. Wickersham. Yes.

Mr. Mitchell. Rule 21, Signing of Pleadings.

Dean Clark. Now, this is the Equity rule as to signature of counsel, and tries to make it even more exact, and the main object is very definite, to do away with the form of verification, which, unfortunately, tends to be I think just a formality.

Mr. Donworth. There is one thought in this connection; it is going to be hard on the lawyer, and I think on his conscience. When you find these things in your complaint and go over things you find certain things that are true and you find certain things that you can safely deny. Then there is a middle ground, where you say, "That is dangerous ground"; we do not know; we are not sure that is so. Let them prove that. Now, if you deny that, the lawyer must certify in effect that he believes the allegations false, and some of them may be true. Now, it is my practice to deny a lot of things that the other man ought to prove, but that are doubtful; but I thought this may be a small matter, and in the end of the sixth line it says, "In matters alleged or the denials made therein are true." I would strike out the words "or the denials made," and then following the next three words, and then add "which contains no denial of matters admitted to be true." I do not see how lawyers can

get along without denying things in the doubtful ground, although they may be true.

Mr. Lemann. The Equity rule is much more limited, "that upon the instructions laid before him regarding the case there is good ground for the same." Of course, that would not give you any breadth. Of course, you never can be sure. You might say theoretically. You might tell your client to deny--you may tell him "This may be true but you ought to deny it." But ought you professionally to take that stand? "I am afraid you are not telling the truth, and so far as my belief is concerned, I do not believe you." What will happen in practice is that they will go on as they have been doing. It is just a question of whether you want to make this a form of words or not. Because the practical result would be that the lawyer would not feel that he could tell his client.

Mr. Mitchell. Why is not the Equity rule all right to adopt?

Mr. Morgan. One of the things you are trying to get away from is the English practice, and what most people will look at ~~the ways of trial~~ as a waste of time. It is a matter of merely putting the plaintiff to his proof at common law, and the defendant always had ~~to be~~ right. He could not strike out the general issue as a sham. And it is considerably reduced. It was tremendously reduced in New York. If you will read the article by Earl Herron,

on the difficulties of proof, in the Yale Law Journal, you will find a case where one man in a case was compelled to spend two weeks proving delivery, and when the defendant's witnesses came in they said, "We will admit delivery" although he refused to admit delivery up to that time--I take this that this is just an attempt and means to cut that down, and certainly it is no advantage to make the lawyer state that to the best of his knowledge information and belief the denial is true.

Mr. Donworth. I do not understsnd that that is what it does.

Mr. Mitchell. Yes.

Mr. Morgan. Yes, that is what it says; it just requires that statement by the lawyer and verification by him.

Mr. Lemann. It puts too much on the lawyers.

Mr. Morgan. Most lawyers do not do it.

Mr. Lemann. I would not want it in my practice, because I have sometimes done wrong when I thought I was right. Of course, those cases like you put cause trouble. But those are not hard cases and this penalizes the honest lawyer.

Mr. Dodge. You have in mind cases in which there is grave doubt as to being able to prove it, and you are not in possession of all the facts, and do not know whether you can honestly say that you really believe that to be true. You think it may be, and you hope it will turn out to be.

Mr. Morgan. Will the English master allow you to put that in your pleading?

Mr. Dodge. I have no doubt he would.

Mr. Morgan. He is not giving evidence. The master determines what the issue shall be.

Prof. Sunderland. I do not think so. They do not try.

Mr. Morgan. They do not try, but do they not make ghe issue what the real question is?

Prof. Sunderland. No.

Mr. Lemann. Of course, this is the easiest practice; the more conscientious the attorney is the more hesitant he is as to the form of the words.

Mr. Dodge. The Equity Rules are as far as we ought to go on that, if there is good ground for filing the pleading.

Prof. Sunderland. I think the cure is through discovery.

Mr. Morgan. Yes, Mr. Dodge, I accept that--it is good ground for filing the pleading.

Mr. Mitchell. There is a motion to substitute the Equity rule on that.

Dean Clark. I could insert that, but the rest of the rules is worth saving, and it does not seem to me very severe. It seems to be required of counsel. And I would hate to lose the whole rule. And I can add this particular point.

Mr. Morgan. You have it in there, that there was good ground for filing the pleading.

Dean Clark. Yes.

Mr. Lemann. And where you have instructions regarding the case that is very important.

Mr. Morgan. Yes.

Mr. Mitcell. Have we settled this last point?

Mr. Donworth. Limit the change to the language criticized.

Mr. Dobie. That takes in the language "to the best of his knowledge it is true" and substitutes the language of the Equity rule.

Dean Clark. It is with particular reference to the denial.

Mr. Mitchell. "that upon the instructions laid before him regarding the case there is good ground for the same."

Mr. Tolman. In these actions do we want those words regarding instructions? That comes from the English practice of instructions and powers.

Mr. Mitchell. Yes.

Mr. Tolman. I think this rule covers it if you strike out the words "the matters alleged or the denials therein are true"; strike that out, and it will then read: "That to the best of his knowledge information and belief there is good ground for filing and supporting the pleadings." That

would be the modern language of the Equity rule.

Mr. Morgan. Right.

Mr. Mitchell. Yes. Is that seconded?

Mr. Morgan. I second that.

(A vote was taken, and the motion was unanimously adopted.)

Mr. Mitchell. Now, Judge Olney, I would like to bring before the Committee for consideration at this point this-- Dean Clark has drafted this rule so that the signature of the attorney implies the various things that he is discussing, or his client in this is really making a certificate to that effect. It occurs to me that it would be really more effective if he were required to make the actual certificate at the time, so that instead of his signature merely implying it, he should sign such a certificate on a pleading. I have a feeling that it might have some salutary effect. I do not believe that putting this into the rule is going to have very much effect. You might take a practical view of that. But if it is in there as a certificate, many a lawyer will be a little more careful.

Mr. Dobie. Do they not have some such practice as that in a bill in equity in New Jersey?

Mr. Olney. I do not know.

Mr. Dobie. They do have chancery courts, and they have a rule in connection with a bill in equity along the

line you suggested.

Mr. Olney. We had to have one the other day, in connection with a pleading, and I really sat up and took notice when I signed the certificate.

Mr. Lemann. I think that is right. I think we should have a requirement that requires the certificate. And I think if you just put it in these rules it will not have much effect; but the chance of its having effect will be improved by making the man sign it.

Dean Clark. I have no particular objection to that. But I have a little feeling that suffers from anything in the way of a formula. That is the reason that I did not want to have an oath put in. It seems to me that if you verify it by an oath, it takes away from the pleading. I suppose that gets to be the form, not the law, and stationers will sell you blanks with that in it.

Mr. Morgan. Yes.

Dean Clark. Then suppose you have not got the certificate on; what are you going to do about it? What penalty is there? Anything that just savors of words, I am not sure means much, and makes the danger very real--

Mr. Morgan (Interposing). A penalty for lack of verification may be required.

Dean Clark. Well, I assume in that case you might treat the pleading as nothing, or might demand that it be

verified. That is one of the difficulties.

Mr. Morgan. Well, the practice I am familiar with is that the party receives it, and the other party receives his, and there would be no default in pleading.

Mr. Wickersham. That is only where the complaint is verified and the answer is not.

Mr. Morgan. Yes.

Mr. Dodge. I should be inclined to leave those words in the Equity rule rather than have it under the typewritten pleading as filed.

Mr. Dobie. They would have a rubber stamp to support this system unquestionably if you did that.

Mr. Lemann. I do not think it is important enough to take much note of.

Mr. Mitchell. Well, there is no motion made about it. We will now take up Rule 22

. Mr. Loftin. Before you do that, I wanted to ask Dean Clark about the words in the second line of Rule 21 in brackets "one or more of."

Dean Clark. I think we ought to settle that. Shall we leave it simply "The attorneys of record," or shall we say "one or more of"? If you say "attorneys of record", where you have many counsel all would have to sign.

Mr. Mitchell. "One or more" is the Equity rule. Why not leave it in?

Mr. Donworth. Some of the lawyers are in other States.

Mr. Lemann. Does this apply to motions? (Laughter.)

Mr. Loftin. I make a motion that it be "one or more".

Mr. Mitchell. All right, that will be accepted. The next is Rule 22.

Rule 22.

Dean Clark. You will note on this that the provision for amendment--I tried to make it very broad, and I have suggested in a footnote, "In view of the foregoing, the following, which is 28 U.S.C., 767, in substance, is thought to be unnecessary" and so Rule 22 as now drawn is supposed to cover the ground of those two sections, 767 and 777, and they are not repeated in the rules. They appear on the left hand page.

Mr. Morgan. You do not think it is advisable to allow ~~the other side to~~ an amendment as of course after the opposing party has pleaded? There are a good many codes that allow amended pleadings to be served as a matter of course within the time specified for a responding pleading.

Dean Clark. Well, of course, there is some argument for doing that. I chose the other course on that. In the first place, the judge would always allow it when there was any real question, and second, that making it as of course might give a chance for delay, and this speeds up a little more.

Mr. Morgan. Well, as I understand, you do allow amendments after pleading where the action has not been assigned for

trial.

Mr. Loftin. Only by leave of court.

Mr. Morgan. Only by leave of court.

Mr. Loftin. Yes, of course.

Mr. Mitchell. Yes.

Mr. Lemann. Suppose you leave out "by leave of court." Suppose there is an amended complaint after an answer has been filed. Is there any provision for an answer to the amended complaint, or do you think that could just be left to the judge's order when he gave authority to amend? There ought to be some provision.

Dean Clark. I cannot say for the moment what we did about that. I have the feeling that I put that in, but I am not sure.

Mr. Olney. I think you did.

Dean Clark. It is Rule 32, I think.

Mr. Mitchell. What do you mean by "assigned for trial"?

Mr. Dodge. I am was going to ask that very question.

Mr. Mitchell. Yes, it is a phrase that does not mean anything special; perhaps it does mean something in some jurisdictions.

Dean Clark. Well, perhaps it does. But perhaps we had better change it.

Mr. Morgan. That is the Connecticut practice, "assigning it for trial." They have a special term or session

every week, and assign cases for the next week ahead.

Mr. Mitchell. Assigns them, not for a date certain, but for the week?

Mr. Morgan. For the week. That proves that it is not very general.

Dean Clark. I think Major Tolman's suggestion all right--"the action has not been set for trial."

Mr. Tolman. That would shorten it.

Mr. Dodge. What do you mean by "set for trial"?

Mr. Lemann. When you get on the calendar, are there weeks waiting for trial? I once waited in New York a long time.

Mr. Mitchell. I suggest that that phrase be referred back to the drafting committee, to have some phrase that would more universally understood.

Mr. Loftin. Getting back to my original inquiry about amending pleadings, as I read the first paragraph, it says, any party may amend as a matter of course by filing such amendment in the clerk's office, provided that the opposing party has not pleaded in response to the earlier pleadings, or where no later pleading is "provided for." Now, suppose there has been a complaint and answer filed, and issue is joined, and the plaintiff sees fit to amend his complaint. As I understand the rules, he can do that as a matter of course.

Dean Clark. No; he cannot do it then; the defendant could amend his answer, if it took all this time.

Mr. Morgan. You see it says, "or where the action has not been set for trial."

Dean Clark. Of course, he may by leave of court, or by consent of the parties at any time do it. That is, there is another method of amending, by leave of court, or by consent of the opposing party.

Mr. Donworth. In the last part of that first paragraph it says "before its filing, or by keave of the court." Would you insert before the words "or by leave of the court" "or by the consent of the parties at any time"?

Dean Clark. Well, I intended to cover it by another provision. Do you mean"at any time" is better?

Mr. Donworth. No. I mean where it says "may amend by consent of the opposing parties signified in writing." My idea is that before or after filing--in either case--you can do it by leave of court; and so I think it would be more plain if you said "by leave of court."

Mr. Cherry. If you put in "by leave of court" it would not be lost so much--"in all cases parties may amend by leave of court or by consent." "By leave of court" in this seems out of touch.

Dean Clark. I think you are right about that.

Mr. Lemann. Would you leave it by endorsement or

otherwise?

Dean Clark. Yes, but it is not necessary. The only thing then is to make it more clear. It is not necessary.

Mr. Mitchell. The words "or otherwise" do not make a very definite provision.

Mr. Lemann. Sometimes the local lawyer just wants to stick on a possible amendment.

Mr. Wickersham. Have you finished with the first paragraph? If so, I would like to ask what the difference in your mind is between the phrases used in the second and third paragraphs? In the second paragraph it says "to be amended" and so on, by "changing the ground of action or defense or adding new grounds or causes of action and claim for relief or new defenses."

The next paragraph, the third paragraph, says that, "amendments shall be held to relate back to the date of the original pleading so amended whenever it appears that the right of action or defense asserted", and so on. Ought that not to be "cause of action" in each case?

Mr. Olney. As to that last paragraph, which provides that it shall relate back, it is hardly necessary for us to pass on that, because it affects the substantive right of the parties. The courts have passed again and again on the amendments, and when they take effect, if it is a new cause of action, it does not relate back, so far as the statute of

limitations is concerned.

Mr. Wickersham. I wanted to get from the reporter a statement of what he regards as the difference.

Dean Clark. I was talking of the language. Of course, you are talking of the substance. I have tried to get away from the term "cause of action," because it seems to me that that is one of the most misleading phrases that we can think of. It has caused trouble wherever it has been used, and I have myself been guilty of not knowing what it means, and ~~when~~ a good many people did not know what it meant; and when I tried to explain to them and found out what they meant, I could not understand what they meant. Therefore, I have tried to kill that phrase off. I have added here, and I think it is the only time I have added it, as a sort of catchall, a provision that you can amend anything, which is the theory I think in any litigation between these same parties. The only question is as to the effect of the statute of limitations which Judge Olney raised, which is covered in the last paragraph. But the reason I am putting in the last clause of the last paragraph was for fear that if I left it simply "ground" alone, some judge may turn out--Illinois, perhaps, where they are stricter, and may say, "I do not see any new ground", but a new cause of action." And it is on that ground that I added the objectionable phrase here.

Mr. Wickersham. What I meant particularly was that in the next paragraph you said, "amendment shall held to relate back to the date of the original pleading so amended whenever it appears that the right of action or defense is asserted," and so on. Do you mean that that is synonymous with "cause of action" as used in the previous paragraph?

Dean Clark. I intended something more than the cause of action in the second paragraph. Here there is something more than simply the right to raise a complaint or defense. In other words, I intended a new ground of action, or a new defense. That is, suppose A and B are suing in matters of Federal jurisdiction, and A has another affair entirely? Why should he not put it in the same suit with B? There are later on provisions for ordering a separate appearance; but the whole theory here is that you had better get your matter at issue between the parties settled as soon as possible.

Mr. Wickersham. Well, I think it wouldlead to ambiguity.

But the next question I shall address myself to is this "cause of action." Now, I know the objection that exists to "cause of action", but the substitute phrase was much more rigid. Cause of action is used in practically every code. Of course there is a lot of literature on the subject. The Dean has written about it and a great many other people.

Mr. Morgan. Did you read McKelsky's article?

Mr. Wickersham. Yes.

Mr. Morgan. Did you know what he was talking about?

Mr. Wickersham. No; but I believe that there is not a single code in which there is not some such provision as is found in the old Code of Civil Procedure adopted in New York 1848, that the complaint shall contain a statement of the facts constituting a cause of action in orderly and precise language, without repitition, in order to enable a person reading it to know what is intended. I do not think that has ever been improved. Dean Clark cited in his article written in 1933, in the Yale Law Journal, the definition of cause of action by Phillips as being "operative facts giving cause or ground for judicial interference." That struck me as a pretty good description. An there is another article in the Yale Law Journal, Vol. 88, which objected to discarding terms which have become so much a part of the rules as to make such discarding inconvenient. Well, you have got it in Connecticut. You have got it in their practice. You have it in practically every code, and I think you would venture into an unknown sea when you try/some other ~~maknexxxf~~ description. In general, it is as well understood as any other term, despite the controversy over it. "Facts constituting a cause of action or defense."

Mr. Mitchell. Do you think we should take that sort of problem up? It is a serious one. I realize there is

a controversy about "cause of action," and I know there are a diversity of views about it. And coming back to Mr. Morgan's suggestion, it seems to me that that is a thing that we might very well take up at another meeting, when we deal with matters of phraseology and expression.

Mr. Wickersham. Does it not go beyond mere phraseology?

Mr. Mitchell. I do not think it is anything but difference of opinion as to whether the words "cause of action" is a scientific and accurate way of describing a question of thought. That is what it really amounts to, and I think it is important to decide whether you will use such a phrase or not. You have considered only 22 rules so far and you have 86 more to consider. At that rate, it will take ten days to go through them. But I would like to see it more accurate as to the choice of words; but that is for some other occasion.

Mr. Wickersham. I am quite willing to note an exception and go on. (Laughter.)

Mr. Mitchell. We will allow the exception.

Mr. Donworth. Mr. Chairman, I would like to inquire, in connection with the division between Rule 22 and Rule 25. As I understand Rule 25, you can sue a defendant on a promissory note, and also for injuries growing out of an automobile accident.

Dean Clark. That is right.

Mr. Donworth. And so on. You can bring in any transaction that resulted in liability. I wanted to make that plain.

Dean Clark. That is quite correct. In the section on joinder of claims, you can do the same thing, subject, however, to rather free power in the court to order a new trial; or, in other words, it is better to get all the sores healed at one time.

Mr. Wickersham. Our courts go so far as holding that by amendment you can insert a cause of action that would have been barred by statute of limitations if in an original suit.

Dean Clark. Of course, you just had a statute passed.

Mr. Wickersham. But before the statute.

Dean Clark. New York took it as a half-way measure between the rule of England, and stuck to their own rules regarding joinder of classesin these six or seven classes, which seems to me horrible, which limited the joinder of parties provision by the joinder of actions section; but we did feel that the joinder of actions section is rather free.

Mr. Morgan. Would this allow the addition of a cause of action which arose after the original action had begun, or are you limiting it to a cause of action in existence at the time of the original action?

Dean Clark. No.

Mr. Wickersham. You can do that by supplemental complaint.

Dean Clark. There is a provision for supplemental pleadings later on.

Mr. Morgan. It would be a supplemental pleading rather than an amendment by addition.

Mr. Mitchell. What is the pur ose of speaking of the amendment that relates back?

Dean Clark. That is to answer the point as to the statute of limitations. That is the question that Judge Olney raised, and there is a lot of litigation about it, andif we can make it clear we want to do so.

Mr. Mitchell. It introduces a new cause of action.-- Excuse me. (Laughter). I was brought up in that feeling. I understand that you cannot by amendment introduce claims barred. That is clear enough.

Mr. Morgan. That is the whole question, whether it is a new cause of action; and in the Kinney case Mr. Justice Holmes said that you ought to be astute enough to say if it was a new cause of action, if it was based on the same occurrences.

Mr. Mitchell. I would understand that. Now, I would like to make a point about the second line. You only mention serving the amended pleading. How about filing it?

Dean Clark. This is another thing.

Mr. Mitchell. You will have to provide for service by serving the other side, because nothing can be filed.

Dean Clark. Is this a pleading?

Mr. Wickersham. Which rule are you speaking of?

Mr. Mitchell. Rule 22, which says a party may amend a pleading filed by him. Well, he may not have filed it.

Mr. Wickersham. For service.

Mr. Mitchell. Yes, for service; and then it says "by filing such amendment." There is no need of filing.

Mr. Morgan. May it "service."

Mr. Mitchell. That is clear enough. Now is there anything else in Rule 22?

Mr. Olney. Should not that last paragraph in Rule 22 go out?

Mr. Mitchell. Why not leave that matter to the court to decide in proper cases? We are trying to lay rules here of procedure, and then we say the effect of the statute of limitations can be so-and-so. Am I correct?

Mr. Morgan. Your question is when they allow an amendment whether the statute of limitations is barred?

Mr. Olney. Certainly.

Dean Clark. This follows the Federal case. Of course, there is something in what Judge Olney says; but if it appears by a few words you can save litigation--and we hesitated to put them in.

Mr. Olney. The trouble is that I do not know what the effect of these words will be and it may be that they will work badly.

Mr. Donworth. I had a concrete case. A young man worked in a factory. He lost a part of his hand. He sued the company, alleging that it was an unsafe place to work. He lost at the trial but got a new trial.

Now, at that stage of the case, he moves to amend his complaint, by alleging that the defendant failed to instruct him, a new employee, as to the method of operating the machine. The court refused to allow him to amend, because it was a new cause of action; that furnishing an unsafe place to work was a very different cause of action from neglecting to instruct the new employee. Now, this would say, "growing out of the same transaction" and you could proceed in this case.

Mr. Dobie. There are a number of those cases. In one case, the complaint alleged that the railroad coupling was unsafe by reason of its being an inferior type of coupling; and in another paragraph of the complaint they said it was a bad specimen of its type of coupling. And I think that was a good precedent, and if we can adopt that kind of a suggestion I am in favor of it.

Mr. Mitchell. In those cases where a railroad is sued for personal injuries, and it is not alleged that it was in interstate commerce, and you bring it under the liability act, and then if it is in interstate commerce, the court holds that the cause of action is different; and that is the point you are trying to cover, and it is a very good thing to do.

Mr. Morgan. In those cases the Supreme Court is going to decide according to the rule and according to the decisions.

Mr. Dodge. I suppose a party includes in a suit on two promissory notes; and on one he has not brought it until

after the statute of limitations has run. Can he bring that up in connection with his complaint on the other note?

Mr. Dobie. That is two causes of action, and you can certainly sue him in the one case but in this other case you cannot.

Mr. Dodge. Well, I do not think so.

Dean Clark. It is merely a matter of construction about what you mean by putting it in. That second clause is subject to the statute of limitations. If your defense is not filed, he can go ahead and recover on it.

Mr. Dodge. It is not provided by the statute that it relates back.

Dean Clark. Well, the only ones that ~~do not~~ relate back are in the final paragraph.

Mr. Dodge. That if two causes of action are set up in the original plrading.

Mr. Wickersham. Now, suppose two promissory notes were given at the same time, arising out of the same transaction, and suit is brought on one of them after the period of limitation has expired on the other. The plaintiff seeks to add the other on his complaint. I understand that under this paragraph that is/~~suggestable~~ just what he can do; because it arose out of "the transaction or occurrence set up or intended to be set up in the original pleading."

Dean Clark. Well, of course, on this point I recognize

that our language here will not be final on the courts.

Mr. Wickersham. Well, ought we not to proceed on the assumption that it is ?

Dean Clark. I do not think it is.

Mr. Morgan. Every proper amendment relates back, ordinarily.

Mr. Wickersham. Yes, it would by the terms of this statement. I do not know whether we ought to consider whether it is desirable to do that. That is what the New York Court of Appeals held could be done under the New York Practice Act. I think that the bar at the time thought that that was a strained thing and going too far, in avoiding by interpretation the effect of the statute of limitations. An argument could be made on both sides.

Mr. Olney. Is not the difficulty with such cases as have been referred to here by Judge Donworth and Mr. Dodge-- that the courts erroneously rule upon it? Now, it is within our province to provide ~~that~~ rules that will prevent incorrect rulings, so far as we can by the court in matters of procedure. But when we try to agree on a rule as to the effect of the statute of limitations, we are going outside of our province.

Mr. Mitchell. I think that is true.

Mr. Lemann. The procedure rules we have adopted are in the Federal courts. Suppose we take the united view on

this question on the local law. We are trying by united action in the Federal court to prevent them from doing it, and that is trying indirectly, it seems to me, to reach a matter over which we have no jurisdiction.

Mr. Mitchell. The only purpose here is to effectuate the statute. That is not a mere incident.

Dean Clark. That was the purpose. There was a case in Illinois, which was a case where, notwithstanding the rather broad rule of amendment allowed generally in the United States Supreme Court, it was held, as I understand, under the Conformity Act, that they must apply the narrow rule in that case.

Mr. Morgan. The last decision under the Employers' Liability Act was that where it was on the injury, and the injured employee died while it was on appeal, by the time the executor got back he was not allowed to amend by adding the wrongful death. He could recover for the pain and suffering of the decedent, etc., under that part of it; insofar as the Employers' Liability Act provided for survival he could recover on that. But what he did was to allege the death, and ask for damages under Lord Campbell's Act. The provisions of that act are just like Lord Campbell's Act, and he got a judgment, which was united, with no separate judgment on each one of those items; and the Supreme Court of the United States reversed that and sent it back, and said all he could recover for was the pain and suffering.

Mr. Olney. Was that because of the requirement of the local statute?

Mr. Morgan. No, it was under the Federal Employers' Liability Act.

Mr. Mitchell. What is your view about Judge Olney's point? Now, we have here a statute that authorizes us to make rules of practice and procedure, and not to change the substantive law.

Mr. Morgan. Yes.

Mr. Mitchell. And now we have a clause, that may be a nice rule, of effectuating the statute of limitations--but can that be done under the decisions of the Supreme Court?

Mr. Morgan. I think we have nothing to do with it.

Mr. Mitchell. You think this Committee states the law anyway?

Mr. Morgan. Yes, I do not think one suit could be brought on two separate promissory notes; it is where you are making another description of the same general occurrence that you can.

Mr. Wickersham. But here you have the phrase "arising out of."

Mr. Morgan. Yes.

Mr. Wickersham. Under this, you could do it.

Mr. Morgan. Yes.

Mr. Mitchell. The question is whether we shall put

in a clause whether we like it or not. It is a mere attempt to change the statute of limitations.

Mr. Morgan. I think it is outside our province, if you want my opinion about it.

Mr. Olney. I move that that last paragraph be left out.

Mr. Dodge. I second the motion.

Mr. Mitchell. The motion is made that this last paragraph in Rule 22 be stricken out, on the ground that it is outside the province of this Committee, and relates to the operation of the statute of limitations.

(A vote was thereupon taken.)

Mr. Mitchell. The vote was 8 in favor of it so that it stands. Is that all on Rule 22?

Mr. Loftin. What was the vote on?

Mr. Mitchell. The decision was that the paragraph remain in.

Mr. Cherry. I think we should count that again, Mr. Chairman.

Mr. Morgan. I think you counted Mr. Cherry and Mr. Loftin on the wrong side.

Mr. Mitchell. All right. Those in favor of striking the clause out as outside the province of this Committee will raise their hands.

(Seven members of the Committee raised their hands.)

Mr. Mitchell. There are 7 of those. Those in favor of leaving it in will now raise their hands.

(Six members of the Committee raised their hands.)

Mr. Mitchell. Six members have voted in favor of leaving it in. So that it will be stricken out.

Dean Clark. What shall I do? Shall I forget it, in view of the closeness of the vote? The Major has a memorandum on it.

Mr. Lemann. Where we divide so closely, perhaps the Court ought to know. If Mr. Gamble were here, he might vote the other way; and it seems to me that one vote is a very small majority.

Mr. Loftin. I suggest that you put it back.

Mr. Morgan. Just keep out those promissory notes.

Mr. Wickersham. Those are the ones that I think ought to go in.

Mr. Lemann. In any case, where we vote so closely, would it not be desirable to have a memorandum made for the Court as to the closeness of the vote.

Mr. Mitchell. I should think so.

Mr. Olney. And if they go out on a close vote, the Court ought to know that.

Mr. Donworth. This clause would be appropriate in a statute, or would be appropriate in a statute of limitations,

or be appropriate in an act regulating ~~the acts of~~ actions or proceedings, and if I am right we should try it from our point of view and see it carried out.

Mr. Mitchell. The Marshal wants to know if we are going to have a night session.

Mr. Wickersham. I think we ought to.

Dean Clark. I second the motion.

Mr. Mitchell. Is that the general sense of the meeting that we have an evening session tonight?

Mr. Wickersham. I so move.

Mr. Mitchell. Then it will be 8 o'clock.

Mr. Donworth. I suggest that we adjourn at 5:30 o'clock.

Mr. Mitchell. Tomorrow morning? (Laughter.) We can sit from 8 to 10 o'clock tonight. Well, I think Mr. Lemann's suggestion is a good one. I do not know how we can handle it otherwise than to have the reporter note some of these important things that are stricken out by a narrow margin vote; and if he thinks well of it and that it is important, he can state that it was a close vote, or something of that kind, and give us a chance to say whether we want the Court to look at it.

Dean Clark. All of those things that went out, I will say went out by a close vote.

Mr. Morgan. Unless Dean Clark departs from his usual consistency, that is what will happen. (Laughter.)

Dean Clark. That suspicion is unworthy of you.

Mr. Morgan. That is not a suspicion; that is a compliment.

Mr. Mitchell. I think we are through with Rule 22 for the time being. We will go to Rule 23.

Dean Clark. Without arguing the question, let me remind Mr. Wickersham that the Equity Rules did not contain the phrase "cause of action" here, although it is used in some other places.

Mr. Wickersham. That is a different thing; there is no cause of action.

Mr. Mitchell. Dean Clark, I read that over, and I thought you had done a good job.

Mr. Wickersham. I move that it be accepted. I do want to say, however, that here is the complaint, which must contain a short, etc., statement of the grounds upon which the court's jurisdiction depends, and a statement of the acts and occurrences upon which the plaintiff bases his claim for relief; a demand for judgment, etc. Now, "the grounds upon which the court's jurisdiction depends." Does that mention facts, or what?

Mr. Doble. Jurisdiction in the Federal court.

Mr. Wickersham. All right.

Mr. Morgan. The facts constituting the ground.

Mr. Wickersham. It was only a question whether we

should state that--this is brought to the attention of a certain section of Congress.

Mr. Mitchell. Ought you not to say "jurisdiction of the Federal court"?

Mr. Wickersham. Yes.

Mr. Mitchell. Of course, the District of Columbia does not come within that definition.

Dean Clark. Well, of course, we have taken the Equity Rules.

Mr. Olney. Why do you not follow the Equity Rule? Are there any substantial differences?

Dean Clark. Do you mean follow it throughout--in all of the different clauses?

Mr. Olney. Yes. I read the Equity Rule, and under the circumstances, I think it is better to take the Equity Rule.

Dean Clark. I thought the Equity Rule put in requirements that were unnecessary and really burdensome.

Mr. Olney. Leave out the first one; I think that is about the only one.

Mr. Morgan. In the third section of the Equity Rule, it says "the bill shall contain a statement of the ultimate facts", etc. If there is anything that gives more trouble than that, I do not know what it is.

Mr. Wickersham. Take the first one. After all,

ought not the complaint in an action at law in the Federal court to state the facts on which the jurisdiction depends? Of course, if it is a case of diversity of citizenship, if the plaintiff is a resident and citizen of one State and the defendant of another, that would be the grounds of Federal jurisdiction; you could say that the ground is diversity of citizenship. But the ~~fact~~ rule ought to be that the defendant may challenge the fact and proof be made.

Mr. Mitchell. It is a ground if it is a constitutional question.

Mr. Wickersham. That is a rgound, but that is not ~~if~~ it grows out of citizenship; if it is a fact that grows out interstate commerce, that ought to be stated as a fact. So that "ground", it seems to me is not adequate.

Mr. Dobie. That is the Equity Rule.

Mr. Olney. That is the Equity Rule.

Mr. Wickersham. Take the ordinary case, that is, the alleged ground for jurisdiction in an action at law in the Federal court.

Mr. Olney. This Equity Rule has never given trouble.

Mr. Lemann. That is the language of the Equity Rules--just exactly that, and I do not think it has ever given any trouble.

Mr. Mitchell. When you reject the language of the Equity Rule, you have to go back to the Supreme Court and say

that you have done a good job, and unless it is a clear case we do not want to do that.

Mr. Lemann. This language has been tried for at least 20 years.

Mr. Dobie. There are hundreds of cases on that; you cannot say that the plaintiff is a citizen of Virginia and the defendant is not a citizen of Virginia.

Mr. Wickersham. But you can state the first part in the Equity Rule, the residence and citizenship of the plaintiff, and of each of the parties, and if any party is under any disability that fact shall be stated. Now, that has been eliminated; and then you leave only a short statement of the ground upon which jurisdiction depends. But if jurisdiction de e nds upon diverse citizenship, as happens so often, it seems to me it should be alleged as other things required in the Equity Rule.

Mr. Donworth. In many cases you have to make allegations of pure law--for instance, that a certain State statute is opposed to a Federal statute.

Mr. Wickersham. That would be a matter of law.

Mr. Donworth. Is that ~~not~~ any more effective?

Mr. Wickersham. I mean we ought not to omit this first paragraph in the Equity Rule, which requires a statement of names, residence and citizenship, from the new rule.

Mr. Mitchell. That is material in every case where

there is a Federal question.

Mr. Dobie. Yes, it is material where there is a Federal question.

Mr. Mitchell. And it is material in the District of Columbia, it seems to me, that you state the ground of jurisdiction if it is diversity of citizenship.

Mr. Wickersham. Well, why did you wipe out that requirement? It seems to me that you might say where the grounds are diversity of citizenship the plaintiff shall state the names and residence and citizenship of the respective parties.

Mr. Morgan. Could not say "the facts and grounds"?

Mr. Wickersham. Yes, the facts and grounds.

Mr. Tolman. You could do that, and the facts supporting such grounds could be stated, or the facts upon which the grounds are based.

Mr. Wickersham. I do not care about the phraseology. But suppose a man brought suit--

Mr. Lemann (Interposing). Is that as important as the venue, and would it not be better, rather than spend a long time on that, just to strike that first section out?

Dean Clark. I think this will be covered by the ~~intro~~ caption, and if you put it back--~~you~~ we have had to make the matter of capacity a matter of defense.

Mr. Wickersham. No, if there is no defense, that is a matter of citizenship.

Dean Clark. No, I mean the matter of citizenship.

Mr. Wickersham. If jurisdiction of the court depends on diversity of citizenship now, and if on the face of the claim it appears that there is no such ground and you claim that ground, it seems to me that it is dismissible. It seems to me that the fact as to citizenship ought to be stated in the complaint.

Mr. Mitchell. That is very important, to show whether the suit is brought in the right district.

Mr. Donworth. This says in the usual ~~appears in a previous~~ caption; that would appear in the caption.

Mr. Wickersham. But the citizenship and residence does not appear in the caption.

Mr. Donworth. But I say if you follow the Equity Rule, you duplicate the names.

Mr. Wickersham. I do not care anything about that. It should require a statement of the residence and citizenship of each party. I think it is important, because the test may depend on those facts, rather than the theory.

Mr. Lemann. It would not be much trouble to repeat the names. If you repeat the names, you would have to state the residence.

Mr. Donworth. Of all the parties.

Mr. Lemann. Yes.

Mr. Wickersham. Then under the Federal statute, where

jurisdiction depends upon diversity of citizenship, and upon the amount in controversy, you must say that the amount in controversy is $3,000, or whatever the amount is, over and above interest and costs. Those are jurisdictional facts, not theories.

Mr. Mitchell. Yes; but the second paragraph of the Equity Rule has been considered broad enough to require a statement of the ground, and it is required to be alleged that the amount amounts to $3,000.

Mr. Wickersham. I think it is because of the jurisdictional statute. We always make the allegations as to the amount ~~now.~~ involved.

Dean Clark. I think it is a little unfortunate to have it in the first and second sections ~~of the Equity Rule.~~ and the caption too. I think that if the provision as to the statement of the grounds is not complete enough, let us put the provision in there. What we are going to have is something conformable to the old Equity pleading, and now, to actions at law, as to all the parties, giving the names of the parties, and that John Smith, the defendant, is a resident of so-and-so, and then state the ground of jurisdiction, that John Smith is a citizen of such and such a State and not some other State. And I think you might end by saying that of those the complaint will hereafter always treat.

Mr. Mitchell. Why not state the facts and grounds

upon which jurisdiction depends?

Mr. Wickersham. Yes, facts and grounds.

Mr. Olney. Somebody might object to the complaint under those circumstances, by alleging that the various defendants are citizens of different states, and in the present case the court has jurisdiction on account of diversity of citizenship. Would that not occur?

Mr. Mitchell. It would not last very long.

Mr. Olney. No, it would not last very long.

Mr. Wickersham. Now, why not put in the facts and occurrences upon which the claim is based for relief? There again, I think "the facts constituting the cause of action" are more important. I have no point to raise on the question, but I think that emphasizes what are facts.

Mr. Mitchell. The word "simple" is better than "direct." There is no great meaning in "direct."

Mr. Dobie. I am very thankful that you abandoned the word "ultimate."

Dean Clark. I do not know that I have. Mr. Wickersham, do you allow "ultimate" too?

Mr. Wickersham. As I say, I do not think you have ever improved upon what you know the "New York Civil Practice Act," as a precise statement of the material facts, without any unnecessary verbiage.

Dean Clark. But I ~~ponder if~~ feel that you have not improved

here any possibility of raising trouble, because you have started trouble in New York more than in any other place,-- because New York prefers trouble anyway.

Mr. Wickersham. That is the old Equity Rule.

Mr. Mitchell. Let us take it step by step. We have paragraph first, and our choice in this is between "simple" "direct" and "plain".

Mr. Morgan. Why not "plain"?

Dean Clark. In the Equity Rules, in the second section they have "plain" and in the third section "simple."

Mr. Wickersham. "Short and simple are the annals of the poor." (Laughter.)

Dean Clark. Yes-- why not begin "Short and simple"?

Mr. Morgan. Not in the last three years. (Laughter.)

Mr. Tolman. This "short statement of the grounds" should be a "short and plain statement of the grounds," and the "ultimate facts" are short and simple. (Laughter.)

Mr. Wickersham. Why should we not use a slang word?

Mr. Mitchell. "A short and simple statement of the facts and grounds upon which the jurisdiction depends." Is that right?

Mr. Wickersham. Yes.

Mr. Mitchell. Then we have in the second section "a short and simple statement of the acts or omissions", and so on.

Mr. Wickersham. I think there ought to be a short and plain statement of the facts.

Mr. Dodge. Why not say "facts", leaving out the word "ultimate"?

Dean Clark. We know what acts are.

Mr. Wickersham. What is an act?

Mr. Morgan. An act is a voluntary contraction of the muscles. (Laughter.)

Mr. Wickersham. "Acts or occurrences"--I do not know what that means.

Prof. Sunderland. When you allege that a certain person is the son of another, is that an act or an occurrence? (Laughter.)

Mr. Morgan. It is an occurrence.

Mr. Wickersham. Is not the old rule that they shall state facts and not conclusions?

Mr. Morgan. And nobody knows what they mean.

Mr. Lemann. I like "facts" better than "acts and occurrences."

Mr. Morgan. I do not think it is any worse than "omissions or occurrences."

Mr. Lemann. Is there any substitute that you can think of?

Mr. Morgan. No.

Mr. Wickersham. We are not required to plead to

theory, but we are required to plead to facts.

Mr. Lemann. I do not think this has any other meaning except facts.

Mr. Morgan. All of this that Mr. Wickersham is trying to get away from is not facts, but evidence on one hand and conclusions of law on the other.

Mr. Wickersham. Would it not be well to state "facts"?

Mr. Morgan. It might be, but he has lots of cases where he says it is conclusions of law and not statements of facts. I doubt whether you can find any form of words that will do it.

Mr. Donworth. A judge in a charge to a jury is not going to say, "Gentlemen, you are the exclusive judges of all acts that have taken place."

Mr. Morgan. Every time you put words like that in a code, the courts just turn loose upon it.

Mr. Wickersham. It is just new terminology and will mean new litigation.

Mr. Olney. The Equity rule has used the expression. Now, that may be very objectionable from Mr. Wickersham's point of view, but if we adopted any other wording, the question is immediately going to be raised, What is the difference. Now, the idea that is intended to be expressed in both is the same. We all have the same idea about it.

Mr. Lemann. If you exclude pleading and evidence, you

might say that these fellows do not object to pleading and evidence.

Mr. Mitchell. Omiy any statement of pleading and evidence.

Mr. Dobie. "Facts" is broader than "ultimate." I think that is a hideous word, and has not meaning.

Mr. Olney. What I mean is this. The practical side of it is that, unless we are going to ~~obtain the~~ obtain a positive advantage which, either directly or in the correction of some evil that we have had, let us take the rule that we have had and are accustomed to.

Mr. Lemann. I think the prima facie argument is in favor of that.

Mr. Morgan. I object to "ultimate", because nobody knows what it means.

Prof. Sunderland. Right there, you say nobody knows what it means. But in a practical sense, is there not very little difficulty about the matter?

Mr. Morgan. No; every new case causes trouble.

Prof. Sunderland. Not in using the word "ultimate."

Mr. Morgan. But you do gain this, that you are not going to run up against claims that you produce something besides evidence--you are not going to have the question

whether it is a question of afacts or an ultimate question of law.

Prof. Sunderland. Or of evidence.

Mr. Morgan. There is no difficulty about evidence, unless you say that you have not stated facts from which the conclusion you want inevitably follows. That is another rule that equity has followed. That is, that you cannot plead evidence, unless the evidence inevitably leads to the conclusion you want. For instance, the court say "negligently done," is the ultimate fact, and it will not do for you to plead that from which negligence may well be inferred, and if you plead facts in any way except that the act was negligently done, you have to plead the circumstancesfrom which negligence inevitably follows.

Prof. Sunderland. Well, you could unless the forms of language in different States is exactly the same in all; you cannot if there is considerable change in the language.

Mr. Morgan. Well, in New York it was 72 years before the court decided that a valuabiton consideration was sufficient, and before that you had the one below going one way, and the others going the other way.

Mr. Donworth. Yes, but we have those decisions now for fact.

Mr. Morgan. Yes, but those decisions come under the rule/ ultimate

Mr. Cherry. Why could not we use the words "ultimate facts" and attempt to get away from the necessity of pleading evidence? Under this system there is not the same need for it.

Mr. Mitchell. Well, if you leave out "ultimate", would it not be well to add "omitting any statement of evidence"?

Mr. Cherry. I think so.

Mr. Mitchell. If you do not state that, they will state evidence, and there is no rule on that.

Mr. Cherry. I think so.

Mr. Mitchell. How would this do? "Separate and short statement of the facts upon which the plaintiff bases his claim or claims, omitting any mere statement of evidence"?

Mr. Olney. In other words, you leave out the word "ultimate"?

Mr. Mitchell. Yes; otherwise you leave in the word "evidence."

Mr. Donworth. I move that the Chairman's sugesstion be adopted.

Mr. Doble. I second the motion.

Dean Clark. I still think it would be bad to get back in any of those words that caused difficulty. I mean any word in combination with the word "facts."

Mr. Lemann. Will there be any more complications

than there are now?

Dean Clark. Yes; we had a new climate of opinion against which words must be construed, and we must get rid of this old moss. Sometimes, I agree, decisions are helpful, but here I do not think they are, because I think they are too conflicting.

Mr. Olney. Well, now, I think we are getting rid of this length of time; what happened to that was this: We had this old common law system of pleading to which the courts and lawyers were accustomed, and they contained the strictest provision as to what the pleading should contain, but we are gradually getting away from that I think until now there is very little difficulty, as a practical matter, with pleadings, on the ground that we do not plead ultimate facts, or something of that sort, unless there is a real essential fact left out and then the question comes up; and the difficulty of the ~~change~~ conflict in the decision ~~that they have~~ has resulted for the most part in favor of a sensible, liberal view of the matter. I am inclined to stand on the language that we were accustomed to and practiced under for years, and with which all the bar is familiar. And the trouble of which we have been speaking is largely confined to the State courts. It does not occur so very often in the Federal courts.

Mr. Morgan. You are right there. I am thinking of State court decisions.

Mr. Wickersham. Well, despite the criticism that I think the praseology which is used in all the codes and has been for years is the best for the facts constituting the cause of action--I think if you attempt some other statement, you ~~xxx~~ will open up a new lot of litigation.

Mr. Lemann. Well, you open up the facts upon which the plaintiff asks for relief.

Mr. Dobie. That is the equity rule.

Mr. Wickersham. I would say "The facts constituting a cause of action."

Mr. Lemann. Why not state the facts constituting the cause for relief"?

Mr. Wickersham. Well, I was thinking of the common law actions. We can put it in the alternative.

Mr. Mitchell. "Short and plain statement of the facts upon which the plaintiff bases his claim for relief, omitting any statement of evidence."

Mr. Olney. I move that we adopt that.

Mr. Dobie. I second the motion.

(A vote was thereupon taken, and all voted in favor of the motion except Mr. Wickersham.)

Mr. Mitchell. That seems to be the sense of the meeting.

Mr. Donworth. Now, does this preclude what we lawyers throw in for a safeguard--the prayer for general relief? It

seems to preclude the general prayer for relief, and that is very useful in an equity action.

Mr. Dodge. There is another rule that makes it evident.

Mr. Wickersham. And especially if you are going to set up facts and circumstances upon which you are asking for some relief, you ought to do that. The theory is that you come into court and you want some relief.

Dean Clark. In answer to Judge Donworth, I will say certainly it does not; and going further, Rule 24 draws the teeth entirely of demand for judgment, except on a default situation. This matter, too, has been a matter of litigation, yet it is covered.

Mr. Dobie. You do not want both of those phrases in brackets, do you?

Dean Clark. No, those are alternatives. Which rule are you referring to? There are alternatives in both rules?

Mr. Dobie. Rule 23. I would prefer the first one.

Dean Clark. Yes, the first one is the one I prefer.

Mr. Dobie. I think that is all right, particularly in the light of the next one; and I move that we adopt that and strike out the second clause.

Mr. Mitchell. That is the first clause in paragraph 3 of Rule 23, is it?

Mr. Dobie. Yes, Rule 23.

Mr. Lemann. Is there any doubt whether a cumulative alternative could be put in the first brackets?

Dean Clark. I should not think so.

Mr. Lemann. Well, you had the second alternative, and that is why I asked the question. You have different types. I thought it ought to be plain that you could add that for a cumulative alternative.

Dean Clark. Well, I thought it does not appear, and the second one was a little awkward.

Mr. Dobie. There are several different types of relief.

Mr. Mitchell. The motion is to adopt paragraph 3rd and the first bracketed clause thereof.

(A vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. That is correct. Now, let us go to Rule 24.

Mr. Lemann. I would like to raise the question as to the language that relief shall not be "different in kind than that prayed for"; and I would like to ask Mr. Donworth about that.

Mr. Donworth. In the paper that I prepared, I have the expression "shall not differ from." Unconsciously, some writers have fallen into the idea that "different" shall be

followed by the word "than." I think the correct expression is "differ from."

Dean Clark. Well, I will change it to "differ from." Of course, this is one of the things that are easily changed.

Mr. Mitchell. Why is not the second alternative better than the first?

Dean Clark. I will speak about that. I says it is more in line with the ordinary expression, but I think it means nothing if it does not mean the first; the second is a blind way of saying the first. I have a little preference for the first, as being more direct; but if you think that is harsh and you ask for the ordinary practice of the bar, having it more direct, you can use the old form. But I do not know what it means if it does not mean that. As a matter of fact, the New York has always understood what it meant, and has said from time to time that it does not mean anything, and then it has said it means the first; so that not only are you not sure that it means the first, but you are not sure that it means anything.

Mr. Wickersham. Well, you have the limitation that means something, that is, that it shall not exceed the amount claimed in the demand for judgment of the complaint.

Dean Clark. Well, of course, it always means that in law cases; that is all we want it to mean, and that is all the demand for judgment does.

Mr. Mitchell. I like the second one better.

Mr. Olney. May I suggest that the provision in regard to relief in the case of an appearance is in the negative here, when it should be in the affirmative? In other words we wish to give the court power to give whatever relief is required by the merits, regardless of anything that may be in the prayer. And it seems to me that it should be put in the affirmative, that the court can give the relief that the merits require, irrespective of the form of the complaint, and not put it negatively as it is here.

Mr. Donworth. Should that not be true even if the defendant defaults where the relief is of a negative nature?

Mr. Mitchell. No.

Morgan. No; if he defaults he does not get hurt any worse than the demand for judgment states.

Mr. Dobie. In other words, there is a sort of estoppal there. You sue me and ask for $300 damages. Now, I will go to Europe on a vacation trip. Or in other words, you try to get me separated from the old ancestral home--with soft music. (Laughter.)

Mr. Donworth. Well, if you are good they would not foreclose the mortgage. (Laughter.)

Mr. Morgan. Mr. Chairman, if you take this clause, I object to "embraced within the issues." I agree with Judge Olney

in what he has suggested. I would take the second sentence and say something like this:

> "Except as to a party against whom judgment is rendered by default for want of appearance, the judgment shall accord the relief to which the party in whose favor it is asked is entitled on the merits of the case, regardless of whether or not the party has asked for such relief by his pleading."

That is what we generally have in mind.

Dean Clark. That is not a bad idea. I think that is rather good.

Mr. Olney. That is the old equity rule, and that is the right rule.

Mr. Mitchell. Will you give me that again?

Mr. Olney. "Except as a party against whom judgment is rendered by default for want of appearance, the judgment shall accord the relief to which the party in whose favor it is asked is entitled on the merits of the case, regardless of whether or not the party has asked for such relief by his pleading."

Dean Clark. Do you want to go ahead and say anything more affirmstively? Do you want to add to your rule an

affirmative statement as to default in appearance? You leave it now to implication.

Mr. Olney. No; this is the second sentence.

Dean Clark. Oh, I did not understand that.

Mr. Mitchell. Suppose a man does appear initially and puts in an answer and does not appear for trial, or anything of that kind?

Mr. Wickersham. He is in bad luck.

Mr. Mitchell. Yes.

Mr. Olney. The difficulty in the first instance is, if he does not appear he can fairly say that the court has not jurisdiction of me only to the extent to which that relief is asked; but when he appears he is responsible.

Mr. Mitchell. I understand that your motion is made with the understanding that the drafting committee can make any revision in form.

(A vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. It is carried.

Mr. Donworth. I would like to ask some of these gentlemen whether there is any provision in any code limiting the plaintiff in a default case to the specific relief asked? Now, you may want to have a commissioner appointed because the defendant does not voluntarily make the conveyance that he should.

Now, as I understand the issue, the court can ask, in the event that the defendant does not make the conveyance, that a Commissioner be appointed. I understand that you have to think out very carefully the result--that instead of being governed by what situation will develop after a formal hearing, he must have a hearing in equity at the same time. Is it new that the plaintiff is foreclosed by this equitable relief that he asks for? It is new to me.

Mr. Mitchell. Do you mean that if you ask for specific peformance in the complaint, and do not say anything about it, a comissioner is appointed under (d)?

Mr. Dobie. I think that is just the mechanics of it.

Mr. Mitchell. That is he title; the rest is just the machinery of getting it.

Mr. Donworth. Is there any precedent for limiting the plaintiff in equity to the specific relief demanded?

Mr. Morgan. That is what most of the codes say; that first provision that Dean Clark has is theprovision of a number of codes, I am sure.

Dean Clark. Yes, it is very general.

Mr. Olney. I have not looked at it for a long time, but there are decisions, I think, to that effect. Is that not true?

Mr. Mitchell. Then we will pass to Rule 25.

Mr. Wickersham. Here again you have got that phrase that I object to, "claims for relief" and "rights of action." I do not know what is a claim for relief. I have some idea of what a cause of action is. But I have no idea what "claims for relief" or "rights of action" are.

Mr. Mitchell. Well, we will know that we have that in there when we come to it.

Mr. Wickersham. Yes. I am only emphasizing it now, but we will have it up again, but I think we will have difficulty with it.

Dean Clark. Of course, in this rule it makes little difference which you use, because it is so very obvious that there is no restriction either way.

Mr. Olney. As I read it, I gather that under this rule you can sue a man for damages because he hits you with his automobile, also because he gave you a promissory note.

Mr. Morgan. And also on a promise to convey theproperty known as "Blackacre", and also for alienating the affections of your wife.

Dean Clark. Yes, he could include everything.

Mr. Morgan. Do you remember what the judges in Wisconsin said, that you could start out with an action for alienation of your wife's affections, and could wind up with a suit in ejectment.

Mr. Wickersham. I am opposed to that. I think that is going too far.

Mr. Lemann. I think in New York you can do it. You could summons me for an automobile accident, and decide later on that you wanted also to have it include alienating your wife's affections.

Mr. Wickersham. That is not in one suit.

Mr. Lemann. I just said summons.

Mr. Wickersham. Oh, a summons is a different thing. Except in some cases where the statute requires the summons to have the endorsement of the cause of action, there is some statutory provision as to service where that is required.

Mr. Dobie. Have you any definite ideas to any limitation, or would you go back to the idea that Judge Olney was talking about a few moments ago? I think that is very bad.

Mr. Wickersham. Well, as I say, I believe in knowing what the cause of action is. That is, I want to know what I am sued for.

Mr. Dobie. That has nothing to do with this. This is just the story of--

Mr. Wickersham (Interposing). I want to know the cause of action.

Mr. Morgan. Well, you have to have a separate statement of the cause of action. This is joinder.

Mr. Dobie. This is joinder and counter claim.

Mr. Morgan. You can join in practice.

Mr. Wickersham. Rule 25 says that they may join as many different claims for relief founded upon as many different rights of action, whether based on legal or equitable grounds or both, or stated or claimed in the alternative or otherwise.

Dean Clark. I am not sure whether Mr. Wickersham is basing his objection on the wording.

Mr. Wickersham. No, it is the subject.

Mr. Mitchell. Let us not discuss this on the ground that it states cause of action.

Mr. Morgan. No.

~~Dean Clark. On the substantive matter.~~

Dean Clark. But on the substantive matter it contains a good deal which New York tried to put restrictions on, but in New York it is stronger; and in view of the history, at least of the recommendations of either your Judicial Council or Commission, an act was passed, Chapter 339 of the Session Order 1935, providing for clear joinder of actions and giving the court discretion to try them either with the joinder or have separate trials. Now, I am off of New York. (Laughter.)

Mr. Wickersham. I am not enthusiastic about New York either.

Mr. Dobie. I congratulate you on your non-provincialism.

Dean Clark. How about congratulating me?

Mr. Dobie. I congratulate both of you.

Mr. Tolman. How about adding/these two words in line 3?

Mr. Wickersham. "causes" of action."

Dean Clark. I do not object to that.

Mr. Mitchell. Is that all right?

Mr. Wickersham. Well, it emphasizes what I have been contending for right along.

Mr. Mitchell. The real question that is vital in here, it seems to me, is not the question of phraseology. We can settle that some other time. It is the question of joining different types of action in one suit.

Mr. Wickersham. Yes.

Mr. Mitchell. Of course, we allwagree about the action on that. I was looking at the recommendation of the different committees on that, to see what the consensus of opinion of the bar is on joinder of different causes of action. It is very important/I think. to know Perhaps some of these suggestions are enough to tabulate them in our minds.

Mr. Loftin. Judge Parker is against it.

Mr. Mitchell. Yes, he is against it.

Mr. Olney. Do you know what the practice is in England?

Mr. Morgan. This New York practice act adopted the English practice; is that right?

Prof. Sunderland. It is not quite the same.

Dean Clark. This limitation as to land. The suggestions of the local committee show that in Florida ~~in~~ ejectment suits for land would be excluded from joinder.

Mr. Donworth. I would like to inquire as to the last sentence of Rule 25; it says, "The court may, however, order separate trials of any distinct issues where they may be thus more conveniently disposed of." As long as you are going to have different parties in controversies in the same suit, and where the defendant's attorney or the plaintiff's attorney would try to prejudice the parties by mixing them up, it seems to me that the right of the court to join issues should not be restricted to where it is convenient. Now, the court should have a broader power where they could be thus conveniently disposed of, or for the vaoidance of prejudice to any party. I just throw that out as a suggestion.

Mr. Dobie. How about putting in "The court may in its discretion order a separate trial of separate and distinct issues."

Mr. Donworth. Yes.

Dean Clark. This is from the Equity rule. I do not know about the objection to it, but I am inclined to say that

I am not sure that it might not be better to put it as you suggest, rather than leave it in the court's discretion; because no one really know theground you should go on in order to get a separate trial.

Mr. Mitchell. There ought to be a basis for exercising the discretion of the court.

Mr. Donworth. You could add "or in order to avoid prejdice to any party" or "where necessary to avoid prejudice to any party."

Mr. Dobie. What about saying "where the ends of justice so require"?

Mr. Donworth. Yes, "where the ends of justice so require."

Mr. Mitchell. Dean Clark, may I ask whether, taking Rule 42, 43 and 44, it is possible in this system to put in one suit a number of causes of action, and a number of defendants, some interested in one, some in others, and some not at all?

Dean Clark. That is permitted in New York practice - when you getdown to joinder ofparties.

Mr. Mitchell. Yes, I refer to Rules 42, 43 and 44.

Mr. Lemann. It is where there is a question of law common to all.

Mr. Mitchell. Not always.

Mr. Lemann. I will read that part of 42; it says, "where any question of law or facts is common to all the rights of action."

Mr. Mitchell. Yes.

Dean Clark. May I say that I think this is one of the places where the profession has been completely in accord in opinion; it has been practically unanimous; and where in my judgment it would unfortunate if we went back to the unworkable and undesirable provisions, because I see no reason why we should not bring out in the complaint all sources of dispute. There is not any chance for prejudice, because of the provision for separate trial, and as I read it the whole trend has been just as was the experience in New York. Now, a question was raised as to the English provision. This is what I found in 1928 before some of these changes were made. In Kansas, Wisconsin, and Ontario the restrictions were removed entirely. In Iowa, and Michigan, they were removed except as to the division of actions legal and equitable. In England and New Jersey they are removed, with the exception of actions not relating to land. Now, there are other provisions which do not fall within the same sort of framework, but are practically as broad. As I read it, the Florida statutes practically allow free joinder. The Alabama code has very little in it. Massachusetts has joinder within three main divisions, and Texas joinder is based on discretion. In Louisiana aplaintiff may

accumulate separate causes ofdemand in the same action, with certain limited exceptions. In Illinois the new act provided free joinder.

Mr. Morgan. Mr. Chairman, may I say with reference to tha that I think it was pointed out in the Michigan Law Revie under Prof. Sunderland's direction, that in the past, particularly under the common law and under the codes to begin wit the matter of joinder in pleadings was always tied up up with the notion that anything that was joined in pleading had to be tried together, and everybody was looking to convenience of trial or prejudice in the trial, etc., without thinking at all of the convenience of getting these disputes down on paper, and the convenience you would have and the saving in time and paper work, and the time of the court, and all that sort of thing, by getting this whole bunch of controversies with reference to the particular parties in one suit. And the convenience of trial is taken care of on an entirely different basis. It is right up to the judge as to whether it is or is notprejudicial and what you are doing is to save paper work and separate lawsuits, and perhaps a lot of new trials.

Prof. Sunderland. You are saving a lot of argument about restrictions.

Mr. Morgan. Precisely, saving a lot of argument, by preventing questions on misjoinder, etc., and it strikes me

that this is one of the most important things you can do at the pleading stage game.

Mr. Wickersham. Then it is considering everybody's convenience except that of the defendant. Why should I be brought into a lawsuit with "A, with whom I have a controversy, and be obliged at the same time to attend to all the litigation between A, B, C, D, and E?

Mr. Morgan. You do not have to be if you do not want to.

Mr. Wickersham. Well, the court has, perhaps, a right to decide as to whether I should be compelled to come into court as to a controversy with A, to attend to a lawsuit as to B and C and D, with whom I have nothing to do, and being sued in a matter with which I have nothing to do so far as the rest of the controversy is concerned.

Mr. Mitchell. It is not quite ~~fair~~ clear that that is so. It says, "may join as plaintiffs or be joined as defendants in action where any question of law or facts is common to all the rights of action,"etc. There is somewhere in the case, as I understand it, a common question of law and facts that pertain to all of the defendants.

Prof. Sunderland. And that is the only part.

Mr. Morgan. That is the only thing you are interested in.

MR. Wickersham. Irrespective of law, that is my only obligation; but it may be against A, B, C, and D, and why should I be compelled, because there is a similar question of law, to litigate in an action with which I have nothing to do in the controversy.

Dean Clark. I must tell Mr. Wickersham that that is in another rule. I do not think that is this rule. But I do not think that is a fair statement.

Mr. Wickersham. Perhaps not; but my objection goes to that kind of a controversy that, as I understood from what Mr. Morgan said, would bring into one lawsuit any plaintiff, A as against B separately, and B, C, and D, jointly, and X and Y jointly and separately.

Mr. Lemann. I do not think that is so. The suit against you was based upon running over somebody with your automobile, and the suit against me was based on libel. That is what you are afraid of?

Mr. Wickersham. Well, I may have misread it, and if so I withdraw my objection.

Mr. Lemann. In the case I referred to, they all sued on the theory that false statements were made to the company and that the plaintiff was induced to invest his money on those false statements. Now, that is a clear case. I suppose they can be sued together. But those defendants have separate

defences--one of them has died, and some have not gone to the meeting and every one has a different factual situation; but I suppose in practice they could be joined as defendants even after such a rule as this. But that is the typical kind of case that I understand is required or permitted to be joined.

Dean Clark. Yes; but the only variation I make ia when you say "under any practice or system." I afraid under the old code system you could not do that.

Mr. Lemann. You wanted to permit that anyway.

Mr. Wickersham. How about this: "The plaintiff may join in a common complaint as many claims for relief, founded upon as many different rights, based upon legal or equitable grounds, or both, as he may have against theopposing party." That means any one of theoppositng parties.

Mr. Mitchell. That is a single party.

Dean Clark. Read the next sentence.

Mr. Wickersham. "Likewise, where there are multiple parties, either plaintiff or defendant or both, such joinder may be had, subject only to Rules 42, 43 and 44, governing joinder of parties." The court may, however, order separate trials of any distinct issues where they may thus be more conveniently disposed of ."

Mr. Mitchell. Now, that refers to Rule 42, 43 and 44.

Dean Clark. In those rules there must be a statement

of law and facts as to all.

Mr. Donworth. The United States could sue all the delinquent taxpayers in one suit. (Laughter.)

Mr. Morgan. They could under this.

Mr. Cherry. They could if they could get jurisdiction.

Dean Clark. How could they get jurisdiction?

Mr. Lemann. They could not sue you or me under the income tax ~~tax~~ laws.

Mr. Donworth. Unless you claim the invalidity of it.

Mr. Lemann. Unless I claimed invalidity.

Mr. Dodge. It turns on the same question of law.

Mr. Wickersham. "All persons may join as plaintiffs or be joined as defendants in one cause of action where any question of law or facts is common to all the causes of action sought to be enforced." Now, that may not be theonly question involved.

Dean Clark. That is correct; you need to have only one "tie that binds", but if you have one tie that binds you can do that.

Mr. Wickersham. There may be other questions that affect X and Y but do not affect P, Q and R.

Dean Clark. That is shown by the case where 196 plaintiffs received false stock prospectus, and each plaintiff recovered different amounts; but they had joinder there, even

before your amendment this spring in New York.

Mr. Wickersham. Well, if that is so, where there is no statute——

Mr. Dodge. That is a little different where is a different question of ~~loss~~ law. Suppose a man had bought from five different brokers in New York, and the transactions were entirely different; but under the law there was a question in all cases as to whether the buyer could recover without having tendered back his stock certificate. That was the only question common to all the cases, but that was a question of law. Could those five brokers be joined in one suit?

Dean Clark. It seems to me that this question is getting academic anyway. The question comes to this: Are you going to trust the Federal judge to handle the cases expeditiously, or are you going to prevent that by some blind rule that would tie his hands? Suppose the complaint has gone beyond the bounds anyhow, would they so far enjoin a lot of people that should not be enjoined? Unless the judge is awfully stupid, there will not be any particular harm. I think it is, generally speaking, a more or less academic question, except very occasionally--there are physical and practical limits anyway on joinder; but suppose a plaintiff either makes a mistake or attempts to act wrongfully. It is so easy there to have/~~control of the thing~~ ~~entire~~ another trial; and in most of your cases

you will have only a set of documents and go along. If you have an arbitrary rule, in most of those cases you have to have Separation from the beginning and you have to have argument and dispute as to when you have it. Under this way, suppose a mistake is made, it is so simple to have a separate trial order, because from now on they can proceed as in two or three separate cases.

Mr. Mitchell. When you says mistake, you do not mean a violation of the rule, but you mean a case where the court would have a right to step in?

Dean Clark. Yes.

Mr. Mitchell. Mr. Dodge's question is in the affirmative.

Mr. Dodge. And I am not worried about it, but I wondered if you meant the rule of law to that extent where there was only one question of law affecting all of them.

Mr. Lemann. Suppose that was not a decisive question? Would that take care of it?

Dean Clark. I do not think it would. I suppose it has to be decisive. The reason I take this question of law or fact is that it was first taken up in the English rule and then in New York, California and New Jersey.

Mr. Mitchell. Well, if you put the word "decisive" in there, you would be in hot water, because one of the defendants

might have a separate defense, and the court might say that would be decisive in his case, but it would not be in others.

Mr. Donworth. Well, would we not all agree on Rule 25 if the sentence beginning "likewise" were omitted. That is entirely unnecessary, because that is actually covered by Rules 42, 43 and 44. Where there is one set of plaintiffs and one set of defendants, can we not permit that as many different causes of actions in contract form between different parties be brought in? I think we can raise this general question when we come to Rule 42, which is the blanket rule covering the entire subject. Is that not so?

Dean Clark. Yes; but the only thing is that we always will expect to find something in this; we could say, if we want to warn them as to the multiple parties, "see later."

Mr. Lemann. Could we not pass this sentence until we reach a conclusion on Rule 42? Because if we are going to permit it, we have to say so.

Mr. Mitchell. Well, we have got to decide what to do in the light of Rules 42 and 43 and 44.

Mr. Donworth. I move that we pass Rule 25, but with the understanding that the middle sentence is not disposed of.

Mr. Morgan. Well, there is really no necessary connection between putting the statement in the pleading and going to trial together--no necessary connection between them at all

it is a question of the convenience of plesding, first, and that question of convenience of pleading is entirely separate from convenience of trial.

Mr. Wickersham. Yes, but you leave the defendant's rights entirely to the discretionary action of the judge.

Mr. Morgan. Yes.

Mr. Wickersham. Now, I think the defendant ought to be protected against being haled into a controversy with a whole lot of parties with whom he has no controversy whatever, because there is a claim of the plaintiff against the defendants interconnected with all the other parties--simply because there is an element of law which is a factor in both lawsuits. I think that is destroying theproper protection of a defendant being sued under the law.

Mr. Donworth. Do you oppose the essential principle of Rule 25, when all the questions are between the identical parties?

Mr. Wickersham. No, I do not disapprove of that.

Mr. Donworth. Then Rule 25 can be considered as approved, except as to the middle sentence.

Mr. Olney. With you change you suggested.

Mr. Mitchell. Are you entirely satisfied with the change? I think if therights of the defendant are going to be left to the court to protect, there should be a clause that

he may do that without any substantial prejudice. It says "If public justice so requires.

Mr. Donworth. I finally amended that so that it will read something like this: "The court may, however, order separate trials, in order to avoid prejudice to any party, or where necessary to avoid prejudice to any party,"

Mr. Mitchell. That is the idea.

Mr. Lemann. And then approve the rule otherwise; that is the idea?

Mr. Donworth. Yes, that is the idea.

Mr. Mitchell. All right.

Mr. Olney. In this matter as I have seen it, the difficulty with the old practice had not been that you were required to file separate suits so much. I do not see very much gain in the mere joinder of suits. The difficulty with the old practice was that it permitted a joinder of suits in certain classes of cases and refused it in others, with the result that there was any amount of litigation and any amount of decisions that did not go to the merits, but simply decided that there was error committed in refusing a joinder in thiscase or in permitting it in that case. Now, if you are going to escape from that situation,--and I think it should be escaped from, as far as the principle is concerned--I am right with the law school men on this matter: It seems to me that you can permit the thing very properly, provided you

accompany it with a provision that makes it very flexible, and the judge has power to so guide the proceedings that, although they sre joined, prejudice is not done to the individual defendant, leaving this matter of flexibility until afterwards, but permit them to be joined; because the moment you endeavor to establish a certain class of cases in which joinder is permitted, and another class in which it is not permitted, you are going to have the same experience that we had in California, and all the code States, where they have similar provisions, of any quantity of litigation to determine in what way you could join them.

Mr. Donworth. Well, those observations, in which I concur, are really addressed to Rule 25 and not Rule 42.

Mr. Olney. I think they apply to both, and as long as you have approved a flexible system, this ought to work.

Dean Clark. I agree with you. I think we have done it.

Mr. Olney. I rather think we have.

Dean Clark. Rule 83 is another rule that has a bearing on this, "Consolidation and Severence."

Mr. Hemann. Would it not be well to pass this narrow rule, so as to pass the issues? We are all in apparent agreement as to most of Rule 25.

Mr. Mitchell. All in favor of that motion will say

"aye"; those oppposed "no."

(The vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. Now, some of the members want to adjourn at 5:30 o'clock and it is now 5:25. Shall we pass to another rule now?

Mr. Dodge. We should take up Rule 42 next.

Mr. Mitchell. Very well. We will take a recess now until 8 o'clock this evening and we will be in session from 8 until 10 o'clock tonight.

(Thereupon, at 5:20 o'clock p.m., the Advisory Committee took a recess until 8 o'clock p.m.)

EVENING SESSION.

Friday, November 15, 1935.

The Committee reassembled at 8 o'clock p.m.

Mr. Mitchell. We were dealing with Rule 25; we had referred to Rules 42, 43 and 44. And with the agreement of the Committee, I would suggest that, instead of proceeding straight along with the rules next in order, we pass to Rules 42 to 45, while the subject is fresh in our minds, and work out this subject of joinder of parties. What do you think of that? We have been discussing that, and I thought while we were on it we might just as well clean it up.

Mr. Wickersham. Yes.

Mr. Mitchell. If there is no objection, we will do it that way. That carries us over to Rule 42.

Dean Clark. May I say rather briefly what I think you will all appreciate here? What I have done is I have taken the English rule and those of California, New Jersey and New York as my models. I hoped that I have improved it. I have definitely tried to do so; because it has always seemed to me that he main purpose of the English rule was quite clear, or the main factor of it was this common question of law and fact; but I thought it was stated rather blindly, as I shall indicate in a moment. And furthermore, the English rule

contained in words absolutely no limit on the joinder of the defendants, and all theAmerican models which have copied it have contained no limit. Now, it would seem to me in practice that you would really have to apply the same limitation to defendants as to plaintiffs--you really did as a practical matter, but that it would be clearer to have the test stated also as to the defendant, so that this rule, if anything, is limited beyond the English rule. And as a matter of fact, it is limited beyond the construction of the New York rule by the Federal court in New York, in one of the aspects that Mr. Wickersham was mentioning. In the Federal court in New York they have held that if you had common questions tying some of the parties together, the single common question need not tie all together; that is, if you had a common question between A and B and another common question between B and C, that you would have the requirement fulfilled; whereas I have made it definitely that there must be one common question going all the way through. The case I have in mind is reported in 21 Fed. Rep. 67. In that case 23 plaintiffs joined under the National Banking Act against 20 defendants claiming that at various times during 20 years they had made false reports. They set up 57 causes of action and each cause did not affect all of the defendants. If you will turn to my footnote you will see the English rule. The English rule is really in

four rules. As stated in my footnote: "Under Rule 1, those persons may be joined as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions any common question of law or fact would arise; under Rule 4, 'all persons may be joined as defendants against whom the right of any relief is alleged to exist whether jointly, severally, or in the alternative'; under Rule 5, it is not necessary 'that other defendants shall be interested as to all the relief prayed for, or as to other cause of action included in any proceeding against him'; and Rule 7 provides for joinder in the alternative."

"It will be noted that the above rule eliminates the xxxx confusing reference to transactions and extends the common question of law or facts test to the joinder of defendants, a matter which is in some doubt under the English rule."

And so, turning back to the rule as we have it, it says, "All persons"--and I put in in brackets "subject to the jurisdiction of the court;" I put that in as a limitation, which I think may be implied. That is, we are not intending to extend jurisdiction, and I do not know that that is necessary. I think it would be so clearly implied if we did not

put it in here, but I thought I would have it in here so that you would have it before you:

"All persons may join as plaintiffs or be joined as defendants in one action where any question of law or facts is common to all the rights of action sought to be enforced."

What I have done is to build up and make definite that test, which is the foundation of the English rule, and is really covered up by lots of language concerning transactions or series of transactions.

"Such persons may be interested, or be liable, jointly, severally, or in the alternative, but need not be interested in obtaining or defending all the relief prayed for. The court may make such order as may be just to prevent a party from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest, and may order separate trials or make such order as may be expedient to prevent delay of the action. Judgment may be given to one or more of the plaintiffs for the relief to which he or they may be found entitled and against one or more defendants according to their respective liability."

With a provision that misjoinder of parties shall not be a ground for dismissal, but any right of action may be severed and proceed with separately.

Mr. Morgan. Are you not going to allow judgment as between plaintiffs? Why do you not say "the parties" in-

stead of plaintiff and defendant" in the first paragraph, last three lines?

Dean Clark. Yes, that could just as well be "parties". Then we have another provision providing for judgment, the so-called "split judgment".

Mr. Mitchell. Why do the English exclude actions for the recovery of land in this joinder rule of theirs? What is the theory back of that?

Dean Clark. I always thought that was because of the theory that land must be locally tried; that is, on questions of venue.

Mr. Morgan. That may be.

Dean Clark. And the theory that if you had land claims, those must be tried at the place where the land is.

Mr. Morgan. That is, jurisdictionally being equal, instead of venue?

Dean Clark. And it would not be possible to bring any personal action, subject to a different rule, and force ~~fourth~~ then to be tried with the land action.

Mr. Mitchell. I notice under the English rule, in addition to having the authority to order the cases tried separately, they have the authority for the judge to order the exclusion of some causes of action, that is, limiting it. Is there any advantage in that?

On the question of trying them, it is only a question of separate trial, but here the court or judge may

order any such cause of action to be excluded and the consequent amendments to be made.

Dean Clark. Under that provision for the severance of the action they may be proceeded with separately, and that amounts to the same thing.

Mr. Mitchell. That amounts to the same thing.

Mr. Donworth. A thought has occurred to me in connection with this, and I do not know how valuable it is; but I thought I would try to discuss it, but I do not know how to define the thought without spending too much time on it. We understand that in different parts of the country there is quite a lot of opposition to what we are doing here--the unifying, I mean, into one system of practice in the Federal court. A great many think that is a mistake, and I want to suggest a thought further that we should not at this stage--I mean by this stage, in the preparation of the rules we submit to the Court next May, or whenever it is--confine it to a minimum and hope to get by this opposition that exists to the fundamental thing that we are aiming at. I think there is a lot to be said in favor of the idea of unifying the system of law and equity according to what you might call the eclectic method, of sticking to the system that is most general in the country. If I were a dictator-- that expression has been used--and knew that I was dealing with a democracy, I would at first not try to propound an ideal system, but would

a workable ecletic system, based on what is now the going practice, and leave for another rule, after we have got by the opposition, the things of this nature. I do not know whether I am right or not. But I just pass that thought on.

Dean Clark. If I may comment on that a little, I think there is something to be said for it, of course, and it is a question somewhat of emphasis. We are not now, as it appears--we have already decided not to try wild sweeps of imagination, and I think it is quite proper; on the other hand, it does not seem to me that we can go too far into the past, because it does seem to me that we lose at least some strength, and I should think a great deal, if we put up a system which, frankly, to the authorities on the subject, must be amazing, and here is a case where the whole trend of thought is quite general. For example, how could the American Society try to support us if we take out the old common law rules, which are simply trouble breeders. How can I support my own works if it is a thing I have condemned for years? And if I may say so, I think any one who has really studied the subject will say, it seems to me, that it is a question of emphasis, and if we go back and take some old test, like "all persons interested in the subject of the action and in the relief demanded," which is the current code phrase, we just take away the talking point of people who really understand the subject.

Mr. Dobie. Was not that argument of Mr. Donworth--

I do not mean precisely, but I mean along the same lines--but several people have come to me since the appointment of this Committee, and have spoken to me; and of course they were familiar with the system in which we have a separation of law and equity; and they said, "Do not burden it too much at the start. Go ahead and combine the rules." It is going to create opposition. It seems to me that we are biting off a whole, big mouthful; and I believe we get along better if we bite off a good deal than if we say, "This is only a little thing that we are giving you, and the bite will come later." I think we had better give them a good deal. On the element of time, I would like to see our old friend tempus fugit catch up with us. I do not mean that you are reactionary. I know you are not; but that idea occurs to me.

Mr. Donworth. I am trying to be practical.

Mr. Dobie. I know you are.

Mr. Donworth. Rather than have an ideal report.d

Mr. Mitchell. Well, the opposition to this legislation for a great many years has been directed mainly at the law side; this idea of combining law and equity in a uniform system has always been in the background. It has not stood out as a proposal at all, a uniform system in all cases in the Federal courts; and that made it necessary for the lawyers in every State to learn the law system in his own State and

another law system in the Federal court, and to keep on learning, if h could, about the Federal equity system, and destroyed conformity. In that way, there was great objection to the proposal. I always thought it had a good deal of merit, and it had enough merit, so that Senator Walsh as long as he lived was able to block the legislation. And now the court has got it. I think at first the idea was to go along with changing the rules in law cases alone, and then they realized that this was a great chance for a big reform, to wipe out this distinction in theproceedings and pleadings between the two kinds of causes, and they took hold of that. And one of the main arcuments in favor of it, as far as the practical side and the bar are concerned, is that, while it does destroy conformity in the law cases and the lawyer would have to learn thlaw in the Federal court, which may be different from their State system, they are learning another system in the Federal court in equity cases. Now, of course, the lawyers are not widely interested. But the thing has been well recei ed, and I think the lawyers and judges a re t horoughly "sold"on this unification matter, and that is going a long way to help it through. And I think it would be a terrible pity if we did not take advantage of this situation and put up a proposal that is not antiquated, and does not perpetuate those old different notions, and one that has reason back

of it. We are not putting anything that has not been actually tried somewhere, in some of the States, and there is a great deal of appeal to them; and I think myself that the court, or a majority of the court, feel that there is an opportunity here to do a job that will stand out as a milestone of progress in the way of procedure in the courts. I think that is what they expected. They do not want us to go wild and get out a lot of work that nobody understands, but they do expect, as far as I can sense their attitude, to have a real job, one that has merit and takes advantage of every new development on this subject, that has turned out to be useful and meets old objections.

I think we ought to proceed along those lines. Of course, you have got one leaverage that you could not have if you were obliged to take the rules and go to Congress and say, "Will you please enact these?" They might chew them all to pieces. But they are to be effective unless Congress can get a bill through to change them. But the burden is on the other side--a very different practical situation than it would be if you were just simply trying to get them enacted into law. They are to be law unless there is a veto by Congress. I have a great deal of confidence that, if you do a good job, if it is worked out carefully and it is simple, clear and easily understood and apparently workable, that you can go out and "sell" it and get away with it. If there are any objections--and

there always are with lawyers, very substantial objections and numerous objections--I do not think we ought to be afraid to try something that we know is right.

Now, as far as this joinder business is concerned, that is all a new thought to me. I have been practicing in certain jurisdictions where an engine of this kind is never thought of. But when this Committee was constituted, one of the things that I know what the court tried to do was to get a group of men, law school men, not only students and scholars on the subject, but who had had practical experience and were outstanding men; and who had had experience in this line in the law school field; so that those of us who are practicing lawyers would have the wide knowledge and understanding of what had been tried in different places, and we could depend on these law school men, the very best of their kind, to at least labor with us, with the advice of scholars and students all over the world, and things that they had worked out. I do not think, if I could be given the job of drawing up a set of rules, that I would adhere very strictly to the old ideas that I had had and I was anxious to get away from that. The practicing lawyers here who are not law school men wish to apply their practical knowledge in the way of criticism and help, and all of that; but we think we have got to have a little vision differing from our old habits and lay them aside and

try to use something that is an improvement.

Mr. Loftin. Mr. Chairman, I understood you to say that it was your interpretation of the act that the only way Congress could prevent these rules going into effect would be to repeal the law under which they are made.

Mr. Mitchell. Yes; if they do not confirm them and pass a statute, with the approval of the President; they do not have to repeal the law. They can pass a statute changing some of the rules but what I meant was that the rules automatically go into effect unless the opposition has enough strength to pass the bill in one session of Congress, in both Houses. And I tell you they will have a heavy job on their hands, if you have the Supreme Court back of it, and the general sentiment of the progressive and thinking Members of the bench and bar.

Mr. Loftin. Well, it was your thought that they could either repeal the law or modify or change certain rules?

Mr. Mitchell. Yes.

Mr. Loftin. That seems to be borne out by the language which says that such unified rules shall not become effective until they shall have been reported to Congress by the Attorney General at the regular session thereof, and until after the close of such session. Unless they take some affirmative action they go into effect.

Mr. Mitchell. The Chief Justice spoke of this thing in his address, you remember?

Mr. Loftin. Yes.

Mr. Mitchell. He said it was up to Congress and if they did not like it they would make a real reform, and that it was their duty--well, I did not mean to talk about that.

Mr. Wickersham. Dean Clark, you say this same rule, 42, is in force in several States?

Dean Clark. Yes, in Illinois, California, New Jersey and New York.

Mr. Wickersham. What is the New York statute?

Dean Clark. The New York statute is the English rule, the one given in the footnote to the rule. As a matter of fact, all the other jurisdictions that I have studied--well, I am not sure; Illinois made some changes, but New York and California and New Jersey provisions I think are identical with the English provisions. I think they use thesame wording.

Prof. Sunderland. The Illinois provision uses also most of the English wording.

Dean Clark. Well, they are all modeled on the English model. I hoped I was making it a little clearer. But my impression is that in Illinois a little qualification of the English rule was attempted.

Prof. Sunderland. Well, I think it is just slight.

Dean Clark. Yes.

Mr. Dodge. Well, in England and these States there is one marked difference from our rule, and that is that the differ-

ent causes of action must arise out of the same transaction of series of transactions; and I am just wondering if A and B meet on the street and A happens to mention a certain claim he has got against C, and B says, "That is funny, I have a claim against D that turns on that same question of law; let us, you and I, join in one suit and save expenses and sue C and D." I wonder whether there is an advantage in that. That goes beyond anything that has been tried anywhere, does it not?

Dean Clark. Well, this, of course, does not contain that language. I think it does not go beyond, because I think that language does not have real significance. What does a common question of law or facts arising out of a transaction or series of transactions really men?

Mr. Lemann. This says "question of law or facts;" if you have to have the same series of transactions; it might be law only, which of corse, would take you to an entirely different situation.

Dean Clark. The English provision is "law or facts."

Mr. Lemann. Yes; but is it limited by the same state of facts? Apparently there are two limitations under the English rule. Is that right? The first limitation is things arising out of the same transaction or series of transactions; and the second is that there must be a common question of law or fact. Is that a correct statement of it? I am just trying to get his point.

Prof. Sunderland. There is that limitation on plaintiff, but not on defendant.

Mr. Lemann. No.

Dean Clark. I might say on this that I would like to have thelaw school men in particular, who have played around with it a good deal--and I think all of them here present have--I would like to get their reaction as to whether this is an improvement or not. But I might say before you go into textual details, that perhaps the main question of policy might be decided. That is, I think, more important than the question of the wording exactly. What I have been trying to do is to get in the main the English text, and then upon that see whether we as a committee might improve upon that. This was, as I hoped, an improvement upon the English wording. If it is not, certainly we are subjext to no criticism if we use the English wording.

Mr. Lemann. Well, unless there is some precedent for joining in one action all sorts of controversy that turn upon a common question of law, I hesitate to support theidea. Of course, where there is a common question of fact, I am ready to have that; but this open a very unlimited door, if there is simply a common question of law--"Are they all liable under the income tax English law?" If so, join them all." If there is a precedent for this, all right, but I do not know of any. I have not investigated.

Prof. Sunderland. Now, here are the English ~~Denmark~~ rules.

(Prof. Sunderland read the rules referred to.)

Mr. Wickersham. They are tied together by thesame trandaction?

Prof. Sunderland. Yes, in both instances we have them tied as to transactions or series of transactions.

Mr. Mitchell. That is the English rule.

Prof. Sunderland. In England they do not have it on the defendant's side.

Mr. Mitchell. Well, we are striking it out of both.

Prof. Sunderland. It carries the defendant's rule in England over to the plaintiff.

Mr. Lemann. You say in England they do not make a primary rule, because I understood Dean Clark to say that in England it may be a common question of either law or fact. So that there must be some cases arising.

Dean Clark. Yes. Well, as a matter of fact, as to the defendant, I do not think they do extend it in actual practice in England.

Mr. Lemann. Is this an old rule in England?

Dean Clark. It was adopted about 1886.

Mr. Lemann. About 40 years ago. Have there been many cases?

Dean Clark. Yes, there have been a lot of cases.

Mr. Mitchell. Prof. Sunderland, why do youfeel that it is desirable in the Illinois Practice Act to go back to the English rule having a more restricted application?

Prof. Sunderland. Well, on the question of making it the same and getting the same tie as to the defendants, it seemed a little easier for the bar to take it.

Mr. Wickersham. I wouldbe in favor ofthat Illinois rule.

Prof. Sunderland. So would I.

Mr. Wickersham. But I think a rule that enables a plaintiff to bring in the same cause of action against a man, and five others against whom he has a different cause of action, and ten others against whom he has a similar cause of action has worked out a great hardship against the individual defendant. He would be compelled to watch the proceedings against all the other defendants, because something might be done that would affect his particular interest. It would add greatly to the expenses, and it would add enormously to the duties of his attorney; andI cannot see any logical reasnn for carrying the rule that far, just because there is a common question of law involved. Now, I think as you have limited it in the Illinois practice-- you have got a practicable system. You have got provisions that justify, really, the various groups of people in a suit, but I cannot possibly see any justification in compelling a single

defendant to come into a lawsuit, with, perhaps, 20 others, and with as many different lawyers, and saddle him the additional expense and trouble of having his attorney watch all of those others to be sure that something is not done in the suit by which he would be injuriously affected. I do not think the way they are tried in any particular district I live in would be of any advantage, and I think it would lead to hardship on individual defendants in many cases.

Mr. Dobie. Might he not get an advantage sometimes?

Mr. Wickersham. No. I have been in lawsuits, and they are common enough, they thought they would be justified in having a town meeting of counsel. (Laughter.)

Mr. Lemann. It is everybody's business and nobody's business.

Mr. Wickersham. And I think it would very seriously jeopardize the interests of some defendants.

Mr. Lemann. There is no doubt about that.

Mr. Mitchell. It is indeed a question whether it is safe for us to go further here than the English rule.

Mr. Wickersham. I think that Illinois statute that took those questions into consideration and said, "This is going far enough" was correct, and if we went much further than that, by that very thing, we would stir up opposition undoubtedly. In 1915, I did part of the framing of the Constitution of the State of New York, which contained a

great many reforms, and was turned down by the people subsequently on a separate submission; subsequently it was adopted, just taken step by step, 85 per cent.

Mr. Mitchell. Prof. Sunderland, do you feel that, outside of selling it to the bar, as a matter of practice it is good practice to favor the English rule, instead of the more restricted Illinois practice?

Prof. Sunderland. ~~Yes.~~ It would not make much difference, because practically every combination will be in one under the several rules.

Mr. Wickersham. Whether it is a real one or not?

Prof. Sunderland. Yes, I think it is an extraordinary case that would not come under this rule, and I do not think for that reason that this broader rule that Dean Clark has indicated is necessary.

Dean Clark. I was going to say this; that I dislike such an expression; but I think this expression is, briefly, "arising out of the same transaction or series of transactions." I can see that it does no harm, and I think the whole question is academic. I cannot conceive of that language being in or out making any practical difference on the side of the plaintiff. I will raise the question about the defendant in a moment. I would like to have anybody tell me what that means, but that may be an academic question.

Mr. Morgan. Well, you can find out what a transaction means in New York, if you are ~~limited~~ interested.

Dean Clark(Interposing). What is a series of transactions?

Mr. Morgan. I do not know about that, but New York has held that if you have a fist fight and a slander at the same time--if a man soaks a fellow on the jaw--there are two separate actions, and they do not arise out of the same transaction.

Prof. Sunderland. It might be a"series of transactions." (Laughter.)

Mr. Morgan. That might be.

Mr. Lemann. In that case the court would say there is not a common question of law,

Dean Clark. Well, I think you cannot stop to talk about that.

Mr. Mitchell. Dean Clark, will you state to us the reason for liking the English system which does not place any such requirement on the defendants. What is the point on that?

Dean Clark. I am a little afraid to put a restriction on the defendants. One of the famous English cases, and it is a kind that certainly should be followed, is Payne vs. Bryan Time Recorder Co. I have it here:

"The plaintiff carried on a business as an office supply company, and had bought cars from the Bryan Time Recorder Co.--No; it sold the cars to the Bryan Time Recorder Co., and bought them from the Curtis Co., Ltd. The Bryan Time Recorder

Co. refused to pay for the cars supplied to them, on the ground as they alleged, that they did not conform to the specimens which which they had contracted that they should conform to."

That is, this was the middleman in between that was going to squeeze both sides. He brings a suit against both. Now, if the car is up to specifications, the purchaser must take it. If the cars are not up to specifications, he can recover over from the man or from the company from whom he has bought them. Now, are those two things"a transaction or series of transactions"?

Mr. Wickersham. Well, why were they not?

Dean Clark. Well, I hope so.

Mr. Wickersham. Well, has anybody doubted whether they are a transaction or series of transactions? If you have a man buying cars and selling to B, that is a series of transactions.

Dean Clark. Well, there is a restriction in the English rule, so that there was not any occasion for going into the matter.

Mr. Lemann. Did the middleman sue his purchaser and find out which one of these fellows owes him the money? One of them owes him.

Mr. Mitchell. He would have to get his ~~stuff~~ story effective.

Mr. Lemann. That is it. Did he take the judge

aside and say, "One of these fellows is right and one is wrong, and I do not know which one."

Mr. Wickersham. Have it in the alternative.

Mr. Lemann. Does he make any statement himself? Does he say, "I believe they are all right, but if they are not all right"--

Mr. Morgan (Interposing). He says "I believe they are all right, but if they are not right, this bird must pay for them." I do not want to lose both suits."

Mr. Mitchell. It is going to be a great advantage along this line if we are able to point to some jurisdiction, like the English, where the thing was tried and worked. I think that is more likely to get approval than if we tried to get something new; we might get into trouble. The question occurs to me whether we ought to shrink away from the English system, as they did in Illinois.

There is this thing also--that whatever you adopt, and the rule is adopted, and the Supreme Court goes along, and it has a standing committee and keeps an eye on it, and finds that there are cases that this rule does not plainly cover--I think they will just fix it and in the course of time they will get a rule that will cover all the cases.

Mr. Morgan. May I ask Dean Clark if the English court has worked out a"series of transactions"?

Dean Clark. I do not think they have. I think the

emphasis has always been on the question of law or facts test.

Mr. Wickersham. Prof. Sunderland, what has been the operation of that law in Illinois?

Prof. Sunderland. I think it has operated very well. I think Major Tolman will know better about that.

Mr. Tolman. I do not think there is much regard for it, but the lawyers use it.

Mr. Morgan. It is only a year since it went into effect.

Prof. Sunderland. Two years.

Mr. Lemann. California has a rule like this. What is the effect there, Mr. Olney?

Mr. Olney. It has not yet had any appreciable effect. I couldnot tell you.

Mr. Lemann. Would it not be better to figure this out and get the opinion on it?

Dean Clark. This has been written about a good deal. Prof. Sunderland has written about it, and Mr. Lowman, and all of us have tried a hand.

Prof. Sunderland's research man had an excellent article on series of articles on jt.

Mr. Lemann. Who was he?

Dean Clark. Col. Plumb.

Mr. Morgan. In the Michigan Law Review.

Mr. Wickersham. Of course, we know it has been written about, and certain persons think it is a good thing or is not a good thing, but to what extent has it been used in the court

and has the bar responded?

Prof. Sunderland. I am inclined to think that in England there has been very little litigation over it. I think that proves that in the course of years it has not caused trouble.

Mr. Wickersham. How about Illinois?

Prof. Sunderland. I understand it has not gotten into court yet.

Mr. Wickersham. Well, of course, that Illinois rule is not very different from the New York rule--because of the action as to the defendant must grow out of the same transaction or series of transactions.

Prof. Sunderland. Yes, I think this is very similar to the New York rule. Of course, in New York the rule against defendants was very much restricted; so that you could not use the rule, or restriction of the rule, in a series of causes of action.

Mr. Donworth. If there is a common question of fact, or a common question of law--take the negotiable instruments law. Can you sue anybody because an endorser is liable? And you take the income tax law and the Federal Government: If you eliminate the identification of the transaction or series of transactions, it seems to me that there is absolutely no limit.

Mr. Wickersham. What strikes me is that it puts an

enormous unnecessarily on the individual defendant, or the small group of defendants, where there are whole lot of other defendants with whom he has no relation whatever, except that there is some common principle of law that runs through as to all of them.

Mr. Lemann. Well, of course, it does have that. I have the suggestion that Louisiana is raising a point about the franchise law how "losses" is to be construed where there is an offset; and now they are sending bills to almost every corporation, and under this system they could sue one hunddred of them in one case, because there is a common question of law.

Mr. Morgan. Is not that the way it ought to be attended to? That is, in one lawsuit, or else make all of them dependent upon one. I do not see any sense in having one hundred lawsuits.

Mr. Lemann. What would happen is that ~~we have tried~~ they try one and the rest wait.

Mr. Morgan. All the rest is just mathematics, and the other fellows are not brought into court. Of course, that would not arise here. What you have said, Mr. Chairman, as to the fire cases in northern Minnesota right after the war, where there was a question of the cost of quite a number of actions.

Mr. Donworth. It was one transaction.

Mr. Morgan. Well, we had 300 or 400 cases, and it took three months to try one. It was a question of the cause

of the fire.

Mr. Mitchell. A fire was set out in the woods, and they contended that it was started by the railroad.

Mr. Lemann. And you got them together?

Mr. Morgan. I had to. The litigants had to get together, or you would have stricken down the system of courts. It would have taken 900 months to try all of those cases.

Dean Clark. There is a later rule for consolidation, but I wonder if the Committee has in mind how far the court can go now in trying cases? The present consolidation statute is found in 28 U.S. Code, 724. I put in a later rule regarding consolidation; but I do not think I can go further than this:

> "When causes of a like nature or relative to the same question are pending before a court of the United States, or of any territory, the court may make such orde orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate the causes when it appears reasonable to do so."

Mr. Donworth. When a motion to consolidate is up, everybody is heard, just as in a court of equity.

Dean Clark. Well, of course, either here in this way, or in a motion to sever, and in this way you can put them

together.

Mr. Wickersham. Here is the Practice Act of New Jersey of 1912:

> "The plaintiff may join separate causes of action against several defendants, if the causes have a common question of law and fact and arise out of the same transaction or series of transactions."

Mr. Mitchell. There is an interesting decision of the New York Court of Appeals, in which they considered the New York statute and required a common question of law and fact; and they held that there was a subtantial question of law and fact that was common to all. Then the next question was whether or not the cases arose out of the same transaction or series of transactions; and the series of transactions was this: Each of the plaintiffs had bought stock in a certain corporation from the defendant, and alleged false representation, and one after the other had made a separate purchase, and they all alleged this false representation; and it was held that series of purchases was an independent act by the purchasers, and it must be a series of transactions within the meaning of the statute, and it was going the wrong way.

Mr. Wickersham. That was joinder of theplaintiffs.

Mr. Mitchell. Yes, this was a New York statute.

Mr. Lemann. An entirely different thing has been

said by the New York Court of Appeals recently.

Dean Clark. Another case in New York was the case I have given you, where there were 23 plaintiffs against 21 defendants, and where attention was directed to the fact that they made these reports, and there were 57 causes of action set up in that case, and that each cause did not affect all of the defendants.

Mr. Dodge. In view of those circumstances, suppose, on the question that Mr. Mitchell just called attention to--suppose five plaintiffs buy the stock of five different defendants, and there was one question that was common to all that happened to be involved. Is there any advantage in allowing under such circumstances the suits to be consolidated into one?

Dean Clark. Well, the main advantage in all this is to avoid dispute. I think in a good many of these cases it is not important to get cases tried together as such. The most important thing is to avoid trouble from it, and it has been a source of trouble ever since--well, there was some trouble at common law, but it was worked under the codes. But if we can get a system whereby you remove the dispute--and here you shift the basis of it; instead of fighting over the bare bones of whether your paper documents should be together or should be separate--and Mr. Morgan is quite correct when he emphasizes the bearing of this question as being connected

with that end of the litigation; it shifts the emphasis as to the convenient way of trying the cases.

Mr. Wickersham. Yes, it shifts the emphasis so that the defendant is expected to bear a very much greater burden than he would otherwise.

Dean Clark. You have mentioned that several times. I do not think he bears a greater burden.

Mr. Wickersham. Well, you try a suit for a defendant where there are a whole lot of defendants represented by other attorneys, and you will find out where the difference is.

Mr. Mitchell. Take the case that Mr. Dodge mentioned, where you have a number of plaintiffs who have made a separate purchase of stock, and have not even made it from the same vendor; they have made it from a series of stock sellers, each one of whom has been selling stock in the same corporation. It may be that each one of them has been making representations of a similar nature as to the financial condition of the corporation, and that the only common question of fact there is whether the finances of the corporation are, as each one of those defendants represented it to be. Now, if you can join all of those defendants, and if you can join all of those plaintiffs in one suit, the only possible advantage of having them together was that the one question of the financial condition of the corporation could be litigated before one jury, with the one set of witnesses. I do not see

that anybody gains by that.

Mr. Lemann. Maybe the plaintiffs would lose because each fellow would be tied up with the other fellows; by the time you had all the lawyers, with their engagements and the witnesses--by the time they get through with their own case--well, I would not be mixed up with it.

Another question may be this: I was just wondering of how much practical importance this was. Prof. Sunderland gives the impression that the Illinois rule would care for most of the cases. But in the Federal cases, how far would the jurisdictional question come in if you lug in a lot of plaintiffs and defendants? And to what extent can you do this without breaking some of your Federal jurisdiction?

Mr. Dobie. That is a good point.

Mr. Lemann. If that is going to limit you--

Mr. Dobie (Interposing). It will limit you tremendously.

Mr. Lemann. I have an idea that the Illinois practice could be adopted; and that is why I think if we can agree on the Illinois rule, that we had very much better do it than adopt the Federal rule.

Mr. Mitchell. I think that is true.

Dean Clark. If we are going to the English system on that, we ought to go, and as I say, the English system contains some fine rules. But if the point of going to

a
~~the~~ Federal system is important--and it has some argument here, it certainly seems to me that we ought to go to it, and that we ought not to reject that for another system which, if anything, is limited, and is certainly untried, because, so far as I know, there are no Illinois cases which give us any light on the subject. But it seems to me it would be a great mistake to go back of the English system in that way.

Mr. Wickersham. Well, both of these States, Illinois and New Jersey--I do not know what the other statute is.

Dean Clark. Well, I am sorry, Mr. Wickersham, but you read the New Jersey provision as to plaintiffs.

Mr. Wickersham. No, I read the one as to defendants.

Mr. Lemann. Let us hear it again.

Mr. Wickersham. No, it was as to defendants, not as to plaintiffs. I think the same illustration was made by Mr. Olney a moment ago. Suppose, instead of buying from one corporation, the plaintiff had bought from three or four different corporations. They are totally different corporations and totally different transactions, and there is no connection whatever between them. Would you say then that the court would have a rightto bring all the defendants under those circumstances into one suit? I think that would be a hardship on the defendants. What I read was exactly this:

"Any person may be made defendant, whether jointly

severally, or in the alternative * * * *

(Mr. Wickersham read the New Jersey provision.)

Prof. Sunderland. That uses the word "contest,""the same contest."

Mr. Wickersham. Yes. Well, you have "transaction."

Prof. Sunderland. In Illinois we have a little broader language "series of transactions."

Mr. Wickersham. But you have some connecting links.

Prof. Sunderland. We have some connecting links?

Mr. Wickersham. And here your connecting links are thrown aside as immaterial. I think that is going too far.

Mr. Dobie. Could you not trust to the court in cases of that kind?

Mr. Wickersham. No, I would not trust to the court where you have a substantive right of the defendant.

Mr. Dobie. You are afraid of them?

Mr. Wickersham. I think the right of the defendant is to be sued under circumstances that protect him, and I think it would be an undue hardship to bring me as a sole connection with 25 or 30 other people with whom I have no connection whatever in a transaction to which I am not a party, because there is a common question of law involved.

Mr. Dobie. You do not think you could trust the court in a showing of that kind?

Mr. Wickersham. I might or might not.

Mr. Leman. There is one question about the practice ~~professionally~~, and that is disapproval of the courts.

Mr. Dobie. And yet we are drawing these ruleson a somewhat different basis, and making them rather flexible in many cases, and granting the court large powers in amendments and things of that kind. Is this not inconsistent with that?

Mr. Morgan. As long as you have no confidence in your trial judges, you will never get any procedural reform. You do not care what kind of fellows they are, because you will not give them any power. And then you say you cannot give them any power, because they cannot be trusted. And there you are , in a continuous circle. That strikes every reform for procedure, evidence and pleading--that you will not trust your trial judges. It was found that all the way through all the uncertainty in regard to the right of the court to comment on the evidence, that there were floods of telegrams, and they said, "If we had good judges we would be willing, but God help us, we do not have good judges;" and then you do not have good judges because they do not have any power. You must break that continuous circle in some place.

Mr. Olney. I can tell you what happened in California: We had a constitutional amendment which permitted judges to charge juries on questions of facts; but it specifically provided that the jury could overrule the judge on such questions. There came up a hanging case; and the judge, Judge Pratt, told

the jury they must go out and bring in a verdict for hanging.

Mr. Morgan. They did that in England, and the jury brought in a verdict of "not guilty."

Mr. Dobie. Was he hanged in that case?

Mr. Olney. I do not know.

Mr. Lemann. I was just teasing Mr. Dobie, because I have heard ~~xxxx~~ lawyers and others criticizing the court. I think as lawyers we can question their intelligent use of their powers, as a general proposition. I think I remember that Commonwealth case that you referred to a moment ago, Mr. Morgan.

Mr. Morgan. That indicated that there was much more confidence in the Federal judges than in the State judges.

Mr. Lemann. I think we all have confidence in the trial judges.

Mr. Dobie. Well, if you have, is not the question of evidence and of separate trial of certain issues being lost sight of in this discussion? Take the case that Mr. Dodge suggested: Would it not occur to the Federal trial judge that the only t ing there would be any advantage of having all of these people in court for, would be the one question that they had in common? That is the fact about that corporation's solvency. As to that, you would have a united front on the plaintiff's side and a united front on the defendant's side; and this town meeting and the difficulty of stepping on the judge's toes by defendant's lawyers would not occur; and

where you have separate questions as between the plaintiff and one defendant, in which other defendants were not interested, they would be determined separately. I think any intelligent administration of that sort of rule would enforce that. I do not suppose the trial judge likes one of those cases any better than any of the lawyers.

Mr. Lemann. I think we are chasing windmills in this discussion. I would like myself to see the cases in which this has come up, and how many cases would not be cared for by this Illinois rule. I think it quite unlikely --certainly, as I said to Mr. Dodge, I think it very unlikely it would come up, and I think that usually plaintiffs want to unit cases. If he had a case, I would rather try my own case. I do not think I would say, "Let us join in," because "Too many cooks spoil the broth," and he could try his case and I would try my own, and we could exchange views. So if I was trying to sue somebody I do not think I would be likely to want to bring in a lot of defendants. If I tried it before a jury, the more defendants I have, except in very large places, the more likely it would be that they would take men of their own class on that jury, that would be rather likely to take their point of view. I can see this English case, where a fellow that is in between, and he wants to get it settled, and each fellow will get it settled as to himself, and that is apt to be carried off. But I have a notion that we are fighting a theoretical point here, just

for the sake of a perfection viewpoint on one side, and overcoming the practical difficulties on the other; both sides overstate the picture, and I hardly think that it is worth using ourselves up on.

Mr. Dodge. The case is likely to arise where one lawyer had four parties who have a personal injury case, and he found that perhaps there was a combination of law, perhaps not vital, and he joined four different parties in this complaint.

Mr. Dobie. In the Federal court.

Mr. Lemann. That is not likely.

Mr. Dodge. It might happen.

Mr. Olney. It might happen. For instance, the Southern Pacific is a Federal corporation.

Mr. Morgan. They could if they wanted to.

Mr. Dobie. Would they want to go into the Federal court in the first place?

Mr. Olney. I do not think they would.

Mr. Morgan. But they would know that the case would be removed if they ask for more than $3,000.

Mr. Dodge. I think there should be some extension of the English rule. I think the English rule is very good, but I have not heard any argument for the extension of it.

Mr. Donworth. The whole purpose of it is that cases of similar nature may be brought together and tried together. I think all cases have many features of similarity. Now, you

are having in 25 cases one common point of law, and they may be so diverse in every other respect as to make unfair. In other words, you are sacrificing independence in these different cases there to the immaterial circumstance of ~~there~~ their having one common point of law.

Mr. Morgan. Well, do you think the trial judge would not order a separate trial under those circumstances?

Mr. Donworth. If you leave it to ~~its~~ his discretion, he will exercise his discretion, but he has to apply the rule.

Mr. Morgan. Well, do you think the judge would not ~~that he~~ order a separate trial, under those circumstances?

Mr. Donworth. Yes, that leaves it to his discretion; but we are making rules, and it seems to me that, unless there is some precedent of applying the identical point of law as a sufficient identification point to make one case, we should divide them.

Mr. Dodge. And if the judge is certain to separate the trial, why do it in the rule?

Dean Clark. To avoid the controversy that continually comes up as to that.

Mr. Tolman. I would like to make one suggestion as to what seems to me to be the real difficulty that confronts us. There have been omitted from this rule the words "arising out of the same transaction". Now, I would call your attention to the very radical difference there is between "comm question of law

or fact," and the expression "a common question of law or fact arising out of the same transaction."

Dean Clark. Or series of transactions.

Mr. Tolman. Or series of transactions. It is a very different thing.

Mr. Donworth. "A question of law arising out of"--

Mr. Tolman. "A question of law arising out of the same transaction." Now, the Massachusetts committee called our attention on this matter to the rule in admiralty. The admiralty rule uses this language, "growing out of the same matter."

Mr. Wickersham. The same what?

Mr. Tolman. "The same matter." Now, to a certain extent Equity Rule 37 joins together the subject matter of the litigation and the common interests.

Mr. Wickersham. I suppose in the admiralty rule the word "matter" means a ship, does it?

Mr. Tolman. The ship or the accident.

Mr. Wickersham. In other words, it is the same transaction; it is equivalent to the language "arising out of the same transaction or series of transactions"?

Mr. Lemann. It seems to me that the English rule would be all right. I do not like the Illinois rule.

Dean Clark. I would accept the English rule. I think that point is somewhat academic. But I must say that I would be very much disturbed by the Illinois rule. I would like somebody

to state what the Illinois rule is.

Mr. Tolman. I did not want to be understood as pleading here for that rule.

Mr. Dobie. Prof. Sunderland drew that.

Dean Clark. He did?

Mr. Dobie. And he is the man that has said the least about it at this table.

Prof. Sunderland. I do not think it is a fair rule. (Laughter.)

Mr. Mitchell. I would like to ask if there is anything about the Illinois rule, where you would not find the same thing in the English rule because not only in the Illinois rule but in the English rule when you say contesting the defendant it applies not only to the same question, but to the same transaction or series of transactions. Now, the English rule uses that same phrase in connection with the plaintiff. Now, I do not find anything in your rule, Prof. Sunderland, that differs greatly from that language of the English rule, except that you use that same expression when you are dealing with the defendant. Is that about it?

Prof. Sunderland. Yes, that is about it.

Mr. Morgan. Why not take the English rule, where you have had forty years experience by the court, and if you take the Illinois rule, God knows what the Supreme Court of Illinois is going to do about it.

Dean Clark. The English rule refers to parties whom it is necessary to make a party, to the complete determination or settlement of any question arising, or in the alternative, arising out of the same transaction, regardless of the cause of action contained therein. That phraseology "whom it is necessary to make a party for the complete determination and settlement of any question involved therein." If you put that in almost anything could happen.

Mr. Wickersham. In other words, there is some justification for bringing in a number of defendants here; and for this proposal I see no justification whatever, except the suggestion that it is more convenient to the plaintiff to bring in the defendant in one suit instead of three or four suits. But the defendants have some rights. And I see no justification for bringing the defendant into a suit because, although he has no concern in the transaction which gave rise to the claim against the other defendants, there is the same question of law that is common to them all. And it would be imposing on the defendant an intolerable burden.

Mr. Dobie. He might be very much interested in the separate transaction, but one in the same series, I say, it is a separate transaction from the other one litigated, but in the same series.

Mr. Wickersham. I do not know what a series means.

Mr. Dobie. Nobody does.

Mr. Wickersham. I do not understand what a series is.

Mr. Dobie. I congratulate you. I am advocating some logical justification for bringing a defendant into a lawsuit with a whole lot of other defendants with whom he has no common cause at all, or common interest, just because there is one question of law applicable to all of them. It may not be the determining question of law; it may that there is just one legal question that affects all of them, but it does not read that that is the determining question.

Mr. Mitchell. Now, some of us will want to study this subject further before the Committee makes a final decision for its report. I think we might make a tentative decision, if it is the sense of the meeting that the rule should stand, in the meantime, but the Committee should study it and look up the authorities. Now, as I understand, the question, first is whether we shall go the whole way, as the Committee has done. There are others of us that think we can compromise on the English rule, that has been tried and seems to work, and may be there are others who may still want to go back to the Illinois rule. Now, can we not take them both and settle first, whether the majority of us are in favor of the one stated by the subcommittee, and then pass on to the English rule, and test that, and if that fails, then we will try the Illinois rule, and that will bring it to a head.

Mr. Lemann. May I ask what the English courts have said as to the difference between the English rule and the

Illinois rule?

Mr. Morgan. Nobody knows what the Illinois rule is.

Mr. Lemann. What has the 40 years experience of the English rule produced in the case of circumstances that will bring defendant in on unrelated actions?

Mr. Morgan. I hesitate to vote for the English rule until I know what is meant.

Mr. Mitchell. Let us have your present impression tonight on the subject, with the understanding that it will be considered and the subcommittee will consider the question.

Dean Clark. Might I say on that that there have been some cases--there have not been so many, but there have

been some well known cases. In one case the plaintiff sued two insurance companies, each of which had insured a portion of the cargo. The matter has not been greatly fought over in England, because it has worked well, and nobody has apparently been harmed, and they are satisfied. But I must say that the effect of the Illinois rule is that you do not know what it is. It seems to me that it can well be "All things to all men."

Mr. Olney. If I understood the reporter correctly--and to find out whether I did I would like to ask him this question and to put this proposition: Your concern here today with what is practically a radical advance, taking the country over. Now, under those circumstances, is it not wiser for us to take the English rule than try to go further, and if I understood you correctly, the only advantage to be derived from taking the further step would be to avoid some questions as to misjoinder?

Dean Clark. Yes, well--

Mr. Olney(Interposing). Now, it is not better to face some little question that may come out under the English rule, which provides for "transactions;" in other words it puts that limitation--rather with this matter of ours, going still further into a field of whose effect we arenot certain, and where our action is certain to be questioned?

Dean Clark. I think that is a perfectly fair argument, and I cannot object greatly to the English rule. The main

thought I had in mind was that the English rule contains certain combined statements. I do not think I have gone beyond the English rule, really.

Mr. Wickersham. Is it not true that in the long run the Federal judges are likely to take a correct view of it and come out all right?

Dean Clark. I think that is true.

Mr. Dobie. And you have the Supreme Court on top of this. I have been talking to Mr. Cherry, and I do not know about the New York rule, but they would come up and block you all the time.

Mr. Cherry. I am quite satisfied with the ~~New York~~ English rule.

Mr. Olney. I move that we adopt the English rule. I might say, that in all our discussions here, we want to get through with this whole matter, or rather, we want to get through approving of all of these things; our primary purpose is to present a plan for the unification of the procedure in law and in equity, and that is the thing we can do and have got to get over if we can. That is the great refrom we have got to make, and that is the only refrom that has got to be submitted to Congress. And it is far better for us to prepare a plan that will go through and accomplish that, with as little opposition as possible, than to put in a lot of other things that are going to hazard that greatly, when these other things can be attended to afterwards by the Supreme Court itself, without the necessity of going to Congress with it. The result of all of that is

that when we get through we will have to go back and scan all of the things that we have done and see what is wise in connection with them. I have particular reference to something that was drawn by Prof. Sunderland, with whom I thoroughly agree, but which is going to strike most of the provisions rather badly I think. But for the time being, let us go on with this and get what we can and what is wise, and then take a survey at the end. So I make my motion.

Mr. Morgan. I second the motion.

Mr. Mitchell. Is there any further discussion? Those in favor of the motion will say "aye"; those opposed "no."

(A vote was taken and the motion was unanimously adopted.)

Mr. Donworth. Does that apply only to Rule 42, or does it take in Rules 43 and 44?

Dean Clark. I should say it only applies to Rule 42, and there are some questions on Rule 43 and 44 that ought to be considered.

Mr. Olney. By the way, in connection with Rule 42, I want to offer a few changes there.

Dean Clark. Well, I suppose Rule 42 will be very considerably changed anyway, in the mere language.

Mr. Olney. Well, this is further on. Well, this is in the third sentence, where it says, "The court may make such order;" it seems to me that it should read, "The court may make such orders," in the first place, because it ought not to

be confined to a single order; and then it goes on "as may be just to prevent a party from being embarrassed or delayed"--

Mr. Donworth (Interposing). "Or prejudiced;" I do not know "embarrassed or prejudiced" might be the same thing.

Mr. Olney. But the embarrassment is apt to come in the delay--"embarrass the party, by requiring him to attend proceedings in which he may have no interest." I would substitute for that, "against the party against whom the asserts no claim, and who asserts no claim against him."

Dean Clark. I think that is all right.

Mr. Olney. I am offering that for your consideration, because I myself have not considered it thoroughly.

Mr. Donworth. I suggest also, in the first line of Rule 42, where it says "All persons subject to the jurisdiction of the court may join as plaintiffs." As a general rule, anybody can join as a plaintiff, whether he is subject to the jurisdiction of the court or not. The expression is pertinent to the defendant and not the plaintiff. He can come in whether he is from Canada or Louisiana.

Mr. Cherry. You are out of the Union now.

Mr. Wickersham. Well, if you put that clause in parenthesis--

Dean Clark(Interposing). Yes, I think that would be implied anyway; that is, we would not use the joinder to sustain jurisdiction. I just wanted to have assurance in the

beginning that it will not.

Mr. Wickersham. It applies also to the defendant, does it not?

Dean Clark. "All persons subject to the jurisdiction may be joined as defendants"; so that it applies to the defendants.

Dean Clark. Well, it applies, but this is not the jurisdictional test, so that I do not think it is intended. But I certainly think it is intended to be implied.

Mr. Wickersham. Well, we do not need it as to theplaintiff.

Dean Clark. No.

Mr. Mitchell. How about Rule 43?

Dean Clark. Rule 43 presents another problem. I might say there has been coniderable agitation to have a Federal interpleader statute. I think the insurance people, among others, want it.

Mr. Mitchell. Yes, I drafted it for them years ago.

Dean Clark. They want a little more, and Prof. Chase, of Harvard, has, I think, prepared a brief, and wants a lot more done; and he says some of it must be done by statute, and of course, it would because he wants to have process run in different jurisdictions. But he states that there are certain things that very clearly can be treated by rule and he hopes we will treat them. I might say what I have done here is in

the main, hardly more than to delete things as they are. I wanted to bring in the idea that you could have interpleader, and this is not a rule that does very much as it now stands. Now, he makes certain suggestions that we could abolish some of the requirements--and I shall have to go over this thing myself.

I suppose interpleader might come in under our defense section anyway, but he wants to provide it so that it can be filed as a defense; that is, that the stakeholder or company, being sued, can, as a matter of defense, bring in an interpleader.

Mr. Mitchell. Do you mean interpleading the other claimants?

Mr. Donworth. He can bring them in.

Mr. Mitchell. That was the original statute as it was drawn, where you had different claimants to the same policy, sued by one--that they could interplead. That would take care of the question of diversity of citizenship.

Mr. Olney. I have never had any interpleader experience in the Federal court, as it happens. I have had in the State courts; but is there any question about the right of interpleading in the Federal court? Is any statute or rule required for it? It is a relief to which a man is entitled.

Mr. Lemann. The reason the insurance companies had to have it was because the venue required it where the question of citizenship was giving him trouble.

Mr. Mitchell. If you were sued on a policy by a claimant in one State, you could not interplead by a claimant in another State, because under the venue statute, that person must be sued in his own district.

Mr. Donworth. That is supposed to be covered by the statute, is it not?

Mr. Mitchell. Yes.

Mr. Olney. And when I read this rule--I hesitate to define in a rule the right of interpleading. Of course, the right is pretty well established, the cases uphold it, and you definition may be wrong.

Mr. Mitchell. Well, you mean to leave the statute alone and not deal with in the rule?

Mr. Olney. Yes.

Mr. Mitchell. It has to be treated in one place or the other. You cannot interplead unless a statute or the rule allows it.

Mr. Olney. Well, you can in equity give the right of interpleader without a special statute, I think.

Mr. Mitchell. Well, if you have a lot of statutes or rules which prescribe the procedure and do not say anything about it--do not say anything in the statute or the rules--you do not get it. That would be my impression.

Mr. Olney. Furthermore, I think your general rules in regard to making parties and bringing in other parties

would cover the matter. But the objection that I had is to endeavoring to define theright of interpleader. I am afraid of it. It may be a groundless fear, but I am afraid of it.

Mr. Morgan. You mae the suggestion, Mr. Clark, that that provision as to ~~party~~ parties would take care of all interpleading?

Dean Clark. Well, of course, that is really the thing I want to do. All I did in Rule 43 was to tie interpleader up with the rule as to parties, and that is all I tried to do. But, I think that is a place that we can clear up some of the difficulties without much trouble. I do not believe there will be any question under this rule, but here what is a matter of defense is taken over by the interpleader.

Mr. Morgan. It certainly is, with your party provision here.

Mr. Lemann. This rule is very awkwardly worded.

Mr. Morgan. Yes.

Mr. Lemann. It says, "In accordance with the provisions of Rule 42," and as I understand, down to the word "providing", it is an attempt to restate the provisions of Rule 42; and it makes it very confusing, when it is not adapted to the expression by way of rule. I would leave out those four lines, and say at the bottom "Compare with Rule 42, if you want to draw attention to it.

Dean Clark. All it does is to say that you may have interpleader under the rules we have provided herein for joinder of

parties.

Mr. Dodge. When they calim against the plaintiff, is the plaintiff who is subject to the possible doubly liability?

Dean Clark. It may be the plaintiff or the defendant. it might be the plaintiff, but the original suit of interpleade would be by a plaintiff.

Mr. Dodge. If he ~~held~~ were the plaintiff in interpleader, but I think this was a case where there was an existing suit and somebody else was possibly bringing a case against the defendant.

Mr. Lemann. What he was saying was that you should have interpleader so that we would have Rule 42 so we know that Rule 42 would govern it.

Dean Clark. Yes; and the last sentence covers the point.

Mr. Donworth. I would like to suggest, Mr. Chairman, without starting a discussion, that it seems to me that some of these things that we are doing here may go beyond our mandate, and it may be that Congress will affirmatively approve these rules, and I hope they will appeal to Congress so that it will. So that I am particularly tender about putting in things that may be legislation themselves. It seems to me that we might well consider putting in a section--if my point of view that I have stated is correct--whereby, when a citizen of Texas sues a corporation of New York in Texas--say for

insurance or anything else--that that claim constitutes a fund n the court, and that the Texas court, on the application of the defendant, could bring in other claimants to that money, and they could be notified, even though they are not amenable to suits directly. That ought to be the law.

Mr. Mitchell. Well, that would amend the Constitution in a good many cases, because you are always up against the question of diversity of citizenship in any of those interpleader cases.

Mr. Donworth. Well, how are you going to do when the Texas man brings a suit against a New York corporation in Texas, and the fund is brought into the court and ~~he~~ is subject to the jurisdiction. There is your jurisdiction, and the rest is only incidental.

Mr. Lemann. Auxiliary.

Mr. Mitchell. Well, if it is paid in, I suppose that is different; I do not know.

Mr. Olney. When you get right down to it it is a question of debating the provisions of the Constitution. The right of interpleader which exists in these two defendants--and in this case--~~the~~ the moment you have two defendants, why, there is not the diversity of citizenship which is required.

Mr. Mitchell. Judge Donworth's idea is, I think, that we ought to avoid putting anything into the mouth of the legislature, outside of the Committee's function and the statute.

The moment we do that we are lost, unless we can get Congress to pass the statute and approve it.

Mr. Donworth. I think that is right.

Mr. Mitchell. Yes, that is a risky thing to do.

Dean Clark. It seems to me that we ought to make at least a gesture toward interpleader. I suppose any person interested in rules of joinder might think of interpleader, and try to look to find it in these rules; and I tried to tell him that we had it in here.

Mr. Mitchell. You can say in Rule 42 joinder of plaintiffs or joinder by interpleader of defendants; make it clear.

Dean Clark. You could, although there is a good deal of weight in Rule 42 now. It could go in. Then Prof. Jevie would be interested in getting in the last sentence of Rule 43.

Mr. Olney. In order that we may get on, I suggest that this be a suggestion to the reporter in connection with the redraft which you are going to make.

Dean Clark. I would like to have your suggestion on this: Do you think we want to go into interpleader somewhat more? I do not think Prof. Jevie asked us to go quite as far as Mr. Donworth suggests. I think Prof. Jevie feels that a statute is necessary to go as far as we want. But he thinks that some of the details ~~that~~ we can cover by going into the matter more extensively.

Mr. Donworth. Suppose we put in something along this

line--"To the extent that the jurisdiction of the courtin any case goes, the court may make appropriate order on interpleader--to the extent of the jurisdiction of the court in any case it may make orders appropriate to giving the parties or either of them, the remedy of interpleader."

Mr. Tolman. As I read Prof. Levie's letter, the one thing that he must have in mind is the power to adjudicateclaims from different States.

Mr. Donworth. Well, that needs a statute.

Dean Clark. That is true, but he does not state that that must be done by ststute.

Mr. Tolman. I know.

Dean Clark. That is what he is really after.

Mr. Tolman. Well, he is going to get that jurisdiction or venue by Congress if he can. This question here of jurisdiction does not mean that we will not get interpleader when we are within the jurisdiction. I think it is desirable for that purpose.

Mr. Donworth. I wuld not limit it to Rule 42. I would make it subject to the jurisdiction of "in any case", or something like that.

Mr. Wickersham. Here is the statute which covers the subject. This, I believe, is the one you spoke of, Mr. Mitchell, that you drew up. It is the Act of May 8, 1926, Chapter 273. It extends the insurance interpleader

statute, providing that it shall include any person holding a fund against which there are conflicting claims, and conferring upon the United States District Court, jurisdiction in all cases where a general equity interpleader by bill of equity for that purpose would now lie, subject to the same conditions, as to venue, right to enjoin proceedings in the State court, and diversity of citizenship as are contained in the insurance interpleader statute." I will read it.

(Mr. Wickersham read the Act of May 8, 1926, Chapter 273.)

Mr. Mitchell. You see, that is limited to Rule 2, claim for diversity of citizenship.

Mr. Lemann. Yes, you see that was another reason. We have so much trouble with where the limit was $1,000, and they made the limit $500.

Dean Clark. Yes, that was an act of 1925.

Mr. Wickersham. This brings the fund into the court, and in a case where there is diversity of citizenship--and then requires anybody outside who claims an interest in the fund to appear and claim it.

Mr. Lemann. That would require a Louisiana insurance company to interplead and sue a Louisiana citizen.

Mr. Mitchell. That is true.

Mr. Donworth. When the interpleader attaches, you can bring in any ~~finance~~ person, regardless of residence.

Mr. Mitchell. Well, ~~does~~ it says the claimants have to have diversity?

Mr. Donworth. In the first instance.

Mr. Lemann. In your case, you bring in a class of cases that the statute would cover.

Mr. Dodge. Is it not true that a New York ~~court~~ claimant could come into Massachusetts ~~corporation~~ and compel two Massachusetts citizens to interplead?

Mr. Lemann. Yes.

Mr. Dodge. Well, how about a defendant in that? Suppose it was a Massachusetts defendant?

Mr. Lemann. That would be more doubtful. Suppose the Massachusetts corporation goes into New York.

Mr. Dodge. A New York corporation can go into Massachusetts and compel two Massachusetts citizens to interplead there without any difficulty, both claiming against the plaintiff.

Mr. Lemann. Yes.

Mr. Dodge. Now, suppose a plaintiff comes in in thesame way to Massachusetts, can you not bring in any other defendant of the same citizenship as the defendant?

Mr. Lemann. Yes

Mr. Dodge. Under that last sentence of Rule 44, can

that not be done now?

Dean Clark. Well, you cannot have them all on the same side. I think you get into trouble there. That is, if now the defendant must counter claim against somebody in Massachusetts, are you not going to have them on the same side--

Mr. Dodge. No.

Mr. Mitchell. On the adverse side.

Dean Clark. Yes, that is what I mean.

Mr. Lemann. They are sued as nominal defendants, but they are sued there in the same case.

Mr. Dodge. I was wondering, if there is not jurisidiction, if we are not trying to give jurisdiction there.

Dean Clark. In that sentence I did not intend jurisdiction; of course that would involve the words "diversity of citizenship." On the other hand, to put it in affirmatively was thought to be necessary, because, of course, your action of interpleader was a plaintiff stakeholder suing in equity, and not a suit brought by way of counter claim.

Mr. Lemann. Not a counter claim.

Dean Clark. That is correct.

Mr. Lemann. I suggest this motion: That the reporter be requested to draft a rule on interpleader, with the change in the language that we have now employed, with reference to the manner in which--to make it plain that we specifically

recognize the right of interpleader, and in thatredra ft that he submits for the Committee's consideration the point that Prof. Jevie wants to cover, indicating to just what extent it is not covered by existing law; and that he make it plain that this rule will not supersede the statute.

Mr. Mitchell. I think ought to expressly say so.

Mr. Lemann. Because, in other words, this might be construed as overriding it.

Mr. Mitchell. I was going to say that. Is there any second to that motion?

Mr. Tolman. I second the motion.

(A vote was taken and the motion was unanimously adopted.)

Dean Clark. Are you through with Rule 43 now? If so, I was going to say I think we will have to give some consideration to Rule 44.

Mr. Mitchell. Can you do it in five minutes?

Dean Clark. Perhaps I can state the point. This is a situation where at common law there had to be a joinder, the parties having a joint interest, but where there was a subsequent mistake, if you did not make it it could be corrected. The court generally used the expression "united in interest, and the equity rule does use that expression. When we came to work on it, we first started it with simply keeping the equity rule in effect. The equity rule, you will

see is practically just that ~~first~~ sentence of Equity Rule 37:

"Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join he may for such reason be made a defendant."

Now we have fairly extensive Federal statutes which I think must be included here. I think they are 28 U.S.C., 111. Those are given two pages back.

Mr. Tolman. That is page 3 of that note?

Mr. Wickersham. Yes.

Dean Clark. Yes. It goes pretty far I think in the right direction. That is, it goes against the old common law idea that you had to bring somebody in. There has been a general tendency to get away from that requirement anyway. Some of the provisions go so far as to provide that a joint obligation shall be treated as joint and several. The Federal statute takes a little different tack. It says:

"When there are several defendants in any suit at law or in equity and one or more of them are neither inhabitants of nor found with in the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly

served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants or nor found within the district, as aforesaid, shall not constitute a matter of abatement or objection to the suit."

Now, that pretty much, as I read it and have read it and tried to work on it, makes it so that you do not abate the Federal suit any more, but largely continue with those you have begun. That is the basis upon which we have now drawn the rule.

And in doing so we went back to the old phrase as used in the Federal Cases, of "joinder of necessary parties." "Persons having a joint interest must be joined on the same side as plaintiff;" "When persons who are necessary or proper parties."

And I may say right here that I think probably the words "or ~~appear~~ proper" should come out, because I think this power need be given only in the case of necessary parties--"parties have not been joined or been joined in the action and are inhabitants or to be found within the district in which action is brought," the court may order them to appear in the case. But when such persons are neither inhabitants of or found within the district in which the action is brought", and so on. That is the way we have it.

Now, from that point on the next section is the statute.

Mr. Lemann. Would you leave out "necessary"; that the court cannot entertain jurisdiction even though they are necessary parties.

Dean Clark. Yes, that is what the statute says.

Mr. Dobie. The next part is the only one that that can apply to; the indispensable party it is impossible to dispense with; and the "proper party" means nothing.

Mr. Donworth. The court divides "necessary parties" into two classes; first, that is merely necessary, not indispensable; and the other, indispensable; as to those the court would not hesitate to join them; if they are only necessary, it will.

Prof. Sunderland. For that reason, is not "necessary" a very bad expression, as it seemed to me; you do not know what it means.

Mr. Morgan. It means somewhat between "proper" and "indispensable."

Mr. Dobie. In that connection I want to ask you the difference between "indispensable" and "necessary."

Prof. Sunderland. Some courts use "indispensable" as "necessary."

Mr. Dobie. But not the Supreme Court. The Supreme Court, strictly speaking, does not use the word "proper." It uses the expressions "formal party" or "trustee" and naked titles, as a person who is in to satisfy some

technical rule but has not interest in the suit. A necessary party is one who has an interest in the suit, and who ought to be in it for the complete determination of all the issues; but he is not so essential to it but that an adjudication as to it can be had without an adjudication as to him. And indispensable party, one who is so indispensable to the suit that no essential decree can be handed down which does not ipso facto apply to him.

Prof. Sunderland. I think that is true, but the State cases are greatly confused.

Mr. Dobie. Yes.

Prof. Sunderland. Now, would it not be possible to eliminate any misunderstanding?

Mr. Dobie. Yes, I do not think "proper party" should be in at all.

Prof. Sunderland. Yes.

Mr. Dobie. And I want to bring up this point: It seems to me that there are two things here: One is a Federal statute that is applicable to both law and equity, and applies to dispensing with these parties, either if they are not inhabitants of or found within the district. The other is if the man lives next door he will defeat the jurisdiction, if he lives in the same State as the plaintiff.

Dean Clark. Yes. Let us go over it, because the

suggestion is troublesome. Now, I really need to go fully into the thing, because I am afraid you limit the matter of joinder. As a matter of fact, I do not believe there is very much left to indispensable parties; nor do I doubt that there should be anything left. I am rather afraid that if you start by taking out "necessary" or start defining it, you have cut down on the power of the court to go into the suit. I do not say that it is impossible. Maybe some of you can suggest language which will hot be. But I ~~might therefore~~ should rather go the other way, because it seems to me that it is a salutary tendency to go in and decide the case as to the parties who were in, because I do not see that you are going to do any real injury by doing that, and you will do much more injury by saying that you cannot decide a case because you cannot catch somebody who had some interest.

Mr. Mitchell. In this rule, are you taking care of the situation where a person is a necessary party and is within the jurisdiction, in the district, but the joinder of whom would oust jurisdiction?

Dean Clark. In that case, I take it that the present Equity rule is that you do not need to join him.

Mr. Mitchell. I know; but the point of the thing is whether this rule was dealing with the case where we have parties in the district, but because of lack of diversity

of citizenship, they are out of the jurisdiction of the court.

Dean Clark. What I have done is shown in the last sentence.

Mr. Mitchell. Yes, you have covered that; that is the last line.

Mr. Donworth. One thought I had in mind was that the court got along very well with Equity Rule 39, and with that rule in force, the courts have created a distinction between being necessary and indispensable parties, and whether substantially the same thing as in Equity Rule 39 would not be all right, without trying to provide specially for it, but merely leave it to the court.

Dean Clark. Of course, that is possible. After all, that Equity Rule 39 was in the Equity cases, and we are now trying to draft a rule as to common law cases. And I am very much afraid that with that "united in interest" rule which is used in the code proceedings,--that each one would be considered pretty restricted.

Prof. Sunderland. That is covered in all sorts of ways.

Mr. Olney. If I remember correctly, Mr. Reporter, there was a decision by Judge Taft, in which he elaborately considered the case where two parties were interested in a patent, and one of them desired to bring suit, and my recollection was that, if the other party would join with him as

a party plaintiff--and under the patent laws he was required to be joined--he would oust the jurisdiction of the court. And Judge Taft laid down and discussed the case quite extensively, and pointed out that the suit may be maintained nevertheless in the Federal court. Are you familiar with that case?

Dean Clark. I do not remember the exact case, but is not that a provision of the Equity rule that we are trying to cover in the last sentence?

Mr. Olney. As I remember it, I remember thinking it was rather an elaborate procedure, but something that had to bbe quite carefully observed; and as I remember it, they had to allege that they had asked theother person to come in, or something of that sort, and he had refused.

Mr. Donworth. Was not that the case that enforced the statutory provision of the patent law, that the holder of the legal title to the patentmust be entitled to sue?

Mr. Olney. Yes, it grew out of that.

Mr. Donworth. You see, thejurisdiction of the court in patent cases is along different lines. I do not think the case Judge Olney has in mind would throw much light on this. I think it is an interpretation of another statute.

Mr. Dobie. Shields vs. Barrow is the leading case on that, according to this book here--which I wrote myself.

Mr. Mitchell. Gentlemen, it is past 10 o'clock, and

we should adjourn. What time do you want to meet in the morning?

I suggest 9:30. Of course, I should not object if overnight the greatest living authority on Federal Procedure would write a statute or rule on the subject.

Mr. Dobie. I have no objection. (Laughter.)

(Thereupon, at 10:14 p.m., the Committee adjourned until Saturday, November 16, 1935, at 9:30 o'clock a.m.

THIRD DAY

CONFERENCE OF ADVISORY COMMITTEE

ON

UNIFORM RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES AND THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Saturday, November 16, 1935.

The Committee met at 9:30 o'clock a.m., pursuant to adjournment.

PRESENT: The members of the Advisory Committee and their advisers and assistants as hereinbefore noted.

Mr. Mitchell. Gentlemen, we are still on Rule 44.

Dean Clark. I should like to make a suggestion which is general, because, as I indicated last night, there are some points of difficulty here. It seemed to me that we ought to provide for the court going ahead, so far as we were authorized to do so under the present Equity rules and the statutes. That is, our rule ought not to be a limited one. I would rather go the other way; but Now, I am not sure what, along with the last sentence of the rule, which is a statement by implication that plaintiff need not join parties who would oust the jurisdiction of the court, we ought also to state it affirmatively. And that raises the question whether Equity Rule 39, which appears on the left hand side, really does not mean necessary party, instead of proper party.

Mr. Dodge. I did not think in the Equity rules they used that phrase "necessary parties" at all.

Dean Clark. They did not.

Mr. Dobie. In Rule 37 it does not say "necessary parties"; it says a party whose presence is necessary or prope to complete the termination of the case." But they did n simply use the adjective affecting parties.

Mr. Donworth. Would it not be a good idea to strike ou "proper parties"?

Dean Clark. I think so. I want to put in there "necessary parties" and take out "proper" and say "whenever possible the plaintiff shall set forth in his complaint the names of persons not joined who are necessary ~~xxxproperx~~ parties, and state why they are not made parties--as they are not within the jurisdiction of the court and cannot be made parties." It seemed to me that that is what is meant. I arrived at that conclusion, not merely by Rule 39 alone, but also because of the statute. What I have done here in effect is, as was suggested last night, ~~was~~ to put the Equity rule and the statute one after the other, so to speak. I did that because of a little hesitancy. I thought it would be, perhaps safer, if I put them both in. I should be glad to go to the full length, which it does seem to me is justified, saying that "necessary parties"need not be included when they are not inhabitants of the State, or when they are persons

who would oust the jurisdiction of the court."

Mr. Dobie. Yes.

Mr. Donworth. Would not your thought be met by striking out the parenthetical clause? If you read it without the parenthetical clause, is there any objection to stating in the complaint the reason why you do not join the particular party? The present rule contemplates that, and is there any real objection to stating it? And if you leave out this parenthesis it will cover the case.

Dean Clark. But if "proper" means proper there is no necessity to state that. The reason you have not got that in is because you do not want it. With, howveer, "necessary parties", it is different; and then you will state it. In other words, how would it do to pass ~~it through~~ this rule, entitled "necessary parties" only, and with the change I have indicated? You do not need to join even necessary parties when they are within the jurisdiction, or when they would oust the jurisdiction of the court.

Mr. Mitchell. Well, there is confusion about indispensable and necessary.

Dean Clark. That is quite possible. I think I would just as soon say nothing about indispensable, in the hope that we carry it along so that indispensable parties will eventually disappear, because I do not believe there is any such thing.

Mr. Tolman. It seems to me that we do not need to deal with proper parties at all; they present no difficulty. The difficulty is that with parties that ought to be made parties and cannot; and I think what we ought to name is necessary parties, without committing ourselves to that delicate question whether they are necessary or indispensable.

Dean Clark. Yes, that is my view now.

Mr. Dobie. But you cannot dispense with the indispensable. (Laughter.) But I agree with everything you have said, that since you cannot dispense with the indispensable, you do not have to make provision for it.

Dean Clark. Yes.

Mr. Morgan. I suppose there are cases where you could just make a decree or judgment as between A and B, without necessarily affecting the rights of C, and that would be indispensable, would it? ~~Could you~~ We do not need to say anything about it; if it is a matter of substantive law, they could not get on without it.

Dean Clark. That is the way I would rather leave it. You do not have to say "indispensable parties", because the court can take care of it. But in answer to a question, I am not quite sure that there are cases.

Mr. Morgan. I do not know.

Mr. Dobie. What kind of cases are indispensable?

Dean Clark. I do not mean legally indispensable.

Mr. Dobie. Well, I can read you a few cases of the Supreme Court such as Williams vs. Bankhead, where A, B and C were all separately claiming an entire fund. They are indispensable.

Dean Clark. No--I thought that would be the case.

Mr. Dobie. Suppose you and Major Tolman and Mr. Mitchell claimed all of this fund. The decree is necessarily for Mr. Mitchell and Major Tolman and you, all of you, and no one else. That is the Supreme Court, and not Mr. Dobie speaking.

Dean Clark. Why does that need to be indispensable? Of course, if it is a judgment against all defendants, it should, but why can it not be a judgment between A and B?

Mr. Lemann. We cannot settle that question as to whether there ought to be indispensable parties. The Supreme Court has held that there are indispensable parties, and I cannot think of any cases where that should be so.

Mr. Dobie. A corporation in a suit by a stockholder.

Mr. Lemann. It is true that it has been decided that there is such a thing as indispensable parties, and it is beyond our province to discuss whether that is well taken or not. I agree with you that we ought to make it plain, in the interest of clarity, and I do not know whether I am sympathetic with Dean Clark's viewpoint; but we ought to make this ~~plaintiffs~~ necessary but not indispensable.

Mr. Mitchell. I rather shrank from approving a rule

which, on its face, was a rule which provided for giving the court power to grant a judgment against a party who was not there and your rule will so read?

Mr. Lemann. That is true.

Mr. Mitchell. But in a party's absence, it is impossible to render a decree against him. Otherwise, the court may render a judgment against a party who is not there, and it seems to me it is a mere matter of making your rule not to appear to go further than you can. It will not go further, I admit, even if you do not, but it will look as if you are trying to do so. That is all I had in mind.

Mr. Morgan. Do you think that is true, Mr. Chairman, for making this statement in the light of the precedents of the United States Supreme Court, which decisions distinguish between necessary and indispensable parties?

Mr. Lemann. Well, is there any objection to saying indispensable except wasting three words?

Mr. Donworth. In an action to foreclose a mortgage, all of the courts hold that the original holder of it is an indispensable party to the foreclosure of the mortgage.

Mr. Dobie. A suit by a stockholder to enforce, in the name of the corporation, is another one that they have insisted upon--the corporation is indispensable there. You know those cases, and I agree that we cannot touch that.

Mr. Lemann. I move that the reporter be instructed to

state after the word "necessary," the words "but not indispensable."

Mr. Olney. But when you are dealing with"necessary, indispensable or proper partiesy you will need really great study to properly word it.

Mr. Donworth. Why is it not met by striking out the parenthesis and striking out the words "or proper" above? I am saying that because no rule of court, so far as I am aware, has used the word "indispensable." The courts have worked that out as substantive law, and if you strike out "or proper" above and strike out the parenthesis, there is no trouble.

Mr. Olney. There is no difference between a necessary party and an indispensable party; there should not be.

Mr. DDobie. There should not be, but there is under the Supreme Court terminology.

Mr. Olney. That may be; but we do not want to work up phrases and then leave it to the Supreme Court. The word "necessary" means indispensable, and there is no difference between them in the English language.

Mr. Mitchell. Why not use the two words "proper" on the one had and "indispensable" on the other and leave out "necessary."

Mr. Olney; If you say there "indispensable", then they will proceed anyhow--

Dean Clark (Interposing). I think Mr. Donworth's sug-

gestion is that there is a definite ~~term~~ principle back of the law, and I regret to do that anyway. You see we already have the statute, of 28 U.S.C., 111, whatever that may be.

Mr. Morgan. Yes.

Dean Clark. And I hate to put in anything which restricts that statute. That statute will, perhaps, be construed more broadly than it has.

Mr. Dobie. Certainly you want to go as far as the Equity rule and the statute combined?

Dean Clark. Yes. If we limit this rule to the proper parties we have certainly gone back to the Equity rules.

Mr. Olney. I cannot imagine any case, excepting a case in rem in which a party is generally indispensable.

Dean Clark. I cannot either.

Mr. Olney. But we feel that we want to be very careful about this, because we may go further than we have any idea of doing and provide something that will get us into trouble.

Dean Clark. Well, if this is the holding with reference to the use of the term "necessary parties", we are not doing any violence to the language of the Supreme Court if we use that expression.

Mr. Mitchell. The thing that occurs to me is that if you use "necessary", and say that that does not mean what it says, you have got to follow it with "indispensable" in order to--

Mr. Dobie(Interposing). I agree with Mr. Olney that it is a hideously bad term, but we cannot help it.

Mr. Olney. The Supreme Court uses this terminology and if we want to take a shot at that , very well.

Mr. Lemann. There is a difference in law between "necessary " and "indispensable." Judge Olney thinks not; he thinks they mean the same thing.

Mr. Dodge. I think they mean the same thing.

Mr. Donworth. Let us remember that in this last sentence we are simply dealing with an allegation to be inserted in the complaint.

Mr. Lemann. The second sentence is what is important.

Dean Clark. In the second sentence I wanted to take out the words "or proper."

Mr. Wickersham. In both places?

Mr. Dobie. I would eliminate that.

Dean Clark. And also the reference to "proper parties" in the last sentence.

Mr. Loftin. The last or next to the last.

Mr. Morgan. The last.

Mr. Olney. I can see no reason why, if the judgment is really to have any effect between those who are actual parties to the litigation, it should not proceed, although there may be others who really should be parties to the litigation who cannot be brought in without the permission of the

court. But if there is a case wherein the court simply cannot proceed effectively even as between those who are before it, we ought not to provide a rule which would apparently permit the court to do so and result in an ~~interlocutory~~ nugatory or harmful decree or judgment.

Mr. Wickersham. of course, you cannot directly affect the rights of a party who ought to have been brought in, but you can certainly prejudice them if the court goes ahead and makes a decree that really affects his rights, so that he could come before another court and say, "I was not a party." And I wonder whether we are not up against that ~~decision~~ situation. I do not believe in attempting to do the improper thing by adjudicating his rights in his absence.

Mr. Mitchell. I think we are all agreed about that.

Mr. Wickersham. Well, certainly the word "necessary" has acquired a pretty settled meaning.

Mr. Dobie. I think it has. It is ~~unheeded~~, but an unhappy one ~~xxxy~~ fairly well crystallized.

Mr. Wickersham. But everybody uses the phrase.

Mr. Dobie. The Supreme Court has used it again and again.

Mr. Wickersham. Yes.

Mr. Lemann. Do all courts use it?

Mr. Dobie. I do not know, about the State courts, but the Federal courts do.

Mr. Lemann. All that I know do.

Mr. Olney. The courts constantly use names and expressions that are perfectly opposite to the case ~~to the case~~ before them, but you take it in connection with another case, and it may not be.

Dean Clark. My thought is about the same as Major Tolman expressed. I want to go as far affirmatively as I think we are entitled to go. I do not want to stand in the way of the Supreme Court going further, as I have a feeling that they are going to go if the question comes up. To put it the other way, if we do not go as far as applying this rule to "necessary parties," we are limiting the present law, and that is the worst thing that we can do. If we go as far as "necessary," we go as far as the court has nowgone; and my guess is that the court is probably going eventually to make "indispensable" and "necessary" the same thing, as they ought to be, and we are not saying anything about that.

Mr. Wickersham. If we used a word that they have used right along from time immemorial, the court can give as wide or as narrow a content to it as it chooses. But that is a well settled term. I do not know why we should start a new term.

Dean Clark. It would not be absolutely impossible to accept Mr. Lemann's suggestion of adding "indispensable"; but personally I do not want to put that in, because I do not want to suggest bad ideas to anybody.

Mr. Donworth. Well, you never will get the Federal court to hold that if my neighbor has given me a mortgage on his home, and I foreclose that mortgage, I can omit my neighbor, the owner of the fee, merely because there are five or six subquent lienors who live in Idaho.

Mr. Mitchell. We all agree to that. My point was that we ought not apparently to say so.

Mr. Lemann. That is the same point I was making.

Dean Clark. That case is one of those little examples that do not mean anything in connection with this case; ~~other~~ as to ~~than~~ "indispensable parties," how can you find the amount of the judgment when the defendant is not there? It is a case of the proper issue not being presented without the party. I do not think you need any particular reference to "indispensable parties" to show that you cannot find the amount due on a mortgage without the presence of the person who owes the money.

Mr. Dodge. It looks to me as if the court tried to avoid the use of the word "necessary" as to a party. Why can we not do the same thing, and speak of "proper party"?

Mr. Dobie. That is worse; "proper" is worse.

Mr. Dodge. The Supreme Court uses it in a number of cases.

Mr. Dobie. I know they do; but "proper" is between the "formal" and "necessary." But I think, as Dean Clark says, that "necessary" is a stronger word than "proper." And I

should think we certainly ought to go as far as the Equity rule and the statute combined. I think if we strike out "or" and that stuff in parenthesis, we are all right.

Mr. Dodge. In the former Equity rules, they sought to avoid the anomalous statement that a necessary party need not be a party, and they succeeded in avoiding that all the way through.

Dean Clark. Well, of course, if you apply the meaning of the word "proper" as we use it generally--that is, if you do not try to give it a Federal significance, the rule means absolutely nothing, because in ordinary course you do not need proper parties anyway. It is generally a matter of your choice.

Prof. Sunderland. Yes, it is a matter for the plaintiff.

Dean Clark. Yes, and you ask plaintiff settle the question.

Prof. Sunderland. The court, of course, will have something to say about it.

Dean Clark. The court will have something to say about, but generally, under the code, the defendant joins with the plaintiff in that class of case.

Mr. Dobie. To get things to a head, I move that this rule be adopted, omitting the words "or proper" in the fourth line~~xxxxxxxxxxxxxxxxx~~ from the bottom and striking out the parenthesis "(in the case of proper parties)" in next to the last line.

Mr. Donworth. Let us get that again. In the fourth line you strike out "or proper."

Mr. Dobie. Yes.

Mr. Morgan. And in the fourth line from the bottom you strike out "or proper".

Mr. Donworth. The fourth line from the bottom.

Mr. Dobie. Yes.

Mr. Tolman. Did you not mention the material in parenthesis?

Mr. Dobie. Yes-- "(in the case of proper parties)."

Mr. Donworth. Strike out that parenthessis. The same thing?

Mr. Morgan. The same thing you suggested before.

Mr. Dobie. Strike out that in parenthesis.

Mr. Loftin. I second the motion.

Mr. Olney. May I r ad this leading authority?

"An indispensable party is one without whom the suit cannot proceed, and one in whose absence the court could not enter a decree. His relation to the suit is so direct and vital that without him no decree could be entered determining the rights of the parties. Even in his absence the decree would affect his interest. It is therefore necessary that he be before the court. There can be no dispensing with indispensable parties."

Now, here are the illustrations, and they are of distinct value:

"Thus if A, B and C, each claim an entire fund, they are all indispensable parties to a suit concerning the disposition of the fund; and the award of any part of the fund to one is necessarily a decision as to this part against the other two. In a suit to rescind an entire and indivisible contract, we will say, on the ground of fraud, all the parties to this contract were held to be indispensable."

"How, can you rescind a contract where there were two parties on the other side, and rescind as against only one of them, if it is an indivisible contract. So, in a partition suit, all the parties in joint interest were declared to be indispensable parties; the court could not give a decision for the partition of property unless all the parties are there. A corporation was held indispensable in a suit by a stockholder against a third party. The person in possession is held to be indispensable in suits to recover possession of real or personal property.

"How can you get a judgment in a suit for possession, unless you have before you the man who is in possession. An insurance company sued a man to cancel a policy to be paid to his wife if living, and otherwise to his children. Both the wife and the children were held indispensable parties. It is again a question of an indivisible contract."

It means that there are cases in which for the court

to render a judgment at all, you have got to have all of the parties before you.

Now, that being so, we can in this case go this far, that we can provide here that the court may proceed, except in those cases where the judgment, or for the effect of the judgment, there have got to be other parties before the court, where the judgment is really nugatory.

Mr. Mitchell. We are agreed to that. I think our trouble is here: Here is the word "necessary." In ordinary usage the word "necessary" means what it says; it is the same thing as "indispensable." But the courts have given a secondary meaning to "necessary" in this connection, and they have used it as applying to a class of parties who are not indispensable, whose presence would ordinarily be exacted. Now, how are we going to phrase it so as to cover that?

Mr. Olney. I am pointing out that if we simply use the expression "necessary" here, the court and litigants are going to consider also the case of "indispensable parties." In other words, we authorize the court go go ahead, even though the parties that are absent are necessary parties. Now, if we do that without defining and making a distinction ourselves between "necessary" and "indispensable", we are going to give an opening for litigation and trouble.

Mr. Dobie. Do you want to add the words "necessary but not indispensable"?

Mr. Olney. That might cover it.

Mr. Dobie. It is a hideous terminology.

Mr. Olney. Yes, it is.

Dean Clark. Did you ascribe that work to me that you are reading?. (Laughter.)

Mr. Olney. No.

Dean Clark. I was just going to disclaim that Supreme honor.

Mr. Mitchell. Instead of saying "necessary or proper", we could simply say a person who ordinarily should be a party and is not a party, the court can proceed to render judgment to the parties who are there, and so on.

Mr. Olney. Mr. Chairman, as I see it, we are all agreed upon the principle here. We want to go just as far as the court can really go, but there are certain limitations which we cannot overcome ourselves, and the Supreme Court itself could not overcome.

Mr. Mitchell. And you do not want to appear to be trying to do so.

Mr. Olney. No, we do not want to appear to be trying to do so. And it seems to me that we cannot sit here in this Committee and be certain that we formulate a rule that covers as difficult a question as that as to "proper". And I suggest that it simply go back to the draftsman for a little reconsideration of the subject, in view of this discussion, and see if

particular point cannot be covered, so that the lawyer that picks up the rule and the judge that picks it up and reads it, will see on its face just exactly what it means.

Mr. Donworth. Would not the thought be met by inserting these words: Take in the middle sentence, it says: "But the judgment rendered therein shall be without prejudice to the rights of the absent parties," and then it can go on and say, "unless indispensable, the judgment shall not count as to them."

Mr. Olney. Well, you are going to have an awful time with the litigants and the courts as to the difference between indispensable and necessary.

Dean Clark. I should prefer not to have it come back without some suggestion. There is not much that I can do except to come back to you and say, "In February I think as I did in November." Now, there is not any question about the fact that the Supreme Court has made a distinction between "necessary" and "indispensable." Some of the Federal courts have suggested that the terms "necessary" and "indispensable" have the same meaning. But nevertheless, the distinction has been put somewhat like this: "Where necessary parties are so interested in the controversy that they should be made parties in order to enable complete justice to be done, yet if they are separable from the rest, they are not indispensable parties." Now, I do not know how the court can proceed.

Mr. Mitchell. That is in line with my suggestion to

strike out the word "necessary" and say "parties that normally should be joined;" that the court can proceed and render judgment against the parties before it, provided the absent parties are not completely indispensable to the granting of the relief sought." And then you will avoid the use of the word "necessary." They have not used it in the Equity rule. I concede that the courts have given it a meaning that is apparently inconsistent with the ordinary use of the word "necessary," and why should we confuse the lawyers about it? I doubt if one lawyer in 50 who brings a suit is familiar with the decision distinguishing between "necessary" and "indispensable." And we use the word, and if we do not accept "indispensable parties" they do not know what we are talking about.

Mr. Cherry. May I ask if it is not likely that, in whatever form these rules come out, there will be published in the professional magazines some notes of this Committee. I wonder if it would not be the place of a note to state that.

Dean Clark. I want somebody to raise that question.

Mr. Cherry. I raise it only because I think it pertinent here.

Dean Clark. As to what we should have in the way of annotations; but it seems to me that we should have at least a reasonable amount. But I wanted to get the judgment of the Committee somewhat on that point.

Mr. Morgan. Mr. Chairman, how are you going to construe

your phraseology "~~he~~ who normally should be made parties"? It seems to me just as bad.

Mr. Mitchell. Well, take the Equity rule.

Mr. Morgan. You say "normally should be made parties"--I do not know what that means.

Mr. Mitchell. I did not mean to do any more than to impress the idea that it would avoid the word "necessary."

Mr. Olney. This expression would cover it, "parties whose appearance before the court would be required for a complete determination of the controversy."

Mr. Morgan. No.

Mr. Donworth. No; where the controversy is divisble, they do go on and determine what they can; so far as it is indivisible--

Mr. Olney (Interposing). No; that would cover both proper and necessary and all the rest of it--the expression that I have used. Where he uses the expression "normally", it was intended to cover all kinds of parties who might be proper parties.

Mr. Mitchell. Well, the question before us, the one on which the motion has been made, is ~~xxx~~ to adopt this rule, with those omissions; and the opposit on suggests that the matter be referred back to the Committee and let them s truggle with it a little further to see if they can phrase it as to meet this difficulty and the use of the word "necessary."

Mr. Donworth. Should we not make some progress? So that, tentatively, I offer this motion: That the motion of Mr. Dobie, I think it was, striking out "or proper" be supplemented by adding after the word "within the district", just below the middle of the page, the words "or indispensable," with the idea that when we get it revised, we will have to reconsider, perhaps, and non-joinder of parties who are not inhabitants of nor found within the district shall not constitute a matter of abatement or objection to the suit."

Mr. Dobie. Would you repeat that again, in the last sentence.

Mr. Donworth. No, I do not think it is necessary, because this relates only to the allegation in the complaint.

Mr. Mitchell. Is there a second to the amendment?

Mr. Dobie. I am willing to accept that, because I think that has an advantage, because it does say that we are in this rule making a distinction between "necessary" and "indispensable."

Mr. Mitchell. That is thepoint.

Mr. Doge. This is not a question of pleading, it is a question of parties.

Mr. Donworth. The last sentence is a question of pleading.

Mr. Dodge. It is a question of parties.

Mr. Mitchell. The last paragraph is a wuestion of parties.

Mr. Dodge. The last paragra ph is a question of parties.

Mr. Mitchell. Yes.

Mr. Tolman. Did Mr. Donworth move to s trike out the last paragraph?

Mr. Mitchell. No, Mr. Dobie moved to strike out the words "or proper" in the fourth line from the bottom and from the top, and also the matter in parenthesis; and the amendment of Mr. Donworth was to add after the words "within the district", just below the middle of the page, the words "unless indispensable."

Mr. Dobie. Yes, I think that has an advantage, because it shows the two words are used in two different senses

Mr. Donworth. In the sixth fifth line from the bottom.

Mr. Wickersham. "Unless indispensable."

Mr. Donworth. Yes.

Mr. Wickersham. I see.

Mr. Olney. I think it had better go in after the beginning of the sentence.

Mr. Wickersham. We understand that, but t he average lawyer might read that rule as meaning three things--"necessary parties" "indispensable parties" and "proper parties."

Mr. Dobie. No, we left that out.

Mr. Wickersham. So far as it would meet our thought, I think it is all right, but as to the average lawyer--

Mr. Mitchell (Interposing). Let us let the subcommitte chew it over and try to think of something better and not close our minds against their suggestions. What is your pleasure on that amended motion?

(A vote was taken and the motion as amended was unanimously adop

Dean Clark. May I ask a further question. I am wonde ing if I ought not to insert in that sentence: "but when such persons are neither inhabitants are nor found within the distri in which the action is brought"--ought I not to put this in, to tie it up with the last sentence: "or their joinder would oust the jurisdiction of the court as to the parties before it."Now, you see in the last sentence I have more or less set that up by implication but not directly.

Mr. Dobie. That was my point at the start. I am in favor of saying everything directly that you can.

Mr. Dodge. Is it the sense of the meeting, Mr. Chairman, that the phrase "necessary parties" must, ~~if it is~~ must continue to be used in the Supreme Court, apparently, still, without using it in the Equity rules--your suggestion that the word "proper" be used, as they did, has not been definitely passed on here, has it?

Mr. Mitchell. No, we made some changes in this which we recognize may not be satisfactory, but we made an attempt to refer the thing back to the drafting committee for further suggestion.

Mr. Dobie. I think a note there would be very helpful. I think that is one of those cases in which you just put a note there.

Mr. Mitchell. You could put that note in yourself.

Dean Clark. All right.

Mr. Mitchell. Now, we go back to Rule 26.

Mr. Dodge. I should like to have the reporter consider whether the terminology adopted in Equity Rule 39 cannot be safely adopted here, to avoid the technical phrase "necessary parties."

Dean Clark. I am worried about that. It seems to me that the expression is "proper parties". As a matter of fact, I would prefer really to accept this rule, although I will say frankly that I think it goes further than anything else.

Mr. Mitchell. Well, you can consider that.

Dean Clark. Equity Rule 39 has stood for 30 years and has not caused trouble.

Dean Clark. All this discussion by parties in Supreme Court cases cause trouble.

Mr. Dodge. Was that under the Equity rules?

Dean Clark. Yes. I have a series of cases in my book, going through the 1920s and also some late ones.

Mr. Mitchell. Well, we are on Rule 26.

Mr. Dodge. I want to ask one other question, Mr. Chairman. Have we covered all of the points that are covered by

Equity rules just preceding Rulex 44--that is, Rules 40, 41, 42 43 and 44?

Dean Clark. We have left out certain of the Equity rules I have a note on all of them. You will note that at the end of my Rule 44, I have said:

"In view of this and other rules on joinder of parties herein contained, it is believed that Equity Rules 40, 41, 42, 43 and 44 are unnecessary, and that Equity Rule 41 should also be omitted as unnecessary as well as misleading. Equity Rule 40 is "nominal parties." Equity Rule 41 is "suits to execute trusts, of will,-heir as party." Equity Rule 42 is "joint and several demands". Equity Rule 43 is "defects of parties"--resisting objections." Equity Rule 44 is "defect of parties-tardy objection." It seemed to us that we had covered all thos things.

Mr. Mitchell. Have you covered the questions to when you shall raise the question of defect of parties?

Dean Clark. Yes.

Mr. Mitchell. That is that clause that these shall be deemed pleadings. (Laughter.)

Dean Clark. It may be. I will have to watch that.

Mr. Mitchell. Well, you have that in mind.

Dean Clark. Oh, yes. The Committee may want to go over these rules that I have omitted and raise any question you like after looking them over. Under Equity Rule 41 in

particular, the heir at law need not be made a party. That seems a curious thing; but when you look at the history of it it comes from the English chancery practice, where they have probate power, and it had no principle at all.

Mr. Mitchell. Mr. Hammond has raised the question as to whether the rules as they now stand provide time limits for raising objections, and I merely suggest that to you.

Dean Clark. I thought I had covered it when the motion was a pleading, but now that the motion is here or the suggestion that we do not know what it is, perhaps we will have to do something new about it.

Mr. Lemann. I thought we were now to consider that last sentence in the second paragraph, as to when you should set up various objections. I think that point is not merely a point as to parties, but various other points. This says, "amotion"--well, this motion presents that point. I suppose that means one motion. I had an equity suit where the party presented a motion to dismiss after a motion to dismiss. I could not find that anybody had ever tried to present a motion to dismiss where it said you could not do it. And he did it. (Laughter.) If his motion to dismiss is denied, and files his answer in five days, and another motion to dismiss, there is no express language in the rule saying he could not do it.

Mr. Morgan. You can make a motion to strike a motion to strike.

Mr. Olney. In my State it is by demurrer.

Mr. Mitchell. The reporter has that to check on.

Mr. Donworth. I think the rule I drew yesterday covers that. You must answer the summons within 20 days. The motion may be made, but if frivolous the court may impose terms.

Dean Clark. Yes. Now, Mr. Lemann's point, which is a little additional, as to the number of days for pleading, is one thing, and your question is one of the inclusive nature of the motion. I want to say frankly that I would like to make these objecting motions all inclusive. That is one reason why I started out to make the motion that on this rule your answer is the all-inclusive document. Then, as I indicated when we discussed this before, I thought some people might consider that too harsh, and I put in this alternative, of which I am ashamed; but nevertheless, it was yielding to necessity--

Mr. Loftin (Interposing). Is it not a good thing on the question of jurisdiction you can dispose of the case on a preliminary motion?

Dean Clark. Well, that is true, but that being so, why should not that motion apply to all objections except--

Mr. Morgan (Interposing). You have a rule to that effect in Connecticut, that a demurrer, for example, must include all grounds of attack--

Dean Clark (Interposing). We did have it, but when they revised the book they forgot and left it out.

Mr. Mitchell. You could make that optional amendment

prior to "include all", so as to include dilatory motions. Some of them are motions that could be heard on affidavit, and in some of them I am told that the party is entitled to a trial by jury. Now, if you make it all-inclusive, the point might be made that where the right to trial by jury exists, you will have to hold a separate jury trial on a preliminary motion, and that should be avoided, unless you hve covered it by the phrase that the court may immediately proceed to hearing and decision.

Dean Clark. Now, I suggest that this particular question might be passed until we consider further just what the motion is going to be. Afterward we have decided that, we can decide its omnibus character. Now, I sent around ~~there have been~~ some suggested substitutes for the last paragraph. There are two alternatives. The first is an alternative which I consider as broad as my original statement, but avoiding the use of that word, which seemed to be a fighting word, namely, "defense", and using something else, leaving that out. Now, I take it on that that the law now is that very occasionally a jury trial might be claimed on that matter presented by motion on certain limited things, notably on such things as that involving venue where the defendant lives. I think, however, that that would be so very occasional that it probably would not cause much trouble. The times when you would actually have that sort of preliminary jury trial would be very occasional indeed.

The alternative I have suggested, however, would limit this motion very decidedly, and may be that would be a good thing. That is at the end of the document I sent around. That is to provide that this preliminary motion will be merely to affect the summons and prompt service. In that case, you avoid the necessity of jury trial, and you would have limited this preliminary motion to one very definite and limited thing, and everything else would have to go in the answer, except this little thing. So that the first form I took was: "When the defendant desires to present matters to prevent further proceedings against him which do not go to the merits, he may present such matters by motion in advance of his answer and ask a hearing thereon," etc. Your alternative is that the defendant may, in lieu of/and in advance of the answer, move with regard to the summons and proper service, and ask for a further hearing.

Mr. Mitchell. I like thebroader phrasing better. If it turns out that some of them are triable by jury, the court may, in its discretion, say that they should be dealt with at the trial, and that would solve the whole problem.

Dean Clark. Yes.

Mr. Dodge. Well, I have tried a case for three days on the question whether the corporation defendant was doing business in the State. It is rather unusual to have a trial upon a motion. That question, whether the defendant is a resident

of the district, also might involve some days trial. It is not a hearing on a motion. It is a trial of a question of fact.

Dean Clark. Well, I do not see that it presents any difficulty. The facts are presented, or the issue is raised in that way, and the Chairman suggests, the court might say, "This is an important matter and we are not going to proceed to a hearing on this.

Mr. Dodge. It would never go on the motion list. It would go on the trial list of the court.

Dean Clark. Yes.

Mr. Mitchell. Well, there is a clause here in the original broad rule: "Whereupon the court, in like manner, as set forth, may proceed to a hearing and decision of such evidence." Now, when the matter comes before him, if he finds that there is going to be a trial with a lot of witnesses, he will say, "Well, we will put that off until the trial on the merits." And if he finds the issue simple, he may, in his discretion, proceed as a trial or a hearing on it immediately.

Mr. Donworth. Mr. Chairman, it seems to me that there is a very well thought out way here. We have just 50 years of experience; and I hesitate to see something which is said to be just as good or better introduced in lieu of it. Novelty may seem to be an improvement, but you lose the benefit of all the decisions that have been made. Now, here is the practice

that I understand has prevailed from time immemorial, and this would consist in leaving the rule as written, but adding this: "Any objection the defendant may raise concerning the sufficiency of the service of process upon him, or on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, an shall be decided on preliminary hearing." Now, I have before me the case of Quality vs. Mining News. I will not read it. But we know the facts, as they have been mentioned here. The Mining News Co. claimed that they had never been served with process, although its opponent had. What did it do? It was a State court proceeding. It filed a petition for removal, coupled with the fact that it presented it and made a special appearance. That is all it did in the State court. When the matter got to the Federal court, then it made a special appearance and moved to quash the service of summons. One of the chief points in the case was whether a petition for removal constituted a general appearance, so that a special appearance could not be made on that motion. The court held that there was nothing in that, and that the method of raising the objection was proper.

There is here another case that is somewhat typical of probably 50, where the courts held that, although the word "venue" is not in the federal statute, ~~when~~ the immunity to ~~venue~~ suit, other than a certain district where one is an inhabitant

etc., is really a venue question, and unless seasonably objected to byspecial appearance or motion, it is waived, and they have held--here is a case where a man is answering to the merits, and by the permission of the court, he withdrew his answer, and then put in a special appearance, on the ground of the wrong district, and the court held that it was too late; that by withdrawing his answer he could not do away with the effect of it, and so that he was liable to suit in that district. Now, it is rare, although, as Mr. Dodge says, it occasionally happens, that there is a trial at all upon those matters. You may have affidavits, etc., but oftentimes--for instance, the wrong district may appear upon the face of the complaint. If often does. And all the defendant has to do is to say "I ~~am~~ object" on his special appearance. In the same way, suppose the return of service of summons shows delivery of the copy to the man next door, why, then, he rules that it is quashed. It seems to me, gentlemen, that the bar all over the country knows that a special appearance on a motion is the way to raise those two points. They have been thoroughly accustomed to it, and to compel them to go through some other process that is entirely novel and I do not think as good or as effective, or as simple to solve this question in limine--I do not think it is right to depart from this well established practiced.

Dean Clark. Well, of course, there is not a very great

difference after all between what Mr. Donworth has suggested and what is suggested here. The only difference I thought really was--well, there are two differences. One was a distinct specification of the things that were to be raised by motion, which was what my second alternative did, although we put in other things; and the other was that this matter could not be raised by answer. I think those were the only two.

Mr. Morgan. Well, it certainly is true that in most of the code States it can be raised by answer.

Dean Clark. It can be raised by answer; that is the proper place to raise it, and I must be say I should be surprised if that is not the case in the Washington State practice.

Mr. Donworth. That is not done there. The question of traversing matter alleged, even though it be in abatement, for instance, like the appointment of an executor or guardian--that matter in abatement must be raised by answer; but the question of the sufficiency of the service on the defendant I have never known in any court to be raised by answer.

Mr. Dodge. It is strictly in accordance with the rule that the defense is that the allegaton of the complaint ~~a/m~~ that the defendant is an inhabitant of the district is not true, and that question is ordinarily raised, in the practice I am familiar with, by an answer in abatement, which

raises that question of fact; and I do not see how it can be dealt with as a mere matter of the question of service.

Mr. Donworth. That is two different questions. The question of service is one thing; the question of venue is another.

Mr. Loftin. What is the objection to including in the answer ~~that~~ when the defendant desiresto follow that course where he has the option of doing it the other way at his discretion?

Mr. Donworth. I do not understand this rule[redacted] gives him that option. But it is for the interest of both sides not to prepare your case--sometimes it costs a man $1000, just the preparation of the case, when he is raising the point whether he is in court or not.

Mr. Loftin. The defendant may not think very much of that, but he could include it in his answer; but if he thought it was really something that would end the case, he could present it in his motion.

Mr. Mitchell. Suppose he puts both in and went to trial, and as the trial proceeded, he figured that he could come in on the merits, and waive the other point, and then he found that he was not going to win on the merits, then he would insist on the point. It sort of gives the defendant the position where he can get in, and if judgment is going to be his way he can submit to the jurisdiction; if not, he can get out from under.

Mr. Morgan. That is the way it is with a motion.

Mr. Wickersham. Oh, no; it goes in the motion first.

Mr. Morgan. I know, but if it goes against him, he can appeal in most States. You have a practice whereby you can appeal from all sorts of orders.

Mr. Wickersham. That is in the State practice.

Mr. Mitchell. That is not quite the same. You have in mind an appeal.

Mr. Morgan. No, I have in mind if you are ruled against on your jurisdictional point, then can go on on the merits, and then in the appellate court you can try them both.

Mr. Mitchell. But suppose your jurisdictional point is good, and you know you can get out, and you are willing to give them a trial on the merits and see which way the cat jumps.

Mr. Morgan. All right; but I do not see that it makes any difference whether it is in your answer or motion. Now, where you try a case where there is a plea in abatement, and a plea on the merits at the same time, and your provision is such that there is no waiver if you are trying them both before the jury, you can get separate findings on each defense. That is what the Federal court said is the proper way to do.

Mr. Mitchell. If he puts it in the motion.

Mr. Morgan. You can put it in the motion first. Are you intending that we ought to have a motion as the exclusive

way of doing it?

Mr. Mitchell. I was just raising the point of giving the option of putting it in the motion or answer--a thing like an objection to the service.

Mr. Morgan. Yes.

Mr. Mitchell. Why, the defendant could say, "Well, I think my process point is good, but I am willing to go along and see how the case goes on the merits. And if the court is friendly to me, I will forget the process point, but if it is unfriendly I will insist upon the process point." Now, if you move in advance of the answer to set aside the service, and waive the point, he must make up his mind then and there whether he is going to insist on that point; and he makes the motion, and it is a good one, and the case is dismissed, but he is not given his option to juggle with the result. So that I think there are some of these suits, so far as the motion to set aside is concerned--where he ought to be forced to make his selection before action.

Mr. Cherry. Could you not enforce that anyway, whether he has put in a motion or an answer, because of that provision ~~XXXX~~ this we have already discussed by which the court may order on its own motion, or on the adversary's motion, the separate hearing of one of those matters, and that is the kind of matter that would be heard first, I suppose, whether in the motion or the answer.

Mr. Mitchell. That probably would solve it.

Mr. Cherry. I was wondering whether it would solve it, but I think it would take care of the supposition of the defendant juggling with it. He could only do that if the plaintiff did not protest and allowed it.

Mr. Wickersham. Well, if a man is improperly served, and the court has not some jurisdiction over him, ought not that question to be settled at once? Why should the court be burdened with the consideration of a case, perhaps going as far as the trial, when he has not proper jurisdiction over the defendant? It seems to me that point ought to be open, at least, to the defendant to make at the very out set. Why should he be put to the expense of preparing for trial, when he is not there in court?

Mr. Lemann. I understand that in this last paragraph, by motion that you would have to put in that motion and everything else that you wanted to present against the plaintiff.

Dean Clark. That point is not decided yet. I suggested that that was desirable, but that is another point.

Mr. Lemann. Well, you either do that or else give him no opportunity to present in advance of the answer any other point.

Dean Clark. Certainly, I do not think we ought to have more than one of these preliminary proceedings.

Mr. Lemann. I am not willing to have cases dragged out,

but I have had one or two extraordinary experiences, where it was outside the district. Some years ago the e was a suit in New Orleans in the Federal court, and then theplaintiff decided to sue them in New York for $1,000,000, and he sued them in New York, on the ground that they were doing business in New York, but they had correspondents in New York and they had collateral in New York and we went in and pleaded to the jurisdiction. It was in the Federal court, and the case went to the Supreme Court of the United States on the jurisdictional point, and it was held that we were not doing business in New York. We had to try the question of fact, and my recollection was that there was a fine imposed upon him. Now, under the rules that case, I suppose, is typical of many cases that might arise. Under the proposed rules, we could not raise that jurisdictional question without raisin all the other questions that we might want to raise in respect to that complaint. Of course, we did not know anything about the New York practice, we did not know anything about the sufficiency of the complaint under the New York law, and did not want to mess with any of it. We wanted to know whether we had to respond to the New York judge or not, and we wanted that decided. There was no question of delay about it. We wanted to know if we had to litigate in New York, and I think we were entitled to have that decided.

Mr. Mitchell. You say you could not do that under the

proposed rules?

Mr. Lemann. As I understand the last paragraph the way it now stands, we could have made a motion, and then considered any other dilatory objection that we wanted to make to that complaint. We are not abolishing the dilatory objections.

Mr. Morgan. But you are discouraging them. ~~We wi~~

Mr. Lemann. We were, therefore, called upon to consider that situation under the New York law, the sufficiency of that plea, when from our standpo nt it was outrageous that there should be any attempt to haul us into the New York court. I think it boils down to that. Is the danger of abuse that you gentlemen think the ~~petitioners~~ practitioners are predisposed to increased by delay so greatly from this particular question--I am not talking now about technical defects in the summons, whether it is properly made out, or whether the return is properly made; but is the danger of delay or abuse from permitting the defendant to challenge the jurisdiction of the court on that alone, wit out using a s ingle other defense, so great that you are going to deprive him of that and to say that "You cannot do that; you must do some other things at the same time."

Mr. Wickersham. May I ask about this substitute paragraph, where it says in the last paragraph--

Mr. Lemann (Interposing). I agree to that. I think the plaintiff ought to know whether is in or not.

Mr. Wickersham. Yes.

Mr. Lemann. I said yesterday that I think it is often to the advantage of the plaintiff to have the defendant state his position right, whether he is in court or out of court. And very often, by having such a rule, you give the plaintiff the advantage of having the defendant waive the point. But I would say it must be heard in three days or 24 hours. You can make the delay as short as you want, but I do think it is fundamentally important to give the defendant the right to raise that question of whether he is subject to the jurisdiction of that court.

Dean Clark. I think one of the defects of civil jurisdiction has been right here, on the possibility of dilatory pleadings. It goes back to the days of the common law, when they were afraid to examine the defendant in rebuttal, and he had lots of excuses that he could make to postpone his answer. This seems to me to be just a throwback in the experience genenerally to the old days of the common law system. In England it is customary to try these matters all together at one time, so that the defendants cannot successively raise these dilatory points--and it seems to me to be a great mistake to go back to that old system. Here is a case where a party might long delay a trial on the merits, and in Connecticut you might do it by successive actions, motions to expunge, demurrers, etc., each one requiring a formal hearing. Now, the requirement of shortening the time does not help very

much because we all know the extensions that are allowed for filing these things, and that they are very easy to obtain, and there is not only the delay of getting the pleadings in, but there is the delay of getting them heard and decided, and when you have got a separate hearing day and decisions successively by the judge, you have a chance of delaying the case for years--and I mean years really. Now, the Supreme Court has held not very long ago that a plea to the jurisdiction for lack of service could be joined to a plea in abatement, where authorized by State practice. That is the case of the Scandinavian Insurance Co., decided in 1929.

Mr. Dobie. Any rule you make--of course that will be safeguarded; it is very obvious that, of course, if the point goes to the jurisdiction of the court as a Federal court, there is nothing we can do about it. That is always before the court as in that Mitchell case, the ticket case. So that all of this is limited to points that do not go to the jurisdiction of the court as a Federal court.

Dean Clark. I put that point in this last draft--that jurisdiction is not raised.

Mr. Olney. I think if we adopt a rule here which does not require the defendant to present promptly any objection to the service of summons upon him, you are simply going to open the door to all sorts of delay and motions that will put off the hearing on the merits. It will work just the oppo-

site to what we endeavor to provide for. The defendant should not only have the right to come in and make a motion that the service be quashed, but he should be required to do it and present it only in that way. So that that matter whether or not the court is entitled to go ahead is determined right at the outset, and if you follow any other practice you are just going to open the door.

Mr. Mitchell. Would you be satisfied with the rule as it stands, with a substitute for the last paragraph and the addition of a provision that motions as to points about the sufficiency of the service must be raised in advance?

Mr. Wickersham. Not only the sufficiency of the service, but the jurisdiction of the court. Take, for instance, the quest on of service on the corporation--

Mr. Olney (Interposing). No; one moment. I make a very sharp distinction between objections pointed to the fact that the court has not yet acquired jurisdiction of that individual defendant.

Mr. Wickersham. That is right.

Mr. Olney. And all other objections. If there is an objection to the jurisdiction of the court on general grounds, or if there is a plea in abatement or anything of that sort, they are in an entirely different category.

Mr. Mitchell. Then you include not only sufficiency of service of the summons, but suit in the proper district,

as one of those things that ought to be raised in advance.

Mr. Olney. I would not permit the defendant to raise in his answer thepoint that the summons had not been properly served. That is no place for it. When he answers he answers on the merits.

Mr. Mitchell. Would you include the point that thesuit is not in the right district?

Mr. Olney. The point that the suit is not in the right district is a matter of defense.

Mr. Morgan. No.

Mr. Mitchell. I am wondering whether the question whether the point that the defendant is sued in a district of which he is not an inhabitant is another objection that should be raised in advance along with the objection that there has not been sufficiency of service.

Mr. Olney. Let me tell you the general scheme that should prevail in cases of this character: When the objection is merely that the defendant has not been served, that objection he should be required to ~~make~~ be made at the outset and it should not be in his answer. It is a separate motion. He is not yet responsible to the court and not yet required to answer.

Mr. Mitchell. Now, is that all?

Mr. Olney. No. When it comes down to defenses or objections that the court has not jurisdiction, that it is in the wrong district, they can all be put in the answer if desired. But there should go along with the rule a provision

whereby those things can be called up in advance and heard and determined. You take this matter, for example, of a plea in bar. There ought to be a provision here whereby the court has the power to hear that in advance of anything else if it wishes to do so.

Mr. Dodge. That is there.

Mr. Dobie. That is all in there.

Mr. Olney. I am not objecting to the rule.

Mr. Mitchell. In view of that statement; and having in mind what the rule should do; having in mind those things, I should say that the rule is acceptable to you, with the substitution in the last paragraph, but with the addition of a provision that objection to the sufficiency of the service must be made in advance. Now, that is Judge Donworth's motion; only he included--he was a little broader than that; he did not limit his motion to objection to the service, but he tried to include matters of residence in the district; and Mr. Olney has raised the question that that might involve a new trial; and that is where you get.

Mr. Donworth. I would like to remind Mr. Olney that objection to the jurisdiction of the court, because there is nothing in the Fede al court giving jurisdiction--of course, that can be raised at any time. That depends upon facts that ought to be alleged in some answer. But defendants should bear in mind that the courts have held that where, under the

general power of the district court to decide cases, the authority is conferred to dispose of that case; it is held that suit in the wrong district is merely a matter of personal objection in limine. For instance, there is a suit, we will say, arising under the Federal laws against Judge Olney. Suppose he is sued in Nevada as he passes through there on the train; but bear in mind that if he answers to that suit in Nevada the case is there and he cannot get it out. If he wants to object to the district, on the ground that he is not an inhabitant, he must do so just preliminarily, as in case of service of process.

Mr. Olney. I had that case in mind. It ought to come in the same category.

Mr. Dodge. I think if that involves an allegation of pleading a question of fact, it should be a plea rather than a motion.

Mr. Wickersham. Suppose the pleading alleged that the defendant was a resident and citizen of the Eastern District of Massachusetts, for example, and that was denied by the defendant, who claimed residence in New Hampshire.

Mr. Dodge. That is a novelty to raise the question of fact in an allegation of the complaint by a mere motion.

Mr. Wickersham. Would you try that out on motion? You say that where there is a question raised by a pleading, you go to trial on that?

Mr. Dodge. Yes.

Mr. Wickersham. Now, suppose the defendant has an xx office in Boston, but lives in Concord, New Hampshire, and has always lived there. Now, if that issue can be tried out either on the pleadings, or perhaps, under this rule, by motion, if he is served in Boston--?

Mr. Dodge. If you can by motion raise a question which is a denial of the allegations of the complaint, yes.

Mr. Lemann. If you mean the paper by which you can do it, I suppose so.

Mr. Wickersham. The preliminary question of whether the court has jurisdiction over the defendant ought to be triable in advance of the pleadings on a motion.

Mr. Lemann. Why not supplement the rules by a special provision that objections of the defendant to the jurisdiction of the court must be raised immediately by a pleading--call it what you will--to be filed within a specified period, and make it short, and that must be immediately disposed of? That is the way I would put it.

Mr. Morgan. Take Mr. Wickersham's case. Suppose the defendant, in order to get diversity of citizenship here, your allegation had to be ~~he~~ true--the allegation that he was a resident of Massachusetts rather than a resident of New Hampshore. Suppose it was a citizen of New Hampshire suing the defendant as a citizen of Massachusetts, and he alleged that

he was a citizen of Massachusetts. I take it that there you could not prevent the defendant raising that point by his answer or his plea, because the court would have no power to proceed there. That is a jurisdictional question.

Mr. Lemann. Where it alleges that he is a citizen of another State when he is not?

Mr. Morgan. Yes.

Mr. Lemann. That goes to the question of jurisdiction.

Mr. Dobie. Jurisdiction as a Federal court.

Mr. Lemann. Yes.

Mr. Morgan. That is jurisdiction over the person. It is not jurisdiction that cannot be obtained by consent, but it is jurisdiction over the person.

Mr. Dobie. In the case Mr. Morgan is talking about--that is a proper allegation about diversity of citizenship. For example, that Mr. Wickersham is a citizen of Massachusetts and he lives in New Hampshire, if it is not denied, that is sufficient for entering the Federal court.

Mr. Morgan. Yes.

Mr. Dobie. But if it is denied, as Mr. Mitchell states--the Supreme Court of the United States raised it for the first time--they will get into the record if it is denied; and then of course, unless the record disposes of the question, the Supreme Court is going to dismiss the case as in the Mitchell case and the Gilman case.

Mr. Morgan. Suppose we provide that the only way to raise that would be ~~in~~ by motion in advance of trial?

Mr. Olney. That is not Mr. Lemann's suggestion, as I understand it.

Mr. Lemann. No. I am not sure that I would object, on further thought, to saying that he must do it; but I had not thought of it sufficiently up to now. I was not thinking of that kind of plea.

Mr. Wickersham. Would that be valid on the point we are speaking of here? Suppose you have shown diversity of citizenship, and as a matter of fact live in the same State, and that fact appeared on the trial --I think the court would dismiss the case.

Mr. Dobie. It would throw it out.

Mr. Mitchell. A rule that he had to make it by motion would not be worth anything.

Mr. Olney. The point that Mr. Donworth and myself had in mind relates only to objections to the jurisdiction which can be waived by the defendant.

Mr. Mitchell. Judge Donworth raised that.

Mr. Olney. And he must either waive them or insist on them, then and there.

Mr. Mitchell. Let me read Mr. Donworth's motion. He wants to add to Rule 26 this:

"Any objection that a defendant may raise concerning the

sufficiency of the s rvice of process upon him, on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, and shall be decided on preliminary hearing."

Mr. Morgan. That w ll not do. If he is not subject to suit in the district where the action is brought--that is the very case I put.

Prof. Sunderland. You put a case of diversity of citizenship.

Mr. Morgan. Yes; I put a case of diversity; and that is exactly what he is objecting to.

Mr. Mitchell. This is not diversity.

Mr. Dobie. It is not diversity; it is jurisdiction of the district court, but not jurisdiction of the District Court for the Eastern District of Massachusetts.

Mr. Lemann. Theonly objection I raised to that portion is, ~~If~~ it claimed that when you get that out of the way, the court overrules it, and I say, "I ought not to be sued in New York" and the court says, "You are wrong"--that then I have my right to have my bite at that declaration for further particulars, or any other information I want, before I file my answer.

Mr. Donworth. No, not on my motion. The only question, in my opinion, is, Is the defendant in court?

Mr. Lemann. Suppose I am in, and I say I had better get

a New York lawyer; I have to fight this case. And I get a New York lawyer, and the New York lawyer says, "This case is terrible for us, and that will not do at all." I say, "Can I not raise that?" He says, "No." And he says, "That motion has been overruled, and everything else you put in your answer."

Mr. Mitchell. And your point is whether the rule so worded would require him, in case he did make a motion to set aside the service, to not only include that but put in a further dilatory motion?

Mr. Lemann. In advance, yes.

Mr. Morgan. You are not going to have all of this question of ~~that defendant~~ Mr. Lemann getting a New York lawyer in the Federal court.

Mr. Lemann. If the rules are adopted, I will not need him.

Mr. Wickersham. A New York lawyer is all right. (Laughter.

Mr. Donworth. If you find that you are in court, and everything goes on as though you had not made a motion, you start de novo.

Mr. Lemann. That is all right then.

Mr. Loftin. Judge Donworth, where is this to come in?

Mr. Donworth. I would not disturb anything that Dean Clark has put in.

Mr. Loftin. The original rule, with his suggested change

for the last paragraph; and then your suggestion follows that.

Mr. Donworth. Well, I think the Committee on style may, perhaps, amalgamate the last paragraph of Dean Clark's and mine; but it is the substance of it that I am for.

Dean Clark. May I ask this: If Judge Donworth's motion for procedure goes in, I do not need my last paragraph.

Mr. Wickersham. Will you read that again, Mr. Chairman?

Mr. Mitchell. "Any objection that the defendant may raise concerning the sufficiency of the service of process upon him, or on the ground that he is not subject to suit in the district where the action is brought, must be raised by motion before the time for answer expires, and shall be decided on preliminary hearing."

Mr. Loftin. Then, Dean Clark, if that takes the place of your paragraph, then a further defense must be included in the answer.

Dean Clark. Yes, except that I suppose these motions to clarify the pleadings would still come in.

Mr. Loftin. Well, Judge Donworth's motion confines it to those two specific things, and if you strike out your last paragraph entirely, those are the only two things you could put in your motion.

Dean Clark. No, let us go back to the sentence in the rule: "Every defense or objection ~~in~~ in point of law or fact, and whether to the jurisdiction or in abatement or bar, going to

any matter set forth in the complaint or counter-claim, except as stated herein or in Rule 37 (Motion to correct or strike out), or in Rule (blank) (Motion for summary judgment) be made as a defense in the answer to the complaint." Now, there are three exceptions later on.

Mr. Wickersham. Does Mr. Donworth's suggestion follow this?

Dean Clark. No, Mr. Donworth's suggestion would be a substitute for the last paragraph, but I do not know ehether the last paragraph should be saved or not. But in substance Mr. Donworth' motion would be a substitute for the one I have here, and there will be two differences between what I have here and his: First, a distinct substitution of the kind of things you can cover, and second, the requirement that it must be done in advance.

Mr. Wickersham. Yes.

Mr. Lemann. You said you should start out de novo if that is overruled, and then you said you agreed to something else.

Mr. Donworth. Will you state your question more clearly?

Mr. Tolman. I move that we accept Mr. Donworth's suggestion.

Mr. Wickersham. I second the motion.

Mr. Dodge. Before voting, I will ask for the interpretation of it.

Mr. Lemann. If the jurisdiction is questioned on the ground stated, and the challenge is overruled, must the defendant then answer, or would he have the right then to raise the questions which he would have been entitled to raise if no jurisdictional point had been raised?

Mr. Donworth. My understanding is that if the court grants this motion he starts out at scratch.

Mr. Wickersham. Of course, on appeal, the decision of that motion would be one of the points raised.

Mr. Mitchell. Well, if you adopt Judge Donworth's suggestion in lieu of the last paragraph, the only thing you can put in, the only objection you can make in advance of the answer is that you can make a motion to strike out, as has been indicated.

Mr. Lemann. So that you wouldhave to have a special change in order to accomplish what he has in mind.

Mr. Mitchell. If you want to start at scratch, as he said, to the greatest advantage, then you have to make some further provision in language beyond what he has.

Dean Clark. It depends on what you mean by "starting at scratch" and if you are starting at scratch, I think he is still correct. I might say that, if you want to answer further things in advance of the answer, I think it would be one of the worst steps backward that we could make. I think even on Mr. Lemann's plan of consulting the New York lawyer

that it would be true.

Mr. Lemann. I do not have to be penalized by my desire for information as to jurisdiction; and that is what we have here.

Mr. Mitchell. I do not see your point. If you have a right to make a motion in advance on the service of process, or that you are sued in the wrong district, and it is denied, then what is the next move? You must then put in an answer and include every point, except that you have the right to make motions directly to strike out, or motions for judgment. Does that satisfy you?

Mr. Lemann. I will put my point this way: If you are sued in New York, and claim they have no jurisdiction there, and that you are not in court, as I understand, you can file a motion before your answer and raise any questions you want that are not covered by Rule 37 or Rule 70.

Mr. Morgan. No.

Mr. Mitchell. No. We are assuming that the motion of Mr. Donworth, instead of being in addition, is a substitute.

Mr. Lemann. Everybody is going to be permitted to do it. Then you have met my point.

Mr. Mitchell. Yes. He did not put it in the form of a substitute, but Dean Clark said it ought to be. I understand it is a substitute.

Mr. Donworth. Either way. It can be a substitute or

added.

Mr. Wickersham. I suppose it will be a substitute.

Mr. Loftin. Dean Clark, what about your provision as to special appearance?

Dean Clark. I am not sure how that comes in.

Mr. Loftin. He said strike out your last paragraph entirely. That included theprovision for a special appearance.

Dean Clark. I think that ought to be continued, after Mr. Donworth's motion.

Mr. Wickersham. Ought there to be a special appearance, or must there of necessity be a provision for special appearance?

Mr. Mitchell. To get this to a head, I understand that Judge Donworth's motion as amended is a motion to substitute his provision for that part of the last paragraph commencing "when the defense is such" and ending with the words "decision on such defense." It leaves in the provision that no special appearance is necessary.

Dean Clark. I changed the wording ~~I have in word~~ of that, in my substitute, and I said, "The defendant may present", and so on. I am not sure I will not have to change it further; but I wish to add this: "The filing of such objection shall constitute a special appearance."

Mr. Wickersham. That is thepoint.

Mr. Morgan. Yes.

Mr. Wickersham. In other words, you do not submit yourself to the jurisdiction of the court.

Mr. Olney. I should like to ask Dean Clark a question which bears on this point. Take the second sentence of Rule 26. It says: "Every defense or objection in law or fact, and whether to the jurisdiction or in abatement or bar, going to any matter set forth in the complaint or counter-claim shall, except as stated herein," and so on, "be made as a defense in the answer." Why should it be limited to matter that are set out in the complaint or counter-claim? Every real defense ought to be set out in the answer. Is that not the theory?

Dean Clark. I thought that was what we were saying. I do not get your point.

Mr. Olney. You limited it by saying "going to any matter set out in the complaint or counter calim." Should not those words go out?

Dean Clark. Perhaps they should.

Mr. Olney. "Every defense or objection in point of law or fact, and whether to the jurisdiction or in abatement or bar","shall, as stated herein," and so on, "be made as a defense in the answer."

Dean Clark. I guess that is all right. I do not think they add anything particularly, and they might ome out.

Mr. Mitchell. Take out "any matter set forth in the

complaint or counter-claim"?

Mr. Olney. No, I would bring it down to the point I had in mind: "Every defense or objection in point of law or fact, whether to the jurisdiction or in abatement or bar, other than the objection that the court has not acquired jurisdiction of the defendant"--

Mr. Mitchell (Interposing). That is covered by "except as herein stated".

Dean Clark. Is there any danger, if you put that in ~~im~~ or made that change, it might occur that there are, according to Mr. Donworth's motion, other matters of jurisdiction that are not included, and those other matters must come in somehwere, because jurisdiction is a very wide term.

Mr. Olney. All I am seeking to do is to get in--you have not only "every defense", but you have "every defense or objection."

Dean Clark. Yes.

Mr. Olney. And you say they must be in the answer.

Mr. Mitchell. "Except as herein stated."

Mr. Olney. "Except as herein stated." Well, that is all right.

Mr. Mitchell. As I get it now, before we submit any motion, you have stricken out the words in Rule 26, "going to any matter set forth in the complaint or counter-claim shall," and you have stricken out ~~that~~ last paragraph, and

the words, "when the defense is such," down to the words "decision on such defense" and you have changed the rest of the last paragraph to read, "The filing of such motion shall constitute a special appearance"; and then you have substituted for this last paragraph, except that last sentence that I just read, Judge Donworth's proposal. I will state it/that was to get it on the record.

Mr. Dodge. Suppose a motion is denied after hearing, but the special appearance shall continue thereafter to get the jurisdiction over the person pending the proceedings?

Dean Clark. I think that should be changed, and if that is the sense of the Committee I will study this. I do not think that probably the filing of a motion alone should be all that constitutes a special appearance. I think the filing of a motion and answer in abatement--I mean not as a technical expression, but simply to convey my thought--both should constitute a special appearance.

Mr. Olney. Is that by way of abatement?

Dean Clark. That is the expression they use in the code.

Mr. Dodge. Nothing is thereafter submitted to the decision of the court if his position is wrong as to his suability there. He should be allowed, of course, to go ahead and defend the case on appeal on the jurisdictional point.

Mr. Mitchell. Your point is that a proper sentence should be put in there that, ~~x~~having once made the motion he has in mind, he is at liberty to go on and defend without prejudicing his point.

Mr. Morgan. In the Federal court that is ~~better~~ settled by decision. If he saves his exception, we are going to have another rule that both exceptions shall be saved. So I think that will be covered.

Mr. Dodge. If you make any reference to special appearance the full extent of it should be made plain.

Mr. Olney. It would be of advantage to the ~~profession~~ profession if it is clearly stated that if a man comes in and makes his objection to the court's jurisdiction as to him personally, that is, as to the service of summons, and the objection is overruled, and then goes on to answer as he should be required to do, that his answer is not taken as a waiver of his first objection.

Mr. Mitchell. Well, that is agreed to; but the only question ~~is~~ is whether it is not automatic under the decisions, or whether it has to be expressly put into that effect.

Mr. ?Donworthy. I think there is a diversity of decisions of the courts ~~xxxxx~~ as to whether, when you have lost, the special appearance may continue, whether you have preserved that.

Mr. Wickersham. There is a diversity of opinion.

Mr. Olney. I think we will all agree that a man should

not be put the hazard, if he makes a special appearsnce and oves to quash the summons and it is denied--put to the hazard of either taking his chance on the correctness of his motion and having the order of the court overruled on appeal, or else xfxsx allowing the judgment to go by default against him. In some Statss he is out in that position, and it is not right.

Mr. Morgan. I think about half the States put him in that position, I think they are right.

Mr. Dodge. Well, I disagree with that.

Mr. Morgan. I know you do.

Dean Clark. Of course, if we go further, we might get into appeals.

Mr. Morgan. We cannot do anything on that, because the Supreme Court of the United States rules on that.

Mr. Mitchell. Are we ready to vote on that question?

Mr. Dodge. Which question?

Mr. Mitchell. The adoption in substance of the rule.

Mr. Dodge. I wanted to raise only one other question: What has a motion for summary judgment got to do with this?

Dean Clark. Well, certain of these objections you can raise summarily. As a matter of fact, I am not sure how far this exception goes.

Prof. Sunderland. Well, of course, the motion for summary judgment is not an answer. So you have got to have the exception.

Dean Clark. Yes.

Mr. Mitchell. They may be raising some of these points on motion for summary judgment. That would seem to be inconsistent with this rule about putting in an answer. So they except that.

Mr. Dodge. Do you mean the defendant moves for summary judgment without filing an answer?

Dean Clark. Yes.

Prof. Sunderland. Not without an answer.

Mr. Wickersham. Well, if in lieu of a demurrer, the defendant moves to dismiss the complaint.

Mr. Cherry. If we find that is not needed when we come to summary judgment it is easy to strike it out.

Mr. Mitchell. We can settle whether any exception of summary judgment is needed after we find what the summary judgment procedure is.

Mr. Lemann. I just want to know what wehave.

Mr. Donworth. My motion has no effect on the suit. It just lets the defendant out.

Mr. Dobie. In case of service of process, there is a possibility of answering as to venue later.

Dean Clark. We cannot touch fundamental jurisdiction over subject matter. That can be called to the attention of the court anyway. So, if you call it to the attention of the court through a motion to dismiss--or I suppose you

could even do it orally at the trial.

Mr. Lemann. I was not speaking of the jurisdictional point.

Dean Clark. I am deciding that.

Mr. Lemann. In other words, if you want to state that the complaint does not constitute a cause of action, how will you do it?

Dean Clark. In the answer.

Mr. Lemann. That is my understanding from the course of the discussion.

Dean Clark. Then if you want a preliminary hearing, you will ask the court for a preliminary hearing.

Mr. Mitchell. On the question of the adoption of Rule 26, in substance, as changed, all in favor will say "aye", those opposed "no."

(A vote was taken and the motion was unanimously adopted.)

Mr. Mitchell. Rule 27.

Prof. Sunderland. May I suggest before we pass this that the term "suggestion" might be considered. "motions and suggestions in support thereof." The term "suggestions in support of the motion" seems anomalous. Might it not be worded as a motion, stating the grounds, etc.?

Dean Clark. All right.

Prof. Sunderland. That is in the middle of Rule 26.

Mr. Wickersham.

In the middle of Rule 27 it says: "Averments other than those of value or damage, when not denied, shall be deemed admitted." Is that not too broad? You might have an averment of value which did not go to the measure of damages, but which was a mere allegation of fact. Why should it not be answere , or if it not answered admitted?

Dean Clark. I did not get your point fully. You wanted to leave out "of value."

Mr. Wickersham. I do not quite understand that sentence. It seems to me that in some cases an averment of value or damage might be a material fact that ought to be answered.

Dean Clark. I took this over from the Equity rule.

Mr. Wickersham. I know, but I just wondered whether that is not too broad. Of course, if it is simply a part of the demand for judgment, that is one thing. But take, for instance, diversity, and you want to get jurisdiction in the Federal court, and you aver that the vause of action involves a claim for more than $3,000, and then it appears as you go along that the claim could not be $3,000, because everything involved was not more than $1,000.

Dean Clark. Well, I would be prepared to leave that out. I just put it in because it was in the Equity rule. It was new to me, so far as code procedure was concerned, I do not believe it would do any harm to leave it out, because I suppose the court would not go ahead and give judgment without some proof of damage.

Mr. Wickersham. I presume so.

Dean Clark. Then suppose we strike out the words "other than those of value or damage"?

Mr. Wickersham. I think that would be well.

Mr. Morgan. Well, do you need that at all? The rules ordinarily provide that by failure to answer--

Dean Clark (Interposing). Absolutely, they always do.

Mr. Wickersham. Yes.

Mr. Morgan. I supposed that was a matter of interpretation without any rule.

Dean Clark. And you may remember that Prof. Miller, of Northwestern University, has a long, profound article, going back to the early days, about admission by failure to demand.

Mr. Loftin. This says he shall by his answer set out his defense to each claim in the complaint, admitting, denying or explaining, and so on.

Mr. Wickersham. My only point is why we should make an exception of allegations of value and damage from any other allegation.

Mr. Mitchell. Yes; why was that?

Mr. Morgan. Well, it says damages are not admitted by demurrer.

Mr. Wickersham. That is/the question of damages.

Mr. Mitchell. How about value?

Mr. Morgan. I do not know. That is new to me.

Mr. Dobie. What that in the ancient equity rules, or was that put in the new rules?

Mr. Morgan. There are some cases saying that the allegations of the complaint as to the value of a chattel in an action of replevin are not admitted by failure to answer.

Mr. Dobie. I wondered if it had something to do with the ancient law of warranty.

Mr. Olney. I can see no reason why, if the defendant does not answer, you cannot take judgment for value and every allegation in the complaint be taken pro confesso. It is a purely superfluous proceeding, as a rule. It just requires a little more action by the court.

Mr. Mitchell. Well, if the claim is not denied the court always has--

Mr. Dobie (Interposing). There are some cases holding that that is a question of opinion and not of fact, and I wonder if it could have crept in in that way.

Dean Clark. I do not find that it goes back. The note to Rule 30 in Hopkins says, "A new rule largely based on the English practice but so different from that practice that the English decisions will be of small benefit to the American partitioner." And I do not find it in the section of the Equity rule as to the answer; that is very short, and it says the defendant must swear to his answer.

Now, as to the code provision about admissions. The New York provision, and the provision generally found in many code jurisdictions is that the material allegation of the complaint not controverted by the answer, and so on, must be taken as ~~proof~~ true for the purposes of the litigation.

Mr. Wickersham. Is there not something in the old Equity rules that the answer must be responsive to the bill, and except where the rule permitted that the defendant shall neither admit nor reply, he must reply to every allegation; he did not admit by not answering, but he could be required to answer every allegation of the bill. Perhaps this grew out of that.

Mr. Olney. That rule was responsive to the idea that the original bill in equity was in the nature of a bill of discovery.

Mr. Wickersham. Yes.

Mr. Dobie. It is evidence as well as pleadings in some States, and it takes two witnesses to controvert it, and under those circumstances value ought not to be there.

Mr. Wickersham. I fancy that that consideration of a bill in equity under those conditions was that, while he would not admit other allegations by not answering--

Mr. Olney(Interposing). Let me put it this way, is there any reason why, if the defendant refuses to answer the complaint, the plaintiff should not have just the relief he

asks for in the complaint, without anything further.

Mr. Morgan. You would not go so far as to say that that would prove an allegation of unliquidated damages?

Mr. Olney. No, he alleges the amount.

Mr. Morgan. Suppose he has a broken leg, and claims damages of $50,000.

Mr. Olney. Why not allow it?

Mr. Morgan. No court would allow it.

Mr. Wickersham. Legs become more valuable as time goes on. (Laughter.)

Mr. Olney. Will he come in and answer?

Mr. Mitchell. It is a universal practice, where it is unliquidated and they must assess damages, and we ought not to change that.

Mr. Dobie. That would result in allegations of absurd damages.

Mr. Wickersham. If the reporter is willing totake out that sentence, I move that it be stricken out--"averments other than those of value and damage", when not denied, shall be deemed admitted."

Dean Clark. What did you want to take out?

Mr. Morgan. "Averments other than those of value or damage, when not denied, shall be deemed admitted."

Mr. Morgan. Yes.

Dean Clark. Would that suit you?

Mr. Wickersham. Yes. Would that suit you?

Dean Clark. Yes.

Mr. Mitchell. The English rule does not say anything about value. I am positive about value, but I should hesitate to adopt a rule that would be an innovation. The only objection is that the answer shall be deemed admitted. And I think it is unsafe to do that.

Dean Clark. This is the Equity rule.

Mr. Mitchell. But they do not say "value." They say ~~That was~~ damage. Otherwise, they may say that the allegations of damages may be taken as admitted even in an unliquidated case.

Mr. Cherry. You would suggest leaving out "value or"?

Mr. Mitchell. Yes.

Dean Clark. Suppose we put in"averments as to the amount of damage."

Mr. Mitchell. That is two more words, and I think it means the same.

Mr. Olney. Does it really. I doubt that. The amount of damage is the question --the allegation is that the man was damaged in a personal injury case.

Mr. Dobie. And that the damage was caused by the defendant. That is admitted, is it not?

Dean Clark. That is what I was trying to differentiate

Mr. Mitchell. By the amount?

Dean Clark. Yes.

Mr. Mitchell. How about this: "Averments other than those as to the amount of damage."

Mr. Wickersham. That is all right.

Mr. Dodge. You preserve the general denial.

Dean Clark. Yes. I have this: This is the place where this comes up: Now, on the point just suggested as to the so-called general denial. I have provided that they should deny each and every allegation. I have not called it a general denial. Of course, in substance that is what it is. I say: "Denials may be specific denials of distinct allegations or paragraphs of the complaint, or in proper cases, as provided in Rule 21"--Rule 21 is a certificate that the denial is made in good faith, etc.--"or, in proper cases, as provided in Rule 21, of each and every allegation or paragraph of the complaint."

Now, there has been, of course, a good deal of discussion as to the use of the so-called general denial. After all, that is a label. I do not see anything to be gained by making the defendant use as many paragraphs of denial, denying paragraphs in the complaint, when he really wants to deny them all, and it seems to me that that is all this does. If he is going to deny everything he can do it under any rule I know of, and this just provides a short way of doing

so. And as I read thecases, the attempt to tie down the defendant really does not get anywhere. And if he is going to make denials, he will. It is an attempt to search his conscience, and the court may try to enforce it, and really cannot, and will waste time. When I was in Portland this summer I spoke about these rules, and Ralph King and other lawyers came up and spoke about this. And Mr. King said, "I hope you are not going to abolish the general denial", and the lawyers all agreed that it would be a foolish thing to try to do so.

Mr. Morgan. The only question I had on that is that wherever I have practiced you could put in a general denial, and could deny anything if it was not literally true in the manner alleged. I notice that the Connecticut rules attempted to get away from that and provided that if the purpose was to deny merely the qualification, or if the facts stated were true with qualification, there should be an admission of the statement so far as it was true and a denial of the qualification. I do not know how that works in Connecticut. Of course, we put in general denials in Minnesota in my practice when there was no question that the facts stated happened, but had not happened in just that particular way. And the result was that these attempts to get the pleadings to disclose the issues never did disclose them. The

plaintiff put in everything he could think of, and then the defendant put in a general denial.

Mr. Wickersham. That is like the practice of moving for a bill of particulars or making the complaint more definite. It was a hang-over from the old common law pleadings. In common law actions the tradition of the actions at law persisted, and they did not adopt for common law proceedings the concept of a bill of equity, such as demanding a categorical reply to every allegation.

Mr. Donworth. It is often difficult to make a specific denial without making it a negative pregnant.

Mr. Morgan. Yes.

Mr. Donworth. For that reason, a general denial is better.

Mr. Dodge. Why refer to Rule 21 here? It is a general rule applicable to all pleadings.

Dean Clark. It is not necessary here. But I did it because people might say, "You ought to have specified denial."

Mr. Lemann. In my State in the last fifteen years we have had this requirement as to particular allegations, that you must answer each one, and if you ask for the psychological reaction, I think there has been a residuum of effect in tying down.

Dean Clark. This raises a question that I discussed with my own Chief Justice in my Connecticut Law Journal. I

feel strongly convinced that the way pleadings are now developed in our jurisprudence, you cannot get out by way of pleading fine points of admission. It is hopeless to expect it, because the judges are not going to enforce the only penalty that counts, namely, loss of the action, and it is a waste of time to try to ~~abolish it by~~ polish up in that way pleadings. It so happens, however, that by starting ~~a comparatively~~ an apparently new procedure "summary judgment" we can do just that thing.

Mr. Morgan. Discovery before trial will do it.

Dean Clark. Well, I am referring to the whole matter of summary procedure, which does not have the history and back ground of pleadings generally. It seems to me there is less reason now to worry about this if we have ~~sufficient~~ efficient summary procedure.

Mr. Dobie. May I ask this question? You countenance here the combination of admissions and denials. Some courts have said you cannot do that.

Dean Clark. Yes.

Mr. Dobie. For instance, in a personal injury case a man wanted to admit that the defendant was a corporation and that he was in its employ and deny everything else, the court said, "You cannot do that," but it seems to me that where you have a very large number of statements, you might admit that that is desirable.

Mr. Olney. In my State ~~there~~ we have had a lot of troubl

but I think the profession is so wedded to it that it is not advisable to strike it out.

with general denials, and he is put to proof? I want to ask Dean Clark if you cannot accomplish everything you want by requiring an answer to each specific allegation of the complaint. As I say, that would be too revolutionary for our purposes. But I will call attention to this, Dean Clark: I think the way you have worded this in regard to Rule 21 might be taken by the profession and misread. You say, "or in proper cases, as provided in Rule 21." Now, there are no "proper cases as provided in Rule 21." What you mean there is--

Mr. Mitchell (Interposing). "proper cases."

Mr. Olney. In cases in which it is proper to make a general denial it might be done.

Dean Clark. I think your criticism is correct. What I really meant is "in proper cases."

Mr. Dodge. I do not see why that should be in here and not anywhere else.

Mr. Morgan. It is just to warn the people, and he says that does not amount to anything anyhow.

Mr. Dodge. If the general denial is abolished, you will have the same allegation repeated ten times, and it involves a considerable waste of time.

Prof. Sunderland. In my State it was abolished about five or six years ago and the bar feels very well satisfied.

Mr. Morgan. Does it work?

Prof. Sunderland. It works very well and they think

it is an advantage.

Mr. Lemann. I say there is a residual advantage that that it will also save time. I do not think they should all be admitted--but it should be done even if you say "Look out for Rule 21."

Mr. Mitchell. The only doubt I have is whether it is not advisable to put in this Rule 27 something like what Mr. Morgan suggested, a sentence stating that of the allegations in the complaint some are admitted and some are not; it may be that some of it is true and he could deny only the remainder. Because if you deny the whole thing, there is some untruth in it; and the conscientious lawyer would think of that.

Mr. Morgan. We used to see if we could not deny generally.

Dean Clark. I will try to work that out, but the general denial is specifically permitted in Connecticut.

Mr. Dobie. Are you against the abolition of the general denial?

Dean Clark. Yes, very distinctly, because I think it is a cluttering up of another rule that does not mean anything. And I say that with all respect to Illinois lawyers, who like to say, "Now, we will be specific," and set up that part, and it does not mean anything.

Mr. Morgan. Do you know how that qualification of the

rule works in Connecticut? Do they just slam in general denials?

Dean Clark. General denials are very freely used there.

Mr. Donworth. Is it not true, that you may call upon the other side to state facts, by a discovery?

Mr. Morgan. I think discovery is the ultimate way to get it. Because otherwise a lawyer never wants to disclose any more than he can help, and the judge is trying to make him disclose.

Prof. Sunderland. That is true. I do not think you get far with your requirement of general denial.

Mr. Morgan. I think it does some good.

Mr. Tolman. Mr. Chairman, I would like to call the attention of these gentlemen to the fact that in these suggestions of local committees and members of the bar which accompany this rule, they all make the unanimous request for the abolition, or the discouragement, at least, of general denials, and a specific setting up of the defense, as is required in Equity Rule 30.

Mr. Olney. If that is the case, I am in favor of it, because my ~~concern~~ experience is different from Dean Clark's. In my experience you do get something by requiring a general denial

Mr. Lemann. You have my testimony as to the three states that I know of. Now, the only thing on the other side is that Dean Clark says it is useless and to abolish it.

Dean Clark. You ought to look at the cases where they struggle to enforce therule, and it gives a nice chance for dilatory proceedings. Now, there is not any overwhelming statement from local committees. There is only one of these suggestions from local committees--when they think of it they put in certain affirmative recommendations, but not many but when you put in the reconstruction I think you will find quitea good many practitioners will object.

Mr. Lemann. You hve had no difficulty with theplaintiff being required to plead in paragraphs. Now, in my jurisdiction, I will say they would be presented by the defendant objecting that the plaintiff had not complied with the rule, that he must plead in paragraphs--more than there wouldof the plaintiff complaining that the defendant had not answered in paragraphs. As has been suggested, you just could tell your stenographer ~~to use~~ paragraphs numbers X to XX; you could just say, "Deny these paragraphs."

Mr. Dobie. The Equity rule says avoiding general denials it does give some countenance to them.

Mr. Dodge. We would not permit it in equity.

Mr. Lemann. There is a requirement of separate paragraphs.

Mr. Morgan. This rule applies to the Equity rules.

Dean Clark. The Equity rule does not prohibit general denials.

Mr. Morgan. It says "avoiding general denials."

Dean Clark. It is distinctly an admonition. As to the rule as to paragraphs, if a judge is going to throw a person out for not putting paragraphs, that rule as to paragraphs, or that whole section on the form of pleading I did not take as mandatory. That is a suggestion to the bar as to how to draw their pleadings. I do not believe a judge will throw them out.

Mr. Morgan. He may strike the pleadings.

Mr. Lemann. It may open the door for objection.

Dean Clark. I do not think he will strike, unless my rule on motions to strike is stronger than I think. I think it is very limited.

Mr. Tolman. Last night we put in this expression of omitting a mere statement of evidence, and here we leave it out. That is to say, it is in Rule 30, and we have not got to that yet. But we did act last night on that rule.

Mr. Mitchell. On the general denial business, the general opinion of lawyers about it is that, while it may not be necessary or desirable to require the defendant to go ahead and answer or deny specifically each allegation, we can accomplish something that will satisfy the members of the bar if we propose that general denials be abolished, and putting in a sentence or two along the line of Connecticut, that Mr. Morgan has referred to, and simply specify that in dealing

with any allegation you can admit part or deny part, but they must answer it all, and specifically admit that part that is true, and get rid of the opening given a lawyer to deny the whole allegation, even though much of it is true, merely because there is some little qualification in that that he can deny. I think we can accomplish something along the line of the Equity rules, which recommend avoiding general denials and the recommendation of the Bar Association and the experience of many lawyers, by putting something of that kind in. I will go so far as to say that they should be required to deny or admit every specific allegation. But we all know that where an allegation is inaccurately stated and it gives us an excuse to deny the whole thing, we ought not to be able to do that. We ought to be able to accept that which would get at the meat of it. There is no penalty for it.

Dean Clark. I am willing to put in that provision.

Mr. Morgan. I move that that be done.

Mr. Dobie. Will you state that again?

Mr. Mitchell. I would rather have Mr. Morgan state it. I got that from him.

Mr. Morgan. It is the rule of practice in Connecticut that I had in mind. I am not prepared to give the phraseology, but it is to the effect that in denying an allegation which is made with qualifications, the party denying must

specify those portions of the allegations which he really denies and admit the portion--have uou the rule there, Dean Clark?

Dean Clark. No, I have a reference to it. It is the the Connecticut Practice Book, Section 199.

Mr. Mitchell. Can we not leave that to the drafting committee with the recommendation that they try to draft something along those lines?

Mr. Olney. I move that that be done.

Mr. Morgan. I second the motion.

Mr. Mitchell. Does that include Rule 27?

Mr. Olney. No.

Mr. Tolman. Should not some regard be given also to the consideration of Equity Rule 30?

Dean Clark. Well, I think it ought to be clear. As a matter of fact, I wanted to leave this expression in, and I took it that the Bar Association men would leave this expression in and ~~I prefer the~~ add the further sentence.

Mr. Morgan. That is right.

Mr. Mitchell. That is right.

Mr. Morgan. A denial of every allegation, if he has to take out the qualification, I am satisfied. I agree with Mr. Dodge that there is no use of repeating.

Mr. Mitchell. All those in favor will say "aye", those

opposed "no."

(The motion was unanimously adopted.)

Mr. Wickersham. In this rule as to the answer, Rule 27, I should think we might insert, before the last sentence, in the fourth line from the bottom, "Facts which constitute matters of defense should be stated plainly, omitting any mere statement of evidence;" that is substantially what you have in the provision as to the plaintiff.

Mr. Dodge. You mean affirmative defense?

Mr. Wickersham. Not merely affirmative defense, but facts constituting matters of defense.

Dean Clark. Have you in mind this provision in the first sentence of Rule 35. I think it is covered there. I do not know that I object greatly to inserting this, but I object to doing it over again. It is not in here.

Mr. Morgan. I think Rule 35 will take care of it.

Mr. Wickersham. But you have got a provision as to the plaintiff in Rule 23, and that requires the complaint to contain a short and plain statement of the grounds upon which the court's jurisdiction depends, thus omitting any mere statement of evidence.

Mr. Morgan. What is the matter with the first sentence of Rule 27, that the defendant by his answer shall set out in short and simple terms his defense."

Mr. Wickersham. "Shall set out in short and simple terms the facts constituting his defense or defenses."

Mr. Morgan. Yes.

Prof. Sunderland. Well, if your defense is a denial, what are the facts?

Mr. Wickersham. Well, of course, you could get an affirmative defense.

Dean Clark. Well, why does not the general Rule 35 cover it? This really does not mean anything anyway, as the course of decisions on facts shows that it is just an admonition, and I put in the admonition at the top of Rule 35.

Mr. Mitchell. There is a provision in the Equity rule about "omitting mere evidence."

Mr. Morgan. You could put in "omitting mere evidence."

Mr. Mitchell. Yes, you could say here, "omitting mere evidence."

Dean Clark. Yes.

Mr. Wickersham. My thought was that Rule 23 was a specific rule as to the contents of the complaint, and Rule 27, dealing with the answer ought to be as specific a rule as Rule 23, as to pleading facts.

Mr. Tolman. "Omitting mere ststements of evidence"?

Mr. Wickersham. Yes.

Mr. Mitchell. Will you make a motion stating where you think they ought to go in in Rule 27.

Mr. Wickersham. Well, it could go in line 3, after the word "claim" asserted in the complaint" or later on in the provisions as to answer. I leave that to the drafting committee, as a matter of style, but I should insert something--~~I believe~~ "facts constituting a defense" should be stated, omitting any mere statement of evidence."

Mr. Mitchell. The thing you want in is "omitting any mere statement of evidence."

Mr. Cherry. Is it not a question whether that should be stated here, andin Rule 23, or only once as a matter of drafting by the style committee?

Mr. Wickersham. That will be all right.

Mr. Cherry. That is a matter that should be left to consideration and redrafted by the drafting committee.

Mr. Wickersham. I think the ~~thing to be accomplished is simply~~ difficulty and the effort to get away from the code expressions as to the complaint "statement of facts constituting a cause of action", and in the answer "statement of facts constituting a denial or defense."

Mr. Cherry. I am merely suggesting whether it should go in each one of these rules or be stated only once in Rule 35 and be left to the drafting committee.

Mr. Mitchell. Well, if it is satisfactory we will hav it so understood, that they will put that clause in "Without any mere statement of the evidence" both as to the answer

and the complaint; and leave it to them to determine whether they will put it in Rule 35, or scatter it around.

Mr. Loftin. I would like to ask the reporter one question. In his draft of Rule 27 he has the words "averments other than those of value or damage" which is theprovision of Equity Rule 30. But there follows in Equity Rule 30 an exception reading, "except as against an infant, lunatic, or other person non compos and not under guardianship." I wanted to ask whether he ~~did~~ omitted that advisedly?

Dean Clark. I did it after consideration , maybe not advisedly, but after consideration. I might say that I have studied that a good deal, and I cannot see any fairness in a provision that you could not in effect go ahead against an infant, lunatic, or person noncompos. The provisions are included that persons under disability shall have a guardian ad litem, or may be represented by guardian. That is provided later. And if an infant is properly represented, which is the duty of the court, why should not the representative of the ~~interest~~ infant have to plead like everybody else? I take it that if you have in this restriction, it is doubtful what it means, but I suppose it means that you have got to prove everything.

Mr. Wickersham. The infant's answer by his guardian is in effect a general denial.

Dean Clark. It has got to be a general denial; but

why should be the rule?

Mr. Wickersham. That should be the rule on the theory that the guardian ad litem ought not to be able to bind or prejudice the infant's rights. The infant is a ward of the court and the court will look out for him. The guardian must do the best he can and trust the court, but he cannot prejudice the infant by any admission.

Dean Clark. What basis should there be for such a rule?

Mr. Wickersham. The basis is that the infant is the ward of the court and a mere deputy of the court could not prejudice the duty of the court to protect the infant.

Dean Clark. That is why the provision ought not to be in.

Mr. Wickersham. You do not want to have the infant protected?

Dean Clark. No, I do not see why you should interfere with getting cases tried when the infant must be adequately protected.

Mr. Wickersham. The only theory is that an adult can give instructions to his attorney, but that an infant or an incompetent, not being of sound mind or full discretion, cannot give instruction, and therefore ought not to be prejud judiced by the action of the vicarious representative.

Mr. Mitchell. I would like to know whether the phrase "not under guardianship" applies only to a person non compos,

or applies only to an infant; it says "except as against an infant, lunatic, or other person non compos and not under guardianship." Now, does this suggestion relate only to infants not under guardianship, or to these others?

Mr. Dobie. I think the phrase "not under guardianship" limits only the other persons. It is absolute as to the infant or lunatic, even if they have a guardian.

Mr. Mitchell. But I do not see why there is any distinction there. It may be a rule to protect any of these people, if there is not a general guardian. I do not know what it means.

Mr. Dodge. I think the rights of these people are covered elsewhere than under pleading.

Mr. Morgan. It is a question of substance. Ordinarily, the court will not allow them to bind the infant.

Mr. Mitchell. Are you ready to vote on Rule 27?

Mr. Loftin. Do we understand, Mr. Chairman, that the reporter will give some further consideration to the points that have been raised?

Dean Clark. Yes.

Mr. Loftin. It should be in this rule or some other rule.

Dean Clark. I am not sure what those requests mean. I have considered it, and my own view is decided upon it. It

is a provision for the protection of the infant, and there is a later provision for the appointment of a guardian ad litem. Now, when I am told to give further consideration, does it mean that I reverse my decision or not?

Mr. Loftin. Do I understand that your decision was that if there was a guardian ad litem, any decision he made should be binding?

Dean Clark. Yes.

Mr. Morgan. In pleading?

Dean Clark. Yes.

Mr. Wickersham. I object to that.

Dean Clark. An infant is properly represented under the care of the court. And that being true, why should not the representative that does the work have the same power to bind him as with adults?

Mr. Wickersham. Because he would consult with his principal and take his principal's instructions. In other words, his duty is to see in a general way as to the infant's interests, and he has no power to bind him, because he can not take instructions from the infant.

Dean Clark. Of course, the guardian ad litem is acting under the control of the court right along.

Mr. Wickersham. Yes.

Dean Clark. And all this means is that in any case where there is an infant in it, you have to have every single

allegation of the complaint approved by the court.

Mr. Wickersham. We are familiar with that practice, and it gives rise to no complaint.

Dean Clark. I do not think we are familiar with it.

Mr. Wickersham. We are familiar with it.

Dean Clark. In code practice, we do not find that.

Mr. Wickersham. But whether it is code practice or not, everybody knows that a guardian cannot bind the infant.

Dean Clark. You do not find anything in the New York rules on pleading to that effect.

Mr. Wickersham. It is so well established in New York that--

Mr. Mitchell (Interposing). The rule is not a rule of pleading at all.

Mr. Wickersham. It is a rule of substantive law.

Mr. Mitchell. It is the duty of the guardian to deny everything. The result is, as a matter of practice, that he always does deny.

Mr. Morgan. Surely.

Mr. Wickersham. I should be very much surprised, if the matter is embodied in rules in the various courts of New York, and it is so well settled that in the 50 years that I have dealt with it--and I have been a special guardian--and you know what your duty is. In other words, theoretically the court takes care of it, and there many things which an

adult can do in instructing an attorney that the infant cannot do.

Mr. Morgan. I was not objecting to the rule, but to Dean Clark's interpretation of it. He said it meant, certainly, that he was bound by admissions, etc., and forced to deny.

Dean Clark. Do you mean to say that a formal allegation, such as that the plaintiff is a corporation, must be proved in every case against an infant?

Mr. Morgan. I am not sure about that particular one.

Mr. Wickersham. There is a statutory provision about that.

Mr. Donworth. I think the practice is to deny it, but not to be meticulous about the method of proving it. As far as the pleadings are concerned, it is denied.

Mr. Morgan. Yes--everything.

Mr. Mitchell. It is denied because he puts in a denial. It is not denied because he does not admit it.

Mr. Olney. What about a guardian denying something that he knows is perfectly true?

Mr. Dobie. In Virginia some of the statutes say this: "The infant cannot waive anything, but it is taken as objecting to everything according to his admissions." No directions.

Mr. Wickersham. That is a general rule, because he cannot speak for himself. His attorney or guardian is only his representative.

Mr. Tolman. Well, is there any dispute about that?

Mr. Wickersham. I understand that Dean Clark wants to change that.

Mr. Tolman. No, he was speaking about his individual belief.

Dean Clark. No, I do not.

Mr. Dobie. Somebody is going to raise that question.

Mr. Loftin. We are generally basing these rules on the Equity rules. Now, we omit something that is in the Equity rule, and the question might arise, Why did we leave that out?

Mr. Mitchell. These rules are going to have the force of law and become statutes, and if you state specifically that everything that is not denied is admitted, even against the infant, are we not in trouble?

Mr. Loftin. If they have the force of law, then you might change the law.

Mr. Mitchell. Would it not be better to take the Equity language on that and put it in and add a little to it, and end the whole controversy?

Dean Clark. I suppose so. I do not think it makes much difference. This carries a provision in the rule that does not exist, so far as I know, in all the code States. You do not find in any code any requirement of this kind.

Mr. Wickersham. Well, if you make that point, I would insert in the seventh line from the bottom, after the words

"shall be deemed admitted", the words in Equity Rule 30, "except as against an infant, lunaitc or other person non compos and not under guardianship."

Mr. Loftin. Do you make that as a motion?

Mr. Wickersham. Yes.

Mr. Loftin. I second it.

Mr. Mitchell. Is there any further discussion?

Mr. Olney. I will suggest that, with all the experience that I have had, quite a number of times, and that was recently emphasized--I had to draw an answer to a long and very discursive ~~discusrion~~ and involved complaint--

Mr. Mitchell. Does that relate to this guardianship business?

Mr. Olney. No.

Mr. Mitchell. We have a motion pending in regard to infancy that we would like to dispose of.

(A vote was thereupon taken, and the members except one voted in favor of the motion.)

Mr. Mitchell. Now, is it something under Rule 27, Mr. Olney?

Mr. Olney. Yes, Rule 27. As I say, I had to answer a long and very discursive complaint. The only way to effectually put before the court the position of the defendant was to tell his story affirmatively. It could not be done by mere denial. It was necessary to do that in order

to give the court an idea of what the real facts were. And so we simply took the bull by the horns and made the answer in two parts, and in one I set out affirmatively the affirmative defenses. It was a long story; but there they were set out very carefully, to give the court a quick idea. But in order to make double measure, I had to go to work and deny specifically every allegation of that complaint, and it took me several days to do it in that fashion--although I think the affirmative answer should have been taken in itself as a denial.

Now, the proper idea of pleadings is to present to the court in advance a real statement of the position of the parties so that they can be understood and the court can get an idea of what they are. Now, I have made this suggestion for your consideration, and I am not certain it is worth while or might not involve some further question that I do not quite see:

"The answer or reply by way of traverse ~~may~~ need not be made in terms of express denial, but may be made by affirmative allegations of facts which, to the extent to which they are inconsistent with the allegations of the opposing party, shall be taken to be a denial thereof."

Mr. Mitchell. Can you continue the same thing into the answer by stating in the last paragraph "denying each and every allegation of the complainant."

Mr. Olney. I am not sure about that.

Mr. Dobie. It worked in that case.

Mr. Olney. I did it both ways.

Mr. Mitchell. You ought not to be afraid, unless the rule requires a specific denial paragraph by paragraph, and that we have not insisted on.

Mr. Lemann. You could have denied each allegation.

Mr. Olney. It was impossible to do that in connection with each paragraph of this complaint. You had to tell your story as a whole.

Mr. Mitchell. Were you operating under a set of rules that required you to specifically every allegation in each paragraph?

Mr. Olney. No, but every specific allegation of the complaint.

Mr. Mitchell. Now, we have such a rule here; that is, as I understand your statement, you did not have to go down paragraph by paragraph and review the allegation.

Mr. Olney. Well, you have got to do it, unless you put in a general denial.

Dean Clark. The general denial, I understand, still stayed in?

Mr. Olney. I know it did.

Mr. Mitchell. That would solve your problem.

Mr. Olney. I think the profession fails to appreciate that they can put in a good denial by way of affirmative

allegation. It may be worth while to call their attention to it, because, if that practice is followed it will clear up a good many absurd pleadings.

Prof. Sunderland. In Michigan, we have a rule that where the defendant in support of his denial relies upon an affirmative set of facts, he must set them up.

Mr. Morgan. That makes him pleading his evidence.

Prof. Sunderland. Yes, he pleads his evidence, but that situation is required and certainly gives notice.

Mr. Olney. You take the average answer; if it is at all complicated, with the desire on the part of the defendant attorney to avoid--

Mr. Morgan (Interposing). Argumentative denials.

Mr. Olney. No, not argumentative denials, but a negative pregnant--the court can read that answer, and he cannot tell for the life of him what it is all about. There are a lot of denials in there, but it would take him a long time to determine what is denied. But if the answer tells the defendant's story affirmatively, it is going to present a much better picture to the court that tries the case.

Mr. Wickersham. I have always been accustomed to do that--after responding to the allegation, then set forth the story of the defendant, where it is desirable to get the whole story before the court, as a separate defense.

Mr. Olney. Well, this was just a suggestion, and I

think the suggestion had better be withdrawn.

Mr. Mitchell. Are we ready then to vote on Rule 27? All in favor of the adoption of the rule as modified will say "aye"; those opposed "no."

(A vote was taken and the rule was unanimously adopted.)

Dean Clark. May I, in passing on the point we have discussed, point out that in this rule Rule 21 provides specifically on the matter of consent of persons under disability to procedure. It is a question of special authorization.

Mr. Wickersham. How do you mean--special authorization for what?

Dean Clark. For consent by the guardian or next friend, with the consent of the judge.

Mr. Morgan. If there is an order of the judge, then there is no occasion for that.

Dean Clark. Express authority for what we have now taken away.

Mr. Morgan. No.

Mr. Mitchell. Now, we are down to Rule 28.

Mr. Dodge. Is there any provision in these rules for penalizing the violation thereof? What happens if a plaintiff files a prolix complaint, manifestly not complying with the rules?

Dean Clark. There is a certain provision for default

for not doing things on time. The provisions for mistakes in pleading are covered only by the motion to correct, which I think is Rule 37. And you will notice when we get there that that is of a very limited scope.

Mr. Dodge. Well, the court must have authority to non-suit such a plaintiff.

Dean Clark. Possibly we had better take that up when we get to Rule 37.

Mr. Mitchell. Rule 28 relative to counterclaim.

Mr. Dobie. Would you be willing to broaden that first sentence, "The answer must state any counterclaim arising out of the transaction." I hate that word, but if you do not leave it there I want to make it as broad as possible.

Dean Clark. This is a compulsory ~~pleading~~ filing of the counterclaim.

Mr. Dobie. Yes. Well, that is not so bad.

Mr. Wickersham. You have brackets around the clauses in the second line of Rule 28. What do you mean by "The claim is deemed ~~xxxxxxxxxxxx~~ to be waived" unless it states any counter claim arising out of the transaction. What do you mean by that?

Dean Clark. I wanted to suggest the two alternatives.

Now, in the other brackets it says "arising out of the
Mr. Wickersham.
act and occurrences."

Dean Clark. Yes, I meant them as two alternatives

I might say that one suggestion was that we used both "transactions" and "occurrences." I was not sure all of those things added very much, and I put in the two alternatives. Where this requirement of compulsory filing is adopted it is usual to have the term "transaction." I do not like that much better.

Mr. Wickersham. I do not either. I like "cause of action" much better.

Dean Clark. "Cause of action" will not do it. This is broader than anybody's conception of "cause of action."

Mr. Wickersham. But now you are saying that a defendant in a lawsuit loses the counter right of action against the plaintiff if he does not plead it, if that counterclaim arises out of either the transaction which is the subject of the action, or out of acts and accurrences which are the subject matter of the action.

Mr. Mitchell. Does not the second clause there make a distinction between that sort of case and the counterclaim which may be the subject of an independent action?

Mr. Wickersham. Yes, but that is voluntary.

Mr. Mitchell. Yes.

Mr. Wickersham. That is voluntary, but I am speaking of this provision which ends all right of a man to a countersuit unless he brings counterclaim in the action

against him.

Mr. Mitchell. I do not so read it. The next sentence is if it is thesubject of an independent action it may be stated.

Mr. Dobie. Yes it is "must" in the first, and "may" afterward.

Dean Clark. Let me explain. I think Mr. Wickersham is correct in saying that he does not like it. Some of the codes provide that if you do not file counterclaims arising " out of the affair", you lose it, an that is what is attempted in the first sentence.

Mr. Olney. You take the case of a set-off.

Dean Clark. The States are California, Idaho, Montana, Nevada, and Utah, and ~~follow~~ Equity 30, on the ~~left~~ left. Now, other codes try to put some penalty on it. Other codes provide that if the defendant fails to set up such a counterclaim he cannot recover cost--Indiana, Ohio, Oklahoma and Wyoming.

Mr. Wickersham. Well, do you understand that under that Equity rule if the defendant does not set up that counterclaim, he is barred forever from suing on it? I do not so understand it. It does not say so.

Mr. Dobie. It says "must."

Mr. Wickersham. I knowit says "must" but there is no penalty.

Mr. Olney. That is the rule in every jurisdiction.

You take the case of a set-off, and of course set-off comes under the same thing.

Mr. Wickersham. I do not know about that.

Dean Clark. The rule in some codes reads: "Every counterclaim shall be set up or be deemed abandoned." I think that rule should be amended. There is a long string of Federal sitations.

Mr. Dobie. Not Supreme Court ones.

Mr. Morgan. The rule does not say "or may be deemed abandoned".

Mr. Wickersham. No, it does not say "may be deemed abandoned." It says must state in short and simple form. Now, that is rather directed to the form of the statement than the provision that the counterclaim may be inserted.

Dean Clark. I think there is a Supreme Court case. There is the case of the American Exchange of New York.

Mr. Donworthy. I would like to ask whether that is not opposed to the idea here--for instance, a physician sues for professional services, and the defendant claims malpractice, and it is tried out in a counterclaim in that suit.

Mr. Wickersham. Yes, I would be in favor of taking the first alternative in brackets"(arising out of the transaction which is the subject matter of the action)." I would be in favor of that. But I was wondering how far this Equity rule had been construed. The Equity rule does not seem to go as far as

this.

Mr. Dobie. May I interrupt you? There are Supreme Court cases--American Mills Co. vs. American Surety Co., 260 U.S., and Moore vs. Cotton Exchange, 296 U.S. 270. But my statement is that these must be set up in the answer or will be deemed abandoned and cannot be set up in a subsequent suit. The word "transaction "must be given a broad meaning.

Mr. Wickersham. I would not object if it was "arising out of the transaction."

Mr. Mitchell. You make a motion to accept one of these alternatives?

Mr. Wickersham. Of course, I like "cause of action" better.

Dean Clark. "Cause of action" would not answer at all. Now, as to the alternative, I would say that they are supposed to have the same significance. It is just a question of trying to improve on the word "transaction," as to which I do not think there can be anything much worse.

Mr. Mitchell. Well, we have ~~a code~~ an equity rule with that phrase in it and a decision of the Supreme Court construing it. Why put in a new phrase?

Mr. Dobie. May I read this? This is Mr. Justice Sutherland, not Dobie:

"Transaction" is a word of flexible meaning; it may ~~be~~ comprehend a series of many occurrences, depending not so much upon the weakness of their connection, but upon their relationship." That is from 270 U.S. 593; the quotation is on page 610.

Mr. Morgan. Is not "transaction" a flexible word which means transaction? (Laughter.)

Mr. Dobie. Well, they have at least given it a much broader meaning than the New York courts.

Mr. Morgan. Very much so.

Mr. Wickersham. If that is the word used in the Equity rule, I think it might be well to follow it.

Mr. Mitchell. No, we are limiting it.

Dean Clark. You mean extending it.

Mr. Lemann. I should think extending it.

Mr. Morgan. "Subject matter" is another thing that has been fought over.

Mr. Lemann. It has been or will be fought over.

Mr. Morgan. It has been fought over on joinder and counterclaim.

Prof. Sunderland. "Subject matter" and not "subject."

Mr. Olney. Gentlemen, we have the rule and a very broad construction put upon it by the Supreme Court. Why change the rule under those circumstances?

Mr. Wickersham. I move to accept the first alternative.

Mr. Morgan. I second the motion.

Mr. Mitchell. All in favor of accepting the phrase "transaction which is" will say "aye"; those opposed "no."

(A vote was taken and the motion was unanimously adopted.)

Dean Clark. Now, Mr. Dobie, do you want to make a motion?

Mr. Dobie. No, I will withdraw that.

Mr. Olney. Now, where there are counterclaims ~~where~~ That a man is required to present, should they be excepted from the counte claims of which the court would have original jurisdiction?

Mr. Morgan. You have that later.

Mr. Dodge. That is Rule 29.

Mr. Olney. Then it ought to go in here.

Dean Clark. Now, I was considering Rule 28 and Rule 29 together, and Rule 28 gets very cumbersome. It could be in Rule 28, except that there is a lot in Rule 28 altogether.

Mr. Olney. The only suggestion I had to make was this: "The answer should state any counterclaim arising out of the transaction which is the subject matter of the action and within the jurisdiction of the court." That is all that is required--

Mr. Wickersham(Interposing). I do not think that

is necessary under the authorities. I was troubled about that, I had a u estion about that, and had it looked into very carefully, and I tried to find how far the decisions have gone in sustaining jurisdiction where there is jurisdiction of the original suit of the counterclaim, even bringing in third parties, as between t he defendant and the third party, ~~and~~ where they would not have jurisdiction of that cause of action as between those parties if brought by original suit.

Mr. Olney. Well, if the court can go ahead with it, it is a thing which I am suggesting is not necessary.

Dean Clark. Yes, your suggestion is based on Rule 29. Rule 29 is based on the idea that you do not need original jurisdiction.

Mr. Olney. When my suggestion is not valid.

Mr. Dobie. In those cotton cases they held that it was not necessary that original jurisdiction should appear as to a compulsory counterclaim.

Mr. Donworth. That is the same case--in 270 U.S.

Mr. Dobie. Yes, that is the same case, Moore vs. Cotton Exchange, 270 U.S. Would you like to see that case?

Mr. Donworth. No.

Mr. Olney. The expression that the counterclaim is deemed waived is not really accurate. The counterclaim is really barred in that case.

Dean Clark. Yes.

Mr. Olney. Yes, it is not waived; it is barred.

Mr. Morgan. Yes

Mr. Olney. Do you not think that should be changed?

Mr. Mitchell. The Supreme Court has held as to Equity Rule 30--it does not even say "waived" there; it merely says the counterclaim must state; it does not say a word about waiver, or ~~xxxxxx~~ bar or anything else, and then they have gone on and held that, in the absence of anything of that kind, the claim had to be sued on again.

Mr. Olney. But Justice Sutherland used the expression "barred".

Mr. Mitchell. Maybe he did, but I think the Equity Rule upon which that decision is based does not say a word about waiver or bar.

Mr. Olney. Further than that, it was not necessary to put an express provision in; but if any is in I should think that it should be "~~bar~~ barred," and not "waived."

Dean Clark. I think it should be "~~bar~~ barred." Of course, I do not suppose you really need it in now that the court has spoken, but it seems to me that, as the court has spoken, it is well to tell lawyers about it, so that they do not have to go back and look up these cases.

Mr. Lemann. Is it "barred" or "deemed barred"?

Mr. Morgan. "Deemed barred;" you would not say that.

Mr. Lemann. No, I say, "is barred."

Mr. Donworth. Without talking about what is already gone over, is it understood that the defendant can amend his answer?

Mr. Morgan. Yes.

Mr. Donworth. This bar or waiver does not take effect until the thing is merged in judgment; and as long as he can amend, that isall right.

Dean Clark. Yes, that is stated in the amendment section, and it is staed later here, five lines from the bottom. "And the court may allow the amendment of an answer to include a counterclaim upon such terms as it shall deem fit."

Mr. Wickersham. I do not understand this last part. You have got that the answer must state in a counterclaim; and then it says down below "The right which is sought to be enforced by the counterclaim may be one acquired by the defendant, or arising or maturing, after the commencement of the plaintiff's action and at any time before final judgment is ~~rendered~~ entered, and the court may allow the amendment of an answer to include a counterclaim upon such terms as it shall deem fit; provided that it may dismiss a counterclaim which was ~~be~~ acquired by the defendant, or arose or matured after the commencement of the plaintiff's action, if it shall find that the defendant seeks to press the counterclaim for the purpose of harassing the plaintiff and delaying his action. The court may at its

discretion order a severance of a counterclaim which could be made the subject of an independent action or a separate trial of any counterclaim until the second judgment or all judgments are entered in the court. or delay in the execution of the first judgment

Dean Clark. Which one is that? Did you say the pleading of a counterclaim which is matured, or at various stages?

Mr. Wickersham. Yes.

Dean Clark. That is one as to which there is a good deal of complication?

Mr. Wickersham. Yes.

Dean Clark. Some of the rules are restricted and some rules make the point of time the time of the arising of plaintiff's claim, which throws it away back. What we have tried to do is, first, to provide a definite rule to avoid question, and second, to provide pretty free rules for pleading and yet to allow the court to prevent any--

Mr. Wickersham. I do not object to it.

Mr. Dobie. Is not the code provision that a contract is a contract, and there it cannot arise; as to the other, it can arise. I think that is the general provision. I think there are cases that way. And some of them say that is the idea--that I may be suing you to keep you from going out and buying a claim against me.

Mr. Mitchell. You have a motion, Mr. Wickersham?

What is your motion?

Mr. Wickersham. That we accept it.

Mr. Olney I would like to get one change in language which I think is ikportant. As this first sentence reads it says: "May state any counterclaim which may be the subject of an independent action, and is within the jurisdiction of the court, in accordance eith the provisions of Rule 29." Now, it is not within the jurisdiction of the court in accordance with the rules, but it may be "in accordance with the provisions of Rule 29, a counterclaim which is within the jurisdiction of the court."

Dean Clark. Yes, I guess we will transpose that.

Mr. Mitchell. We will transpose that.

Mr. Olney. Also in the nexy sentence it says, "Such counterclaim shall include any claim," etc. Now, that word "shall" should be "may", by all means, because you have got in there cases in which it is not mandatory to present the counterclaim.

Dean Clark. I afraid that is the fault of my expression. What I meant is that the term "counterclaim" shall include." ~~It is a word as to which~~ I thought we ought to have a definitional section. This is a definition. We had a little discussion about that, whether we wantedto have the formality, even, of the appearance of a statute which

would have, first, a section on definitions, and so on; and so I have put in such definitions as came up along through the rulesin this way. This is a definition.

Mr. Olney. But all that is required is to change "shall" to "may."

Dean Clark. That is all right.

Mr. Olney. Down toward the bottom of the page you say "The right which is sought to be enforced" by the counter-claim may be one." Should that not be put more strongly--that the rights which may be enforced shall include those".

Dean Clark. I should think that is all right. I am not quite clear that it is any different. I should think you way you put it is all right. I am not sure why you feel that the change is ncessary. Is not either way the same thing, except that you think it should be made in the plural?

Mr. Olney. Well, you put it in the singular, when there may be quite a number.

Mr. Dobie. But it would apply to each one.

Mr. Olney. This is not particularly important.

Mr. Mitchell. Instead of saying "a right," you want to say "the rights."

Mr. Olney. Yes. There is one other thing.

Mr. Dodge. While you are looking at that, I will ask you a question. Is the law at present that a cross complaint not arising out of the same transaction must be

within the jurisdiction of the court?

Dean Clark. There is nothing said in the Equity rule about it, as you will notice.

Mr. Dodge. I mean in actions at law if there is a set-off or counterclaim arising out of an independent contract may it not be set up, although it involves only $100, and therefore would not be within the jurisdiction of the court.

Dean Clark. Well, the cases go such a distance that I think that many argue that. I do not think that it has been clearly decided.

Mr. Lemann. Will that not come up under Rule 29? Suppose you have a claim against me for an automobile accident for $3,000, and you owe me $500 for a job of work.

Mr. Morgan. You cannot do that now.

Mr. Dodge. This rule may cut off the right of set-off as it now exists.

Mr. Lemann. Are you sure you cannot now?

Mr. Morgan. No. I think the counterclaim is under contract, and if it is tort it arises out of the same transaction. I think that is the usual rule.

Mr. Lemann. But suppose you sue me on a contract.

Mr. Wickersham. It would depend on the lawsuit.

Mr. Lemann. Suppose you sue me on an automobile for $3,000, and I say you owe me on a grocery bill $500;

can you do that?

Dean Clark. You are confusing two questions. I think Mr. Dodge's questinn was a limited one.

Mr. Dodge. I say if itwas an independent suit.

Dean Clark. I do not think you can.

Mr. Dodge. You cannot set out a counterclaim of $100 in a Federal court in a matter of contract.

Mr. Donworth. I do not think you can as an independent matter in a Federal court.

Mr. Dobie. Are you talking about the jurisdictional amount now?

Mr. Lemann. Yes.

Mr. Donworth. Yes.

Mr. Dobie. I do not know about that. The leading case is the American Soda Fountain case, in which Chief Justice ~~Fair~~ Fuller wrote the worst opinion he ever wrote. There is no discussion of the question. He says all things considered, it may very well appear that the jurisdictional amount is there. He then cites 69 cases, ~~every~~ not one of which is in point; because every one of them depended upon appeallate procedure, in which the rules are very different.

Mr. Mitchell. We have no authority to make any rule that makes any change in jurisdictional questions.

Mr. Lemann. But as I understand it as to the juris-

diction, the Supreme Court has the final say where the jurisdiction is uncertain, and if it is uncertain you could make any kind of claim you wanted to, and the Supreme Court would approve it.

Mr. Mitchell. Gentlemen, it is a little after 1 o'clock, and I have a request from photographers who want the privilege of taking photographs of the members of this conference.

(Thereupon, at 1:10 o'clock p.m., the Advisory Committee adjourned 1:45 o'clock p.m.

AFTER RECESS

Saturday, November 16, 1935.

The Advisory Committee met at 1:45 o'clock p.m., pursuant to recess.

Mr. Mitchell. We are still on Rule 28.

Dean Clark. May I speak of two different kinds of questions that were presented to me during the recess, and dealing with somewhat the same problem. That is the material at the foot of the page.

Mr. Wickersham. Rule 28?

Dean Clark. Rule 28, the counterclaim question. And this is the same part that you originally asked the question about, Mr. Wickersham. Mr. Olney thought that the provisions beginning with the word "provided", and providing for dismissing a counterclaim acquired by the defendant afterward was rather doubtful, and suggested striking it out altogether. In particular, he raised the question that no counterclaim, under the mandatory section, ought to be stricken out, which, is true. When we drew it we thought there would be no counterclaim under the mandatory section, because it was supposed that a counterclaim arising under the transaction originally sued upon would undoubtedly mature at the time of the original one. He suggested that while that usually be true, it would not always necessarily be true, and his idea was to

strike that out. Mr. Dodge suggested that he thinks the allowing of a counterclaim at any time before final judgment is going too far, and that it ought to be at any time before trial. I was wondering, combining those two points--if we move the time up to the time of trial, and then struck out the proviso, how that would appeal to the Committee.

Mr. Mitchell. Strike out entirely the proviso?

Mr. Wickersham. It is at least an improvement over saying "before final judgment."

Dean Clark. The only question there is one that I raised before, that the trial might conceivably be mixed, and you might have what would be claimed to be several lawsuits.

Mr. Cherry. Especially under these rules, with provision for severance and separation.

Mr. Dobie. That precise question has been raised in connection with removal of cases on account of prejudice and local influence. That has been changed, so that now it means the first trial.

Mr. Dodge. It would naturally be the first trial.

Mr. Dobie. That is what the Supreme Court has held.

Mr. Cherry. But that might not be so where there is but one trial.

Mr. Dodge. On the merits.

Mr. Cherry. No; under this provision we adopted

a rule calling for severance of the different parts of the case.

Mr. Wickersham. Would it be better to say, instead of "trial ~~before~~ upon the issues", "trial ~~before~~ upon the main issues"?

Mr. Mitchell. I would say "before the final submission of the case."

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Mr. Morgan. I would like to have it allowed during trial.

Mr. Mitchell. That leaves in the idea that it must be before the trial.

Mr. Morgan. Instead of trial, say "before final submission."

Mr. Mitchell. What do you think about that, Mr. Dodge?

Mr. Dodge. I think it is all right.

Dean Clark. "Before final submission."

Mr. Mitchell. It may be better to say "before completion of the trial."

Mr. Donworth. After what word does that go in?

Dean Clark. Sixth line from the bottom, where we have "before final judgment is entered," and this is a variation of that.

Dean Clark. What about striking out the proviso?

Mr. Wickersham. I think that is permissive with the

court, and like that. If on its face, a late application appears to the court to be made simply the purpose of harassing the plaintiff, the court would have almost a right to do that.

Dean Clark. You think, then, it would be necessary, as Mr. Olney thought it would, to limit this to only the permissive counterclaims?

Mr. Wickersham. The only what?

Dean Clark. To only the permissive counterclaims. You see, under the first sentence of the rule--

Mr. Wickersham. Yes; well, do you not mean that that is so?

Mr. Dobie. The other has to be in the answer.

Mr. Morgan. Yes, you would have to have an amendment.

Mr. Dobie. The compulsory counterclaim has to be in the answer; if it is not it is waived.

Mr. Cherry. Your control of the amendment would cover the other, would it not?

Dean Clark. Yes. Judge Olney thought up the point that I may state your proviso at the bottom of the page, and also a suggestion from Mr. Dodge, which has been more or less taken care of by the suggestion that, ahead of "at any time before final judgment," it be "at any time before completion of the trial." And then we were just discussing

whether you thought the proviso unnecessary. Mr. Wickersham said he thought it was permissive, and therefore helpful; and therefore, the question whether the mandatory was conclusive, as pointed out in sentence 1 of the rule--that the counterclaim must be in the answer or it is barred--that that would not come up here anyway.

Mr. Mitchell. You cannot very well bar a counterclaim that has not arisen. Why not put it in your rule so that that would not be construed to mean that?

Mr. Dodbie. What is the harm in leaving in this last provision giving the judge this power?

Mr. Donworth. I think it is a very wise provision. Otherwise the defendant may before trial come in with a claim. But you could prevent all nonsense.

Mr. Morgan. He would not have a right to do that thing, except by amendment, or something supplemental of the pleading, for which he would have to get permission.

Mr. Olney. It seemed to me that there might be some difficulty in it.

Mr. Dobie. This is after the commencement of the plaintiff's action?

Dean Clark. Yes.

Mr. Dobie. So that he may put it in his answer, and it may arise in his answer, and it may come out at the trial that he went out and bought this counterclaim. I favor

putting it in.

Mr. Olney. When that situation arises, it simply means that his counterclaim would be overruled and thrown out, and a judgment in bar rendered against it.

Mr. Dodge. Does this word "dismiss" mean dismiss on the merits?

Dean Clark. No.

Mr. Dodge. It means get rid of it, so far as this case is concerned?

Dean Clark. Yes.

Mr. Dobie. And bringing an independent action on it later. I make that motion, that this be left in.

Mr. Lemann. I second the motion.

Mr. Mitchell. All in favor of that motion will say "Aye"; those opposed "No."

(The motion was unanimously adopted.)

Mr. Dodge. I just raised the question whether that word "dismiss" applies where you refer to a claim growing merely out of this particular case.

Mr. Dobie. How about "dismiss as a counterclaim in this case"?

Mr. Dodge. That would make it plain.

Mr. Dobie. "Dismiss as a counterclaim in the instant case."

Prof. Sunderland. Or dismiss without prejudice.

Mr. Dobie. Yes, that is better "dismiss without prejudice."

Mr. Wickersham. Where would you put that?

Mr. Olney. Do you think that would accomplish anything at all from a practical point of view?

Mr. Dodge. The court might have allowed the amendment, and then on further consideration find it had been brought to harass the defendant.

Mr. Morgan. Yes.

Mr. Mitchell. Are there any changes on the second page of Rule 28 that you want to make? It does not seem to me that that next sentence is worded right. It says, "The court may at its discretion order a severance of a counterclaim which could be made the subject of an independent action or a separate trial of any counterclaim or a delay in the execution of the first judgment to be entered until the second judgment, or or all judgments are entered." I do not understand that.

Dean Clark. Perhaps a comma would help. It could be made the subject of an independent action, (comma), or the separate trial of any independent counterclaim, (comma).

Dean Clark. "The court may at its discretion order a severance of the counterclaim," and so on, or order a separate

trial.

Mr. Morgan. Put in between "ay" and "order."

Mr. Donworth. If you put the words "in its discretion" further back, you do not need any further change--"the court may, in its discretion."

Mr. Wickersham. You do not want two "mays" in there. "The court may, at its discretion, order a second trial", and so on.

Mr. Morgan. Yes.

Mr. Olney. The first sentence is not very limited, so as to require that that claim be one of which the court would have original jurisdiction. In other words, the plaintiff could bring suit against John Doe, and, we will say John Doe and Richard Roe; and then John Doe can proceed to sue Richard Roe, although on a claim of which the court would not have jurisdiction at all.

Dean Clark. Which provision is that?

Mr. Olney. Rule 30.

Dean Clark. Well, you are ahead of us. (Laughter.)

Mr. Mitchell. We have not finished with Rule 28. We are on the second page of Rule 28.

Mr. Wickersham. I move that those changes be made and that we adopt Rule 28.

Mr. Loftin. I second the motion.

(A vote was taken, and the motion was unanimously adopted.)

Mr. Mitchell. Now, as to Rule 29.

Dean Clark. This presents the question of jurisdiction that we were discussing before. We had debated it in a limited way, more or less, to avoid raising a question than otherwise. I have no great wish to limit jurisdiction over counterclaims If we can go further, I will be very glad to go further, and as Mr. Dobie has pointed out, the law is confused on the subject.

Mr. Donworth. I am in sympathy with that idea. I think the phraseology might be very much improved. Think of this situation: When the c unterclaims must be pleaded pursuant to Rule 28--

Dean Clark. That is in the alternative--or "arises out of the transaction or acts and occurrences which are the subject of the action."

Mr. Donworth (Continuing). "No independent grounds of jurisdiction need be pleaded, unless the counterclaim is pressed after the action is dismissed for want of jurisdiction." Does that mean that you are going to amend after dismissal? I had thought, subject to Dean Clark's idea, that in the fourth line, where it says, "unless the counterclaim is", we might insert these words "intended to be presse

and then beginning on the next line "~~xxxjxxxxxx~~ substitute/"even if." That is, when a man files his counterclaim, he must show the jurisdiction at that time, and not wait until the suit is dismissed and then ask to amend.

Dean Clark. I think that is all right. Of course what he would have to do then would be to amend. The way ~~we xxx~~ stated it, if he has not actually pleaded that counterclaim, we allow him to amend. So that we reach the same result.

Mr. Donworth. I do not care.

Dean Clark. But I think that is all right.

Mr. Lemann. If we are uncertain about the jurisdiction, let us say nothing about it, and take up Rule 29, and leave it "within the jurisdiction of the court." We cannot determine that~~xxxxxxxx~~if we do not know just what its purpose is--and this seems to imply, in the case we discussed, that perhaps there would be no jurisdiction. I said to Mr. Dobie that that is not clear. I have gone over this Rule 29--and I have gone into the question of where there was no jurisdiction where the amount was less than $3,000. And if we are in doubt, let us say nothing about it.

Mr. Dobie. They have held, in the case of a compulsory counterclaim, that no jurisdictional facts may appear; that is, facts to justify the jurisdiction of the Federal court as a court.

Mr. Dodge. What have they held as to voluntary counter claim?

Mr. Dobie. I do not think that appears.

Mr. Lemann. Your idea is where there is a counterclaim for less than the jurisdictional amount?

Mr. Dobie. Yes. That is what the Supreme Court held in the Soda Fountain case, without a technical discussion; and I guess that is the law. There have been some minor cases in which some of the judges pointed out that it is perfectly clear that, where the plaintiff claims $900 and the defendant claims $2,600, he can add them together; it is not a counterclaim. I doubt whether we should go into that.

Mr. Lemann. I do not think so.

Mr. Dodbie. But they did hold in the Cotton Exchange case that, as to compulsory counterclaim, it was not necessary that Federal jurisdiction had to appear.

Mr. Dodge. But it is very unfortunate that a man sued for $3,000 should not be allowed to bring up a set-off of $500, but would have to go in the State court.

Mr. Morgan. If you get any cases of that kind, where the plaintiff sues for $3,000 and the defendant wants to bring in a counterclaim for $500, that can be taken care of--not arising out of the same case.

Mr. Dobie. Independently?

Mr. Morgan. Yes.

Mr. Dobie. In the Soda Fountain case, they held that they might add the two together.

Mr. Morgan. I do not care about adding the two together I want you to knock out the defendant. You sue me for $3,000 on a personal injury, and I put in a claim for $1,000 on a promissory note.

Mr. Dobie. I think that is all right. I think jurisdiction once vested would not be taken away by the counterclaim.

Mr. Morgan. I grant that; but suppose theplaintiff moves to strike the counterclaim because it is not within the jurisdiction of the court and does not arise out of the same transaction, and he could not bring it in a Federal court as separate lawsuit; and now he says that you cannot counterclaim anything arising out of the same transaction unless your counterclaim would have been itself within the jurisdiction of the Federal court."

Mr. Dobie. As I read the Federal cases, I do not think it is clear. If the plaintiff's claim is $3,500, the defendant cannot divest jurisdiction.

Mr. Morgan. We know that.

Mr. Dobie. I mean, he can bring in his counterclaim.

Mr. Lemann. That is what we want to know, if he can

bring in his counterclaim.

Mr. Dobie. Yes, the court would have jurisdiction, even if there if his counterclaim was for $100.

Mr. Lemann. I think we should leave that out and leave it to the Supreme Court.

Mr. Mitchell. Has not that not been covered by cases?

Mr. Dobie. I think so.

Mr. Wickersham. I think so. I think if the court once had jurisdiction, you can file a counterclaim for less than the amount you would have to sue for if you were seeking original jursidiction.

Mr. Dobie. I agree with you.

Mr. Morgan. Even though it does not arise out of the same transaction.

Mr. Lemann. I move that until an investigation is made --and that on this question of law, we have a memorandum on it, and if we can do that, that we pass it now.

Mr. Mitchell. We can certainly include it.

Mr. Wickersham. What is the law as to jurisdiction of a cause of action by way of counterclaim where jurisdiction has been acquired? But I think it ought to be restricted to something growing out of the same transaction.

Mr. Lemann. That we think is settled. What we are wondering about is where that goes beyond that.

Mr. Wickersham. I do not think you ought to be able to

do that.

Mr. Mitchell. It is not a question of adding the two together.

Mr. Wickersham. No, it is simply to bring a new controversy by way of counterclaim.

Mr. Mitchell. To bring in a new controversy where it has not connection with the claim sued on, and the only claim is that it lessens the jurisdictional amount, and your claim is that you can do that, notwithstanding that it is less than $3,000.

Mr. Wickersham. I think they can do that. I was surprised to find that, but I think the decision sustain that.

Dean Clark. We have been talking now about the ordinary cases of a money claim.

Mr. Morgan. No, I am talking about any kind of claim.

Dean Clark. I want to ask you if you go that far. Suppose it was $1,000 against $3,500. Suppose it was an injunction on independent grounds.

Mr. Mitchell. That is hardly a counterclaim.

Mr. Morgan. It is according to this.

Dean Clark. Yes, it is according to this.

Mr. Donworth. Suppose it was an assault and battery ~~case~~, and the defendant says,"my damage is $2,000. "

Mr. Lemann. Of course, he would never say that the

damages were $3,000. (Laughter.)

Mr. Dobie. I think the Supreme Court would sustain that.

Mr. Lemann. But my point is that you might owe me $2,000 for groceries, and you have got me in court and I think if the court passes on your claim for $3,000, it would pass on my claim against you for $2,000.

Mr. Dobie. I think that would be so.

Dean Clark. Suppose against that suit against me for assault I want to put in a claim for specific performance of a contract.

Mr. Donworth. There is one theory upon which the counter-claim, while independent of theoriginal suit, is within the jurisdiction, although involving less than $3,000, and that is when a plaintiff brings suit for anything, and he brings into controversy an entire adjustment of the ~~counterclaim~~ accounts and claims, tort and contract between him and the defendant, and that is the inside offer in his complaint-- "I want to adjust all points." If that is so, the original jurisdiction would cover it.

Mr. Dobie. I think so. There are cases holding that where a State is sued on a contract for prison labor, this man can come back on a contract, although he could not have ~~tried~~ brought an independent suit.

Mr. Dodge. Well, that is the sovereign.

Prof. Sunderland. That is on the theory that it is a common law recoupment.

Mr. Dobie. That is right. I do not believe you could do that otherwise.

Mr. Dodge. Will you look that up and make a memorandum, Dean Clark?

Dean Clark. I had my associate, Prof. Schumann, work on this. I have not his memorandum here, and I will have to depend on memory. But what he had chiefly in mind was the broader kind of claim I spoke of, and it does not seem to me that that would come in. That was his judgment--that specific performance case. Do you think so?

Mr. Dobie. I think on jurisdictional grounds it would be all right if the rules permitted it. In other words, the court already has jurisdiction of the case and it has attached, and they would be apt to "shoot the works" out.

Dean Clark. Well, specific performance of a contract on realty?

Mr. Dobie. Yes, that would be my case.

Dean Clark. That is going pretty far.

Mr. Morgan. But you are not going to distinguish between different kinds of claims which do not arise out of the same transaction, and you are going to go back to the old English distinction between set-off and counter-claim. We have gone beyond recoupment.

Mr. Dobie. I would be inclined to take the chance and put it up to the court.

Dean Clark. Of course, that is one way of extending Federal jurisdiction--which Congress has not been very anxious to do, or if not extending it, at least clarifying the law in such a way as to be pretty extensive.

Mr. Mitchell. The real principle underlying this defense of counterclaim is that the plaintiff is going to get a judgment against you and get something out of you, and if he does and you are not allowed to litigate and collect your claim against him, he may run off with your money, and you may never get yours. It seems to me that, in the case that has been suggested, the plaintiff is suing for money and the defendant is not seeking any relief that will diminish what the plaintiff gets; he wants specific performance of a contract for real estate. I do not quite see the reason behind the idea that he should be allowed in a Federal court to bring in a case that otherwise is not within its jurisdiction as an independent suit, where it is not a subject matter that is worth $3,000, and where it has not relation to diminishing the plaintiff's recovery in any way.

Mr. Olney. Suppose A sues B, who is a State officer in the Federal court, to restrain him from taking certain action which he is authorized to do under ~~xxxxxx~~ State statute,

because it is claimed that that State statute is unconstitutional by reason of the provisions of the United States Constitution. Suppose the Federal court takes jurisdiction of that suit for injunction, on the ground that a Federal question is involved, and then suppose that officer turns around and files a counterclaim against the plaintiff for $3,000 on a promissory note, and they both are citizens of the same State.

Mr. Mitchell. Why should we not follow Mr. Lemann's suggestion and refer this back to the Committee, with an understanding that a thorough examination of the authorities will be made and determine what the Federal courts allow now, and make the rule conform to it?

Dean Clark. That is all right.

Mr. Mitchell. I think you all are in the dark until we know the authorities. So that I suggest that we refer it back to the Committee to look it up, and then we will know what the law is.

Mr. Dodge. That was Mr. Lemann's motion.

Mr. Morgan. I second that motion.

(A vote was taken and the motion was unanimously adopted.)

Mr. Tolman. I wonder if we should not ask Dean Clark that this memorandum of authorities be referred to us?

Mr. Mitchell. We had better see it before our next meeting.

Now, we will pass Rule 29 with that understanding, and go to Rule 30.

Mr. Olney. There in the first sentence the same question comes up. It says,"The answer may state any claim, whether based on legal or equitable grounds or otherwise, arising out of the transaction which is subject of the action,who shall reply as provided in Rule 31." That claim made by one defendant against the other, does ~~not~~ that come within the Federal jurisdiction?

Mr. Mitchell. It arises out of the same transaction.

Mr. Wickersham. This just elects which one of those causes in brackets in Rule 30 we will adopt. I think before we use the phrase "transaction which is ", we had better determine that.

Mr. Morgan. And you use "subject matter" instead of "subject"?

Mr. Wickersham. Yes.

Dean Clark. Yes.

Mr. Mitchell. And to be consistent we will strike out "acts and occurrences which are."

Mr. Wickersham. "The transactionx which is the subject of the action."

Mr. Morgan. "Subject matter of the action."

Mr. Wickersham. Yes.

Mr. Morgan. We ought to make them uniform at any rate.

Mr. Wickersham. Yes.

Dean Clark. On the point of jurisdiction, I think independent grounds are not needed; but here the question is by no means clear.

Mr. Dobie. That is true; and in the case of Moore vs. New York Cotton Exchange--and Mr. Wickersham was in that case; it says George W. Wickersham and Henry W. Taft for the New York Cotton Exchange--the court said, "We are of opinion that this counterclaim comes within the first branch of the rule." (That is the compulsory claim branch, and we need not consider the second branch, that Federal jurisdiction must appear." Then they cite and inferior court Federal case.

Mr. Lemann. In the middle of the second paragraph of Rule 30 it says, "The third party shall file his answer or other defense in the cross action, and he may also plead defenses to and otherwise dis ute, " and so on. I was a little uncertain of what that language meant--whether the third party could do anything different from what the original defendant could do--whether in case of "other defenses" the defenses could be presented by the answer.

Dean Clark. I intended to include in that "his answer or defenses." I want to make it inclusive and to cover this man motion that I provided for under Rule 26--which I guess does not need to be considered here now; and if a motion to strike were correct, which I consider a defense, and possib-

motions for summary judgment or other procedure.

Mr. Lemann. It seems to me you ought to be as definite about this as you were in the specification as to the defendant; otherwise the difference in language might --

Dean Clark (Interposing). I think I am. I have forgotten just what we did, but I think we probably tied the defendant down, and now we tie this man down.

Mr. Lemann. He should be equally tied.

Dean Clark. Yes. Now, if you want I will go back over it, or if you wish I will just change it to make that third party to be tied like the defendant.

Mr. Cherry. Why not tie them by the same cord, by reference?

Dean Clark. That could be done. But the next part of it, "he may also pleaded defenses to and otherwise dispute the plaintiff's claims," --

Mr. Cherry (Interposing). That would go in, yes.

Dean Clark. Let me say on that that some of these cases have said he could not do that unless the plaintiff ~~plotted~~ pleaded against him. But I never saw any reason for that limitation. But if he ultimately may bring a very good case why should he not dispute it whether the plaintiff claims a judgment against him or not?

Mr. Lemann. But he could not do that in any way that the original defendant could not.

Dean Clark. That is correct. Now, on this jurisdictional point question, may I say that in the note I said: "It is not believed that independent grounds of jurisdiction and venue are necessary here; but further examination of the authorities will be made." Now, my staff did investigate further, and they feel that it is not--at least, perhaps it is not beyond question, but is reasonably clear, but I guess I had better include that in the memorandum that you want.

Prof. Sunderland. I did not understand which way they indicated.

Dean Clark. Not necessarily--

Mr. Donworth. Independent grounds.

Dean Clark. Independent grounds where you want to bring in a third party; it is the same transaction.

Mr. Lemann. It seems anomalous to have that rule that you could not do the other thing.

Dean Clark. I want to make that clear. This is on the co-defendant. I do not think there is anything under any Federal practice about bringing in a third person, but it is a claim against a co-defendant who is already in.

Mr. Lemann. Well, in a receivership, you can sue a third person without regard to the amount. If you get a receiver appointed in a Federal court, in Louisiana, that receiver can bring in any defendant without regard to the amount. He can sue anybody for any amount, although the

corporation for which he is a receiver was a Louisiana corporation and could not have sued that man in the Federal court. But the original plaintiff was a citizen of Massachusetts, and he came to Louisiana and got a Federal receiver appointed, and that Federal receiver brought in defendants where the corporation could not have done so.

Mr. Dobie. That is on the question of ancillary jurisdiction.

Mr. Lemann. Yes. I think that justifies the third person.

Mr. Olney. I do not think it justifies the co-defendant rule. That jurisdiction is maintained there as ancillary to the first suit, because he is an officer of the court.

Mr. Lemann. But I think it is on the theory that he is in the court--not on the theory that depends on his citizenship.

Mr. Olney. No, because he is an officer of the court.

Mr. Lemann. Well, I think at least we ought to examine the law.

Mr. Olney. There might be an entirely different controversy that exists in the receivership, and still the receiver can bring that suit.

Mr. Dobie. There a number of cases that Prof. Jevie brings up where interpleader has been sustained.

Mr. Lemann. I think it all should be covered by the memorandum, and see how far it goes.

Mr. Dobie. I think so too, and we need not discuss it further.

Mr. Mitchell. Shall we pass Rule 30, then, subject to this disclosure of this memorandum later?

Mr. Olney. There is one thing--I do not know whether the reporter has considered it or not. That is, if you are permitting here a suit by one defendant against another, would it not be advisable to insert some provision that unless the original plaintiff's right to relief is attacked in some way, he should be protected against delay by the filing of this claim in which he is really not interested.

Dean Clark. I think perhaps it would be a good idea to put it in specifically. We have, I suppose, our general provisions as to consolidation which I suppose cover it; but I see no reason why that should not go in as a specific precaution.

Mr. Mitchell. Did you notice that suggestion of the Minnesota Committee as to contribution or indemnity?

Dean Clark. Yes, I want to speak about that. In the last three lines of the first page of Rule 30, providing for separate trial, I have not said any more than, "The court in its discretion, as it finds convenient."

Mr. Only. I know, but I think this thing is going

to strike the bar as a possible way of delaying matters, and it might be well to have some special provision in there.

Mr. Lemann. I think it will delay matters anyway. It is an admonition which may be passed. We might limit this, If you put in, where the plaintiff is harassed or limited--perhaps we could leave it out. Now, this rule is more limited than some people wanted. For instance, Prof. Gregory of Chicago gave me a draft much broader than this. In general, this third party practice is reasonably new. They have it somewhat in New York and Wisconsin. It is rather a desirable thing, but the question is how broad is it to be made? You will notice for one thing that I have limited it to things arising out of the same transaction.

Mr. Mitchell. It is purely an indemnity provision, is it not?

Dean Clark. Yes.

Mr. Mitchell. To get indemnity there and third party contribution.

Dean Clark. Yes. Now, I have limited it because I thought it was a new thing to most of the States. I did not want to ask them too much. But I should be glad to have my caution overruled. I am naturally conservative, and if the Committee wants to be more radical I am willing. (Laughter.)

Mr. Wickersham. We will all take notice of that.

Mr. Mitchell. In Minnesota, they have said the thing n a very few words, so far as contribution and indemnity are concerned. They have said if he is a third party and not a party to the action he is entitled to contribution or indemnity. Then they go on and add two other cases. What do you think about this?

Prof. Sunderland. Those are probably the English cases. There are three branches of the English rule, and they probably apply them all.

Mr. Mitchell. What are the other two branches of the English rule, and why should they be excluded?

Dean Clark. One difficulty does arise about the difficulty of extending Federal jurisdiction. First, it is a question whether you can extend Federal jurisdiction, and second, whether you shoud. Now, as to how far you go, the broader you make the rule bringing in a third party, the more you run into this question of independent grounds of jurisdiction or if you are not doing that, you are really are drawing in third parties who could not otherwise be sued under the rules in the Federal court. That is about the problem. It is mainly here, I think, ~~is the~~ a question of Federal jurisdiction which makes this situation a little harder than it would be in the State practice.

Prof. Sunderland. Those second branches of the English rule are very technical. I do not think anybody

would know what they meant.

Mr. Mitchell. I do not.

Prof. Sunderland. But the first part, as to contribution, and indemnity, is very clear.

Dean Clark. They have not put in the details.

Mr. Mitchell. No.

Dean Clark. That is, that contribution or indemnity would only cover that sentence.

Prof. Sunderland. Yes, the last part of the first sentence.

Mr. Mitchell. I did not mean to press it. I just wanted information.

Dean Clark. I would like to know, Mr. Wickersham, if the Committee would like to extend this rule.

Mr. Wickersham. I am in favor of extending it, as far as the decisions of the courts allow.

Dean Clark. Well, this is not covered by decisions. Of course, the State courts are doing it.

Mr. Wickersham. Well, there are a number of Federal decisions where third parties were brought in under the New York rule, for example, and they sustained it. One of them is the case of Wichita Light Co. vs. Public Utilities Commission, 260 U.S. In that case A and C had a contract whereby C, the light and power company, agreed to supply A power at a certain price. A and C were both citizens of

West Virginia doing business in Kansas. B, the Kansas Public Utilities Commission, declared a rate higher than the rate in the contract, and directed C to supply A at that rate. A brought suit against B, a citizen of Kansas, on the ground that that order violated its contract rights with C. C. intervened in the suit between A and B. The Supreme Court said that the intervention of the Kansas company in the same suit did not take away theground of diversity of citizenship, on the ground that jurisdiction existed when the suit was begun. And it said that jurisdiction once acquired of that kind is not divested by a subsequent change in the citizenship of the parties; nor is such jurisdiction defeated by the presence of a party whose presence is not material. They said the Kansas company was a proper party but not a necessary party.

Mr. Mitchell. They talked about that, but they did not say whether they decided the case on that.

Mr. Dobie. I think that is plain. They did consider the intervention.

Mr. Wickersham. Yes, but there was jurisdiction which did not depend upon the citizenship of A and B.

Dean Clark. Yes, but the Federal court in New York has held that there must be diversity between B and C, or some other ground before jurisdiction can exist in the Federal court. I may cite for that 29 Fed. Repo (2nd) 72; 28

Fed.(2nd) 897). Mr. Wickersham. Yes

Dean Clark. It was said that diversity is not required for intervention, nor for cross-suits between defendants. But we are now dealing with bringing in a new party. Now, of course, what we have done is to try to make it more limited, with the hope of making the new practice stick.

Mr. Lemann. Would it not be better to ~~add~~ do this--that we could always find some case that ought to be within it, and we could always amend it--that the reporter has fixe it as far as it ought to go.

Mr. Donworth. I second the motion.

Mr. Mitchell. All in favor of adopting Rule 30, subject to this further examination of the Federal decisions on the jurisdiction will say "aye"; those opposed "no."

(A vote was taken and the rule, with the qualification, was unanimously adopted.)

Mr. Dodge. I want to raise one question about Rule 30 which is not jurisdictional. At the very end, the rights of the plaintiff against the new defendant are nothing at all. He has no rights, and the defendant gets execution only when he pays the plaintiff's judgment. Now, this being a rule applicable to both equity and law, I am wondering if that interferes with the right of a plaintiff who may be rich and applies as against an impecunious defendant of the right of the latter against a solvent guarantor. That, I think, i

a familiar ground of equity jurisdiction which gives the plaintiff direct relief against the guarantor, and I trust we are not interfering with that by providing that the plaintiff shall have no right against a new defendant.

Dean Clark. Well, you will notice that the plaintiff does have some rights against the defendant. The plaintiff may amend his pleading to include the third party, as if he might have originally joined such party.

Mr. Dodge. By an amendment in his pleading?

Dean Clark. Yes. All we have done is to stop it where he could not originally have joined him in the suit.

Mr. Mitchell. Let me interrupt to say that the court attendants are anxious to know what hours we are going to sit tomorrow, Sunday.

Mr. Tolman. I am going to suggest that we meet at 2 o'clock tomorrow, and have an afternoon and evening session so that we can really get a little rest in the morning. I think we will accomplish more if we do that.

Mr. Donworth. I second that motion.

Mr. Tolman. Another thing about it is that we can not get anything to eat in this neighborhood on Sunday; we would have to go a long way to find a restaurant.

Mr. Mitchell. That is why I was going to suggest that we meet at that hour: Instead of adjourning at 6 o'clock tomorrow and then coming back, we might run through until

7 o'clock, and make take a rest of 15 minutes during that time, and we can sit until 7 or 7:30 o'clock and then adjourn for the day, instead of running off and coming back and sitting late. I favor that as a good suggestion.

Mr. Wickersham. If we remain in session for five hours tomorrow we will do pretty well.

Mr. Olney. My impression is that you will not do as much in a straight five-hour session as you could in a broken five-hour session.

Mr. Lemann. I was wondering if you could. If you did that you should not come back at night.

Mr. Doble. What is your proposition about tomorrow?

Mr. Lemann. I should say begin at 10 or half-past 10 and meet for three hours and then come back later for three hours and then not come back at all at night.

Mr. Wickersham. Would we not do more if we met at 2 o'clock and sat until 7? I move that tomorrow we meet at 2 o'clock and sit until 7.

Mr. Olney. At the end of three hours you will find that ~~they~~ drag.

Mr. Wickersham. Well, we will take a 15 minutes recess.

Mr. Loftin. The only objection to that is that I have an engagement tomorrow afternoon.

Mr. Lemann. Mr. Morgan goes tonight.

Mr. Morgan. Yes.

Mr. Dobie. I believe that 2 o'clock is a good suggestion. I think at half-past 4 we should take a short recess.

Mr. Mitchell. You made a motion, Mr. Wickersham, that we meet from 2 o'clock to 7.

Mr. Wickersham. I did.

Mr. Donworth. Subject to such recess as can take.

(A vote was taken and the motion of Mr. Wickersham was unanimously adopted.)

Mr. Dobie. Then it is definitely settled that we will not sit tomorrow night or tomorrow morning?

Mr. Mitchell. We will not sit except from 2 to 7. And we will pass on to Rule 31.

Dean Clark. How about tonight?

Mr. Mitchell. I assume that we will sit tonight.

Mr. Loftin. Yes, I make that motion.

Mr. Mitchell. We will so understand it, unless there is some objection.

Mr. Donworth. In Rule 31, in the third line, there are two typographical errors. "His motion" should be "its motion" and the next word should be "or"; in other words, it should be "upon its motion or the motion."

Mr. Wickersham. In what line?

Mr. Donworth. The third line.

Mr. Wickersham. Well, that is a repetitionthere.

Mr. Dobie. It ought to be "its motion or the motion."

Mr. Wickersham. Yes.

Dean Clark. Yes, that is right.

Mr. Morgan. And following that, we say"The action shall deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied"--I should say there "new or affirmative matter therein," "the plaintiff may meet by denial, defense or counterclaim." I do not think you want to deem it denied, because that always put the other party to theproof, even though it is going to be confessed and avoided--

Dean Clark. Wait a minute. I think you are changing the effect of the rule. I think that is all right, but let us consider it. This provides for no reply except when it is required as a counterclaim.

Mr. Morgan. Yes.

Dean Clark. In other case you may have it on the order of the court. If you do not have it you have no reply, and then if you have no reply it has got to be deemed denied or you are unfair to the defendant.

Mr. Morgan. Not at all, if you provide that he may meet it in the evidence by denial, defense or claim such as

he may have. If you are going to deem it denied, then under other circumstances he has got to be put to theproof on it.

Dean Clark. Well, as a matter of fact, this is the ordinary code provision.

Mr. Morgan. I know it is and I always have objected to it.

Dean Clark. Well, I do not think it means very much in the course of a trial.

Mr. Morgan. It may not; but it means that you do not need to reply, and that you go to trial without an issue and without an affirmative defense.

Dean Clark. This is new to me, but will you give it again?

Mr. Morgan. My point is that when you abolish a reply that you go to trial without an issue whenever there is an affirmative defense, and that the case is then tried on the evidence without the pleading.

Mr. Wickersham. Is that not the whole theory of it?

Mr. Lemann. What is your suggestion? What language do you want to take out or leave in?

Mr. Morgan. I want to take out the notion that any new or affirmative matter in the reply shall be deemed denied.

Mr. Lemann. Would it suit you to take that out and say "The plaintiff may assert any defense without further pleading"?

Mr. Morgan. Yes, "and the plaintiff may meet it by denial or affirmative defense.

Mr. Wickersham. Then you have to have rejoinder.

Mr. Morgan. No. You are talking about the evidence.

Mr. Lemann. Could you get it by omitting the words from the word "any", the last word in line 4 down to the word "he" in the sixth line, and inserting the words "and the plaintiff." It will then read, "The action shall be deemed upon the filing of the answer, and the plaintiff may assert any defense or claim which he has to any new or affirmative matter set up in the answer."

Mr. Lemann. What do you mean by "assert"?

Mr. Morgan. No. My notion is that he may meet the affirmative matter in evidence, by denial, defense or claim.

Mr. Lemann. "Make any defense to the counterclaim." Would that cover it?

Mr. Morgan. It is not a counterclaim I am talking about. It is where you have an affirmative defense other than a counterclaim made by reply.

Mr. Wickersham. The usual provision is that all of that shall be denied without rejoinder.

Mr. Morgan. Quite so.

Mr. Wickersham. That is the Equity rule.

Mr. Morgan. Yes, and my assertion is that it is a mistake; it does not mean anything.

Mr. Wickersham. Yes, it does.

Mr. Dobie. The defendant has to prove that new matter.

Mr. Wickersham. Yes.

Mr. Dobie. You do not want to put him to that trouble.

Mr. Morgan. No, I do not. All I want to put in is it can be at issue and then he can put in any evidence or disclosure in avoidance that he has.

Mr. Mitchell. This puts the burden on the ~~defendant~~ plaintiff to disprove the allegations of the answer; whereas if you put it in the answer it puts the burden on the defendant to establish it.

Mr. Morgan, Suppose you have your opening statement. You have your affirmative defense and it is not met by reply. Then you have your opening statement. Will not the opening statement disclose whether the plaintiff intends to meet the averment of the defendant by defense and avoidance, or by denial? If you put it this way, he may put the defendant to the burden of an affirmative defense, and then he can put the defendant to the proof, when there is no dispute in fact on the matter.

Mr. Dobie. Take a suit for the sale of goods, and in the answer the defendant sets up infancy. Now, the plaintiff is perfectly willing to admit infancy, and wants to say that these goods were necessaries. I think that is the kind

of case Mr. Morgan has in mind.

Mr. Wickersham. I have never known embarrassment to arise out of the provisions of the code, that in pleading facts in replym any facts alleged in reply which were not responsive to the answer shall be taken as though put in issue, without the need of any additional pleading.

Mr. Morgan. I have not either, but I do not see why you should say that they should be deemed denied.

Mr. Wickersham. That is the language used in all codes.

Mr. Tolman. And in the Equity rule.

Mr. Wickersham. Yes, in the Equity rule.

Mr. Olney. I would like to ask the reporter if the intention conception of these rules is not that, as between the plaintiff and defendant, the pleadings shall stop with the answer?

Dean Clark. Yes.

Mr. Olney. Then what do you mean by saying, "Unless the answer assert a counterclaim, no reply shall be filed." You cannot reply in any case.

Dean Clark. In case of a counterclaim you do. But we call that answer a reply.

Mr. Olney. But you go on and say, "No reply shall be filed without special order of the court."

Dean Clark. Yes.

Mr. Olney. Why should he file an answer unless his counterclaim is filed?

Dean Clark. Well, this is essentially the New York rule.

Mr. Wickersham. In New York you may move to require the plaintiff to reply to new matter inserted in the answer; and you get then an admission or a denial, and you do not have to go to work and prove a lot of things that are admitted

Mr. Olney. Is that satisfactory, or does it cause delay?

Mr. Wickersham. I have never known them to require it. It is very seldom used.

Mr. Morgan. That is to limit the plaintiff.

Mr. Wickersham. Yes, that is to limit him.

Mr. Olney. I do not know of any code State that requires that.

Mr. Wickersham. It is to eliminate endless controversies.

Dean Clark. The rules on reply--some of them have it as to all new matter.

Prof. Sunderland. I think California is very peculiar, in that it has no reply.

Mr. Olney. So far as the counterclaim is concerned, that is different, but suppose there is affirmative matter set up by way of defense.

Prof. Sunderland. It is very common not to allow reply.

Mr. Morgan. Supose you have a personal injury action, with a defense of release, and if the release is deemed denied, has the defendant got to go on and prove the release, when the real defense is that it was obtained by fraud?

Prof. Sunderland. Under the language of this I think he would have to do so.

Mr. Mitchell. I think, too, it is a question of the burden of proof. It seems to me that if you strike out that clause "Shall be deemed to be denied and leave it "Shall be deemed at issue" it will be all right.

Mr. Morgan. All I am trying to do is I am trying to ~~require~~ ask why you should put the defendant to any greater burden with reference to his affirmative defense than you are doing with reference to the palintiff, with reference to his claim. You have taken great pains here to require the defendant to admit the matters which are not to be in controversy, and here you are making a special provision that the defendant has got to be deemed to have denied every one of his affirmative defenses, and then theplaintiff may not only put him to proof, but he may confess and avoid.

Mr. Mitchell. Well, take the release case that you referred to. There is an allegation and an answer as to the ~~relief~~ release claimed.

Mr. Morgan. Yes.

Mr. Mitchell. Now, on your theory if it is done the way you want it, suppose the plaintiff not only claims the release was obtained by fraud, but denies that it was ever executed?

Mr. Morgan. Yes.

Mr. Mitchell. Now, would it not be true under your system that the burden would be on the plaintiff to show in the first instance that he did not sign it?

Mr. Morgan. No.

Mr. Mitchell. Or would defendant be in the position of having to go on the stand and prove that it was signed?

Mr. Morgan. My notion was simply this: That the defendant can meet that in any way he sees fit, by denial; but maybe the burden of going forward by my system would be great.

Mr. Mitchell. That is just it. In trying my case I will want the defendant to go on the stand and have the burden of proving that the document was never signed, and the privilege of cross-examining him, instead of having put my witnesses on and having the burden of proving that it was signed.

Mr. Morgam. I did not want that. All that I am saying is that there ought not to be a statement in the rules to the effect that the matter is necessarily denied. My point is

that you ought to say nothing about it, and the opening statement of counsel would state whether it is or is not denied. Because in these cases, if the pleadings do not say what the theory of the controversy is, you can get the theory of the controversy from the opening statement of counsel. You go to trial without an issue in all these cases.

Mr. Wickersham. You ought not to.

Mr. Morgan. But you do.

Mr. Wickersham. You ought not to, and we ought to avoid as far as possible haling the defendant or plaintiff into court without knowing what he is going to meet. Now, the only reason for this provision was to do away with the necessity for rejoinder for new matter set up in the answer; and it seems to me that it is in the interest of justice that the plaintiff confronted with new matter, or the defendant having new matter, should know whether his assertion is going to be disputed by the plaintiff, and the best way to do that--there are two ways. Oneis by rejoinder and you do not file pleadings for indemnity; therefore the new facts are taken as denied and are put in issue.

Now, under this new system, and with some of the codes, you get an examination of the parties before trial, and that brings it out. But the pleadings which, after all--the sole purpose of pleadings is to show what the intentions are between the parties. I think you ought to have some kind

of issue framed on the answer, except as to new matter.

Mr. Morgan. I withdraw my suggestion if you think it will not make any difference.

Mr. Olney. I will renew my question to Dean Clark. He said that the idea was that in certain cases the reply might be required.

Dean Clark. It is ordered by the court.

Mr. Olney. If it is ordered by the court, then your words here "shall be filed" should be changed to "shall be required."

Dean Clark. Of course, I should change "filed" anyway. I suppose it is served on the other side. But perhaps "required" would be better. "Filed" is the word that I use all the way through, meaning what you mean by "served" I suppose.

Mr. Olney. No.

Dean Clark. But "required" is all right. I mean no reply shall be required without special order of the court.

Mr. Dobie. Without even very much evidence, by affirmative order of the court if a man files it would it not be stricken out?

Dean Clark. Yes, I should say "no reply shall be had. On the idea that Mr. Morgan had, on any plan excepting by changing our scheme and going to the Minnesota rule, which is to reply to any new matter, which is not a new--

Mr. Morgan (Interposing). Then you have to have the same provisions as to new matter in the reply. So it does not make any difference where you "get off."

Dean Clark. Yes, but whether we put in your language or not, the defendant would not know until the trial what he was up against; then he would know something about it.

Mr. Morgan. Well, that is all right.

Mr. Dobie. There are a good many theoretical ideas that can support what Mr. Morgan says, but I do not think it is very important.

Mr. Morgan. I do not think it is very important.

Mr. Dodge. How about the provision in that rule that new matter must be regarded as in issue without further pleading? And leave out the suggestion that it shall be deemed to be denied.

Mr. Morgan. Yes.

Mr. Wickersham. Yes; but you go further and allow the plaintiff or defendant under certain circumstances, where there is new matter, to require a reply.

Mr. Dodge. Yes, in a release case he might require it.

Mr. Morgan. Yes; I think the motion for reply will take care of it.

Mr. Olney. I think any reply should be submitted to the court.

Mr. Dodge. Yes. Wherever it is required at all.

Mr. Olney. They carried that out under the common

law to an unreasonable extreme.

Mr. Dodge. It will not arise often.

Dean Clark. Yes, and it is a compromise which is already in the Equity rule, which is another reason for following it. In the State codes there are three rules on this subject. In a limited number of States no provision is made for reply, although in some they speak of "answer to a counterclaim"--California and Arizona. In a greater number provision is made for reply to the counterclaim which is denied, and that the court may order a reply. The third rule, in a greater number of States, is that a reply is necessary in order to reply to and avoid any new matter contained in the answer. Now, on that latter rule, which is probably more frequent in the code States, you have a certain ambiguity as to whether you have new matter or not; and the matter is left somewhat up in the air; and in trying to strike a balance, backed also by having the Equity rule pointing the way, I took the middle course.

Mr. Morgan. I think that is a good reason for taking the Equity rule in the report.

Mr. Wickersham. I move that, on the general subject that Rule 31 as drafted shall stand.

Mr. Lemann. We are going to change the language.

Mr. Wickersham. Yes, I do not mean the language,

but the general scope of it.

Mr. Tolman. I second the motion.

Mr. Olney. With that ~~permission~~ for service remaining.

Mr. Lemann. Yes, and the reporter has another change.

(A vote was taken upon the motion and it was unanimously adopted.)

Mr. Mitchell. We will now take up Rule 32.

Mr. Donworth. In the fourth line, reading it right through from the beginning it says:

Rule 32.

"Answer or reply to amended complaint or answer.--- When an amendment to the complaint shall be made ~~as to~~ after answer filed, the defendant shall put in a new or supplemental answer within ten days after that upon which the amendment or amended complaint is filed, unless the time is enlarged or it is otherwise ordered by the court."

It will often happen that the amendment is of such an inconsequential character that ten days is utterly too long. Of course, it might have to be extended, but the implication here is very strong that at least ten days delay follow from a new answer. How would it do, at the end of the fourth line, where it says "unless", to make it read: "unless a different time is ordered by the court."

Mr. Cherry. Yes.

Mr. Morgan. Very frequently the court says that the original answer may extend to the amended complaint.

Mr. Donworth. Yes, "unless a different time is ordered by the court."

Mr. Mitchell. There is nothing said here to the effect that unless a new answer is put in your answer should be deemed to stand as a denial. Would that be sufficient?

Mr. Cherry. Well, if you say "unless ordered by the court," because that would include also the Chairman's suggestion that the answer stands as a denial unless there is an inconsequential amendment.

Mr. Donworth. Yes, I think that will have a stronger implication xxx that the ten days should stand.

Mr. Morgan. Yes, and make it "unless otherwise ordered by the court."

Mr. Mitchell. Why do you hawe to get an order from the court?

Mr. Cherry. Well, this amendment after answer would be on a motion, and it would be part of the order allowing the amendment, I take it.

Mr. Mitchell. Not necessarily, because you can get an amendment before the time--

Mr. Cherry (Interposing). Not under these rules.

Mr. Mitchell. Not under these rules?

Mr. Cherry. No.

Mr. Mitchell. You can amend within the original time to answer. Suppose you have twenty days to answer and it

is amended within ten days; you cannot answer within twenty days.

Mr. Morgan. No.

Mr. Donworth. Well, probably a very large proportion of amendments do not requires any answer. Why do you not say "may"?

Mr. Mitchell. Instead of "shall"?

Mr. Donworth. The tendays as a matter of course is very liberal. Of course, it may exceed ten days, but allowing ten days as a matter of course is very liberal.

Dean Clark. Yes, I think so. All of this rule, even the part you are improving, is the Equity rule.

Mr. Loftin. Why not put in "in an absence of an amended answer the answer shall be deemed to be to the complaint as amended"? That is the practice in my State.

Mr. Morgan. That is the practice in my State.

Mr. Mitchell. I do not think it is necessary to get an order to that effect.

Mr. Loftin. Not an order, but a straight rule. That would leave it up to you to allow it either ~~leave~~ your answer stand to the amended complaint or file a new one.

Mr. Wickersham. If you put it "may" it would cover that.

Mr. Mitchell. Do you not think there should be something, Mr. Morgan, that would cover that?

Mr. Dodge. Suppose it should read "If the amendment requires other answer"?

Mr. Loftin. I make that motion, that some phraseology of that kind be used.

Mr. Olney. In providing for the answer in case of amendment, you have to differentiate between the case where an amended answer is put in--that is an answer in toto, and the case where an amendment is merely a special amendment by itself, or where there is [illegible] the amended answer put in--which is frequently done--or a plea to the amended complaint is put in, the original answer can stand. But when it comes down to a special amendment going in, as is frequently the case, your original answer cannot act.

Mr. Loftin. I am not insisting that it shall. I only insisting that if the defendant thinks his answer is sufficient to the amended complaint, that he can let it so stand. But if he thinks it requires an answer then he can answer it.

Mr. Olney. If nothing more than an amendment is made to the complaint, the original answer stands without any order or anything further.

Mr. Loftin. The rule does not say so. It says he shall answer.

Mr. Wickersham. No, it says "may."

Mr. Loftin. It says, I think, "shall."

Mr. Wickersham. I thought you took that out and said "may."

Mr. Donworth. When the new matter comes in I think the plaintiff is entitled to know whether the defendant denies or admits, and so there should be some provision requiring either a new answer or the defendant to stand upon his old answer.

Mr. Loftin. That is the suggestion I made, and I made a motion to that effect.

Mr. Morgan. And I seconded the motion.

Mr. Donworth. And unless the time is enlarged, it should be changed to read "unless otherwise ordered by the court." Is that the idea?

Mr. Cherry. Yes.

Mr. Mitchell. There was a motion made about putting in some provision about allowing the answer to stand as an amendment to the claim.

Mr. Donworth. It does come often.

Mr. Lemann. Your point is that the defendant must say what he wants to do; he must say within a time not to exceed ten days. Is that what it comes to?

Mr. Loftin. Yes.

Mr. Mitchell. Somebody has made the point, however, that he put in some new and important stuff, and the may not make any reference to it, and he allows his old answer to

stand. Does that embrace that?

Mr. Donworth. Well, if his old answer is not so framed as to admit that--

Mr. Mitchell (Interposing). He has admitted it.

Mr. Donworth. Yes, he has admitted it.

(The motion of Mr. Loftin was thereupon voted upon, and it was unanimously adopted.)

Dean Clark. Then the brackets come out, because you do not have a default.

Mr. Mitchell. You will have to recast that whole section.

We can pass on that Rule 33.

Mr. Olney. Before we leave that, I understand that when an amendment is made to a complaint, that the provision simply is that the defendant has the right to allow his old answer to stand, or to answer it if he wants to do so.

Mr. Mitchell. Yes; it does not make any difference.

Mr. Wickersham. It is an amended complaint, an amendment to the complaint. There is a distinction between those.

Mr. Olney. Then what is the requirement as to the answer?

Mr. Mitchell. If it is not answered, and the defendant allows his old answer to stand, the situation is very different; but the chances are that the defendant will put

in a new answer, and he does not want to admit the new allegations in the complaint which are not affected by his orignal answer.

Mr. Olney. I think if an amendment is made, it should be answered absolutely.

Mr. Mitchell. It is absolutely safe as it stands, if he denies it. Why should he have his stenographer write it over again?

Mr. Olney. The rule is that he shall answer; if he can stipulate in the matter, or getting a special order, all right; but so far as a general rule is concerned, he should be required to answer.

Mr. Mitchell. He has answered, and has an answer in that he thinks the provision is all right. But if he is wrong, the provision as to new matter is admitted.

Mr. Dobie. What he would do is just to file the old answer again.

Mr. Olney. You are failing to distinguish here betweem an amended complaint the motion of the plaintiff, and where an amendment is made to the complaint by the insertion of new matter. Now, the answer is already made to the complaint as it originally stood. The amendment inserts new matter, and that new matter ought to be answered.

Mr. Mitchell. Of course, if the old answer does not

answer it, then it is admitted, is it not? And that is so worded as to deny it; then why should he write it over again?

Mr. Olney. The wording of this rule as you have it would not, in our State imply that at all. We frequently specify, when an amendment is made in open court, that the answer shall stand as an answer to it. But implied in that always is the idea that the new material is denied, and must be proven by the plaintiff. It does not make any difference whether the old answer touches it or not. The implication always is, when that statement is made, that the plaintiff must prove his new matter. It is just a loose way of practicing; but that is what it means; but when you put it into a rule, it does not mean that.

Mr. Donworth. I have the impression that, when we had changed all the allegations of that paragraph, and new matter was in a new paragraph 10, and he left his answer stand, he has again denied all that is in 10, even though it has been changed.

Mr. Olney. What I am saying is that the court, under those circumstances--which frequently take place--will say, "We will let the old answer stand", and they mean by that that the new matter is denied.

Mr. Mitchell. They do not mean that. They mean it is admitted. They mean that the old answer is to be deemed

filed; and that if the old answer has allegations which amount to a denial it is denied, but if the old answer is so drawn as to admit the new allegations in the complaint, why, they are admitted; but if he has a general denial of the complaint in his answer, it follows that he has denied everything. The defendant always has to make up his mind whether or not the old answer means that he wants to meet the allegations of the amended complaint. If he is satisfied with his old answer, and would not change a word as an answer to the amended complaint, then he allows his answer to stand, and the effect of that, in substance, is to save the old answer. That is the common practice that I have been accustomed to.

Mr. Lemann. I do not think there is any doubt about that. If he is satisfied, and the defendant thinks nothing of it, and he lets ten days pass--or any other time--then he has stood on his original answer.

Mr. Mitchell. Yes.

Mr. Lemann. If there is something in the amended complaint which he has not answered, it is admitted.

Mr. Wickersham. That is right.

Mr. Mitchell. Yes, that is right. And it saves a lot of unnecessary repetition.

We will now pass to Rule 33.

Mr. Morgan. What is the idea of exceptions? That is an equity term, and it is not applied to law cases.

Dean Clark. Perhaps that is not necessary. But since exceptions were abolished in equity, perhaps we do not need to repeat that.

Mr. Morgan. I should not think so. You ought to put"demurrers"if you put "exceptions" there.

Mr. Wickersham. I think we ought to retain that because it applies to exceptions in suits in equity.

Mr. Morgan. It applies to demuerrers also.

Mr. Mitchell. When you deifine things which you can or cannot do in the pleading, that excludes everything else.

Mr. Morgan. Well, why should we not abolish "exceptions"? Could you not take exceptions to a plea in equity?

Mr. Wickersham. How could you take exception to a plea inequity ? You move to dismiss, on the ground that it fails to state a cause of action or for some other reason, but you take exception to it.

Mr. Donworth. You did under the old common law practice.

Mr. Wickersham. The old chancery practice.

Mr. Morgan. Yes.

Mr. Wickersham. For that reason, they put in this rule abolishing exceptions.

Dean Clark. We have put in a provision as to that, and as to demurrers.

Mr. Morgan. All right; but I do not see why you

should aboliish exceptions to the answer, and not to the bill.

Mr. Dodge. If there is any such thing as exception to the bill.

Mr. Morgan. Was not that the term we used?

Mr. Lemann. We excect to petitions at law.

Mr. Morgan. It may come from the so-called civil law.

Mr. Mitchell. I wonder, when we state specifically what matters the exceptions are allowed, that does not exclude all other exceptions, and it is not necessary to go on and say, "This is abolished and that is abolished", if our formula is complete.

Mr. Donworth. Further, they have already been abolished, and we should only say there therefore"abolished?" (Laughter.)

Mr. Dobie. It does not hurt anything in there. The old Equity rule states it, and that was a well known device in the old Equity rule , and you are following that practice to a great extent. Would it not be well to leave it in?

Mr. Mitchell. If you leave it in, is there not a question whether demurrers are left in?

Mr. Dobie. Well, that was the procedure under the old Equity rule.

Dean Clark. That goes back t the old Equity rules, as to the old demuerrers and exceptions, and pleas and ex-

ceptions to answers.

Mr. Dodge. I wish you could wish you could put it in some ways o that it would seemto be a new act of abolishment. It is continued as abolished. (Laughter.)

Mr. Dobie. That may revive some ancient things.

Dean Clark. We should say "exceptions to the answers are abolished."

Mr. Mitchell. How about "shall not be applied"?

Dean Clark. That is the other expression I used.

Mr. Dodge. "Shall not be applied," that is better.

Mr. Lemann. I notice in these suggestions of the local committees, that one of them fixes the time for filing a motion to strike; and it raised a question of whether it should be one day or fifteen days after the filing of the answer. That was the suggestion of one of the local committees; and your suggestion is that it be permitted to be done in part. I do not know whether that would work better if you strike part of it out.

Mr. Mitchell. This time proposition is a matter that has been referred back to the Committee for their consideration. There were changes made in the prior rule that upset the whole schedule.

Mr. Lemann. But there is no time limit in this draft

here.

Mr. Mitchell. Well, we had some limit about when pleadings generally should be interposed, and we should word it as to include a pleading in any--

Dean Clark (Interposing). Yes, we have to put in something new. Mr. Donworth suggested a rule on that, and I think we will have to adopt his rule or some similar rule. We have suggested it as an addition to Rule 37.

Mr. Mitchell. I think it is important somewhere in the rules to have a definite statement of just the time that is allowed for these things--lawyers will look for that.

Mr. Lemann. How about the suggestion to strike out "exception for insufficiency of an answer or abolish," I am just asking for information, and to direct attention to it, and not suggesting that he should strike that out.

Dean Clark. Well, I suppose you are referring to the defendant's counterclaim, and where it says, "to strike such defense or counterclaim."

Mr. Lemann. But the Rule says that the plaintiff may move to strike for insufficiency, "on showing that the decision of the motion would finally dispose of the action." I do not quite catch that.

Mr. Morgan. That is the end of that.

Mr. Olney. Well, if it finally disposes of the counterclaim, why submit an amendment, instead of taking

the motion as amended.

Mr. Cherry. That raises the question that I intended to raise.

Mr. Lemann. I have a case now in which I may wish to strike in the Federal court, which may not dispose of the action, but may dispose of a large part of it, so as to clear up the matter and know that there are certain things about it that I need not worry about. I do not know whether it is a question of procedure or not, but I do not know whether I could do it under these rules. At first I thought we could not do it under these rules, because it might take out the whole case. Now, my man may not want to take out the whole case; only two-thirds of it. The answer sets up an affirmative defense and may be now good. It may be good as to a small part of the case. I should have to strike all of it out.

Mr. Wickersham. This only covers that part. When you have got that stricken out, in other words, it may be a good defense.

Mr. Lemann. But as I read this at first, I thought it required me to get rid of the entire defense.

Mr. Morgan. That is what it means. That is to prevent you from making motions to strike out this sentence or that sentence; you have to take the whole defense or

counterclaim.

Dean Clark. Yes.

Mr. Lemann. I assume he did not mean to recommend that.

Dean Clark. What I meant was that you had to take the counterclaim as a whole, but do not have to take the answer as a whole.

Mr. Wickersham. Well, you have got in the provision for summary judgment. The answer does not require summary judgment.

Mr. Olney. This is not a motion to strike out particular sentences. It is a motion to strike out the ground of insufficiency.

Mr. Wickersham. Of the facts?

Mr. Lemann. Not the whole answer.

Mr. Olney. The insufficiency of the particular answer or counterclaim that is alleged.

Dean Clark. Correct.

Mr. Olney. If a man is making a motion of that character, why should he be required to say if the motion is granted it will finally dispose of the matter?

Mr. Wickersham. Do you mean of the whole suit?

Mr. Olney. I mean reading this language here--you refer to the rule as worded here, and you will see what the point was.

Mr. Wickersham. I understand from this that the effect of the motion--it is the affirmative defense on the counterclaim that you may to strike out.

Mr. Olney. Well, if he is moving on the insufficiency of the counterclaim.

Mr. Morgan. It takes the place of the old demurrer and separate defense on counterclaim; is that it?

Mr. Olney. No, I am saying that the words here--he cannot move to strike out the affirmative matter on the ground that it is an insufficient defense.

Mr. Morgan. I thought he could.

Mr. Olney (Continuing). Without showing in addition, as a preliminary condition precedent to making that motion, he has got to show that the decision of the motion may finally dispose of it.

Mr. Morgan. Of the case?

Mr. Olney. No; of the stricken matter; that is the ground of it.

Mr. Mitchell. I should think striking it out would finally dispose of it.

Mr. Olney. Yes.

Mr. Mitchell. Do you mean you cannot amend?

Mr. Olney. No, you cannot amend, it is granted. I do not know what they had in mind.

Dean Clark. I was trying to limit motions to ~~striking~~ strike

out portions of the answer, and I do not think it is done quite as clearly as it might be. What I meant was that the plaintiff may move to strike out, and the decision of the motion would ~~be one that would~~ merely be one that would pass upon the defense or counterclaim.

Mr. Morgan. Does that mean that the old demurrer would do?

Dean Clark. Yes, and that you cannot strike out a portion.

Mr. Olney. That is not done by this rule.

Dean Clark. I think the language could be improved.

Mr. Lemann. You can move to strike the answer; you cannot move to strike thebill. Is that right?

Mr. Dodge. Yes.

Mr. Loftin. I think we went all over that in Rule 26.

Mr. Wickersham. Now, you have in Rule 33, according to this "but if an anaswer set up an affirmative defense or counterclaim, the plaintiff may move to strike it out for insufficiency", and so on; "and if the court finds that such decision will so dispose of it, the court may proceed to a hearing of the motion and strike out the matter or permit amendmnnt in accordance with the provisions of Rule 22."

Mr. Mitchell. Judge Olney's point is that he objects

to the words ~~saying~~ "on showing that the decision of the motion may finally dispose of" the matter. The point, as I see it, is why put that in, when in the next provision you have a provision for allowing amendment, which would prevent the granting of the motion finally disposing of it. Is that it?

Mr. Olney. Exactly. I think the idea that Dean Clark and the object he is seeking to accomplish is absolutely good, but it seems to me that it does not go to motions to strike because of the insufficiency of the answer. If you are to provide here--it might be very wise to put in a rule that there should be no motion made to strike out matter as redundant, evidential or immaterial.

Mr. Wickersham. Or impertinent or scandalous.

Mr. Olney. Or impertinent or scandalous, unless it appears that the granting of that motion will facilitate the final hearing of the case.

Dean Clark. That is what I am trying to do in this latter rule.

Mr. Olney. That does not go to motions to strike for insufficiency. That is really the old demurrer.

Mr. Dodge. What is the matter with "Equity Rule 33?

Dean Clark. I was trying to limit the filing, that is, I was trying to make it where you have a defense that is insufficient and it can be heard; I was trying to avoid things being put to a hearing when there was not anything

of substance there. I think you are correct. The language does not very well say what I had in mind.

Mr. Lemann. Why should you permit them to strike out an answer as insufficient when you would not permit them to strike out a bill?

Dean Clark. Well, so far as the complaint is concerned, you attempt to set up the insufficiency in your answer. There is no answering an answer.

Mr. Lemann. No; but you set down a case under Equity Rule 29.

Dean Clark. 26.

Mr. Mitchell. There is a difference between the two if he makes a motion of that kind.

Mr. Wickersham. There is a motion for short judgment, which is a short way for testing the sufficiency of the suit or answer.

Dean Clark. That is true.

Mr. Wickersham. And is a much more efficiency way than this, because it is not limited to the defendant's pleading.

Mr. Olney. I do not see how you can put on a restriction on the right to strike out the answer as insufficient, but you can very well put a restriction on any motion to strike out part of an answer as redundant or immaterial.

Dean Clark. I think I could put in here something similar to the provision I have in Rule 37, that you would

not have a hearing unless there was a preliminary finding that it would--

Prof. Sunderland(Interposing). I says here that it will always dispose of it; if it is attacked on the ground of insufficiency it will always dispose of it.

Mr. Mitchell. The trouble is you say it will always dispose of it, and then in the next breath say that it can be amended, so that the granting of the motion would not finally dispose of it.

Prof. Sunderland. That may be.

Dean Clark. I put it in because of what I had taken away earlier--and which you have now taken a way from me. (Laughter.) I put in, you will recall, that no motion would go to a hearin unless it was found that it would dispose of things; that all motions would come in, with the reasons attached. That was in Rule 21, or whatever it was.

Mr. Lemann. Rule 26.

Dean Clark. No, not Rule 26, Rule 21. You remember it?

Mr. Morgan. Yes.

Dean Clark. And you would never have a hearing if that rule applied, so that I have stated the converse here, that you would have a hearing if there was ~~xxx~~ any motion.

Mr. Olney. I think I have now what Dean Clark had in mind; so I suggest that this rule be passed back to him for

redrafting.

Mr. Morgan. Is there anything more than that you may strike out for insufficiency?

Dean Clark. Well, that, plus limiting it and having it limited by the court, unless you did something.

Mr. Morgan. Oh.

Dean Clark. Rule 22 is the amendment rule, as I understand it. Rule 9 is the one where I provided for no hearing ordinarily, and you remember that you took it out there. Now I had this drawn on the basis of that previous rule; there would be no hearing ordinarily, and this was a way of getting a hearing.

Prof. Sunderland. Your point is Rule 33?

Mr. Tolman. I submit this suggestion: Let the rule stand as it is until line 4 and the first three words of line 5, and then insert in relation to the rest of that rule, the last sentence in the Equity rules.

Dean Clark. I think that will probably do it, but this has got to be recast, and I shall be glad if you will let me fix this.

Mr. Mitchell. I think we have it plain that we can do that, unless there is objection? Are there any other suggestions?

Mr. Olney. I would like to have this suggestion of Dean Clark's carried into the new rule, that there be put a

restriction upon motions to strike out part of an answer as immaterial or edundant or evidential. Those motions are constantly used for purposes of delay, and there ought to be a restriction putupon their making, unless it appears definitely that they will facilitate the final determination of the cause.

Mr. Mitchell. We will now go to Rule 34.

Mr. Donworth. With your permission I would like to go back to Rule 32 now for a moment. Before I give the language, I would like to say that I think the whole administration of justice depends very much upon the facility of trial amendments. It so often happens that the case of a plaintiff or defendant is a little different from what he alleges, but it occasions no surprise, and I think trial amendments should be incorporated. Now, this makes no provision for trial amendments, and implies that there shall be making of amended pleadings in a very extreme case. That was true of the Supreme Court practice when I was a master. And without asking approval of this, as Dean Clark has rewritten Rule 32, I want to end up this proviso as follows: "Provided, that in the case of amendment to the complaint or to the answer made during trial, the time allowed for pleading thereto by the adverse party shall be in the discretion of the court."

Dean Clark. I think that is a good suggestion. I do think there very likely might be amguity between Rule 32 and 22. Rule 22 was a rule for very free amendment, and this looks as if this were an amendment in advance of the time.

Mr. Donworth. That is all I have to say.

Dean Clark. I think in the first line of Rule 34 the word "either" might well become "a", so that instead of saying "upon application of either" it will say"upon application of a party."

Prof. Sunderland. And in the first line of the second sentence the word "necessary" should be "permissive."

Dean Clark. "Shall be permissive."

Prof. Sunderland. "It shall not be permissive in any supplemental pleading to set forth any of the statements in the original pleading, " and so on.

Mr. Olney. Shall not be permissive.

Mr. Cherry. Unless--

Mr. Dobie. "Unless the special circumstances of the vase may require it."

Dean Clark. I think theidea of both is the same, but it seems to me that here you are likely to have a mandate and then nothing to carry it out.

Mr. Cherry. Well, as you have it it says "shall not be necessary unless special circumstances require it."

Mr. Morgan. Yes.

Mr. Donworth. Suppose a new suit occurs. That is the usual situation. You have got a release, perhaps. Is it not necessary sometimes to set forth, by matter of inducement, some of the things you said in the original pleading? You say it is not necessary to do that, but you can tell your story.

Dean Clark. I am shocked at the way you Minnesota gentlemen criticise the Supreme Court. (Laughter.)

Mr. Cherry. I do not care whom you criticize.

Mr. Wickersham. It has become the fashion. (Laughter

Mr. Cherry. But I have noticed that some of your worst language comes from those old rules. I did not suppose we could not criticize that more freely than your language.

Mr. Mitchell. Is that sentence necessary at all?

Mr. Cherry. No.

Dean Clark. They have a separate rule in equity on the opposite page.

Mr. Dobie. Rule 35.

Mr. Mitchell. That is a different thing.

Mr. Dodge. ~~That is a different thing.~~ That is supplemental? Who would ever think it was supplemental.

Mr. Mitchell. Supplemental and only covers enough to show that it is additional. I do not think we need that sentence.

Mr. Donworth. While we are discussing that I do

want to criticize the Supreme Court. Take that expression "or if which he was ignorant when it was made." That is in the old rule. That has never been the practice, to amend your complaint when you discuss some important fact of which you were ignorant when the first complaint was made--never been the practice to make a supplemental pleading.

Mr. Morgan. Certainly not. That is an amended complaint.

Mr. Donworth. Although the Supreme Court said that, I did not think it should be in here.

Mr. Mitchell. That ought to be stricken out and left to the amendment clause to take care of.

Mr. Dobie. That is the best usage.

Mr. Mitchell. Is that agreeable, Dean Clark?

Dean Clark. Yes.

Mr. Mitchell. We are only striking out "or of which he was ignorant."

Mr. Donworth. I also move that the sentence "shall not be necessary," down to "require it", shall also be stricken out.

Mr. Mitchell. Is there any second to that motion?

Mr. Cherry. I second the motion.

(The motion was unanimously adopted.)

Mr. Olney. In that connection, it is not really neces-

sary, but it might assist as a practival matter if you add some such statement as this "Statements in the original pleading to which the supplemental pleading is a supplement shall be deemed included in the supplemental pleading." So that that would get out of the practice of repeating. But there is nothing important about that at all.

Mr. Cherry. It is a supplement.

Mr. Dobie. That is what"supplement"means.

Mr. Olney. Other lawyers do not look at it that way.

Dean Clark. I do not suppose there will be much trouble anyway. We have a provision for incorporation by reference.

Mr. Mitchell. Is that all of Rule 34?

Mr. Dobie. Does that last sentence go in, the one in brackets?

Mr. Donworth. There has been no motion made as to the matter in brackets.

Dean Clark. The reason I put those brackets is because I thought it would be implied without stating it. Do you want to state it?

Mr. Wickersham. I would say it is not necessary. I move that it be stricken out.

Mr. Cherry. I second the motion.

Mr. Lemann. I was wondering whether the sentence is worth saving. Are any lawyers going to ask about it?

Mr. Mitchell. As was said a moment ago, that restatement can be general; it does not say anything else could be

done. If we say nothing about supplemental pleading, are we adopting it?

Mr. Lemann. I would think that the lawyers might believe that the Committee had overlooked this thing.

Mr. Cherry. And they have been going under the Federal equity practice.

Mr. Wickersham. We have in a provision for supplemental pleading, have we not?

Dean Clark. Yes, this is such a provision.

Mr. Cherry. Did we have it under the Equity rule?

Dean Clark. No.

Mr. Mitchell. I suggest that that be taken care of, because you are applying to the court for an order to allow something, and in the order you should fix what time you need to answer in; whereas your clause here, Dean Clark, might be construed to be perfectly useless. Why not put in an appropriate provision allowing the supplemental pleading within an appropriate time, and the court may make such order as may seem appropriate.

Mr. Tolman. Within such time as the court may fix.

Dean Clark. That is for the original supplemental pleading, not the answer.

Mr. Mitchell. No, the court can adjust the answer at a time allowed, without having a fixed rule.

We are through now with Rule 34. We will take up

Rule 35.

Mr. Wickersham. I note the same correction there that I have in other places--of the failure to use the term "cause of action." (Laughter.)

Mr. Mitchell. I am going to rule that it be understood that you take an exception for the failure to use that phrase without further reference to it. (Laughter.)

Mr. Wickersham. That is all I want.

Dean Clark. We cannot use those words here.

Mr. Wickersham. I could.

Now, as to this Rule 35, I will note that in the other rule we used the words "facts," instead of "acts," as in this rule.

Mr. Morgan. "Acts, omissions and occurrences," yes.

Mr. Donworth. Well, we came to a pretty definite conclusion in regard to the complaint, did we not?

Mr. Morgan. We used "facts", yes.

Mr. Wickersham. "Shall state the facts."

Mr. Donworth. What is that rule as to the complaint?

Dean Clark. Simply a plain statement of the facts.

Mr. Donworth. Do you know the number of the rule?

Dean Clark. That is Rule 23, I think.

Mr. Morgan. Yes, 23.

Mr. Wickersham. "Facts or grounds" we left it.

Mr. Cherry. Well, this is subject to instructions

already given to the reporter, is it not, this morning?-- that either it is all stated in here, in Rule 36, or it is stated wit r eference to each pleading? Did we not do that this morning?

Mr. Morgan. We asked him to consider that.

Mr. Cherry. Well, in redrafting, I thought it was the policy that we elected that it should go in one place or should apply to each pleading specifically.

Mr. Wickersham. We required that the plaintiff state a plain statement of the facts upon which the plaintiff bases his claim or the demand for relief, omitting any more statement of evidence. Now, if we say "statement of facts", without detail, upon which the claim of the pleader as based, it would conform with the provisions of Rule 23.

Mr. Morgan. Would you call a denial a clai?

Dean Clark. Surely; but do you not think we could say that directly?

Mr. Morgan. Yes, we could say it directly.

Mr. Tolman. To be consistent, I think we should change "acts" to "facts" and strike out the next three words.

Dean Clark. Yes.

Mr. Tolman. I intended to submit a memorandum on that subject. in addition to thd one that was presented by Judge Olney.

Dean Clark. I wish you would. I feel a little

heartbroken about that. (Laughter.)

Mr. Cherry. Then we will have to bring up "cause of action again." (Laughter.)

Mr. Mitchell. Well, we will take another shot at that when you submit that.

What more is there in Rule 35?

Dean Clark. Well, if you want to pass it as settled.

Mr. Wickersham. I like the alternative better than the original. The alternative is from the English rule,

is it not?

Dean Clark. The way I put it, the first way, the American provision, "In pleading the performance or occurrence of conditions precedent, it shall be sufficient to allege generally that all conditions precedent have been performed or have occurred." That is, it is still theplaintiff's job to allege performance, and the denial specifies the particular theory. That is, you have got to have a particular denial; but after he has denied it, the plaintiff must prove that condition and its performance.

Now, the English rule is, "Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, and averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading."

Mr. Morgan. But do you get the idea that that changes the burden of proof?

Mr. Mitchell. Yes.

Mr. Morgan. It has nothing to do with theburden of proof.

Mr. Lemann. No. The defendant can deny it, and if he does deny it the plaintiff has to prove it.

Prof. Sunderland. If it changes the burden of proof

it is not a condition recedent, but a condition subsequent.

Mr. Morgan. What is it precedent to? As far as I can make out, "precedent" and "subsequent" has to do only with proof and pleading.

Prof. Sunderland. Only with proof.

Dean Clark. I was going to say that I could not understand for a moment what it meant. (Laughter.) "The performance or occurrence of which is intended to be contested shall be distinctly specified." Now, unless he distinctly specifies it there is no way of knowing he is going to deny it.

Mr. Morgan. Not necessarily. It might be a counterclaim.

Mr. Lemann. Suppose it was a defendant who wanted to contest it. Then, under the English rule he wouldhave to specify it; and it is the same thing under the reporter's rule, is it not?

Prof. Sunderland. But by implication, remember that the counterclaim goes back.

Mr. Lemann. And the plaintiff would have the burden of proving that the condition had been performed. The defendant would have to deny it, but the plaintiff would have to prove it.

Mr. Dobie. He cannot prove it under special denial.

Prof. Sunderland. It is by defendant's specifica-

tion in his answer.

Mr. Lemann. But the result is the same in the reporter's rule.

Mr. Morgan. Except that by the reporter's rule, the defendant has to allege in general terms what the English implies.

Mr. Lemann. Then if the defendant denies it the plaintiff must prove it.

Mr. Dodge. The English rule merely says "or condition precedent."

Mr. Morgan. It says he has performed all things on his part to be performed. Is that not the code language?

Mr. Dobie. I move that we adopt the reporter's statement of that, rather than the English rule.

Mr. Cherry. But not the reporter's interpretation.

Mr. Dodge. I second the motion.

Mr. Mitchell. The question is on the adoption of the reporter's rule, with reference to conditions precedent, instead of the English rule.

(A vote was taken and the motion was unanimously adopted.)

Mr. Lemann. Have you got everything in here, Dean Clark that ought to be in here?

Dean Clark. Do you mean the rest of it?

Mr. Lemann. Yes.

Dean Clark. Certainly not. There is nothing there that should go out. You mean have I got everything in that should go in?

Mr. Lemann. Yes.

Dean Clark. Certainly.

Mr. Donworth. I would just call attention to the distinct recognition that the pleader may employ all the common counts. Now, in reading that, it is an exception to stating facts; there is no doubt about that.

Mr. Dobie. That is generally recognized under the codes.

Dean Clark. I was going to say that we were pleading facts, but if I say we are pleading facts, I would still keep it down.

Mr. Donworth. There are so many things like that.

Mr. Morgan. You can say, "goods sold and delivered, services rendered," etc.

Prof. Sunderland. Why should he not file a bill of particulars?

Mr. Morgan. Without a demand?

Mr. Dodge. We have to have a bill of particulars.

Mr. Dobie. In the other case a man knows what it is, and does not want a bill of particulars.

Dean Clark. I do not see why, if you have a bill

of particulars, you should not have the common counts. "The Lord giveth and the Lord taketh away."

Mr. Tolman. It seems to me that the provision--not as a criticism of pleading, but as to the common count, if you put in the word appropriate there so that he will file the appropriate counts, I do not think there is any intention--I do not mean to criticize, but if we allowed old fashioned common counts, and have to put in all of them, when it is simply a claim for merchandise--I do not think that is necessary.

Mr. Lemann. It is just a provision which permits a man to put it in ten different ways; in count 1 he says it one way; in count 2 he says the same thing over in a different way.

Mr. Dobie. No.

Mr. Morgan. That the defendant is indebted to the plaintifffor money received, for goods sold and for services rendered. In some States they have them printed, and all you have to do is to put the figures in.

Mr. Donworth. But he repeats the thing.

Mr. Olney. That is the man pleads the facts, and then pleads all the common counts in a separate count, and then the case is tried. ~~It is described.~~

Mr. Lemann. Why not prohibit it?

I move that when you use the common count, you use a bill of particulars.

Mr. Donworth. It is done in Washington, and causes no embarrassment.

Dean Clark. I think if a bill of particulars is required with the common count, that does away with all good of the rule. It is to avoid fighting over immaterial things. Now, where it is material you can go after the plaintiff and get it; but in the simple money judgment, the simplest way is a brief statement.

Prof. Sunderland. What objection is there to the ~~plaintiff~~ things you get in a bill of particulars?

Dean Clark. Because you do not need it.

Mr. Loftin. Suppose it is for goods sold and delivered, you do not have anything except the amount, and nothing as to the items.

Mr. Dobie. Very frequently it is but one item, and the man knows exactly what it is.

Mr. Loftin. But very often it is for a number of items, and I do not see how you can separate them without going into court for an order.

Mr. Dodge. That is, every common count must be accompanied by a bill of particulars.

Mr. Olney. In nine cases out of ten the defendant knows exactly what he is sued about when he is sued on a

common count.

Mr. Donworth. I think there are arguments in favor of leaving it in, because that is what is allowed under the code system.

Mr. Cherry. That is right.

Mr. Olney. That is a matter of the common count under our system of pleading to change or destroy that would be wholly opposed to the theory that the bar is accustomed to. It is used constantly and is extremely convenient for many apparently small matters, and is far more important in State courts than here, where the court has jurisdiction only in cases involving more than $3,000. For these reasons I think it is advisable to use it; but like Dean Clark, I can see no reason for requiring a bill of particulars to be filed with it and allowing this method to prevail, because the bill of particulars itself will be the equivalent of the regular complaint.

Prof. Sunderland. You cannot attack the insufficiency. That is the real reason why we have the common count; they cannot attack the insufficiency. And if you attack the bill of particulars, you can safely attack the sufficiency.

Mr. Lemann. If you want to expedite the pleading and get a more sensible system, why use this simple system and then come with a bill of particulars and have the delays.

If you want to cut out the delays, why do you not cut out the bill of particulars?

Dean Clark. I do not think you are going to cut out delays, but will promote them. Unfortunately, many States they did not know what the common counts were and we have a hybrid system which is not common count.

Mr. Wickersham. I was not in favor of the common count, because no lawyer in New York under 45 years knows what it means.

Mr. Morgan. Do they not ever use it?

Mr. Wickersham. No.

Dean Clark. There are quite a few cases that I know of that do.

Mr. Wickersham. They are away back.

Mr. Morgan. I think you are mistaken, Mr. Wickersham, in that.

Dean Clark. There are some cases.

Mr. Wickersham. There may be, but they are very far back. I was brought up under the old common law system, so I know what they mean.

Mr. Mitchell. What is your pleasure about this "balance due on accounts" and the common counts? Shall we adopt the rule as it stands? There was a motion made to require a bill of particulars to be attached. But I heard

no s econd.

Mr. Dobie. I move that it be adopted.

Mr. Donworth. Well, the alternative rule provides that "~~including~~ In pleading the balance due upon an account or upon an instrument for the payment of money, it is not necessary that the pleader set forth the items of account." Is it not usual that he must furnish those items or a copy of the instrument, if demanded? Have you covered that in some other way? Now, a man can sue on an agreement and give the substance of it, and he will get by all right, but the defendant is entitled to a copy. Is that covered?

Mr. Morgan. There are other provisions about getting copies of written instruments.

Mr. Dodge. There is nothing in this rule, however, about pleading ~~w~~written instruments. Is that left out intentionally, Dean Clark?

Dean Clark. I did not leave it out intentionally, although I did not care very much about it. I have provided that you can bring suit on written instruments. The usual way is that you can state them either according to the facts or state them in exact form of agreement or attach them as exhibits.

Mr. Dodge. Is that in some other rule?

Dean Clark. There was a provision for summary judg-

mentment procedure. I did not see why you had to require copies here, when you had some other procedure for obtaining copies. This is a matter of pleading.

Mr. Dodge. It is more important than that I think. It is harder to determine how to plead a contract than how to plead facts.

Mr. Mitchell. The question is on the motion for the adoption of the fourth paragraph of this Rule 35, which startsout, "In pleading the balance due on an account," and then adds the ~~paragraph below~~ material below ending withthe words Rule 37.

Mr. Tolman. How about the amendment ~~khexx~~ suggested? Do you accept it?

Dean Clark. I am not ready to accept it.

Mr. Morgan. Do you mean to say that you are only going to allow a common count upon an account for the payment of money?

Dean Clark. No.

Mr. Morgan. Why do you have them in the same paragraph?

Dean Clark. Perhaps they should be in different paragraphs.

Mr. Morgan. I think so. It looks as though you were limiting them to that.

Dean Clark. And take out the wordx "also."

Mr. Wickersham. Making it read "may employ."

Dean Clark. Yes.

Mr. Mitchell. All in favor of that motion will say "aye"; those opposed "no."

(A vote was taken and the motion was adopted.)

Mr. Donworth. I vote "aye" with the understanding that in some case a defendant sued on a written agreement may get a copy, but I suppose there is something on that somewhere else.

Dean Clark. What is the requirement for that?

Prof. Sunderland. There is no requirement.

Mr. Morgan. There is a rule for the discovery of things in possession of the other party.

Prof. Sunderland. But the question is whether you should be required to resort to discovery in a matter of that kind.

Dean Clark. I do not think it is really important enough for that; but if some of you gentlemen feel that that would help let us put it in. I will make a note that he "must furnish such items or a copy of the instrument."

Mr. Morgan. On demand?

Dean Clark. Within ten days.

Mr. Olney. Suppose you have no copy. That may sometimes take place.

Mr. Donworth. Had you better not leave it that the defendant may apply to the court.

Mr. Morgan. That is taken care of in another place.

Mr. Lemann. In the case of a promissory note, is that all right under another rule?

Mr. Morgan. Yes, but I want to get the original. You can get both an inspection of the original and a copy ~~of the~~ demand. That is safe.

Mr. Dodge. The method of pleading on a written contract is covered somewhere else.

Mr. Donworth. Not the method of pleading.

Mr. Dodge. Is not that very important. The commonest form of action is on contracts. Do you have to annex a copy of the contract?

Dean Clark. No, you do not. That may be done, however, by exhibit. What you have done is to provide permissively for the use of exhibits.

Mr. Dodge. That is in one of the other rules?

Dean Clark. Yes.

The next paragraph of Rule 35 is one of pleading a judgment or the decision of a court; it is three lines. Is that satisfactory?

Mr. Lemann. What guided you in picking out these things? That would not impress me as very common. Is that a matter that would come up?

Dean Clark. Yes, that will come up, and most of those things are covered by statute in one jurisdiction or another.

Mr. Lemann. And you think it is important enough to require special treatment?

Dean Clark. Yes. This is I suppose less important,

ant, but we have several different statutes.

Mr. Olney. From a practical point of view it is exceedingly important. We frequently have orders of court, such as for the appointment of an administrator; and you do not have to go back and allege that the man died in such a jurisdiction.

Mr. Mitchell. If there is no objection to those three lines they will stand as accepted.

Mr. Lemann. The next is "It shall not be necessary to allege the capacity of a party to sue or be sued."

Mr. Wickersham. I move that that be accepted.

Mr. Tolman. I second the motion.

Mr. Mitchell. If there is no objection those four lines will be considered as accepted.

Dean Clark. Perhaps at the end of that whole clause we ought to add "if known to him."

Mr. Cherry. "If known to him." He does not know whether there is or is not anybody.

Dean Clark. What do you think of that suggestion " If known to him"?

Mr. Cherry. As it stands, should he tell him to whom to sue? Suppose he does not know.

Mr. Morgan. Suppose there has never been any guardian?

Mr. Lemann. Well, say I sue Mr. Dodge and he says,

"You cannot sue me." Should he tell me whom to sue? He will say, "I do not know."

Mr. Dodge. What other cases have you in mind?

Mr. Morgan. A great many cases do not have any guardian.

Mr. Donworth. Well, you sue John Smith as executor of an estate.

Mr. Dobie. In some cases there is nobody to be sued until a personal representative is appointed.

Mr. Lemann. Yes, that might be another point that the court would have to consider.

Dean Clark. I should think all of these things would be ~~xxxx~~ implied; but I see no objection to saying, "The proper party to be sued," and I assume "if known to him."

Mr. Dodge. Could this party be sued without permission of the court?

Mr. Morgan. No. Would he have capacity?

Mr. Dodge. That is a question. I do not know what "having capacity means."

Mr. Cherry. At least I would like to have him limited in what he is required to do by what he can do. That is why I suggested "if known to him."

Mr. Morgan. I want to know if there is any such thing as "incapacity to be sued." He can sue an infant or he can sue an insane person; then there is the provision

for having a guardian ad litem for them.

Dean Clark. What I meant particularly was the case of corporations. Perhaps that language can be improved--if I should say if the capacity of the plaintiff to sue or the defendant ~~is~~ to be sued is in issue.

Mr. Morgan. ~~I~~ Suppose you sue as a corporation something which is not a corporation, what good will it be? I just want to know whether there is any such thing as incapacity to be sued.

Dean Clark. I think that is simply a definition of words.

Mr. Morgan. No, I do not think it is. I want to know. I am not quarreling on terminology.

Mr. Olney. It is very easy to have John Doe.

Mr. Olney. Suppose you sue a messenger; and the question involved is whether it is incorporated or unincorporated.

Mr. Morgan. The only case I know about is that against the St. Paul Hypothetae, a labor organization, and they demurred, both on the ground of incapacity and on the ground it did not state sufficient facts, and the court sustained the demurrer on theground that it did not state sufficient facts.

Dean Clark. What I had in mind in stating a representative capacity--whether the language is proper or not--

was that in many States you have the question whether the corporation is incorporated. In New York you are required by special rule to allege it, and there it is just a formality. And that is what I want to hit. Now, if you look at the rule in the Southern District of Florida, you will see, perhaps, a better statement of the subject--that they limit it to the capacity in which the plaintiff sues.

Mr. Morgan. Well, of course, that is the usual provision limiting it to the plaintiff, is it not?

Dean Clark. That is not the usual provision.

Mr. Morgan. I thought it was.

Mr. Dobie. There are cases holding that you cannot do it; the Missouri courts hold that.

Mr. Morgan. Yes, you have a conflict on that, for the plaintiff it is perfectly clear.

Mr. Dodge. Does this mean that if you sue a labor union, that the labor union in its reply must allege who are proper parties to be sued?

Prof. Sunderland. If you sue a labor union by its name, you have not sued anybody, because there is no such person.

Mr. Morgan. You have not sued anybody. That is the point. I do not see how anybody who has no capacity to be sued can come into court and say that you have not sued the proper party.

Prof. Sunderland. They can come into court and admit ~~the facts.~~ their capacity

Mr. Morgan. That is what I mean.

Dean Clark. Well, if you take the corporate or representative capacity--

Mr. Morgan (Interposing). If you take the representative capacity, he must come into court and deny that he has that representative capacity.

Mr. Olney. It means no general denial; that is all.

Dean Clark. That is all.

Mr. Wickersham. You include in that clause t he case of suing an executor or administrator outside of the jurisdiction where he is appointed. You cannot sue him in his representative capacity other than in the State in which he is appointed, or he cannot sue, perhaps. That could be lack of capacity to sue or be sued in that representative capacity.

Mr. Morgan. Yes; that is what Dean Clark said.

Mr. Wickersham. Now, it says here "shall also allege the proper party to be sued." I am inclined to doubt that.

Mr. Olney. Would this not besufficient? "It shall not be necessary to allege the capacity of a party to be sued nor shall it be necessary to plead such capacity unless it be specifically denied," and stop there?

Dean Clark. That is all right.

* Insert dict cyl. here *

Mr. Morgan. I think it would be all right to leave that stand.

Mr. Olney. Just stand as it is, except a period after "opposing parties."

Mr. Donworth. It is an anamolous situation in this, that it requires the defendant or plaintiff to deny something not alle ed; but I suppose that is because the allegation is implied.

Mr. Olney. Yes, I think so.

Mr. Donworth. It denies that plaintiff was ever appointed administrator of the estate of so-and-so.

Dean Clark. But it seems to me it should be a clear implication anyway.

Mr. Donworth. I think that is all right.

Dean Clark. Suppose the John Jones corporation brings suit, and then you require them to prove later on that it is the John Jones corporation.

Mr. Tolman. Could that anomaly be removed by changing the word "it", to "lack of capacity", so that it will read, "unless the lack of capacity be specifically alleged."

Mr. Morgan. Yes.

Mr. Tolman. I suggest that because of the statement that you denied something that is not alleged--

Dean Clark(Interposing). That is all right. That is a good suggestion.

Mr. Donworth. But still the burden is on the party who alleges incorporation or executorship to prove it; and Major Tilman, would not your suggestion change the burden of proof? How would you word it?

Mr. Tolman. It would be this way--I will read it from the beginning:

"It shall not be necessary to allege the capacity of the party to sue or be sued; nor shall it be necessary to prove such capacity unless lack of capacity be specifically set up by the opposing party."

Mr. Donworth. Would not that lead to the conclusion that the opposing party must always prove that lack of capacity?

Mr. Tolman. Yes, I think so.

Mr. Cherry. No--shall not be required to prove that capa_city unless the lack of capacity is alleged.

Prof. Sunderland. Lack of capacity would not have to be proved. That is a negative.

Mr. Cherry. That is correct.

Mr. Wickersham. Does that include the general rule that where a corporation sues or is sued, it is not necessary to aver or prove the fact of incorporation, unless it is specifically and affirmatively denied. That is the New York rule.

Prof. Sunderland. I doubt whether the word "capacity"applies to that.

Mr. Wickersham. I believe it does.

Dean Clark. What case is that?

Mr. Wickersham. In a case where a corporation sues, it is not necessary to sue the incorporation unless the fact of incorporation is specifically denied.

Mr. Morgan. That would not cover this.

Mr. Wickersham. I do not think it would.

Dean Clark. Why would it not cover this? I do not understand.

Mr. Wickersham. That is what I want to know. A B brings a suit, and avers thst this corporation is incorporated under the laws of the State of Ohio. Unless the answer affirmatively denied that fact, the mere fact that there is a general issue does not raise that and compel the plaintiff to prove the incorporation; and the same thing applies to the defendant. In other words, to save the bother of proving the fact of incorporation in the case, unless that is a real issue, or is made the real issue by affirmative allegations.

Dean Clark. That is what I wanted to hit here; and I wanted to go further and make it unnecessary to make even a formal allegation in your complaint.

Mr. Donworth. Of course, in cases of diversity of citizenship the allegation must be in there.

Dean Clark. Yes.

Mr. Wickersham. Yes. But I thought "capacity" did hit that. If it does not I suggest that you put in "capacity."

Mr. Wickersham. But if you have a corporation in some controversy, there might be reasons why that corporation could not be sued or might not be able to sue.

Mr. Morgan. Yes--for instance, because it had not paid its taxes.

Mr. Wickersham. Or because it has not filed a certificate. And I want to raise that point because somehwere I think we ought to have a provision for removing the necessity of proving in corporations where it is not the real issue.

Mr. Morgan. Or even alleging it.

Mr. Wickersham. Well, its capacity to sue would accomplish that. I think there is a difference.

Mr. Mitchell. Yes.

Dean Clark. All right; let us say "It shall not be necessary to allege corporate existence or capacity or representative capacity. Nor shall it be necessary to prove the same, unless lack ~~of~~ thereof is specifically alleged."

Mr. Mitchell. I do not think it would be necessary to say "corporate existence."

Dean Clark. If you have a suit by John Jones

administrator
~~executor~~/of the will of James Smith, you have that in your summons and in your caption, and so on, and then go on and say, in paragraph 1 of the complaint, that he is duly qualified as an administrator oor trustee--I do not think that is necessary.

Prof. Sunderland. You hardly state a cause of action if you sue as a representative and you do not say you are. You sue the defendant personally, and then say that you are the representative of somebody else.

Mr. Morgan. The caption would incorporate that.

Mr. Wickersham. Suppose an executor is sued or an administrator is sued in another jurisdiction; a foreign executor is sued and he has lack of capacity to be sued there. Of course, if you allow that issue to be raised indirectly, or by general denial, and it ought to be raised by denial, but if there is no controversy over it, it could be covered. But I think it ought to be clear, and if we can bring in that provision about representation--

Mr. Mitchell (Interposing). Your point is that it is not clear from these lines that it relates to thepoint of corporate existence. That is your point?

Mr. Wickersham. Yes. The point of corporate existence, or in case of the representative, theexistence of the representative in his capacity to sue in ~~any~~ that capacity.

Mr. Mitchell. That is covered.

Mr. Wickersham. I supposed so but was not sure.

Mr. Donworth. Is it not better to leave this as it is from this point of view? A great majority of cases are based on diversity of citizenship, where the allegation is essential on jurisdictional grounds. Perhaps the bar may not think that, but we have somewhat implicitly tried to omit the allegation of the incorporation in some case, and it is presumed--and I am afraid of that. I do not like to put in, where such allegation is essential on jurisdictional grounds--I do not like to make that exception, and I should think the best way is to make no reference to corporate capacity, which would lead to a result that it has to be proved.

Mr. Wickersham. I think it is a distinct point to have a distinct clause as to corporations. A great many cases are brought against corporations. I think it should be provided for specifically that there is no necessity for alleging incorporation unless it be specifically denied. I think that clause should be by itself, as it gives rise right away as has done here to the question whether you mean to bring in the fact of incorporation.

Mr. Lemann. I move that the reporter be requested to redraft the language in thelight of this discussion, so as to cover corporate existence, as well as capacity and representative capacity.

(The motion was duly seconded, and a vote was taken and it was unanimously adopted.)

Mr. Mitchell. The next is "In all cases damage, actual or threatened, shall be specified, and when items of special damage are claimed they shall be specifically stated."

Prof. Sunderland. Does that contribute anything to what we already have in here?

Dean Clark. Very little. The main reason for putting it in is to cover the item of special damage, and of course that is pretty usual. Maybe that is not necessary, but Mr. Lemann. is already suspicious that I have not any rule like this in anywhere.

Mr. Lemann. I was not suspicious.

Mr. Mitchell. What difference have you made between special damage and general damage? General damages shall be specified, and then special damages.

Dean Clark. I think special damages should be alleged.

Mr. Mitchell. You have not told anybody what special damages are.

Mr. Wickersham. Suppose there is a suit for $10,000 for an injury; is that special damage?

Mr. Morgan. No.

Mr. Wickersham. Then all cases of damage I think should be specified.

Mr. Olney. Well, that is capable of interpretation that you would have to allege injury.

Mr. Wickersham. If it was in your complaint and you say you are damaged by it in the sum of $25,000--

Mr. Morgan. That is general damage.

Mr. Wickersham. That is general damage. Now, in special damage you have to allege special facts to sustain it?

Mr. Olney. So far as the damage is concerned, would it not be sufficient to say where special damages are claimed they should be specifically stated?

Mr. Wickersham. Yes.

Mr. Mitchell. That is where items of special damages are claimed they should be specifically stated.

The next item in Rule 35 is as to allegations of fraud or mistake.

Dean Clark. This rule is often stated ~~in~~ at much more length than it is here.

Mr. Lemann. See page 215 of Clark on Pleading. Mr. Dobie cannot take away everything from you. (Laughter.)

Mr. Dobie. He is the leading authority on the subject.

Rule 37

Mr. Lemann. The footnote in ~~X~~/I think is the language you apparently have in mind.

Mr. Wickersham. It says "In all allegations of fraud or mistake the facts must be stated with full particularity"; but when it comes to malice, intent, and so on, they do not have to be. I mean leave that sentence out.

Mr. Morgan. Do you mean the last part?

Mr. Wickersham. Yes, that would go without stating it.

Dean Clark. No, because we put in the facts that refer to the state of mind of a person. If I may quote from the authority referred to it says, first, that where the party relies on fraud or mistake, the facts must be stated with full particularity; but when it is material to allege malice or any condition of mind of a person, it shall be sufficient to allege it as a fact, without setting up the circumstances from which the same is to be inferred.

Mr. Morgan. I think you said the same thing in the rule in fewer words.

Mr. Olney. The only objection I have to it is that word "full".

Mr. Morgan. Yes.

Mr. Wickersham. Yes.

Dean Clark. All right, take out that word "fully". There is an English order on this subject, and the New York Board of Consolidation recommended one. (Laughter.)

Mr. Mitchell. Well, with/that word "full", out that paragraph will stand, unless there is some objection.

The next one in that rule is, "When a party is in doubt as to which of two or more statements of fact is true,

he may state them alternatively in a single claim or defense or separate claims or defenses, and in insufficient alternative shall not affect a sufficient one."

Dean Clark. This is to provide distinctly for alternative pleading, which was prohibited at common law, but which ought not to be prohibited under the code, and is legal under the code; so that it was found desirable to do it by specific provision, which is done in sveral States.

Mr. Morgan. Is there any State which has that last provision as to"an "insufficient alternative"? What do you mean by "an insufficient alternative shall not affect a sufficient one"?

Dean Clark. Shall not render it insufficient.

Mr. Morgan. But if you say that "John Smith or somebody else kicks me, and you serve that only on John Smith, the first alternative states a cause of action against John Smith, and the other does not. This is a rule that is advocated in "Clark on Pleading."

Dean Clark. What page? (Laughter.)

Mr. Morgan. But I doubt whether there was any case in the world which suggested that such a leading was good against demurrer.

Mr. Dobie. It is a case stated if either one of them is true.

Mr. Morgan. If either one states a cause of action--

Mr. Dobie. Yes.

Mr. Morgan. But if one alternative does not state a cause of action, when you reduce the complaint to its lowest terms, either I have or do not have a cause of action against you, and you could state that against anybody in the world.

Mr. Mitchell. If you did it to somebody else, why not ignore it?

Mr. Morgan. I do not know whether you want to go that far--that if he alleges "either or," that he does not then have to select the one which states a cause of action.

Dean Clark. You will notice the Chairman's reaction, which I think was interesting. He says, "Why not ignore it?"

The Chairman. Yes, why not ignore it.

Dean Clark. "Clark on Pleading" says it is not clear whether the alternative should not be rejected as surplusage.

Mr. Morgan. I think it is very clear why it should not be.

Mr. Olney. Because the man does not allege it.

Mr. Morgan. Yes, because the man says he either has done it or has not.

Mr. Lemann. I thought it meant this kind of a case: That I was walking out and Mr. Morgan hit over the head with a brick; and the alternative is that he did not; that Mr. Dobie hit me with a brick.

Mr. Dobie. Those are different causes of action.

Mr. Morgan. That would be a kind where you would fall between two stools.

I am not objecting to that. I only want to know what we are doing.

Mr. Donworth. It might be put in as a stump speech, to stir up prejudice against the defendant.

Mr. Morgan. Of course, you can put it in count 1, you put in one alternative and in count 2 you put in the other.

Mr. Lemann. That is about the same as common count.

Mr. Morgan. No.

Mr. Lemann. You are going to have them both. (Laughter.)

Mr. Dobie. A case of the other kind would be under the doctrine of the "last clear chance", in which the State, at least the engineer, so that your foot was caught in the frog, or in the exercise of due care might have seen it. The first of those makes a cause of action, while the other one does not.

Mr. Donworth. There is a division of authority on that.

Mr. Dobie. Can you take out that last clause of that paragraph?

Dean Clark. No. Why not put it this way; what is wrong with this, "and an insufficient alternative may be rejected as surpkusage."

Mr. Olney. There is no insufficiency of the alternati in the statement that a man either hits me or he did not.

Dean Clark. If the allegation that he did not hit you is insufficient, take it out; let it stand that he hit you.

Mr. Wickersham. It is not an insufficient alternative. It is either a truthful alternative or it is not. You say, "This is the fact, or if it is not something else is the fact." The first thing you will be met with is a motion to make more definite and certain, under the present practice, because the defendant will know it is that you claim, and if it is somebody not the defendant, then thedefendant, "Why sue me then?"

Mr. Mitchell. Would this cover ~~xkx~~ a case where it mentions two partners and covered either one or the other?

Dean Clark. No.

Mr. Mitchell. It is the case of different statements against the same defendant?

Dean Clark. Yes.

Mr. Mitchell. So that that illustration cannot arise.

Mr. Wickersham. I think the phrase "an insufficient alternative shall not affect a sufficient one" should go out.

Mr. Mitchell. It is already out.

Mr. Dobie. How did you state it?

Dean Clark. "An insufficient alternative should be rejected as surplusage."

Mr. Tolman. I think it is useful. A year ago I tried an important case that had two inconsistent alternatives.

Now, if one of them had been tested by a motion to strike and it had been stricken, I do not think any of us would have thought that that affected the other, would it? This announcement here would make that point perfectly clear.

Mr. Donworth. There was a very humorous and ancient thing that was done under the old English law. The allegation was that the defendant borowed the plaintiff's kettle in a new condition and returned it greatly damaged. The defendant put in a defense, first, "I never borrowed it; second, it was cracked when I got it; and third, it was all right when I returned it." (Laughter.)

Mr. Morgan. You can do that with three separate defenses under the Statute of Anne.

What were those words proposed?

Mr. Morgan. "May be rejected as surplusage."

Mr. Wickersham. Why not put it in the alternative? I do not know what it means.

Mr. Mitchell. You are recognized, Mr. Morgan.

Mr. Morgan. I am even willing to stand for this heresy of Dean Clark. I just eant you to know that it is a heresy, and it is one that will shock kmkk most lawyers.

Mr. Lemann. Did it shock you?

Mr. Morgan. It shocked me very much, yes. But I have gotten used to that, because I have read "Clark on Pleading" so often. (Laughter.)

Mr. Mitchell. If you were shocked, how would you change this?

Mr. Morgan. I would strike out that clause, "an insufficient alternative shall not affect a sufficient one."

Mr. Dobie. Judge Olney has an amendment that he wants to offer.

Mr. Olney. No, my amendment is exactly what Mr. Morgan offered. It is to use that paragraph of the rule down to the words "in a single claim or defense or separate claims or defenses", and stop. Now, you can test that effectively and let the court take care of it.

Mr. Lemann. Do you think that would reach a sufficient result--or might?

Mr. Olney. Might.

Dean Clark. Well, the New York courts hold the other way.

Mr. Lemann. Well, is this what "Clark on Pleading" allows and recommends, or does this overrule Clark?

Dean Clark. This is what he recommends.

Mr. Mitchell. Under Clark on Pleading and the New York decision, you may state two alternate allegations against the same defendant, and if one of them turns out to be insufficient your whole case falls, does it not?

Mr. Wickersham. No.

Dean Clark. Well, if there is something else.

Mr. Mitchell. I mean under that New York decision .

Mr. Wickersham. What case is that?

Dean Clark. The case of Johnson, reported in the

Mr. Wickersham. What does that hold?

Dean Clark. That where the allegations are in the alternative each alternative must be sufficient.

Mr. Morgan. That is the regular rule.

Mr. Wickersham. That is the regular rule. Of course, that is subject to a motion which can be made at once to select which one you are going to proceed under.

Mr. Olney. That objection is made to one of them, and if it is stricken out he can promptly amend.

Dean Clark. Under the case of McGinness vs. Surety Co., unless each one is sufficient, the allegation is not good.

Mr. Mitchell. Unless both are good.

Mr. Morgan. Yes--unless each one states a cause of action.

Mr. Lemann. Not"either"but "each", which means both. This would not do any harm, and might reach a result that is desirable, and why not leave it in?

Mr. Mitchell. The answer to that is this: ~~To~~ You make an allegation which states a good cause of action, and you say "maybe that is so" Now you have not stated a cause of action, and ~~may~~ state something else which ~~is~~ does not. I think that is logical, perhaps.

Mr. Morgan. Absolutely logical.

Mr. Olney. It permits a man to bring an action for one thing and then state a differant cause of action.

Dean Clark. What he will do is to start his complain on one alternative and then start over with another alternative, on two different counts.

Mr. Donworth. This is what it does:, "An insufficient alternative will not act as a sufficient one," but it may be stricken out on motion.

Mr. Morgan. That is what Dean Clark wants.

Mr. Wickersham. I do not know what an insufficient alternative is.

Mr. Mitchell. Suppose I undertake to state a cause of action--

Mr. Cherry (Interposing). Either you assaulted me or bought me a dinner. (Laughter.) That is my alternative.

Mr. Wickersham. It says "When a party is in doubt as to which of two or more statements of facts is true, he may state them alternatively in a single claim or defense or separate claims or defenses." Now, if one ofthem is not substantiated and does not hold, if one of them is insufficient, it shall not affect theclaim of the other. I am spelling it out, to see if that is what you mean.

Mr. Mitchell. Yes.

Mr. Wickersham. Then I think you couldget better language to express it.

Mr. Morgan. But you see it will not come in that way ordinarily.

Mr. Wickersham. It comes up on motion.

Mr. Morgan. It has been dismissed on the ground that the whole action is insufficient, we will say.

Mr. Wickersham(Interposing). It is a ~~cause for the~~ case of insonsistency.

Mr. Morgan. No.

Prof. Sunderland. The whole case goes out.

Mr. Wickersham. This does not say that if you have two causes of action and one of them is inconsistent with the other you may still plead them both in the same pleading as a cause of action or defense. It simply says where the parties are in doubt as to which one is true, they may state them alternatively a single claim of defense or a separate claim of defense and an insufficient alternative shall not defeat a sufficient one.

Mr. Morgan. Yes.

Mr. Wickersham. That is, in the same statement of the cause of action you might have an allegation of facts. You might, "Either I was knocked down and run over by John Smith or an automobile belonging to John Smith, I do not know which." Of course, that is perhaps a perfectly good alternative, as you are suing John Smith the owner of the automobile.

Mr. Mitchell. Yes, but it does not state a cause

of action against Smith.

Mr. Wickersham. No.

Mr. Donworth. Take this case: The plaintiff allege first, "My house was destroyed; its value was $1,000 and I am out $1,000. That house was destroyed, ~~xxx~~ either because the defendant employed some men who undermined that house, which I suspect, or in the alternative defendant was excavating on the adjoining property, and he deprived me of lateral support. It seems to me it is something like that. The house was destroyed, and the defendant was reponsible, whether he did it by hiring these men to undermine it or whether it was negligence.

Mr. Lemann. Both of those allegations can be stated.

Mr. Wickersham. There you have a single action against the defendant for injuring your property by negative action. Now, you state, "Either it was that or something else."

Mr. Morgan. And each states a cause of action.

Mr. Lemann. Yes, both.

Mr. Wickersham. It is a question whether he was guilty of negligence or not--

Mr. Morgan (Interposing). That was bad at common law.

Mr. Wickersham. But not under the code.

Prof. Sunderland. How about stating them alternativel in a single claim or defense, ~~xxxxx~~ with the same legal

effect as though it was stated separately?

Mr. Mitchell. Now, as long as you can dodge the thing by stating them separately--and we will admit that--

Mr. Morgan (Interposing). Oh, certainly.

~~Mr. Mitchell.~~ Then what is the harm of saying that the insufficiency of either of them shall not affect the other? So I am in favor of leaving it as it stands.

Mr. Dodge. I so move.

Dean Clark. Do you like it, Mr. Morgan.

Mr. Morgan. I do not dislike it.

Mr. Mitchell. All in favor of the paragraph as it stands here will say "aye"; those opposed "no."

(The motion was adopted, all voting in favor if it except Mr. Wickersham.)

Mr. Mitchell. It is carried.

The next sentence in Rule 35 is "For the purpose of testing the sufficiency of a pleading," and so on.

Dean Clark. That is/~~xx~~ a provision that allegations of time or place shall be taken as true, but amendments shall be allowed to correct errors; and you will recall the old common law rule that allegations of time and place have to be made but did not have to be proved as made. Hence, you could never bring such pleadings as the statute of limitations, because allegations as to time did not mean anything. This is an

attempt to tie down the pleading a little more so that you can more quickly get to the issue involved.

Mr. Mitchell. I do not understand that. Do you mean that an allegation as to the time and place does not mean anything?

Mr. Morgan. There is a case in the books where the plaintiff alleged that a contract was made in such a date in the year 1082, and the other side demurred, and he said, "It does not make any difference what theory you go on, you have a ststute of limitations which cannot be renewed for 800 years and the court, instead of regarding that as a misprint for 1882, said, "Yes, that is true; but you do not have to prove your dates as alleged at common law, and consequently you can go ahead with your case at any time before the statute actually runs.

Mr. Dobie. In the same way, they can say that a certain thing happened on the ocean which happened in the city of London.

Mr. Morgan. Yes.

Mr. Mitchell. This says the allegations of time and place shall be taken as ~~true~~ True.

Mr. Morgan. That is as an allegation or pleading.

Mr. Wickersham. No, I do not think it shall be taken as true.

Mr. Dodge. Are not the cases that you have in mind

very rare?

Mr. Morgan. Not so rare. That is the reason for most of the rules in most o the States that you cannot take up the statute of limitations on demurrer.

Mr. Wickersham. Because the statute may be waived.

Mr. Morgan. Well, some of the explanations are t hat the dates do not count so that the court can tell whether the statute has run or not.

Mr. Wickersham. Well, do you not go too far when you say they shall be taken as true

Dean Clark. Well, for the purpose of testing the sufficiency.

Mr. Mitchell. What it means is that you have got to prove them as alleged.

Mr. Morgan. Yes.

Mr. Mitchell. I think we must change the wording of this, because most of the lawyers will not know what you mean by that.

Dean Clark. This question comes up now, and I have a note from a distinguished professor as to allegations of time in pleading, and then he goes on discusses the defense of t he stat te of limitations. That is published in the Oklahoma Law Review.

Mr. Wickersham. Well, allegations of time and place

should be subject to amendment.

Mr. Morgan. Yes.

Mr. Wickersham. But that is different from saying that they should be taken as true. Suppose you bring it for the purpose of testing the sufficiency of the pleading. You make a motion to dismiss the complaint citing the allegations of time and place. Of course the court may amend ~~or may not~~, on motion and they amend rather freely, but I do not think they are taken as true necessarily. It is just as to the sufficiency of the pleadings.

Mr. Mitchell. I think the reporter gets the idea, that where there is an allegation of time and place, the court on demurrer says, "We do not have to take the date because we do not know whether that is the date or not."

Mr. Wickersham. No, the allegation might be immaterial, but might go to the very whole root of the action.

Mr. Morgan. Yes.

Mr. Mitchell. I suggest that be left to the reporter to see if he can devise any better language than saying it shall be taken as true.

Mr. Olney. Well, for the purpose of testing the sufficiency of a pleading, allegations of time and place shall not be binding upon the pleader.

Mr. Mitchell. Is that not the idea, Mr. Morgan?

Mr. Morgan. I think that is the idea.

Mr. Donworth. "Or shall be assumed as alleged."

Mr. Mitchell. Well, I think we can ~~kix~~ pass that to the reporter.

The next paragraph of that rule is that the defendant or plaintiff shall raise by his affirmative pleading, and not by mere denial, all matters which show the action or counter-claim not maintainable.

Dean Clark. Yes. This part of the rule is substantially that of England, New York and Connecticut. The old provision was that the answer shall contain a denial, and also new matter, without specifying it; and it has been a matter of a great deal of doubt whether a certain situation should be called new matter or should come in as denial. This is an attempt to particularize, and I think the great value of these rules is probably not in the general provisions, but in the list of specific things.

Mr. Lemann. Is contributory negligence purposely omitted from this?

Mr. Dobie. I had that in mind--and the fellow servant doctrine and the assumption of risk.

Mr. Lemann. Contributory negligence is more important.

Mr. Morgan. In Federal pleading, contributory negligence has to be pleaded specially.

Mr. Dobie. That is a general rule.

Dean Clark. I am afraid that we split on this question.

Mr. Lemann. Is there a Federal rule on contributory negligence?

Mr. Morgan. Yes, the Federal rule makes contributory negligence a matter of affirmative defense which is pleaded and proved by the defendant, and they have held that that has got to be applied under the Federal Employers' Liability Act, even when the case is brought in the State court.

Dean Clark. I am not so sure about that.

Mr. Morgan. I am.

Dean Clark. The burden of proof is on the defendant, but the evidence is admissible under the general denial.

Mr. Morgan. That is in New York and in the Second Circuit in New York.

Mr. Donworth. Then it ought to go in. Contributory negligegence should then be ~~amended~~ mentioned as one of those things that must be ~~xxxxxx~~ set out.

Mr. Morgan. Yes.

Mr. Dobie. I had that in the fellow servant doctrine or assumption of risk, under general denial. I think they ought to be set up in here, if you gentlemen are agreed.

Mr. Dodge. Well, you have not got in there waiver. I should think the exclusion of something of that kind might

caused trouble. Most of these things mentioned here might come in under new matter. The case of payment is peculiar; the defendant has to allege payment and the plaintiff has to allege non-payment.

Mr. Lemann. You could put in certain specific things without enumerating them all generally; but to cover Mr. Dodge's point, you ought to enumerate them after saying "including".

Mr. Wickersham. Or "for example."

Mr. Lemann. Yes.

Mr. Donworth. I think that is an unfortunate phraseology here beginning with the fourth line, "And all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise," and so on. It is the raising of them which takes the other party by surprise, namely, the raising of them at that time.

Mr. Dobie. Under the general denial.

Mr. Donworth. "Which ~~not~~, if not seasonably raised, might take the opposite party by surprise."

Dean Clark. Or if not pleaded.

Mr. Morgan. If not pleaded, yes. This is from the English rule, is it not?

Dean Clark. Yes.

Mr. Morgan. That is where we got the notion that you had to plead payment, I think.

Dean Clark. That is, the defendant shall "raise by his affirmative pleading"--that phrase might not be good-- "all matters which show the action or counterclaim not to be maintainable." You see it goes back to the beginning.

Mr. Morgan. Why do you not say "affirmatively pleading"?

Dean Clark. I am doubtful about the law, as I have stated--I mean in the Federal court. And unless specifically required in the Federal court, I am not sure it should go in, because there is quite a difference. Take New York, for example; you do not have to plead it, and you are going to try to change the habits of New York.

Mr. Morgan. In New York, you can raise contributory negligence on the general allegation, on the ground that it is caused by the negligence of the defendant; it is to be read as an allegation of the defendant, and solely an allegation of his.

Mr. Lemann. That is the case in every State where you do not have to plead it.

Mr. Morgan. No; New York says also that the burden of proving due care is on the plaintiff; in everything except a wrongful death case, and that is put on the defendant by special statute. Massachusetts and a good many of the New England States, and in Michigan, as I understand it,

and at common law, it made the plaintiff allege due care .

Prof. Sunderland. Yes.

Mr. Morgan. But it is changed in Massachusetts by statute now and in Connecticut, as to the wrongful death I think.

Dean Clark. Yes.

Mr. Lemann. It can happen in New York and elsewhere, because there are many jurisdictions where contributory negligence must be pleaded.

Dean Clark. Yes.

Mr. Dobie. And you can either leave it as it is now--

Mr. Mitchell. I think if we put it in that it must be pleaded--

Mr. Dobie (Interposing). There are even a number of cases where plaintiff must show that he is not at fault, and he has a general denial. Then you say that you cannot prove contributory negligence under the general denial, and that is surplusage, and I would like to see the fellow servant doctrine and contributory negligence included in there.

Mr. Donworth. I wouldlike to make this general observation, that we should be cautious about adding anything as to the method of proof. There is a general feeling about the country that in the Federal court, in a contributory negligence case, the plaintiff does not get quite a fair chance,

and that the defendant goes into the Federal court for that reason; and sometimes they pass statutes in the State for the purpose of getting rid of a Federal rule like this. And I would not like to have any Member of Congress have a chance to say that we changed that situation by anything we have done here. I do not know to what extent this goes, but Ithink the reporter should carefully consider whether we are on a safe line. If anything is on the doubtful side I would rather not put it in, rather than run into the idea that we have made it what we do for the purpose of defeating a contributory negligence action in the Federal court.

Mr. Mitchell. This would go the other way. This makes it wider.

Mr. Cherry. Yes, thismakes it wider.

Mr. Dobie. We say here, as to the fellow servant doctrine, assumption and contributory negligence, you must set that up; that is favorable to the plaintiff.

Mr. Lemann. It strikes me that these two sterling works discuss the point as to contributory negligence.

Dean Clark. I am sorry that you have not read "Clark on Code Pleading;" that is not a sterling work; nevertheless I recommend it to your attention.

Mr. Morgan. On the question of burden of proof, the Federal court, wherever it has arisen, has said that the

burden of proof was a matter of substance and governed by Federal law, and not of State law, under the Conformity Act.

Mr. Dobie. And the Federal court will follow the rule I have stated; and then in the case of Harney vs. Southern Pacific, it was said that you could not take it away from the court and make it any different rule by some constitutional provision of a Western State, and Chief Justice Hughes in a ringing decision said they could not.

Mr. Wickersham. "Shall plead affirmatively." Is that not better?

Dean Clark. Now, do you like "former recovery" or do you like res judicata?

Mr. Morgan. "Former recovery." "Former recovery" is in there.

Dean Clark. Do you want any assumption of risk with the fellow servant rule?

Mr. Dobie. I should like to see that there.

Dean Clark. How much of that is there in there? Does not that make it inadequate?

Mr. Loftin. Look at the Employers' Liability Act.

Mr. Wickersham. Is that not a question of substantive law?

Mr. Dobie. I wonder if it is a matter of pleading.

Mr. Wickersham. I mean essentially that is not a question of pleading, but of substantive law.

Mr. Morgan. You mean where assumption is risk is

a defense?

Mr. Wickersham. Yes.

Mr. Morgan. Yes.

Mr. Mitchell. What is your point, Mr. Lemann?

Mr. Lemann. Dean Clark thought"former recovery" was as good as res adjudicata on this list, and Mr. Morgan said he thought "former recovery" was better; but some of us think that most lawyers would recommen res adjudicata as a more familiar term in this enumeration. And I would want to make a different answer from Mr. Morgan.

Mr. Mitchell. Let us take a vote on it.

Mr. Morgan. I do not object. I like the Latin, and I am glad somebody is familiar with res adjudicata.

Mr. Wickersham. I agree with that.

Mr. Olney. Res adjudicata goes further than "former recovery."

Mr. Donworth. There might not have been recovery; he might have been beaten.

Mr. Morgan. Yes.

Mr. Mitchell. We have not settled that. What is the sense of the meeting on "former Recovery"?

Mr. Loftin. Mr. Morgan withdrew that.

Mr. Dobie. I move that res adjudicata be put in there.

Mr. Donworth. I move that that be put in there without"ad", just making it "res judicata."

(A vote was taken, and the motion was unanimously adopted.)

Dean Clark. All I can say is that it is certainly

very helpful to have these suggestions. This is a matter that is fought over very often.

Mr. Lemann. With regard to contributory negligence, it is important to know whether it is an affirmative defense.

Mr. Wickersham. Did I understand that Dean Clark was willing to insert after the word "pleadings" the words "such as, for example"?

Mr. Donworth. The word "license" is put in that list. What the drafter of the rule really means is the absence of a license. That should be m de license or the lack of license.

Dean Clark. No, what I suppose is meant is legal license.

Mr. Donworth. Oh, yes.

Dean Clark. Maybe it is not important enough to change. It is an amalgamation from England, New York, and Connecticut, mostly England.

Mr. Morgan. When they want to put in thegeneral issue they put this down.

Mr. Donworth. The corporation must pay an annual license; otherwise it cannot bring suit. But that is another matter.

Mr. Mitchell. Then we are passing on--

Mr. Olney(Interposing). Mr. Chairman, it is 20

after 5 o'clock.

Mr. Mitchell. Well, we probably had ~~mmk~~ better not take up a new rule now, then.

Mr. Morgan. Mr. Chairman, I have to go, ~~but~~ before I go I would like to say, in case you discuss it before your adjournment that I would like to see the setting up of a permanent Advisory Committee; and I hope that ~~that~~ suggestion of Dean Clark's will not be rejected without very serious consideration; because I think that is about the most important thing that can happen, besides getting a set of rules here that will get by the first time.

Mr. Mitchell. I talked with Dean Clark about that, and we all agreed that that was an important thing. The thing that we can put up to the court by way of suggestion in the next three or four months--

Mr. Morgan (Interposing). I do not care how you put it up.

Mr. Mitchell. So that I suggest that if you do not happen to be present at the time we discuss it, or even if you are, that if you or any other members of the Committee have views about it, and will state ~~them~~ in writing, I will see that the Chief Justice gets them. So that we will take care of that in that way.

M. Lemann. I would like to move, Mr. Chairman, that we elect a Vice Chairman, if that is in order.

Mr. Olney. Yes, I meant to do that.

Mr. Lemann. And I name Mr. Wickersham.

Mr. Mitchell. If there are no further nominations, I will make the request that the Secretary be so instructed.

(The motion was adopted, all voting "aye" except Mr. Wickersham who did not vote.

(Thereupon, at 5:25 o'clock p.m., the Advisory Committee took a recess until 8 o'clock p.m.

EVENING SESSION.

Saturday, November 16, 1935.

The Advisory Committee met at 8 o'clock p.m., pursuant to the taking of a recess, Hon. William D. Mitchell, presiding, all the members present as heretofore noted, except Prof. Morgan.

Mr. Mitchell. Gentlemen, we are on Rule 36. Are there any suggestions as to that?

Mr. Tolman. I would like to ask Dean Clark if this expression in Rule 36, "Any forms of general allegation accepted in common law or equity pleading," and so on, means any allegations that equity accepted?

Dean Clark. Yes, I think so.

Mr. Tolman. Otherwise there would be some doubt as to the general allegations--that you are contrasting it with specific allegations.

Dean Clark. Yes, I did have some idea of the general ~~fraud~~ broad allegations, but I think the way you put it possibly means more than theother way.

Mr. Mitchell. Is that not a rather dangerous clause, giving him a chance to go back and have it written over?

Mr. Lemann. The expression seems proper, "Any forms of general allegation accepted in common law or equity pleading shall not be taken," and so on. The expression "No

form and so on is rather peculiar.

Mr. Mitchell. Well, I was looking at the general expression. We have a lot of other rules that cut out a lot of things.

Mr. Dobie. You go back to the general clause of a bill in equity.

Mr. Olney. It seemed to me that it read pretty well.

Mr. Mitchell. Shall we strike out the sentence beginning "any forms," down to the words "grounds of relief"?

Mr. Tolman. I so move.

Mr. Dobie. I second the motion.

Mr. Lemann. Do you mean take out the second sentence?

Mr. Mitchell. I think the last or second sentence.

Mr. Lemann. The second sentence is out.

Mr. Mitchell. The next is Rule 37.

Mr. Wickersham. In the ninth line, should it not be "further facts not material within theknowledge of the defendant"?

Dean Clark. No, it is "that there are further facts peculiarly within the knowledge of the plaintiff." That means that they are not within the knowledge of the defendsnt.

Mr. Wickersham. Well, it is defendant and not

plaintiff there, is it not?

Dean Clark. No.

Mr. Dobie. Does the defendant move?

Dean Clark. Yes, I am trying to provide that he does not get very far, unlessit will mean really something to have him have the information.

Mr. Wickersham. Well, the defendant is moving, is he not?

Dean Clark. Yes.

Mr. Wickersham. Well, those particulars may be ordered if the court may find that there are further facts not peculiarly within the knowledge of the moving party.

Dean Clark. Well, that is just a negative.

Mr. Wickersham. Well, is not the point that the mover is ignorant of the facts? And it is the defendant there.

Dean Clark. Well, it is the plaintiff there and the defendant knows nothing. In most of these cases the defendant knows just about as much as the plaintiff.

Mr. Wickersham. If they are peculiarly within the knowledge of the party, why should he move?

Dean Clark. They are not within his knowledge, but within the knowledge of the plaintiff. The plaintiff has some knowledge which the defendant has not.

Mr. Wickersham. Then leave as it is, "peculiarly within the knowledge of the plaintiff."

Dean Clark. Very well, but there is a "not" put in there.

Mr. Mitchell. I t means within five days of the service of the motion.

Mr. Donworth. Before the motion is determined.

Mr. Olney. In that connection, I am afraid that word "peculiarly." Is it not better to say "presumably within the knowledge of the plaintiff but not alleged"?

Mr. Wickersham. Instead of "peculiarly."

Mr. Olney. I am substituting for that "presumably."

Prof. Sunderland. "Peculiarly" is the usual express-

Dean Clark. I wanted a little more than "presumably." I wanted something theplaintiff knew and the defendant did not.

Mr. Dodge. Sometimes the defendant, even if he knows the facts, has the right to have the issues narrowed, as to what is material, and I do not think in the specification it should be limited to facts of which the defendant is ignorant.

Dean Clark. That is a philosophy that I do not agree with, because I think these things are almost always a waste of time, and that you make a great step in advance if you

put the burden on the fellow who is going to move; make it so that it is not an easy way of raising a question. And I do not believe the idea of narrowing the issues is worth anything. That is just the idea of trying to perfect the written documents before trial.

Mr. Wickersham. Is it not a little more? Under this modern system of prosecution it is exceedingly important to know what the plaintiff's action is, and quite difficult at times to know what the defense is, and anything that tends to make clear the issue, it seems to me, is of value both to the court and to the parties.

Dean Clark. As to clearing the issues, we put in a provision later so that either party can go to the judge for formulating the issues. But this is a matter of perfecting the pleadings and just a way of delaying the case. You move for a more specific statement; and you know how many times a defendantwho does not know the case, might once in a while--suppose a case where it is not known, particularly where it is a claim against an agent, but in practically every case when you really get in court the defendant, at least, knows as much about the case as the plaintiff--or he had better get a new lawyer.

Mr. Wickersham. Very often he does not know just what the plaintiff is going to claim.

Mr. Mitchell. That is covered later by clearing the

issues up.

Mr. Wickersham. That may be.

Mr. Dodge. This motion ~~motion~~ is only available where the plaintiff has not stated in his pleading as much as the defendant is entitled to have him state. He has stated his pleading in such general langauge that, as a matter of pleading, the defendant is entitled to have him state more narrowly what his claim is. It seems to me that it does not turn on the question of the knowledge of the defendant, but rather on having the pleadings definite and proper as they ought to have been originally.

Dean Clark. Well, if these rules stand there will be a rare pleading that will be too general,

Mr. Loftin. I raise the question whether you think the penalties are not inclined to be rather severe for not pleading; that is the filing of judgment against the plaintiff; or whether the same thing might be accomplished by dismissing it without prejudice.

Dean Clark. Well, yes. I suppose what I really mean is the default judgment, or that default may be entered against the plaintiff.

Mr. Olney. Default against the plaintiff is dismissal.

Dean Clark. Dismissal is what you mean, yes.

Mr. Mitchell. Without prejudice.

Mr. Loftin. I suggest "dismissing without prejud'

Mr. Dobie. You cannot dismiss against the defendant.

Mr. Cherry. Without prejudice you could.

Dean Clark. Yes. Now, I am very anxious indeed to get back in here what was taken out of Rule 9. I do think these motions ought not to call for a hearing unless the court orders it. I think that submitting these motions, at least with a reststement of the reasons, and the court passing on them at once, is most desirable--because here is a procedure for dragging the case out without getting anywhere sofar as the case is concerned.

Mr. Mitchell. It does not always follow tha if the court is going to expedite oral argument it is going to expedite the case; The delay comes up in a case where the motion is denied without hearing, and if he files a brief he puts it in a position to be delayed without hearing. It does not always follow that oral argument delays a case. In a busy court in a big city I think motions are disposed of much more promptly and correctly if they are argued one after the other.

Mr. Lemann. You generally have one day a week which is motion day, or rule day, and the judge will go through frequently 50 Or 60. It is very rare that he does not do like that. I think often he puts it in his portfolio and he gets a whole bunch of them. I know of one case which is very simple, and the judges have not passed on it in eight

or nine months.

Dean Clark. Well, of course, there is a difficulty of trying to cover the whole country. I suppose that would be true in the large cities. In the cities that are not so large, you have a regular prepared argument and hearing; but I am speaking of theprocedure where the judge holds up the proceeding, and as I said before in one case, the judge held it up for over a year after having an argument. You will remember Judge McDermott's suggestion on this; and I had no idea of suggesting a brief. I think that the motion in itself should contain all the reasons and say nothing about a brief.

Mr. Mitchell

In cases that have been held up for a year that you think should have taken a much shorter time, the remedy could be to allow a very short time for oral argument, and most of the courts allow five, ten or fifteen minutes.

Mr. Dodge. You might give the plaintiff the election in the smaller cities of filing his statements in writing.

Mr. Donworth. How about the defendant?

Dean Clark. Well, the defendant usually wants to tak the longest way around.

Mr. Olney. You cannot establish a rule for a c of this character by individual experience, or particul exprrience. The probability is that this judge who d

this matter a year delayed a great many other things. He was one of the delaying kind. I think as a rule the judge will dispose of these things more quickly on oral argument than he would by this method. There would be one condition in which that would not be true, and that would be where the judge had a good law secretary, who could go through all these things and prepare a memorandum for him and report on these things, and under those circumstances they would be disposed of very quickly.

Mr. Mitchell. None of the district judges have them.

Mr. Loftin. No, none of them have them.

Mr. Olney. No.

Mr. Mitchell. I do not really feel that you are gaining time by denying an oral hearing on a motion like this. In fact, you get action much more quickly that way.

Mr. Olney. If the judge is the right sort, you get it pretty soon; if he is not, lawyers are reluctant to come before him with those motions. They feel pretty uncomfortable about doing a thing of that sort.

Mr. Tolman. Mr. Chairman, it has been my experience that nearly every case is delayed in which a motion is filed. We have found that to be true; perhaps we ought to have a rule to present a motion to the judge every day. (Laughter.)

Mr. Lemann. I think that is the experience generally.

Mr. Olney. Yes, the experience of the bar generally.

Mr. Lemann. In this class of cases, the motion to make more definite and certain is the most particular class of cases in which you are likely to get a verbal statement. That was the case before you had Rule 9.

Mr. Mitchell. You mean when you had Rule 9?

Mr. Lemann. If he has one of these things before him he is going to get the record, and read the complaint, and read it over again, and read the memorandum, and say, " What is your point?" And then he says, "This motion does not come in under this." Why do you not tell him?

Mr. Mitchell. I think in Rule 9 you raise a more serious question than you can by an oral hearing.

Mr. Loftin. We struck it out of Rule 9, but we can put it back in this.

Dean Clark. Yes, we did strike it out of Rule 9.

Mr. Loftin. Well, I made the motion to strike it out of Rule 9, or, at least, I made a long argument on that, and I repeat it, but I am very much in sympathy with the desire of Dean Clark to expedite procedure, but I do not believe it can be accomplished by submitting the motion to a judge in writing.

Mr. Mitchell. In writing?

Mr. Loftin. In writing.

Mr. Wickersham. Well, before a district judge sometimes these motions are complicated. You take a long and involved pleading, and the judge cannot spend more than five or six minutes on each case, and he says, "I wish you would file a memorandum on that Tuesday" and a copy will be given to the other side, and he will have an answer. In the meantime, he gets a chance to read the thing carefully and thinks it over, and when he gets the memorandum he decides it. But on the argument it takes time to stop and go over it. I think you ought to realize that as a rule, judges will discourage that business or peocedure, but if they have to take the thing under advisement and wzzzs take a lot of time on it, thejudge ought to have the right to do so.

Mr. Mitchell. If you allow an oral hearing, there is nothing to prevent the judge saying, "Submit briefs by Monday or Tuesday."

Mr. Loftin. He frequently does that.

Mr. Wickersham. Yes.

Mr. Loftin. And if he has not made up his mind he says, " A memorandum must be submitted," But more often, according to my recollection, he decides it right there.

Mr. Wickersham. In a large number of cases I think he does; so that when you get a difficult or involved one,

he does not want to take the time to talk it all out, as he would if he had not any special amount of business.

Mr. Mitchell. What you have here is a prohibition against an oral hearing, and I do not think that will save time.

Mr. Wickersham. Yes; and Rule 9 is stricken out.

Mr. Loftin. Yes.

Mr. Cherry. And this refers to Rule 9. Where it says "as provided in Rule 9," strike that out. Well, Dean Clark, would it be practical to say, "The court shall proceed to consider the motion expeditiously"?

Mr. Wickersham. Yes, finally.

Dean Clark. Yes.

Mr. Wickersham. Summarily.

Mr. Mitchell. And then leave it to local rules.

Mr. Donworth. "Summarily" would not do; it means without notice, does it not?

Mr. Mitchell. Yes--"expeditiously."

Mr. Wickersham. "Expeditiously."

Dean Clark. Now, back in the motion days the requirement was for motion days for at least once a month. I have provided this procedure by which the motion would not have to come up formally; so I changed that wording "as often as the business shall require." It may be that if you are going to have hearings, you ought to have a limit of at

least once a month.

Mr. Wickersham. Are you speaking of Rule 9, or--

Dean Clark. One of those rules; I do not whether it was Rule 9 or not.

Mr. Donworth. The judges in many districts have to move around, and they hear motions in each place. And I do not think you can be too specific on that.

Mr. Mitchell. Is that not a matter that we should leave to be filled in by local rules?

Dean Clark. Well, of course, that was the provision of the Equity rules, that the court should fix motion days, but it makes the motion days at least once a month.

Prof. Sunderland. And lots of them did not do it. They could not do it, because they were not there once a month.

Dean Clark. No. I have left that out, on the theory that you would not need as many, but you are now going to.

Mr. Donworth. You are suggesting now "as often as business may require." That would be all right.

Dean Clark. That is Rule 9, but now I think it ought to be oftener than the business requires.

Mr. Loftin. It says "as often as business requires".

Dean Clark. Well, back in Rule 9, you will recall that it said, "Each district court shall establish regular

times and places, at intervals sufficiently frequent for the prompt dispatch of business." Now, the Equity rule, quoted on the opposite page, has it "Regular times and places, not less than once each month."

Mr. Dobie. They had to do that unless the circuit judge dispensed with it. I do not believe that was observed, however.

Mr. Mitchell. Well, take a situation where they are organized on the divisional system; that is, the State is a single district, and there are four or five divisions, such as in Minnesota. There are four or five divisions in my own district, and the judge can only attend, if he is out in another division, once or twice a year. Now, there is a motion made in that division, and it is filed with the deputy clerk in that division. I do not see why you cannothave a motion day at his headquarters in the Twin Cities, or in Duluth, where the parties are.

Mr. Cherry. Where they have divisions and more than one judge, that is a practical matter that affects one judge in the district in one way and another in another. They do that in Minnesota. The two judges change places, since they went on the Federal bench, they comply with that idea so that if they are actually in term or session, they are available for a good many of these things in the division where they reside.

Mr. Mitchell. Well, there is not a judge in every division. There is no judge that lives at Fergus Falls, for example.

Prof. Sunderland. The Western District of Michigan has to handle a lot of these cases also; we could not ask the judge to do that.

Mr. Lemann. We have a judge in the Western District of Louisiana that has to hold court in five different places.

Dean Clark. What I have in mind that the defendant has to go along until just after the judges leaves, and then suppose I file my more specific statement, and then I go back and collect my fee from the defendant, because things will be held up until the judge comes around; and you see it is next year.

Mr. Lemann. In most places it is twice a year.

Prof. Sunderland. In my State it is four times a year.

Dean Clark. That is what I am trying to get away from.

Mr. Lemann. Yes. I do not know just how far they have the power to require counsel to attend other than in their own division.

Mr. Cherry. They do have the power.

Mr. Lemann. They have a right to tell a man to attend?

Mr. Wickersham. Well, they do.

Mr. Donworth. That fixes it so that the judge can hold court anywhere in his district.

Mr. Wickersham. Surely he can say, "I am going to hold court at such-and-such a place next week."

Mr. Lemann. I think what Dean Clark has in mind is this: The judge could do it and get expedition if he wanted to.

Dean Clark. Yes.

Mr. Lemann. Of course, it may be that the judge will not do it, and if there is any way we can make him do it--

Dean Clark (Interposing). We can put in a provision that where the motion day is some time away, it can then be disposed of on written papers only.

Mr. Mitchell. You can put in a clause that motions of this type can be heard in oral argument or on brief, as the court in its discretion may determine.

Dean Clark. I think that would be of some advantage.

Mr. Loftin. I think that would be a good idea.

Mr. Mitchell. Do not prohibit them from having an oral hearing in a busy district in a city.

Mr. Olney. If you want to do that, would it not be well to provide that he may, if he wishes, have it submitted on briefs, and may by rule provide that motions of this character may be submitted on brief in particular business?

Dean Clark. I think that would be a good idea, and of course that would give a little scope to judges like Judge McDermott that want to do it.

Mr. Olney. Well, we have a number of places where the district court sits in California--such as Fresno, for example, and I have an impression that the judges do not like to go to Fresno, and I know they usually delay the disposition of cases that are in that particular district. Well, if there were a provision there so that it had to be made in writing and submitted on briefs, it might be disposed of down in Los Angeles, which is the headquarters of the court. But it can be provided for by local rule.

Mr. Lemann. Can we do anything here that will prevent that?

Mr. Olney. No.

Mr. Mitchell. We can say here that they are going to be permitted to have local rules on the subject.

Mr. Olney. What I had in mind is thatif your aim is to expedite action by providing that it can be submitted on briefs, it goes without saying that to make it clear and emphasize it, I should think you will have to have some special provision such as I have indicated.

Dean Clark. I think really you have got to have a special provision. But it is quite true that we ought to

provide some notice of the hearing. Of course, I have not provided for a hearing, and so I did not have that in. Now, Judge Donworth has given me a rule providing for notice:

"After a party has appeared in an action, he shall be shall be entitled to written notice--not granted as course--which notice shall be served on his return."

It does seem to me that we should have some provision of that kind, in view of the changes we are going to make. Now, if we have some provision of that kind, that takes the ordinary course, and unless we go further and provide that the judge may by local rule provide for this other course, of course we will not have it.

Mr. Mitchell. I suggest what I said a minute ago, that we put in a general clause that a motion of this kind may be heard orally or on written brief, as the judge may in his discretion determine. He can either do it by rule, or use his discretion in a particular case, if you put that in.

Dean Clark. All right.

Mr. Mitchell. You cannot force him to make a rule.

Mr. Lemann. I think I should put it in, but it may be merely psychological.

Mr. Olney. The only thought I had was that if you put in the bare alternative it does not amount to much, but if you put it in for the purpose of expedition, that the

local court may make a rule whereby he may require written briefs, and the court gets that idea, it will be better. That is the only idea I have about it.

Mr. Lemann. Specifying that he may make a rule in a certain case.

Mr. Mitchell. I would not use the expression "rule." I would say the court may for the purpose of expedition have an oral hearing, or on written briefs, as he may specially determine. That gives him the right to make a rule or use his discretion in individual cases.

Mr. Lemann. You could say where expedition requires that the court shall require it.

Dean Clark. I think if you do not say anything about a rule that the interpretation will be that the judge in each particular case must so decide which means that the judge does not know anything about it until a matter comes before him; and suppose comes up in the Northern District of Michigan--

Mr. Lemann (Interposing). No, it couldbe sent to him, and you could refer to this rule and say, "Judge, here is a rule that is expedite matters, and it is your duty to hear this without oral argument, and delaying it thirty days or two months.

Dean Clark. Then he has got to, or he has not got to, but he will write to the other party and say, "Have you any

objection to having this submission on papers?" And the other party will say, "I want to be heard."

Mr. Donworth. The point that Judge McDermott had in Rule 9 was that a brief in writing was better method than the oral argument. We disagree with that. That being so, why are we worrying about this one case in ten thousand? The judge has jurisdiction in Seattle and Bellingham. He lives in Seattle, and is in Seattle practically all the year, and twice a year he goes to Bellingham; and he has a term there about three days in a week. Now, I have not had occasion to know what takes place, but I have no doubt that if an attorney in Bellingham made a motion, he would say, "Will you not set it down in Seattle," where they can go in two hours?--I have no doubt that the judge does it. The things works out practically. I do not think there is any mischief here which needs any remedy of stirring up the whole country about it.

Mr. Lemann. There is certainly nothing, I think, that the judge could not do if he wanted to. I had a case where the judge said, "I will not be there for six months," and we said that we wanted action, and he said,"All right, I will do it." And we go to another point in the Western District.

Dean Clark. I am sorry, but it does seem to me that this is more important than those of you who have spoken

think, particularly in the country--in places where the distances are long. And I think it is expecting a good deal of a judge who is in some other part of the State and who is busy with a case before him which he is trying--to expect him to drop that and start expediting a case in which he has no immediate present interest. He can say, "I will read it when I get around to it."

Mr. Wickersham. That is what he will do anyhow. And conditionally that is what he must do. When he gets to another case he will xxy take it up. He cannot stop a lot of important business for a motion.

Dean Clark. He can consider it in two minutes.

Mr. Wickersham. I do not want him to consider it in two minutes--not my motion.

Mr. Lemann. It would make it a good deal better if you make it that he might provide by rule, because I think we would be doing our job much better.

Mr. Cherry. Why not have it three ways? You could have it this way, provide by rule, and ppovide in each individual case. And you can provide language for that. If you said that provision could be made for the submission and decision the way you had it in Rule 9, that would cover, would it not, the individual case and rule?

Dean Clark. Yes.

Mr. Cherry. I would like to see that left open so that any combination of these three, or any two or one of them, could be used, as turned out best in the district. I wonder if we do not lose sight of the fact that since the Judicial Conference has been pretty active--certainly in the Eighth Circuit--I think there is some observation of that; every judge in the circuit has a feeling that the business in his district must be dispatched, and even if the judge is not so anxious to have it decided, is it not better to leave this open, and have these things go out with a strong suggestion?

Mr. Wickersham. Well, almost all the Federal judges today are busy men. If they are not specially busy in their own districts, they are drafted to other districts. Now, it strikes me that we have got to trust them to get back the business as they best can. If you tie them down with too rigid a rule, you will just irritate them and the lawyers, and it will not help.

Mr. Mitchell. And the conditions are so different in the different districts.

Mr. Dobie. If you say nothing, those three courses are open to them.

Dean Clark. Well, that gives flexibility. This other course says, "Notice," and so on.

Mr. Lemann. Yes, there is nothing in this question

to prevent the judge from requiring the matter to be submitted on memorandum, is there? I am perfectly willing to leave it to the judge. If you leave it to the average judge, I am pretty sure he would be of the same opinion we are here.

Mr. Wickersham. Who is to tell him about it?

Mr. Donworth. At the end the judge says very often, "You may submit a memorandum to me."

Dean Clark. Well, they do not get to him until the end of his calendar, and that is what troubled me.

Mr. Wickersham. But really is there any obligation here that is so great that we need to deal with it in this particular way? I think the Federal judges, in my experience, in general are very prompt; they dispose of matters expeditiously; they give adequate hearings when hearings should be had. They are pretty snappy where there is nothing to do; if there is anything important they take a memorandum, and I do not know of any case where the Federal judges unduly delay the disposition of business, there may be exceptions, of course, but that is the general rule.

Dean Clark. Well, this is not a matter of criticism. It is a matter of machinery which gives the defendant the opportunity, by the very set-up to delay the case. Now, suppose it were generally known that here was one prolific source of delay civil actions.

Mr. Wickersham. Well, when a case is pending in a

Federal court--say there is a motion which the defendant or plaintiff expects to be of real importance. He has a right to be heard on it and he has a right to have that motion properly considered, and he has got to let the judge settle the way the business of his court is to be disposed of. I do not think we ought to provide for that.

Mr. Mitchell. Out in the less thickly settled districts of the West, you do not have to wait for motions day. Suppose you have a motion of this kind and you want to bring it on, and you call the judge on the telephone, and if he happens to be in his chambers, in Minneapolis, and motion day is Monday, and this is Wednesday, you can say, "I have amotion that I want to get on for hearing. Are you going to convene on next Monday?" And he says, "Yes, at 10 o'clock;" and so you get out the papers and notify the other fellow that it will be heard at 10 o'clock in the judge's chambers at the courthouse, and you go to his chambers and argue it out. There is very little formality there.

Mr. Wickersham. Yes. Now, in New York it is a different thing. It is well arranged and promptly disposed of, and they do it under their own rules, adapted to conditions in the community. I do not think you ought to put in general rules of practice particular provisions as to where he should

hear it and whether he should take a brief or not. I think that is interfering with the expedition of business.

Dean Clark. Now, we are going to tie it up, the hearing. It is true that the judge can say when the hearing comes on, "I want papers," and when he does that that is another opportunity to the defendant to take more time.

Mr. Dodge. I have never heard of a case where the ultimate result was delayed one day by motion for specifications; it is going to be filed in the early stages, and is disposed of at an early date, and I cannot think of anything that has caused delay in any case, and I have frequently had these motions filed against me.

Mr. Dobie. We have one judge in the Western District of our State. He goes to seven places, he goes to these little towns, and you cannot see him with a telescope, and then he goes back to where he lives. I do not think this is an evil at all. I agree with Mr. Dodge. I do not think it is a prolific source of delay.

Mr. Mitchell. In any matter having to do with the organization and dispatch of their own business, we have to let these district judges make their own rules in their own district, and if we try to do it in a rule, we are going to have a good deal of trouble about it.

Dean Clark. That is the only thing I was suggesting,

and it seems to me that you are just tying them so that they cannot do that.

Mr. Mitchell. You think that the rule as it stands now forces them to have an oral hearing?

Dean Clark. Yes.

Mr. Cherry. May I submit intangible form what I have ?

Mr. Mitchell. Yes.

Mr. Cherry. I think it would very well come in Rule 9: "For the expedition of business, ~~the~~ a rule may be made for the submission and determination of motions upon briefs ~~written~~ statements in support and opposition, without hearing."

Mr. Mitchell. "Hearing" is oral hearing?

Mr. Cherry. Well, I was copying the language that Dean Clark had in the rule.

Mr. Mitchell. Why not leave it to the judge?

Mr. Donworth. That means the judge may do it in his discretion.

Mr. Cherry. ~~Such~~ Special provision may be made. I was using what I thought it might cover either a rule for a particular district or a partitular kind of motion in a district, or a provision in an emrgency or a particular situation.

Mr. Lemann. Why not say "The court ~~may~~ shall make provision by rule," and so on?

Mr. Donworth. The court should be the boss.

Mr. Lemann. Then the court should make provision either by rule or order.

Mr. Olney. I might suggest to Dean Clark that he thinks the delay of the law are largely due to these dilatory motions. In my experience, the delay in getting a case on for trial is due primarily to two things; first, the lawyer for the plaintiff, who does not care particularly to push it on. He knows about the difficulty that the district judges have in getting time to try their cases--not the dilatory motions, but getting it on the calendar and bringing up the trial, so that the judges have time totry it. That was the troubel out in my district for a long time.

Mr. Dodge. That is my experience.

Mr. Olney. You have plenty of time, if you can ever get the case ready for trial, to get rid of the dilatory motion.

Mr. Lemann. We had this experience, that the judges were three years behind; and some men who want to get their case tried could get it in three months--and they are still three years behind.

Mr. Donworth. In my State there is no trouble getting the case at issue. When it is at issue the trouble is about getting the case disposed of.

Dean Clark. I think Mr. Cherry's motion is good.

Mr. Cherry. I make that as a motion, as an amendment

to Rule 9: "For expedition of business, the court may make a rule or order for the submission and determination of motions upon brief written statements in support and opposition, without hearing."

Mr. Donworth. Without oral hearing.

Mr. Cherry. That is all right.

Mr. Donworth. Without oral hearing, it can be submitted in that way.

Mr. Mitchell. All those in favor of that motion will say "aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Mitchell. Then we will leave in "as provided in Rule 9," in Rule 37.

Mr. Donworth. Well, is that so? That is not the only method, is it? Are these rules not supplemental, and can we not leave out the reference to Rule 9?

Mr. Mitchell. I guess that is right. We have already covered that.

Mr. Donworth. "And proceed to determine the motion promptly."

Mr. Cherry. Expeditiously.

Mr. Tolman. There is an entirely different aspect of this Rule 37 that I would like to cover, if you have finished.

Mr. Mitchell. All right; Mr. Tolman.

Mr. Tolman. This rule gives the plaintiff the option of five days to comply with this demand. And this rule--I did not recognize it until I studied it--then intends that notice shall be served on the other side, telling what additional information it wanted to have, and this rule does not permit the court to fix any time or determine the motion until after this five days has expired for the other side to get this information. Now, I think that is a very valuable feature. I think that this rule requires notice of this sort of thing to be served on the adversary first, with the hope, that by force of the rule, a custom will spring up under which the attorneys themselves will do the thing without running to the court, as under present conditions, and that that will save a very large amount of time and trouble. I think that ought to be the rule. I think the parties ought to be compelled, if not by rule, at least by decency, to stipulate if they can in advance in regard to the facts. I think that depositions, for example, should be conditioned first on request to submit the facts, and thus obviate the taking of a deposition, with the expense that would be incurred.

So, in order to make that clear, I have rewritten the first part of this rule, changing the phraseology a

little bit, and I have suggested to Dean Clark:

"At any time before the answer is due, a defendant may serve on the plaintiff's attorney a request for further and better particulars of any matter stated in any pleading, ~~putting~~ pointing out specifically the defects complained of or the details desired. The plaintiff may amend his complaint or supply the bill of particulars within five days of the receipt of such motion, or if he does not, the court shall proceed to determine the motion promptly."

Mr. Mitchell. That is what you have here in Rule 37.

Mr. Tolman. Yes, but there is nothing about serving it on the other side. I wanted to make it clear that this five days is the time within which he may act.

Mr. Mitchell. Then, it would be all right if we inserted here "The plaintiff may amend his complaint within five days after service of the notice."

Mr. Tolman. "After receipt of such notice," and the notice referred to is a notice pointing out the defects, possibly, complained of.

Mr. Mitchell. Suppose we refer that to the reporter for his consideration and have a memorandum on it.

Mr. Tolman. That is what I intended to ask.

Mr. Mitchell. Dean Clark, I would like to ask about that. Here we have a motion where prompt disposition is

important, and I notice that there is a provision by which the plaintiff can make that motion, but suppose he serves his motion and then does not bring it on for hearing, and the other opposing party wants it out of the way.

Mr. Donworth. I have a rule on that, in the next rules.

Mr. Donworth. Have we passed Rule 37 now?

Mr. Mitchell. All right.

Mr. Mitchell. Not quite.

Dean Clark. Well, the title may not be very important, but I am not sure that a better title would not mean a motion to straighten or strike out. I had in mind where, perhaps, "further statement" might be more descriptive.

Mr. Lemann. In that case is not the answer sufficient, without a motion to strike out.

Dean Clark. It might be, although the last paragrap is "strike out".

Mr. Lemann. Yes.

Mr. Mitchell. Is there anything further in Rule 37 that anybody wants to bring up?

Mr. Dodge. I want to bring up my question again, to the effect that this right to specifications should not turn on knowledge, because the defendant's knowledge is not a matter that may be determinative of the evidence; he is got to meet the case stated by the plaintiff. And I have in mind cases where the ~~plaintiff~~ complaint states in very broad language,

but enough to get by a motion to dismiss, or an old fashioned demurrer, but at the same time does not advise the defendant with sufficient definiteness of what the exact claim is he relies upon. Suppose, for example he charges the defendant with false representation. The defendant in answering the complaint says what he said to the plaintiff when he sold him the property. But the proof ~~of try~~ of the truth that is a very different thing. The defendant himself may have to get books and witnesses from a distance, and many other details may have to be covered to meet the defense, and he should be entitled to know specifically what the claim is that he has got to meet and ordinarily I have found that the object of themotion for specification is not to inform the plaintiff of any facts, but to inform the plaintiff of the fact as to what claim he has got to meet in that case.

Mr. Wickersham. Inform the defendant, you mean.

Mr. Dodge. Inform the defendant, ~~mak~~ as a matter of pleading, and not as a matter of prying into the affairs of the plaintiff. I think it would be better if the rule should read/that if in the course of the further statement it is found that there are further facts, that are matters of proper pleading, which are alleged in the complaint, a motion for specification may be made in order that the defendant may properly prepare his defense, and that it should

turn on that rather than on knowledge.

Mr. Wickersham. Yes.

Dean Clark. Well, I tried to get away from this idea of proper pleading, because there is no such thing nowadays.

Mr. Wickersham. Dean Clark wants these pleadings to be some kind of a story of what the plaintiff has to say and what the defendant has to say. My idea is that it is an allegation of facts on which the plaintiff is entitled to claim for relief, and an allegation of facts which the defendant claims protects him from plaintiff's complaint.

Mr. Mitchell. I do agree with Mr. Dodge that it is only fair to the defendant, that if it is ambiguous and uncertain there should be a complete statement. The defendant may know all the facts--that is not the point. The question is Which way is the cat going to jump? And he does not know until it is definitely stated and he can then say, "That is a thing that I have to meet and I will get witnesses for that if it is something else he will have to prepare to sue for that." That is an occasion for a great deal of perjury, and it gives the defendant a chance also to get ready for the particular thing the other man is going after. It is not the matter of knowledge in that aspect. When you get to discovery and documents and things of that kind, you are naturally in a different field.

Mr. Donworth. I think Mr. Dodge would not insist over Dean Clark's objection to the use of the words "as a matter of proper pleading." Would not Mr. Dodge's attitude be met if those words along there read something like this: "Or the further statement or completion of the statement tha if / defendant or the court finds that there are further facts which should be stated in the complaint in order for defendant properly to present his defense."

Mr. Dodge. That is all right.

Mr. Mitchell. Is there any comment on that?

Mr. Donworth. If there are further facts--strike out "within the knowledge of the plaintiff and not alleged." The word "further" indicates that they are not alleged--"further facts which should be stated in the complaint in order to enable the defendant properly to prepare his defense." Is that it, Mr. Dodge?

Mr. Dodge. That is exactly it. I put it the othe way, merely because I did not want Dean Clark to think I was trying to get away from other questions of pleadings. I do not want to make this a bill for discovery, but merely to insure the proper statement of a definite claim.

Mr. Mitchell. What is your pleasure on that? Is that seconded?

Mr. Wickersham. I second it.

Mr. Olney. I second it.

(A vote was taken and the motion was unanimously adopted.)

Mr. Dodge. That is as modified.

Mr. Donworth. Yes, it shouldbe stated in thecomplaint, in order to enable the defendant properly to prepare his defense.

Mr. Mitchell. Is there anything further in Rule 37?

Prof. Sunderland. Is the next sentence to be chang That is, that a man may at the same time file his answer. I think that is the rule in many courts.

Dean Clark. That w as in connection with the supplemental pleading, I think. It could be added here.

Mr. Mitchell. Why not do as we did there, and say that an order--

Mr. Donworth (Interposing). I think if you wait until the three suggestions I have to make are considered, that will dispose of it.

Shall I proceed to those?

Mr. Mitchell. All right; go ahead.

Mr. Donworth. These three rules are intended to keep the case moving along steadily and smoothly and give everybody a chance to be heard, but to cause no delay, and to fix the time within which each ~~specification~~ step must be taken after a ruling on a motion addressed to the previous step, until the

thing is at issue. I would like to read the three, and then comment on them.

The first is Rule 37a, and reads as follows:

(Mr. Donworth read his proposed Rule 37a, which was subsequently handed to Dean Clark.)

Now, by the expression "if any," I mean this, that where an answer does not contain a counterclaim, of course, no reply is needed. If plaintiff, on motion to make the other party answer definitely loses, that is the end of that. There is no further pleading necessary. But if the court rules that the other party must answer definitely, then the defendant must comply with the court's order within five days, or the further time required by the court.

Now, in my proposed Rule 37B, which is, I think, necessary under the system by which terms of court are largely abolished, you must be able to bring a motion up whether made by yourself or the adverse party. That proposed rule reads as follows:

Mr. Donworth read his proposed Rule 37B, which was subsequently handed to Dean Clark.)

Mr. Donworth(Continuing). That is, sometimes a party needs an order in a hurry, and does not want to give the three days, or the judge may be leaving. He can apply to the judge, and on showing cause he can get an order determinable on one day's notice--or any other time. If the other party comes in and says, "It is not right," the judge can change that order.

Mr. Dodge. Do you mean that that would be satisfied by service by mail?

Mr. Mitchell. When you get into that, you will have to allow more time. I have a note to consider that afterward.

Mr. Donworth. Now, as to my third rule, my proposed Rule 37C--this is more or less general, and something of this kind is in all the codes. It gives the court power to do certain things under the conditions named. It reads as follows:

(Mr. Donworth read his proposed Rule 37C.)

Mr. Mitchell. That means fraud or misrepresentation in connection with the proceeding.

Mr. Donworth. Yes, that is the intention, and perhaps that should be stated--of course, not outside the proceeding. Whether the rules are stated in the best way I do not know, but we should have soundly established mach-

inery for keeping the thing going in an orderly way, and subject to such terms as the court may prescribe, so that a procedure may be set up that anybody can pursue to get the matter at issue.

Mr. Mitchell. The feeling that I have so far about the rule is the question whether you would uptset in that way that orderly procedure, and introduce a feeling of uncertainty. We have a lot of suggestions scattered around here, such as that it takes a good deal of time to know how you should serve a man, and how much notice you should give, and then have a lot of things like Rule 37A, which says that after a ruling is made on a motion the party shall within five days thereafter do something. Now, we have no provision for any notice of the decision, either by notice served on the adversary, and we have no provision for notice when you start the five days running; and there are a lot of details of that kind. I feel that, instead of trying to work those things out here at this meeting, if you wish we can refer the supplemental rules to the reporter, to be taken up with the general concept of speeding this question of time, and seeing what is being done, and seeing that they are hooked up together.

Mr. Lemann. I think it might be a good idea to dispose of the Federal case under rules that we provide--rather than to make a time schedule.

Mr. Mitchell. You might get notice by mail, just as Mr. Dodge said; we must make some provision for those things And when you do that, that calls for another provision, and when you do that you might have to give him three days notice, or if you mail it six days' notice, or something like that, and I do not think you can work those details out here, but let us wait until the reporter has had a chance to go over the rules again and consider those points.

Dean Clark. I will say that I think the rules of Judge Donworth are very good, and some of them should go in. I will go over them and see whether they can go in generally Here is a thing that is possible: We could now provide another schedule, just as is now provided--we could put in another schedule of time requirements.

Mr. Mitchell. It would be useful to the bar if you could collect all your time schedules and have them as an exhibit.

Mr. Wickersham. I did that once under the income tax law.

Mr. Mitchell. Yes. I guess there is nothing more in Rule 37.

Dean Clark. Mr. Donworth, I am not quite sure what you mean by "preliminary."

Mr. Donworth. I mean that, instead of pleading you make some motion which will suspend the next plead

and then when the court rules on that, if you lose you have five days to go on with that pleading. That might be more happily expressed.

Dean Clark. Well, in a preliminary motion, the party makes a motion as to any pleading.

Mr. Donworthy. It goes back to the preliminary motion.

Dean Clark. Preliminary motion?

Mr. Donworth. Yes, the motion preliminary thereto. This is not intended to cover all motions.

Mr. Cherry. Well, if any pleading is to follow, the result of the motion, it would not matter what the motion is about, would it?

Mr. Donworth. No.

Mr. Cherry. So that if you say that the motion is ruled out then there is to be more pleading--

Mr. Lemann(Interposing). There are really only two kinds of motions provided.

Mr. Cherry. Yes; but if it were made more general it would be more easily stated, because you say "if any."

Mr. Donworth. "Whenever a decision is made on a motion, the party against whom it is ruled may, within five days, make such further pleading, if any,"

Mr. Cherry. Yes.

Mr. Olney. I should think it wouldbe possible to have a section to cover this matter of making motions. I

think it requires a general section which specifies the notice which is required, and likewise a genral section covering the matter of service of papers, and also in the section governing the making of the motion, general provisions as to the time that should be allowed the parties to respond to any order that was made upon the motion, and then we would escape putting in here, in all these various sections, what time is required and what notice shall be given. Just make it general.

Mr. Donworth. That is the very purpose of my proposed 37A, to make it five days unless the court shall fix some other time.

Mr. Olney. But make it a general rule applying to all motions, and then all the lawyer has to do is to look up that rule.

Mr. Mitchell. Well, that section is for the reporter to consider when he is solving the problem.

Well, that covers Rule 37. And we will now pass on to Rule 38.

Mr. Donworth. Well, this is new in the Federal practice. I believe it is common in State practice.

Dean Clark. No, this is not common in State practice. It is a little attempt to imitate the English procedure, and it is quite new.

Mr. Mitchell. Here we have the pleadings vainly limited to the complaint and answer; when we ~~have more~~ make an effort to plead after that, we ~~come~~ start in making motions. (Laughter.)

Mr. Wickersham. I do not like that last sentence. It says "The court may delay the entry of such order to ascertain if conciliation among the parties is possible."

Mr. Olney. That gives them all sorts of stage play, and chance for delay, and one thing or another.

Mr. Mitchell. Is this intended, Dean Clark, as the best way to have the rule, as analagous to the English system, where you have the master, or somebody, get the parties together and sit down in the case and find out ~~whether it~~ what it really is?

Dean Clark. Yes. It was my suggestion of what I thought was the best that could be done because we have no masters and I do not know how the judges could do it, but this does give the opportunity to the judge to do it. It is not required, but any judge who wants to try this will have an opportunity. But I do not believe we can go any further, unless we can get more personnel in the way of judges, masters, and so on. Now, on the point suggested as to conciliation, you will notice again that Judge McDermott has made suggestions along this line, and the editor of the American Juridical Society Journal has thought these were very fine. Judge McDermott has made suggestions in general. He has addressed

the Society, and they have printed his address, and the Journal has commented upon it in several different issues; and Mr. Harley, the editor, told me that one of the most important things we could do was to urge the judge to exercise some functions of conciliation. I suggest that as indicating the somewhat different point of view. Now, I am not very sure myself how much of that could be put in, but I did not know whether it might not be worth while to put in a provision so that when a judge like McDermott feels that something could be accomplished we could give him an opportunity to try it. If you will turn back to Judge McDermott's suggestion he has made in an address to the Juridical Society--it is two pages back. There is quite a discussion here about that.

Mr. Wickersham. Well, that, however, is a different thing. There it says "on the request of one party for the action, the judge may try to find out whether the controversy can be composed."

Prof. Sunderland. This whole matter has been developed further in the Circuit Court of Detroit than anywhere else. I think they have been more successful there than England. The Superior Court in Boston has recently incorporated the same statement as used in Detroit.

Mr. Wickersham. In one of those controversies in a State court I think it is a very appropriate procedure; but litigation in the Federal courts is very different. I

do not think there w uld be one case in a thousand in the Federal that will be susceptible to this.

Prof. Sunderland. It is not conciliation; it is adopting a process.

Mr. Wickersham. Well, it is a process of conciliation that is suggested.

Prof. Sunderland . Well, it may produce conciliation, but it will save a great deal of time. In Detroit all cases automatically go before three trial judges, and they are handled very rapidly.

Mr. Wickersham. You do not mean in the Federal court?

Prof. Sunderland. No. But when they are ready for trial they go automatically to the three-judge court so as to save very valuable time, and the issues to be tried are there determined, and what amendments to the pleadings shall be made, when the trial shall be had, and other other matters that will facilitate the case.

Mr. Wickersham. That is like the English method.

Prof. Sunderland. Yes; but it is done by the master, and/if it is done at a preliminary stage, it should accomplish a great deal. It is done after the case is at issue, and by that means they can write out the matters that are at issue. They can wipe out any pleadings, and the rule is that after

they have passed the three-judges no amendment of pleadings is made at all. That is the last chance they have, and after the suggestion of the judge if they do not make any change, they cannot do so afterwards.

Mr. Mitchell. Is that done by rule of court, or by statute?

Prof. Sunderland. By rule of court.

Mr. Mitchell. I suppose if the judge on hearing, rules that some particular thing is not material, and the other fellow things it is, he can appeal?

Prof. Sunderland. Well, he will not put down any admission that they do not make. If they admit it he writes it down.

Mr. Mitchell. When he promotes the issues, it is by agreement of counsel?

Prof. Sunderland. By agreement of counsel, and it is a very easy method. And that becomes a final limitation upon the trial judge--it may be a different judge who tries the case--now, in the State court he has this memorandum before him which fixes the scope of that trial; every fact which is noted as admitted is written down, and the issues ~~are~~ written down are the issues to be tried, and no other questions are permitted to be raised upon appeal.

Mr. Donworth. I am afraid this would be a very

prolific cause of reversals. You know the Federal judges, and you know as a rule they are good lawyers; they are self-confident and inclined to cast aside what they think are immaterial matters; and in view of the Constitution of the United States, which gives a party the right to a trial by jury on every issue of fact, you would find that these judges, because they did not understand the matter, and perhaps the last case is present in their minds--you would get a statement there that very often would omit something, and it would be a very fruitful cause for exceptions and reversals, because the party has been be deprived of his right of trial on his issue.

Mr. Mitchell. Your statement I will agree with perfectly, on the assumption that this rule gives the court the power to make an order of what the issues are that both lawyers do not agree to. As it is worded, I think it does give the court such power; but if both lawyers object, or one lawyers objects to saying that it is at issue and it is not, I do not think that can be done. But I understand the purpose of this rule is merely for the court to do those things that he has persuaded the counsel to agree to.

Prof. Sunderland. That is correct.

Mr. Mitchell. And unless the lawyers agree that this is the issue and that is the issue, and this fact and that fact are admitted, and another fact is denied, the judge

cannot put it down as a record to be followed. Now, I think the idea is fine. It can be used with our limited judicial force, and I believe a rule can be put in here that would enable the court to do it. But I think this rule should be amended to make it clear that the court is not making any order against the will of either party. But it is not objectionable to get them together and have them agree on what is really agreed on and what is to be fought out; and it is not a case where the judge can make an order against anybody, making the issues, and saying what is denied and what is not.

Mr. Lemann. We can do this now, can we not?

Mr. Olney. Of course, a first class judge at the outset of the case will do that very thing.

Prof. Sunderland. Yes, but the advantage is that this is done before you get your witnesses.

Mr. Olney. The judge can do it now. I have no objection to a rule such as the Chairman suggests, but if you accept that, a good trial judge will do it now.

Prof. Sunderland. This rule is just to suggest the idea.

Mr. Lemann. So that there is no objection to putting it in.

Mr. Mitchell. It will have the effect of forcing the other fellow to come in. As it is now, you will have

to take your adversary by the scruff of the neck and drag him there. By this rule you serve a notice on him and you sort of bind him. There is no penalty if he does not, the judge cannot force him; but somehow or other it seems to have that effect.

Mr. Lemann. It makes him feel more like signing.

Mr. Dodge. It is done in every case in Boston, in the State court; but it is more along the line of your statement, of getting them together and reaching the issues together.

Mr. Mitchell. Is it done under rule?

Mr. Dodge. Yes. Have you seen that Michigan rule?

Prof. Sunderland. It is not a State rule; it is a local rule.

Dean Clark. Those things are referred to in the Journal, but I do not know the exact wording.

Mr. Dobie. As I understand you, Prof. Sunderland, the experience of the Detroit court has been very happy.

Prof. Sunderland. Yes, it has had a very good effect.

Mr. Mitchell. Mr. Dodge, can you get a copy of your Boston court rules in regard to that?

Mr. Dodge. Yes, I will make a memoradnum to do that and send it to you, Judge Clark.

Dean Clark. Very well.

Mr. Tolman. Would a motion to that be desirable?

Mr. Mitchell. Yes.

Mr. Tolman. I move that the matter be referred to the reporter to be exast, in harmony with the statement made by the Chairman.

Mr. Mitchell. You mean the statements--

Mr. Tolman(Continuing). With the Chairman's view of what the rule ought to be; that it ought to be only by agreement, and the record will show that.

Mr. Olney. I want to object seriously to putting anything in the rule that the court may delay the entry of of its order, or anything of that sort, for the purpose of conciliation.

Mr. Mitchell. I think you might strike that out.

Mr. Olney. I think that will just make trouble; anything that would permit the court to exert pressure.

Mr. Donworth. Rule 38 as it stands reads:

"After the pleadings in an action have been completed, the court may, upon motion of any party showing grounds therefore, or of its own initiative, if it finds that the pleadings do not clearly define the issue to be tried, and after hearing the parties, enter an order setting forth the issues to be tried in the action, or directing such amendment of the pleadings as will clearly and precisely

set forth the issues; and the issues thus formulated and determined shall be the only ones considered at the trial."

You see now, the court, at the beginning of the trial, or at some stage of the trial--when the thing gets around to theproper stage, ~~xxxik~~ says, "Now, let us see. The plaintiff alleges in paragraph 1 so-and-so; the defendant in paragraph 1 denies so much of that," and so on.

Now, he is going to do that same thing in an order, and I do not quite see what he does here is any better than the parties can do, if the parties have conformed to the rules. I will not delay this. I will not oppose it; but it seems to me that it is going to get the parties and their lawyers before the judge, and take up valuable time on something that he ordinarily does in the trial.

Mr. Dodge. I am told that it works quite well, and it allows them to get together and brings about a good many settlements.

Mr. Lemann. I should think it might be more valuable in State courts in small cases than inthe average Federal court, where the lawyers as a rule and the case are much more important, and the lawyers know their pleadings better; and my general impression is that it is not likely to lead to a very successful result. But I do not see any objection to it. Why not wait and see what happens to it?

Mr. Dobie. I just want to make one more point. The rule says that if the court finds "that the pleadings do not clearly define the issues to be tried", and so on. As I understand Prof. Sunderland, even when the plea dings are quite specific and define the issues to be tried, the parties could get together and make a good many other issues. I do not think it ought to be limited to the case where they do not clearly define.

Mr. Mitchell. They deny it in the answer, and when they get before the judge they say, "I did not really mean that."

Mr. Dobie. That is the point I want to make. Sometimes the pleading defines the issues very clearly, and sometimes before the judge they may get a lot of other things agreed to by the parties.

Prof. Sunderland. All I meant was writing down theissues, in theform of three or four questions.

Mr. Lemann. Mr. Dodge, will you find out just how they do it in Boston?

Mr. Dodge. I will get the rule, yes.

Mr. Lemann. And you will send it to Dean Clark?

Mr. Dodge. Yes.

Mr. Mitchell. We will now take up Rule 30.

Mr. Donworth. There is one fault in that, Mr. Chairman. I think it is rather common, in the statutes

about the real party in interest, to permit suit by an assignee of a chose in action assigned in writing. Oftentimes, a claim is assigned because the real plaintiff does not want his name to appear in the public press, etc., and so he assigns his claim to John Smith, and John Smith is a mere formal holder and suit is brought by John Smith. I know in our statute we put that in so that the assignee of a chose in action assigned in writing may sue.

Dean Clark. That is a very restricted meaning, however. Generally, the real party in interest provision has been construed to mean assignee. Some States require a writing, but generally not. And I do not know why you need the writing.

Mr. Donworth. Well, he is not the real party in interest, you see.

Dean Clark. Well, it has been held that he is.

Mr. Dobie. That is, if he has legal title.

Mr. Dodge. If he has there is no question about it.

Dean Clark. Well, I do not object to that, but how about a subrogee?

Mr. Dodge. You just may say including a certain person, so that there shall be no mistake about it.

Dean Clark. Do you not cast doubt, then, on a case of

subrogation?

Mr. Dodge. Is not a man who is entitled to subrogation entitled to sue in his own name?

Dean Clark. Yes, he should be, but if you provide that an assignee may sue and do not provide for these others, how about it?

Mr. Donworth. Well, the word "assign" might mean assignee in bankruptcy, or something of that kind.

Mr. Wickersham. Assignee of a cause of action would be good.

Mr. Dodge. The right to subrogation is an individual right.

Mr. Dobie. If it is not assigned, I say the "subrogee"--if there is any such word--is not the assignee--that is, if it is not assignable; You might call it if you want to an assignable claim, but it is not.

Mr. Dodge. This right of subrogation is an individual right of his assignee.

Mr. Dobie. Yes, it has been specially held under the Federal assignment statute to that effect; so that if it is not an assignable claim ~~xxxxxx~~ the word "subrogee" is not added. It is not necessary that he should be if it is not an assignment.

Mr. Mitchell. That Federal statute is that he cannot come in on diversity of citizenship where he was not in

originally; is that it?

Mr. Dobie. Yes; that is it. I do not think subrogation is an assignment.

Dean Clark. That is what I thought. If you start and pick ur particular things beyond the New York rule, which is pretty bad, but at least has been construed, what they do with things that you do not include?

Mr. Donworth. Does the New York rule, either in this section or any general statute, permit an assignee of a chose in action to sue in his own name?

Dean Clark. It does permit it, but not by statute.

Mr. Mitchell. Well, that clause in brackets is commonly used as a statement of the rule, and if you qualify it by reiterating that present statute about an assignee--

Mr. Donworth(Interposing). Well, we are not dealing here, of course, with that question of jurisdiction. When you have an assignee in the Federal court, he takes from the parties the same interest.

Mr. Mitchell. I do not think we are in any way qualifying that rule when we define "party in interest."

Mr. Donworth. Possibly not. Is not that second clause, Dean Clark, better than the first one?

Dean Clark. The reason I prefer the first one is that the second one has caused quite a little litigation, because it was not known what it meant.

Mr. Mitchell. Is the first one any clearer?

Dean Clark. I hope so.

Mr. Wickersham. I doubt it.

Mr. Mitchell. You have got all the references to cases that arose under the first clause?

Mr. Lemann. I looked at your references to see what the differences were and I think those particular cases were cases of partial subrogation under fire insurance laws--that is, where there was, say, $10,000 insurance, and when the loss was due to the fault of a third person; there is a partial subrogation there. And I was wondering whether you would not have just the same question arise by saying "The person who, by the substantive law, ~~xxxxxxxxxx~~ has the right sought to be enforced." You see, the general rule is that they both must join under the "real party in interest rule." They suppose they would both have to join.

Mr. Mitchell. The reason of that is that they can not submit the claim--they must join; and when the insurance company will not join as plaintiff they must join as defendants.

Mr. Lemann.
I suppose you could not provide that he must hold it in trust for the insurance company.

Mr. Dobie. Some of the cases hold that it creates an express trust; other cases hold that he must sue, because

he has got legal title. But you would not avoid those difficulties, would you, by your alternative?

Mr. Mitchell. It has been so thoroughly threshed out, under the Equity rule that I think if you adopt an entirely new provision, it may cause as much litigation as the other.

Mr. Dobie. I think Dean Clark had the idea. He wanted to get an expression a little broader than that.

Dean Clark. Yes.

Mr. Dobie. I think in the hands of a liberal court, you would not have any trouble; and some of the early decisions to determine who is the real party in interest are terrible; they are very restricted and narrow.

Mr. Wickersham. I move that we adopt the language of the second draft.

Mr. Tolman. I second the motion.

Mr. Dobie. I want to hear more from the reporter. I think that is more important. If he can get a new phrase that he is sure the court will give broader meaning to, and is fairly clear, that would be better. Of course, in some cases/where it is a question of substantive law, I would be willing to substitute it; but I do not like to place that language in it. The second alternative is very much safer in the hands of a libera l court.

Mr. Mitchell. Dean Clark, will you give me an illustration of the ~~profession~~ difficulty as to the real party in interest clause?

Dean Clark. The chief difficulty did arise in connection with assignment and subrogation; especially in connection with partial assignment and subrogation; but there was often a question as to what was the meaning in the case of a technical division of the legal and equitable title. The difficulty ~~was~~ with the old Equity phrase was it seemed to carry some significance as to the beneficiary, and there was often litigation in the old days as to whether a trustee under this provision could sue, or whether the beneficiary ought to ~~see~~ sue, or whether the trustee could ~~be sued~~ sue under this last phrase and the beneficiary also sued; whereas it is well settled, and of course we all know that this did not occur; in many things connected with the estate, the beneficiary cannot sue and ought not to sue. Now, the division of construction which developed was right there, as to whether the real party in interest provision did mean the man who had the substantive right, or mean restrictively the man who had some beneficial interest. Now, taking the case where the matter was brought up of partial assignment or partial subrogation, which were two of the important cases, there was a good deal of holding that the partial assignment in such case was effective only in equity, and the original man must

sued, which meant that a man who had lost a good deal of his interest in the case was the one to use, or even in the case of partial subrogation, there was a question of whether the insurance company had much chance of protecting its interest.

Mr. Wickersham. Well, they got beyond that, did they not? by the later construction?

Dean Clark. Well, the better courts did, yes.

Mr. Wickersham. We have a volume of decisions on that now, and it is pretty well settled.

Mr. Mitchell. How does your substantive law provision remove any difficulty about this partial assignment? Just take a specific case here of subrogation. Why is there any clearer result under the first alternative than under the second in that case?

Dean Clark. There is no question, and it is everywhere taken that the insurance company has a very definite right. Of course, in the case of a partial subrogation, each has a very definite right--the assured and the insurance company. And this provides, in effect, that the one or ones to sue are the ones who have the right, not those who may have--

Mr. Wickersham (Interposing). Well, he is trustee then of an express trust, is he not?

Dean Clark. There is no express provision here. The rule is that both should sue together, or if one sues alone, he ought to make the other party a defendant; in that case I put it "who is the trustee of an express trust."

Mr. Wickersham. I think the insurance company is the trustee of an express trust.

Dean Clark. I should think there was chance of holding that the assured was.

Mr. Lemann. I think the assured is, because he has no interest and is trustee for the insurance company.

Dean Clark. That subrogation is supposed to be effective for the purpose of giving the insurance company an equity to make a claim. But this is a good example of the situation: Now, here are distinguished gentlemen before me who split as to who can come within the technical phrases of the old rule. You see, Mr. Wickersham one way and Mr. Lemann the other.

Mr. Lemann. I think he will agree with a little time for deliberation. (Laughter.)

Mr. Wickersham. Possibly I will.

Dean Clark. No, I think, with all due deference, to Mr. Lemann, that Mr. Wickersham is quite sensible in his reactions.

Mr. Lemann. I think he is sensible, but I think it is the other way. How about this provision "A person who,

by the substantive law, has the right sought to be enforced." Take Mr. Wickersham's view that the insurance company by substantive law has the right to be enforced, if it was the trustee--or if the assured was trustee for the insurance company. I do not object to getting another form if it is clearer, but I just want to be sure that it is clearer.

Mr. Mitchell. I want to ask also whether "a person who, by the substantive law, has the right sought to be enforced" would include a person expressly authorized by staute who has not any right at all?

Dean Clark. I should think if he is given the right by the legislature that he certainly had the right. Well, now, answering a little more directly, Mr. Lemann, of course we cannot say beyond any question that the court wants to do ~~the same~~ strange things, but you h ve got a situation--how can you get away from the fact that both parties, in the example that has been considered, the assured and the insurance company, have definite rights?

Mr. Cherry. By the substantive law.

Dean Clark. Yes.

Mr. Cherry. And that is so by your phrase just as much as by the other. I think that is where Mr. Wickersham and Mr. Lemann were in disagreement, as to what the substantive law was in that situation.

Mr. Lemann. Yes.

Mr. Wickersham. Well, whoever under the substantive law has the right is the real party in interest, is he not?

Dean Clark. Well, he should be, and I want to say so directly. Under the decisions by the better courts that is true, but not by the decisions of all the courts, and not by the--

Mr. Wickersham(Interposing). I think we had better stick to the evils we know of rather apply those that we know not of.

Mr. Cherry. If you use the real party in interest, what was the purpose of leaving out the statement in Equity Rule 37, "may sue in his own name without joining with him the party for whose benefit the action is brought?" Does not that get rid of one of the possible difficulties, or at least, putting it negatively, might it not invite some question if it were left out when it had been in the Equity rule?

Prof. Sunderland. What was the question you asked?

Mr. Cherry. I am asking the question, since it has been in the Equity rule--

Prof. Sunderland(Interposing). I heard that.

Mr. Cherry. One of the questions that Dean Clark raised was whether he had to join the other party with him as plaintiff if he would not join him as defendant? Now, that might tend to eliminate that--I do not say in all cases.

Mr. Wickersham. Were not those words "without joining with him the party for whose benefit the action is brought" perhaps, intended to avoid ousting the jurisdiction in the Federal court?

Mr. Dobie. I think that is likely.

Mr. Wickersham. By joining beneficiaries of the same State as defendant?

Prof. Sunderland. That is taken from our code.

Mr. Wickersham. Maybe so, but I mean the reason for putting it in the rules.

Prof. Sunderland. I do not know what it means, but it is in every code.

Mr. Dobie. Well, there is one thing--"a party in whose name the contract has been made for the benefit of another"; it might apply to that.

Mr. Wickersham. Now, you take that first clause of this rule, "has the right sought to be enforced." Now, the right sought to be enforced is vested in this report in the executor and beneficiary. The executor has the right of action; the right under the substantive law sought to be enforced is the right to the property, which is, perhaps, in the trustee, or in the beneficiary.

Dean Clark. No, it is not in the beneficiary.

Mr. Wickersham. I do not know.

Dean Clark. The law of trusts is that the trustee

must sue as to the trust property.

Mr. Dobie. He may recover and it may all go to creditors, etc.

Mr. Wickersham. "Under substantive law the right to ~~shall~~ be enforced," which is not the right of action. "his is the right under substantive law, as to who are the owners--in equity as well as in law--who are the owners of theproperty. It is not the executor. He might sue for the benfit of those who have the right.

Mr. Dobie. The law gives him the right to get that property in there.

Mr. Wickersham. That is the right of action; that is not the right under substantive law.

Mr. Dobie. That is the only right he is asserting there.

Mr. Lemann. What do you mean by "substantive law"? We are not asserting a right of substantive law. Do you mean a right under common law, or a right in equity? Because, as I understand, we are not abolishing the fundamental differences between common law and equity, but merely the procedure.

Mr. Wickersham. I do not know.

Dean Clark. Does substantive law apply to the particular claim sued upon?

Mr. Wickersham. Yes.

Dean Clark. That is, a right to a partnership

accounting is one thing, and a right to sue your trustee is another; a right to sue for trespass on trust property is another.

Mr. Lemann. Is that what you mean when you speak of a right under substantive law?

Mr. Wickersham. I think this would open up a lot of decisions and lead to litigation the end of which nobody can see.

Mr. Dobie. I think that is only in equity.

Mr. Dodge. Only in equity.

Mr. Dobie. Yes.

Mr. Wickersham. Well, I would do it with the provision that is in the Equity rule.

Mr. Olney. Am I mistaken about this? I have always thought that this rule of the code, which is one with which we are quite familiar, did not express what we really had in mind. I may be wrong, but I had the impression that what they were driving at when this code was adopted was to allow an action to be brought by the real party in interest, when, under the existing law, it would have to be brought, perhaps, by some one who is merely the formal owner, so to speak, and that what was really intended was ~~rex~~ more/a permissive statute than a limiting statute; but unfortunately, they put in words of limitation, that it must be brought by the real party in interest; and really what they had in mind was

that the real party in interest should be allowed to bring the suit, as well as the trustee, for example, who held bare legal title.

Mr. Dobie. I think some of the earlier cases have held that that statute was highly restrictive, and then the later cases have generally held that it was intended to broaden the rules of the common law and to give that right more, was it not?

Mr. Olney. It might be. What happened was that they put in this code section, by virtue of the necessities of the case, and theprogress in ideas, a meaning that gave it the permissive meaning rather than the restrictive one which it had according to this language. Now, what I am pointing out as to this--the only great advantage there is, if it is any at all, in this discussion, is that we ourselves should clearly see what we ought to do. What should be done here--the object we are striving for--is to permit of litigation, the commencement of the suit, either by the real party in interest, or by some one that genuinely represents him under the law, so that if this person representing him obtains a judgment, it is binding not only on him, but on the one who may be called the party having the beneficial interest.

Mr. Dobie. That was the test applied by a lot of

of the courts in those cases of assignment of bare legal title; they said, "The only viewpoint here is the practical one; if the defendant can make any defense against the assignee that he could have made against the assignor, and the judgment in the case is proper for the foundation of a proper plea of res adjudicata, that ends all question about it."

Mr. Olney. So far as this particular language is concerned, if we change that language with which the bar is so familiar in any respect, it is going to cause great question. It is given the construction it should have, of a permissive statute except of a restrictive one--and if we depart from that we are going to have a lot of trouble and litigation.

Mr. Mitchell. What do you think, Prof. Sunderland?

Prof. Sunderland. I think that is partly true. I think it is so thoroughly in our jurisprudence that the best thing to say is that that statute, if used, is to take care of a chose in action. I think if they made that one provision, that an assignee could sue in his own name, they would have done everything that is necessary in most cases, and would have avoided all this litigation; but they did not do it and the litigation is now over, and I think we should keep it.

Mr. Mitchell. It is in the Equity rule too.

Mr. Dobie. Do you want to eliminate this phrase, "Without joining with him the party for whose benefit the

action is brought", in the Equity rule?

Prof. Sunderland. Yes, I do not see any sense in it.

Mr. Donworth. Well, as Mr. Cherry has well said, if it is in every code, leaving it out is going to cause question to be raised.

Prof. Sunderland. Well, I never knew of a case where a judge even discussed it. I think it has been an absolute nullity.

Mr. Lemann. If you leave out a rule like that, and do not give your reasons, can you say in there, "We left this out because we thought it unnecessary."

Mr. Cherry. Well, our reasons would not be those of the Supreme Court.

Prof. Sunderland. Of course, if they edited it or changed it it would be different.

Mr. Lemann. Some courts might say they would.

Mr. Tolman. In Equity Rule 37, Mr. Hammond called my attention to the fact that it says, "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, etc. may sue in his own name."

Prof. Sunderland. That is true.

Mr. Tolman. Under that rule, was the executor the real party in interest? That indicates that he is not

the real party in interest.

Prof. Sunderland. Yes, that is right.

Mr. Dobie. He was always permitted to sue at common law.

Mr. Tolman. I used the parenthetical word "but".

Mr. Dobie. I think the reporter has used the word "but."

Mr. Donworth. The use of the word "but" has exclusive reference to the equity suit, because in the equity suit the executors are the owners.

Prof. Sunderland. As a matter of fact, when this was in the Equity code, "but" was in there.

Mr. Dobie. I move, Mr. Chairman, to get it before the Advisory Committee for action, that we adopt the second of those alternatives, "real party in interest" down there, and that we restore that last phrase in the Equity rule. Not that I have any great idea that it really means anything, but I do have a well defined feeling that if you take it out you will have to do a great deal of explaining.

Mr. Donworth. It will just cost a little printer's ink to leave it in there.

Mr. Cherry. I second the motion.

Mr. Mitchell. All those in favor of the motion will say "aye"; those opposed "no."

(A vote was taken and the motion was unanimously adopted.)

Mr. Donworth. Now, on the question of the guardian ad litem in this Rule 39, that is, of an infant, I want to read you from the suggestions of local committees, the suggestion of the Utah Committee:

"We recommend a rule which eliminates the distinction between guardians ad litem and the next friend of a minor, and that the guardian ad litem acts in both capacities, but only upon appointment by the court in which the action is pending, pursuant to such notice to all relatives of the minor and person having the custody thereof as the court shall order after the filing of an affidavit showing the circumstances. The rule should also expressly provide that the guardian ad litem cannot--"

And this is important for consideration--

"in any way collect the proceeds of a judgment in favor of the infant, but that a general guardian under the laws of the State must be appointed and qualified for that purpose."

Now, especially in personal injury accident cases, a recovery is often had, and as I understand it, the law is in amuddle as to the responsibility of the guardian ad litem appointed by the court.

Mr. Dobie. I do not think generally you can pay him; that is my understanding.

Mr. Donworth. ~~That is my understanding, yes, you~~ You can.

Dean Clark. Yes.

Mr. Dobie. I thought in most of the States you could not.

Mr. Donworth. He is not under bond, and it is a poor system; whether we should undertake now to change it I do not know; but I mention it for your consideration.

Mr. Cherry. We have a statute in Minnesota.

Mr. Wickersham. Now, should we add the language that is in the Equity rule, "a party especially authorized by statute may sue in his own name", you have that, "without joining with him the party for whose benefit the action is brought." I do not think that is necessary, but I just call it to your attention.

Mr. Dobie. We voted to include that.

Mr. Wickersham. You voted to include that?

Mr. Mitchell. Well, maybe we had better take up the guardian ad litem tomorrow. It is after 10 o'clock; and there is some question there that will necessarily take some little time.

Shall we adjourn now until 2 o'clock tomorrow afternoon, and sit from 2 until 7 o'clock?

Mr. Wickersham. Yes.

Mr. Dobie. Yes.

(Thereupon, at 10:05 o'clock p.m., the Advisory Committee adjourned until Sunday, November 17, 1935, at 2 o'clock p.m.)

PROCEEDINGS OF

ADVISORY COMMITTEE ON UNIFORM RULES OF CIVIL PROCEDURE

FOR THE DISTRICT COURTS OF THE UNITED STATES

AND THE

SUPREME COURT OF THE DISTRICT OF COLUMBIA.

(Appointed by the United States Supreme Court.)

Washington, D.C.,

Sunday, November 17, 1935.

The Advisory Committee on Uniform Rules of Civil Procedure appointed by the United States Supreme Court met at 2 o'clock p.m., pursuant to adjournment on the preceding day, Hon. William D. Mitchell (chairman), presiding.

PRESENT: All the members attending the preceding sessions, except Prof. Morgan.

Mr. Mitchell. Well, we are down to the last sentence of Rule 39, beginning, "When an infant or a person incompetent," and so on.

Dean Clark. As I recall, last night some one raised the question whether there should not be a guardain appointed for both plaintiff and defendant. Well, I took this from the Equity rule, and I only gave my interpretation, but I suppose it is a matter of convenience. You start by next friend, without an appointment, and I suppose in most cases

you will have a regular guardian appointed by the probate or other court; yet I take it that the starting of a suit by next frined is very simple, without appointment; then when the case comes into court, the next friend could be appointed as the guardian ad litem, or some one else could be appointed. as Mr. Mitchell. You cannot appoint a guardian ad litem until you get jurisdiction; and you could do it by service of process on the defendant; and in order to have the infant get a guardian ad litem appointed, the next friend must start proceedings and get process served, so that it gives the court jurisdiction. So that I think this is all right.

Mr. Dobie. In some States, they allow a guardian ad litem to be appointed.

Mr. Mitchell. Who applies for the appointment of a guardian ad litem? You get the next friend to start it?

Mr. Dobie. Yes, it is the same procedure. I like this terminology, and I think it is the accurate one.

Mr. Dodge. Would it not be better to use the words "next friend"?

Mr. Mitchell. I am in favor of it.

Dean Clark. You would not criticize the Supreme Court, would you, for the language in the Equity rule?

Mr. Dodge. I noticed that they made that mistake. (Laughter.)

Mr. Mitchell. Well, is there anything else in

that sentence that you want to discuss? That gives the court ample power to require a bond, etc.

Mr. Cherry. Is there any objection to permitting a guardian ad litem for the plaintiff? If we said "may be brought by the next friend, or brought or defended by a guardian ad litem," there might be circumstances under which they wanted that. It would not prohibit the next friend from proceeding.

Dean Clark. I do not see any objection.

Mr. Mitchell. Is it often done?

Mr. Cherry. It is in Minnesota.

Mr. Dobie. Does the court always appoint a guardian?

Mr. Cherry. Yes.

Mr. Mitchell. There is some proceeding by statute for a guardian ad litem. How would we provide for that?

Mr. Cherry. I am not urging it. I did not mean that it was done in the Federal, but in the State court.

Mr. Mitchell. To prosecute or defend. Well, I do not see why we should not permit it, as long as some of the States allow it. There is no reason for abolishing it where it is common practice--as you say, in Minnesota. I think as long as it is the practice, we ought not to change the order permitting defending by guardian ad litem.

Mr. Dobie. Just insert ~~xxfxxx~~ "brogght" before "defend-ed."

Mr. Wickersham. There is in New York a provision that where an infant is a party where there is no guardian a guardian ad litem can be appointed by the court.

Mr. Dobie. In the light of all of that, I move that those two words be inserted.

Mr. Cherry. I second the motion.

(A vote was taken and the motion was unanimously adopted.)

Dean Clark. Now, have we finished with this rule?

Mr. Mitchell. I think so.

Dean Clark. You will notice my second footnote there. Is it the opinion of the Advisory Committee that further rules on parties should be drawn?

Mr. Wickersham. They generally are not so regarded.

Dean Clark. I suppose there could be argument that we would be getting into substantive law; that is a question that needs consideration as to whether we should do it or not. I am willing to attempt it--referring to the footnote.

Mr. Wickersham. It does not seem to me necessary to do it.

Mr. Tolman. I do not think we ought to have a complete code to revise the practice as to these matters.

Mr. Wickersham. As experience develops, the court itself can then make rules modifying or supplementing these rules.

Mr. Mitchell. Not under this statute. We wouldhave

to get the statute amended. The statute says nothing about that, but talks about the first set of rules, and does not say anything about amending them from time to time by the Supreme Court; and I think there is great danger in expecting to modify these rules after they are adopted, without submitting the modifications to Congress. The probabilities are that the rules we submit to Congress will be accepted, and take away that supervisory power.

Mr. Wickersham. Yes.

Dean Clark. Of course, I am not urging it. Perhaps this would not be a suitable occasion; but there are points of debate in any such rule. But I call your attention to the fact that there is a good deal of uncertainty about the law.

Mr. Mitchell. If we do not say anything about it, would it leave it in bad shape?

Dean Clark. I think if we do not say anything about it, there is a considerable amount of uncertainty. Of course, there is the Coronado Coal Co. against a labor union, opinion by Chief Justice Taft. There was a certain amount of uncertainty but probably no more than there is in a great many States.

Mr. Mitchell. There would be somelaw on the subject; there would not be any hiatus.

Dean Clark. It would not touch any law that exists.

Mr. Dobie. I am afraid you would be intruding on the jurisdictional field. I move that that be omitted.

Prof. Sunderland. I second the motion.

(A vote was taken and the motion was unanimously adopted.)

Mr. Donworth. Have we considered the suggestion made from one State about a rule limiting the right of payment of the judgment to the next friend or guardian ad litem? What would be thought of anaddition to this rule that would say something along this line: "That the court may, in its discretion, after the entry of judgment, make such orders as it deems fit and proper regarding payment of the judgment."

Mr. Dobie. Do you not think that is included in that general sentence "orders as the court may direct for the protection of such infants or incompetents"?

Mr. Dobie. We are talking about the concluding clause of this rule.

Mr. Donworth. I did not know that related to the payment, but perhaps it does.

Mr. Mitchell. If it does not it ought to be made clear; but I assume it does.

Mr. Cherry. It is pretty broad inits present wording.

Mr. Donworth. "may be brought or defended", it reads, and then it says, "subject, however, to such orders as the

court may direct", and so on, quoting Rule 39.

Mr. Lemann. That is in the Equity rule.

Mr. Cherry. We have been using the word "make", have we not?

Mr. Lemann. Yes, I think "make" is a better word.

Mr. Mitchell. Do you not think that is broad enough?

Mr. Donworth. Yes.

Mr. Mitchell. We will now pass to Rule 40, "Stockholders actions." In New York, if a plaintiff buys a share of stock after a certain event, he is held liable.

Dean Clark. Of course, this Rule 40 is Equity Rule 27. I changed the word "bill" to "action," etc. I had some doubt as to the necessity of this, but we gathered that the Supreme Court seemed to like it, and announced it in cases before it was promulgated as a rule.

Mr. Dobie. It was held that it was not a jurisdictional rule, in that case against Hall for $57,000,000, and in that case they said it just put into concrete form what had previously been a decision of the Supreme Court. I think we can leave that out.

Dean Clark. You will notice that I carry the Equity rule to the point of requiring verification by oath. I left its simple perfection.

Mr. Cherry. Would it mar that perfection to make

it "shareholders" throughout? That is the modern Equity rule, and here it is reached only in the last line of Rule 40; but since it is used--

Dean Clark (Interposing). Does the American Law Institute not use it?

Mr. Cherry. Yes.

Mr. Dobie. I move that the word "stockholders" in the second line of Rule 40 be changed to "shareholders."

Mr. Mitchell. That will be accepted, unless there is objection.

Mr. Olney. The rule seems to me to be, to a certain extent, a rule that announces a principle of substantive law--whether a man has a cause of action or not; that is what it really amounts to. And while it is in the Equity rules, I doubt very much the advisability of including a rule of this character.

Mr. Dobie. Will you please talk louder, I cannot hear you.

Mr. Olney. There is just this one reason for this rule, so far as I can see, and that is the number of blackmail suits brought by minority stockholders, and they have endeavored to discourage them. But after all, this rule really announces the cases in which there is no cause of action.

Mr. Mitchell. Well, you have got the Equity rules,

and you have got to do one of two things; we have a single proposal now, and we will have to make a back track in the case of a contract to allow a stockholder to bring a suit of equity cognizance after the event, unless we and take a step forward and make that uniform in both classes, we are up against it there.

Mr. Olney. If you wish to announce a rule of substantive law as to when a man has a cause of action, all right.

Mr. Mitchell. Is it any more than saying that an action may be brought by a guardian ad litem? The cause of action belongs to the company, and you are just facing a rule of who may bring an action on behalf of the corporation.

Mr. Wickersham. It does not even say that. It says that in every action brought by one or more stockholders in a corporation, and so on, you may assume such a thing. But it does not confer a substantive right upon him. I think this is a good regulation, and where it is proper to have such an action, this applies to what may be done.

Mr. Olney. I am not objecting the rule, but what is announced here to be the law. I simply say that, in effect, this is saying to the stockholder that "You cannot sue except under certain circumstances, "

Mr. Mitchell. How would you meet my point that the present Equity rule says that? Now, we have to have one

rule for both law and equity. Now, are you going back to the equity suit?

Mr. Olney. My point applies to the original equity rule.

Mr. Dobie. Would you mind stating your point again. I did not hear you.

Mr. Olney. The whole object, if I understand this rule correctly, is that it would put a stop to what has been going on, particularly in New York, as I understand, where a man would buy a share of stock, largely at the instance of some lawyer; he would buy a few shares of stock, and then he would bring a minority stockholder suit because of something that might have occurred before the ostensible plaintiff got the stock. I just wanted to cut that out.

Mr. Dobie. Have you any objection to the rule as drawn?

Mr. Olney. I have no objection to the principle.

Mr. Dobie. What is your objection?

Mr. Olney. My objection is that they are saying here, under the guise of laying down a rule of procedure--they are saying to a man, " You cannot get any relief," as a substantive rule.

Mr. Cherry. We do it with excellent precedents.

Mr. Dobie. And that was exactly was decided in the case of Hall vs. Oakland, in 1881, and this states precisely

what was held in that case. And there are a number of cases holding that it is not a question of jurisdiction.

Mr. Mitchell. This is one that would govern Federal courts in law actions, as well as equity.

Mr. Dobie. I think all of these actions have to be brought in equity; you cannot sue at law.

Mr. Mitchell. That is right.

Mr. Dobie. I move that we adopt the rule.

Mr. Mitchell. We are not changing the substantive law in the Federal court.

Mr. Cherry. I second the motion that it be approved.

Mr. Dodge. There is one point I suggest: It should be "the complaint in the action," not that the action should contain he allegations mentioned there.

Mr. Dobie. Yes; the word was "bill" in the old Equity rule, that is, substitute "complaint" for action. The old rule was "bill", but of course we had to strike that out.

Mr. Mitchell. The "complaint in" is good.

Mr. Wickersham. Yes.

Mr. Mitchell. It has been moved and seconded that we adopt Rule 40 as so changed.

(A vote was taken, and the motion was unanimously adopted.)

Mr. Mitchell. Rule 41.

Mr. Lemann. In the language at the end of the second

paragraph, I note that that is copied from the Revised Statutes and seems rather inexact. It says "The action shall proceed at the suit of the surviving plaintiff against the surviving defendant;" and the word "surviving"seems to apply to both. But it is the language of the statute.

Dean Clark. Could we not say, "and/or". (Laughter.)

Mr. Wickersham. It is the first time.

Mr. Lemann. Instead of saying that, we could say "surviving plaintiff or plaintiffs" or "surviving defendants or defendant," as the case may be.

Dean Clark. That is all right. There is no objection to that.

Mr. Olney. In connection with Rule 41, may I ask the reporter just what is the necessity for the exception that occurs at the end of the parentheds?

Dean Clark. Yes, I wanted to make a statement about that, because it is a little troublesome. That deals with the question of how far a State may be sued without its consent. And it came up a little in connection with this very recent case, "Ex parte Gray. I am not wholly sure that it is necessary. Of course, these suits to enjoin a State statute are normally against some official of the State, and not officially against the State; so that I suppose the technical rule of not suing a State does not apply.

Mr. Dobie. That has been held in at least 50 cases,

ever since the case of Ex parte Young.

Dean Clark. Well, I had some doubt about this and I wanted to raise the question. Do you think the exception is necessary?

Mr. Dobie. No, and I object to it; and my objection was to consent to such substitution; and I think it would be unfortunate to put that up to the State, and I hink the Supreme Court would object to allowing this State officer say whether he should be substituted.

Mr. Mitchell. That is not covered by the statute.

Mr. Lemann. What do you say about the case of Ex parte La Prade, in 289 U.S., 444/ And I wonder whether that was required?

Mr. Moore. In an action to enjoin a State statute because unconstitutional, an official of the State may defend it, and in the Supreme Court, when he has gone out of office, the question is whether his successor may be substituted for him. And it has been held that he cannot, if the complaint made no further allegations to the effect that the successor is attempting to enforce the alleged unconstitutional statute. Now, if it has done that--

Mr. Mitchell (Interposing). The theory of that decision undoubtedly is that you are not suing the State at all, but an individual, and a certain individual is assuming the

right to commit some act under an unconstitutional statute. Now, if he dies, he is through; he is not threatening; and the theory of the decision that if some other individual comes along and holds the same office and makes the same threat, you cannot properly substitute him; there is not a succession in right or interest; is that correct?

Mr. Dobie. Yes; you remember the Young case?

Mr. Mitchell. Yes, my firm argued that.

Mr. Dobie. You will remember that they said there, in a decision by Mr. Justice Harlan, that when a suit is brought against an individual of a State on the ground that a statute is unconstitutional, it is not a suit against the State.

Mr. Wickersham. That is the only way you can get jurisdiction over him, is to sue the State.

Mr. Donworth. That situation would seem to require that you would have to start again.

Mr. Mitchell. That is right.

Mr. Wickersham. Yes.

Mr. Olney. In that connection, to start again might mean an awful waste, and there is nothing accomplished. Would it not be sufficient to provie that, in the case of an officer under these circumstances, the plaintiff could file a

supplemental bill, setting out his death, and that demand or some such other proceeding had been taken, so that it appeared that he took the same attitude about enforcing the statute of which complaint was made, and providing that under those circumstances the original suit should not abate but might be carried on against the successor. That ought to be the law, and I do not see why it cannot be provided for by rule.

Dean Clark. Well, is that different from the first part of it?

Mr. Mitchell. Well, as you have it, if a man did not consent to the substitution--

Dean Clark (Interposing). I mean if you could add the matter in brackets? I put it in brackets because there is some question about it. If you can add that, then if you not got practically Mr. Olney's idea, which now makes it essentially the stautory provision?

Mr. Mitchell. The court says you cannot do that.

Mr. Olney. The court says you cannot substitute, and substitution would mean that the new officer was substitued, and as a matter of fact he might not take the same view of the statute at all But if it appears that he took the same view of the statute and proposes to enforce it and complaint is made that it is in doubt, then you have the same cause of action as to him as you had against the first officer. Here you are to go on with the suit without starting all

over again.

Mr. Mitchell. Well, the theory is that the original suit is still alive and you bring in the new officer without a supplemental bill. The technical objection is that if the first officer is dead, there is no suit, and then you bring in the new man to defend in the old suit, instead of bringing a new suit. That is the technical objection.

Mr. Wickersham. It is not like the officer of a corpration; but here you have got to avoid the position of trying to sue the State. You cannot sue the State.

Mr. Lemann. Does this decision practically wipe paragraph B of the Judicial Code, Section 780, or should it not be left to the determination under that paragraph, hiwhc might be broad enough to cover every case?

Mr. Mitchell. You might sue the tax official of the State.

Mr. Lemann. But the United States gives its consent that. That is covered by paragraph(A).

Mr. Mitchell. What is that--

Dean Clark. It is at the top of 89.

Mr. Mitchell. I am in favor of that clause, because the statute seems to make it necessary, and then if it goes to the court they can strike itout.

Mr. Lemann. That would not go as far as kkxxxxxxxkx Mr. Olney's suggestion.

Dean Clark. Mr. Olney's suggestion, as I got it, was to change the effect of Ex parte La Prade.

Mr. Olney. No, my real objection is to this: Such substitution and continuance of action can be had only if the successor consents to such substitution, or the law of the State of which he is an officer authorizes it." Now, requiring that consent, you are not going to get it, and you might just as well leave it out. In ine cases out of ten you will not have it, and it will mean a lot of additional expense and work.

Mr. Mitchell. You think if you cannot bring him in by subtitution, you can do it by supplemental bill?

Mr. Olney. You can do it by supplemental bill, showing that the new officer takes exactly the same position in regard to the statute as that of which you complained in connection with the first officer.

Mr. Mitchell. I doubt if it would be possible, if you cannot bring him by sub titution, and the court would consent to bringing him by supplemental bill because of the death of the defendant--which would be beating the devil around the stump.

Mr. Olney. I think it would be within our power to provide that the statute should not apply under such circumstances.

Prof. Sunderland. Would it not be true that you would be equally unable to get the State to consent, and that you may go under the same circumstances?

Mr. Lemann. You could provide that if he did not come in within a ce tain time he could be brought in.

Prof. Sunderland. Yes.

Mr. Mitchell. When the Supreme Court handed down the decision saying that you could not substitute a successor in that kind of suit, it was based on the statute and the Court gave court authorities. There is no exception in 780 U.S. Code, Title 28, and they must have held that notwithstanding the statute it could not be done.

Mr. Lemann. Would it not be better to accept the substitution, subject to an examination of the cases?

Dean Clark. I might say that that case was overruled by the Yale Law Journal, if that is sufficient. (Laughter.)

Mr. Dodge. Did the Court hold the statute unconstitutional in regard to that?

Mr. Mitchell. I suppose they must have done so in effect. I do not suppose they said so.

Dean Clark. I do not remember that they discussed it.

Mr. Mitchell. They have got to be so careful about treating the action in any way as ~~kkkk~~ if it were a continuation of interest, and there is no continuation of interest unless it is a suit against the State, and that will do; so they have to take the position that there is no continuation of interest between the officer and his successor.

Mr. Olney. There is a continuation of interest where

the successor takes the same position as his predecessor.

Mr. Mitchell. Suppose you bring an action against him for some act which he had a right to do, and you bring an action against him to enjoin, and he dies, and the next day John Smith, who has no real succession in interest and is an independent person, comes along and makes the same threat, can you join John Smith, by substituting him, or do you not have to bring another suit against him?

Mr. Olney. Why should you be compelled under those circumstances to bring a new suit, and possibly it has gone to trial and judgment may be even now in the power of the court? Why should you be compelled to go through all of that, with all of the dleay and expense, when, after all, the question is identical and the position of the parties is identical, and in reality it is nothing but a State officer trying to enforce a State statute and insisting upon its validity.

Mr. Wickersham. Take the case that Mr. Mitchell suggested awhile ago, about the 26 individuals--and that must be the theory, because it is because he is an officer of the State. Now, suppose you have two totally different individuals, and one is sued and he dies, and the other is a trespasser who comes along and starts a similar trespass and threatens the same. You could not bring him in by a supplemental bill. It may be inconvenient, but is that not where you are left?

Mr. Mitchell. You cannot bind the second man by a

judgment already rendered on the other man.

Mr. Wickersham. "Res inter alios acto."

Dean Clark. I suppose there is a case where the State officer served, is, in effect, a wrongdoer, and when the new man comes in he may not be a wrongdoer. It is not, according to the question he put. It is not like suing a governmental officer.

Mr. Cherry. May I suggest a little more ingenuity, since we are getting ingenuous. A plaintiff in this kind of action could lessen his risk by suing more than one person, and then if one of them dies the action is still going, and I think you could bring in somebody else.

Mr. Mitchell. By supplemental bill.

Mr. Cherry. Yes. Your difficulty seems to me very vital--that if you have only one person and that person dies, then there is nothing to go on, and there is no succession of interest. If several people were involved and any one of them is alive, the case would continue; and then I think under our rule on parties and supplemental pleadings you might get him in.

Mr. Lemann. Suppose A and B were sued and A dies, and after the case had been tried--

Mr. Cherry(Interposing). On a common question of law and facts.

Mr. Lemann(Continuing). And C takes up A's part,

can you bring in C?

Mr. Cherry. On the common question of laws and facts.

Mr. Wickersham. He was a stranger to the act.

Mr. Lemann. When it is in that stage--it is rather extraordinary if you can do it.

Mr. Cherry. I think it is more nearly, possible, than the other.

Mr. Lemann. I agree with you as to that, that the case is kept alive, but it is sometimes hard to bring a third person in a suit at any stage, to which he cannot be tied up.

Mr. Cherry. When there is a common question of laws and facts.

Mr. Mitchell. May I suggest that Mr. Clark prepared a new provision about substitution and put it in brackets and put it up to the court. It is a mere question of law. If they say that the substitution cannot be made--and I do not see how they can avoid it--why, then, they will stick to our exception. If they think we are overestimating that decision, they will adopt our alternative. We cannot decide that. The only thing we can go on is that opinion.

Mr. Donworth. May I make a suggestion that has not been brought up?

Mr. Dobie. Will you gentlemen talk louder?

Mr. Donworth. I want to bring in a suggested thought that I do not think has been brought into the discussion yet.

The statute on which the main portion of this section is grounded--Section b on the preceding page, over on the left, says, "By or against officer of State, city, and so forth---Similar proceedings may be had and taken,"etc. Now, it is only a suit against the State that would bother you, and this I think carries it further than necessary. Let us read what is in that issue: "Except when the action is to enjoin enforcement of a State statute or other legislative enactment". The courts hold that a city ordinance is a legislative enactment of the State.

Mr. Dobie. For some purposes.

Mr. Donworth. Yes; and in suing the mayor or corporation counsel of a city, there is no reason why their successor cannot be brought in, and if they try to beat the jurisdiction, they ought to be brought in. So that it seems to me that the clause in brackets goes too far, and we ought to hold it only in the case of the State, where there is any doubt about it. Is that not true?

Dean Clark. Well, under the decision in Exparte La Prade, the theory in that case was that the individual by evading the statute is acting as an individual.

Mr. Donworth. You can against the city, however, without any limitation.

Mr. Dobie. In the Young case, the Supreme Court said the officer in this case is stripped of his official or repre-

sentative character and is subject in his person to the consequences of his individual conduct. That is pretty strong. I am in favor of doing this by Mr. Olney's way, if we can do it. What I am opposed to is bringing him down there--or making the consent of the State officer to the substitution, or the law of the State, obligatory. I think that ought to go out. I think if we xan do this it ought to be done. It is hard on him to have to bring a new suit. We cannot fight that La Prade case; but we can put it up to the court whether this does not specify the substance of it.

Dean Clark. My idea was of saving something from the wreck.

Mr. Dobie. Yes.

Dean Clark. There was also Mr. Donworth's suggestion that if this rule applied to State officers, would it not also apply to the mayor of a city?

Mr. Dobie. Yes.

Mr. Loftin. Yes; but in that case you could sue the city.

Mr. Dobie. Yes, you could sue the city or could sue a county.

Mr. Donworth. If I had not heard this discussion I would not have thought that.

Mr. Loftin. Ordinarily you could sue both the city and the State officers too.

Mr. Mitchell. Ought not the word "city" be before the word "officers"? You could say "State officers or."

Dean Clark. I should think so.

Mr. Mitchell. I think that would be proper, because a city ordinance is a legislative enactment.

Dean Clark. Frankly, I was intending to include it.

Prof. Sunderland. What is the difference between State statute and State legislation?

Dean Clark. You do not need them both.

Mr. Mitchell. Suppose you put it "law" instead of "statute".

Mr. Donworth. Just leave in "State statute" and strike out the rest.

Mr. Dodge. Suppose a State statute is to correct a tax that is unconstitutionally laid?

Dean Clark. I was not sure that we had gone as far as Ex Parte La Prade put it. We were trying to limit Ex Parte La Prade all we could.

Mr. Lemann. Would not the same question come up in an income tax case? You pay an income tax to the State treasurer, and the State treasurer to whom you paid it has gone out of office; and you want to substitute a new person.

Mr. Dodge. I think the effect of the decision would be moral, rather than anything else.

Dean Clark. I suppose the essence of the decision

is that it would be applied to any case where the defendant may be considered a wrongdoer, when he was acting individually.

Mr. Lemann. If you are suing an internal collector of the United States, you cannot substitute; you cannot substitute him.

Dean Clark. This is like that case.

Mr. Lemann. Then Section 780 does not authorize it, even in the Federal cases. You cannot do it in any case then.

Dean Clark. It does not authorize it in any case, except that I suppose the Federal Government gives consent, as you have indicated.

Mr. Lemann. Section 780 says relating to the discharge of his official duties; it says, "Where, during the pendency of an action," and so on, "brought by or against an officer of the United States, or of a county, city, or other governmental agency, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise seeks to hold such office" that the action may be continued against his successor in office. That is to say, if you cannot substitute the new collector of internatl revenue for the old collector, and if you cannot do it in the Federal court, I think it is clear that you cannot in a State case.

It looks as if the statute were limited to junction cases as to the present or future discharge of official duties.

Mr. Donworth. This case cited was the case of a State statute.

Dean Clark. Yes.

Mr. Donworth. And what was the officer by the defendant?

Dean Clark. The Attorney General.

Mr. Donworth. As I understand it, there is a motion that the whole thought be reconsidered; but independently of that, as I am at present advised, I would strike out "legislative enactment" and save what we can from the wreck. (Laughter

Mr. Mitchell. Dean Clark, your statute does not allow substitution of one officer for another where the matter relates to present or future discharge of his official duties. That is very important; because take the case of the collector of internal revenue. The old collector has collected the money, and if you bring suit against him under the old notion --you cannot bring suit against the present collector. Under this statute, you could not sue his successor, because it is not a matter relating to the present or future discharge of his duties. He is being sued for some misappropriation of the money by his predecessor, and your exception does not cover that.

Dean Clark. Before the brackets, Rule 41 says "His successor in office may be subtituted as a party and the action continued in accordance with the provisionsof said

section."

Mr. Mitchell. That is right. Then I have a suggestion on that. I think that ought to be "State law," instead of "State statute," if we are going to cut out "legislative enactment"--"State law" such as the action of a State warehouse commission fixing rates; and there are a lot of State statutes where it would be a suit against the State; and an order of the commission fixing rates is a legislative act; and they have held that it is the act of theState, under the provisions of the amendment which says that no State shall be sued without its consent; but it is not a statute.

Mr. Donworth. Has not Federal jurisdiction been taken away in all those cases?

Mr. Mitchell. Well, I used that as an example.

Mr. Cherry. There are certain exceptions in that statute.

Mr. Mitchell. How have we left this exception, then, what is the motion?

Mr. Donworth. You wish, Mr. Chairman, to protect the situation that you refer to?

Mr. Olney. Is this not the situation in regard to the statute: That under this decision under Ex Parte La Prade, that we have to put this exception that is in brackets, unless we can find some way whereby, by further facts, on a showing of further facts, we can escape the complete abate-

ment of the action. Is that not the situation? I think we have got to have thisin, but it may be that, as I have suggested--I am trying to draw it up now--it may be that where there is a further showing of facts, which as I understood the statement made here, was not true in the case of Ex Parte La Prade, that you can provide a case where the action can go on.

Mr. Mitchell. My suggestion was that you prepare something and had it to the reporter, and he can work it out; and meanwhile we can pass on.

Mr. Only. Yes; because I think it is pretty clear that we have to accept this as it now reads, with the possibility of a difference.

Mr. Dobie. Yes, I would not object at all. I did not want it to depend entirely on the consent of the State officer; but I would not object but would favor the supplemental bill idea, to be drawn by you--"or the consent of the State officer," though I am not sure that even with the consent of the State officer, there---

Mr. Olney(Interposing). Here is the situation as I see it: Under the law as it stands at the present time, if I get the effect of this case correctly, they certainly cannot proceed without the consent--

Mr. Wickersham. Cannot what?

Mr. Olney. Cannot proceed with substitution without

the consent of the officer of the State.

Mr. Wickersham. I am wondering if you can proceed with his consent.

Mr. Olney. Well, you certainly cannot without it; so that putting it in here means that you can do it, and to that extent it is an amelioration of this case of Ex Parte La Prade. I am wondering if you cannot get a further amelioration.

Mr. Dobie. I think you can.

Mr. Donworth. What we really want to say is, "Provided that it is the intention that this exception shall go only so far as required by the case of Ex Parte La Prade."

Mr. Mitchell. Right.

Mr. Wickersham. I just want to note before you pass that an exception to the use of the words "lack of action." (Laughter.)

Mr. Mitchell. We will now take up Rule 42.

Dean Clark. We have passed that, Mr. Chairman.

Mr. Mitchell. Yes. We will take up Rule 44.

Dean Clark. Have you any objection to any of these Equity rules that are copied here? In Rule 44 I have a note about the Equity rules, which we thought were unnecessary. The only one not in words covered, I think, was this one; and I did not see why it should be here anyway.

That is Rule 41, which says, "In s it to e xecute the trusts of a will, it shall ~~xx~~ not be necessary t o make the heir at law a party; but the plaintiff shall be at liberty to make the heir at law a party where he desires to have the will established against him.

Mr. Dobie. That does not often come up in the Federal court.

Mr. Donworth. What rule is that?

Dean Clark. Rule 41. That I have not intended t o cover at all.

Mr. Wickersham. I suppose it had some useful purpose.

Dean Clark. We have been unable to discover any; and we wondered if it did not say things that, conceivably, might not be so. When are you going to establish a will in the Federal courts?

Mr. Wickersham. This is not to establish a will; it is to execute the trusts of a will.

Mr. Dobie. But after the semicolon it says, "But the plaintiff shall be at liberty to make the heir at law a party where he d esires t o have the will established against him."

Mr. Wickersham. I think that is bad phraseology. I think it means to have the trusts of the will e stablished.

Mr. Donworth. Where you desire to have the trusts

of the will made binding upon him.

Mr. Wickersham. I do not suppose the construction of a will would often come up in the Federal courts.

Mr. Dobie. I know of a number of Federal suits involving the construction of a will.

Mr. Wickersham. I say that does not arise very much in the Federal courts, but usually in the State courts, although it might arise in the Federal court.

Mr. Dobie. There are a large number of cases--I hate to talk about my own book, but in my case book I have a number of cases there, and that line of distinction between what the Federal courts do in probate matters and cannot do in probate matters is very difficult to decide. We have no probate procedure, but where the State procedure permits an independent bill to have the will set aside can be brought in the Federal court.

Mr. Wickersham. Yes, suits to construe the ~~provisions~~ directions /of a will might be brought in a Federal court.

Mr. Dobie. Yes.

Mr. Wickersham. Therefore, we might as well put it in.

Dean Clark. Well, in practice the only case where it has been construed--they did not try it in the case in 111 U.S. 170, which was a suit to enforce a personal trust.

This rule goes back to Rule 50 of the former Equity Rules, which was promulgated in 1842, and is very obviously taken from Order no. 31 of the Court of Chancery of England of 1841. This is the old English chancery rule. So that you can see that the origin of it is very clear. Now, it seems to me that that goes back to a procedure that, in practice, at least, we do not have in the Federal courts, and if there is any question about the construction of a will is joined, with all our rules about joinder of parties, we do not need to talk about getting words in.

Mr. Dobie. Why not leave them out?

Dean Clark. If there is something that is not covered, it is wrong.

Mr. Loftin. I second Mr. Dobie's motion.

Mr. Mitchell. It will be so understood, that this and Equity Rule 41 will be omitted.

We will now take up Rule 45.

Dean Clark. Let me explain about this Rule 45. This suit as a representative of a class is something we always talk about, but as to what it really means, that is almost unknown. That is, in certain cases where you have a class suit, that is all right, but the extent to which it goes, and how far representatives can go has not been clearly defined. Now, we have done, as the footnote to that rule points out,

is to try to differentiate three different types of class suits. In other words, we try to spell what we think is as near the law as we can state it. Of course, can just take the other course--take this very vague and unistructive language of the Equity rule; but we tried to do is to state the limits of the various class suits. If you will down through Rule 45, you will see that we have three instances. The first one might be called the two-class suit; the second, purely a class suit, and the third a bybrid class suit. And there is quite a difference in the conclusiveness of the judgment in the different cases. In the first case, the judgment is conclusive. In the second, it is not conclusive, but is mainly a good precedent. In the third case it is good against persons having a several interest where the object of the action is the adjudication of claims as to specific property.

Mr. Mitchell. Have we got any authority to prescribe the amount involved?

Mr. Dobie. No, I had a question about that. I think that is jurisdictional and ought to go out.

Mr. Olney. I would like to make another objection to this rule. It goes on to prescribe what the effect of the judgment is in various classes of class suits. That is a matter of substantive law. That is not a matter of procedure. The courts have been busy with it, and they are in confusion on the subject; the effect of the judgment is, after all,

not a matter for us and it seems to me we should leave the procedure by which the class suitscan be brought with the effect of the judgment that is recovered on them--it seems to me we will have to leave that to the court.

Mr. Donworth. I had occasion during past years to bring a class suit of considerable importance, and I made a pretty careful investigation of the law, and I found it not so difficult as one would imagine who has not had the responbility of acting under it. It was a case of two mortgages securing bond issues, and there was a doubtful question between the first mortgage bondholders and the second mortgage bondholders. Two banks were acting respectively as trustees. Of course, they could not decide the question, and the question was how could they make an adjustment that would be binding upon the bondholders? The property was worth something over$2,000,000, and a number of bondholders under each class--there were about 750 under the first and about 900 under the second mortgage, and we fortunately had their names and addresses of over three-fourths of them. Well, I will say this, that we did not have to take the responsibility of judgment, because before we got to that point Congress enacted Section 77b, to our great joy and satisfaction.

Mr. Wickersham. That is one of the good things that Congress has done.

Mr. Donworth. Yes, but I find that the Federal court, including the Supreme Court of the United States, in recent decisions, that is within ten years--the Supreme Court of the United States held in one case that where the partiesselected out of a very numerous class were such that Federal jurisdiction existed--for instance, you take a lot of plaintiffs whom are citizens of the State of Washington, or vice versa, or take a lot of citizens who are citizens of California, Louisiana and other States, and there are a lot of defendants who are citizens of Washington. You could bring that suit in the District of Washington, and omit any individual members of the class who would defeat jurisdiction; an adjudicaion entered in that suit was binding on all concerned. The courts, however, scrutinized this principle with great care: You must have enough representatives of both plaintiffs and defendants to make it fairly representative. That was the expression--"fairly representative." You must not handpick your parties. I happened to select 23. I picked out those who were most likely to litigate, and those of opposing views, and I found 23 who had indicated opposing views on one side, and so I thought I would make the number on the other side the same, and that was done. Now, there seemed to be a situation where there was no other way of settling a controverted proposition in that suit; and it may be, as Judge Olney says, that the

ultimate effect of the judgemtn is a matter of substantive law; yet when you are dealin with a way of settling a lawsuit, and parties, it seems proper to bring this in. I think the rule has a real function there, Now, the Equity rule says, "When the question is one of common or general interest to many persons constituting a class," and so on, one or more may sue or defend for the whole. I did not think of this point coming up and did not bring my memorandum of authorities that I prepared in the litigation that I referred to. I have not any particular suggestion to make about this at the present time. I might have later, at the next session, when I have had time to look the matter up.

Mr. Dobie. I would like to say one thing that Dean Clark probably knows--but everybody cannot keep the Equity rules at the end of their finger-tips. But this present Equity Rule 38 supplanted the former Rule 48. Under the old rule there was an express provision that in such cases the judgment shall be without prejudice with the rights and claims of the opposing parties.

In drafting the new rule, they left that out, with the idea that in certain cases it would be binding on the class. There are a number of decisions as to the extent to which it is binding. The leading case is "The Supreme Tribe of Ben Hur vs. G. Caldwell, It is a big thing,

and I think if we can phrase something that is fairly definite-- if we can make a classification that the Supreme Court will accept and that will bring light out of darkness, it would be be very desirable.

Mr. Donworth. But the Supreme Tribe of Ben Hur case to which you referred was against a corporation.

Mr. Dobie. They held in that suit that the decree was binding.

Dean Clark. May I say that I was intending to state anything more than existing law. I think we do state existing law accurately. We have spent a good deal of time and thought on it. Now, here is a case where, if a lawyer gets into it, he is going to be at sea as to what the effect of the Equity rule is. It seems to me that it would be bad to leave something perfectly in the dark, which is meaningless, or mean even suggest the wrong thing. If you read the Equity rule, as it stands, you may have a case"where the question is one of common or general interest" the matter is <u>res adjudicata</u>, which is not so under the Federal decision. We are not trying to enact new law or substantive law, but we are just trying to tell the bar what it is all about.

Mr. Donworth. Do you mean the Federal decisions are in favor of binding the class by the judgment entered?

Dean Clark. Except what we have covered by the first

sentence. The case of The Supreme Tribe of Ben Hur vs. Caldwell was the case of the ownership of the Supreme Lodge of a fund, and that is the true class suit case, where, having adequate representation within the State you can adjudicate the rights.

Mr. Wickersham. Take the Cornett case. You have the same thing there.

Dea Clark. Yes. Now, take a case of a taxpayer. That is not a class suit, and that would not be res judicata. Suppose a taxpayer brings suit and says, "The whole assessment is illegal, and I am doing it for the benefit of all other taxpayers." He gets a decision that it is illegal. That is not binding on others.

Mr. Dobie. They have held also that they cannot join those together for the purpose of making up the jurisdictional amount-- those in category that the Supreme Court had there is not the classic common law category. I think if you can bring light here, you ought to do it.

Mr. Olney. The principle involved here/from the fundamental point of view of numerous parties, which is, perhaps, more important than any other case. The principle involved is the securing of a judgment that is good against a man when he is not actually in the suit, and it all depends on the question of whether or not he was fairly represented in the suit. It is a question of obtaining a judgment

which is good against the man by obtaining a judgment against a representative. Now, the illustrations of that which come up are exceedingly numerous. They apply to judgments against public officers as representing a taxing district and the taxpayers in the district, and the property owners, and the variations and difficulties in it are great. The one rule which certainly is the rule--the one case which is within the rule is the case to which Dean Clark has referred, of where the interest is a joint interest and a sufficient number of people are made defendants, so that that number can fairly be taken to represent the class, and do represent the class, so that when the thing is brought out to a conclusion the judgment would be held binding as to all members of the class. But as I see it, this rule is going to be extended as time goes on into matters that are not matters of joint interest merely, but matters of common interest. I can see no reason, for example, why, when the question is simply one as to the validity of a tax and a suit is brought for the enforcement of that tax against such a number of taxpayers as to make it certain that the matter is contested fairly and fought out--that that judgment ~~ix~~ should not be binding on every taxpayer in that district, and sooner or later the courts are going to come to some such concousion as that; and we do not want ot be here in a position of legislating upon a matter of that sort--and that is what we are doing. We want

to provide that these actions can be brought and judgments obtained in these cases, but just what the effect of those judgments may be, in the way of res judicata, we ought not to determine. We ought to leave that to the court, and leave it flexible, so that they can apply the reasons--apply a reasonable rule and apply it, perhaps, progressive rules as time goes on in connection with it. We ought not to endeavor to legislate upon a subject of that character.

Mr. Dobie. Would you leave all that stuff out, then, that affects the force of the judgment?

Mr. Lemann. Have we got the power to pass on that?

Mr. Olney. I do not think we have, and it also strikes me that there would be difficulty in stating rules that have been followed by the courts too completely. I note in the discussion one of the qualifications claimed is that there should be fair representation. That is not the law.

Dean Clark. Mr. Donworth has just passed up a suggested on that which I will read.

(Dean Clark read a paper prepared by Mr. Donworth.)

Mr. Mitchell. That tests the difficulty and I doubt if we have authority to do it anyway.

Mr. Donworth. Is it not a very important feature of the Federal jurisdiction? Not only the The Supreme Tribe of Ben Hur case, but others?

Mr. Mitchell. Of course, it is important, but we are not dealing with jurisdiction. We have got in this rule another sentence that supports to add together these claims for the purpose of giving jurisdiction under the statute as to the amount involved. That certainly is outside of our province and changing the jurisdiction of the Federal court. If we say, "Well, they have got jurisdiction in that kind of a kind of a case, when, except for our rule they would not have it--" I do not think we could do that.

Mr. Donworth. How far does your objection go? Would you leave out the whole rule?

Mr. Mitchell. No, I would leave out the first paragraph, where it says, "Where a sum is a requisite to founding a Federal jurisdiction, the claim of or against the class shall control," and so on. I would leave out that sentence.

Mr. Dobie. I would like to make that motion. I think we can cut that off pretty quickly. I make the motion that that sentence be expunged.

Mr. Tolman. Beginning where?

Mr. Dobie. Dealing with the jurisdictional amount, the sentence, "Where a sum is a requisite to founding Federal jurisdiction." I do not think we have any power to legislate, and that is a jurisdictional question.

Mr. Dodge. That is two sentences.

Mr. Mitchell. Let us take them one by one. The first point is "Where a sum is a requisite to founding Federal jurisdiction, the claim of or against the class shall control in the first instance, and the claim of the individual in the other two instances." Now, that is a question of jurisdiction.

Mr. Loftin. That was your motion, Mr. Dobie?

Mr. Dobie. Yes.

Mr. Tolman. I second the motion.

Mr. Mitchell. Do you want to discuss that?

Mr. Cherry. Is that new, or is that the result of the cases?

Dean Clark. That just states the present law. It is a question again of whether we want to give information at all. It involves no change.

Mr. Mitchell. Welll, we are purporting to deal with a jurisdictional question there.

Dean Clark. I have no wish to restrict any court from going to places where they ought to go; but this provision in essence has been in equity practice since the beginning, 90 years, and we have no tendency to go anywhere except to avoid confusion.

Mr. Olney. I will have to take issue with you on that.

Dean Clark. Take the taxpayers' suit, for example.

Mr. Mitchell. There is a good deal in it that we

will, no doubt, adopt; but there are four or five different sentences, and we will have to deal with them separately, and it is better to take each one and have them separately, and we have clean-cut question here.

Mr. Dobie. I do not dispute that that is accurate. I think it is. But I think it would be a great mistake for us to provide as to the amount of jurisdiction.

Mr. Donworth. We can leave that to the statute.

Mr. Mitchell. All in favor of striking out that one sentence will say "Aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Mitchell. It is carried. Now the next sentence relates to the effect of a judgment in class cases.

Mr. Donworth. We can leave that to the Supreme Court decisions, which are satisfactory, and the C.C.A. decisions are satisfactory also.

Mr. Lemann. In any event I do not think we have any power to say what the effect of the judgment is.

Mr. Cherry. Well, Mr. Dobie pointed out that in the rule which preceded the present Equity rule, that was attempted.

Mr. Lemann. It is not in the present Equity rules, however,--not in Rule 38.

Mr. Cherry. No, but in the preceding Equity rules.

Mr. Mitchell. Well, if we adopted Judge Olney's

rule, and preferred to leave it flexible--

Mr. Cherry(Interposing). I was only going to the question of our competency to make the recommendations.

Mr. Lemann. It might be a good thing.

Mr. Cherry. It might on the merits, but the question is whether it is within our province.

Mr. Lemann. Is it in order to make a motion to leave out the next sentence, or has that been acted on?

Mr. Mitchell. It has not been acted on.

Mr. Dobie. May I ask a question about the last sentence.

Mr. Olney. I make a motion to strike out the last sentence of Rule 45.

Mr. Mitchell. That last sentence relates to the effect of the judgment in class cases. Is there any further discussion of that?

Mr. Dobie. I would like to make that the basis of the objection that has been made--that the law stated here is not helpful or correct, and that we ought not to go into it at all.

Mr. Olney. I would not say it is not correct, though I am not sure about it by any means. What I do say, is that in the first place, it is not our function--that is more important than anything else. And in the second place, I think a matter of this sort should be left to the courts to develop. I do not agree with Dean Clark at all

that there has been no development in the decisions of the coutt uponnthe subject. I think quite the contrary is true.

Mr. Dobie. I think we have consistenyly broadened the effect of the judgment and decree in every case.

Mr. Olney. Yes. We want to leave here in our procedure a provision by which such suits can be brought, and then let the court determine what the effect of those judgments is, and I am certain that as time goes on they are going to apply the fundamental principle that wherever a man has been genuinely represented in a piece of litigation, and there has been something or some party to it than can be said to have genuinely represented him, and there have been a determination by the court of the real issues that are involved, both of law and fact, that judgment is going to be binding on him. I think they are going in that direction, and that is the direction they ought to go.

Mr. Dobie. You are afraid that we will stop them?

Mr. Olney. Let it develop.

Mr. Tolman. A declaration as to the legal effect of a statute is not procedure.

Mr. Olney. Exactly.

Mr. Lemann. It is the legal effect of judgment.

Mr. Tolman. Yes.

Mr. Lemann. I like the idea of an expression, but that would carry us too far. I like to see people informed.

I had to look this up, and I would have been glad to have somebody tell me, but still I do not think we can undertake to go beyond that.

Mr. Dobie. You do not think that is a question of procedure--the binding effect of judgment?

Prof. Sunderland. I do not see how that could possibly be considered procedure--the effect of the judgment. It absolutely settles the ultimate rights of the party. And that is the very essence of substantive law.

Mr. Dobie. Are you in favor striking that sentence out, Prof. Sunderland?

Prof. Sunderland. I think we have got to. We are clearly outside of our province.

Mr. Dodge. How do you feel, Mr. Dobie?

Mr. Dobie. I am dubious about it, but I think if a reasonable number of us think that it is questionable it ought to go out.

Mr. Mitchell. There is a distinction between our determining the effect of a judgment upon the parties to the suit, and the effect on people who are not. Is there anything in that?

Mr. Dobie. I think there is. If a reasonable number of these gentlemen think that is beyond our purview, I would rather it go out.

Mr. Cherry. Question.

Mr. Mitchell. All in favor of striking out the last sentence of Rule 45 dealing with the effect of the judgment, will say "Aye"; those opposed "no."

(The motion was unanimously adopted.)

Mr. Donworth. The last sentence still remains in.

Mr. Mitchell. No, we just struck it out.

Mr. Donworth. The last remaining sentence I wish to speak of.

Mr. Dobie. Do you mean the first three?

Mr. Donworth. The last sentence that remains.

Mr. Olney. "When persons having a several interest are so numerous as to make it impracticable them all before the court," and so on one or more may institute action for the whole.

Mr. Dobie. Are you going to move to strike that out?

Mr. Donworth. No. That third sentence says, "When persons having a several interest are so numerous as to make it impracticable to bring them all before the court, and the object of the action is the adjudication of claims in or to specific property, one or more may institute action for the whole." Now, there is the hiatus there, you see; it does not say anything about the defendants. To get what I am satisfied is the true rule of law, I would add this provision as to defendants, after the word "whole," put a comma and say

"and a reasonable number of those may be made defendants as

representatives of the whole." When the complaint alleges that the following 23 defendants are interested, the correct pleader, that is, the man who tells his story in a good way will say, "This is a reasonable number to be made defendants in this case." Now, when the court tries the case, in order to give it the effect of a class suit, the court must make a finding that a reasonable of those interested have been made defendants, and that is a question of facts in the case which must be passed on. Do you oppose this, Dean Dean Clark?

Dean Clark. No, that is quite all right.

Mr. Mitchell. Is not the requirement of a reasonable number for fair representation--does it not run all through this?

Mr. Donworth. No, we have not said anything as to defendants, but only plaintiffs.

Mr. Dodge. Can you have a class suit where there a lot of people all claiming an interest? I did not suppose a class suit was possible where a man has a specific interest which he claims in specific property.

Mr. Dobie. There are some of those cases, and I think there have been a number of them. And I wouldlike to ask Prof. Sunderland about that--take, for example, the grain elevator cases. There the deposits are not supposed to be kept separa te. I think there have been those cases

in which they sought to make the interest separate. I think Prof. Sunderland can instruct us on that.

Prof. Sunderland. I do not think much instruction can be given. I think there is great confusion. I think the confusion is due to the term "common or general interest." Nobody seesm to know what those terms mean.

Mr. Olney. Would it be due process of law to render a judgment in a case of that sort which would be binding upon any one unless he was actually before the court?

Mr. Donworth. There have been cases where a piece of real property has been acquired by The Supreme Tribe of this, or that, and the members of the tribeare numerous and scattered all over the country.

Mr. Olney. Well, but they have a joint interest there.

Mr. Mitchell. Is that a several interest or a joint interest?

Mr. Donworth. It is a several interest of each one; some one makes a deed to the supreme tribe. I think you can rely upon the Federal courts not to say when 25 people own a piece of real estate, 3 people can sue to determine the title of the 25. The Federal courts would never say that. But this rule will be considered literally.

Mr. Olney. Suppose there are 500 of them, and each one has a several interest of his own in that one piece of

property; is it due process of law to adjudicate John Jones, who is one of them, who has a certain interest, is bound when he is not before the court?

Mr. Donworth. If the court finds as a fact that it is impracticable to bring them all before the court, and their interest is the same--I mean if they all depend upon the exact state of facts and law, and if you brought a reasonable number in, and a reasonable opportunity has been accorded all of them to come in and assert their rights, it is the only way to do it.

Mr. Olney. But when you add on these other things that you have spoken of, you come back to what is the fundamental principle upon which these cases must go, and that, that you can render a judgment which is binding on a man not before the court, when he has been fairly represented there.

Mr. Donworth. That is right.

Mr. Olney. But in the case of a several interest, where it cannot be said that he was fairly represented in the proceeding, and it is brought in such a way that he was not fairly represented, you cannot get judgment against him without his being a party.

Mr. Mitchell. We have stricken out the provision about the effect of the judgment being binding, anyway.

Dean Clark. In the provision stricken out, it was provided that judgment would not be binding except with the claims

that the judgment passed upon.

Mr. Olney. If that means one or more will do for the whole where there is a several interest it will cause trouble.

Mr. Dobie. I would like to ask one question about those three sentences. In a number of the code provisions they are very much broader than this. They say that where there is a wuestion of common or general interest, or the parties are so numerous that they cannot all be brought before the court; so that in a number instances under the code, even though they are not so very numerous, they still term these "class" suits.

Prof. Sunderland. They are divided into two classes of cases--first, where there are many persons, or where the number of persons is so numerous as to make it impracticable to bring them all before the court. The question comes in, is what kind of cases as a rule is it, to which many persons apply, and what kind where the number of persons is so numerous as to make it impracticable to bring them before the court; and the cases are in utter confusion.

Mr. Dobie. I know that, but I want to ask, was that done deliberately? You want to rule out those other, and limit it only to those cases where the parties are so numerous as to make it impracticable to bring them all before the court.

Prof. Sunderland. It seems to me that where there is a joint interest a few persons ought to be sufficient; wher

it is joint the number ought to be immaterial; where it is not strictly joint--

Mr. Dodge(Interposing). Suppose I am threatened by a suit by a hundred different people, all based on the same question of law, but varying in amount. May I join 5, or 100, and get an injunction bidding on all of them?

Mr. Donworth. Do you mean in a suit to quiet title?

Mr. Dodge. No, a bill to prevent multiplicity of suits.

Mr. Donworth. It has never been applied in that kind ofcase.

Mr. Olney. In the Circuit Court of Appeals I think you can.

Mr. Wickersham. If the litigants claim an interest in a suit of real estate--if there were several and each one claimed an interest; suppose you had a thousand acres of land involved in a Federal suit, by a whole lot of xxentrymen who claimed different entries on that land.

Mr. Lemann. Do you mean on different pieces of land?

Mr. Wickersham. No, I mean on the same tract of land. But they were all based on some common claim.

Mr. Mitchell. Common instrument in the chain of title.

Mr. Wickersham. Yes, common interest in the chain of title.

Mr. Lemann. Would that not be under the second sentence?

Mr. Wickersham. Perhaps so.

Mr. Lemann. I am wondering what cases would be covered by the third.

Dean Clark. The first one would cover the creditor suits; the second would cover taxpayers suits, and the third interest in the fund.

Mr. Dobie. The reporter has made it clear that the second one is spurious and the third one is a hybrid.

Mr. Donworth. He has also made it clear that you can not do it here unless it is impracticable to bring them all in.

Mr. Dobie. That is the point I raise. We are limiting the old Equity rule.

Mr. Wickersham. When the facts have been heard in that case as to the number of litigants who are held bound--whose representation was held to bind those outside, they subsequently tried to avoid the effect of the action. That was that case that has been referred to.

Mr. Donworth. That was mentioned in the suit? I do not remember.

Mr. Wickersham. The Tribe was sued by name in the Ben Hur case.

Mr. Donworth. And certain individuals were joined with it.

Mr. Wickersham. Yes, and after the judgment some of the members of the class who were residents of other States claimed that they were not bound, because to make them parties would result in a loss of the Federal jurisdiction; and it was that they were bound, although jurisdiction was based solely on diversity of citizenship; but I have not got a statement showing the number or proportion of the whole.

Mr. Dodge. Was that an action at law or a bill in equity?

Mr. Wickersham. A bill in equity but the same principle would apply.

Mr. Mitchell. Prof. Sunderland, may I ask you whether, as I understand it, you are satisfied with the first sentence in Rule 45, except that you suggest that the requirement in the first sentence about the large number is an essential. Does that state your position?

Prof. Sunderland. Where it is strictly a joint interest, that is.

Dean Clark. I want to ask if it would be desirable to have a sentence something like this: "At the institution of the action, reasonable previous notice of the class interested shall be had and alleged, with a right to intervene, with a view to securing adequate representation of the remaining members of the class, and until or unless the court has ~~duti~~ expressly consented to the withdrawal or dismissal

of the suit."

I think the whole theory of this adequate representation in the court would do whatever was necessary anyhow. But that would be a little safer to put in a safeguard of that kind, and I do not see any reason for not doing it.

Mr. Dodge. That is interpolated in the law, is it not?

Dean Clark. There has not been any specific provision for notice, I take it. I take it, however, that the right of intervention has existed.

Mr. Dodge. Well, is the bill to restrain multiplicity of action under that second sentence?

Prof. Sunderland. There is no common interest there.

Mr. Dodge. There is a common interest in a question of law. All the claims are dependent upon the same question of law in a case of that kind. They were varying in amount. We had a suit against five or six of them, and we were trying to get others to come in, and the Federal court proceeded to deal with it and issued an injunction--I always assumed, probably wrongly, that it was binding on the class.

Dean Clark. I think that probably is the second, but probably is not absolutely binding, but simply is a very

important precedant.

Mr. Mitchell. I was wondering whether, if you brought a suit, and the rest of them stood around--I was eondering whether if you brought a suit you could leave the other fellows out.

Mr. Donworth. I do not think these suits are much abused. I do not recall a case of collusion. Do you think they have been abused, Mr. Dobie?

Mr. Dobie. I do not think so.

Mr. Wickersham. They are too cumbersome. Nobody wants to get into one if he can avoid it.

Mr. Tolman. I think there is an important distinction in those cases which deal with several interests not joined, between the permitting of the owners of several interests to join and binding a class of defendants who have several interests. It seems to me that the cases that we have been considering are not cases purely of several interests. This Ben Hur case is a case of members of a fraternal insurance company, and there are very many other cases of that class--while in one case technically they may have several interests in the whole insurance pilicy. But these cases go further than that. They refer to the rules and regulations and rates to be charged in a society possessing assets in which they all are interested. Now, a pure case of suit brought, for instance, by the majority

of a number of residents in a certain part of a city, to enjoin a nuisance, it seems to me perfectly proper that they might join as plaintiffs, but to permit less than the whole to defend on behalf of all who own one residence, and to combine those who are not parties by a representative defense by other defendants seem to me to be difficult.

Mr. Wickersham. Is that not what Dean Clark meant when he said in the second sentence, when he said it was not conclusive under the theory of stare decisis?

Dean Clark. Yes, I was trying to say not more than I intended, by saying some of them would be binding and some would not. But you about losed my mouth.

Mr. Wickersham. Well, that is it. If there is not a technical estoppal by res judicata, there at least a principle of law established which the court shall follow in other similar cases.

Dean Clark. Yes.

Mr. Mitchell. In the first place, we have stricken out everything with reference to the effect of the judgment, and in the second case we have referred it to the drafting commission.

Mr. Wickersham. Somebody moved to amend that by adding something.

Mr. Cherry. That was in the third sentence.

Mr. Loftin. The motion was never put.

Mr. Wickersham. Was not that put?

Mr. Mitchell. We have not adopted that the third provision or several interests be extended to defendants with several interests. It has been proposed but not seconded.

Mr. Loftin. Mr. Donworth made the motion and I seconded it.

Mr. Wickersham. A reasonable number of those interested of those interested might be made defendants.

Mr. Donworth. As representatives.

Mr. Dobie. Are you willing to have that, Dean Clark?

Dean Clark. Wait a minute.

Prof. Sunderland. I suggest, Mr. Chairman, that I think there is some advantage in a rule which is not specific. I think that these cases are so important that the court ought to have some scheme of action in dealing with them and dealing with the specific circumstances that come up, and it is very difficult to lay down any definite detailed rules on the subject. If we have some very general and vague rule, such as the Equity rule, the courts are able, in construing that rule, to deal with the cases as they come up as they should be dealt with; in other words, it gives a very free basis of decision, and I am inclined to think, in such a difficult field as this, there ought to be a good deal of flexibility in the decisions of the court.

Mr. Donworth. And here you go back to theEquity

rule

Prof. Sunderland. I believe, on the whole, that is as good a provision as you could have.

Mr. Donworth. It was as a result of that rule that the Supreme Tribe case went the way it did.

Mr. Dobie. Yes.

Dean Clark. May I speak of that. In the first place, the Equity rule is a very sharp limitation on the code rule. The Equity rule is not the code rule, and they point out that they have adopted it from the code rule. But you will notice that, instead of the alternative of the code rule, they run it together.

Now, going to the somewhat broader question whether we ought to do nothing to clarify vague generalities in pleading to date, I must say that I am a little worried at the tendency the Committee has more or less followed. Perhaps it is all right, but what we have done is right along to go back to the judicial language, even though it is a prolific source of litigation. There has been a suggestion that our rules ought to be models to be followed. And yet instead of trying to ~~draft~~ work out rules that ought to be models, we have accepted all the old mossy statements that have caused lots of litigation.

Now, here is another case where the rules are not

clear, and we just throw up our hands and do not try to do anything towards clarifying them. Now, if we are going to build models, I say a very serious question arises; I mean if we are going to accept traditional, mossy models, a very serious question arises which one of the mossy models we shall follow, the Equity rule or the code rule. So much for that.

I want to answer now the question which was asked me, if I would accept Judge Donworth's suggestion. Judge Donworth's suggestion goes further than we had in mind. I do not know that I would object to it; but we had not thought of including the defendants in that particular case. I think that would make that rule include also bills of peace under class suits, and with the doctrine of representation.

Mr. Mitchell. Is it the law now that persons having several interests, and where the defendants are numerous, you can group them or bring in a group representing a class? Is that the law?

Dean Clark. I do not know of any case that goes quite as far as that.

Mr. Dobie. It is a wuestion of genenal or common interest, whatever that means.

Mr. Mitchell. No, I am talking about the third sentence. The second sentence is a common question of law or fact." The third is "When persons having a several interest

arevery numerous. Now, when we come to the third, wh ere there is a several interest, we limit that to plaintiffs.

Mr. Dobie. There there is no common question of law or fact.

Dean Clark. That is correct.

Mr. Mitchell. It has been moved to add to it a provision that would make that apply to the defendant, so that you can bring in a group of defendants. The question I asked about that was whether it was the law to do so, or whether we are ~~xixixg~~ making an advance on it?

Mr. Wickersham. Under the New York practice it says that where the question is one of general or common interest and the parties are numerous, one or more may sue or defend, and so on.

Mr. Mitchell. That would seem to cover it.

Mr. Wickersham. That would cover it.

Mr. Lemann. That is practically the language of the code.

Mr. Wickersham. That is the language taken from the old code.

Prof. Sunderland. Yes; but get practical confusion in the decisions as to what are included in those two classes--as to common or general interest, or what is included where the parties are too numerous, and so on. You will find decisions both ways on every proposition you suggest.

Mr. Mitchell. Well, this proposal that we have before us, of three different classes as they are does not clear up those uncertainties and ambiguities.

Prof. Sunderland. I do not know whether it does or not.

Dean Clark. I am very much convinced that it does, and I think uless prohibited by the Committee I can write something that will accomplish something--if Prof. Dobie does not write that standard work first.

Mr. Donworth. I was not aware when I made that motion that the effect was restricted to the third sentence. I am aware of that now. The old Equity rule only permitted this thing to be done where there was a real class. Of course, the word "class" is subject to definition, but nevertheless there had to be a class. That means that they had to be just in the same boat. In the rule opposite this Rule 45--that is, old Equity Rule 38--it says:

"When the question is one of common or general interest to many persons constituting a class so numerous," etc.,"one or more may sue or defend for the whole."

That obviously excluded anything like several interests. They had to be exactly alike, and their interests had to be exactly alike--perhaps not in dollars and cents, but ofthe samenature.

Mr. Dobie. Do you mean using the word "several" in

its technical sense?

Mr. Donworth. No. The word "class" cannot be ignored. It is just as if they said, "Provided they constituted a class," and we know more about what it means. Now, the code, it seems, goes a little further than that, as quoted in this work on Code Pleading. It says that when the question may be one of common or general interest to many persons, or when the parties are so numerous as to make it impracticable to sue them all, one or more may sue or defend for the whole. The second clause ignores the class, and just makes impracticability and "numerosity" the test, and I am inclined, although I have great respect for the thought that has been put in on this draft of thisparticular section--I am inclined to think that the code provision, which goes a little beyond the old rules, is good enough.

Mr. Dodge. It has caused a tremendous amount of litigation, and we certainly do not want, as Dean Clark says, to adopt old fashioned language if we can improve it. I understand that these three sentences are well within the law.

Dean Clark. That is my profound conclusion of the law. (Laughter.)

Mr. Dodge. Do you object to that, Prof. Sunderland?

Prof. Sunderland. I think that is substantially within some law. (Laughter.) There are so many different kinds that I would not say what the law is.

Mr. Dodge. Is that likely to cause trouble with the old code provisions?

Prof. Sunderland. I think we ought not under circumstances to take State code language. I think that would be a calamity. I think either we ought to take this language that the reporter has suggested, or we ought to take a rule that is not the code rule.

Mr. Dobie. Even though you think the code is fine.

Prof. Sunderland. You will not know what the law is under that code provision. Is that not true, Prof. Dobie?

Mr. Dobie. In some sense. I think you might say, "hardly ever."

Mr. Lemann. I think if Mr. Clark can improve this language he will do it. I think you ought to look over your key language and see how much clearer you have made the situation. The first two sentences did not make it clearer. if you can do anything ~~you~~ we could not object. The three would come under Equity Rule 38, I think. But my feeling is unless there is some objection to that language, and you have a strong feeling that it marks some advance--which I am not convinced of--but if it does not do any harm, let us try this.

Dean Clark. I have not been trying to reframe the law; I have been trying to state it.

Mr. Lemann. Yes.

Dean Clark. I suppose you are correct that an intelligent court, not being held up by all of the decisions, ought to do under the old Equity rule ahat you have said here. But I do not know of any lawyer that can be sure of wha t they are going to do. But it does seem to me that there is a little advantage if we can help out the bar.

Mr. Mitchell. Is the law in the Federal court consistent and clear? Is this, after all, a Federal proposition, and we do not care how much confusion there is in the State courts. The point is whether this rule states the law correctly in the Federal courts? Now, what can you say about that? Is there confusion?

Prof. Sunderland. I do not think there is much confusion.

Dean Clark. There is not much confusion, that is true, but I think there is some, and the difficulty is that the Equity rule looks a good deal like the code rule, and yet it is not, and the whole atmosphere or aroma of class suits adds to the confusion.

Mr. Olney. Of course, here is the principle that governs. The underlying thing that would be accomplished should be to permit, where there is a controversy that is common to a large number of people, of one suit that will settle that controversy, without bringing in the large number

or having them required to actually appear in the court to get a fair trial--if they have fair representation of their interests in that trial. One difficulty with the rule is in the insufficiency of language. When they speak of a joint interest, they may have in mind a joint interest in the controversy, and an identical interest in the controversy, yet the interest of each be different. We have numerous cases of that sort. For example, there are the cases affecting water rights that constantly arise in California. Under our law, the owner of any land whose underlying waters are supplied from the stream has an interest in the waters of that stream. The result is that, if anybody tries to take water out of that stream, he is promptly involved with perhaps a thousand land owners or more. They all have a common interest, and they all have a separate interest in the water, because each has his own land; but they have the same interest in that controversy, and it should be a controversy that could be settled in one piece of litigation, as to whether this man had the right to take the water out under those circumstances, and the law in the matter is in a state of flux, as it were. I believe in going as far as we can see our way clear to go in the way of providing a procedure by which these things can be presented to the court, and then leaving it to the court to determine just how far they shall go and just how they are affected. But I think we ought to go as far as we reasonably can in permitting

the class ~~as to~~ proceed, where there is a controversy that involves a large number of people.

Mr. Mitchell. Did we not all agree to that? The specific question we are down to is whether or not this rule as drafted covers all the cases ~~actively~~ accurately that we want to deal with. The first pargraph deals with joint interests. Does that mean joint interest in property? Dean Clark?

Mr. Wickersham. Does that not mean a common interest?

Mr. Mitchell. Well, is that a property matter--a joint interest in property, that first sentence?

Dean Clark. We intended it to be a joint interest in property, but I am not sure but what the words "common interest" might do here. I might say that I have been somewhat embarrassed by the suggestion that Prof. Sunderland made some time back, that in this situation we did not need to require the parties to be so numerous, and if it is thought desirable some modification of the language "so numerous as to make it impracticable" would be made.

Mr. Donworth. This discussion has made this impression upon me: I have landed where I started out. When I come to comparing the three things--the code rule and Rule 45, the Equity rule, I find they are all different. I do not find in Rule 45 the provision where the question involved is one of general or common interest, or where the parties are so numerous as to make it

impracticable to bring them all into the suit--I find that the word "class" is left out entirely.

Dean Clark. That is true, because we thought that was meningless.

Mr. Donworth. Well, it has produced many decrees that have been affirmed. And perhaps it is a weakness of mine, but I do not like to depart from the old landmarks which have been so often the subject of litigation, and which have been ruled upon and which can be looked up by the lawyer when he is going to act, and when he cites those cases under Rule 45, the court will say, "Yes, but this is a new rule and new language."

Mr. Mitchell. Well, I should say it made them classes. The first sentence is when they have a joint interest in property and are numerous.

Mr. Dobie. I do not like that word "joint" unless it means that.

Mr. Mitchell. Then the next is where they have a common question of law or fact and are numerous. There they are in a class, because they have a common question of law or fact. The third sentence says, when they have a several interest, but it is an interest in a specific property, and that makes them a class. So that I cannot see but what so far as the class is concerned, it has dealt with three different classes in any aspect.

Mr. Donworth. With all due respect, Mr. Chairman, I do not think persons having a common question of law between them are in a class.

Dean Clark. Are taxpayers in a class?

Mr. Donworth. We all have common questions of law. There is not a question of law at all that is not common to a vast number of people. Of course, we threshed that out and voted it out. The only difference between what we voted out and this middle sentence is that in this middle sentence the number must be so large as to make it impracticable to sue them all.

Mr. Mitchell. Could we cover your class point by a general provision that where there is a fair representation of the class--then you introduce the word "class" into it and make it appear that we are really dealing with a class.

Mr. Dodge. Our action today is not final.

Mr. Mitchell. No.

Mr. Dodge. To bring the question up, I would like to move that we adopt the three sentences provisionally, changing the word "joint" in the first line to "common." And we can be supplied with a little memorandum of the existing law in regard to these matters.

Dean Clark. All right.

Mr. Mitchell. Let me understand that motion. That takes the rule down to the words "institute action for the

whole"?

Mr. Dodge. Yes.

Mr. Mitchell. There are no differences up to there?

Mr. Dodge. There are no differences except to changing "joint" to "common" in the first line.

Mr. Lemann. How about leaving the "common interest" in there? The subject matter of the suit runs into the second sentence.

Dean Clark. It is common interest in property that is meant.

Mr. Mitchell. I think you ought to say so, because I do not see any distinction between it and the second one, where there is a common interest.

Mr. Lemann. A common interest in property--

Dean Clark(Interposing). Where you have a specific property.

Mr. Lemann. Where you have a common interest in property.

Dean Clark. Would that make you happier?

mr. Lemann. No, I have no objection to the phrase "common interest in property", as long as I knew that it is understood.

Mr. Wickersham. Joint tenants, or tenants in common, have a joint interest in property.

Dean Clark. It would go further than that. If you

really want to be technical about it I will talk about it.

Mr. Dodge. It means interest of the same nature, and not diverse.

Mr. Donworth. It shows where you are getting when you depart from a thing that has been the subject of so many adjudications, and try to get something better; you start a new line of decisions.

Mr. Mitchell. I asked whether by "common interest" you meant on a question of law, or whether you meant a common interest in property. I was not clear about that.

Dean Clark. I meant property. On the matter of there being various rules of the court, I would like to point out that the Equity rule was a new thing; so far as I know just this form was absolutely new. It was said in the Hopkins edition that it was a new rule adapted from the code procedure. It has been construed somewhat. In fact, it has promoted a good deal of litigation which is not yet ended. I think the Equity rule itself is greatly desirable to avoid; and I must say that I am like Prof. Sunderland--if we are going back to moss, I would rather take the code moss than the Equity moss; because I am afraid that the Equity rule is clearly restrictive . It might not be if the code later went that way. But in terms it is very restrictive.

Mr. Mitchell. I have not enough knowledge myself about

class cases to ask any intelligent questions myself. But the way I feel about it this afternoon, my own personal preference would be to pass over this rule, except insofar as we have stricken out some parts of it, and refer it back to the committee--but largely for the purpose of giving myself a chance to study this; I do not know anything about it.

Mr. Dodge. That would be just the same as to approve it provisionally, with the request for information.

Mr. Mitchell. Anyway you want to do it.

Mr. Wickersham. How about Mr. Donworth's amendment?

Mr. Donworth. I would withdraw that because I find it does not convey the idea.

Mr. Lemann. I second Mr. Donworth's motion. I think the reporter has his heart on this, and I do not think it would do any good.

Mr. Mitchell. All those in favor of adopting Rule 45 down to the words "institute action for the whole," with the substitution of the word "common" for "joint"--

Mr. Wickersham (Interposing). Well, add also "in property."

Mr. Mitchell. I was just going to add--and that the words "in property" were included.

Dean Clark. All right.

Mr. Dobie. If we vote on that, I am frank to say that

I am theoretical on these subjects, and I would like to hear Prof. Sunderland a little further on what he has to say in connection with whether we ought to take either the code moss or the other moss; in other words, whether it is not desirable to have rather a flexible rule here, rather than to try to pin it down to an analysis that, possibly, may be as broad or may not.

Prof. Sunderland. It seems to me that if you take the code rule, it will inject into the Federal system a great deal of litigation, with a large body of precedents, and arguments as to sustaining of various constructions which will be urged in the Federal courts, which will take considerable time and litigation in the Federal courts, to decide what interpretation to make of those provisions. I think that will be unfortunate. I think if we are going to project any possibility of litigation into the Federal courts, under the Equity rule, it will be better to take such a group of proposals as Dean Clark has made, which will very likely turn out to be a practicable set of rules. Now, it may cause some litigation, but I do not think that his rule is likely to cause as much litigation as the adoption of the old code rule.

Mr. Dobie. How about the Equity rule?

Prof. Sunderland. The Equity rule is very vague and does not give us a great deal of trouble, and there is something to be said in favor of the Equity rule, in dealing with

a big subject like this.

Mr. Mitchell. Are you ready for the question? The motion has been made to adopt Rule 45, down to the words "may institute action for the whole", and substitute the word "common" for "joint" in the first line and "interest in property" for more "interest" in the second line.

Mr. Loftin. I did not understand that was all the motion. I thought the motion was to provisionally adopt it as you have stated, and let the matter be referred back to the reporter for further consideration, in the light of the discussion that has taken place here.

Mr. Mitchell. That was implied.

Mr. Dodge. It was expressed.

Mr. Mitchell. But we can have it referred back to ourselves for further consideration and study.

Mr. Dodge. With a request a further memorandum.

(A vote was thereupon taken upon the motion, and it was adopted, all voting in favor of it except Mr. Donworth.)

Mr. Dobie. Mr. Chairman, I do not care much about a record vote. I am inclined to think what Prof. Sunderland says is right, but I am perfectly willing to refer it back to the reporter.

Mr. Mitchell. It will be open at the next meeting and there will be no difficulty about reconsideration.

Mr. Dobie. All right.

Mr. Mitchell. We will now take up Rule 46.

Dean Clark. Rule 46 presents a little the same proposition. I mean we have attempted to leave out the code practice also. But at any rate, I have put up three different suggestions. The first is an attempt to state with some degree of particularity what I think the law is. The second is an attempt to do the same thing, only more briefly. In the second, we throw up our hands and go back to the Equity rule.

Mr. Donworth. This thought occurs to me: This is a compulsory action in a matter; it says "an application to intervene in an action must be granted to the person who claims," etc. I suggest that after the word "application" there should be something meaning "seasonably made." In the code there is usually some provision to that effect, and I think if we are going to make it compulsory on the part of the court to let him in, there should be some discretionary language, so that the would be obliged to let him in during the trial. From the fact that it is mandatory, I think you should leave something to the court, and I suggest something like "seasonably made."

Dean Clark. I thought of a case, if we allowed intervention rather late in the suit, even any time before final judgment--but it was pointed out to me that this is a case

dealing with specific property, and it may affect the rights of a person in property, or have some bearing upon it, when th re is no real reason for having him in at any time.

Mr. Donworth. Well, any person so long as the court has control of the action. It is too late when the court has made its decision.

Mr. Mitchell. What do you mean by granting an application to intervene to a person who is represented?

Dean Clark. That goes back to the class suit.

Mr. Dodbie. That is a person who is represented, but where the representation is inadequate, and he has a different type of claim, for some reason, a different question.

Dean Clark. There are one or two small mistakes in the second sentence. In the sixth line, it says, "an ~~action~~ application to intervene may be granted in the direction of the court," that should be "discretion" instead of "direction." And at the end of that same sentence, it says, "pursuant to Rules 42 and 39." Rule 39 is not the one I want there. It is Rule 29.

Mr. Wickersham. How about Rule 37?

Dean Clark. This is the third party practice.

Mr. Wickersham. Well, take Equity Rule 37 on the opposite page.

Dean Clark. No, I want my rule on bringing in third parties.

Mr. Hammond. That shoul be Rule30.

Dean Clark. Yes, Rule 30 that should be; "pursuant to Rules 42 and 30.

Mr. Dobie. Would it not be better to put it numerically?

Dean Clark. I do not suppose it makes much difference. The reason I put it this way is that Rule 42 is the main one which refers to joinder of plaintiff and defendant and to the third party defendant.

Mr. Dobie. I beg your pardon.

Mr. Lemann. Your jursidictional point is subject to the same comment. But I wondered whether your statement as to intervent on under the second sentence was correct--it does not say third party defendant. I looked into this quest on some time ago, and I looked yesterday at the Whichita case, which I remember having run across, a case of intervention, where it was held that a man might intervene, thou his citizenship was the same as the plaintiff's citizenship.

Mr. Wickersham. He could not destroy the jurisdiction of the court by intervention.

Mr. Lemann. He could not destroy jurisdiction by intervention, although his interest was the same as the defendant's.

Mr. Wickersham. That has been done over and over again.

Mr. Lemann. And I was wondering whether that should not go out, for the same reasons that we took it out in preceding rules; whetherthis might be a case where we state it wrong; because my idea is that you could intervene in a case where you could not be plaintiff or defendant, but you could stay in, because I have done that, where an intervenor's amount would not have got it. So that I am raising two points.

Dean Clark. Didd not that involve property?

Mr. Mitchell. No, it was a suit involving a Louisiana statute, where it did not involve $3,000. A party who had a great more involved than ~~five~~ that filed interventions for others who had much less involved.

Mr. Dobie. I think that ought to go out.

Mr. Lemann. And I think this second sentence would be too broad. But is not the other objection that we took before the real objection, that if it is a jurisdictional matter the court has to settle it and we cannot do so?

Dean Clark. I take it, Mr. Lemann, that your case comes under the first sentence.

Mr. Lemann. No, we did not claim any interest in property.

Dean Clark. Well, some one who was representing you.

Mr. Lemann. No, we did not bring it as a class bill--

at least I was not relying on the class bill provision. I brought it under Equity Rule 37--a bill which involved the validity of this statute.

Mr. Dobie. Did you consider that in subordination to the propriety of the main proceeding? I am just asking for information.

Mr. Loftin. I wanted to raise that question also.

Mr. Dobie. It is technical, and there are a number of decisions on what constitute that.

Mr. Wickersham. There are two decisions to the effect that the citizenship of an intervenor shall not deprive the court of jurisdiction.

Mr. Dobie. And you cannot att ck jurisdiction; an intervenor cannot attack jurisdiction. That has been held. I just wanted to know; that is all.

Dean Clark. Now, you will note this difficulty: If you have something of that kind--if you allow a person to intervene, particularly under my second sentence, he should not be in all respects like the parties who are originally joined, or like parties interested under the common question of law and fact provision; and you would not make any of them have to act in subordination to the main proceeding. As a matter of fact, the court can sever and proceed as to one. Now, it would seem rather unfortunate if you allow the person to intervene under that second sen-

tence--then the men who are already in the action can carry it on, subject to this general right to control the trial when the suit is on, and yet this poor fellow who was intervening, I take it, could not press any claim of his own; he just has to do whatever the plaintiff wants to do; to take whatever the plaintiff wants to take up in the case.

Mr. Wickersham. Sometimes it would make a lot of trouble.

Mr. Dobie. I am inclined to think it would. I am inclined to think you are right.

Mr. Loftin. Do you mean this language?

Mr. Dobie. No, I mean that language of the Equity rule, that the intervention "shall be in subordination to, and in recognition of, the propriety of the main proceeding."

Mr. Loftin. I do not know. I have in mind a case brought in my jurisdiction of a proceeding under a mortgage for foreclosure. A trustee representing a large number of bondholders was suing, and a small group of bondholders sought to intervene, and questioned the propriety of the main proceeding, and claimed that the trustee was improperly representing their interests, and the court under this Equity rule declined to permit them to intervene. Now, as I understand the new rule, that would no longer be a limitation of such an intervention. And the question arises in my mind as to whether you would want to permit a small group of

bondholders to intervene in a proceeding of that kind and have a controversy between the trustee under the mortgage and a small group of bondholders which would delay the litigation.

Mr. Dobie. Suppose the small group brought it and the large group intervened, and the large group owned more bonds and were more heavily interested. Suppose two people brought the suit for 10,000, and 15 intervened having an interest of $1,000,000?

Mr. Loftin. You still do not get to the question that was raised as to the propriety of the main proceeding.

Mr. Dobie. But why should not those 15 men, if the court was willing, be able to question the propriety of it?

Mr. Loftin. I do not think that is practical, because in most of these instruments creating trustees under mortgages, there is a provision about the number of bondholders that can require the proceeding to bring the foreclosure.

Mr. Dobie. Yes.

Mr. Wickersham. Yes, but suppose the requisite number has concurred, and suit has been brought by the trustee, and then a majority comes along and says, "That is all very well. We have no objection to the suit. But the way it is being run is wholly to the interest of the

minority and against the interest of the majority," and they ask an intervention. I have never known a denial of that. I have heard of a few individuals, but not of a large number, and they are allowed to come in in subordination of the main suit. They may not be allowed to challenge the jurisdiction of the suit, but they may challenge the conduct of the suit, and they ought to have that right.

Mr. Loftin. In the case I mentioned they challenged the propriety of the main suit.

Mr. Wickersham. I do not think they can do that.

Mr. Loftin. Now, the reporter has left out that limitation under the new rule, and under his rule the court could go into that question.

Dean Clark. There was some doubt of what is meant where a corporation was collusively put into bankruptcy and the creditors were allowed to intervene in the action.

Mr. Dobie. It is not in any of the code provisions.

Dean Clark. I know. Of course, if you applied the rule strictly in the case I have just put, I think the creditors ought to be allowed to intervene. It seems to me this whole question comes down to the administrative orders to be made in the running of the action. You will notice that we have carried further the idea of multiple parties to a single suit. That is something you did not have at all at common law. That has been the development under the codes. The

multiple tendency has been to carry it a long way under the codes. Mr. Morgan emphasized how much that had to do with his paper work in the office of the clerk of the court, when it did not run into the trial in court. It seems to me unfortunate if we do not provide, in the early part of the litigation, that the court may hear and adjust your claim. You are going to provide a provision at variance with that, in favor of the man who has intervened. The man who has intervened will not be like the other parties; he can, with the permission of the court, separate the issues out and have them separately tried, or the action set down and he is held down to the original action. So that it seemed to me that there was not very much chance of imposition here, because the court is supposed, under our rules, to make orders throughout the trial to prevent imposition on one party. There was not much danger if you did not have it in; but if you did have it in it was a provision that put the intervenor in a different position from all the other parties: whereas if he gets in here, he is not in a different position from the other parties.

Mr. Cherry. As between the first and second wordings of this rule, would you care to state your own preference, Dean Clark?

Dean Clark. I have a preference for the first, as I thought it told more. I have not very much choice. I

suppose the little part of it that covered the question of jurisdiction is going to be cast to the winds, is it? (Laughter).

Mr. Lemann. I think it would be extremely unfortunate.

Mr. Dobie. I think the Supreme Court is going to rule very generously on that point. If the motion is in order, I move the adoption of the rule as it is drawn by the reporter.

Mr. Cherry. Which one?

Mr. Dobie. The first one, including the language in brackets, "on such terms and conditions as the court may think proper to impose." And incidentally, Mr. Hammond has called my attention to the fact that the West Virginia Committee specifically recommended that this propriety suggestion be left out.

Mr. Wickersham. How about the words in brackets about "on such terms and conditions as the court may think proper to impose"? Do you leave those in in your motion?

Mr. Dobie. Yes. I did not mean to stop the discussion, but just to get something before the Conference.

Mr. Mitchell. Is there a second to that motion?

Mr. Dodge. What is the motion?

Mr. Mitchell. It is for the adoption of Rule 46, including the words in brackets.

Mr. Dobie. Not the alternative; the first one.

Mr. Wickersham. Not the first alternative, but the

main rule?

Mr. Mitchell. That is right.

Mr. Wickersham. Taking the words in brackets as part of the context?

Mr. Dobie. Yes, and strike out the ~~two~~ Two sentences beginning with "intervention under the first sentence of this rule", down to the words "~~been joined as plaintiff or defendant.~~ supporting the action"

Mr. Wickersham. Do you mean where it says "Intervention under the first sentence of this rule need not be supported by grounds of jurisdiction independent of those supporting the action"?

Mr. Dobie. Yes.

Mr. Lemann. I object that the second sentence is not an accurate statement.

Mr. Wickersham. You mean you would leave that to the court?

Mr. Lemann. Yes.

Mr. Dodge. Yes, it ~~would~~ should be left under Equity Rule 37.

Mr. Mitchell. The motion was to adopt Rule 46, including the words in brackets, and omitting the two sentences connecting with "Intervention under the first sentence of this rule", down to the words "joined as plaintiff or defendant."

Mr. Tolman. Mr. Chairman, I still believe that under this provision in the Equity rule that "the intervention must be in subordination to and in recognition of the propriety of the main proceeding." ~~It~~ still leaves that out.

Mr. Dobie. Yes, that is my motion.

Dean Clark. Yes, as I was trying to argue, I believe that should be done.

Mr. Wickersham. Dean Clark, as I understand, we do not want to have that limitation now that is in the Equity rule?

Dean Clark. No, I do not.

Mr. Mitchell. All in favor of that motion as I put it will say "Aye"; those opposed "No."

(A vote was taken and the motion was adopted, all voting in favor of it, except Mr. Loftin.)

Mr. Loftin. I vote "No." I prefer the first alternative. That is why I vote "No" on this motion.

(P. 1000 down to end already delivered)